October 28, 2010

Minnesota Laborers' Fringe Benefit Funds
c/o Zenith Administrators, Inc.
P.O. Box 124
Minneapolis, Minnesota 55440-1024

RE: Claim for Benefits for Earl Otterness – SSN#475-60-5601

To the Minnesota Laborers' Fringe Benefit Funds:

Earl Otterness, by and through his attorney David A. Bonello of the Upper Midwest Pension Rights Project, does hereby file this Claim for Pension Benefits from the *Minnesota Laborers' Pension Fund.* For the reasons set forth below, the Fund should approve this Claim, and begin payment of Otterness' pension benefits.

Background

Earl Otterness was a participant in the *Minnesota Laborers' Pension Fund ("The Fund")* from approximately 1967 to 1981. He is a vested participant and eligible for a pension benefit from the Fund. Earlier in 2010, Mr. Otterness submitted an application for benefits. The application was reviewed by the Fund, and it was determined that Otterness is entitled to begin receiving his pension benefits at this time. (See *Retirement Applications Check-Off Form and Fact Sheet* – attached as Exhibit "1").

However, instead of processing his application, the Fund sent Mr. Otterness a letter, dated July 29, 2010, advising him that in order for his application to be processed – and for him to begin to receive his pension benefits – Mr. Otterness needed to submit a Qualified Domestic Relations Order. (See Exhibit "2"). For the reasons set-forth in this Claim, we believe the Fund can start Mr. Otterness' benefits at this time; and to require that a QDRO be submitted in order to process his application for benefits is both a violation of the *Employee Retirement Income Security Act* (ERISA) and the Fund's own policies as set forth in the Fund's governing Plan documents.

Argument

Mr. Otterness was divorced in 1986. In the divorce, Audrey Otterness – (his ex-wife) – was awarded an interest in Mr. Otterness' pension benefits from the Fund. A divorced spouse of a participant - such as Audrey Otterness - can obtain rights to an employee's benefits under a qualified retirement plan if such rights are embodied in a qualified domestic relations order ("QDRO"). This provision requires plans to establish reasonable written procedures for determining the qualified status of domestic relations

orders and for administering distributions under QDRO's. [See 29 U.S.C. §1056(d)(3)(g)(ii)]. ERISA's procedural rules require that the plan:

> 1) Establish reasonable procedures to determine if the order qualifies as a qualified domestic relations order ("QDRO");
> 2) Administer distributions under qualified orders; and
> 3) Segregate the benefits while a decision is pending.
>
> [See 29 U.S.C. §1056(d)(3)(G)(ii)].

The divorce decree (which Otterness provided recently to the Fund) provided that his ex-wife - Audrey Otterness – received an interest in Otterness' pension benefits. The divorce decree states:

> "Petitioner (wife) shall be awarded a portion of Respondent's union pension benefits when he receives them, said portion being one-half of the fractional portion represented by a fraction consisting of the number of years of the parties marriage as the numerator and the total number of years during which respondent pays into the pension as the denominator." (See Exhibit "3").

However, twenty-four years after this divorce occurred, Audrey Otterness has not filed a Qualified Domestic Relations Order pursuant to the divorce decree.

I. <u>ERISA Requires that, Upon Receipt of a Domestic Relations Order, the Plan Administrator Segregate and Separately Account For Monies Which May Become Due to An Alternate Payee; ERISA Does Not Require That Funds Otherwise Due A Participant Be Withheld Pending Qualification of a Domestic Relations Order</u>

ERISA's statutory QDRO requirements expressly contemplate a "qualification process" by which plans, once on notice of a state domestic relations order, will determine whether a state court domestic relations order ("DRO") is sufficient to alter exiting plan obligations. [See 29 U.S.C. §§1056 (d)(3)(H)(i)-(v)]. This "qualification" process commences with a plan's notice of the domestic relations order. The statute expressly states that once a plan receives a DRO, within a reasonable period of time, the administrator shall determine whether that order is a QDRO. [See 29 U.S.C. §1056(d)(3)(G)(ii)(I)-(III)]. ERISA sets a period of 18-months – starting from the time benefits would be payable to an alternate payee (and of course after receipt of a domestic relations order) – within which to either approve the domestic relations order as qualified, or reject the order as non-qualified. This is what is meant by the "18-month period."

ERISA provides that during this "18-month period" in which the issue of whether a domestic relations order (DRO) is a qualified domestic relations order is being determined (by the Plan Administrator, by a court of competent jurisdiction, or otherwise) the Plan Administrator shall segregate in a separate account in the plan or in an escrow account the amounts which would have been payable to the *alternate payee* during such period. 29 U.S.C. §1056(d)(3)(H)(i)[Emphasis added]. The 18-month "qualification" period contemplated that state court action in meeting the rigorous requirement of qualifying a DRO may take some time to perfect. The evident purpose of the 18-month qualification period was to provide time in which any defect in the original domestic relations order could be cured.

However, the time period in which a plan should make a determination on the qualified status of a domestic relations order is *not* the "18-month period" discussed above. Rather, the Department of

Labor and the Congress of the United States has stated that the plan administrator shall make a determination on the qualified status of a domestic relations order within a *reasonable* period of time. In discussing this issue, Congress issued guidance on this matter. The H.R. Conference Report, 841-99th Congress – provides:

> "*Determination by plan administrator* – Under the bill, the administrator of a plan that receives a domestic relations order is required to promptly notify the participant and any other alternate payee of receipt of the order and the plan's procedures for determining whether the order is qualified. In addition, *within a reasonable period* after the order, the plan administrator is to determine whether the order is qualified and notify the participant and alternate payee of the determination." [Emphasis Added].

Further, Internal Revenue Code §414(p)(7)(C)(ii) provides that if, after the expiration of the 18-month period, it is determined that the DRO is not a qualified domestic relations order, then the plan administrator *shall* pay the segregated amounts (including any interest thereon) to the persons or person who would have been entitled to such amounts as if there had been no order. The "18-month period" is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

As stated above, during this "qualification" process, the plan administrator must therefore separately account for amounts which would otherwise be payable *to an alternate payee.* [29 U.S.C. §1056(d)(3)(H)(v)]. In commenting on this 18-month segregation and qualification period, the court in *Files v. ExxonMobil Pension Plan,* 428 F.3d 478, noted "[i]t is only after this eighteen-month period has expired that the putative alternate payee loses the right to uphold payment of plan proceeds to a *designated beneficiary*" [Emphasis added]. See also 29 U.S.C. §1056(d)(3)(H).

Implicit, therefore, in the court's reasoning is that the putative alternate payee does <u>not</u> have a right to uphold payment to the *participant* – specifically that portion of the participant's interest in the pension as awarded him in a domestic relations order – until a proper QDRO is lodged with and approved by the plan. If this were the case, the *Files* court would have noted that fact, by also recognizing that only after the expiration of the 18-month period does a putative alternate payee lose the right to "uphold payments to a designated beneficiary *and the participant*." Id. at 490. [See 29 U.S.C. §1056(d)(3)(H)]. However, the court in *Files* made no such finding. And even if the DRO is later determined to be a QDRO, (after the 18-month period has lapsed) any obligation there under owed to the alternate payee shall apply only prospectively.

What all this statutory language indicates is that nowhere in ERISA is it contemplated that a pending QDRO devising an interest in plan benefits to an alternate payee can prevent the *participant* from obtaining benefits otherwise payable to him under the terms of the plan. The statutory language references separately accounting for - and segregating - those amounts which may become payable to an *alternate payee*. The statute nowhere requires that the entire pension benefit – in particular, the benefit reserved to the participant as set forth in a DRO – can be withheld until a proper QDRO is submitted to the plan on behalf of the alternate payee.

In fact, courts have recognized instances when a participant is already in pay status, then goes through a divorce, the decree from which awards an interest in the participant's pension benefits to his now ex-spouse. In such a situation, the Plan – once being provided with a DRO – must *segregate* any funds that may be payable to an *alternate payee,* but has no duty to suspend the payment of benefits to the

participant. (See *Trustees of the Directors Guild of America-Producer Pension Benefits Plan v. Tise,* 234 F.3d 415, 1t 421 –where the court noted "[t]his benefit segregation requirement obviously assumes that benefits may already be payable during the period the plan is determining whether the DRO is a QDRO"). Id. at 422. For all the detail of the QDRO requirements, ERISA nowhere specifies that a "hold" must be placed on the participant's interest in *his* pension benefits.

There is also evidence of the intent of Congress in drafting the rules governing Qualified Domestic Relation Orders. The H.R. Conference Report, 841-99th Congress - provides the following guidance:

> "If a plan administrator determines that a domestic relations order is defective before the expiration of the 18-month suspension period (or qualification period), the committee intends that the plan administrator may delay payment of a *participant's* benefit until the expiration of the 18-month period ***if the plan administrator has notice that the parties are attempting to rectify any deficiencies in the order*** [Emphasis Added].

In this case, the *Minnesota Laborers' Pension Fund* has no notice that the parties are attempting to perfect the previously submitted domestic relations order. Mr. Otterness has no contact with his ex-wife; and there is no indication that the alternate payee in this case (Audrey Otterness) is taking any action to cure the previously submitted domestic relations order. Furthermore, Earl Otterness has no obligation or duty to file a qualified domestic relations order on behalf of his ex-wife. This is the responsibility of the alternate-payee. The divorce occurred twenty-five years ago. If the Fund does not have any notice or indication that the submitted domestic relations order is being "cured" by the alternate payee, the Fund has no authority to uphold payment now to Mr. Otterness.

In further support of Earl Otterness' argument that the Fund has no authority to uphold *his* benefits, the H.R. Conference Report, 841-99th Congress (previously cited above), provides:

> "In addition, the bill eliminates the requirement that a defined benefit plan establish an escrow account for amounts that would have otherwise been paid during the 18-month period. Instead, the plan administrator is required only to account separately for such amounts. If the deficiency is not cured, or the dispute not resolved within the 18-month period, ***all*** payments ***deferred*** during the 18-month period are to be paid to the person who would have received them if the . . . order had not been issued." [Emphasis Added].

This language again buttresses the argument that - at this time – the Fund only has a duty to segregate those amounts that may eventually become due to an alternate payee; nowhere is it suggested that the failure of the alternate payee to file a proper QDRO can block a participant's distribution from the plan.

The domestic relations order that has been submitted in this case may not yet meet the qualification requirements of the Fund, but it does already include the amount or percentage of the participant's benefits to be paid or the means by which that amount will be determined. The Fund, therefore, should at this point be able to separately segregate amounts that may become payable in the event a QDRO is ultimately filed with the Fund by Otterness' ex-spouse.

By Withholding Payment to Earl Otterness, the Fund is Violating its Own Plan Provisions

ERISA requires that every employee benefit plan shall be established and maintained pursuant to a written instrument, and shall also provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan. {See 29 U.S.C. §§1102 & 1102(b)(3)}.

Counsel for Otterness requested and received from the Fund a copy of the governing Plan document, and a document entitled "*Procedures Relating to Qualified Domestic Relations Orders Amended and Restated through February 5, 2008."* Nowhere in these QDRO procedures do they authorize the Fund to withhold or delay payment of an otherwise payable benefit due a participant. The procedures only allow for the segregation of amounts that may become *payable to an alternate payee*. The procedures provide (in relevant part):

> "Upon receipt of a Domestic Relations Order, the following procedures will be followed by the Fund, unless the Fund determines in the best interests of the Fund and its Participants, the circumstances warrant a deviation from these procedures:
>
> 9. If the Participant's pension is in pay status, during any period in which the issue of whether a Domestic Relations Order is a Qualified Domestic Relations Order is being determined (by the Fund, Fund Counsel or by a court of competent jurisdiction),the Fund Administrator shall separately account for the amounts (hereinafter in this paragraph referred to as "segregated amounts") which would have been *payable to an alternate Payee* during such period if the order had been determined to be a Qualified Domestic Relations Order." {Emphasis added}

A plan administrator must determine whether a domestic relations order is a QDRO within a *reasonable* amount of time. In the view of the Department of Labor, the "18-month period" during which a plan administrator must preserve the "segregated amounts" due an alternate payee is *not* the measure of the reasonable period for determining the qualified status of an order and in most cases would be an unreasonably long period of time to take to review the order.

For the Fund to place a "hold" on the stream of payments going to the participant – or to refuse to begin payments to a participant when the participant is otherwise entitled to receive them (such as Earl Otterness) would be a violation of the Fund's Plan document. The Fund's own Plan document provides that an individual who makes application for benefits shall receive the first payment the month following said application. Section 6.05(b) provides:

> "Benefit payments *shall* commence with the first day of the month following the month in which the Participant has fulfilled all the conditions for the entitlement to (sic) benefit, including the filing of an application."

Otterness has submitted an application which has been approved by the Fund. He is otherwise eligible to receive his pension benefits at this time. By adopting and implementing a practice of placing a "hold" on Otterness' pension benefits that are payable to him – and that portion specifically reserved to him in the divorce decree – the Fund is substantially modifying its written QDRO procedures, and in so doing, the Fund failed to comply with ERISA's amendment provisions.

Section 402 of ERISA states that every employee benefit plan shall be established and maintained pursuant to a written instrument, and shall also provide a procedure for amending such plan, and for identifying who has the authority to amend the plan. [See 29 U.S.C. §1102(b)(3)]. As the Fifth Circuit noted in *Cefalu v. B.F. Goodrich Co.,* 871 F.2d 1290, "the writing requirement gives the plan's participants and administrators a clear understanding of their rights and obligations." Id. at 1296.

The practice of placing a "hold" on distributions from the Plan amounts to an amendment to the Plan, and the Fund had a duty to incorporate such practice into the written Plan provisions. (See *Nachwalter v. Christie,* 805 F.2d 956, at 960).

By preventing Otterness from drawing his pension at this time on the basis that a qualified domestic relations order has not been filed by his former spouse, the Fund is in effect amending and modifying the terms of the Plan. However, since such amendment or modification was not written, it is an oral modification of the Plan.

ERISA rules provide that a Pension Plan document cannot be amended by oral modification. [See 29 U.S.C. §206(d)(3)(G)(ii)]. The Fund is not operating the Plan consistent with its own written rules and procedures, and it is thus prevented from taking action that results in violating the written procedures of the governing Plan documents. (*Schoonmaker v. The Employee Savings Plan of Amoco Corporation,* 987 F.2d 410). It is also a violation of 29 U.S.C. §1104(a)(1)(D) which provides that a plan administrator shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and in accordance with the documents and instructions governing the plan.

Conclusion

Earl Otterness and his ex-spouse divorced 25 years ago. It is the responsibility of the alternate payee to file a proper QDRO. ERISA's qualified domestic relations order provisions provide that an alternate payee may not enforce his/her right or interest in plan benefits until a qualified domestic relations order is obtained. (See *Files v. ExxonMobil Pension Plan,* 428 F.3d 478). The Fund's obligation is to *segregate and separately account* for any benefits which may become payable to an alternate payee; the Fund has no authority to deny Earl Otterness his pension benefits until a QDRO is filed with the Fund. For the foregoing reasons, the Fund should process Otterness' application now, and begin paying his pension benefit.

Respectfully submitted

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Upper Midwest Pension Rights Project
Attorney for Earl Otterness