

NO. A07-2034

State of Minnesota  
In Court of Appeals

Patricia Ann Langston,

*Plaintiff/ Respondent,*

vs.

Wilson McShane Corporation, as Administrator  
for the Twin Cities Carpenters and Joiners Pension Fund, and  
the Twin Cities Carpenters and Joiners Pension Fund,

*Defendants/ Appellants.*

INITIAL BRIEF AND ADDENDUM OF  
DEFENDANTS/APPELLANTS

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF THE ISSUES

- I. Did the Anoka County District Court have concurrent subject matter jurisdiction to determine whether Respondent's domestic relations order was "qualified" as that term is defined by the Employee Retirement Income Security Act of 1974, as amended?

The trial court determined that it has subject matter jurisdiction over the determination of whether Respondent's domestic relations order was "qualified."

See Minn.R.Civ.P. 60.02(d)  
29 U.S.C. § 1132  
Hogan v. Raytheon Co., 302 F.3rd 854 (8th Cir. 2002)  
Welter v. Welter, 2004 WL 2163149 (Minn.App. 2004)

- II. Did the trial court abuse its discretion by denying Appellants' Motion to Vacate Default Judgment and for Leave to File and Answer?

The trial court found that Appellants lacked a reasonable defense on the merits, that Appellants made a weak showing of a reasonable excuse for their failure to timely answer and that Respondent would suffer "substantial prejudice" if the default judgment was vacated.

See Minn.R.Civ.P. 60.02(A)  
29 U.S.C. § 1056  
Riemer v. Zahn, 420 N.W.2d 659, 661 (Minn.App. 1988)  
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- III. Should the Appellants be granted Rule 60.02(f) relief because the result of the trial court's order is that the Appellant Fund is required to provide the same benefits to two different people in violation of ERISA.

See Minn.R.Civ.P. 60.02(f)  
29 U.S.C. § 1056

## STATEMENT OF THE CASE

In December 2007, Respondent Patricia Ann Langston (“Langston”) filed suit in Anoka County District Court seeking declaratory relief that a domestic relations order (“DRO”) issued by an Anoka County District Court Judge was a “qualified” domestic relations order (“QDRO”) as that term is defined by the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), a federal statute. Due to a mistake of fact, Appellants Twin Cities Carpenters & Joiners Pension Fund and Wilson McShane Corporation (collectively referred to as the “Fund”) did not timely Answer the Complaint. Langston then immediately filed a Motion for Default Judgment, but did not serve or notify the Fund or its counsel of the Motion.

On April 18, 2007, the Motion for Default Judgment came on for hearing before the Honorable Jenny Walker Jasper (“Judge Walker Jasper”). Lacking notice, the Fund did not make an appearance. On April 19, 2007, Judge Walker Jasper issued Findings of Fact, Conclusions of Law, and Order for Judgment (“Default Order”) declaring the DRO “qualified” under ERISA, ordering the Fund to commence monthly benefit payments calculated as provided for in the DRO as of August 10, 2005, and awarding Langston her requested attorneys’ fees and costs of \$1,996.00.

Upon receipt of the Notice of Entry of Judgment, the Fund moved to vacate the Default Judgment and sought immediate Leave to File an Answer (“Motion to Vacate”). In support of this Motion, the Fund argued that the Default Judgment was void because the State Court lacked subject matter jurisdiction over the determination of whether a DRO is “qualified” under ERISA, and in the alternative, that the Fund satisfied the Minn.

R. Civ. P. 60 and case law requirements for vacating the Default Judgment because it had reasonable defenses on the merits, it had a non-fatally weak excuse for not timely answering, it had acted with due diligence after receiving the Notice of Entry of Judgment, and there would be no “substantial” prejudice to Langston by resolving the case on its merits.

Thereafter, the Motion to Vacate came on before the Honorable Sharon L. Hall (“Judge Hall”) on June 18, 2007. On August 22, 2007, Judge Hall issued an Order and Memorandum denying the Motion. In the accompanying Memorandum, Judge Hall, ignoring the greater weight of relevant authorities, determined that State and Federal Courts have concurrent subject matter jurisdiction over the determination of whether a DRO is “qualified.” Additionally, Judge Hall applied an erroneous standard in determining that the Fund lacked a reasonable defense on the merits, and that Langston would be “substantially” prejudiced if the Default Judgment was vacated such that the ultimate sanction of default judgment was warranted. Finally, Judge Hall modified the Default Order based upon her adjudication of the underlying respective merits of the case, and ordered the Fund to commence monthly payments to Langston effective as of the date of the Default Judgment on April 18, 2007. This appeal followed.

After the appeal, Langston brought a motion for attorneys’ fees and costs in the Anoka County District Court action seeking the attorneys’ fees from the Fund that were incurred by Langston in opposing the Motion to Vacate under based in part on the trial court’s finding that the Fund’s position lacked merit. The trial court orally deferred

ruling on that Motion pending this appeal, and as of the time of this brief, had not issued its Order.

## STATEMENT OF FACTS

### **The Parties**

Appellant Twin City Carpenters & Joiners Pension Fund (“Fund”) is a multi-employer, defined benefit plan established and administered in accordance with the provisions of ERISA. Complaint ¶ 2. A.App. 1-3, see also Affidavit of Laurie A. Coleman, (“Coleman Aff.”) ¶ 4. A.App. 34. Appellant Wilson McShane Corporation is a Minnesota business corporation and is the third-party administrator for the Fund. Complaint at ¶ 3. A.App. 1, see also Affidavit of David S. Anderson (“Anderson Aff.”) ¶ 4. A.App. 36-37. Langston married Gary Langston on September 5, 1964. Coleman Aff. at ¶ 3, A.App. 33, see also Judgment and Decree (“J & D”), Ex. A to Affidavit of Thomas F. DeVincke, dated June 11, 2007, (“DeVincke Aff.”), p. 2. A.App. 69. At that time, as well as at certain other times relevant to this litigation, Gary Langston was a participant in the Fund. Coleman Aff. at ¶ 3. A.App. 33.

### **The Divorce**

The Langston marriage was dissolved pursuant to a J & D, entered on August 3, 1993 in Anoka County District Court. Complaint at ¶ 5. A.App. 1, see also J & D, Ex. A to DeVincke Aff. A.App. 68-81. Pursuant to the J & D, Langston was awarded, amongst other things, a one-half interest in the marital share of future pension payments to be received by Gary Langston. Id. at pp. 6-7. App. 73-74. Additionally, the J & D ordered

that, in the event that Gary Langston's pension plan allowed him to elect survivor benefits, Gary Langston was ordered to elect Langston as his surviving beneficiary. Id.

The Summary Plan Description ("SPD") for the Fund, which was distributed to all Fund participants, and was also available by contacting Wilson McShane, provided "if your marital status changes or there are other changes in your personal life which affect the name of your beneficiary, contact the Fund office." SPD, p. 32. A.Add. 113. Indeed, the Fund's governing documents create no affirmative obligation on the Fund to comb the records of courthouses throughout the United States to find documents purporting to change the legal status of its participants so as to affect administration of the Fund. See generally SPD A.Add. 75-121 and Plan Document A.Add. 122-198.<sup>1</sup>

Accordingly, at the time the J & D was issued, it was either Gary Langston's responsibility to provide a copy of the J & D to the Fund or otherwise provide notice of his changed legal status as the "participant," or it was Langston's obligation to provide a copy of the J & D or other notice to the Fund as the holder of an Order purporting to affect the legal status of a Fund participant. However, neither Langston, nor Gary Langston, provided a copy of the J & D or any other notice to the Fund. Coleman Aff. at ¶ 8. A.App. 34.

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<sup>1</sup> The Board of Trustees for the Fund issues both Summary Plan Descriptions and Plan Documents. The Summary Plan Description summarizes the benefits available to participants and is drafted in terms that are easy for participants to understand. The Plan Document is the Fund's governing document and sets forth all of the participant's and beneficiary's rights and benefits together with the Fund's obligations.

## **Gary Langston's Second Marriage and Retirement**

Approximately eight years after the J & D was finalized, in July 2001, Gary Langston married Shelly James ("James"). Coleman Aff. at ¶ 3. A.App. 34. As of that time, no one had provided any notice to the Fund regarding any aspect of the Langston divorce. Id. at ¶ 8. A.App. 34. Thereafter, in 2004, Gary Langston retired and submitted an application for benefits to the Fund on June 12, 2004. Coleman Aff. at ¶ 6. A.App. 34. As part of the application process, Langston was required to select one of the seven types of benefits available under the Fund. SPD pp 8-9. A.Add. 89-90, Plan Document pp. 31-48 A.Add. 156-173. Gary Langston elected to receive a fifty percent joint and survivor annuity form of benefit and elected James, his then current wife, as his surviving annuitant. Coleman Aff. at ¶ 6 A.App. 34. Pursuant to the terms of the Plan Document, a joint and survivor benefit election cannot be revoked once benefit payments commence. Amendment 11 to the Plan Document p. 2 A.Add. 189. Upon receipt of the application, the Fund performed various actuarial calculations to arrive at Gary Langston's Normal Retirement Benefit of \$2,825.63 per month for the remainder of his life, and upon his death, \$1,412.81 per month for the remainder of James' life. Id., see also SPD p. 8 A.Add. 89. As of this time, no one had provided any notice to the Fund regarding any aspect of the Langston divorce. Coleman Aff. at ¶ 8. A.App. 34. Accordingly, the Fund approved the application and Gary Langston's benefits commenced on July 1, 2004. Id.

## The Domestic Relations Order

Despite the fact that the J & D was finalized and entered in August of 1993, Langston did not obtain a DRO until July 1, 2005. See DRO, Ex. B. to DeVincke Aff. A.App. 82-84. Moreover, a copy of this DRO was not provided to the Fund until August 10, 2005—some twelve years after the entry of the J & D. Coleman Aff. at ¶ 8. A.App. 34. The DRO identified Langston as the alternate payee of a portion of Gary Langston's interest in the Fund and provided, in relevant part:

(D) **Amount.** The Alternate Payee is hereby assigned 50% of the retirement benefits otherwise payable to the Participant in accordance with the terms of the Plan derived from his accrued vested benefit accumulated from September 5, 1964 through August 3, 1993. The Alternate Payee shall have no rights in or to the portion of the Participant's accrued benefit under the Plan not assigned by this Order, or to any benefit earned by the Participant after August 3, 1993.

(E) **Distribution.** The accrued benefit assigned by this Order shall be paid to the Alternate Payee in the form of an annuity payable over her lifetime with monthly payments commencing when the participant reaches or would have reached his earliest retirement age under the Plan...In the even the Participant dies before payments to the Alternate Payee begin, the Alternate Payee shall be considered the "surviving spouse" of the Participant for purposes of section 205 of [ERISA]. (emphasis added)

\* \* \* \* \*

(G) **Continued Jurisdiction.** In the event the Plan Administrator determines that this order is not a Qualified Domestic Relations Order, both parties shall cooperate with the Plan Administrator to make the changes necessary for it to become a qualified order. (emphasis added)

See DRO, Ex. B to DeVincke Aff., p. 2 A.App. 83.

## **The Fund's Review of the DRO**

Upon receipt of the DRO, and in compliance with ERISA and the Fund's own procedures, the Fund reviewed the DRO to determine whether it was qualified, as the term "qualified" is defined by ERISA, such that it met the enumerated requirements for DRO's set forth in 29 U.S.C. § 1056. *Coleman Aff.* at ¶ 9. A.App. 34. The Fund determined that the DRO could not be "qualified" for two reasons, and it promptly advised Langston of this in a letter dated August 18, 2005 ("Letter"). See Letter, Ex. D. to DeVincke *Aff.* A.App. 86-87.

The first reason that the DRO could not be "qualified" was because the DRO required payments to be made to Langston in the form of an annuity payable over Langston's lifetime. Id. This type of annuity was not available to Langston because, pursuant to the unambiguous terms of the SPD and Plan Document, the benefits could only be payable over Gary Langston's lifetime. Id., see also SPD p. 10 A.Add. 91 and Plan Document p. 35 A.Add. 160. Moreover, even if the SPD and Plan Document would have allowed the benefits to be calculated over Langston's lifetime, from an actuarial standpoint, the Fund could not turn back the clock and re-determine the benefits over a different person's—Langston's—lifetime, especially in light of the fact that the benefits had already been determined, were in pay status and were therefore irrevocable. Id., see also Amendment 11 to the Plan Document p. 2 A.Add. 189. As a result, the only payment method available to Langston pursuant to the Plan Document was a shared payment method whereby she would receive a portion of the monthly benefit being paid to Gary Langston, as calculated over Gary Langston's lifetime. Id.

The second reason that the DRO could not be “qualified” was because the DRO provided that, in the event that Gary Langston pre-deceased Langston prior to the commencement of any payments, Langston was to be considered the surviving spouse thereby entitling her to survivor benefits. Letter, Ex. D. to DeVincke Aff. A.App. 86-87. However, because Gary Langston was married to James and elected James as his beneficiary, and no one notified the Fund of the J & D, Gary Langston’s survivor benefits as part of his Normal Retirement Benefit, vested in James on the date that Gary Langston retired pursuant to the unambiguous terms of the SPD and Plan Document. Id., see also SPD p. 10 A.Add. 91 and Plan Document p. 35 A.Add. 160. Therefore they could not be removed from James and paid to Langston. Id. The only explanation proffered by Langston as to why she waited twelve years to obtain the DRO or otherwise notify the Fund of the J & D was that her previous attorney simply did not prepare one. Transcript of the April 18, 2007 Default Hearing (“D. Tr.”) 3: 8-14. A.App. 6.

### **Langston’s Subsequent Inaction and Gary Langston’s Death**

In the August 18, 2005 letter, the Fund invited Langston to submit a revised DRO correcting the defects. Letter, Ex. D. to DeVincke Aff. A.App. 86-87. But Langston chose not to do so, and never sought nor submitted a revised DRO to the Fund despite the fact that the Judge issuing the DRO specifically retained jurisdiction to make any changes to the DRO that might be deemed necessary by the Fund and ordered the parties to cooperate with the Fund to make any changes necessary for the DRO to become “qualified.” Coleman Aff. at ¶ 11. A.App. 34-35, see also DRO, Ex. B to DeVincke Aff., p. 2 A.App. 83, SPD, p. 32 A.Add. 113. Nevertheless, in accordance with ERISA, the

Fund withheld \$381.38, the amount that would have been payable to Langston from Gary Langston's monthly pension benefit—for the benefit of Langston for the months of September and October, 2005. Coleman Aff. at ¶ 11 A.App. 34-35.

Thereafter, on October 19, 2005, Gary Langston died. See Death Certificate, Ex E to DeVincke Aff. A.App.88. Accordingly, the Fund had no choice but to begin paying the survivor annuity to James in November 2005, as was required by Gary Langston's beneficiary designation and the terms of the SPD and Plan Document. Coleman Aff. at ¶ 12 A.App.35, see also SPD p. 18 A.Add. 99, and Plan Document p. 42 A.Add. 167. Indeed, as of his death, Gary Langston was no longer a Fund "participant," so no changes running through him could be effected by any Order of any Court pursuant to the terms of the Plan, without due process at minimum involving the new vested benefit holder—James. SPD, p. 1 A.Add. 82 and Plan Document p. 10 A.Add. 135.

### **The Family Court Proceedings**

After Gary Langston's death, Langston brought a Motion to Show Cause and/or Enforce Court Order against the Fund in her marital dissolution action in Anoka County District Court. See Order Denying Motion to Show Cause ("Show Cause Order"), Ex A. to Anderson Aff. A.App 39-40. On June 26, 2006, prior to the hearing on this Motion, the Fund's counsel sent a letter to Langston's counsel advising that the Motion was ill advised. Counsel Letter, Ex. F. to DeVincke Aff. A.App. 89-90. And it reiterated the DRO's defects such that, in light of Gary Langston's beneficiary designation, the Fund was already properly paying the survivor benefits to James. Id. The Fund further advised Langston that it would continue to hold the previously withheld payments for

Langston's benefit for eighteen months from the date that the original DRO was submitted; and if no revised DRO was submitted during that time which could be qualified, the payments would revert back to Gary Langston's estate. Id. Nevertheless, Langston proceeded with the Motion in her dissolution action, and a hearing was held on July 25, 2006. Show Cause Order, Ex A. to Anderson Aff. A.App. 39-40. The Honorable Nancy Logering denied Langston's Motion finding that the Court lacked jurisdiction over the Fund for purposes of determining the DRO "qualified," and thus the Court determined that it could not compel the Fund's adherence to the DRO. Id. Langston requested reconsideration of this ruling, but the request was denied. Order Denying Request for Reconsideration, Ex B. to Anderson Aff. A.App. 41.

### **The State Court Action**

Dissatisfied, Langston next filed a Complaint for declaratory relief in Anoka County District Court seeking a declaration from the Court that the DRO was "qualified" under ERISA. See Complaint. A.App. 1-3. The Summons and Complaint were served on Wilson McShane, the Fund's agent for the service of process on January 5, 2007. Coleman Aff. at ¶ 13. A.App. 35. Wilson McShane sent a copy of the Summons and Complaint to the Fund's counsel by facsimile; but the Fund's counsel mistakenly believed these documents related to the family court matter that had retained jurisdiction over modification and amendments to the DRO, to which the Fund was not a party, so the Fund did not timely Answer the Complaint. Id., see also Anderson Aff. at ¶¶ 2-6 A.App. 36-37.

On March 2, 2007, Langston moved for a default judgment pursuant to Rule 55 of the Minnesota Rules of Civil Procedure, but did not serve or notify the Fund, or Fund Counsel with any motion papers. Anderson Aff. at ¶ 6 A.App. 37. As a result, the Fund did not appear at the default hearing on April 18, 2007, before Judge Walker Jasper. *Id.* Noting the lack of appearance by the Fund at the hearing, Judge Walker Jasper asked Langston's counsel if the Fund was provided notice of the hearing. D. Tr. 2: 15-17 A.App.5. Langston's counsel stated that no notice was provided to the Fund and commented: "my uneducated assumption is I'm going to be back here at some point on a motion to vacate this default judgment." *Id.* at 2: 18 and 6: 12-14 A.App. 9. In response, Judge Walker Jasper replied "will you be back on a motion to vacate? Probably ..." *Id.* at 7: 14-17 R.App. 10. Notably absent from Langston's motion papers and the colloquy between Langston's counsel and Judge Walker Jasper was any discussion relating to the previous determination by Judge Logering, a Judge from the same Court as Judge Walker Jasper, that the Court lacked jurisdiction over the Fund to grant the relief requested by Langston, or that the DRO specifically retained jurisdiction to revise the terms of the DRO as deemed necessary by the Fund. Show Cause Order and Order Denying Request for Reconsideration, Ex. A and B. to Anderson Aff. A.App. 39-41 and DRO Ex. B to DeVincke Aff., p. 2 A.App. 83.

Judge Walker Jasper proceeded to grant Langston's Motion for Default Judgment and issued an Order to that effect on April 19, 2007. See generally, Default Order A.App 12-15. The Default Order declared the DRO "qualified" under ERISA, it provided that any interpretation by the Fund to the contrary was null and void, it required the Fund to

calculate monthly benefit payments as set forth in the DRO—irrespective of the terms of the SPD and Plan Document, to remit past payments to Langston commencing on August 10, 2005, the day the DRO was first served on the Fund, and it required the Fund to remit future payments in accordance with the DRO and the J & D irrespective of any rights already vested in Gary Langston’s second-wife, James. Default Order pp. 3-4 A.App. 14-15. The Default Order also awarded Langston attorneys’ fees in the amount of \$1,440.00, as well as costs in the amount of \$556.00. Id.

The Fund received the Notice of Entry of Judgment on April 23, 2007. Anderson Aff. at ¶ 5 A.App.37. Working as expeditiously as possible, on May 4, 2007, the Fund filed a lengthy Motion to Vacate. In support of its Motion to Vacate, the Fund argued: (1) that the State Court did not have subject matter jurisdiction over a challenge to the Fund’s determination that the DRO was not “qualified” under ERISA, and therefore, the Default Order was void; and (2) that the Fund satisfied the balancing test Minnesota courts apply for vacating default judgments pursuant to Minn.R.Civ.P. 60.02. See generally Appellants’ Memorandum in Support of Motion to Vacate Default Judgment and for Leave to Answer, (“Appellant’s Memo.”) A.App. 16-32.

Elaborating on its first argument—lack of subject matter jurisdiction, the Fund pointed out that the threshold issue in dispute between the parties was whether or not the DRO constituted a “qualified” DRO under ERISA and that subject matter jurisdiction to hear any challenge to a plan administrator’s decision about the qualified status of a DRO lies exclusively in the Federal Courts. Id. at pp. 9-10 A.App. 24-25. Turning to its second argument—vacation of the default judgment, the Fund argued that at least three of

the four factors to be examined by courts in determining whether to vacate a default judgment in Minnesota strongly weighed in favor of the Fund, and the fourth reasonable-excuse-for-not-timely-answering factor was not so bad as to defeat the strong showing on the other three factors. Appellant's Memo. pp. 10-16 A.App. 25-31.

Specifically, the Fund argued that it could present a reasonable defense on the merits, such that the DRO could not be "qualified" under ERISA because the DRO required a type of payment to Langston that was not available to her; and that certain benefits ordered in the DRO could not be provided to Langston because they had already vested in James upon Gary Langston's retirement. Id. The Fund also conceded that it had a weak excuse for not timely answering, but that it was not so weak as to overcome strong showings on the other three factors. Id. The Fund further argued that it acted with due diligence after receiving the Notice of Entry of Judgment because the Motion to Vacate was served and filed within two weeks of such notice. Id. Finally, the Fund argued that no "substantial" prejudice would result in vacating the default because there was no indication of extraordinary hardship, or that any evidence or witnesses would be unavailable, and that mere added expense and delay of proceeding on the merits are insufficient to establish "substantial" prejudice such that the ultimate sanction of default judgment is warranted, instead of some lesser sanction. Id.

Langston opposed the Fund's Motion to Vacate. See Respondent's Memorandum of Law in Opposition to Motion to Vacate and for Leave to File an Answer ("Respondent's Memo.") pp. 7-19 A.App. 51-63. Langston argued that the State Court had concurrent subject matter jurisdiction with the Federal Courts over the determination

of whether a DRO is qualified because she alleged that she sought benefits due to her under the terms of the Plan, to enforce her rights under the terms of the plan, and to clarify her rights to future benefits under the plan. Id. With regard to the factors to be considered on a Motion to Vacate, Langston conceded the due diligence factor to the Fund, but she argued that none of the other factors weighed in favor of the Fund. Id. Langston argued that the Fund's excuse for failing to file an answer was weak. Id. Langston further argued that the Fund could not present any reasonable defense on the merits because her right to benefits accrued at the time the J & D was entered in 1993, and as such, Gary Langston's retirement, the vesting of benefits in Gary Langston and James, and Gary Langston's death, could not alter her right to those benefits. Id. Instead, Langston argued that the DRO was simply a mechanism to enforce her already-accrued rights. Id. Finally, Langston argued that she would be prejudiced if the default were vacated because she had counted on the benefit payments for many years. Id.

A hearing on the Fund's Motion to Vacate was held on June 18, 2007 before Judge Hall. Order p. 1 A.App. 131. In an Order and Memorandum dated August 22, 2007, Judge Hall denied the Fund's Motion to Vacate. Id. Ignoring the Department of Labor, the Sixth Circuit Court of Appeals, and an unpublished decision of the Minnesota Court of Appeals that were cited by the Fund, and instead relying on two California State Court cases and two Federal District Court cases outside this jurisdiction, none of which were cited by Langston but rather were acknowledged in good-faith by the Fund, Judge Hall determined that, although Langston sought an Order declaring the DRO "qualified" and never mentioned any provision of the SPD or Plan Document in her Complaint or

argument, Langston's claim was really one for benefits due to her under the terms of the plan, to enforce her rights under the terms of the plan, and to clarify her rights to future benefits under the plan, and accordingly the State Court had concurrent subject matter jurisdiction. Memorandum pp. 8-14. A.App. 140-146.

With regard to the factors to be considered by the Court on a Motion to Vacate, like Langston, Judge Hall conceded that the due diligence factor weighed in favor of the Fund. Memorandum p. 21 A.App. 153. Judge Hall also agreed with Langston that the Fund did not present a reasonable defense on the merits because Langston's interest in Gary Langston's pension was created at the time the J & D was entered, so the fact that Gary Langston's benefits were already in pay status and that certain benefits had already vested in James when the DRO was finally issued does not affect Langston's right to compel the benefits from the Fund. Id. at pp. 14-19. A.App. 146-151. In so holding, Judge Hall relied on two Federal District Court cases from the Ninth Circuit Court of Appeals. Id. Judge Hall did not discredit or discuss the greater weight of authority cited by the Fund which stands for the exact opposite proposition. Id. Judge Hall further agreed with Langston by finding that the Fund's excuse for failing to timely file an Answer was weak and that the Fund did not present a legitimate excuse for its error. Id. at 21. A.App. 153. Finally, Judge Hall agreed with Langston that Langston would be "substantially" prejudiced if the default was vacated because she previously determined that Langston has an interest in Gary Langston's pension and there is no reason to further delay payments to her. Id. at 22. A.App. 154.

Judge Hall also commented at length that Langston is not without culpability. Memorandum pp. 17. A.App. 149. Specifically, Judge Hall noted that Langston “clearly had a responsibility to get a proposed QDRO to the Plan for the Plan Administrator’s qualification in a timely fashion, and the fact that [Langston] waited over 12 years to obtain a QDRO cannot be completely disregarded.” Id. Judge Hall further noted that “had [Langston] timely sent a proposed QDRO to the Plan, she would not be facing the issues present in the instant action. Had she properly responded to the Plan when it initially rejected her QDRO, Mr. Langston would have been alive to help correct the beneficiary designation.” Id. Likewise, Judge Hall chastised Gary Langston for failing to comply with the terms of the J & D by naming Langston, not James as his beneficiary. Id. Ultimately Judge Hall ordered the Fund to commence benefit payments to Langston effective as of the date of the Default Judgment on April 18, 2007. Order, p. 1. A.App. 131. On October 22, 2007, the Fund filed a Notice of Appeal to the Court of Appeals. See Notice of Appeal A.App. 156-157.

Thereafter, Langston brought a subsequent motion for attorneys’ fees and costs against the Fund pursuant to 29 U.S.C. § 1132(g)(1) for all attorneys’ fees incurred by Langston in defending against the motion to vacate default judgment. To satisfy a threshold standard generally akin to Rule 11, Langston argued that the law of this case was that the Fund never had a reasonable basis for disputing the merits of Langston’s claims. The Court orally deferred ruling on that motion pending this appeal, and as of the time of this brief, had not issued its Order.

## STANDARD OF REVIEW

### **I. Lack of Subject Matter Jurisdiction Under Rule 60.02(d)**

A motion to vacate a default judgment under Rule 60.02(d) based on lack of subject matter jurisdiction involves no question of discretion. Hengel v. Hyatt, 252 N.W.2d 105, 106 (Minn. 1977). A judgment that is void for lack of subject matter jurisdiction must be set aside regardless of whether a meritorious defense exists. Id. Whether subject matter jurisdiction exists is a question of law this court reviews *de novo*. Federal-Hoffmann, Inc. v. Fackler, 549 N.W.2d 93, 96 (Minn.App. 1996), review denied. See also Bode v. Minnesota Department of Natural Resources, 612 N.W.2d 862, 866 (Minn. 2000)(this court reviews jurisdictional issues *de novo*). A reviewing court conducting a *de novo* review of a trial court's decision on a purely legal issue is not bound by, and need not give deference to, the trial court's decision. Frost-Benco Electrical Association v. Minnesota Public Utilities Commission, 358 N.W.2d 639, 642 (Minn. 1984).

### **II. Excusable Neglect Under Rule 60.02(a) and (f)**

The standard of review for a decision on a motion to vacate a default judgment is abuse of discretion. Foerster v. Folland, 498 N.W.2d 459, 460 (Minn. 1993). Although the abuse of discretion standard is exacting, it is not a limitless grant of power to the trial court. State v. Warren, 592 N.W.2d 440, 451 (Minn.App. 1999). Where a discretionary power has been exercised arbitrarily, capriciously, or not upon the applicable law but upon personal judgment, there is an abuse of discretion. Schoepke v. Alexander Smith & Sons Carpet Co., 187 N.W.2d 133, 135 (Minn. 1971).

## SUMMARY OF THE ARGUMENT

Relying solely upon minority caselaw out of California and the Ninth Circuit, the Anoka County District Court found that it has subject matter jurisdiction over Langston's Complaint seeking a declaration that a State Court DRO is "qualified" under ERISA. But the official position of the United States Department of Labor, which is charged by the United States Congress with the job of promulgating regulations for the interpretation of ERISA states: "a State Court does not have jurisdiction to determine whether an issued domestic relations order constitutes a 'qualified domestic relations order'; jurisdiction to challenge a plan administrator's decision about the qualified status of an order lies exclusively in Federal Court." And the Eighth, Third, Fourth, Fifth and Sixth Circuit Courts of Appeal all wholeheartedly agree. Indeed, an unpublished decision of the Minnesota Court of Appeals also adopts this majority position. Because the great weight of better-reasoned authority establishes a lack of subject matter jurisdiction over Langston's Complaint, the trial court erred, and Langston's Complaint must be dismissed.

Even if this Court chooses to reverse itself and ignore that majority, the trial court abused its discretion in applying the well-established four-factor test for vacating default judgments. Specifically, the trial court erred in finding that the Fund has no reasonable defense on the merits to Langston's claims. The DRO at issue in this case could not be "qualified" under ERISA because it purported to grant Langston greater and different benefits than the Fund provided. That is unlawful under ERISA and the trial court was wrong to find otherwise. Moreover, the motion at issue here was not one for summary

judgment, rather, it was one merely to allow the Fund to proceed on the merits in the spirit of Minn. R. Civ. P. 1. The trial court erred by seeking to adjudicate what it erroneously perceived to be all potentially material facts that the Fund could have garnered with the benefit of discovery. In other words, the cart was put before the horse. At minimum, the Fund made a strong showing on the reasonable-defense-on-the-merits factor, and the trial court abused its discretion in finding otherwise.

Additionally, the trial court abused its discretion by finding that the Fund failed to make a strong showing that Langston would not be “substantially” prejudiced by allowing an adjudication on the merits. Langston made no showing of hardship resulting from the few weeks that passed after the entry of the default. Langston’s counsel stated on the record at the default hearing that he expected to be back on a motion to vacate. And no witnesses, evidence, or any other building blocks of “substantial” prejudice appear in the record. Minnesota law is clear that the only relevant period of prejudice to parties like Langston for purposes of these proceedings is that which accrues after the default, and there is no record of any prejudice whatsoever that militates in favor of the ultimate sanction of default judgment being wielded. Rather, the only legally cognizable prejudice in the record was minimal attorneys’ fees and costs that could have been the subject of a curative order, and are expressly rejected by Minnesota law as rising to the level of “substantial,” as that word is used in the four-factor-test. Accordingly, the trial court abused its discretion by finding that the Fund failed to make a strong showing on this factor.

Finally, the trial court conceded that the Fund made a strong showing on the factor of due diligence in commencing a motion to vacate after receiving notice of the Default Order. Additionally considering that the Fund's showing on the reasonable-excuse-for-not-timely-answering was no weaker than numerous other controlling cases holding that it is an abuse of the trial court's discretion to deny relief from default when a strong showing is made on the other three factors, the trial court abused its discretion in denying the Fund like relief from default judgment in this case. As a result, in the event this Court finds that it has jurisdiction over Langston's Complaint, the case should be remanded for adjudication on the merits.

### ARGUMENT

**I. STATE COURTS DO NOT HAVE SUBJECT MATTER JURISDICTION OVER THE DETERMINATION OF WHETHER A DOMESTIC RELATIONS ORDER IS QUALIFIED, SO THE DEFAULT JUDGMENT IS VOID.**

Rule 60.02(d) of the Minnesota Rules of Civil Procedure provides in relevant part: the Court may relieve a party or the party's legal representatives from a final judgment, order, or proceeding or grant such other relief as may be just if the judgment is void. A.Add. 2. A judgment is void if the issuing Court lacked jurisdiction over the subject matter or acted in a manner inconsistent with due process. Bode, 594 N.W.2d at 866.

The jurisdiction of the Court is measured by the nature of the cause of action, as determined by the Complaint and the relief sought. Norris Grain Co., v. Nordaas, 46 N.W.2d 94, 106 (Minn. 1950). See also Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 809 (1988)("under the well-pleaded Complaint rule, whether a claim arises

under federal law must be determined from what necessarily appears in the plaintiff's statement of his own claim unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.); Houghton v. Hibbing Taconite Company, 1991 WL 46582 (Minn.App.1991)(unpublished) (under the well-pleaded Complaint rule, the plaintiff is the master of his complaint and chooses what claims are included, including whether a federal question is implicated.) A.Add. 199-201. Moreover, where jurisdiction is conferred by statute, the statute limits the power of the court to act, and the Court cannot exercise jurisdiction unless the terms of the statute have been satisfied. Land O'Lakes Dairy Co., v. Hintzen, 31 NW.2d 474, 476 (Minn. 1948).

ERISA's civil enforcement provisions set forth both who is authorized to bring a claim, and what Courts have jurisdiction to hear those claims. 29 U.S.C. § 1132(a)(1)(B) provides that "a civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the term of the plan." A.Add. 44.

29 U.S.C. § 1132 (a)(3) provides:

a civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

A.Add. 44. 29 U.S.C. § 1132(e)(1) provides:

except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary... of this title. State courts of competent jurisdiction

and the district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B)...of this section.

A.Add. 44.

Accordingly, as a threshold matter, the trial court was required to review the relief sought in Langston's Complaint to determine under which portion of ERISA's civil enforcement provisions Langston's claim fell. See Nordaas, 46 N.W.2d at 106 and Hintzen, 31 NW.2d at 476. This analysis is vital because if Langston's claim arises under 29 U.S.C. § 1132(a)(1)(B), the State and Federal Courts have concurrent jurisdiction to hear the claim. However, if the claim arises under 29 U.S.C. § 1132 (a)(3), the appropriate Federal District Court has exclusive jurisdiction over the claim and the default judgment is void.

To this end, in her Complaint, Langston asserts:

Defendants' refusal to remit survivor benefits to Plaintiff violates the Employee Retirement Income Security Act ("ERISA"), and by reason of the foregoing, Plaintiff is entitled to judgment against Defendants for retroactive and ongoing survivor benefits, plus interest, and reasonable attorneys' fees and costs, and a declaration that Plaintiff is entitled to benefits under the Plan.

Complaint, p. 2. A.App.2. Nowhere in Langston's Complaint does she mention a provision of the SPD or Plan Document, much less allege a violation of the terms of these documents. See generally Complaint. A.App. 1-3. Rather, Langston seeks an Order declaring that the DRO is "qualified" under ERISA. Id. By failing to allege a violation of a term of a plan, Langston's claim cannot fall under 29 U.S.C. § 1132(a)(1)(B) because this section requires a plaintiff to assert that certain benefits are due to him or her under the terms of the plan, to enforce rights under the terms of a plan or to clarify rights

to future benefits under the terms of the plan. See 29 U.S.C. § 1132(a)(1)(B)(emphasis added). A.Add. 44.

Where, as here, Langston seeks a determination that the terms of a document—the DRO, which is completely separate from the terms of the SPD and Plan Document—complies with the enumerated requirements of ERISA to be “qualified,” and only as such, entitles her to benefits under the terms of the SPD and Plan Document, Langston’s claims necessarily fall under 29 U.S.C. § 1132 (a)(3). This is especially true where, as in this case, the very reason the Fund determined the DRO was not qualified was because the DRO required the Fund to provide a type or form of benefit not otherwise provided by the Fund and required the Fund to provide increased benefits in violation 29 U.S.C. § 1056(d)(3)(D). A.Add. 21-42. Accordingly, Langston’s claim clearly implicates the Fund’s interpretation of ERISA, and not a violation of a term of the SPD or Plan Document. Accordingly, it necessarily arises under 29 U.S.C. § 1132(a)(3) and the State Court was without subject matter jurisdiction to enter the Default Judgment.

The Eighth, Third, Fourth, Fifth and Sixth Circuit Courts of Appeal all concur with this analysis. In the Eighth Circuit, the determination of whether a DRO constitutes a QDRO for plan purposes is held not to require an interpretation of the plan’s terms. Hogan v. Raytheon Co., 302 F.3rd 854, 856 (8th Cir. 2002). Similarly, where a party challenges a plan administrator’s determination that a DRO is not “qualified,” the issue in the case is held to be a question of statutory construction regarding the requisites of a QDRO rather than a question of interpretation of the plan. Samaroo v. Samaroo, 193 F.3d 185, 189 (3rd Cir. 1999). See also Hopkins v. AT & T Global Information

Solutions, Co., 105 F.3rd 153, 155 (4th Cir. 1997)(where a plaintiff challenges an administrator's determination that a DRO is not "qualified," the only inquiry is whether the provisions of ERISA were interpreted correctly); Dial v. NFL Player Supplemental Disability Plan, 174 F.3rd 606, 611 (5th Cir. 1999)(in determining whether a property settlement agreement constitutes a QDRO, the plan administrator made no factual determination nor interpreted the terms of the Plan.); Rouse v. Daimler Chrysler Corporation UAW, 300 F.3rd 711, 716 (6th Cir. 2002)(where the issue is whether a DRO creates any obligations under ERISA, and the review does not require the court to meddle in state domestic relations law or policy, the issue is strictly federal in nature.)

Likewise, the Minnesota Court of Appeals and the Department of Labor are also in agreement. In Welter v. Welter, 2004 WL 2163149 \* 3 (Minn.App. 2004) (unpublished) this very court determined that whether a DRO is a QDRO is a matter relevant to ERISA, determinable by the plan administrator, and reviewable only by a Federal Court. A.Add. 51-53. The United States Department of Labor takes the same position: "a state court does not have jurisdiction to determine whether an issued domestic relations order constitutes a 'qualified domestic relations order'; jurisdiction to challenge a plan administrator's decision about the qualified status of an order lies exclusively in Federal Court." U.S. Department of Labor, The Division of Pensions Through Qualified Domestic Relations Order, p. 5. A.Add. 58. The Department of Labor's position is critically important because, in enacting 29 U.S.C. § 1132, Congress explicitly authorized the Secretary of Labor to promulgate regulations relating to the interpretation of 29 U.S.C. § 1132. See 29 U.S.C. § 1132. A.Add. 44-50.

Finally, in enacting ERISA, Congress intended that for any action involving title I of ERISA, which includes §§ 1056 and 1132, Federal Courts would have exclusive jurisdiction. A Congressional Conference Committee Report specifically addressing federal and state jurisdiction under ERISA provides that:

Civil actions may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility. The U.S. district courts are to have exclusive jurisdiction with respect to actions involving breach of fiduciary responsibility as well as exclusive jurisdiction over other actions to enforce or clarify benefit rights provided under title I, [now codified at 29 U.S.C. 1021-1114]. However, with respect to suits to enforce benefits under the plan or to recover benefits under the plan which do not involve application of title I provisions, they may be brought not only in U.S. district courts, but also in state courts of competent jurisdiction.

H.R.Conf.Rep. No. 12280, 93<sup>rd</sup> Cong., 2d Sess. (1974), reprinted in 1974 U.S.Code Cong. & Ad. News 5038, 5107.

Despite all of the foregoing, the trial court concluded that State and Federal Courts have concurrent jurisdiction to determine whether a DRO is “qualified” under ERISA. Memorandum, p. 13. A.App.145. In so holding, the trial court erred in at least two ways. First, despite the fact that when subject matter jurisdiction is challenged by a party, the trial court must review the Complaint and relief sought therein to determine whether the Court has subject matter jurisdiction and whether a federal question is implicated, the trial court did not undertake this analysis and summarily concluded that the Langston’s claims fell under 29 U.S.C. § 1132(a)(1)(B), and thus concluded that the State Court had concurrent subject matter jurisdiction. See Nordaas, 46 N.W.2d at 106, Christianson v.

Colt Industries Operating Corp., 486 U.S. at 809, and Houghton, 1991 WL 46582 A.Add. 199-201; see also Memorandum pp. 8-14 A.App. 140-146, and Complaint A.App. 1-3.

In this case, the absence of this analysis is even more striking because Langston's Complaint is silent on the issue of jurisdiction. See generally Complaint A.App. 1-3. It does not specify under which part of 29 U.S.C. § 1132 her claim arises. Id. And it does not even reference, much less allege, a violation of a term of the SPD or Plan Document or a violation of the calculation of benefits by the Fund. Id. Indeed, no SPD or Plan Document was attached to the Complaint or otherwise even provided to the Court so that such an analysis could be accomplished. Id.

Second, the trial court erred by disregarding the overwhelming majority of relevant precedent and by basing its holding that it had concurrent subject matter jurisdiction over the determination of whether a DRO is "qualified" under ERISA on minority cases that are inapposite and not controlling. Specifically, the trial court relied upon decisions from the California Court of Appeals and the U.S. District Court for the District of Northern California, that involved the same parties. See In re Marriage of Levingston, 12 Cal.App.4th 1303, 1305 (Cal. Ct. App. 1993) ("Levingston I") and Board of Trustees of Laborers Trust Fund for Northern California v. Clevon Levingston, 816 F.Supp. 1496 (N.D. Cal. 1993) ("Levingston II"). However, neither one of these cases are controlling or binding precedent on this Court. While both Courts in Levingston I and Levingston II determined that State and Federal Courts have concurrent jurisdiction over the determination of whether a DRO is "qualified" under ERISA, these decisions suffer from the same errors as the decision of the trial court in this case.

First, neither opinion reviews the relief sought in the Complaint or other initiating document to determine under what portion of 29 U.S.C. § 1132 the action arises. Additionally, these Courts ignored all contrary authority with the exception of the Conference Committee Report for § 1132. And with regard to the Conference Committee Report, the Levingston II Court admitted that this legislative history was contrary to its holding, but determined that despite such text of the Conference Committee Report, Congress actually intended State and Federal courts to have concurrent jurisdiction in determining whether a DRO is “qualified.” Levingston, 816 F.Supp. 1496 at 1499-1501.

The Court’s reliance on In re Marriage of Oddino, 16 Cal. 4th 67, 936 P.2d 1266 (Cal.1997) and Jones v. American Airlines, Inc., 57 F.Supp.2d 1224 (D.Wyo. 1999), which also are not binding or controlling, was similarly misplaced because Oddino and Jones are distinguishable from this case. This is true because in both cases, the pension plan administrators determined that the DRO at issue was “qualified” under ERISA. Therefore, the disputes only concerned the resulting administrative calculation of benefits by the pension plans. Oddino, 16 Cal. 4th at 74 936 P.2d at 1270 and Jones, 57 F.Supp.2d at 1230.

In Oddino, a former spouse of a plan participant filed suit against the plan when the plan refused to include an ‘early retirement subsidy’ in the calculation of amounts to be paid to the former spouse, which resulted in actuarially reduced payments to the former spouse. Oddino, 16 Cal. 4th at 74 936 P.2d at 1270. Similarly, in Jones, the plan participant filed suit against the plan, in Federal Court, alleging that the plan misapplied

the terms of the QDRO when it divided and distributed the benefits to the participant's former wife, which resulted in greater benefits being paid to his former wife than what was provided for in the QDRO, which in turn resulted in reduced benefits being paid to the participant. Jones, 57 F.Supp.2d at 1230. Unlike this case, the plaintiffs in Oddino and Jones both expressly alleged that their claims arose under 29 U.S.C. § 1132(a)(1)(B) because they were seeking benefits due to them under the terms of the plan and not an order declaring a DRO "qualified."

Because Langston's Complaint does not allege that the Fund failed to administer benefits pursuant to the terms of the SPD and Plan Document, but rather, alleged that the Fund erred in its determination of whether the terms of the DRO met all requirements under ERISA for being "qualified," and because overwhelming authority provides that a challenge of such Fund determination lies exclusively in Federal Court, the Default Judgment must be declared void and Langston's case must be dismissed for lack of subject matter jurisdiction.

## **II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANTS' MOTION TO VACATE DEFAULT JUDGMENT.**

### **A. Vacation under Rule 60.02(a)**

Rule 60.02 (a) of the Minnesota Rules of Civil Procedure provides in relevant part: the Court may relieve a party of the party's legal representative from a final judgment, order, or proceeding and may grant such other relief as may be judged due to mistake, inadvertence, surprise, or excusable neglect. A.Add. 1. A party seeking to set aside a default judgment under Rule 60.02(a) must show that: (1) there is a reasonable defense

on the merits; (2) there was a reasonable excuse for the delay; (3) the party acted with due diligence after notice of entry of judgment; and (4) no substantial prejudice will result to the opposing party. Riemer v. Zahn, 420 N.W.2d 659, 661 (Minn.App. 1988); see also Hinz v. Northland Milk & Ice Cream Co., 53 N.W.2d 454 (Minn. 1952)(it is the duty of the trial court, in furthering justice through the adoption of a liberal policy conducive to the trial of causes on the merits to grant a motion to open a default judgment and permit a party to answer if the defaulting party shows that he (a) possesses a reasonable defense on the merits; (b) has a reasonable excuse for the failure or neglect to answer; (c) has acted with due diligence after notice of entry of judgment; and (d) that no substantial prejudice will result to the other party.)

The goal of all litigation is to bring about judgments after trials on the merits, and for this reason courts should be liberal in opening default judgments. Taylor v. Steinke, 203 N.W.2d 589, 860 (Minn. 1973). Accordingly, default judgments are to be liberally reopened to promote resolution of cases on the merits. Galatovich v. Watson, 412 N.W.2d 758, 760 (Minn.App. 1987); see also Hill v. Tischer, 385 N.W.2d 339, 331 (Minn.App. 1986)(“relief [under Rule 60.02] should be granted liberally so as to permit determination of the controversy upon the merits.”) The Minnesota Court of Appeals has frequently reversed denials of motions to vacate default judgment where the defaulting party’s weak excuse for failing to timely answer was outweighed by a strong showing on the three remaining factors. Reimer, 420 N.W.2d at 662, see also Guillame & Associates, Inc. v. Doe-John Company, 371 N.W.2d 15, 19 (Minn.App. 1985).

## 1. Reasonable Defense on the Merits

A reasonable claim on the merits exists when a party presents sufficient facts to support a decision in his or her favor. Charson v. Temple Israel, 419 N.W.2d 488, 492 (Minn.1988) (finding that a claim need only be “debatably” meritorious to satisfy this factor.); see also Lysholm v. Karlos, 414 N.W.2d 773, 775 (Minn.App. 1987)(a defense is presented if the moving party raises a triable issue); Finden v. Klaas, 128 N.W.2d 748, 750 (Minn. 1964)(a reasonable defense is one where the proposed answer, if established, provides a defense to the merits of plaintiff’s claims); Schultz v. Milam, 410 N.W.2d 845, 848 (Minn.App. 1987)(even where appellant failed to enumerate specific facts supporting his claim in his motion to vacate, his original complaint set out in detail the basis for his action against respondents, which was enough to avoid summary judgment, and therefore appellant showed a reasonable claim on the merits.)

In this case, the Fund’s determination that the DRO was not “qualified” was meritorious. Benefits under a pension plan may not be assigned or alienated except pursuant to a qualified domestic relations order. 29 U.S.C. § 1056(d). A.Add. 21-42. ERISA defines a “domestic relations order” as any “judgment, decree, or order which relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependant and is made pursuant to a State domestic relations law. 29 U.S.C. § 1056(d)(3)(B)(ii) A.Add. 21-42. To be “qualified,” the DRO must “create or recognize the existence of an alternate payee’s right to, or assigns to an alternate payee, the right to, receive all or a portion of the benefits payable with respect to

the participant under the plan,” and meet additional requirements. 29 U.S.C. § 1056(d)(3)(B)(i) A.Add. 21-42.

To be qualified the DRO must clearly specify:

- i. the name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order;
- ii. the amount or percentage of the participant’s benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined;
- ii. the number of payments or period to which such order applies; and
- iv. each plan to which the order applies.

29 U.S.C. § 1056(d)(3)(C) A.Add. 21-42. Additionally, the DRO cannot:

- i. require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan;
- iii. require the plan to provide increased benefits; and
- iii. require the payment of benefits to an alternate payee which are to be paid to another alternate payee under another order previously determined to be qualified domestic relations order.

29 U.S.C. § 1056(d)(3)(D) A.Add. 21-42.

At the time the Fund reviewed the DRO in August, 2005, Gary Langston had already retired and was receiving a monthly pension benefit from the Fund, so the application process and benefit calculation were complete and irrevocable. Amendment 11 to the Plan Document, p. 2 A.Add. 189. As a result, the Fund determined that the payment method in the DRO required the Fund to provide a type or form of benefit to Langston that was not otherwise provided by the Fund because the benefits subject to the

DRO vested at the time of Gary Langston's retirement and were already amortized over Gary Langston's lifetime. Letter, Ex. D. to DeVincke Aff. A.Ap. 86-87. As such, the Fund could not re-amortize the vested benefits over Langston's lifetime. Id. Similarly, the Fund determined that by requiring Langston to be considered the surviving spouse thereby entitling her to survivor benefits when the surviving spouse benefits were already vested in James as of the date Gary Langston retired, the DRO required the plan to provide increased benefits. Id. Because the DRO required the Fund to provide a type or form of benefit not otherwise provided by the Fund, and required the Fund to provide increased benefits, the DRO did not comply with the provisions of 29 U.S.C. § 1056(d)(3)(D), so it could not be deemed qualified by the Fund. A.Add. 21-42.

The Fund's determination that benefits vested in both Gary Langston and James as of the date of Gary Langston's retirement has been upheld by the Third, Fourth, and Fifth Circuit Courts of Appeal in strikingly similar cases. In Hopkins, 105 F.3d 153, the plaintiff obtained a judgment against her former husband for unpaid alimony payments. Id. at 105 F.3d 155. At the time the judgment was obtained, the former husband had remarried, was retired, and was receiving monthly retirement benefits from his pension plan. Id. Because the pension was considered a marital asset at the time the parties divorced, the State Court issued a DRO ordering that plaintiff be made an alternate payee of the pension benefits and that plaintiff, not the new spouse, be designated as the surviving spouse. Id. The DRO was later split into two DROs with the first ordering monthly payments to the plaintiff from the pension benefits, and the second ordering monthly payments to plaintiff from the surviving spouse benefits. Id. The plan

determined that the second DRO could not be “qualified” under ERISA because the survivor benefits had already vested in the new wife. Id.

The Fourth Circuit Court of Appeals upheld the plan’s determination and held that pension benefits vest in a surviving spouse on the date the plan participant retires. Id. In so holding, the Court noted that its decision was consistent with the overall framework of ERISA because, under ERISA, a participant can only replace a joint and survivor annuity and surviving spouse benefits during the ninety day period prior to retirement, and only with the consent of the current spouse, which evidences that at the time of retirement, a participant’s spouse has a vested interest in surviving spouse benefits because once a participant retires, the participant cannot change the distribution of plan assets. Id. at 156-157, quoting 29 U.S.C. § 1055(c)(2)(A), (7)(A) A.Add. 15-20. The Court further stated that its holding balanced the interest of current and former spouses because a former spouse’s interest in surviving spouse benefits can be protected simply by obtaining a QDRO before the participant retires, and a current spouse can obtain an interest in pension benefits at any time. Id. at 157. Finally, the Court noted that its decision would not burden efficient management of the plan because plan disbursement of plan assets is based on actuarial calculations that necessarily involve the life expectancy of the recipient of the benefits, and the plan must know, on the date the participant retires, to whom the surviving spouse benefits are payable. Id. at 157 n. 7.

Likewise, in Samaroo, 193 F.3d 185, the plaintiff was granted fifty percent of the monthly pension benefit payable to her former husband upon retirement. Id. at 193 F.3d at 187. The parties’ divorce decree did not address the payment of surviving spouse

benefits. Id. The former husband passed away before he reached the age of retirement, so no benefits were ever paid to the plaintiff. Id. The plaintiff made claim for a survivor annuity from the plan, which the plan denied based on the absence of any surviving spouse language in the divorce decree. Id. The plaintiff then filed an action in State Court, naming the plan as a party, and seeking to amend the divorce decree to name her as the surviving spouse. Id. at 188. The plan removed the matter to Federal Court and filed a claim for declaratory relief seeking a declaration that plaintiff was not entitled to surviving spouse benefits. Id. The Federal Court remanded the portion of the case that dealt with the divorce, and the State Court amended the divorce decree. Id. at 188-189. Ultimately, the Third Circuit Court of Appeals agreed with the plan that the amended divorce decree could not be a QDRO, and held that successful operation of a defined benefit plan requires that the plan's liabilities be ascertainable as of particular dates. Id. It stated that allowing an insured to change operative facts, after the fact, would wreak actuarial havoc on the administration of the plan. Id. at 190. The same is true in this case.

Finally, in Rivers v. Central and South West Corp., 186 F.3rd 681 (5th Cir. 1999) the plan participant and his wife divorced, and thereafter the participant remarried and retired. Id. at 682. The plan participant elected to receive a joint and survivor annuity and named his new wife as the beneficiary. Id. The participant then passed away. Id. Twenty-five years after the dissolution and ten years after the participant passed away, the participant's former wife filed suit against the plan asserting a claim to one-half of the pension benefits accrued during their marriage. Id. The suit was removed to Federal

Court where summary judgment was granted in favor of the plan. Id. at 683. The Fifth Circuit Court of Appeals affirmed the district court's ruling, adopting the Fourth Circuit's holding in Hopkins, and noting that the former wife failed to protect her rights in the pension plan by neglecting to obtain a QDRO prior to the participant's retirement date, and consequently the survivor benefits irrevocably vested in the new wife on the date of retirement. Id. at 683-684. Accordingly, the court held that the former wife is forever barred from acquiring an interest in the pension. Id.

The holdings in Hopkins, Samaroo, and Rivers make it clear that the Fund presented a "triable issue" as required by Lysholm, 414 N.W.2d at 775, presented sufficient facts to support a decision in its favor as required by Charson, 419 N.W.2d at 492, and presented a defense to Langston's claim as required by Finden, 128 N.W.2d at 750. Accordingly the trial court abused its discretion by ignoring and disregarding these cases, by basing her decision on personal judgment and by relying on In re Gendreau, 122 F.3d 815, 818-819 (9th Cir. 1997) and Trustees of Directors Guild of America—Producer Pension Benefits Plans v. Tice, 234 F.3d 415, 421 (9th Cir. 2000) in concluding the Fund could not present a reasonable defense on the merits because Langston's interest in Gary Langston's pension was created at the time the J & D was entered. Memorandum pp. 14-19. A.App. 146-151. And as a result, the fact that Gary Langston's benefits were already in pay status, and because certain benefits had already vested in James when the DRO was finally issued, does indeed affect Langston's right to the benefits under ERISA. Id.

The trial court's abuse of discretion is further compounded in light of the fact that Gendreau and Tice stand for the proposition that a former spouse's interest in a pension plan can arise before a QDRO is obtained, but the former spouse is prohibited from enforcing that interest until a QDRO is obtained. Gendreau 122 F.3d at 819, and Tice 234 F.3d at 421. Accordingly, a QDRO need not be obtained before plan benefits become payable to the plan participant. Id. This is not the situation presented in this case. The Fund has never taken the position that Langston was not entitled to any benefits after Gary Langston retired, indeed, the Fund withheld her portion of the benefits for the required two months after the DRO was provided to the Fund but before Gary Langston's death. Coleman Aff. at ¶ 11 A.App. 34-35. Much like in this case, in Gendreau, the Court noted that in situations where a plan administrator determines a DRO is not qualified, a former spouse "simply has to return to state court for a revised order that would pass muster as a QDRO." Id. 122 F.3d at 818-819. However, Langston opted not to pursue this remedy. Coleman Aff. at ¶ 11 A.App. 34-35. Additionally, neither Gendreau nor Tice involved a claim for surviving spouse benefits. Rather, Gendreau involved a plan participant's attempt to bar his former spouse from obtaining a QDRO by filing bankruptcy and Tice involved a former spouse seeking to collect on a judgment against the plan participant for failure to pay child support.

Not only is the Fund's position on the underlying merits a reasonable one that satisfies the standard for a reasonable-defense-on-the-merits, which is lower than the standard for summary judgment, but also, the Fund has established that the great weight of authority would allow it to prevail even on the heightened standard applicable to

summary judgments. Accordingly, the trial court erred in finding that the Fund failed to make a strong showing on this factor.

## 2. Reasonable Excuse for Failure or Neglect to Answer

In its Memorandum, the Fund explained that its failure to timely file an Answer in this case was based on a mistake of the Fund's counsel that Langston's Request for Reconsideration in the family court matter was still pending because the Fund had not yet received a copy of the denial of that Request, and that the Complaint was related to that matter and not a new lawsuit requiring a responsive pleading. Appellant's Memo. pp. 12-13 A.App. 27-28, see also Anderson Aff. at ¶¶ 2-6 A.App. 36-37. The trial court rejected the Fund's proffered explanation, holding that as non-parties to the family court action, the Fund would not have received notice of any filing and because the case title in this matter sets forth the Fund's name, indicating that this action concerned the Fund. Memorandum p. 20 A.App.152. Admittedly, the Fund's showing on this factor was weak, but its showing was no weaker than the showings made in numerous cases where this Court has found an abuse of discretion in denying a motion to vacate default judgment.<sup>2</sup>

In Riemer, the "[trial] court found that the record demonstrated that Zahn [the defendant] was aware of the seriousness of the case, the need to answer correspondence from Reimer's attorney, and the possibility a default judgment would be entered should he fail to respond." Id., 420 N.W.2d at 659. Based on these findings, the trial court

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<sup>2</sup> This Court is reluctant to penalize parties for neglect or mistakes of his lawyer and will provide relief of such mistakes when it can be done without "substantial" prejudice to their adversaries. Kurak v. Control Data Corp., 410 N.W.2d 34 (Minn.App. 1987).

decided that default judgment was appropriate based on the extreme “weakness” of defendants excuse for not answering. Id. However, the Court of Appeals reversed, finding that the trial court abused its discretion by focusing solely on the weakness of the excuse for not interposing an answer, and by failing to balance the weak excuse against the strong factors. Id.

In Hill, the defendant’s excuse for not answering and not making any appearance whatsoever until after the default was entered was that “he forgot and neglected to answer the complaint because of the busy summer season and because he was absent from the community for a period of time.” Id., 385 N.W.2d at 330-31. The trial court denied defendant’s motion to vacate finding “forgetfulness is not excusable neglect.” Id. at 332. The Court of Appeals reversed and found the trial court abused its discretion because defendant made a strong showing on the other three factors. Id.

In Spicer v Carefree Vacations, Inc., 379 N.W.2d 728 (Minn.App. 1986), the defendant alleged that it “inadvertently and unintentionally failed to respond to respondent’s complaint,” because defendant’s President did not realize the legal significance of the document and defendant’s Chairman did not realize that it was a document requiring immediate action. Id. at 728. The trial court denied a motion to vacate finding that the defendant did not show a sufficient excuse for its failure to answer. The Court of Appeals agreed that the defendant’s excuse was weak, but reversed the trial court’s decision to deny the motion to vacate finding that given the strong showing on the other factors, the trial court’s limited view on the weak excuse was in error. Id. at 730.

In Valley View, Inc. v. Schutte, 399 N.W.2d 182 (Minn.App.1987), the plaintiff served the summons and complaint upon defendant. Id. at 184 When no answer to the complaint was received, plaintiff's counsel wrote to defendant's corporate counsel, advising him of the service upon his client. Id. Defendant's corporate counsel did not respond, so plaintiff sought and obtained a default judgment. Id. Thereafter, defendant moved to vacate the default and the trial court denied the motion on the grounds that defendant failed to satisfy any of the four relevant factors. Id. Although the Court of Appeals noted that defendant exhibited a weak showing on the reasonable excuse factor by stating, "it is difficult to believe Bergerud [defendant] or his attorney still thought no answer was due after the...letter. The letter clearly requested a response from Bergerud's counsel. Id. at 185, The Court of Appeals reversed, finding the trial court abused its discretion in denying the motion to vacate because the "weak showing on the reasonable excuse factor is outweighed by the other three factors. Id. at 186.

Finally, in Guillame, the plaintiff served a summons and complaint on defendant. Id. 371 N.W.2d at 17. Defendant did not answer. Id. Two and half years later, plaintiffs sought a default judgment against defendant. Id. Defendant appeared at the motion hearing and asserted it did not realize the plaintiff was seeking relief that could have an adverse affect on defendant. Id. The trial court rejected defendant's excuse and entered default judgment, defendant moved to vacate the default and the motion was denied. Id. The Court of Appeals found defendant's excuse to be weak, but nonetheless found defendant's excuse plausible and reversed the trial court holding that a weak showing on

one factor should be weighed against a strong showing on the other three factors especially in light of the spirit of the rules. Id. at 19.

Comparing the foregoing cases to the present case, it simply cannot be said that the carelessness-with knowledge-that-default-may-be-entered-as-a-result as in Riemer, or the forgetfulness and traveling as in Hill, or the failure to appreciate the importance of a summons and complaint by a company president and chairman as in Spicer, or the outright negligence in the face of a clear warning as in Valley View, or the misinterpretation of a summons and complaint as in Guillame are better excuses than the excuse proffered by the Fund here. Accordingly, the trial court abused its discretion as the Fund's strong showing on the other three factors should have outweighed the Fund's weak showing on this factor.

### **3. Due Diligence After Notice of the Entry of Judgment**

Both Langston and the trial court conceded that the Fund acted with due diligence after receiving the Notice of Entry of Judgment. See Respondent's Memo. pp. 7-19 A.App. 51-63 and Memorandum p. 21 A.App. 153.

### **4. No Substantial Prejudice**

Substantial prejudice refers to additional prejudice imposed only by reopening the judgment—not by prejudice alleged to have occurred prior to the Complaint—and the mere passage of time and expense implicit in defending against the initial action is not “substantial” such that the ultimate sanction of default judgment is appropriate. Lysholm, 414 N.W.2d at 776; see also Riemer, 420 N.W.2d at 662 (delay, expense, and inconvenience of litigation do not constitute substantial prejudice); Imperial Premium

Finance, Inc. v. GK Cab Co. Inc., 603 N.W.2d 853, 858 (Minn.App.2000)(“the delay and expense of additional litigation, without more, do not create sufficient prejudice to defeat a motion to vacate”); and Kemmerer v. State Farm Ins. Co., 513 N.W.2d 838, 841 (Minn.App.1994)(a party’s having to close and reopen file does not constitute substantial prejudice.)

In this case, Langston makes no allegation that in vacating the Default Judgment and allowing the parties to litigate this matter on the merits, prejudice will result in the loss of availability of witnesses or evidence, which are the real building blocks of “substantial” prejudice. Rather, Langston merely argued that she would be prejudiced if the default were vacated because she counted on the benefit payments for many years. Respondent’s Memo., pp. 16-17 A.App. 60-61. This reliance alleged by Langston focuses on the wrong time period and is nothing more than garden-variety delay, and it focuses only on prejudice allegedly accruing prior to the initiation of her lawsuit—not prejudice accruing after the Complaint, which is the only appropriate time period for the trial court to inquire. Additionally, given the fact that Langston waited twelve years to obtain a DRO, allowed her benefits to vest in someone else, never followed-up or checked with her former husband or the Fund to determine whether she was correctly named as Gary Langston’s beneficiary, and failed to submit a revised DRO as recommended by the Fund curing the defects that would have allowed the Fund to begin paying her benefits, Langston’s reliance argument is without merit.

Despite the foregoing, the trial court agreed with Langston, albeit under a slightly different theory, but with the same result. According to the trial court, because it

previously determined that Langston has an interest in Gary Langston's pension, the court stated that there is no reason to further delay payments. Memorandum p. 22. A.App. 154. The trial court's holding is puzzling, however, in light of its finding that Langston "clearly had a responsibility to get a proposed QDRO to the Plan for the Plan Administrator's qualification in a timely fashion," that "had [Langston] timely sent a proposed QDRO to the Plan, she would not be facing the issues present in the instant action," and that "had she properly responded to the Plan when it initially rejected her QDRO, Mr. Langston would have been alive to help correct the beneficiary designation." Memorandum pp. 17. A.App.149. Nonetheless, the trial court's reasoning is in error because delay is not a permissible justification for a finding of "substantial" prejudice. See Lysholm, 414 N.W.2d at 776, Riemer, 420 N.W.2d at 662, Imperial Premium Finance, 603 N.W.2d at 858 and Kemmerer, 513 N.W.2d at 841.

And to the extent that the trial court found this important factor to somehow be moot as a result of it endeavoring to rule on all issues as if the motion were one for summary judgment, it erred in applying the test for vacating default judgments. When making its arguments, the Fund did not have the benefit of any discovery whatsoever, or the protections of any other rules of procedure, including Rule 1, which states that all of the rules should be construed to allow just proceedings on the merits. Accordingly, to the extent that this factor was not misapplied by the trial court, it strongly weighs in favor of the Fund and the trial court's holding must be reversed.

### **III. THE TRIAL COURTS ISSUED CONFLICTING ORDERS WHICH REQUIRE THE FUND TO VIOLATE THE PROVISIONS OF ERISA SO EQUITY REQUIRES THE DEFAULT JUDGMENT BE VACATED.**

Rule 60.02 (f) of the Minnesota Rules of Civil Procedure provide in relevant part: the court may relieve a party of the party's legal representative from a final judgment, order, or proceeding and may grant such other relief as may be judge for any other reason justifying relief from the operation of the judgment. "Relief under this residual clause of Rule 60.02(6) [now 60.02(f)] is appropriate where the equities weigh heavily in favor of petitioner and clearly require relief to be granted to avoid an unconscionable result. This clause is invoked where necessary to further the liberal policy behind opening up default judgments and proving trials of actions on their merits." Wiethoff v. Williams, 413 N.W.2d 533, 536-537 (Minn.App.1987)

The Default Order issued by Judge Walker Jasper Orders the Fund to commence benefits payments to Langston commencing on August 10, 2005, the day the DRO was first served on the Fund. Default Order pp. 3-4 A.App. 14-15. The Order denying the Motion to Vacate issued by Judge Hall Orders the Fund to commence benefits payments to Langston commencing on April 18, 2007 the date of the Default Order. Order, p. 1. A.App. 131. If the Fund follows Judge Walker Jasper's Order, it will be in violation of Judge Hall's Order, and vice-versa, with the latter likely giving rise to an action by Langston to enforce the more beneficial Order.

To compound the difficulties for the Fund, if the Fund follows either Order it will be violating ERISA, thereby subjecting the Fund's Trustees to lawsuits by any plan participant or beneficiary for violating their fiduciary duties. 29 U.S.C. § 1056(d)(3)(D)

prohibits the Fund from qualifying a DRO and paying benefits pursuant to that DRO if the DRO (i) requires a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan or (ii) required the plan to provide increased benefits. In this case, the DRO both Judge Walker Jasper and Judge Hall declared “qualified” under ERISA requires the Fund to pay a form of benefit not available to Langston. Even if the Fund could somehow determine the amount payable to Langston as determined by her lifetime, given certain actuarial assumptions, it is likely that this would result in increased benefits due to Langston when comparing the amount of benefits payable to Langston under the shared payment method—the only payment method available to Langston at the time she submitted her DRO. The Fund must also take into account that is paying the very same benefits Ordered to be paid by Judge Walker Jasper and Judge Hall to James, Gary Langston’s vested beneficiary. This most certainly will result in increased benefits being paid by the Fund. At minimum, leave should be granted to the Fund to seek relief in the nature of an interpleader, as it is forbidden by ERISA from paying the same benefits to two different people, and it faces imminent litigation from James if it ceases benefit payments as a result of the trial court’s default judgment. As a result, the equities weigh heavily in favor of vacating the default judgment to allow the parties to litigate this matter on the merits and obtain a clear determination of all parties’ rights and responsibilities.

**CONCLUSION**

Based on the foregoing, the Fund respectfully requests that this Court reverse the trial court and find that federal courts have exclusive jurisdiction over the determination of whether a domestic relations order is “qualified” under ERISA, which renders the default judgment void. In the alternative, the Fund respectfully requests that this Court reverse the trial Court and vacate the default judgment to allow for a trial on the merits, or for such other and further relief that the Court deems just and equitable.

Respectfully submitted,

Dated: December 31, 2007

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