No. ________

In The
Supreme Court of the United States

M&G POLYMERS USA, LLC; M&G POLYMERS USA, LLC COMPREHENSIVE MEDICAL BENEFITS PROGRAM FOR EMPLOYEES AND THEIR DEPENDENTS; THE M&G CATASTROPHIC MEDICAL PLAN; THE M&G MEDICAL NECESSITY BENEFITS PROGRAM OF HOSPITAL, SURGICAL, MEDICAL, AND PRESCRIPTION DRUG BENEFITS FOR EMPLOYEES AND THEIR DEPENDENTS; AND THE M&G MAJOR MEDICAL BENEFITS PLAN,

Petitioners,

v.

HOBERT FREEL TACKETT; WOODROW K. PYLES; UNITED STEEL, PAPER AND FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION; AND HARLAN B. CONLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, when construing collective bargaining agreements in Labor Management Relations Act (LMRA) cases, courts should presume that silence concerning the duration of retiree health-care benefits means the parties intended those benefits to vest (and therefore continue indefinitely), as the Sixth Circuit holds; or should require a clear statement that health-care benefits are intended to survive the termination of the collective bargaining agreement, as the Third Circuit holds; or should require at least some language in the agreement that can reasonably support an interpretation that health-care benefits should continue indefinitely, as the Second and Seventh Circuits hold.

2. Whether, as the Sixth Circuit has held in conflict with the Second, Third, and Seventh Circuits, different rules of construction should apply when determining whether health-care benefits have vested in pure ERISA plans versus collectively bargained plans.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption of this petition contains all parties to the proceedings.

Petitioner M&G Polymers USA, LLC, is a wholly owned subsidiary of Mossi & Ghisolfi International and is incorporated in West Virginia. Petitioner M&G Polymers USA, LLC Comprehensive Medical Benefits Program For Employees And Their Dependents is a medical benefits program sponsored by M&G. Petitioner The M&G Catastrophic Medical Plan is a medical benefits program sponsored by M&G. Petitioner The M&G Medical Necessity Benefits Program Of Hospital, Surgical, Medical, And Prescription Drug Benefits For Employees And Their Dependents is a medical benefits program sponsored by M&G. Petitioner The M&G Major Medical Benefits Plan is a medical benefits program sponsored by M&G.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

PETITION FOR A WRIT OF CERTIORARI

Petitioners M&G Polymers USA, LLC; M&G Polymers USA, LLC Comprehensive Medical Benefits Program For Employees And Their Dependents; The M&G Catastrophic Medical Plan; The M&G Medical Necessity Benefits Program Of Hospital, Surgical, Medical, And Prescription Drug Benefits For Employees And Their Dependents; and The M&G Major Medical Benefits Plan (collectively "M&G") respectfully submit this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The order of the court of appeals denying *en banc* rehearing (Pet. App., *infra* 148-149), is unreported. The panel opinion (Pet. App., *infra* 1-23), is reported at 733 F.3d 589 (6th Cir. 2013) ("*Tackett II*"). The opinion and order of the district court (Pet. App., *infra* 24-87) is reported at 853 F. Supp. 2d 697 (S.D. Ohio 2012). The Sixth Circuit's previous opinion (Pet. App., *infra* 88-121), is reported at 561 F.3d 478 (6th Cir. 2009) ("*Tackett I*"). The district court's original opinion and order (Pet. App., *infra* 121-147), is reported at 523 F. Supp. 2d 684 (S.D. Ohio 2007).

STATEMENT OF JURISDICTION

The court of appeals filed its order denying *en banc* rehearing on October 22, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), are set forth at Pet. App. 150-152.

STATEMENT OF THE CASE

When employees and unions bargain with employers for retiree health-care benefits, those benefits—and the conditions for receiving them—are set out in collective bargaining agreements. The agreements almost never, however, explicitly address the duration of those benefits. The circuits have badly split over how to construe that contractual silence. This case is an ideal vehicle for resolving that entrenched split—which has been repeatedly acknowledged by courts and commentators alike—on an important, recurring issue of federal law where uniformity is sorely needed, see *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am.* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962), and congressionally required. *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 200 (1962) ("[T]he administration of collective bargaining contracts [is to be] accomplished under a uniform body of federal substantive law.").

As Judge Posner has put it, the circuits are "all over the lot" in applying different legal rules to determine when retiree health-care benefits in a collective bargaining agreement have vested (and thus cannot be altered by the employer even after the agreement terminates). *Rossetto* v. *Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000). That is no exaggeration. The Sixth Circuit construes silence or ambiguity in a collective bargaining agreement as creating an "inference" or "presumption" that the agreement vests a right to lifetime, contribution-free benefits in the absence of extrinsic evidence to the contrary.

The Third Circuit applies the opposite presumption and requires a clear statement in collective bargaining agreements that the parties intend the benefits to continue indefinitely. And the Second and Seventh Circuits (among others) have staked out a middle ground between those diametrically opposed positions—rejecting both the Sixth Circuit's presumption in favor of vesting and the Third Circuit's presumption against it, and instead requiring at least some language in a collective bargaining agreement that can support interpreting that agreement to provide health benefits indefinitely.

This circuit split has been percolating for years—and the resulting divergence on an important, frequently recurring issue of federal law is intolerable.

Indeed, the rule of construction is frequently outcome-determinative, as it was in this case. The split thus inappropriately encourages forum-shopping and creates magnet jurisdictions for litigation—which, given the rising costs of health care generally and the ever-growing number of retirees particularly, can only increase. This Court's review is needed now to resolve the conflict and restore uniformity on this important and recurring issue of federal law.

Granting the petition would also present the Court with an opportunity to resolve a related split that is similarly outcome-determinative—whether the rules that govern the construction of pure ERISA plans in determining whether benefits have vested should also apply when making the same determination concerning collective bargaining agreements. In conflict with the Second, Third, and Seventh Circuits, the Sixth Circuit applies one legal rule of construction in the former context (a presumption against vesting), and a different legal rule in the latter (a presumption in favor of vesting). That distinction makes no sense, injects needless confusion and uncertainty where uniformity and consistency are needed, and is at odds with this Court's instructions concerning the interpretation of collective bargaining agreements. This Court's review is needed to resolve that conflict, too.

1. Since 2000, M&G has operated a chemical plant in Apple Grove, West Virginia. Before that, Goodyear and Shell operated the plant and employed its workers. Pet. App. 3. A series of collective

bargaining agreements governed the relationship between the workers and their employers at the plant. *Id.* at 3-4.

Included as part of the 2005-2008 collective bargaining agreement was a provision that the employer's share of retirees' health-care costs would be capped annually. Pet. App. 7. The cap provision was also included in a previous cap agreement ("2001 Letter H"), which, in turn, referenced the original cap agreement in the Goodyear collective bargaining agreement ("1991 Letter G"). *Id.* at 130. As relevant here, the agreements obligated the retirees to make contributions toward their health-care costs to the extent those costs exceeded the amount the employer had agreed to pay. *Id.* at 8.

2. After M&G informed retirees in 2006 that they would be required to contribute to their health-care costs—as per the cap agreements in the bargained-for benefit plan—the retirees and their union filed this class action. They alleged that language in the effective collective bargaining agreement referring to a "full Company contribution towards the cost of benefits" gave them a vested right to health-care benefits for life without any contributions. Pet. App. 140. The district court granted M&G's motion to dismiss all of the claims, holding that the retirees were subject to the cap agreements. See *id.* at 147. The retirees and their union appealed.

3. The Sixth Circuit reversed in part, concluding that the retirees had sufficiently pleaded an

intention to vest health-care benefits to survive a motion to dismiss, and remanded for further proceedings. Pet. App. 90. In reaching that conclusion, the Sixth Circuit relied heavily on a prior case—*International Union, United Automobile Workers of America* v. *Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983)—which holds that any retirement benefits obtained through a collective bargaining agreement are presumed to vest. Pet. App. 90.

On remand, the district court conducted a bench trial on liability and ruled that the retirees had a vested right to free health-care benefits for life. Pet. App. 25. According to the district court, the cap agreements were of no moment given the presumption in favor of vesting. *Id.* at 52. The district court issued a permanent injunction barring M&G from collecting retiree medical contributions. *Id.* at 86-87. M&G appealed.

4. Guided once again by the *Yard-Man* presumption, a panel of the Sixth Circuit affirmed. The court approved the district court's "inference" that the language in the collective bargaining agreement vested a right to lifetime, contribution-free benefits in the absence of any extrinsic evidence to the contrary. Pet. App. 2-3. Although the cap agreements were potentially extrinsic evidence against vesting, they were insufficient to counter the retirees' argument once vesting was assumed—because, according to the court of appeals, they were not reproduced in some of the literature discussing the agreement between M&G and its retirees. *Id.* at 14.

A petition for rehearing *en banc* was denied. Pet. App. 148-149.

REASONS FOR GRANTING THE PETITION

The circuits are badly divided on the legal rule of construction that should apply in LMRA cases when construing collective bargaining agreements to determine employers' health-care obligations to retirees. As a result, in what should be an area of federal law that is uniform across the country, the courts of appeals apply different legal rules that are frequently outcome determinative—thus encouraging inappropriate forum-shopping and creating magnet jurisdictions—in retiree health-care benefit litigation. Former employees, like the plaintiffs in this case, who would lose in most jurisdictions can prevail if they are fortuitous enough to have at least one retiree member of their putative class living in Michigan, Ohio, or Kentucky.

When Judge Posner says that the circuits are "all over the lot" in applying different legal rules when interpreting collective bargaining agreements to determine whether health-care benefits have vested—and thus whether retired employees can be required to share in the cost of those benefits—it is not hyperbole. *Rossetto*, 217 F.3d at 543. The Third and the Sixth Circuits conflict most sharply, with the former applying a presumption against vesting and the latter applying a presumption in favor of vesting.

Other circuits, such as the Second and the Seventh, have sought a middle ground—crafting rules of construction that require at least some language in a collective bargaining agreement that can support construing the agreement to provide health benefits to retirees indefinitely. The circuit split has been entrenched for years, so there is no reason to think that further percolation is needed. It is time to resolve the conflict and restore uniformity on an important issue of federal law that, if anything, is recurring even more frequently as health-care costs rise and the number of retirees across the country increases. The issue of whether and when retired employees who receive health-care benefits from their former employers must share the cost of those benefits has never been more pressing.

This Court's review is therefore needed for at least three reasons. First, it would resolve the circuit split over the presumption to be used—if any—when determining whether medical benefits for retirees are vested (and thus cannot be altered by employers). While some circuits hold that such benefits are not vested unless a collective bargaining agreement contains express language to that effect, others emphasize examination of extrinsic evidence and place a thumb on the scale in favor of vesting. The difference is outcome determinative on gateway questions of law and is creating magnet jurisdictions within the federal courts.

Second, the petition presents the Court with an opportunity to resolve a related circuit split on whether a different legal rule of construction should be applied to collective bargaining agreements than is applied to pure ERISA plans in determining whether health-care benefits have vested. Although several courts of appeals have indicated, in reliance on this Court's instructions concerning the interpretation of collective bargaining agreements generally in *Litton Financial Printing Division* v. *NLRB*, 501 U.S. 190, 207 (1991), that the same legal rule should apply in both contexts, other circuits—including the Sixth Circuit here—use one presumption for collectively bargained plans and the exact opposite one for pure ERISA plans. Those discrepancies are incoherent, at odds with this Court's instruction in *Litton*, and, again, lead to inappropriate forum shopping.

Third, uniformity is exceedingly important in this area of the law given that retiree benefit litigation is only increasing as health-care costs rise and the number of retirees grows ever larger. Billions of dollars and thousands of jobs are riding on uniform interpretations of federal law. Indeed, as the ratio of retirees to active employees continues to increase, that imbalance in the system—long predicted to cripple Social Security—will also undermine the ability of employers to create jobs if health benefits are considered vested in situations unintended by the parties. For all of those reasons, this Court should review (and reverse) the Sixth Circuit's decision in this case.

I. This Court's Review Is Needed To Resolve An Entrenched Split On How To Construe Collective Bargaining Agreements In Retiree Benefits Cases

The circuits have long been divided on how to determine whether health-care benefits for retirees have vested—thereby obligating employers to continue providing those benefits to retirees indefinitely. The conflict is most pronounced in those circuits that deal most with union bargaining—the Second, Third, Sixth, and Seventh. At the root of the conflict is the presumption or inference that a court should make in the face of silence or ambiguity in collective bargaining agreements on the duration of the health-care benefits.

At one end of the spectrum, the Third Circuit mandates that any vesting of health benefits must be "clear and explicit" in the language of the collective bargaining agreement—thereby precluding the use of extrinsic evidence by retirees to prove an alleged intent by an employer to vest the benefits. At the other end of the spectrum is the Sixth Circuit—and, as Judge Sutton has pointed out, although that court denies that it applies any presumption in favor of benefits vesting (including in the instant case), the reality is otherwise:

> Unless a company can point to explicit language in the relevant agreement stating that "retiree benefits" terminate at a particular date or do not vest, the benefits seem to vest as a matter of law. What we continually

> disclaim presuming we continually seem to presume.

Noe v. *Polyone Corp.*, 520 F.3d 548, 568 (6th Cir. 2008) (Sutton, J., concurring in part and dissenting in part); see also Raymond A. Franklin, *Vesting Retirement Benefits: Revisiting* Yard-Man *and Its Unacknowledged Presumption*, 25 J. CIV. RTS. & ECON. DEV. 803, 821-22 (2011) (noting with approval that the Sixth Circuit does, in fact, apply a presumption in favor of vesting). Indeed, the case law and commentary are replete with references to the presumption created by the Sixth Circuit in the seminal case of *Yard-Man, Inc.*, 716 F.2d 1476.[1]

In *Yard-Man*, the plaintiffs brought suit when a factory closed and the company informed the union that retiree health benefits would end when the collective bargaining agreement expired. The agreement was silent on the duration of benefits.

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[1] See, e.g., *Rossetto*, 217 F.3d at 543 ("[*Yard-Man*] holds that benefits are presumed to vest if they are conferred by a collective bargaining agreement * * * *"); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.* v. *Skinner Engine Co.*, 188 F.3d 130, 140 (3d Cir. 1999) ("We cannot agree with *Yard-Man* and its progeny that there exists a presumption of lifetime benefits in the context of employee welfare benefits."); *Am. Fed'n of Grain Millers* v. *Int'l Multifoods Corp.*, 116 F.3d 976, 980 n.3 (2d Cir. 1997) (saying *Yard-Man* "apparently presum[ed] that retiree benefits are vested"); Roger C. Siske et al., *What's New in Employee Benefits* (ALI-ABA Course of Study, July 1-5, 2002), WL SH011 ALI-ABA 59, 322 ("The Sixth Circuit *presumes* vesting and requires a clear statement of termination to prove otherwise." (emphasis in original)).

The Sixth Circuit determined that extrinsic evidence should be used to resolve the purported "ambiguity" because, according to the Sixth Circuit, "when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree." *Id.* at 1482.

As courts and commentators have observed, that inference—known as the "*Yard-Man* presumption"—"necessarily tilted the playing field and in the face of silence or ambiguity, an employer defending itself in the Sixth Circuit must disprove it vested retiree medical benefits." Evan Miller, *Retiree Medical Litigation's Dirty Little Secret: "Location, Location, Location!,"* JONES DAY COMMENTARY (Aug. 2009), *available at* http://www.jonesday.com/retiree-medical-litigations-dirty-little-secret-location-location-location-08-04-2009/; see also *Rossetto*, 217 F.3d at 543 (Posner, J.) ("[*Yard-Man*] holds that benefits are presumed to vest if they are conferred by a collective bargaining agreement * * * *").[2]

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[2] The numbers speak for themselves. The Sixth Circuit has concluded that benefits have vested (or likely vested) in 16 out of 18 reported cases since *Yard-Man* was decided. See *Moore* v. *Menasha Corp.*, 690 F.3d 444 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1643 (2013); *Bender* v. *Newell Window Furnishings, Inc.*, 681 F.3d 253 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 436; *Tackett I* & *II*, Pet. App. 88, 1; *Schreiber* v. *Philips Display Components Co.*, 580 F.3d 355 (6th Cir. 2009); *Cole* v. *ArvinMeritor, Inc.*, 549 F.3d 1064 (6th Cir. 2008); *Noe*, 520 F.3d 548; *Yolton* v. *El Paso Tenn. Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006); *McCoy* v.

(Continued on following page)

The case at bar exemplifies how the *Yard-Man* presumption works. The language of the collective bargaining agreement provided for "full [c]ompany contribution towards the cost of [health-care] benefits" for employees who met certain requirements—but the agreement was silent as to how long the company was

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Meridian Auto. Sys., Inc., 390 F.3d 417 (6th Cir. 2004); *Maurer* v. *Joy Techs., Inc.*, 212 F.3d 907 (6th Cir. 2000); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.* v. *BVR Liquidating, Inc.*, 190 F.3d 768 (6th Cir. 1999); *Golden* v. *Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996); *Armistead* v. *Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Smith* v. *ABS Indus., Inc.*, 890 F.2d 841 (6th Cir. 1989); *Weimer* v. *Kurz-Kasch, Inc.*, 773 F.2d 669 (6th Cir. 1985); *Policy* v. *Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.* v. *Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984). Employers won in the Sixth Circuit only 11% of the time. See *Wood* v. *Detroit Diesel Corp.*, 607 F.3d 427 (6th Cir. 2010); *Reese* v. *CNH Am. LLC*, 574 F.3d 315 (6th Cir. 2009) (opinion by Judge Sutton).

In contrast, during the same time period, the Seventh Circuit concluded that benefits vested in only 3 out of 13 reported cases. See *Temme* v. *Bemis Co.*, 622 F.3d 730 (7th Cir. 2010); *Bland* v. *Fiatallis N. Am., Inc.*, 401 F.3d 779 (7th Cir. 2005); *Diehl* v. *Twin Disc, Inc.*, 102 F.3d 301 (7th Cir. 1996). Employers won in the Seventh Circuit 77% of the time. *Zielinski* v. *Pabst Brewing Co.*, 463 F.3d 615 (7th Cir. 2006); *Barnett* v. *Ameren Corp.*, 436 F.3d 830 (7th Cir. 2006); *Cherry* v. *Auburn Gear, Inc.*, 441 F.3d 476 (7th Cir. 2006); *Int'l Union of United Auto., Aerospace & Agric. Implement Workers of Am.* v. *Rockford Powertrain, Inc.*, 350 F.3d 698 (7th Cir. 2003); *Rossetto*, 217 F.3d 539; *Pabst Brewing Co.* v. *Corrao*, 161 F.3d 434 (7th Cir. 1998); *Murphy* v. *Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995); *Bidlack* v. *Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993); *Senn* v. *United Dominion Indus., Inc.*, 951 F.2d 806 (7th Cir. 1992); *Ryan* v. *Chromalloy Am. Corp.*, 877 F.2d 598 (7th Cir. 1989).

obligated to continue paying for those benefits. Because the parties were contracting for retiree benefits, however, the Sixth Circuit—"[k]eeping in mind the context of the labor-management negotiations identified in *Yard-Man*"—determined it was "unlikely" that the union would have agreed to the terms if they could be altered (but ignored that the benefits were not to be altered *as long as the collective bargaining argument was in place*). Pet. App. 112.

The Sixth Circuit thus inferred (or presumed) that the absence of a durational term—i.e., contractual silence—meant that the benefits were intended to last indefinitely (thus leaving the employer to try to prove a negative). See also *Yolton*, 435 F.3d at 581 (stating that not even a duration-limiting clause in a collective bargaining agreement can prevent vesting unless the clause specifically refers to "retiree benefits themselves"). The Eleventh Circuit has also cited *Yard-Man* with approval and expressly adopted its presumption.[3]

At the other end of the spectrum, the Third Circuit requires a clear statement in the collective

[3] *United Steelworkers of Am.* v. *Connors Steel Co.*, 855 F.2d 1499, 1505 (11th Cir. 1988) (agreeing with *Yard-Man*). In contrast, the Second, Third, Fifth, Seventh, and Eighth Circuits have expressly rejected the *Yard-Man* presumption. *Am. Fed'n of Grain Millers*, 116 F.3d at 980; *Skinner*, 188 F.3d at 139; *Int'l Ass'n of Machinists & Aerospace Workers, Woodworkers Div.* v. *Masonite Corp.*, 122 F.3d 228, 232 (5th Cir. 1997); *Rossetto*, 217 F.3d at 543; *Anderson* v. *Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988).

bargaining agreement that the parties intended health-care benefits to vest:

> Because vesting of welfare plan benefits constitutes an extra-ERISA commitment, an employer's commitment to vest such benefits is not to be inferred lightly and must be stated in clear and express language.

Skinner, 188 F.3d at 139 (Ackerman, D.J., sitting by designation, joined by Greenberg, J., and Alito, then-J.). In reaching that conclusion, the Third Circuit expressly rejected an "invitation to adopt the presumption enunciated in *Yard-Man*" and concluded instead that "it is not at all inconsistent with labor policy to require plaintiffs to prove their case without the aid of gratuitous inferences." *Id.* at 139, 141 (citation and internal quotation marks omitted). In direct conflict with the Sixth Circuit, the Third Circuit holds that health-care benefits vest only when there is an unambiguous statement in the collective bargaining agreement demonstrating that intent.

The other circuits fall in between the Sixth and Third Circuits—rejecting the *Yard-Man* presumption, yet not going so far as to expressly adopt the Third Circuit's clear-statement rule. In particular, the Second and Seventh Circuits have most clearly recognized the solemnity with which an employer would have taken on such a great responsibility as vesting medical benefits. For example, in *Joyce* v. *Curtiss-Wright Corp.*, 171 F.3d 130, 134 (2d Cir. 1999), the Second Circuit held—in an opinion joined by then-Judge Sotomayor—that retirees must be able to "identif[y] specific written language that is reasonably susceptible to interpretation as a promise * * * to vest the retirees' health benefits" to survive summary judgment. The Second Circuit thus made clear that, unlike the Sixth Circuit, it would "not infer a binding obligation to vest benefits absent some language that itself reasonably supports that interpretation." *Id.* at 135.

Similarly, the Seventh Circuit presumes that medical benefits for retirees are *not* vested if the collective bargaining agreement is silent as to that term. *Rossetto*, 217 F.3d at 544 ("Our presumption against vesting, it is important to emphasize, kicks in only if all the court has to go on is silence."); see also *Cherry*, 441 F.3d at 481 ("The presumption that healthcare benefits do not exceed the life of an agreement imposes a high burden of proof upon the retirees.").

The seminal case in the Seventh Circuit is *Bidlack* v. *Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (*en banc*). There, the *en banc* court stated that an employee's entitlement to benefits expires with the agreement that creates the entitlement unless there is a genuine ambiguity—something beyond silence. *Id.* at 606-07. As Judge Posner elaborated in *Rossetto*, "*Bidlack* enables the employer to fend off a trial without having thought to have included in the contract an express provision limiting the duration of the benefits." *Rossetto*, 217 F.3d at 544.

Other circuits likewise shy away from the *Yard-Man* presumption because "the use of presumptions may interfere with the correct interpretation, under normal LMRA rules, of the understanding reached by the parties." *Senior* v. *NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 218 (1st Cir. 2006). The examination of extrinsic evidence is still allowed under certain circumstances, but the burden of proof regarding vesting remains with the plaintiffs. *Ibid.*[4]

II. This Court's Review Is Also Needed To Resolve A Related But Distinct Split On Whether The Same Interpretive Rules Should Apply To Both Collective Bargaining Agreements And ERISA Plans In Determining When Benefits Have Vested

In addition to the circuit split on the presumption, if any, to be applied in LMRA retiree-benefits cases, the Sixth Circuit's decision in this case implicates a related but distinct circuit split on whether the answer to that question should depend on whether the benefits are provided in a collective bargaining agreement or under a pure ERISA plan.

[4] Even in "no presumption" circuits, the confusion sown by *Yard-Man* sometimes results in extrinsic evidence being allowed to overcome silence regarding the duration of retiree medical benefits. See, e.g., *United Paperworkers Int'l Union* v. *Champion Int'l Corp.*, 908 F.2d 1252, 1257 (5th Cir. 1990); *Bower* v. *Bunker Hill Co.*, 725 F.2d 1221, 1223-24 (9th Cir. 1984).

The Third and Seventh Circuits have specifically addressed this question and refused to make a distinction between ERISA plans and collective bargaining agreements where interpreting provisions regarding health-care benefits is concerned. See, e.g., *Skinner*, 188 F.3d at 139 (the same rules of construction "apply without regard as to whether the employee welfare benefits are provided under a collective bargaining agreement, [summary plan description], or other plan document"); *Rossetto*, 217 F.3d at 544 ("The distinction between collective bargaining agreements and ERISA plans is not recognized in our cases, and we are not minded to embrace it now and make the law even more complicated than it is."). Likewise, the Second Circuit appears to treat both types of cases the same way. See *Abbruscato* v. *Empire Blue Cross & Blue Shield*, 274 F.3d 90, 97 (2d Cir. 2001); *Joyce*, 171 F.3d at 134.

Other circuits, however, apply different interpretive rules depending on whether a collective bargaining agreement or an ERISA plan is at issue. The Sixth Circuit, for example, has held that a clear-statement rule should apply in ERISA cases but not in LMRA cases like this one. See, e.g., *BVR Liquidating, Inc.*, 190 F.3d at 772-73. The Fourth Circuit has reached the same conclusion. *Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994) (holding that an employer's waiver of the right to modify benefits must be "clear and express" in ERISA cases because the undertaking there, unlike in LMRA cases, is voluntary); *Trull* v. *Dayco Prods., LLC*, 178 F. App'x 247, 250 (4th Cir. 2006) (confirming *Gable*).

The First Circuit has noted the conflict as to "whether the same interpretive model should be used in both the ERISA context and the LMRA context," but without taking a stance. *Senior*, 449 F.3d at 217 n.18. Similarly, the Tenth Circuit has stated that the *Yard-Man* presumption might be more appropriate in the realm of collective bargaining than in ERISA. *Chiles* v. *Ceridian Corp.*, 95 F.3d 1505, 1514 (10th Cir. 1996) (abrogated on other grounds). Here, had the Sixth Circuit applied its ERISA rule to the collective bargaining agreement—as the Second, Third, and Seventh Circuits would have done—the outcome of this case would have been different. This Court's review is needed to resolve that conflict, too.

Of particular relevance, the Sixth Circuit has attempted to justify the distinction between health-care benefits provisions in ERISA plans and those in collective bargaining agreements by pointing to *Yard-Man*—which, according to the Sixth Circuit, was "specifically intended to apply in the context of a collective bargaining agreement." *BVR Liquidating*, 190 F.3d at 773. This is in keeping with *Yard-Man*'s rationale that an "inference" should be made that collectively bargained-for retiree health-care benefits are vested because "it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations." *Yard-Man*, 716 F.2d at 1482.

Judge Posner, however, has pointed out that if anything, "a reversal of these presumptions would make better sense—that if the union negotiated for the benefits, they would surely appear in the collective bargaining agreement." *Rossetto*, 217 F.3d at 543-44; see also Gregory Parker Rogers, *Rethinking* Yard-Man: *A Return to Fundamental Contract Principles in Retiree Benefits Litigation*, 37 EMORY L.J. 1033, 1067 (1988) ("If the union was serious about getting benefits for its retirees beyond the end of the contract as 'deferred compensation,' then almost certainly it would demand a clause in the collective bargaining agreement to that effect.").

In addition to blinking the reality of collective bargaining negotiations, the Sixth Circuit's dueling presumptions also conflict with this Court's teaching in *Litton* that in the collective bargaining context, the written words of the contract must indicate that the employer intended for a benefit to extend beyond the life of the collective bargaining agreement. 501 U.S. at 207. In *Litton*, this Court held that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement" unless the "collective-bargaining agreement provides *in explicit terms* that certain benefits continue after the agreement's expiration." *Ibid.* (emphasis added). Under *Litton*, then, silence should not be held against the employer, as the Sixth Circuit does. Benefits can only continue past the life of the agreement if there are explicit terms in the agreement indicating so.

The extent to which *Litton* demands a clear-statement rule in the context of retiree health-care benefits, however, is unsettled. The Third Circuit relied heavily on *Litton* in holding that the same presumption against vesting should apply to both collective bargaining agreements and ERISA plans but the Sixth Circuit has, predictably, rejected that approach. In *Golden*, 73 F.3d at 655, the Sixth Circuit opined that "courts, through rules of contract interpretation, can find that rights accrue or vest under the agreement even if they are not explicitly set out in the agreement."

As Judge Easterbrook pointed out in dissenting from Judge Posner's majority opinion in *Bidlack*, however, *Litton*'s insistence on "explicit terms" does not preclude parties from agreeing to unchanging benefits "[b]ut the presumption is and always has been that benefits mentioned in a collective bargaining agreement do not vest." *Bidlack*, 993 F.2d at 616-17 (Easterbrook, J., dissenting). Thus under *Litton*, silence in a collective bargaining agreement concerning the duration of a benefit cannot be enough to give rise to a vesting claim—silence is plainly not the "explicit language" required by *Litton*. Ambiguity, however, may present a closer question—and extrinsic evidence could be admissible in that circumstance. But what cannot be correct under *Litton* is that the mere existence of collective bargaining creates an "inference" of vesting, as the Sixth Circuit has repeatedly held (even as it has vigorously denied doing so). It is time to retire *Yard-Man* and bring the

Sixth Circuit (and others) into line with this Court's precedent.

III. The Proper Interpretation Of Collective Bargaining Agreements And ERISA Plans Is Unquestionably Important And Squarely Presented Here

Retiree-benefit plans are increasingly subject to litigation. See *supra* note 2. And health-benefit issues will only increase under the Patient Protection and Affordable Care Act as the Nation's health-care system undergoes seismic changes. What is at stake in the legal rules applied to resolve cases like the one at bar is nothing less than billions of dollars and potentially thousands of jobs. And more than ever, retirees, labor unions, and employers all need predictable legal rules in the health-benefits context. The problem is particularly acute in states where collective bargaining agreements are commonplace—and it requires this Court's review to resolve the conflict and restore uniformity on these exceptionally important, recurring issues of federal law.

It is intolerable that simply by providing the same benefits through a collectively bargained plan, rather than an ERISA plan, employers should find themselves subject to a patchwork of differing (and frequently outcome-dispositive) legal rules. That state of affairs runs contrary to both congressional intent and common sense—and requires this Court's review to resolve. *Allis-Chalmers Corp.* v. *Lueck*, 471

U.S. 202, 209 (1985) (holding that § 301 is a "congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts").

This case presents a textbook example of the problem—and is thus an ideal vehicle for resolving it. There is no factual dispute that the collective bargaining agreement at issue was silent on the duration of the health-care benefits conferred. In the Third Circuit, where duration must be explicitly mentioned in a collective bargaining agreement, M&G certainly would have prevailed. In the Second and Seventh Circuits, where there must be some textual ambiguity other than silence to permit the parties to introduce extrinsic evidence to prove an intent to vest, M&G likewise would have prevailed. Not so in the Sixth Circuit, which assumed that benefits vest simply by virtue of the recipients being retirees (and which looked to extrinsic evidence to create ambiguity, to boot).

Not surprisingly, the Sixth Circuit has become a magnet for such litigation—leading to the intolerable situation that the outcome of these cases can be more dependent on where they are brought than on their actual merits. See Jeffrey S. Klein & Nicholas J. Pappas, *Recent Developments in Retiree Health Benefits Litigation*, N.Y.L.J., June 5, 2006, at 3 (noting that, after *Yard-Man*, medical-benefit vesting cases are dependent not only on the facts of the case "but also on the governing judicial precedent in the jurisdiction where the case is filed"); Michael S. Melbinger

& Marianne W. Culver, *The Battle of the Rust Belt: Employers' Rights to Modify the Medical Benefits of Retirees*, 5 DEPAUL BUS. L.J. 139, 161 (1993) (highlighting facts that portend races to the courthouse in different jurisdictions).

This case also presents an ideal opportunity for this Court to address the entrenched circuit splits that have resulted from the Sixth Circuit's *Yard-Man* presumption. There are no procedural or factual issues here—only pure questions of law that are outcome-determinative. Furthermore, although this Court has previously denied certiorari in cases raising the same issues, there can be little doubt now that the splits will not resolve themselves. The respective positions have been analyzed and staked out by the various circuits and further percolation would not aid the Court's analysis or resolution of the issues.

This Court's review is badly needed to provide clarity to employers, employees, unions, and retirees across the country on an exceptionally important issue of federal law that has immense practical consequences—especially as employers face increasing health-care costs and rising numbers of retirees. "Employers with national operations are subject to multiple and inconsistent rules, compounded by the uncertainty inherent in sending big-stakes questions to the constantly changing panels that are juries." *Bidlack*, 993 F.2d at 620 (Easterbrook, J., dissenting). The current hodgepodge of legal rules and dueling presumptions is driving up litigation and employer costs alike—ultimately to the detriment of workers and the economy, too. As Judge Easterbrook has put it, "[u]ncertainty now reigns * * * * Uncertainty never promotes industry." *Ibid.* This Court should grant the petition, resolve the conflicts, and restore uniformity on these important, recurring issues of federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

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733 F.3d 589

Hobert Freel TACKETT, Woodrow K. Pyles, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, and Harlan B. Conley, Plaintiffs-Appellees/Cross-Appellants,

v.

M & G POLYMERS USA, LLC, M & G Polymers USA, LLCComprehensive Medical Benefits Program for Employees and their Dependents, M & G Catastrophic Medical Plan, M & G Medical Necessity Benefits Program of Hospital, Surgical, Medical, and Prescription Drug Benefits for Employees and their Dependents, and M & G Major Medical Benefits Plan, Defendants-Appellants/Cross-Appellees.

Nos. 12-3329, 12-3407.

United States Court of Appeals,
Sixth Circuit.

Argued: March 15, 2013.
Decided and Filed: Aug. 12, 2013.
Rehearing and Rehearing En Banc
Denied Oct. 22, 2013.

ARGUED: Philip A. Miscimarra, Morgan, Lewis & Bockius LLP, Chicago, Illinois, for Appellants/Cross-Appellees. David M. Cook, Cook & Logothetis, LLC, Cincinnati, Ohio, for Appellees/Cross-Appellants. ON BRIEF: Philip A. Miscimarra, Morgan, Lewis & Bockius LLP, Chicago, Illinois, Christopher A. Weals, Morgan, Lewis & Bockius LLP, Washington, D.C., for Appellants/Cross-Appellees. David M. Cook, Jennie G.

Arnold, Claire W. Bushorn, Cook & Logothetis, LLC, Cincinnati, Ohio, for Appellees/Cross-Appellants.

Before: KEITH, MARTIN, and COLE, Circuit Judges.

OPINION

COLE, Circuit Judge.

Defendants-Appellants Cross-Appellees M & G Polymers USA, LLC ("M & G") and associated health plans appeal the permanent injunction granted by the district court in favor of Plaintiffs-Appellees Cross-Appellants, retirees and dependents of retirees from an M & G plant and the union that currently represents plant employees.[1] Plaintiffs brought a class action suit against Defendants after M & G announced that Plaintiffs would be required to make health care contributions. After a bench trial, the district court found Defendants liable for violating both a labor agreement and an employee welfare benefit plan. The district court issued a permanent injunction ordering Defendants to reinstate Plaintiffs to the current versions of the benefits plans they were enrolled in until 2007 to receive health care for life without contributions.

While Defendants ask this Court to reverse the liability determination and injunction, Plaintiffs request this Court to reinstate certain Plaintiffs to the pre-2007 versions of their benefits plan. Defendants

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[1] Hobert Freel Tackett; Woodrow K. Pyles; Harlan B. Conley; and United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union.

argue that the district court clearly erred when it found that (1) certain letters requiring retiree contributions to health care costs were not a part of Plaintiffs' labor agreements; and (2) Plaintiffs' right to lifetime health care vested at retirement. Plaintiffs cross-appeal, arguing that, although the district court correctly held that their right to lifetime contribution-free benefits vested, the district court erred by restoring them to the current versions of their benefits plan, as opposed to the pre-2007 versions. We affirm the judgment of the district court.

I.

The named plaintiffs are Ohio residents and retirees from the Apple Grove, West Virginia Point Pleasant Polyester Plant ("Apple Grove"), which M & G has owned since 2000. From 1992 to 2000, Apple Grove was owned by Shell Chemical Company ("Shell"). Prior to 1992, it was owned by The Goodyear Tire & Rubber Company ("Goodyear").

Plaintiffs and similarly situated retirees belong to Local Union 644 ("Local 644") of the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO ("USW"), which currently represents Apple Grove employees. Prior to 1995, Local 644 belonged to the United Rubber Workers ("URW"), which merged with the USW in 1995. Over the years that Apple Grove was owned by Goodyear, Shell and M & G, Local 644 entered into a number of labor agreements.

Typically, the union as a whole—first the URW and later the USW—would negotiate a "master" agreement with the employer. Individual plants would adopt an agreement in one of three ways: (1) some plants directly participated in the "master bargaining" with the employer and entered into the master agreement itself; (2) some plants separately adopted "me-too" agreements that were the same as the master agreement; and (3) some plants, including Apple Grove according to Plaintiffs, negotiated "me-too with exceptions" agreements, meaning that they adopted agreements based on the master agreement, but with certain exceptions or differences. M & G, however, claims that Apple Grove was a "'me-too' location[ ]" that "had a consistent practice of applying the 'master agreement' settlement year-after-year."

While Apple Grove was owned by Goodyear, Goodyear and Local 644 entered into a collective bargaining agreement ("1991 CBA") effective November 6, 1991, to November 6, 1994, and a collectively bargained Pension, Insurance and Service Award Agreement effective May 15, 1991, to May 15, 1994, ("1991 Master P & I Agreement"). The 1991 Master P & I Agreement described, among other things, the health care benefits that retirees could expect to receive. A "side letter" ("1991 Letter G") was part of the 1991 Master P & I Agreement for certain URW locals, but not necessarily all. The 1991 Letter G stated:

> If the average annual cost of health care benefits [per retiree who retires on or after May 1, 1991, including his/her spouse] exceeds [$10,500 for retirees (including surviving spouses) under age 65 and $4200 for

> retirees (including surviving spouses) over age 65], the cost in excess * * * shall be allocated evenly to all retired employees (including surviving spouses) in such group.

The 1991 Letter G also specified that the required contributions would not begin until July 1, 1997.

Also, a Summary Plan Description ("SPD"), effective as of May 15, 1991, stated that the "Company has established a required maximum average annual company cost per retiree for medical coverage," and set this maximum at $10,500 per year for each retiree under age 65 and $4,200 per year for each retiree over age 65 (surviving spouses included). It provided that the cost of any excess above the maximums would be allocated among all members of the group of retirees evenly, and that contributions would not begin until at least July 1, 1997.

In 1992, Shell bought Apple Grove and, in 1993, formally adopted the Goodyear benefit plans previously in effect at the plant. In 1994, Shell and the URW and some URW locals entered into the "1994 Master P & I Agreement" which, for some URW locals, included a side letter: "1994 Letter G." The same year, Shell and Local 644 entered into another collective bargaining agreement, the "1994 CBA," effective November 6, 1994, to November 6, 1997.

On May 9, 1997, Shell and the USW (the current union) entered into the "1997 Goodyear Master P & I Agreement," which was effective until May 9, 2003. This agreement included, for some USW locals, a side letter: "1997 letter H." On November 6, 1997, Shell and the USW and Local 644 entered into the "1997 CBA," effective until November 6, 2000.

M & G bought Apple Grove in 2000. In September 2000, M & G and the USW and Local 644 entered into the "2000 CBA." A P & I Agreement, effective on Nov, 6, 2000, accompanied the 2000 CBA. In 2003, M & G and the USW, acting on behalf of Local 644, began bargaining over the next collective bargaining agreement. The bargaining continued through August 2005, and included more than sixty days of negotiations. On August 9, 2005, M & G and the USW on behalf of Local 644 entered the "2005 CBA," to be effective August 9, 2005, to November 5, 2008. The 2005 CBA included Letter of Understanding 2003-6 ("LOU 2003-6"). All Plaintiffs were, prior to retirement, active employees under one or more of the above CBAs.

The 2000 P & I contained the following language:

> Employees who retire on or after January 1, 1996 and who are eligible for and receiving a monthly pension under the 1993 Pension Plan * * * whose full years of attained age and full years of attained continuous service * * * at the time of retirement equals 95 or more points will receive a full Company contribution towards the cost of [health-care] benefits * * * * Employees who have less than 95 points at the time of retirement will receive a reduced Company contribution. The Company contribution will be reduced by 2%

> for every point less than 95. Employees will be required to pay the balance of the health care contribution, as estimated by the Company annually in advance, for the [health care] benefits * * * . Failure to pay the required medical contribution will result in cancellation of coverage.

The 1994 and 1997 P & I Agreements contained similar language.[2] Each P & I Agreement, once reached, was printed as a booklet and distributed to local union members.

The side letters were also known as "cap letters" because they "capped" the company's contribution towards the cost of retiree health care benefits. 1991 Letter G was the first such letter. 1994 Letter G, 1997 Letter H and LOU 2003-6 were also "cap letters," similar to 1991 Letter G, specifying various

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[2] The 1994 and 1997 Master P & Is contain nearly identical language, except instead of referencing the "1993 Pension plan," they reference the "1950 Pension Plan." The 1991 P & I states:

> Employees who retire with 10 or more years of continuous service and who are eligible and receiving a monthly pension under the 1950 Pension Plan for a pension (other than a deferred vested pension), shall receive the benefits described in this [section]; provided, however, that each Employee eligible under the 1950 Pension Plan for a deferred vested pension whose employment with the Employer is terminated during or subsequent to the month in which he attained age 60 shall also receive such benefits effective as of the first day of the month for which he receives a deferred vested pension.

coverage maximums and "bite dates" when required contributions would begin. The letters were not reproduced in P & I booklets and allegedly not ratified as part of the local agreement.

In December 2006, M & G announced that it would begin requiring retirees to contribute to the cost of their medical benefits. *See Tackett v. M & G Polymers, USA, LLC (Tackett I)*, 561 F.3d 478, 480 (6th Cir. 2009) (per curiam). At the time, each Plaintiff was enrolled in either (1) the Medical Necessity Plan; (2) the Catastrophic Plan; or (3) the Comprehensive Plan. Some Plaintiffs refused to pay premiums and were dropped from coverage. Other Plaintiffs paid premiums, even if under protest, and remained enrolled in their plans.

Plaintiffs filed suit on February 9, 2007. Plaintiffs contended that the promise of a "full Company contribution towards the cost of [health care] benefits" in the CBAs provided them with a vested right to receive health care benefits in retirement without making any contributions. *Tackett I*, 561 F.3d at 482. Defendants contended that various other agreements between Local 644 and the successive employers, specifically the cap letters, limited that promise.

Plaintiffs' amended complaint stated three claims: (1) violation of labor agreements under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a); (2) violation of an employee welfare benefit plan under § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B); and (3) breach of fiduciary duty under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3).

The district court granted Defendants' motion to dismiss on all three counts and Plaintiffs appealed to this Court. We affirmed the dismissal of the breach of fiduciary duty claim, but reversed the dismissals of and remanded the first two claims. *Tackett I*, 561 F.3d at 493. Then, the district court conducted a bench trial on the issue of liability.

Eight witnesses testified at the bench trial. For Plaintiffs: two Apple Grove retirees (Woodrow Pyles and Hobert Tackett), and four former union negotiators (Ron Hoover, Randall Moore, Karen Shipley, and Brian Wedge). For Defendants: M & G's Human Resources director for Apple Grove (Kimm Korber), and a former M & G negotiator (Robert Long). The district court opinion amply summarizes their testimonies. *See Tackett v. M & G Polymers USA, LLC*, 853 F. Supp. 2d 697, 703-09 (S.D. Ohio 2012).

After the trial, the district court found in favor of Plaintiffs on both remaining claims. Plaintiffs moved for a permanent injunction to reinstate their lifetime contribution-free health care benefits. The district court ordered that Plaintiffs be reinstated, but to the post-2007 versions of their plans.

Defendants appeal the liability ruling and, accordingly, seek to have the permanent injunction dissolved. Plaintiffs appeal the portion of the permanent injunction that orders retirees and dependents previously enrolled in the pre-2007 Comprehensive Plan or Catastrophic Plan to be enrolled in the current Comprehensive Plan instead of being reinstated to the pre-2007 Comprehensive Plan.[3]

II.

After a bench trial, we review the district court's factual findings for clear error and its legal conclusions de novo. *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 210 F.3d 672, 683 (6th Cir. 2000) (citation omitted). We review the scope of a permanent injunction for an abuse of discretion. *Lee v. City of Columbus*, 636 F.3d 245, 249 (6th Cir. 2011) (citation omitted). "The district court abuses its discretion when it relies on clearly erroneous findings of fact, uses an erroneous legal standard, or improperly applies the law." *See United States v. Lawrence*, 555 F.3d 254, 261 (6th Cir. 2009) (quotation omitted).

The liability determination in this case hinges on whether the collectively bargained agreements between Plaintiffs and Defendants vested in Plaintiffs a right to lifetime no-contribution health care benefits. A health care plan is a welfare benefit plan which, unlike a pension plan, does not vest automatically, but only "if the parties so intended when they executed the applicable labor agreements." *See Noe v. PolyOne Corp.*, 520 F.3d 548, 552 (6th Cir. 2008).

[3] Plaintiffs previously enrolled in the Medical Necessity Plan do not object to being enrolled in the current version.

To vest, in this context, means to remain binding "beyond the expiration of the collective bargaining agreement." *See UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983). Substantive federal law governs the analysis. *See id.*

A.

In *Tackett I*, we said that the P & I language indicated a desire to vest benefits:

> First, the "full Company contribution" language suggests that the parties intended the employer to cover the full cost of health-care benefits for those employees meeting the age and term-of-service requirements. Keeping in mind the context of the labor-management negotiations identified in *Yard-Man*, [716 F.2d 1476 (6th Cir. 1983)] we find it unlikely that Plaintiff USW would agree to language that ensures its members a "full Company contribution," if the company could unilaterally change the level of contribution. The CBA has no limitation on the amount of a company contribution and if the Defendants' argument were accepted, the company presumably could lower the contribution to zero without violating this language. Such a promise would be illusory.
>
> Second, the limiting language, "[e]mployees will be required to pay the balance of the health care contribution," follows the provision requiring contributions by those retirees who had not attained the requisite seniority

> points. From the placement of this language, we can reasonably infer that it did not apply to all retirees, but only to those retirees who had not attained the requisite seniority points.
>
> Third, the collective bargaining agreement tied eligibility for health-care benefits to pension benefits. This is another factor indicating that the parties intended the health care benefits to vest upon retirement.

561 F.3d at 490. Subsequently, we described this analysis as "[t]he determination above that the parties intended health care benefits to vest [which] carries over to the ERISA § 502(a)(1)(B) claim." *Id.* at 491. According to the district court, "[b]y presenting the intended vesting as a fact leading to the result that Plaintiffs had presented a plausible claim, the appellate court pointedly issued a conclusion instead of merely recognizing a credible possibility."

Although we applied general principles of contract interpretation in *Tackett I*, *see* 561 F.3d at 489-90, we did not apply them to a complete factual record as would have been necessary for a conclusive determination of the vesting issue. For example, it was a matter of factual dispute whether the side letters were part of the CBA. If part of the CBA, they would have been relevant to the issue of vesting. However, this Court found them to be "extrinsic" to the Rule 12(b)(6) analysis because they were not part of the pleadings. *See id*. at 487 n.6 (citing approvingly the district court's "note[ ]" that the "'unusual' procedural posture of the case * * * allowed the court to consider the Letter Agreements in a [Rule] 12(b)(1) motion but not in the [Rule] 12(b)(6) motion.").

Tackett I also limited its "determination[s]" to the Rule 12(b)(6) context in two other ways. First, prior to embarking on the Rule 12(b)(6) analysis, which contains the language relied on by the district court, the *Tackett I* panel pointedly declined to convert Defendants' Rule 12(b)(6) motion into a Rule 56 motion for summary judgment. *See id.* at 487-88. The panel concluded that it "w[ould] not consider matters extrinsic to the pleadings and [would] proceed to review the district court's Rule 12(b)(6) analysis." *Id.* at 488. Second, the panel acknowledged the possibility that the district court might determine on remand that Plaintiffs did not have vested benefits. *See id.* at 493 n.11. For these reasons, *Tackett I* did not conclusively determine that Plaintiffs' retirement benefits had vested.

B.

Fortunately, the district court's determination that benefits had vested did not rest solely on a misinterpretation of *Tackett I*. The district court also performed its own analysis of the facts, which led it to conclude that the cap letters were not part of the Apple Grove CBA and that vesting occurred. The district court considered the following evidence, in addition to the P & I agreement: (1) documents indicating an agreement between the union and the employers to "cap" health benefits, several "side" letters and the SPD, which were part of the "master" agreements; (2) P & I booklets circulated to Apple Grove employees that described, among other things, retiree benefits, and did not contain any "capping" documents; (3) testimony from individuals involved in "master" negotiations, Apple Grove local negotiations or both. *See Sw. Williamson Cnty. Cmty. Ass'n, Inc. v. Slater*, 173 F.3d 1033, 1036 (6th Cir. 1999) (citing *Dandridge v. Williams*, 397 U.S. 471, 475 n.6, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970)) (holding that an appellate court can affirm district court on alternate grounds supported by the record).

Whether the cap letters were part of Apple Grove's CBAs is an issue of fact, reviewable only for clear error. *See Thomasville Furniture Indus., Inc. v. JGR, Inc.*, 3 F. App'x 467, 473 (6th Cir. 2001) ("Whether a given document is part of a written contract is a question of fact." (citing *Greenberg v. The Life Ins. Co. of Va.*, 177 F.3d 507, 516 (6th Cir. 1999) (additional citation omitted))). The district court did not clearly err in finding the cap agreements inapplicable to Apple Grove.

M & G argues that the conduct of union representatives from 1991 to 2005 was inconsistent with the district court's interpretation of the CBAs and P & Is as not including the cap letters. M & G claims that even the testimony of Plaintiffs' witnesses demonstrates that union representatives did not believe there was a vested right to lifetime no-contribution benefits for Apple Grove retirees. The most persuasive evidence cited by M & G is the "internal union conversations" that appear to indicate that at least some union representatives believed the cap letters to apply. Moore testified that he had been told by some local committee members that the 1997 Letter H applied, but that, despite "seach[ing] extensively," he could not find "any document indicating it had been adopted or ratified by the local." Hoover advised Moore and Shipley that "if" they used "a letter like Goodyear," they should "move the damn dates out or your retirees are going to get hit with a premium." Moore testified that Shipley told him that she was told "to be aware that there was a Letter H."

Although these statements certainly have the potential to imply that cap agreements were applicable, they need not be dispositive. Hoover participated in the master bargaining, which undisputedly included cap letters. However, he did not participate in local bargaining for Apple Grove, and the fact that he told some Apple Grove negotiators about the cap letters in the master agreement does not demonstrate that they applied to Apple Grove, especially since he qualified his advice with the word "if." At best, Hoover and Moore acknowledged the possibility that the cap letters applied to Apple Grove, but neither had any firm knowledge or documentation of the letters' applicability. In the face of such ambiguity, the district court did not clearly err by concluding that the letters did not apply to Apple Grove.

In sorting through conflicting recollections of negotiations, the district court noted that several parties with authority to bind M & G and the union rejected or disputed cap letter applicability. M & G objects to the district court's "focus on what union entity can 'bind' the union" as an error of law. M & G argues that "[q]uestions regarding who can 'bind' the union * * * are unrelated to the probative value of evidence regarding what local bargaining committee members have done or said about past bargaining or past agreements."

The district court did not, as M & G claims, treat statements of those with "binding authority" as dispositive, but it did appear to weigh these statements more heavily than statements from those without binding authority. Credibility determinations are a matter of fact and the district court's determination receives great deference. *See United States v. Esteppe*, 483 F.3d 447, 452 (6th Cir. 2007). It is not unreasonable to infer that a party with authority to bind would be more likely to be informed regarding important documents.

M & G describes the district court as "find[ing] that the collective bargaining agreement was enforceable only as to specific items described during ratification votes," and cites *Teamsters Local 589 (Jennings Dist., Inc.)*, 349 N.L.R.B. 124, 128 (2007) for its argument that such a "deficiency" does not void union ratification of an agreement. The district court did not, as M & G suggests, use the non-presentation of the cap letters as an "escape mechanism" from an otherwise-ratified agreement. Rather, Apple Grove employees' lack of knowledge regarding the cap letters was cited as an example of absence of evidence of the letters' inclusion in the Apple Grove agreements. As Plaintiffs point out, this was "but one piece of evidence among many."

Similarly, the district court did not err by considering the lack of awareness of the cap letters on the part of Shell's accountants and M & G's actuaries. The district court merely noted the absence of the type of evidence of the cap letters' applicability to Apple Grove that one would expect to see if Defendants' account of events was credible. The district court properly treated such lack of awareness as circumstantial, not "dispositive," evidence that the cap letters did not apply to Apple Grove.

M & G argues that LOU 2003-6, which permitted collecting contributions from retirees whose insurance costs exceeded the caps set forth in the 2001 Letter H, was applicable to all Plaintiffs, including those who retired prior to August 9, 2005, because employers may lawfully implement portions of a final offer after an impasse is reached in bargaining. *See United Paperworkers Int'l Union v. NLRB*, 981 F.2d 861, 866 (6th Cir. 1992) (per curiam).

In early 2004, when LOU 2003-6 was unilaterally implemented by M & G, any portions affecting then-retirees' rights were not lawfully implemented because the ability to take unilateral action post-impasse only applies to mandatory topics of bargaining, *see Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 902 (6th Cir. 1996), while retiree benefits are a permissive topic. *See Yard-Man*, 716 F.2d at 1482. Furthermore, in August of 2005, when LOU 2003-6 became part of the 2005 CBA, it could not be applied to pre-August 9, 2005 retirees because their benefits had already vested, as described below.

Finally, M & G cites the SPD as evidence that retiree benefits were capped. However, SPDs "are not legally binding, nor parts[ ] of the benefit plans themselves." *Engleson v. Unum Life Ins. Co. of Am.*, 723 F.3d 611, 620, No. 12-4049, 2013 WL 3336741, at *7 (6th Cir. 2013) (quotation marks and citations omitted). Although the district court was permitted to consider the SPD as "extrinsic evidence," *see Moore v. Menasha Corp.*, 690 F.3d 444, 456 (6th Cir. 2012), we cannot say that the district court clearly erred by declining to find it persuasive.

C.

Given that the district court did not clearly err in finding that the cap letters were not part of the pre-2005 CBAs, the district court also did not clearly err in interpreting the pre-2005 CBAs as vesting a right to lifetime contribution-free benefits in the pre-August 9, 2005 retirees. Interpretation of a CBA is a matter of law only when the parties rely wholly on the terms of the CBA and do not present any extrinsic evidence of intent. *See Yard-Man*, 716 F.2d at 1480 n.1. In this case, the determination of intent becomes a mixed question of both law and fact, for which the standard of review is clear error. *See id.*

We must determine whether the parties intended benefits to vest by applying traditional rules of contract interpretation, as long as doing so is consistent with federal labor policies. *Id.* at 1479. To interpret the language of a CBA, we must:

> (1) "look to the explicit language," (2) evaluate that language "in light of the context" that led to its use, (3) "interpret each provision * * * as part of the integrated whole," (4) construe each provision "consistently with the entire document and the relative positions and purposes of the parties," (5) construe the terms "so as to render none nugatory" and to "avoid illusory promises," (6) look to other words and phrases in the document to resolve ambiguities, and (7) "review the interpretation * * * for consistency with federal labor policy."

Tackett I, 561 F.3d at 489 n.7 (quoting *Yard-Man*, 716 F.2d at 1479-80).

Though *Tackett I* was not conclusive on the vesting issue as a whole, it is conclusive on a narrower question: that of whether the quoted "explicit language" of the CBA, in the absence of "other words and phrases in the document" such as the cap letters, indicates an intent to vest. *Tackett I* interpreted the quoted language of the CBA, standing alone, as indicating intent to vest and this interpretation bound the district court, while leaving it free to make its own conclusion about the ultimate question of vesting based on other portions of the document, extrinsic evidence or both. *See*, *e.g.*, *Yolton v. El Paso Tenn. Pipeline Co*., 435 F.3d 571, 579 (6th Cir. 2006) ("When ambiguities exist, courts may look to other provisions of the document and other extrinsic evidence." (citation omitted)). The qualifying language in *Tackett I* implied that the CBA language, though indicating intent to vest, contained enough ambiguity to permit examination of such additional evidence.

The district court's presumption that, in the absence of extrinsic evidence to the contrary, the agreements indicated an intent to vest lifetime contribution-free benefits was in accordance with both *Tackett I* and the CBA language promising a "full contribution" to qualifying employees. To the extent that vesting was presumed, it was not the district court that, *sua sponte*, shifted the burden of proof, but rather the language of the CBA and its linkage of health care benefits to pension benefits, *see Reese v. CNH America LLC*, 574 F.3d 315, 322 (6th Cir. 2009), that led to the conclusion that retirees had a vested right to health care benefits and, in the absence of evidence to the contrary, a vested right to contribution-free health care benefits. Having reached the conclusion that benefits were vested, it was then reasonable for the district court to conclude that those benefits could not be bargained away without retiree permission.

M & G points out that we have previously said that vesting of contribution-free health care benefits should not be presumed "simply * * * because none of the CBA documents provided that retirees 'would be required' to pay premium contributions." *Wood v. Detroit Diesel Corp.*, 213 F. App'x 463, 466 (6th Cir. 2007). But in this case, the 2000 CBA, and the others with similar language, specifically promised a "full Company contribution" towards health care benefits. Furthermore, in *Detroit Diesel*, there were applicable "Supplemental Agreements" advising retirees that they "'may be required to make monthly contributions'" and that "rates of payment, coverages, and terms and conditions of the program were all subject to change by Detroit Diesel at any time on reasonable notice." *Id.* at 467. In the present case, the analogous capping agreements are not applicable. Finally, even in *Detroit Diesel*, where there was weaker evidence of affirmative intent to vest and stronger anti-vesting evidence, this Court still concluded that the plaintiffs had sufficient likelihood of success on the merits, even though it "[might] not [have been] a 'strong' likelihood," to warrant preliminary injunctive relief. *See id.* at 471. The district court's analysis does not conflict with that in *Detroit Diesel.*

M & G also contends that, because the USW recently agreed that retirees must make medical contributions, Apple Grove retirees cannot possibly have a vested right to lifetime contribution-free health care. However, if benefits are vested, then subsequent concessions by the union cannot modify them without retirees' permission. *See Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 181 n.20, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971).

Given the inapplicability of the capping agreements, the district court did not clearly err in finding that pre-August 9, 2005 retirees had a vested right to receive contribution-free health care benefits.

D.

Plaintiffs cross-appeal the scope of the permanent injunction. They contend that the district court abused its discretion when it ordered retirees and dependents previously enrolled in the pre-2007 Comprehensive Plan to be enrolled in the current Comprehensive Plan instead of being reinstated to the pre-2007 plan.

Plaintiffs argue that the district court misapplied *Reese v. CNH America.* In *Reese*, we held that retirees whose lifetime health care benefits had vested could nonetheless be subject to "reasonable changes" in their health care benefits, as long as the changes were "reasonable in light of changes in health care" and "roughly consistent with the kinds of benefits provided to current employees." 574 F.3d at 326 (citations omitted). However, this was only the case because the CBA did not contain any statements to the contrary. *See id.*

Plaintiffs argue that the P & I agreements specify the precise benefits provided to retirees. They cite, for example, the 2000 P & I stating that "[a]fter the date of the Employee's retirement, the deductible * * * shall be limited to $175 per person, $350 per family * * * * " However, they do not explain why these plan specifics, unlike those in *Reese*, are vested for life. Plaintiffs argue that vested no-cost medical coverage would be illusory if the Comprehensive Plan is "allowed to be whittled away under the guise of 'plan design changes' until no shred * * * remained," but that is a red herring because our reasonableness requirement does not permit such an extreme "whittling."

The 2007 changes to the Comprehensive Plan that Plaintiffs point to were not unreasonable. Plaintiffs cite increased prescription drug costs and annual deductibles that do not appear to be severe and unreasonable (e.g., co-pay for generic drugs going from $4 to $10, annual prescription drug deductible going from $175 to $250). The increase in the maximum out-of-pocket limit from $500 to $4,000 per family is the most significant change cited, but not so large that the district court clearly erred in finding it to be "reasonable in light of changes in health care." *Id.* at 326 (quotation marks omitted).

III.

For the above reasons, we affirm the judgment of the district court.

853 F. Supp. 2d 697

Hobert Freel TACKETT, et al., Plaintiffs,
v.
M & G POLYMERS USA, LLC, et al., Defendants.

Case No. 2:07-cv-126.

United States District Court,
S.D. Ohio,
Eastern Division.

Feb. 21, 2012.

David Marvin Cook, Claire W. Bushorn, Jennie Gayle Arnold, Cook Portune & Logothetis LLC, Cincinnati, OH, for Plaintiffs.

Mark A. Knueve, Thomas Howard Fusonie, Columbus, OH, Andrew Lylburn Scroggins, Deborah S. Davidson, John R. Richards, Morgan Lewis & Bockius, Philip A. Miscimarra, Chicago, IL, Christopher A. Weals, Simon J. Torres, Washington, DC, for Defendants.

OPINION AND ORDER

GREGORY L. FROST, District Judge.

This is a class action ERISA case involving the contractual right to lifetime contribution-free health care benefits for retirees who worked for M & G Polymers USA, LLC and its predecessors. The matter came on for a bench trial in May 2011 on the issue of liability. The Court found in favor of those plaintiffs in Subclasses One through Four and against Defendants, but in favor of Defendants and against those plaintiffs in Subclass Five. The Subclass One through Four Plaintiffs then filed a motion for a permanent injunction, seeking the reinstatement of lifetime contribution-free health care benefits for the plaintiff retirees and their surviving spouses or dependents. (ECF No. 196.) For the reasons that follow, this Court **GRANTS** the motion.

I.

A. Background

The class (retirees, their spouses, and surviving spouses or other dependents of individuals who worked for the named defendant company) assert that although they have a right to lifetime retiree health care benefits, the company is requiring them to pay for those benefits in violation of various collective bargaining agreement ("CBA") provisions.[1]

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[1] The parties have agreed on the class and subclasses involved, which are as follows:

Class:

All retired employees of M & G Polymers USA, LLC ("M & G") and/or its predecessor company, the Shell Chemical Company ("Shell"), who worked at the Point Pleasant Polyester Plant ("Plant") in Apple Grove, West Virginia and were represented by the USW or its predecessor unions ("Union") in collective bargaining, and who retired or left service from the Plant having met the eligibility requirements for retiree health care benefits specified in the applicable collective bargaining agreements ("CBAs") and P & I Agreements, as well as the spouses and surviving spouses and other dependents of those retired former employees who also claim a right to such benefits, and

(Continued on following page)

the surviving spouses of Union-represented Plant employees who died while employed at the Plant who also claim a right to such benefits (the "Class").

Subclass 1: Members of the Class who retired, left service or died while employed at the Plant having met the eligibility requirements for retiree health care benefits specified in the P & I Agreement dated May 15, 1991, through May 15, 1994, as adopted by the CBA between Goodyear Tire & Rubber Company ("Goodyear") and the Union for the Plant effective November 6, 1991, through November 6, 1994, and as adopted by Shell, and their eligible surviving spouses and dependents.

Subclass 2: Members of the Class who retired, left service or died while employed at the Plant having met the eligibility requirements for retiree health care benefits specified in the P & I Agreement dated July 20, 1994, through July 20, 1997, as adopted by the CBA between Shell and the Union for the Plant effective November 6, 1994, through November 6, 1997, and their eligible spouses and dependents.

Subclass 3: Members of the Class who retired, left service or died while employed at the Plant having met the eligibility requirements for retiree health care benefits specified in the P & I Agreement dated May 9, 1997, through May 9, 2003, as adopted by the CBA between Shell and the Union for the Plant effective November 6, 1997, through November 6, 2000, and their eligible spouses and dependents.

Subclass 4: Members of the Class who retired, left service or died while employed at the Plant having met the eligibility requirements for retiree health care benefits specified in the P & I Agreement dated November 6, 2000, through November 6, 2003, as adopted by the CBA between M & G and the Union for the Plant effective November 6, 2000, through November 6, 2003 and applicable until August 8, 2005, and their eligible spouses and dependents.

(Continued on following page)

Plaintiffs Hobert Freel Tackett, Woodrow K. Pyles, and Harlan B. Conley are all Ohio residents and retirees from the Point Pleasant Polyester Plant in Apple Grove, West Virginia. They and similarly situated retirees belong to a labor union, Plaintiff United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("USW"), which represented (or at least one of its predecessor unions represented) them as employees of Defendant M & G Polymers USA, LLC ("M & G") (which bought the plant in 2000), or one of its predecessor companies, such as the Shell Chemical Company (which owned the plant from 1992 to 2000) and The Goodyear Tire & Rubber Company (which owned the plant until 1992). Plaintiffs' theory of the case is that the CBA provides vested retiree health care benefits as a result of the following language, which appears in various agreements:

> Employees who retire on or after January 1, 1996 and who are eligible for and receiving a monthly pension under the 1993 Pension

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> *Subclass 5:* Members of the Class who retired, left service or died while employed at the Plant having met the eligibility requirements for retiree health care benefits specified in the CBA between M & G and the Union for the Plant effective August 9, 2005 through November 6, 2008 or any subsequent CBA between M & G and the Union for the Plant, and their eligible spouses and dependents.

(ECF No. 103, at 2-7.)

> Plan * * * whose full years of attained age and full years of attained continuous service * * * at the time of retirement equals 95 or more points will receive a full Company contribution towards the cost of [health-care] benefits * * * * Employees who have less than 95 points at the time of retirement will receive a reduced Company contribution. The Company contribution will be reduced by 2% for every point less than 95. Employees will be required to pay the balance of the health care contribution, as estimated by the Company annually in advance, for the [health care] benefits * * * * Failure to pay the required medical contribution will result in cancellation of coverage.

In addition to a series of main agreements, a number of side letters are involved in this litigation. The Sixth Circuit previously explained these documents as follows, before remanding the action to this Court for additional factual development:

> A series of collective bargaining agreements has been in force at the Plant, with each typically lasting around three years before renegotiation. The first letter agreement, signed contemporaneously with the 1991-1994 collective bargaining agreement, was adopted "for purposes of conforming with the new Financial Accounting Standard Board (FASB) accounting requirement" that required accrual accounting of healthcare benefits. This new requirement hurt a company's balance sheet performance if the company

> had no cap on its health-care costs. While signed in 1991, the caps were not to take effect until July 1, 1997. Concurrent with the 1994-1997 collective bargaining agreement, another cap letter postponed the effective date of the caps to 2004.

Tackett v. M & G Polymers, USA, LLC, 561 F.3d 478, 483 n.1 (6th Cir. 2009).

Plaintiffs claim that on or about January 1, 2007, Defendant M & G acted contrary to the agreements by unilaterally modifying the health care benefits by shifting a large part of the health care costs onto the class members. The other named defendants are M & G-sponsored health plans through which the class members receive health care benefits: the M & G Comprehensive Medical Benefits Program for Employees and Their Dependents ("Comprehensive Plan"), the M & G Catastrophic Medical Plan, the M & G Medical Necessity Benefits Program of Hospital, Surgical, Medical, and Prescription Drug Benefits for Employees and Their Dependents ("Medical Necessity Plan"), and the M & G Major Medical Benefits Plan ("Major Medical Plan").

Plaintiffs filed the instant action on behalf of the named retirees and their surviving spouses or dependents, as well as other similarly situated retirees and their surviving spouses or dependents, on February 9, 2007. (ECF No. 1.) Via their amended complaint, Plaintiffs originally asserted three claims: violation of labor agreements, actionable under Section 301 of the Labor Management Relations Act

("LMRA"), 29 U.S.C. § 185(a) (Count I); violation of employee welfare benefit plan, actionable under Sections 502(a)(1)(B) and (a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(1)(B) and (a)(3) (Count II); and breach of fiduciary duty under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) (Count III). (ECF No. 14 ¶¶ 26-31.).

Defendants then filed a motion to dismiss the amended complaint (ECF No. 19), and this Court granted that motion (ECF No. 63). On appeal, the Sixth Circuit Court of Appeals affirmed the dismissal of the § 502(a)(3) claim constituting Count III, but reversed and remanded the remaining Count I § 301 claim and Count II §§ 502(a)(1)(B) and (a)(3) claim (ECF No. 68). Defendants unsuccessfully sought summary judgment on Counts I and II, and the matter progressed to a bench trial held from May 9, 2011, to May 16, 2011. This Court filed an August 5, 2011 Opinion and Order, 2011 WL 3438489, in which the Court found in favor of Plaintiffs in Subclasses One through Four and against Defendants on the issue of liability as described herein on Plaintiffs' Count I and II claims. (ECF No. 177.) The Court also found in favor of Defendants and against Plaintiffs in Subclass Five on those claims. This left for resolution the issue of damages, which the Court had previously bifurcated from the liability issue and upon which the parties are currently working. (ECF No. 207.)

Also in need of disposition is the remaining plaintiffs' pursuit of the reinstatement of their lifetime contribution-free health care benefits. That issue is before the Court by way of Plaintiffs' motion for a permanent injunction (ECF No. 196), Defendants' memorandum in opposition (ECF No. 205), and Plaintiffs' reply memorandum (ECF No. 206). The motion came on for an in-court hearing on February 13, 2012, and the Court took the injunctive relief issue under advisement at the conclusion of that proceeding.

B. Agreed Facts

The Final Pretrial Order set forth the parties' agreed facts, providing:

> The following facts are established by admissions in the pleadings or by stipulation of counsel:
>
> 1. M & G Polymers USA, LLC ("M & G") is a producer of polymer and related chemical products with a facility located in Apple Grove, West Virginia ("the Apple Grove facility," also known as the "Point Pleasant Plant").
>
> 2. The Goodyear Tire & Rubber Company ("Goodyear") owned the Apple Grove facility until November 20, 1992, when Shell Chemical Company, an affiliate of Shell Oil Company ("Shell"), purchased it.
>
> 3. Production, laboratory, and maintenance employees at the Apple Grove facility are represented by the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied

Industrial & Service Workers International Union, AFL-CIO ("USW") and its Local 644L.

4. Prior to 1995, production, laboratory, and maintenance employees at the Apple Grove facility were represented by the United Rubber Workers ("URW"). The URW merged with the USW in 1995.

5. Retiree Plaintiff Class Representatives H. Freel Tackett, Woodrow Pyles, and Harlan Conley (together with the Class members, the "Retiree Plaintiffs") were employed at the Apple Grove facility and were members of the collective bargaining unit represented by the Union.

6. Mr. Tackett retired on or about March 1, 1996. Mr. Pyles retired on or about January 1, 1996. Mr. Conley retired on or about August 1, 1998.

7. On November 6, 1991, Goodyear and Local 644 of the URW entered into a collective bargaining agreement ("CBA") effective November 6, 1991, to November 6, 1994.

8. On May 15, 1991, Goodyear and the URW and certain URW locals entered into a collectively bargained Pension, Insurance and Service Award Agreement effective May 15, 1991, to May 15, 1994 ("1991 Master P & I Agreement").

9. The 1991 Master P & I Agreement between Goodyear and the URW and certain URW locals included a side letter, "Letter G,"

dated May 15, 1991, dealing with retiree medical benefits ("1991 Letter G").

10. Goodyear created a Summary Plan Description ("SPD") that described the employee benefit programs applicable to hourly rated employees at the Apple Grove facility as of May 15, 1991.

11. Goodyear and Shell entered into an agreement dated December 18, 1992, pertaining to the employment by Shell of certain employees of Goodyear at the Apple Grove Facility (the "Employee Agreement").

12. On December 29, 1993, Shell formally adopted those Goodyear benefit plans that were previously in effect at Apple Grove for represented employees at the Apple Grove facility.

13. On July 20, 1994, Goodyear and the URW and certain URW locals entered into a collectively bargained Pension, Insurance and Service Award Agreement effective July 20, 1994, to July 20, 1997 ("1994 Master P & I Agreement").

14. The 1994 Master P & I Agreement between Goodyear and the URW and certain URW locals contained a side letter, Letter G, dated July 20, 1994 ("1994 Letter G") dealing with retiree medical benefits.

15. On November 6, 1994, Shell and Local 644 of the URW entered into a CBA effective November 6, 1994, to November 6, 1997.

16. On May 9, 1997, Goodyear and the USW and certain USW locals entered into a collectively bargained Pension, Insurance and Service Award Agreement effective May 9, 1997, to May 9, 2003 ("1997 Goodyear Master P & I Agreement").

17. The 1997 Goodyear Master P & I Agreement between Goodyear and the USW and certain USW locals included a side letter, Letter H, dated May 9, 1997, dealing with retiree medical benefits ("1997 Letter H").

18. On November 6, 1997, Shell and the USW and Local Union 644 entered into a CBA effective November 6, 1997, to November 6, 2000 ("1997 CBA").

19. M & G purchased the Apple Grove facility from Shell effective June 1, 2000.

20. In connection with the purchase, M & G and Shell entered into a 7 Human Resources Agreement dated June 1, 2000 ("HR Agreement").

21. In September 2000, M & G and the USW on behalf of Local 644L began bargaining for a potential extension of the 1997 CBA, which by its terms expired on November 6, 2000, and subsequently engaged in bargaining for a successor to the 1997 CBA.

22. On November 6, 2000, M & G and the USW and Local Union 644L entered into a CBA effective November 6, 2000, through November 6, 2003 ("2000-2003 CBA").

> 23. In September 2003, M & G and the USW on behalf of Local 644L commenced bargaining for a successor to the 2000-2003 CBA which was due to expire November 6, 2003. This bargaining encompassed more than 60 days of negotiations from September 2003 through August 2005 (the "2003-2005 Bargaining").
>
> 24. On August 9, 2005, M & G and the USW on behalf of Local Union 644L reached agreement on a new CBA effective August 9, 2005, to November 5, 2008 ("2005 CBA").
>
> 25. The 2005 CBA included LOU 2003-6, dealing with retiree medical benefits, which was signed by Union chief spokesperson Karen Shipley and Company representative Kimm A. Korber.

(ECF No. 165, at 4-6.)

C. May 2011 Trial Testimony

In addition to introducing testimony via deposition transcripts, the parties presented live trial testimony by select witnesses. The Court briefly summarizes the key points of each such witness' testimony below. For ease of reference, much of the following content is taken verbatim from this Court's August 5, 2011 Opinion and Order, a decision that the Court incorporates fully herein by reference. (ECF No. 177.)

1. Woodrow Pyles

Retiree Woodrow Pyles was the first witness to testify. Pyles testified that he had begun working at the Apple Grove facility on May 1, 1959. In December 1992, Shell bought the plant from Goodyear, which Shell later sold to M & G. He retired on January 1, 1996. A union member, Pyles testified that he held a number of positions in the union, including that of union steward and that of liaison. He stated that he would attend P & I conferences and would study the P & I booklet. After a new pension and insurance agreement ("P & I agreement") had been reached, Pyles testified, the union would hold a conference to explain the changes. He also testified that the local CBA governs working conditions and would be negotiated locally by the union.

Notably, Pyles testified several times that it is the local's position and unwritten policy that letters that are not printed in the booklet distributed to the local union members do not apply to the local union. He stated that no cap letters applied to the Apple Grove agreements. Although he had obtained a copy of Letter G at a conference regarding the 1991 agreement, Pyles testified, he did not distribute the letter to the local members because it was not part of the booklet. Pyles explained that the summary plan description described the plan as non-contributory, with the company paying the entire cost of the plan. He testified that he has not paid union dues since his retirement and that he never gave the union permission to represent him now. Pyles also testified how he has paid the premium for himself and his spouse since its implementation, which he protested in a series of letters to M & G's Kimm Korber that he discussed.

2. Hobert Freel Tackett

Retiree Hobert Freel Tackett testified that he began working at the Apple Grove facility on February 7, 1966, and retired from that facility on March 1, 1996. He stated that he had held a number of local union positions, including president and vice-president, and was a member of the local bargaining unit. Similar to Pyles, Tackett identified various agreements and testified that the CBA covers working conditions while the P & I agreement governs benefits. He testified that he was never aware of any employer contribution limit or cap under the agreement and that he first saw a cap letter only after this litigation had commenced. Tackett testified that he understood the applicable plans to provide retirees who had 95 points with contribution-free medical care for life; they had to pay only if they had less than 95 points. He also testified that he did not believe that letters not printed in the booklet controlled retiree benefits. Tackett stated that he relied on the booklet for medical and pension benefits information. Similar to Pyles, Tackett testified that he had never granted anyone the right to bargain on his behalf since retired.

3. Ron Hoover

Ron Hoover testified next on behalf of Plaintiffs. Hoover explained that prior to his retirement—he is now a union consultant—he worked for the international union with the primary responsibility of working with the master bargaining agreement. He explained that a master bargaining agreement would be negotiated typically every three years, and after that agreement was secured, another agreement would be negotiated in an approach termed "pattern bargaining." Locals would ratify the master agreement and then would negotiate supplemental agreements focused on their specific issues. Not all locals were part of the Goodyear master bargaining, Hoover testified, and Local 644 was not. Some locals not under the master agreement had "me too" agreements in which their own CBA language incorporated some or all of the master agreement provisions. Hoover testified that he believed that the Apple Grove plant stood on its own.

Hoover stated that he was never the lead spokesman at the Apple Grove plant, that the plant was not part of the master agreement, that he was not certain how they even got the pattern agreement, and that he did not know for certain whether Apple Grove adopted the P & I insurance agreement. He also testified that he had never negotiated Local 644 agreements with Shell or M & G. He indicated that he had attended bargaining sessions where benefits had been discussed.

Hoover explained the 1991 cap letter as a union compromise to help Goodyear control or minimize its liabilities; he explained that the letter was a way to avoid showing the extent of projected liability for retiree medical benefits due to FASB considerations. In other words, Hoover explained, the cap letter was a mechanism by which a company could minimize numbers to attract investors. He explained how the letter worked and the importance of what he called the "bite date," or the date on which retirees would have to actually begin contributions toward their medical insurance. Hoover emphasized the importance of always moving the bite date out so that it could always be subject to further movement by negotiation.

According to Hoover, he has no knowledge that the Letter G cap letter was ever adopted at the Apple Grove plant. He explained that the letter was not part of the 1994 agreement between Shell and Local 644. Although he may have participated in 1997 negotiations, Hoover testified, his role was to explain how the Goodyear master agreement worked. Hoover stated that he lacked the authority to bind Local 644 to anything and that only the head negotiator had such authority. He testified that he did not know whether the cap letter labeled as Letter H automatically applied to M & G. Thus, Hoover testified, when he spoke with Randy Moore, he told Moore that if the cap letter applied, Moore should be certain to move the bite date out so that it did not impact retirees. Hoover also testified that he told Karen Shipley the same thing in 2003. Hoover disagreed with the contention that there was a link between the 95-point rule and the cap letter.

Hoover stated on cross-examination that by agreement not all letters were printed in the booklets. As an example, he explained that the 1991 Letter G was part of the master agreement even though it was not in the printed booklet. Hoover stated that a general understanding existed between the union and company representatives that the bite date would always be moved. He stated that the union never intended to have retirees pay a premium and that he understood that the company representatives could not say publicly that there would never be retiree contributions because the accountants would then not certify the FASB statements.

Hoover explained that the Apple Grove plant appeared to be some sort of "me too." He stated that he could not identify well a marked-up copy of the 2000 agreement, and Hoover indicated that he could not say for a fact whether cap letters were part of the adopted agreement. Such letters were not printed in booklets, Hoover again explained. He testified that if the letter information was not presented to the local members, then the local representatives were not doing their jobs. Hoover also testified that a "me too" local could adopt the P & I agreement but not letters and again stated that he did not know what Local 644 had done. He stated that he did not know whether the letters were ever presented to the local members. Hoover did state that if the cap letters were not renewed, then they were gone. Hoover testified that he had been careful to never interpret the Apple Grove agreement for Local 644.

4. Randall Moore

Randall Moore is currently the Sub-District Director of the international union and was previously a staff representative. He was assigned to Apple Grove negotiations in late summer 2000. Moore testified that he relied on the local committee in these negotiations and explained that after he was unsuccessful at negotiating a two-year extension of the existing agreement, negotiations for a new P & I agreement continued.

Moore testified that based on his experience, the issue of retiree benefits is typically a subject of forward-looking negotiations in which future retirees' benefits are discussed, but existing retiree benefits remain fixed. He stated several times that it was his understanding that Local 644 is a "me too" that accepted only parts of the "Big Rubber" master agreement. Moore stated that, to his knowledge, Shell was not a part of the "Big Rubber" negotiations.

He also testified that the 1997 P & I agreement for the Apple Grove plant did not reference Letter H. Moore stated that when local individuals such as Sam Stewart brought the cap letter to Moore's attention, Moore spoke to Hoover. Hoover provided Moore with a copy of Letter H because the local committee did not have a copy, Moore testified, and Hoover explained that the cap letter is a FASB accounting letter. Moore testified that Hoover never told him that Letter H applied and only suggested that Moore push back the contribution date if the letter were applicable to Apple Grove. Moore also testified that he looked for and never found any document indicating that Letter H applied.

Moore stated that it was less than clear whether the cap letter applied. He testified that the local committee proposed pushing the effective contribution date out, but that the company denied the proposal. The company was also bewildered by Letter H, Moore explained, and on October 17, 2000, the company's chief negotiator, David Dick, responded to Moore's request for written clarification by providing a document stating the company's position that Letter H did not apply.

Moore also testified that the Apple Grove booklet needed cleaned up [sic] because it contained provisions that did not apply to the local plant. He explained that the parties agreed to remove these provisions while abiding by the agreement they had reached. Thus, Moore testified, Letter H was removed, and the 2000 P & I agreement that resulted does not contain Letter H.

He stated that for a period of time, Karen Shipley had been assigned to Local 644 until he was reassigned back to the local. Shipley had asked Moore about Letter H during the subsequent negotiations between the local and M & G, he testified, and Moore explained that Letter H did not apply. Moore testified that he was confused when presented with Letter of Understanding 2003-6 because the union had not agreed to its contents or that Letter H applied. M & G's new chief negotiator, Robert Long, was given a copy of Dick's October 2000 disavowal of the cap letter's application, Moore testified, but this did not change M & G's position. Moore testified that he stated to M & G in negotiations that he lacked the authority to bargain away benefits for existing retirees.

Moore testified that negotiations over Letter of Understanding 2003-6 went nowhere. He enlisted the aid of the international union's attorney, but the result was still the same. Moore testified that the union saw the handwriting on the wall as to what M & G was going to do, and that when Shipley signed Letter of Understanding 2003-6 on August 9, 2005, it was a simple formality because her name was already on the company-provided signature line. Moore explained that the union knew that future retirees would be covered differently than existing retirees. Although the union contested the lawfulness of M & G's actions, Moore stated, the company went ahead and implemented retiree contributions.

5. Karen Shipley

Karen Shipley is a staff representative for the international. She testified that she was part of the 2003 Apple Grove negotiations and acted as the union's chief negotiator. She therefore had the authority to bind the union, she explained, and that the local committee assists the chief negotiator. After M & G's Long and Korber approached her with Letter H, Shipley spoke with Hoover. The parties disagreed over whether the letter applied, she explained, and she states that she informed the company that the union could not bargain over existing retiree benefits, which was a permissive subject of bargaining. The union disagreed that Letter H applied, Shipley testified, and took the position that given the company's disagreement, the letter should then be deleted.

Shipley testified that after offering to withdraw Letter of Understanding 2003-6, M & G reversed course and refused such withdrawal. M & G then implemented its last, best, and final offer, she testified, which included Letter of Understanding 2003-6. Shipley testified that the union never agreed to Letter of Understanding 2003-6 while she was negotiating.

6. Brian Wedge

Brian Wedge is currently on leave from the Apple Grove plant while he serves as a staff representative for the international. He testified as to his involvement in numerous Local 644 negotiations in numerous union positions. Throughout the ratification of these agreements, Wedge explained, no cap letters had ever been presented as part of the agreements to be ratified by local members. He discussed the 1997 agreement negotiations specifically and testified that

M & G had taken the position that it had separated from the master agreement. M & G's Dick stated that Shell had separated from the master agreement, Wedge testified, because Shell did not belong to the larger negotiating group responsible for that agreement.

In preparing for the 2000 negotiations, Wedge explained, he had heard of Letter H. Because he did not know whether the letter applied or what it was, Wedge testified, he spoke with Hoover and obtained a copy of the letter. Wedge testified that Letter H was not part of the agreement with which they had started. Since the time he began working at the Apple Grove plant in 1987, Wedge testified, such a cap letter had never been included in the booklets local members received.

Wedge testified that M & G took the position that the cap letter did not apply to M & G or Shell. He also testified that the union regarded the October 2000 Dick document as conclusive. The parties proceeded to adopt the 1997 booklet with some changes, Wedge explained, and produced the actual P & I agreement at a later date. Wedge testified that the parties knew they would have to remove content from the booklet that did not apply to Apple Grove. He stated that this was why he had made a handwritten notation on a union copy of Letter H indicating that the letter was to be removed. Wedge testified that the final copy of the P & I agreement distributed to union members did not contain Letter H.

When he was next part of the negotiating team in 2005, Wedge testified, the cap letter issue arose in conjunction with Letter of Understanding 2003-6. He indicated that Moore had questioned the applicability of a cap letter, and Wedge testified that no retirees had agreed that the union could negotiate benefits on their behalf. Wedge testified that the union attorney had informed the negotiators that the union had no right to bargain for the existing retirees. He repeated that the union was not legally permitted to bargain on behalf of the retirees. Wedge testified that the company nonetheless implemented its plan and that retirees have suffered as a result. Some people, he explained, won't speak to him as a result.

On cross-examination, Wedge testified that the union proposed in 2000 negotiations to move the cap letter effective date of retiree contributions because there was uncertainty over whether the letter applied. He stated that the Dick letter on behalf of M & G resolved the issue and that by the end of negotiations, it was settled that Letter H did not apply.

Wedge also explained the inapplicability of the master agreement. He provided the example of when Moore asserted during negotiations that the master agreement's pension multipliers automatically applied and M & G responded by adopting the position that the master agreement did not control. Wedge also testified that the union was responsible for distributing for local ratification the agreement information. He indicated that there was never an agreement between the company and the union as to what would go into the booklet.

7. *Kimm Korber*

Defendants' first witness was Kimm Korber, M & G's Human Resources Director. Korber testified that he had been hired in 2001 as Human Resources Manager for the Apple Grove plant and that his duties had included general human resources work as well as labor responsibilities. He stated that he had first become aware of issues with the P & I Agreement in the 2000 negotiations. Korber testified that because the Letter H effective date for contributions was after the next negotiations, he assessed that the letter would be discussed in the 2003 negotiations.

During those negotiations, Korber testified, Shipley had told him that the retiree benefits was a permissive subject of bargaining, that the parties could not reach an impasse over this issue, and that she was not interested in discussing the issue. He indicated that Shipley had proposed deleting Letter H. He also summarized the history of negotiations, stating that the union changed its position after it learned of Dick's October 2000 document.

Korber testified that he was not trained in benefits administration and that he has only a basic understanding of ERISA requirements. He stated that M & G is the plan sponsor and the named fiduciary and that the plan had never sent an ERISA notice to retirees of their being subject to the cap or of the possible termination of benefits.

Korber also testified regarding meeting with Rex Rousch. He denied that Rousch told him that Letter H was a Goodyear document and not a Shell document, but stated that he obtained the letter from Rousch. When presented with various exhibits, Korber indicated that Letter H had not been part of local booklets and could not point to where the 2000 CBA or P & I agreements adopted the Goodyear Letter H.

When questioned regarding the October 2000 Dick response that disavowed cap letter application, Korber testified that he had not discussed the document with Dick. Korber stated that a chief negotiator has the authority to bind a company. When asked whether the union could rely on Dick's response, Korber essentially avoided the question and responded by discussing proposals.

Korber reviewed exhibits related to M & G's acquisition of the Apple Grove facility from Shell and various emails regarding Letter H. He denied that it was left to counsel to determine the effective date of Letter H, but confirmed that he was part of the decision to apply a cap to all retirees. Korber stated that this was not an actuary decision. He disagreed with the position of Moore and Shipley that they did not have the authority to bargain for retirees, but stated that without Letter H, bargaining for retirees would be a permissive subject of bargaining.

Korber also testified regarding M & G's due diligence in the plant purchase. He further stated that he was aware of Letter H in 2001, although he did not mention the application of caps in a strategy memorandum he wrote on M & G's benefits program. This failure to mention Letter H continued throughout other documents and communications Korber sent involving benefits. In a July 12, 2004 email from Korber to Duane Lee, Korber testified, he did address Letter H, but he denied that this was the first time he sent Lee the letter. Korber testified regarding subsequent emails that noted that Letter H may not be deemed enforceable to Apple Grove and that discussed the possible impact of Letter H. He acknowledged his December 2005 email to Lee that concerned the topic of how much M & G would save if Letter H were applied to all retirees. Korber also acknowledged subsequent emails that tracked the effect of the cap letters, which was that retirees were being dropped from the benefits plan. In subsequent testimony, Korber did not disagree that over half of all retirees had died or been dropped from the benefits plan. In another email that Korber acknowledged, he stated that most retirees look to the booklet for a guide to retirement health plans.

8. Robert Long

The final witness to testify was attorney Robert Long. He explained that he routinely represents management in labor negotiations and that he has participated in between 200 and 300 negotiations.

One such negotiation was the Apple Grove bargaining that began in the fall of 2003. He testified that during these negotiations, Shipley stated that the union was not willing to discuss retiree medical benefits and that it was a permissive subject of bargaining. Long testified that generally speaking, retiree bargaining is a permissive, or non-mandatory, subject of bargaining and that a company and union can by mutual agreement enter into agreements on this topic. He later stated that the parties cannot modify vested benefits, but can modify non-vested benefits.

Long testified that following two union caucuses, the union returned to the table and mentioned Letter H, a cap letter, and that Sam Stewart had indicated that it was part of the binding agreement. He stated that no union representative suggested that Letter of Understanding 2003-6 applied only to future retirees. Long testified as to the circumstances surrounding his negotiation offer that, if the union took the position that Letter of Understanding 2003-6 implicated a permissive subject, then the company would withdraw it from the last, best, final offer. He testified that the company ultimately rejected the union's proposal to delete Letter H.

Long also testified that he never did any research as to whether Letter C or Letter H applied, but instead simply accepted the propositions that Shell had adopted Goodyear letters and that M & G had assumed Shell's contractual obligations. He had been told that M & G had a P & I book with Letters C and H in it. Long testified that he may have seen the

Dick response disavowing cap letter applicability, but he stated that he could not recall when. He testified that he relied upon Korber to be the primary architect for P & I proposals and stated that he had never read the 2000 P & I agreement cover to cover and that he did not know whether Letter H was part of that agreement. In subsequent testimony, Long stated that Stewart did not have the authority to bind the union, as opposed to Shipley, who held such authority.

D. February 2012 Hearing

In lieu of presenting additional testimony, the parties elected to proceed at the February 14, 2012 hearing on their previously filed briefs and accompanying declarations, with counsel making oral argument.

II.

A. Standard Involved

In considering whether entry of a permanent injunction is warranted, this Court must consider (1) whether Plaintiffs have succeeded on the merits of the case, (2) whether Plaintiffs will suffer irreparable injury in the absence of equitable relief, (3) whether the balance of hardships to the respective parties favors injunctive relief, and (4) whether entry of injunctive relief is in the public interest. *Duer Constr. Co., Inc. v. Tri-County Bldg. Trades Health Fund*, 132 F. App'x 39, 45 (6th Cir. 2005) (citing *PGBA, LLC v. United States*, 389 F.3d 1219, 1229 (Fed. Cir. 2004)).

See also eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006) (setting forth similar test for permanent injunction); *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.").

B. Discussion

The central issue in this litigation has been whether Plaintiffs—the qualifying retirees, their spouses, and their dependants—have a vested right to lifetime, uncapped (or contribution-free) medical benefits. It is settled that those plaintiffs in the first four subclasses do. The extant issues are now what that right encompasses and whether Plaintiffs are entitled to an injunction ordering the implementation of that right at this juncture.

Plaintiffs are entitled to a permanent injunction. They have prevailed on the merits of their claims, with only the issue of damages remaining. The absence of an injunction now would essentially transform the liability determination into a Pyrrhic victory, at least in the short term. This would be an unacceptable result, especially in light of the consequent irreparable harm.

Lack of a permanent injunction at this point would continue to inflict irreparable injuries on Plaintiffs. Money will of course remedy some of the damages Plaintiffs have incurred. In the absence of equitable relief, however, Plaintiffs will suffer irreparable injury regardless of any money ultimately awarded. The submitted declarations detail various anecdotal evidence of the type of injuries that many if not most of the plaintiffs have incurred and will continue to incur. It is not an illogical leap to extrapolate from such anecdotal evidence recognition of the harm facing the greater class. Money simply cannot remedy many of these injuries, such as the ongoing quality of life concerns. The apparent potentially shortened life spans or lives of lesser quality marked by ongoing anxiety and undue strife are clear. Moreover, the balance of hardships to the respective parties favors entry of the injunction, with Plaintiffs suffering far greater hardship should this Court further delay reinstatement to coverage for those dropped from the plans and forestall stopping Defendants from collecting the improper 2012 premium that M & G indicates it will continue to impose. (ECF No. 206-3.)

The enforcement of contractual obligations and the judgment of this Court are also unquestionably in the public interest. Plaintiffs have presented this Court with numerous cases in the briefing supporting this point. Additionally, as Plaintiffs argue, it is in the public interest to transfer the burden of coverage to the private company that included such coverage in its bargaining and not to keep much of the burden of providing health care coverage on the public by forcing numerous retirees and their dependants to rely upon public assistance programs.

Defendants devote much time to arguing minor points to the contrary on these factors, but much of the arguments presented are simply red herrings that warrant little discussion. For example, waiting for a conclusive damages determination before stopping premium collection and before reinstating those dropped from coverage would wholly fail to alleviate the irreparable harm many plaintiffs would incur. Such an approach would contravene logic by conflating measurable damages—out of pockets expenses—with intangible damages, such as the quality of life issues addressed above.

Contrary to Defendants' arguments, the fact that this litigation has been ongoing for five years does not weigh against a stay. Five years of impropriety on the part of M & G does not mean that a few more months or even years does not matter. Five years of unnecessary ongoing medical issues and financial hardship that cannot fully be undone matter. Defendants may characterize their opposition to the permanent injunction motion as seeking to maintain the status quo, but the status quo here is a company wrongfully denying individuals critical benefits to which the individuals are lawfully entitled.

Equally unpersuasive is Defendants' dubious paternalistic concern for the retirees. Defendants argue that should they prevail on appeal, many of the retirees may end up without health care coverage. Because it is M & G's actions that have already divested numerous retirees of such benefits, the Court is skeptical of the depth of Defendants' concern. In any event, such an issue is of little weight in the injunction inquiry. Any loss of coverage that might result should the Court enter a permanent injunction now and Defendants then subsequently prevail on appeal does not weigh against entering the relief requested. As the Court has previously noted, it doubts that Defendants will prevail on appeal. More important for today's issue is that any loss of coverage that would result if the Court is wrong would be Plaintiffs' own fault. They has [sic] asked for the Court to place them on such a possible path, and even if unlikely to be realized, the path Plaintiffs request presents a possible self-inflicted wound. In other words, because Plaintiffs are rolling the dice even if they do not see themselves as necessarily gambling, Defendants should not benefit from protecting Plaintiffs from hypothetical harm to which Plaintiffs ask to expose themselves.

This Court therefore rejects Defendants' arguments, which again and again return to the underlying premise that delay is fine because money can function as an overarching salve. This oversimplification ignores the realities involved here.

Defendants then argue that, in the event that the Court elects to enter a permanent injunction, this Court should require a bond. Both sides direct this

Court to cases involving bonds related to Federal Rule of Civil Procedure 65, and these cases recognize the well-settled proposition that whether to require a bond is within the discretion of the Court. *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995). The circumstances of this case weigh against imposition of such a requirement. The age of Plaintiffs and their financial means outweighs the notably limited possibility that Defendants will prevail on appeal. Defendants in turn have prospered from their impropriety for years and have presented testimony to this Court in support of their liability arguments that the Court recognized as simply false. Plaintiffs have prevailed on the merits and have generally suffered financial hardships while pursuing what lawfully belongs to them. Defendants have enjoyed a financial windfall for years as a result of their improper conduct, even if the subsequent damages portion of this action will serve to divest Defendants of a portion of that ill-gotten gain. Requiring any bond, much less one of the sort contemplated by Defendants, would only work to further effectuate another injustice on Plaintiffs. This Court in its discretion declines to require a bond.

Having made the threshold determinations that entry of a permanent injunction is warranted and that no bond would be appropriate, this Court turns to the issue of the proper scope of that injunction. This raises the core issue of what precisely vested.

Plaintiffs argue that the right to the health care plans as they existed pre-2007 is what vested. They suggest that this Court has already recognized that fact, and, failing that, urge the Court to accept that such vesting occurred. Defendants of course disagree and argue that at best, only the right to health care vested without such specific plan details having vested. Thus, Defendants argue, any reinstatement to health care benefits should be only to the plans as they exist now.

Contrary to Plaintiffs' contention, this Court did not previously hold that the prior plan details vested. To explain this point, it is necessary to review the Court's prior vesting discussions, however repetitious that review may be. As in the summary of the facts above, much of the following is often taken verbatim from this Court's incorporated August 5, 2011 Opinion and Order. (ECF No. 177.) That decision answered whether contribution-free benefits vested. Today's decision answers whether specific plans or plan details were within the scope of what vested.

The Sixth Circuit has held that "[r]etiree health benefit plans * * * are welfare benefit plans; thus, vesting only occurs if the parties so intended when they executed the applicable labor agreements." *Noe v. PolyOne Corp.*, 520 F.3d 548, 552 (6th Cir. 2008). *See also Tackett*, 561 F.3d at 489. The presence or absence of such intent is again critical here because, as the court of appeals has explained, "[i]f the parties do not intend to vest the benefits, the former employer can modify the retiree benefits without breaching a collective bargaining agreement." *Tackett*, 561 F.3d at 489. The appellate court has also explained that "[a] court may find vested rights 'under a CBA even if the intent to vest has not been explicitly set out in the agreement.'" *Id.* (quoting *Maurer v. Joy Technologies, Inc.*, 212 F.3d 907, 915 (6th Cir. 2000)).

The Sixth Circuit has described the "broad analytical framework" that this Court must apply to the vesting issue as follows:

> The seminal case for determining whether the parties to a CBA intended benefits to vest is *UAW v. Yard-Man*, 716 F.2d 1476, 1479 (6th Cir. 1983). Under *Yard-Man*, basic rules of contract interpretation apply, meaning that courts must first examine the CBA language for clear manifestations of an intent to vest. *Id.* Furthermore, each provision of the CBA is to be construed consistently with the entire CBA and "the relative positions and purposes of the parties." *Id.* The terms of the CBA should be interpreted so as to avoid illusory promises and superfluous provisions. *Id.* at 1480. Our decision in *Yard-Man* also explained that "retiree benefits are in a sense 'status' benefits which, as such, carry with them an inference * * * that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree." *Id.* at 1482. With regard to the "*Yard-Man* inference," later decisions of this court have clarified that *Yard-Man* does not create a legal presumption that retiree benefits are interminable. *Yolton*, 435 F.3d at 579. Rather, *Yard-Man* is properly understood as creating an inference only if the

> context and other available evidence indicate an intent to vest. *Id.*
>
> When an ambiguity exists in the provisions of the CBA, then resort to extrinsic evidence may be had to ascertain whether the parties intended for the benefits to vest. *Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am. v. BVR Liquidating, Inc.*, 190 F.3d 768, 774 (6th Cir. 1999). If an examination of the available extrinsic evidence fails to conclusively resolve the issue and a question of intent remains, then summary judgment is improper. *Int'l Union, United Mine Workers of Am. v. Apogee Coal Co.*, 330 F.3d 740, 744 (6th Cir. 2003).

Noe, 520 F.3d at 552. The court of appeals has further clarified:

> Courts reviewing a collective bargaining agreement must also keep in mind the context of labor-management negotiations on retiree health-care benefits: "because retirement health care benefits are not mandatory or required to be included in an agreement, and because they are 'typically understood as a form of delayed compensation or reward for past services' it is unlikely that they would be 'left to the contingencies of future negotiations.'" *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 580 (6th Cir. 2006) (quoting *Yard-Man*, 716 F.2d at 1481-82).

Tackett, 561 F.3d at 489. Application of these directions to this case led this Court to the conclusion that Plaintiffs obtained vested medical benefits.

That conclusion does not conflict with the Sixth Circuit's prior discussion of the issue of vesting. Citing the November 6, 2000 CBA language set forth above, the court of appeals previously made several critical points:

> First, the "full Company contribution" language suggests that the parties intended the employer to cover the full cost of health-care benefits for those employees meeting the age and term-of-service requirements. Keeping in mind the context of the labor-management negotiations identified in *Yard-Man*, we find it unlikely that Plaintiff USW would agree to language that ensures its members a "full Company contribution," if the company could unilaterally change the level of contribution. The CBA has no limitation on the amount of a company contribution and if the Defendants' argument were accepted, the company presumably could lower the contribution to zero without violating this language. Such a promise would be illusory.
>
> Second, the limiting language, "[e]mployees will be required to pay the balance of the health care contribution," follows the provision requiring contributions by those retirees who had not attained the requisite seniority points. From the placement of this language, we can reasonably infer that it did not apply to all retirees, but only to those

> retirees who had not attained the requisite seniority points.
>
> Third, the collective bargaining agreement tied eligibility for health-care benefits to pension benefits. This is another factor indicating that the parties intended the health care benefits to vest upon retirement.

Tackett, 561 F.3d at 490. This Court previously noted that, on its face, the court of appeals' language appears to present a controlling interpretation of the CBA that proves dispositive of at least the vesting issue, if not the issue of capped versus uncapped benefits.

This Court recognized, however, that the next sentence of the court of appeals' opinion suggests that perhaps the Sixth Circuit was not handing down an opinion that proves dispositive outside the Rule 12 context. Following the third point, the *Tackett* panel stated that "[w]e hold that the Plaintiffs' Complaint presented a plausible claim that the parties intended to vest health-care benefits. Accordingly, we hold that the district court erred in granting the Defendants' Rule 12(b)(6) motion on the § 301 claim." *Id.* This language might cast the otherwise essentially conclusory language of the three points (noting that the appeals court did use some qualified language such as "suggests") into a qualified light and presents the issue of whether the Sixth Circuit was interpreting the language as a matter of law or simply saying that it presented a plausible claim for Rule 12(b)(6) purposes and that the vesting issue was left open upon remand.

The Court continues to find the answer to the vesting issue in the next portion of the appellate decision. There, the *Tackett* panel moved from Count I, the § 301 claim, to Count II, the § 502(a)(1)(B) claim. After outlining the considerations relevant to deciding the vesting issue, the Sixth Circuit stated that "[t]he determination above that *the parties intended health-care benefits to vest* carries over to the ERISA § 502(a)(1)(B) claim. The Plaintiffs have therefore presented a plausible claim under ERISA § 501(a)(1)(B)." *Tackett*, 561 F.3d at 490 (emphasis added). Notably, the court of appeals phrased its summary of its prior discussion as an unqualified declaration—"the parties intended health-care benefits to vest"—without linking that summary statement to a mere finding of a plausible claim. By presenting the intended vesting as a fact leading to the result that Plaintiffs had presented a plausible claim, the appellate court pointedly issued a conclusion instead of merely recognizing a credible possibility.

In other words, had the Sixth Circuit said that based on the factual allegations that it must accept as true, it concludes that Plaintiffs have stated a plausible claim for Rule 12(b)(6) purposes, this Court would perhaps consider the vesting issue open on remand. But what the court of appeals did was conclude that the parties intended vesting, which meant that Plaintiffs had of course stated a plausible claim, which meant that they should have survived the Rule 12(b)(6) attack. The distinction is important; it is the difference between saying that the facts *likely* present a viable claim and saying that the facts *do* present a viable claim. This Court therefore stands by its prior conclusion that the Sixth Circuit answered the threshold vesting issue.

As noted in the bench trial decision, however, even if this Court is incorrect in its interpretation of the appellate precedent and the court of appeals did not intend to be dispositive on the issue and reasonably only intended to reach the issue of plausibility of the claim presented, the Court recognizes that there are no facts that would defeat the same conclusions. The linking of eligibility for health care benefits to pension benefits indicates the parties' intent that health care benefits vested upon retirement. *See Reese v. CNH America LLC*, 574 F.3d 315, 322 (6th Cir. 2009) (noting cases in which the tying of eligibility for pension benefits to eligibility for health-care benefits "played a 'key' role in a vesting-of-health-benefits determination"). Regardless of the analytic path, the end result is still the same because, in light of the meaning of the CBA language, this Court must conclude that vesting occurred. Whether the appellate path or this Court's own analysis leads to this conclusion is ultimately irrelevant.

As also noted, however, *what is significant is that the Sixth Circuit did not conclusively state the precise nature of the right to health care benefits that vested* in light of the fact that the appellate panel left the door open for further related factual development and analysis on remand. After summarizing the cap letters and the postponement of the effective date of the caps, the Sixth Circuit stated that "[t]he import of this perpetual postponement and the applicability of these cap letters to the current parties are fact issues that must be resolved by the district court outside of the Rule 12(b)(1) determination." *Tackett*, 561 F.3d at 482 n.1. Thus, as in *Reese*, the core issue in this case is ultimately not "did the benefits 'vest,'" but rather "what does vesting mean in this context." *Reese*, 574 F.3d at 321. The bench trial answered *what* vested—the right to lifetime contribution-free health care benefits—and today the Court is called upon to explain whether what vested includes specific benefits.

What vested for those plaintiffs in Subclasses One through Four was a right to contribution-free lifetime health benefits. What vested for those plaintiffs in Subclass Five was a right to capped lifetime health benefits, contingent on the qualifying plaintiffs paying the above-cap premiums. The Court has not previously explained whether these rights encompass a right to the particular benefits in place at the point of retirement. This Court concludes that they do not, which means that those plaintiffs in Subclasses One through Four should be reinstated into the current versions of the health care plans involved.

While disagreeing with the Court's vesting analysis, Defendants have taken the position that the health care benefits agreements condition exercise of any vested right to benefits on satisfaction of the cost-sharing precondition. Defendants' theory of the case is that there has been continuity in the wholesale assumption of contractual obligations by each owner of the Apple Grove plant, an unbroken line of side agreements that provide contextual meaning to the language of the main agreements. They posit that the side agreements apply to the plant and its retirees either expressly or under a "me too" arrangement. Thus, Defendants reason, the right to the contingent benefits is clear provided a retiree satisfies the condition of making his or her contribution. This is a permissible scheme; a plan may contemplate fully funded, lifetime health care benefits *or* defined-contribution health care benefits. *Wood v. Detroit Diesel Corp.*, 607 F.3d 427, 432 (6th Cir. 2010). The scheme Defendants assert is not, however, the scheme that exists here.

The factual history that the parties present could not be more different. On one side, Defendants have presented largely dubious testimony to support the theory that an unbroken chain of cap letters informs agreements resulting in at most lifetime health care benefits that are contingent on satisfaction of a cost-sharing arrangement. On the other side, Plaintiffs have presented notably more compelling evidence that Defendants have engaged in after-the-fact company scrambling to find a way to impose unilaterally application of cap letters as a cost-savings measure that defies the agreements the caps puncture.

This Court untangled which agreements do in fact apply to the Apple Grove plant and concluded that Defendants have conflated companies and agreements. The pre-August 5, 2005 side agreements to the master agreements do not apply to Apple Grove.

Rather, the intent and effect of the applicable operative documents governing Subclasses One through Four present a lifetime benefits scheme for qualifying retirees and beneficiaries without the cost-sharing Defendants wrongly imposed. The cap letters were not part of these agreements, and even if they were, they were wholly abandoned.

Thus, contrary to Defendants' assertions, there is no unbroken chain of cap letter applicability. The evidence indicates that Apple Grove is a partial "me too" plant, or a "me too, with exceptions" plant, with the ability to accept or reject such side agreements. The evidence also indicates that Local 644 rejected application of these unpublished agreements. Additionally, chief company negotiator Dick expressly rejected cap letter applicability, and when union negotiator Moore attempted to pull a master agreement's pension multipliers into the negotiation, M & G took the position that the master agreement did not control—a position that undercuts reliance on side agreements that the evidence indicates ultimately applied only to the master agreements.

The first cap letter at issue was in 1991. The evidence does not support that this letter was part of the P & I booklet adopted by Local 644. Testimony indicated that the booklets are prepared after the local's vote. There is no testimony that the agreement terms ratified by the local included cap letters, regardless of the subsequent booklet content. The testimony of Wedge, Moore, Hoover, Pyles, and Tackett indicates that the booklet as published set forth the total benefits agreement and that it was both permissible and the unwritten policy and practice of Local 644 to adhere to only that which was published in the booklet. Pyles did not testify to knowledge of a cap obtained from a summary plan description; rather, he testified that he did not know of the cap letter and consequently did not ratify it as part of the local agreement. Hoover made clear that a "me too" local could indeed decline to adopt the side agreement letters, and the testimony of Pyles and Tackett indicate that this was the unwritten policy and practice of Local 644. Even James Kruse, whose deposition testimony generally weighed against Plaintiffs in many respects, recognized the divergent nature of the Apple Grove plant. Absent cap letter incorporation into the local P & I agreement, Shell (and consequently, M & G) could not have assumed the cap letter agreement as a successor as part of its purchase of the plant. There is no basis to conclude that the 1991 summary plan description was presented to local members; in any event, a summary cannot itself constitute the terms of the agreement for § 502(a)(1)(B) purposes. Additionally, as Joint Exhibit No. 2 reflects, the express incorporation of specified Goodyear agreements did not include all Goodyear side agreements, pointing to the conclusion that Shell never initially adopted a cap letter.

Neither the 1994 nor 1997 dealings implemented cap letter applicability to the Apple Grove facility. Although deposition testimony by Dale Wunder supports adoption of Letter H in 1997, this conflicts with the Shell documentary evidence and the more credible testimony of Local 644 members as to what they saw, what they ratified, and how the local approached the incorporation issue. The cap letters at issue were Goodyear cap letters that were not negotiated into the local P & I agreements.

The Court also notes expressly that the evidence concerning the 1997 agreement working copy is not the smoking guns Defendants contend. Instead, as Plaintiffs accurately targeted during trial, this was a Goodyear agreement signed by Goodyear officials who were unable to sign for Shell. The working copy cannot provide a logical basis for cap letter incorporation because when placed in context it is apparent that it was simply that: a copy of an agreement from which the parties could begin their work, with not all parts applicable to the relevant negotiating parties.

In 2000, when Shell sold the Apple Grove plant to M & G, M & G assumed CBA and P & I agreement obligations from Shell. The company's own accountants recognized the retiree benefits as involving no retiree contribution, and there was no booklet incorporation of the cap letter.

It is significant that even if there were at one point cap letter applicability for pre-August 5, 2005 retirees, the parties' dealings extinguished invocation of such retiree contributions. At one point, the union took the position in negotiations that the cap issue was at least potentially relevant, and the union's negotiator recognized the potential applicability of the cap letter. Testimony explained the prophylactic context of Moore's actions and points to strategic maneuvering that removed any possibility of cap letter applicability. M & G disavowed cap letter applications, the effective contribution date of the relevant hypothetically applicable cap letter expired, and the parties proceeded without the possibility [sic] retiree contributions for existing retirees. Even assuming *arguendo* earlier cap letter applicability, the 2000 P & I agreement cut off any chain of cap letters.

Letter of Understanding 2003-6, dated August 9, 2005, and made part of the 2005-2008 agreement that applies to those plaintiffs in Subclass Five, permits implementation of above-cap retiree contributions. The issue is whether that document looks only forward from August 9, 2005, or indeed presents a permissible, memorialized understanding of existing if previously unimplemented side agreements. Defendants would have this Court accept the proposition that the parties continually kicked the can of retiree contributions down the road until it was no longer economically feasible for the company. The evidence is to the contrary.

Letter of Understanding 2003-6 contemplates caps on employer contributions to retiree health benefits and provides that "premium cost sharing charged to retirees will be based on the amount by which total cost for all retiree insurances (medical, life, etc.) exceed the caps set forth in Letter H dated January 1, 2001." The unilaterally implemented letter also states that retirees would not be required to contribute to their premiums until January 1, 2006, and that the retiree premium contribution rates would become effective on that date. Defendants argue that Letter of Understanding 2003-6 and the union's history of attempting to negotiate the effective date of caps and to eliminate the application of Letter H point to the application of the caps to M & G. Defendants posit that Letter of Understanding 2003-6 unambiguously supports the unbroken application of caps to retirees (including preexisting retirees). That document explicitly references the prior 2001 cap letter and provides that "[r]etiree benefits" means "benefits for the Company's preexisting retirees." The trial testimony undercuts deeming Letter of Understanding 2003-6 dispositive in Defendants' favor for pre-August 9, 2005 retirees, spouses, and dependents.

This Court concluded that Letter of Understanding 2003-6 does not rehabilitate broken or reaffirm longstanding cap letter applicability in regard to those plaintiffs in Subclasses One through Four. Despite Defendants' best efforts at rewriting history, the trial evidence places the previously ambiguous Letter of Understanding 2003-6 into its proper context as a going-forward document applicable to individuals in Subclass Five and not a document that also speaks to and clarifies the meaning of the prior agreements governing Subclasses One though Four. The actual context of Letter of Understanding 2003-6 does not include a shared intent to vest only partially funded (*i.e.*, capped employer contributions for) lifetime health care benefits to retirees in the first four subclasses.

Rather, the document's context teaches this Court that application of Letter of Understanding 2003-6 to the plaintiffs in the first four subclasses was a unilateral move by M & G to unlawfully circumvent binding agreements to obtain economic advantages. The addition of Letter of Understanding 2003-6 to the 2005-2008 agreement changes the meaning of what constitutes a "full company contribution" from prior agreements so that the clause no longer means the full cost of health-care benefits for qualifying employees, but rather a capped company contribution to the health-care benefits.

To be certain, the parties' decade-plus history of dealing with the cap letters and contributions does not present a model of negotiating clarity, much less competence. On one side, the union's own negotiator once questioned cap letter application, and at least one if not more Local 644 individuals who lacked binding authority appeared not to understand what was involved in the negotiations and the agreements reached. Defendants fare no better. During the 2000 CBA negotiations, attorney David Dick was the lead or chief negotiator for M & G and stated clearly and unequivocally that the cap letter did not apply. The testimony Defendants intend to explain away Dick's purported "confusion" is simply not credible.

Nor is the testimony of Long helpful in regard to applicability. The curiously under-informed Long expressly relied on Korber, whose testimony this Court found to be incredible time and again, in accepting cap letter applicability. Having had ample opportunity to observe the witness and to consider his testimony, this Court expressly rejects as simply not credible the testimony of Korber, M & G's Human Resources Director, which indicated that M & G had assumed cap letters as part of the preexisting obligations as a successor to Shell. Korber's actions, particularly his communications with the consultant actuaries for M & G, are not consistent with an individual or a company that knew or believed that any cap letter applied. It does not appear to this Court that Korber knew of Letter H until at least 2003, despite his contention that he knew of the cap letter years earlier. Additionally, M & G's own reporting of contribution-free retiree health care benefits (tracking Shell) contradicts the company's post-hoc position that the cap letters always applied and undercuts Korber's self-serving testimony.

In contrast to Korber's testimony, the Court found credible the testimony of Hoover and Moore, who together explained that confusion existed because various locals had different approaches. Potential cap letter application does not equal actual application, and the Court finds that Local 644 never adopted cap letters prior to August 9, 2005, even if union leadership was uncertain about that position at times and had to check in with the home office for assistance during negotiations.

It is also notable that the union lacked the ability to negotiate the vested retiree benefits, a point to which the Court will return below. Previously, this Court noted the examples that Pyles and Tackett did not consent to the parties addressing this permissive subject of bargaining. *There is no evidence any retiree did.* But there is evidence that union negotiators such as Shipley routinely adopted the position that retiree contributions were not on the table. Only individual union members not in the know apparently believed that the cap letters applied, and they lacked authority to bind the union and the retirees.

As the Court has previously noted, the significant confusion by the parties is odd. It appears that various individuals' efforts to circumvent clarity and full disclosure to the public of self-serving arrangements got a bit too clever for nearly all involved until even key actors were confused by what essentially hidden agreements applied in what context. Goodyear master agreement shenanigans did not necessarily filter down to the me-too with exceptions plant involved here, but the various actors in the history of the Apple Grove plant appear to have been rarely well informed. This is no way to run a business or a union. Companies should know what they are buying (obligations and all), investors should know what company liabilities exist, unions at all levels should be clear on what they are negotiating, and retirees should know what agreements they are ratifying.

Plaintiffs have presented ample evidence involving M & G's counsel, actuaries, and human resources personnel that no one thought that there was a cost-sharing plan in place for Apple Grove retirees for years until it became advantageous to the company. Multiple M & G actors appear at best uncertain of what benefits liabilities they assumed when they purchased the plant and another expressed a position wholly adverse to cap letter applicability. Those who testified supporting cap letter applicability wholly lacked veracity. Ultimately, this litigation presents a scenario in which a company faced with ballooning benefits costs uncovered a longshot means by which it could attempt to retroactively rewrite agreements to reduce costs—and then the company turned to actuaries to inform the purported scope of the cap letter, apparently basing the claimed scope on the amount of money that could be saved if the company prevailed. This is unlawful.

The issue of liability that once appeared complicated during summary judgment proceedings became far more clear as a result of the trial. And despite real conflicts in evidence, including each party's own at times contradictory evidence, the greater weight of the evidence favors Plaintiffs. For example, the evidence indicates that Dick, the company's chief negotiator and someone with the clear authority to bind the company, rejected cap letter applicability. The company attempts to insulate itself by dubiously disowning his comments and authority, while concurrently pointing to Long's testimony as supporting applicability. Defendants cannot reject one of their negotiators as misinformed and turn to another uninformed negotiator to achieve the continuity of applicability that they seek to prove.

In contrast, the evidence indicates that those with the authority to bind the union disputed cap letter applicability. The company insists that the Court should credit instead those local members who lacked such binding authority. The evidence indicates that there were no ERISA notices given here, that the retiree benefits issue was not a subject of bargaining, and that the retirees did not consent to negotiations on the issue. The company asks this Court to ignore these facts. The evidence indicates, however, that Defendants developed the contribution scheme as a self-serving response to economic realities and in contravention of the negotiations conducted and applicable agreement reached. This is impermissible under the controlling law.

The plan participants' understanding of what they ratified reflects the benefits agreements reached. This Court therefore concluded: (1) the relevant agreements set forth a scheme in which the employer is responsible for covering the full cost of healthcare benefits for those employees meeting the age and term-of-service requirements in Subclasses One through Four; (2) qualifying individuals in Subclasses One through Four are entitled for the company to cover the full cost of the health benefits, without these plaintiffs being required to pay premium contributions; (3) the contribution-free health benefits for individuals in Subclasses One through Four exist despite the fact that various inapplicable side agreements between other parties deferred the eventual collection of retiree contributions; (4) for the plaintiffs in Subclasses One through Four, Defendants have had no right to collect the premiums charged and have impermissibly terminated benefits for the failure to make such a contribution; and (5) the cap letter applied to Subclass Five, the members of which Defendants could permissibly require to make above-cap contributions. These conclusions speak to the vesting of the right to benefits and not to the benefits themselves.

Having summarized how it determined both that vesting occurred and that the right to lifetime contribution-free health care benefits is what vested, this Court turns to the only real issue that remains after deciding that a permanent injunction is warranted: Should Plaintiffs be reinstated to the pre-2007 versions of the plans? The answer to this question defines part of the scope of the injunction.

There is no real dispute involving two of the three plans involved. The parties apparently agree that the Medical Necessity Plan has remained either unchanged or essentially unchanged so that Plaintiffs do not object to the reinstatement of those dropped from Medical Necessity Plan coverage back into the existing Medical Necessity Plan. Nor do Plaintiffs object to the reinstatement of anyone dropped from the no-longer-existing Catastrophic Plan into the Comprehensive Plan. At the February 15, 2012 hearing, counsel for Plaintiffs indicated that it appears that only one plaintiff falls within this category and that Plaintiffs have no objection to that individual being placed into the Comprehensive Plan.

The issue is into what version of the Comprehensive Plan does the former Catastrophic Plan member and anyone dropped from or currently in the Comprehensive Plan fit. To support their respective positions, both sides direct this Court's attention to the aforementioned *Reese v. CNH America LLC*, 574 F.3d 315, although Plaintiffs emphasize the subsequent district court proceedings that grew out of the Sixth Circuit's remand. Plaintiffs argue that vesting fixed in time at retirement with irreducible benefits, which would mean that reinstatement only into the pre-2007 Comprehensive Plan is proper. Defendants counter that assuming *arguendo* that a right to lifetime contribution-free health care benefits vested, no right to the pre-2007 version of the plan vested.

Curiously, neither side presented much in the way of a substantive case on this issue.[2] For example, when this Court asked Plaintiffs' counsel where in the CBA was there language vesting specific benefits, counsel answered that there was not and only generally directed this Court to the P & I agreements. The P & I agreements set out *some but not all* coverage, and counsel did not identify for the Court *any* specific

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[2] The parties devoted oral argument to whether reinstatement into the prior plans was problematic or even possible. This issue is ultimately a red herring. Any administrative or financial difficulty that would accompany such reinstatement cannot inform the predicate question of whether such reinstatement is called for under the agreements and law involved. If a right to these plans vested, then this Court does not care in this context whether the fulfillment of that right would be difficult.

language in those documents. This approach presents a problem for Plaintiffs for two reasons.

First, the Court is not obligated to guess at what a party's argument is, guess at what an opposing argument is, and then rule on the merits of arguments that the parties have not actually presented. *Cooey v. Kasich*, Nos. 2:04-cv-1156, 2:09-cv-242, 2:09-cv-823, & 2:10-cv-27, 2011 WL 5326141, at *12 n.5 (S.D. Ohio Nov. 4, 2011) (cautioning counsel that "given that this Court is in the business of resolving disputes and not charged with fashioning arguments from nearly random asides, some might argue that informing the Court of the specific arguments asserted and providing supporting authority for the positions taken would be a more prudent litigation strategy"); *Cooey v. Strickland*, No. 2:04-cv-1156, 2009 WL 4842393, at *99 (S.D. Ohio Dec. 7, 2009) (explaining that "this Court cannot fashion an argument that has not been presented to it and then consider that argument as the basis for [injunctive relief]"); *Lyon v. Yellow Transp., Inc.*, No. 2:08-cv-464, 2009 WL 1604807, at *15 (S.D. Ohio June 8, 2009) ("This Court is in the business of resolving the legal arguments presented to it, not in creating a party's inferred argument for him and then passing judgment on it.").

Second, Plaintiffs' strategy does not readily or necessarily align the instant case with the case on which they apparently primarily rely, *Reese v. CNH Global N.V.*, No. 04-70592, 2011 WL 824585 (E.D. Mich. Mar. 3, 2011). In that district court opinion, the trial judge had before it multiple summary judgment motions and other filings, all of which involved an extensive record consisting of documents that it appears the parties actually discussed. Despite facts strikingly similar to the instant case, the post-remand *Reese* is perhaps of limited value in resolving today's dispute. The language of the agreements at issue in *Reese* was important, as was the parties' course-of-dealing related to benefit plan modifications. The parties in the case *sub judice* have failed to argue the specifics of similar evidence in regard to the motion for a permanent injunction.

There is nevertheless value in the *Reese* proceedings to the instant case. Following the Sixth Circuit's remand in *Reese v. CNH America LLC*, 574 F.3d 315, the retirees seeking benefits filed a petition for rehearing with the court of appeals. The appellate court denied rehearing in *Reese v. CNH America LLC*, 583 F.3d 955 (6th Cir. 2009). One circuit judge, the author of the prior *Reese* appellate opinion, wrote a separate concurrence in which he made several notable points. First, he explained that in regard to the fixed versus changeable benefits debate in *Reese*, "there was evidence that both sets of parties had treated the benefits as changeable with respect to individuals who had retired under prior CBAs." *Id.* at 955 (Sutton, J., concurring). The judge also explained that "it blinked reality to say that the 'vested' benefits were forever unchangeable, given that the parties had allowed them to change, even in some ways that did not favor prior retirees." *Id.* at 956. Finally, in discussing the state of the record in regard to whether the prior retirees had approved benefits changes, the appellate judge opined that under the panel's remand,

> the parties are free to develop evidence on this point. That evidence may show that plaintiffs should win as a matter of law because the prior retirees either approved the changes or they did not diminish the nature of the benefits package that existed upon retirement. Or it may show that CNH should be allowed to make reasonable modifications to the health-care benefits of retirees, consistent with the way the parties have interpreted and implemented prior CBAs containing similar language.

Id. This interpretation of the remand and relevant law indicates that modifications are appropriate when (1) retirees approve of the changes, (2) the changes do not diminish the *nature* of the benefits (as opposed to any particular benefit itself), or (3) a company makes reasonable changes under a prior course of dealing approach.

On remand, the *Reese* district court treated this construction of the appellate panel's decision as definitive, despite no other panel judge joining the author of the concurrence. 2011 WL 824585, at *7 n.8 (stating that the concurrence shall be treated as clarifying the panel's original decision). This approach was perhaps necessitated by the wording of the panel's remand, which simply provided that "we leave it to the district court to decide how and in what circumstances [the company] may alter such benefits-and to decide whether it is a matter amendable to judgment as matter of law or not." *Reese*, 574 F.3d at 327. The important point here is that the Sixth Circuit did not remand for a determination of *whether* modifications could occur, but rather for inquiry into *how* and *under what circumstances* modifications could occur. Off the table was the vesting of irreducible benefits. That possible modifications were permitted was now established.

The instance [sic] case is similar to but not the same as *Reese*. The Sixth Circuit found that the *Reese* CBA did not provide fixed and irreducible benefits, although it did provide a vested right to contribution-free benefits. The CBA language at issue here tracks these conclusions. If the CBA in *Reese* did not accomplish such comprehensive vesting, then the essentially analogous CBA here cannot. The extrinsic evidence here, as in the *Reese* trilogy of cases, thus provides the next step in ascertaining the parties' intent.

Although questioning some of the appellate court's conclusions, the *Reese* district judge proceeded on remand to analyze the specific provisions of the relevant agreements in light of the parties' past dealings. That judicial officer concluded that the only circumstances under which the Reese parties allowed modifications to employee health care benefits to occur was through a collectively bargained agreement. 2011 WL 824585, at *10. Thus, the company could only change benefits through an agreement with the union.[3] *Id.*

Plaintiffs have not put forth evidence to a similar conclusion here. The parties submitted declarations at the hearing that addressed essentially the irreparable harm issue and what benefits plan permutations provided. At trial, evidence repeatedly indicated that the union could not negotiate retiree benefits (even if some union individuals were at times unclear on this point). But modifications to the benefits plan details occurred over time. This indicates no vesting of fixed plan benefits and that the plan was susceptible to reasonable changes. *See Reese*, 574 F.3d at 326 ("We know that the contracting parties viewed the 1995 CBA's benefits as subject to some changes because they changed them."). Because the union lacked the ability to negotiate over the vested retiree benefits, the fact that modifications occurred places this case into a context where changes could and did occur absent company-union negotiation.

There is no evidence that the retirees actively approved of any changes; at best they evinced silent acquiescence to positive modifications or pass-throughs during the course of the me-too relationship. A change that benefits retirees is still a change, even

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[3] The district judge also explained that a shutdown agreement explicitly addressed the ability to modify select retirees' benefits, but no such agreement is involved in the instant case. *Reese*, 2011 WL 824585, at *10.

if "[t]hat sort of change would not break any promises to provide irreducible benefits for life." *Reese*, 574 F.3d at 325. Not all of the modifications at issue here are such upgrades, but the takeaways are nonetheless that the details of the benefits were not fixed and that no individualized negotiations controlled the modifications.

The changes about which Plaintiffs now complain do not diminish the *nature* of the benefits, even if the changes alter the *implementation* of the benefits. Plaintiffs come close to conceding a portion of this proposition when they characterize the change of a \$1.00 copay to a \$2.00 copay as a pass-through that presents a *de minimus* change that does not constitute a reduction in benefits. (ECF No. 206, at 10.) But that *is* a reduction, even if it may be meager to some individuals. The key point is not the limited effect of the reduction, but that the reasonable reduction does not disturb the essential nature of the benefit provided.[4] A nominal copay is a nominal copay—and its implementation here worked a reduction in benefits that the retirees accepted.

Prior particularized benefits have evolved post-2006 without abandoning the core nature of the benefits. For example, the fact that a covered individual

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[4] Reasonableness is key. For example, an increase from a \$1.00 copay to a \$10,000.00 copay would reveal the modification to be nothing more than an improper end-run around providing a meaningful benefit.

still gets a limited copay for prescription drugs, even if the copay has evolved from $4 to $10, means that the nature of the core benefit is left untouched while the specific implementation of that benefit now costs those covered more. This is an acceptable result under the law. Of course, the key is the reasonableness of any modification.

Despite the premiums issue, however, M & G to its credit has made reasonable changes implemented under a prior course of dealings approach. In *Reese*, the Sixth Circuit explained that "[c]onsistent with the parties' practices, nothing in the text of [the CBA] said that health-care coverage would be fixed and irreducible into perpetuity for all employees who retired under it." 574 F.3d at 325. This Court invited Plaintiffs' counsel to direct this Court to where the CBA indicates fixed and irreducible coverage into perpetuity and was told in response that the CBA does not. Telling the Court to search the P & I agreements for possible support in that regard is insufficient proof of Plaintiffs' position. As in *Reese*, the context here indicates that "the CBA—unless it says otherwise—should be construed to permit modifications to benefits plans that are 'reasonably commensurate' with the benefits provided in the [CBA]." *Id.* at 326.

Also here, as in *Reese*, "[n]or did the statements of company representatives to retirees show that these benefits were unalterable as a matter of law." *Id.* Plaintiffs should have directed this Court to such statements and no doubt would have if they could have. They did not.

Ultimately, then, this case echoes the Sixth Circuit's summary of the *Reese* context in which "the retirees have a vested right to receive health care benefits for life." *Id.* at 327. As in *Reese*, the proposition that "these benefits must be maintained precisely at the level provided for in the [CBA], * * * is not supported by the [CBA], extrinsic evidence provided by the parties or common sense. [The company], in short, cannot terminate all health-care benefits for retirees, but it may reasonably alter them." *Id.* Earlier in its opinion, the Sixth Circuit explained the rationale underlying the changeable nature of a vested right to benefits:

> The language of health-care provisions, as the 1998 CBA illustrates, generally does not contain the kind of precision that characterizes a pension plan. "Employees," it says, "who retire under the Case Corporation Pension Plan for Hourly Paid Employees after 7/1/94, or their surviving spouses eligible to receive a spouse's pension under the provisions of that Plan, shall be eligible for" health-care benefits. JA 1288. It is one thing to say that this kind of language, when tied to eligibility for a pension plan, prevents an employer from *terminating* the benefits—which we have held here. It is quite another to say that an employer may not *alter* the benefits in any way, particularly when the parties have a history of doing just that and when common experience suggests that health-care plans invariably change over time, if not from year to year. *See Diehl v.*

> *Twin Disc, Inc.*, 102 F.3d 301, 309 (7th Cir. 1996) (distinguishing a promise to provide "lifetime insurance benefits" from "decid[ing] precisely what those benefits are").

Id. at 324. Such guidance informs today's decision.

Plaintiffs' right to contribution-free benefits vested, but as *Reese* teaches in construing similar contractual language, no specific benefit plan details vested. The parties' course of dealing reveals that the specific details of the health care benefits were and are changeable and that retirees accepted modifications in the past. The past informs the present, so that this Court must conclude that reinstatement into the current version of the health care plans is appropriate, subject to any concession on the part of Plaintiffs such as in regard to the Catastrophic Plan member who will be reinstated into the Comprehensive Plan without Plaintiffs' objection.

III.

For the foregoing reasons, the Court **GRANTS** Plaintiffs' motion for a permanent injunction, but declines to adopt the exact scope of the injunction requested. (ECF No. 196.) The Court therefore **ORDERS**:

(1) within forty-five days following the filing of this Opinion and Order, Defendants shall reinstate all retirees, their spouses, and surviving spouses or other dependents who were enrolled in the Medical Necessity Plan back into the Medical Necessity Plan;

(2) within forty-five days following the filing of this Opinion and Order, Defendants shall reinstate all retirees, their spouses, and surviving spouses or other dependents who were enrolled in the Catastrophic Plan into the current Comprehensive Plan;

(3) within forty-five days following the filing of this Opinion and Order, Defendants shall reinstate all retirees, their spouses, and surviving spouses or other dependents who were enrolled in the Comprehensive Plan into the current Comprehensive Plan;

(4) Defendants shall maintain plan membership for all retirees, their spouses, and surviving spouses or other dependents who are currently enrolled in either the Medical Necessity Plan or the Comprehensive Plan; and

(5) as of the date of the filing of this Opinion and Order, Defendants shall cease collecting from and charging any premiums to Plaintiffs.

IT IS SO ORDERED.

561 F.3d 478

Hobert TACKETT, et al., Plaintiffs-Appellants,
v.
M & G POLYMERS, USA, LLC, et al.,
Defendants-Appellees.

Nos. 07-4515, 07-4516.

United States Court of Appeals,
Sixth Circuit.

Argued: Jan. 22, 2009.
Decided and Filed: April 3, 2009.

ARGUED: Renate Klass, Martens, Ice, Klass, Legghio & Israel, Royal Oak, Michigan, Robert E. Rickey, Cook, Portune & Logothetis, Cincinnati, Ohio, for Appellants. Deborah Shannon Davidson, Morgan, Lewis & Bockius, Chicago, Illinois, for Appellees. ON BRIEF: Renate Klass, Stuart M. Israel, Martens, Ice, Klass, Legghio & Israel, Royal Oak, Michigan, Robert E. Rickey, David M. Cook, Cook, Portune & Logothetis, Cincinnati, Ohio, for Appellants. Deborah Shannon Davidson, Philip A. Miscimarra, Morgan, Lewis & Bockius, Chicago, Illinois, for Appellees.

Before: MARTIN and MOORE, Circuit Judges; GWIN, District Judge.*

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* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

PER CURIAM.

The Plaintiffs United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("USW") and Hobert Tackett, Woodrow W. Piles, and Harlan B. Conley ("Retiree Plaintiffs") separately appeal the district court's dismissal of their case under Federal Rule of Civil Procedure 12(b)(1) and (b)(6).

The Plaintiffs alleged that, under their collective bargaining agreement ("CBA"), the Defendant M & G Polymers, USA ("M & G") promised them vested health-care benefits. When Defendant M & G announced it would begin requiring retiree contributions to health-care costs, the Plaintiffs sued. In addition to suing M & G, the Plaintiffs also sued the M & G-sponsored health plans that Retiree Plaintiffs receive their benefits from: the M & G Comprehensive Medical Benefits Program for Employees and Their Dependents, the M & G Catastrophic Medical Plan, the M & G Medical Necessity Benefits Program of Hospital, Surgical, Medical, and Prescription Drug Benefits for Employees and Their Dependents, and the M & G Major Medical Benefits Plan (collectively, with Defendant M & G, "Defendants").

In resolving this appeal, we must decide two main issues: (1) whether, under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), a district court must find that a violation of a collective bargaining agreement has occurred before it can exercise jurisdiction; and (2) whether, under this Circuit's *Yard-Man* analysis, *UAW* v. *Yard-Man*, 716 F.2d 1476, 1479 (6th Cir. 1983), the Plaintiffs have sufficiently established a right to vested healthcare benefits to survive a motion to dismiss under Rule 12(b)(6) by relying on CBA language promising a "full Company contribution" to these benefits.

Because we hold that (1) a violation is not a prerequisite to jurisdiction under § 301 and because (2) the Plaintiffs have sufficiently shown an intention to vest healthcare benefits to survive a motion to dismiss, we **REVERSE** and **REMAND**.

I. Standard of Review

We generally review a district court's ruling under Rule 12(b)(1) and 12(b)(6) *de novo*. *Nichols v. Muskingum College*, 318 F.3d 674, 677 (6th Cir. 2003) (citations omitted); *Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007). Courts have, however, observed an exception to this *de novo* standard of review under Rule 12(b)(1). When Congress statutorily confers subject-matter jurisdiction, it can require that certain prerequisites be met before a federal district court can exercise jurisdiction. *See*, *e.g.*, 28 U.S.C. § 1332 (establishing jurisdiction over cases between "citizens of different States"). When Congress establishes a jurisdictional prerequisite, a district court may admit extrinsic evidence and resolve disputed facts to decide if the asserted claim satisfies the jurisdictional prerequisite. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). If a district court considers and resolves facts in deciding a Rule 12(b)(1) motion, we review those findings for clear error. *Nichols*, 318 F.3d at 677. Aside from the resolution of jurisdictional prerequisites, a district court must generally confine its Rule 12(b)(1) or 12(b)(6) ruling to matters contained within the pleadings and accept all well-pleaded allegations as true. *Gentek Building Products*, *Inc. v. Sherwin-Williams*, 491 F.3d 320, 330 (6th Cir. 2007).

II. Background and Procedural Posture

Before their retirement, the Retiree Plaintiffs worked at the Point Pleasant Polyester Plant (the "Plant") in Apple Grove, West Virginia. At that location, Plaintiff USW, or its predecessor union, bargained on behalf of the Plant's employees. The Plant has changed ownership several times, and M & G now owns the plant.

In December 2006, M & G announced that it would begin requiring retirees to contribute to the cost of their health-care benefits. After Defendant M & G's announcement, Retiree Plaintiffs, as putative class representatives, and USW sued under § 301 of the LMRA and under the Employee Retirement Income Security Act ("ERISA") §§ 502(a)(3) and 502(a)(1)(B), 29 U.S.C. § 1132. Following the district court's dismissal, the Plaintiffs appealed separately, with USW challenging the district court's ruling on § 301 and the Retiree Plaintiffs challenging the ruling on both § 301 and ERISA §§ 502(a)(3) and 502(a)(1)(B). The appeals were consolidated for submission to this Court.

In their Complaint, the Plaintiffs pointed to language in the November 6, 2000 CBA between M & G and USW that governed retirees' entitlement to health-care benefits:

> Employees who retire on or after January 1, 1996 and who are eligible for and receiving a monthly pension under the 1993 Pension Plan * * * whose full years of attained age and full years of attained continuous service * * * at the time of retirement equals 95 or more points *will receive a full Company contribution towards the cost of [health-care] benefits* * * * * Employees who have less than 95 points at the time of retirement will receive a reduced Company contribution. The Company contribution will be reduced by 2% for every point less than 95. Employees will be required to pay the balance of the health care contribution, as estimated by the Company annually in advance, for the [health care] benefits * * * * Failure to pay the required medical contribution will result in cancellation of coverage.

(emphasis added). According to the Plaintiffs, this "full Company contribution" language shows a vested right to health-care benefits: those employees meeting the age and term-of-service qualifications are entitled to fully-covered health care benefits and those falling below these qualifications would receive reductions from full coverage as set out in the plan. The Retiree Plaintiffs also sought to represent surviving spouses whose benefits were affected by Defendants' alleged breach. The Plaintiffs said that the Defendants unilaterally set the "contribution" at a level below full coverage violating the above-quoted language.

The Defendants moved to dismiss the Complaint under Rule 12(b)(1) and 12(b)(6). The Defendants argued that, § 301, which confers subject-matter jurisdiction in federal district courts in "[s]uits for violation of contracts," 29 U.S.C. § 185(a), required that a plaintiff show a "violation" before a district court could exercise subject-matter jurisdiction. In the alternative, the Defendants moved to dismiss saying that the language quoted by the Plaintiffs did not establish a vested right to health-care benefits.

In moving to dismiss, the Defendants submitted evidence of several side letter agreements. Defendants said that these side letters were incorporated by reference into the CBA that the Plaintiffs sued under and that the side letters cap the amount of the employer's contribution to the cost of health-care benefits. Responding, the Plaintiffs said that these side cap letters were not part of the collective bargaining agreement that the Plaintiffs sued under. Resolution of this disputed issue, however, required consideration of materials extrinsic to the pleadings.[1] The Defendants said that the district court could consider this extrinsic material under Rule 12(b)(1) because the court found a lack of a violation, which was a jurisdictional prerequisite.

The district court agreed with the Defendants and held that the showing of a collective bargaining agreement violation was a prerequisite to jurisdiction: "Absent a breach by Defendants, this Court lacks jurisdiction over the § 301 claim." *Tackett v. M & G Polymers USA*, *LLC.*, 523 F. Supp. 2d 684, 691 (S.D. Ohio 2007). The court then admitted and weighed the extrinsic evidence on the side letters to decide whether M & G breached the collective

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[1] In support of the contention that the side letters were incorporated into the CBA, the Defendants submitted evidence of the collective bargaining history at the Plant dating back to 1991. A series of collective bargaining agreements has been in force at the Plant, with each typically lasting around three years before renegotiation. The first letter agreement, signed contemporaneously with the 1991-1994 collective bargaining agreement, was adopted "for purposes of conforming with the new Financial Accounting Standard Board (FASB) accounting requirement" that required accrual accounting of healthcare benefits. This new requirement hurt a company's balance sheet performance if the company had no cap on its health-care costs. While signed in 1991, the caps were not to take effect until July 1, 1997. Concurrent with the 1994-1997 collective bargaining agreement, another cap letter postponed the effective date of the caps to 2004. The import of this perpetual postponement and the applicability of these cap letters to the current parties are fact issues that must be resolved by the district court outside of the Rule 12(b)(1) determination.

bargaining agreement.[2] *Id.* at 690. Ultimately, the district court concluded that the Defendants did not breach the CBA, and that it lacked jurisdiction.

As an alternative to its dismissal for lack of jurisdiction, the district court then assumed for argument purposes that it had jurisdiction over the Plaintiffs' claims for relief and addressed the Defendants' 12(b)(6) motion to dismiss. Because the LMRA § 301 and the ERISA § 502(a)(1)(B) claims both turned on whether the Plaintiffs' benefits were vested, the district court considered these claims together and held that the "full Company contribution" language did not plausibly state a claim for vested healthcare benefits.

The district court additionally granted the Defendants' 12(b)(6) motion directed at the Plaintiffs' ERISA fiduciary claim, holding that Plaintiffs "failed to plead facts" supporting this claim. *Id.* at 696.

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[2] For example, the Plaintiffs submitted to the district court a letter written by David Dick, an attorney who represented M & G in labor negotiations in 2000. The letter said that the applicability of one of the cap letters to "M & G is less than clear. In fact, the Company believes it does not apply to M & G." During this litigation, however, Dick submitted a declaration saying he "was not familiar with details or history concerning any side letters." In resolving the Defendants' Rule 12(b)(1) motion, the district court accepted Dick's characterization of the letter and found that this letter "was the result of a lack of understanding on [Dick's] part of the history of cap incorporation." *Tackett*, 523 F. Supp. 2d at 690.

III. Rule 12(b)

III.A. Rule 12(b)(1)

Our review of the district court's dismissal under Rule 12(b)(1) turns on whether a plaintiff must establish the breach of a collective bargaining agreement as a prerequisite to jurisdiction under § 301 of the LMRA.[3] The LMRA confers subject-matter jurisdiction in federal district courts in "[s]uits for violation of contracts." 29 U.S.C. § 185(a).[4] Whether the language in a statute like § 301 is a jurisdictional prerequisite or merely an "'essential ingredient[ ] of a federal claim for relief'" is sometimes a "'close question.'" *Arbaugh*, 546 U.S. at 503, 516, 126 S. Ct. 1235

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[3] The Plaintiffs also claimed that the district court had federal-question subject-matter jurisdiction under 28 U.S.C. § 1331. Here, the district court dismissed the claim because it failed to meet the requirements of § 301. We, however, ultimately conclude that the court had jurisdiction under § 301. Accordingly, we need not address whether 28 U.S.C. § 1331 could support jurisdiction over the Plaintiffs' claims if the claims had failed to meet a jurisdictional requirement of § 301.

[4] In full, § 301 says,

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

(quoting *Da Silva v. Kinsho Intern. Corp.*, 229 F.3d 358, 361 (2nd Cir. 2000)).

If a violation is not a prerequisite to jurisdiction, then, to survive a Rule 12(b)(1) motion, the Plaintiffs need not show a violation but merely that their violation claim is "colorable." *Id.* at 513, 126 S. Ct. 1235 (citing *Bell v. Hood*, 327 U.S. 678, 681-85, 66 S. Ct. 773, 90 L. Ed. 939 (1946)). Additionally, if a violation is not a prerequisite to jurisdiction, the district court erred in admitting and weighing evidence extrinsic to the pleadings in resolving the Rule 12(b)(1) motion.

III.A.1. The Distinction between a Jurisdictional Prerequisite and an Essential Ingredient of a Federal Claim to Relief

In finding that it did not have jurisdiction over Plaintiffs breach of contract claim, the district court relied upon *Bauer v. RBX Industries, Inc.*, 368 F.3d 569 (6th Cir. 2004). Giving *Bauer* an exceedingly broad reading, the district court held that plaintiffs in a § 301 action must demonstrate a contractual violation to establish jurisdiction. *Tackett*, 523 F. Supp. 2d at 691-92. The district court's interpretation of *Bauer* was over-broad. More importantly, the Supreme Court and this Court have both subsequently rejected the district court's requirement.

After the *Bauer* decision, the Supreme Court clarified the distinction between a jurisdictional prerequisite and an essential ingredient of a federal claim to relief and provided a test that courts must use to determine what showing is required to establish jurisdiction and what showing is required to establish the merits of their claims. In *Arbaugh*, the plaintiff sued for alleged violations of Title VII. *Id.* at 503-04, 126 S. Ct. 1235. Title VII says that "[e]ach * * * United States district court * * * shall have jurisdiction of actions brought under this subchapter." *Id.* at 505-06, 126 S. Ct. 1235 (citing 42 U.S.C. § 2000e-5(f)(3)). Title VII "makes it unlawful 'for an employer * * * to discriminate,' * * * on the basis of sex." *Id.* at 503, 126 S. Ct. 1235 (citing 42 U.S.C. § 2000e-2(a)(1)). Separately, Title VII defines "employer" to only include those employers with "fifteen or more employees." *Id.* at 504, 126 S. Ct. 1235 (citing 42 U.S.C. § 2000e(b)). The central issue in *Arbaugh* was whether this statutory "employee-numerosity requirement" was a "jurisdictional" prerequisite, or merely an "essential ingredient[ ]" of the plaintiff's claim. *Arbaugh*, 546 U.S. at 513, 126 S. Ct. 1235.

In resolving this central issue, the Arbaugh Court first criticized the frequent sloppiness in courts' treatment of motions to dismiss, noting that courts too often "conflated" Rule 12(b)(6) merits motions with Rule 12(b)(1) jurisdictional motions. *Id.* at 511, 126 S. Ct. 1235. To remedy this, the Supreme Court established a bright line rule:

> If the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not

> be left to wrestle with the issue * * * * But *when Congress does not rank a statutory limitation on coverage as jurisdictional*, *courts should treat the restriction as non-jurisdictional in character.*

Id. at 515-16, 126 S. Ct. 1235 (citations omitted) (emphasis added).

In determining whether Congress intended courts to treat the employee numerosity requirement as jurisdictional, the Supreme Court noted that Title VII gave no indication that a district court should raise and resolve the employee-numerosity requirement on its own. *Id.* at 514, 126 S. Ct. 1235.

In concluding that Congress did not intend to rank the employee-numerosity requirement as jurisdictional, the Court identified two additional practical considerations that supported its holding: the discretion that district courts enjoy when their fact-finding overlaps with the merits of the claims and judicial efficiency. *Id.* A district court can resolve disputed facts that underlie a jurisdictional prerequisite in a 12(b)(1) motion, but when the prerequisite is intertwined with the merits, this fact-finding undercuts the jury's role as the "proper trier of contested facts." *Id.* Additionally, because subject-matter jurisdiction defects can be raised at any stage of litigation, and because a lack of subject-matter jurisdiction requires dismissal of pendent state-law claims, a district court may be required to dismiss state claims after expending considerable judicial resources. *Id.*

III.A.2. Application of Arbaugh in the Sixth Circuit

After oral argument in this case, this Court reexamined *Bauer* and its § 301 jurisprudence in light of the *Arbaugh* decision. *Winnett v. Caterpillar, Inc.*, 553 F.3d 1000, 1004-07 (6th Cir. 2009). In *Winnett*, this Court overruled the *Bauer* decision and held that "the existence of a union contract is an element of Plaintiffs' merits claim, not a limit on federal subject-matter jurisdiction." *Id.* at 1007.

In reaching this decision, the *Winnett* Court started with an examination of Congressional intent. *Id.* at 1005-06 ("*Arbaugh* now tells us to ask: Did Congress 'clearly state[ ],' 546 U.S. at 515, 126 S. Ct. 1235, that the existence of a union contract is a jurisdictional prerequisite for a Section 301(a) claim?"). In determining whether Congress intended a contract to be a jurisdictional prerequisite, the Court noted that the only reference to jurisdiction in § 301 was to personal jurisdiction and in that reference the statute had not "impose[d] new barriers" to federal courts, but had "ease[d] access." *Id.* at 1006. Additionally, § 301 includes all of the prima facie elements of the cause of action in the jurisdiction-conferring provision. The Court reasoned that, if a contract is a jurisdictional prerequisite, then likely each other prima facie requirement in § 301 functions as a jurisdictional prerequisite. The *Winnett* Court was "reluctant to conclude that Congress intended to create a cause of action that has no non-jurisdictional elements." *Id.*

After finding no indication that Congress "clearly state[d]" that courts should treat a contract as jurisdictional, the Court went on to address the "real-world considerations" associated with treating a contract as jurisdictional. *Id.* This additional analysis after examining Congressional intent was drawn from the *Arbaugh* decision: "*Arbaugh* also tells us not to just look at labels but also pragmatically to consider the consequences of giving a jurisdictional label to an element of a cause of action." *Id.* The *Winnett* Court then pointed out that, when a district court finds a jurisdictional defect, the court must dismiss even meritorious pendent state-law claims, despite the time and resources the court and parties have expended on the case. *Id.* at 1007 (noting the "wasteful inefficiencies on the parties or the courts").

As directed by the Supreme Court in *Arbaugh* and the *Winnett* Court, we conclude that Congress did not "clearly state[ ]" an intent to treat the violation language as jurisdictional. *See id.* at 1005-06. Additionally, after examining the "real-world considerations" of labeling the violation language as jurisdictional, we find the district court's interpretation would wreak havoc. *See id.* at 1006.

The *Winnett* Court has already determined that Congress did not intend the "contract" language in § 301 as jurisdictional. We agree and hold that Congress did not "clearly state[ ]" that courts should treat the violation language as jurisdictional for the same reasons identified by the *Winnett* Court. The language of § 301 suggests that a violation is not a prerequisite to jurisdiction: "Suits *for violation* of contracts * * * may be brought in any district court of the United States having jurisdiction of the parties * * * * " 29 U.S.C. § 185(a) (emphasis added.) If we were to consider a violation a jurisdictional prerequisite, Congress would be requiring a district court to determine whether a violation had occurred before it could decide at the merits stage whether a violation had occurred. This cannot be the result intended by Congress with the use of the violation language.

This conclusion is bolstered here, even more so than in *Winnett*, by the "real-world considerations" associated with labeling a violation as a jurisdictional prerequisite. *Winnett*, 553 F.3d at 1006. First, the LMRA gives the district court jurisdiction over "[s]uits *for* violation of contracts." Section 301 does not limit jurisdiction to "suits where a violation of contract has been established." The district court will consider the same set of underlying facts when deciding if there was a violation to support jurisdiction and when deciding if the Plaintiffs should ultimately succeed on the merits of their claim. Any merits-related fact-finding by a district court during a jurisdictional determination undercuts the jury's traditional role as "the proper trier of contested facts." *See Arbaugh*, 546 U.S. at 514, 126 S. Ct. 1235 (citations omitted).

Second, as both *Winnett* and *Arbaugh* noted, "when a court lacks subject matter jurisdiction over a claim, it must immediately dismiss not just that claim but any pendent state-law claims as well—no matter how late in the case the district or appellate court identifies the jurisdictional defect." *Winnett*, 553 F.3d at 1007 (citing *Arbaugh*, 546 U.S. at 514, 126 S. Ct. 1235). For example, a case may go all the way to a jury trial on a § 301 claim and pendent state-law claims. If the jury finds that the state-law claims are meritorious but also that a plaintiff did not establish a violation of a labor contract, the court would be required to dismiss these meritorious state-law claims after expending considerable judicial resources on their adjudication. This required dismissal may "impose * * * wasteful inefficiencies on the parties or the courts." *Id.*

These inefficiencies become exacerbated in the context of a § 301 action. In *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 502, 82 S. Ct. 519, 7 L. Ed. 2d 483 (1962), the Supreme Court addressed concurrent federal and state court jurisdiction over claims for a violation of a collective bargaining agreement. The Court held that state courts have concurrent jurisdiction over § 301 claims. *Id.* at 521-22, 82 S. Ct. 519 ("We agree with the Supreme Judicial Court of Massachusetts that the courts of that Commonwealth had jurisdiction in this case, and we accordingly affirm the judgment before us."); *see also*, *Valinski v. Detroit Edison*, 197 F. App'x 403, 407 (6th Cir. 2006) ("State courts have concurrent jurisdiction over § 301 claims, but must of course apply federal law."). If Plaintiffs' claim for breach of contract is dismissed for lack of jurisdiction, res judicata does not prevent relitigation of the breach of contract claim in a state court with plenary jurisdiction. *See* 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4436 ("The basic rule that dismissal for lack of subject-matter jurisdiction does not preclude a second action on the same claim is well settled.").

Accordingly, we hold that the district court erred in dismissing the Plaintiffs' claims for lack of subject-matter jurisdiction.[5]

III.B. Rule 12(b)(6)

After dismissing the Plaintiffs' LMRA claim for lack of jurisdiction, the district court then assumed that it had jurisdiction and dismissed the Plaintiffs' complaint for failure to state a claim. We now address the district court's grant of the Defendants' 12(b)(6) motion. The district court "decline[d] to consider material extrinsic to the pleadings in regard to the motion to dismiss," and therefore did not convert the 12(b)(6) motion into a motion for summary judgment. *Tackett*, 523 F. Supp. 2d at 693.[6]

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[5] The Defendants ask this Court to affirm the district court's holding under Rule 12(b)(1) because the Plaintiffs have failed to present a colorable claim. We need not address this argument because below we conclude that the Plaintiffs have sufficiently stated a claim under the more rigorous Rule 12(b)(6) standard.

[6] The district court noted the "unusual" procedural posture of the case, which allowed the court to consider the Letter

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The Defendants say that we should affirm that district court's 12(b)(6) ruling, or, alternatively, convert this into a Rule 56 motion and consider materials outside the pleadings. The Defendants say that conversion is appropriate because both parties submitted, and the district court considered, extrinsic materials in the Rule 12(b)(1) analysis.

Under our 12(b)(1) analysis above, we did not consider matters outside the pleadings. Rule 12(b)(6), besides some minor exceptions, does not permit courts to consider evidence extrinsic to the pleadings. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499, 2509, 168 L. Ed. 2d 179 (2007) (citing 5B WRIGHT & MILLER § 1357). If, however, as the Defendants urge, we convert the 12(b)(6) motion into a Rule 56 motion, we would need to examine all of the extrinsic materials the parties submitted. Accordingly, we will first address whether such an examination is necessary, and decide if the Defendants' Rule 12(b)(6) motion should be converted into a Rule 56 motion on appeal.

III.B.1. Rule 12(d) Conversion

When a court considers matters outside the pleadings in a Rule 12(b)(6) motion, Rule 12(d) requires that "the motion must be treated as one for summary judgment under Rule 56." FED. R. CIV. P.

Agreements in a 12(b)(1) motion, but not in the 12(b)(6) motion. *Tackett*, 523 F. Supp. 2d at 692.

12(d). A district court may convert the motion *sua sponte.* This conversion, however, "should be exercised with great caution and attention to the parties' procedural rights." 5C WRIGHT & MILLER § 1366.

In the Sixth Circuit, before a district court may convert the motion *sua sponte*, the "district court must afford the party against whom *sua sponte* summary judgment is to be entered ten-days notice and an adequate opportunity to respond." *Yashon v. Gregory*, 737 F.2d 547, 552 (6th Cir. 1984). Despite this "clearly established rule," an appeals court will reverse for failure to notify only if the losing party can "demonstrate prejudice." *Id.*; *Harrington v. Vandalia-Butler Bd. of Educ.*, 649 F.2d 434, 436 (6th Cir. 1981) ("A District Court's failure to comply with the ten-day requirement of Rule 56(c) is subject to the harmless error rule.").

Yashon states that the notice requirement is flexible and that a failure to give notice will result in reversal only if there was sufficient prejudice to the non-moving party. *See* 5C WRIGHT & MILLER § 1366 ("[T]he absence of formal notice will be excused when it is harmless or when the parties were otherwise apprised of the conversion * * * and, in fact, had a sufficient opportunity to present the materials relevant to a summary judgment motion.").

In asking this court to convert the 12(b)(6) motion *sua sponte*, the Defendants point to *Cunningham v. Osram Sylvania, Inc.*, 221 F. App'x 420, 423 (6th Cir. 2007), an unreported Sixth Circuit opinion where the district court granted the defendant's 12(b)(6) motion to dismiss, but considered materials extrinsic to the pleadings. On appeal, the parties conceded that, although the district court decided the motion under Rule 12(b)(6), "a decision under Rule 56 was appropriate." *Id.* This Court did not reverse because the district court committed a "technical error" and merely mislabeled its analysis: the district court's decision was the "functional equivalent" of a Rule 56 determination. *Id.*

Cunningham involved the review of a district court opinion that was the "functional equivalent" of a ruling under Rule 56. The merits analysis presented here under Rule 12(b)(1), however, was not at all the functional equivalent of a Rule 56 determination. Here, the district court weighed and resolved the claim without viewing "the facts, and all inferences to be drawn from them, in the light most favorable to the nonmoving party." *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 629 (6th Cir. 2002) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). Additionally, the district court made no conclusions regarding whether the claim presented any "genuine issue as to any material fact." FED. R. CIV. P. 56(c).

Because the district court's ruling was not the functional equivalent of a Rule 56 ruling, we decline the Defendants' invitation to base our ruling on Rule 56. Therefore, we will not consider matters extrinsic to the pleadings and we will proceed to review the district court's Rule 12(b)(6) analysis.

III.B.2. Rule 12(b)(6) Standard

In deciding a Rule 12(b)(6) motion, a district court must (1) view the complaint in the light most favorable to the plaintiff and (2) take all well-pleaded factual allegations as true. *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009) (citations omitted). But the district court need not accept a "bare assertion of legal conclusions." *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995).

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1974, 1965, 167 L. Ed. 2d 929 (2007), the Supreme Court said that, when viewing the complaint under the above standards, to survive a motion to dismiss a complaint must contain (1) "enough facts to state a claim to relief that is plausible," (2) more than "a formulaic recitation of a cause of action's elements," and (3) allegations that suggest a "right to relief above a speculative level."

Just weeks after the *Twombly* decision, however, the Supreme Court cited *Twombly* to reaffirm the liberal pleading standard in Rule 8(a)(2): "Rule * * * 8(a)(2) requires only a 'short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the * * * claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007) (quoting *Twombly*, 127 S. Ct. at 1964). On several occasions, the Sixth Circuit has identified "uncertainty regarding the scope of *Twombly*," and noted that *Twombly* may be "limited to expensive, complicated litigation." *Gunasekera*, 551 F.3d at 466. In reviewing a motion to dismiss, "[w]e read *Twombly* and *Erickson* in conjunction with one another." *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295-96 (6th Cir. 2008).

We will now address whether the Plaintiffs have sufficiently pleaded their LMRA and ERISA claims to survive a Rule 12(b)(6) motion.

III.B.2.a. Section 301 Pleading Sufficiency

The parties dispute whether the Plaintiffs have plausibly alleged a violation of the CBA. The Plaintiffs allege that Defendants unilaterally modified the Plaintiffs' vested health-care benefits. Health-care benefits vest only if the parties so intend. *Noe v. PolyOne Corp.*, 520 F.3d 548, 552 (6th Cir. 2008). If the parties do not intend to vest the benefits, the former employer can modify the retiree benefits without breaching a collective bargaining agreement.

In determining whether the parties intended health care benefits to vest, this Court applies the principles first described in *UAW v. Yard-Man*, 716 F.3d 1476, 1479 (6th Cir. 1983). In *Yard-Man*, we held that, when interpreting a collective bargaining agreement, a court must start with the "explicit language." *Id.* General principles of contract interpretation should guide a district court's interpretation of the explicit language.[7] "When a contractual provision is ambiguous, the court may turn to extrinsic evidence." *UAW v. BVR Liquidating, Inc.*, 190 F.3d 768, 774 (6th Cir. 1999). Language in a collective bargaining agreement that "equate[es] eligibility for retiree health benefits with eligibility for a pension" suggests an intent to vest. *McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417, 421 (6th Cir. 2004) (citing *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996)).

Courts reviewing a collective bargaining agreement must also keep in mind the context of labor-management negotiations on retiree health-care benefits: "because retirement health care benefits are not mandatory or required to be included in an agreement, and because they are 'typically understood as a form of delayed compensation or reward for past services' it is unlikely that they would be 'left to the contingencies of future negotiations.'" *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 580 (6th Cir. 2006) (quoting *Yard-Man*, 716 F.2d at 1481-82).

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[7] In interpreting a CBA, courts must (1) "look to the explicit language," (2) evaluate that language "in light of the context" that led to its use, (3) "interpret each provision * * * as part of the integrated whole," (4) construe each provision "consistently with the entire document and the relative positions and purposes of the parties," (5) construe the terms "so as to render none nugatory" and to "avoid illusory promises," (6) look to other words and phrases in the document to resolve ambiguities, and (7) "review the interpretation * * * for consistency with federal labor policy." *Yard-Man*, 716 F.2d at 1479-80.

Here, the Plaintiffs have pointed to language in the collective bargaining agreement sufficient to survive a 12(b)(6) motion. In their Complaint, the Plaintiffs pointed to language in the November 6, 2000 CBA between M & G and the USW:

> Employees who retire on or after January 1, 1996 and who are eligible for and receiving a monthly pension under the 1993 Pension Plan * * * whose full years of attained age and full years of attained continuous service * * * at the time of retirement equals 95 or more points *will receive a full Company contribution towards the cost of [health-care] benefits* * * * * Employees who have less than 95 points at the time of retirement will receive a reduced Company contribution. The Company contribution will be reduced by 2% for every point less than 95. Employees will be required to pay the balance of the health care contribution, as estimated by the Company annually in advance, for the [health-care] benefits * * * * Failure to pay the required medical contribution will result in cancellation of coverage.

(emphasis added).

The district court held that the "full Company contribution" language meant "that qualifying retirees will receive the total amount of the company's *potential* contribution toward the cost of health benefits." *Tackett*, 523 F. Supp. 2d at 695. The district court found that the language, "[e]mployees will be required to pay the balance of the health care contribution," supported its reading. *Id.* at 696.

We disagree with the district court's reading of the relevant portions of the CBA. First, the "full Company contribution" language suggests that the parties intended the employer to cover the full cost of health-care benefits for those employees meeting the age and term-of-service requirements. Keeping in mind the context of the labor-management negotiations identified in *Yard-Man*, we find it unlikely that Plaintiff USW would agree to language that ensures its members a "full Company contribution," if the company could unilaterally change the level of contribution. The CBA has no limitation on the amount of a company contribution and if the Defendants' argument were accepted, the company presumably could lower the contribution to zero without violating this language. Such a promise would be illusory.

Second, the limiting language, "[e]mployees will be required to pay the balance of the health care contribution," follows the provision requiring contributions by those retirees who had not attained the requisite seniority points. From the placement of this language, we can reasonably infer that it did not apply to all retirees, but only to those retirees who had not attained the requisite seniority points.

Third, the collective bargaining agreement tied eligibility for health-care benefits to pension benefits. This is another factor indicating that the parties intended the health care benefits to vest upon retirement.

We hold that the Plaintiffs' Complaint presented a plausible claim that the parties intended to vest health-care benefits. Accordingly, we hold that the district court erred in granting the Defendants' Rule 12(b)(6) motion on the § 301 claim.

III.B.2.b. Sufficiency of Pleadings for ERISA § 502(a)(1)(B) Violation of Employee Welfare Benefit Plan Claim

ERISA § 502(a)(1)(B) allows a plan "participant or beneficiary" to bring a civil action to "recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132.

As noted above in the discussion of § 301, health-care benefits, as opposed to pension benefits, do not mandatorily vest. *Sprague v. Gen. Motors*, 133 F.3d 388, 400 (6th Cir. 1998) (en banc). Employers, therefore, "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Id.* (quoting *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78, 115 S. Ct. 1223, 131 L. Ed. 2d 94 (1995)). But employers may vest health care benefits if they choose to do so. *Id.* at 400. When the plan document at issue is a collective bargaining agreement, the interpretative principles outlined in *Yard-Man* govern a court's determination of the parties' intent to vest health-care benefits. *Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 917 (6th Cir. 2000) (noting the continued application of *Yard-Man* to ERISA cases involving a collective bargaining agreement).[8]

The determination above that the parties intended health-care benefits to vest carries over to the ERISA § 502(a)(1)(B) claim. The Plaintiffs have therefore presented a plausible claim under ERISA § 502(a)(1)(B).

III.B.2.c. Sufficiency of Pleadings under ERISA 502(a)(3) Claim for Violation of Fiduciary Duties and Violation of Benefit Plan

ERISA § 502(a)(3) allows a plan "participant, beneficiary, or fiduciary" to bring a civil action:

> (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.

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[8] Defendant M & G points us to language in *Sprague* that it argues limits *Yard-Man's* application: "Because vesting of welfare plan benefits is not required by law, an employer's commitment to vest such benefits is not to be inferred lightly." *Sprague*, 133 F.3d at 400. Although the Defendant seems to contend that *Sprague* tacitly overruled the principles defined in *Yard-Man*, this Court has already rejected that argument. *See Maurer*, 212 F.3d at 917.

29 U.S.C. § 1132(a)(3). Section 502(a)(3) is a "catchall" for ERISA violations, *Varity Corp. v. Howe*, 516 U.S. 489, 511, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996), that allows courts to provide "appropriate" equitable relief. 29 U.S.C. § 1132(a)(3). But § 502(a)(3) is not an appropriate means to relief when a plaintiff merely "repackage[s]" a § 502(a)(1)(B) claim: "Where Congress has elsewhere provided means to adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case [§ 502(a)(3)] relief normally would not be appropriate." *Varity*, 516 U.S. at 515, 116 S. Ct. 1065. In *Varity*, the Supreme Court allowed a plaintiff's fiduciary claims based on alleged employer misrepresentations to go forward when the plaintiff lacked a remedy under § 502(a)(1)(B). *Id.*

Although the *Varity* Court, in allowing the § 502(a)(3) claim, emphasized that the plaintiff could not have brought a § 502(a)(1)(B) claim, the Sixth Circuit sometimes allows a plaintiff to bring claims under both §§ 502(a)(3) and 502(a)(1)(B). *Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710, 718 (6th Cir. 2005). The *Hill* Court allowed a plaintiff to bring claims under both sections when § 502(a)(1)(B) would not provide the complete relief the plaintiff sought. There the plaintiff complained of an "improper methodology for handling all of the * * * claims." *Hill*, 409 F.3d at 718. The Court held that the plaintiff had pleaded sufficient facts to support a § 502(a)(1)(B) for unpaid benefits.

But the plaintiff in *Hill* also brought a claim for injunctive relief under § 502(a)(3) to require the defendant "to alter the manner in which it administers all of the * * * claims." *Id.* The Court noted that this § 502(a)(3) claim was for "plan-wide injunctive relief, not [for] individual-benefit payments." *Id.* Although the plaintiff had the ability to seek damages for improperly denied benefits, the Court allowed the plaintiff to proceed on both claims because "[o]nly injunctive relief of the type available under § [502(a)(3)] will provide the complete relief sought." *Id.*

Relevant to a § 502(a)(3) claim, the Retiree Plaintiffs sought an injunction to prevent Defendant M & G from terminating their vested benefits in the future. Additionally, the Retiree Plaintiffs sought equitable relief to return them to their position before the Defendants' breach.[9] In appealing the district

[9] In their Complaint, Plaintiffs said:

> Plaintiffs request that this Court[a]ward Class Members retiree health care benefits, pursuant to the terms of the applicable collective bargaining agreements and the Plans, and such monetary damages and/or equitable relief as necessary to restore Class Members to the positions in which they would have been and should be but for defendants' contractual and statutory violations and wrongful conduct.
>
> * * *
>
> Plaintiffs request that this Court[a]ward Class Members retiree health care benefits, pursuant to the terms of the applicable collective bargaining agreements and the Plans, and such monetary damages

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court's dismissal of their § 502(a)(3) claim, the Retiree Plaintiffs note that they claim "allegations of plan-wide breaches of fiduciary duty."

The mere recitation of the "plan-wide" language lifted from *Hill* will not justify a claim under § 502(a)(3) when § 502(a)(1)(B) relief is available. *Hill* involved an improper denial of benefits in the past and a current "improper methodology" for calculating benefits. 409 F.3d at 718. The Retiree Plaintiffs do not present an allegation of a flawed, systemic plan-wide methodology of calculating benefits.[10]

Instead, the Retiree Plaintiffs asked the district court for recovery of health benefits due under the plan (including monetary damages), a declaration of their rights to health benefits under the plan, and an injunction prohibiting the plan administrator from

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> and/or equitable relief as necessary to restore Class Members to the positions in which they would have been and should be but for defendants' contractual and statutory violations and wrongful conduct.

[10] *Hill* differs from this case in several other important ways. In *Hill*, five named plaintiffs brought a putative class action against a defendant ERISA plan administrator. This Court held that only one of the named plaintiffs could successfully bring an action under § 502(a)(1)(B) for money damages because the other four named plaintiffs had failed to exhaust their remedies. The Court said that futility would not excuse the failure to exhaust administrative remedies prior to bringing the § 502(a)(1)(B) claim. Additionally, the Court held that exhaustion was important because of the "fact-intensive" nature of the individual claims under § 502(a)(1)(B). *Hill*, 409 F.3d at 723.

modifying or terminating retiree health benefits in the future. All of these remedies are cognizable under § 502(a)(1)(B). *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985) (explaining that there are three distinct remedies available under § 502(a)(1)(B): "an action * * * [1] to recover accrued benefits, [2] to obtain a declaratory judgment that [a participant or beneficiary] is entitled to benefits under the provisions of the plan contracts, and [3] to enjoin the plan administrator from improperly refusing to pay benefits in the future"). The Retiree Plaintiffs' additional claims for equitable relief pursuant to § 502(a)(3) are simply repackaged claims for benefits. Because § 502(a)(1)(B) fully provides a means for the relief sought by the Retiree Plaintiffs, further equitable relief pursuant to § 502(a)(3) is unavailable. Accordingly, we affirm the district court's dismissal for the Retiree Plaintiffs' § 502(a)(3) claims for failure to state a claim under Rule 12(b)(6).

Before concluding, we also note that, in briefings before the district court, the Retiree Plaintiffs submitted extrinsic evidence alleging that the Defendants made misrepresentations about the Plan. The Retiree Plaintiffs proffered the declaration of a former Plant employee, Rodric R. Ball II, who retired in 1999 when M & G owned the plant. Ball stated that, during a 1998 meeting concerning retirement benefits, employees were "promise[d] * * * health coverage * * * at 'no cost.'" Declarant Ball provided a two-page document that reads under the heading MEDICAL:

"Continued coverage at no cost under the current P & I Agreement."

Because the Retiree Plaintiffs included none of the facts or allegations Ball described in their Amended Complaint, we decline to consider the declaration. We note, however, that the district court has discretion to permit a second amendment to the complaint "when justice so requires." FED. R. CIV. P. 15(a)(2).[11]

IV. Conclusion

We hold that the district court erred in treating a violation as a jurisdictional prerequisite and that it therefore erred in granting the Defendants' 12(b)(1) motion on the Plaintiffs' § 301 claim. We additionally hold that the district court erred in concluding that the Plaintiffs had failed to state a claim for relief in their Amended Complaint, thereby erring in granting the Defendants' 12(b)(6) motion on the § 301 and ERISA claims. Finally, we affirm the district court's

[11] Without passing on the merit of a § 502(a)(3) claim incorporating Ball's Declaration, we note that the analysis presented above on duplicative relief would not apply to a § 502(a)(3) claim based on the misrepresentation if the district court eventually determines that the Retiree Plaintiffs did not have a vested right to health-care benefits. If the district court determines that the Retiree Plaintiffs did not have vested health-care benefits, the Retiree Plaintiffs, like the plaintiffs in *Varity*, would have "no 'benefits due [them] under the terms of [the] plan.'" *Varity*, 516 U.S. at 515, 116 S. Ct. 1065.

dismissal of the Plaintiffs' § 502(a)(3) claim. Accordingly, we **REVERSE** and **REMAND**.

523 F. Supp. 2d 684

Hobert Freel TACKETT, et al., Plaintiffs,
v.
M & G POLYMERS USA, LLC, et al., Defendants.

No. 2:07-cv-126.

United States District Court,
S.D. Ohio,
Eastern Division.

Nov. 21, 2007.

David Marvin Cook, Robert E. Rickey, Cook, Portune & Logothetis, Cincinnati, OH, Renate Klass, Stuart M. Israel, Martens, Ice, Klass, Legghio & Israel, P.C., Royal Oak, MI, for Plaintiffs.

Nelson D. Cary, Thomas Howard Fusonie, Vorys Sater Seymour & Pease, Columbus, OH, Christopher A. Weals, Morgan, Lewis & Bockius LLP, Washington, DC, Deborah S. Davidson, Philip A. Miscimarra, Morgan, Lewis & Bockius LLP, Chicago, IL, for Defendants.

OPINION AND ORDER

GREGORY L. FROST, District Judge.

This matter is before the Court for consideration of Defendants' motion to dismiss (Doc. # 19), Plaintiffs' memoranda in opposition (Docs. # 34, 35), Defendant's reply memorandum (Doc. # 36), and Plaintiff's sur-replies (Docs. # 61, 62). For the reasons that follow, the Court finds the motion to dismiss well taken.

I. Background

This is a class action case in which the putative class—retirees, their spouses, and surviving spouses or other dependents of individuals who worked for the named defendant company—assert that although they have a right to lifetime retiree health care benefits, the company is requiring them to pay for those benefits in violation of various collective bargaining agreement ("CBA") provisions. Plaintiffs Hobert Freel Tackett, Woodrow K. Pyles, and Harlan B. Conley are all Ohio residents and retirees from the Point Pleasant Polyester Plant in Apple Grove, West Virginia. They and similarly situated retirees belong to a labor union, Plaintiff United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("USW"), which represented (or at least one of its predecessor unions represented) them as employees of Defendant M & G Polymers USA, LLC ("M & G") (which bought the plant in 2000), or one of its predecessor companies, such as the Shell Chemical Company (which owned the plant from 1992 to 2000) and The Goodyear Tire & Rubber Company (which owned the plant until 1992). Plaintiffs assert that various CBA provisions provide lifetime retiree health care benefits.

Plaintiffs allege that on or about January 1, 2007, however, Defendant M & G unilaterally modified the health care benefits by shifting a large part of the health care costs onto the putative class members. The other named defendants are M & G-sponsored health plans through which the putative class members receive health care benefits: the M & G Comprehensive Medical Benefits Program for Employees and Their Dependents, the M & G Catastrophic Medical Plan, the M & G Medical Necessity Benefits Program of Hospital, Surgical, Medical, and Prescription Drug Benefits for Employees and Their Dependents, and the M & G Major Medical Benefits Plan.

Plaintiffs filed the instant action on behalf of the named retirees and their surviving spouses or dependents, as well as other similarly situated retirees and their surviving spouses or dependents, on February 9, 2007. (Doc. # 1.) Via their amended complaint, Plaintiffs assert three counts: violation of labor agreements, actionable under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (Count I); violation of employee welfare benefit plan, actionable under Sections 502(a)(1)(B) and (a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(1)(B) and (a)(3) (Count II); and breach of fiduciary duty under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) (Count III). (Doc. # 14 ¶¶ 26-31.)

On May 15, 2007, Defendants filed a motion to dismiss the amended class action complaint. (Doc. # 19.) In connection with that briefing, Plaintiffs filed a joint motion for leave to file two sur-reply memoranda (Doc. # 42), which the Court granted (Doc. # 60). The parties have therefore completed briefing on the motion to dismiss, which is now ripe for disposition.

II. Discussion

A. Standard Involved

Defendants move for dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Rule 12(b)(1) provides that an action may be dismissed for lack of subject matter jurisdiction. Under the Federal Rules of Civil Procedure, "[p]laintiffs have the burden of proving jurisdiction in order to survive a Rule 12(b)(1) motion * * *." *Weaver v. Univ. of Cincinnati*, 758 F. Supp. 446, 448 (S.D. Ohio 1991) (citing *Moir v. Greater Cleveland Reg'l. Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990)). *See also Rapier v. Union City Non-Ferrous*, *Inc.*, 197 F. Supp. 2d 1008, 1012 (S.D. Ohio 2002) (citing *McNutt v. General Motors Acceptance Corporation of Indiana*, *Inc.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936); *Rogers v. Stratton Indus.*, *Inc.*, 798 F.2d 913, 915 (6th Cir. 1986)) ("The plaintiff bears the burden of establishing, by a preponderance of the evidence, the existence of federal subject matter jurisdiction"). Moreover, this Court may resolve any factual disputes when adjudicating a defendant's jurisdictional challenge. *See Moir*, 895 F.2d at 269.

In contrast to Rule 12(b)(1), Rule 12(b)(6) requires an assessment of whether Plaintiffs have set forth claims upon which this Court may grant relief. For the purpose of the analysis under Rule 12(b)(6), this Court must construe the amended complaint in favor of Plaintiffs, accept the factual allegations contained in the amended complaint as true, and determine whether Plaintiffs' allegations plausibly suggest viable claims. *See NicSand*, *Inc. v. 3M Co.*, 507 F.3d 442, 448 (6th Cir. 2007); *Assoc. of Cleveland Fire Fighters v. City of Cleveland*, *Ohio*, 502 F.3d 545, 548 (6th Cir. 2007); *cf Goad v. Mitchell*, 297 F.3d 497, 500 (6th Cir. 2002). In other words, "a complaint will be dismissed pursuant to Rule 12(b)(6) only if there is no law to support the claims made, or if the facts alleged are insufficient to state a claim, or if on the face of the complaint there is an insurmountable bar to relief." *The Limited*, *Inc. v. PDQ Transit*, *Inc.*, 160 F. Supp. 2d 842, 843 (S.D. Ohio 2001) (citing *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697, 702 (6th Cir. 1978)).

B. Analysis

Relying on Rule 12(b)(1), Defendants first argue that the Court should dismiss Plaintiffs' § 301 claim constituting Count I because the claim fails to present a breach of the CBA. Rather, Defendants assert, they have simply complied with the CBA and ancillary agreement provisions that permit the implementation of above-cap contributions. Defendants then argue that dismissal is also warranted under Rule 12(b)(1) because the National Labor Relations Board ("NLRB") has primary jurisdiction over the claim, with the caps constituting an agreed-upon mandatory subject of bargaining. Finally, Defendants posit that dismissal is warranted under Rule 12(b)(6) because the limitations on the health benefits, including caps on employer contributions, were the result of collective bargaining and disclosed in the 1991 summary plan description.

The nature of Defendants' initial challenge to this Court's jurisdiction over Count I means that the Court can look outside the factual allegations of the pleadings. Were this a facial attack on the amended complaint under Rule 12(b)(1), the Court would necessarily accept the factual allegations of the amended complaint as true. *See U.S. v. A.D. Roe Co., Inc.*, 186 F.3d 717, 721-22 (6th Cir. 1999) (explaining that in "a facial attack on subject matter jurisdiction, [a court] would take the allegations in the complaint as true and construe them in the light most favorable to the non-moving party"); *see also RMI Titanium Co. v. Westinghouse Electric Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996). In the absence of a facial attack on the amended complaint, however, this Court need not accept that pleading's factual allegations as true. *See RMI Titanium Co.*, 78 F.3d at 1134 (explaining that when a Rule 12(b)(1) motion attacks the existence of subject matter jurisdiction, apart from the pleadings, a court does not accept the pleadings as true but weighs the evidence as needed to determine jurisdiction); *Wright v. United States*, 82 F.3d 419, 1996 WL 172119, at *4 (6th Cir. 1996) (unpublished table decision) ("Regardless of what the complaint says, the court has no subject matter jurisdiction if the factual predicates of subject matter jurisdiction do not exist."). Thus, the Court can consider evidence extrinsic to the pleadings without converting the matter into a summary judgment proceeding. *See* FED. R. CIV. P.

10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); *Nichols*, 318 F.3d at 677; *Rogers v. Stratton Industries*, *Inc.*, 798 F.2d 913, 915-16 (6th Cir. 1986) (supplementation of record in Rule 12(b)(1) challenge does not convert motion to dismiss into a summary judgment motion).

Consideration of such evidence—which has been properly authenticated—defeats Plaintiffs' position.[1] Defendants argue that Letter of Understanding 2003-6, dated August 9, 2005, and made part of the current CBA (which controls the period from August 9, 2005 through November 6, 2008), permits implementation of above-cap contributions. (Doc. # 19-9, Ex. 8, at 6-7.) This letter indeed contemplates caps on employer contributions to retiree health benefits and provides that "premium cost sharing charged to retirees will be based in the amount by which total cost for all retiree insurances (medical, life, etc.) exceed the caps set forth in Letter H dated January 1, 2001." (Doc. # 19-9, Ex. 8, at 6.) The letter continues to state that retirees would not be required to contribute to their premiums until January 1, 2006, and that the retiree

[1] The Court assumes for the sake of argument that a Rule 12(b)(1) inquiry is appropriate here. *See Gentek Bldg. Prods.*, *Inc.* v. *Steel Peel Litigation Trust*, 491 F.3d 320, 330 (6th Cir. 2007) (reasoning that when a factual attack on jurisdiction implicates an element of the cause of action, a district court should conclude that jurisdiction exists and proceed to address a direct attack on the merits of the plaintiff's claim.).

premium contribution rates would become effective on that date. (Doc. # 19-9, Ex. 8, at 6.)

Defendants additionally direct this Court to a May 15, 1991 letter ("Letter G") incorporated into the CBA effective May 15, 1991. Letter G provides both that a specific age-based cap limitation exists on the employer contributions for each employee who retires on or after May 1, 1991, and that "[i]f the average annual cost of health care benefits for [each group of retirees outlined in the letter] exceeds the specified amount, the cost in excess of that amount shall be allocated evenly to all retired employees (including surviving spouses) in such group." (Doc. # 19-3, Ex. 2, at 8.) The letter, signed by a representative of each side, then provides that "no retired employee or surviving spouse shall be obligated to contribute for such excess health care cost until July 1, 1997." (Doc. # 19-3, Ex. 2, at 8.)

Plaintiffs attack Defendants' reliance on this authenticated letter and similar documents—cap letters dated July 20, 1994, May 9, 1997, and January 1, 2001 (Docs. # 19-3, 19-4, 19-5)—on the grounds that they all relate to *Goodyear* retirees and that Defendants have failed to show that the *Goodyear* documents apply to Shell and M & G employees who retired from the Apple Grove plant after it was sold by Goodyear to Shell in 1992, and then sold by Shell to M & G in 2000. In fact, in its sur-reply, Plaintiff USW even states that "M & G argues that Shell's assumption of the Goodyear CBA and P & I agreement necessarily included the 1991 Goodyear 'cap' letter, but presents *no evidence* in support of that argument." (Doc. # 61, at 4 n.2.)

The Court has struggled with Plaintiffs' premise because it is so curious that the Court has been concerned that it is not reading Plaintiffs' briefing correctly. There is ultimately no doubt, however, that Plaintiffs are attempting in this specific context to evade the very agreements into which they voluntarily entered. There is also no doubt that, in contrast to Plaintiffs' contention, Defendants have presented ample evidence supporting application of the cap letters.

The first cap letter originated in 1991. The declaration of James Kruse, the retired Goodyear employee responsible for human resources and labor relations (including collective bargaining over retiree benefits), indicates that the May 15, 1991 Letter G was part of the agreement incorporated into the Master P & I Agreement and that it applied to the Apple Grove plant. The declaration also explains that Shell assumed the agreement obligations as a successor as part of its 1992 purchase of the plant. (Doc. # 37, Ex. 12.)

The declaration of Dale Wunder, Shell's Vice President of Human Resources who was assigned to the Apple Grove plant, also indicates that Shell assumed the existing agreement obligations as a successor. Wunder additionally indicates that although the parties agreed not to change the agreements from using "Goodyear" to using "Shell," the parties agreed that the 1994 and 1997 Goodyear agreements were applicable to the Apple Grove plant. Notably, Wunder also indicates that Shell and the union specifically agreed that the July 20, 1994 Letter G to the 1994 P & I Agreement and the May 9, 1997 Letter H to the 1997 P & I Agreement applied to retirees from the Apple Grove plant. (Doc. # 37, Ex. 13.) Thus, the caps remained applicable.

In 2000, Shell sold the Apple Grove plant to M & G. The declaration of Kimm Korber, M & G's Human Resources Director, indicates that M & G assumed the preexisting CBA and its obligations as a successor to Shell, that the union asserted in negotiations that the January 1, 2001 Letter H applied, and that the eventual 2005-08 CBA included the Letter of Understanding 2003-6 that tracks and reaffirms the caps applicable to all preexisting retirees back to the original May 15, 1991 Letter G. Moreover, the declaration specifically states that the union never disputed that the retiree contributions could be collected in the form of monthly contributions. (Doc. # 37, Ex. 14.)

These declarations and their attachments thus present an unbroken chain of cap letter applicability. Plaintiffs, overlooking the union's assertion during negotiations with M & G that the 2001 cap-supporting Letter H applied, argue that M & G admitted the caps did not apply. The declaration of David Dick, an attorney who represented M & G in the 2000 negotiations, clarifies that M & G's October 17, 2000 communication denying applicability of the

1994 and 1997 letters was the result of a lack of understanding on his part of the history of cap incorporation and that the denial did not modify the existing agreements and party obligations. (Doc. # 37, Ex, 15.)

The text of Letter of Understanding 2003-6 unambiguously supports the unbroken application of caps to retirees (including preexisting retirees). That document explicitly references the prior 2001 cap letter and provides that "[r]etiree benefits" means "benefits for the Company's preexisting retirees." (Doc. # 19-9, at 6.)

In contrast to this evidence of continued application of the caps, Plaintiffs present an argument based on inferences, selectively pointing to documents such as M & G's October 17, 2000 negotiation memorandum, while sidestepping the evidence that placed that document in context and evidence that the caps have long and continuously applied. Four additional points warrant fuller discussion.

First, Plaintiffs have unsuccessfully attempted to change the context of the argument. As previously noted, Defendants' Rule 12(b)(1) motion to dismiss is a factual, not facial, challenge to jurisdiction. Defendants in fact sought to emphasize this point, stating in the memorandum in support of their motion the applicable standard and scope of review for "[w]here, as here, a party factually challenges a court's jurisdiction to hear a claim * * * * " (Doc. # 19, at 10 n.5.) But in an effort to defeat judicial consideration of the substance of Defendants' declarations, Plaintiffs attempt to recast the nature of the Rule 12(b)(1) attack as a facial attack on the amended complaint. *See* Doc. # 61, at 5 (Plaintiff USW argues that "alleged conversations cannot support a Rule 12(b)(1) or (6) motion, which is based on the assertion that the complaint fails to state a claim and that the Court lacks jurisdiction."); Doc. # 62, at 1 ("Plaintiff Retirees adopt the arguments set forth in Plaintiff USW's surreply regarding Plaintiffs' LMRA Section 301 claims."). Because Defendants assert a factual, not facial, attack, the Court can consider and even weigh the substance of the declarations in the Rule 12(b)(1) context, without proceeding to Rule 12(b)(6) and a subsequent conversion to a Rule 56 proceeding. *See DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004) ("A Rule 12(b)(1) motion * * * can attack the factual basis for jurisdiction, in which case the trial court must weigh the evidence and the plaintiff bears the burden of proving that jurisdiction exists.").

Second, the October 17, 2000 M & G memorandum (itself extrinsic evidence) cannot trump the parties' agreement reached after that (ill-informed) negotiating position; the subsequent agreement reached by the parties reaffirmed the applicability of the caps. Thus, there is no modification as Plaintiffs assert, but only a validation of the preexisting cap agreements and obligations.

Third, the M & G purchase agreement for the Apple Grove plant fails to defeat the applicability of the cap letters. Even if the purchase agreement excluded the cap letter obligations, this does not speak to the pre-purchase obligations of the pre-2000 retirees or the pre-purchase application of caps. And even if the purchase agreement did not include the cap provisions, the parties' subsequent dealings as outlined in the negotiations reaffirmed the application of the caps to preexisting and subsequent retirees. In other words, there *might* have been an argument that M & G meant to exclude these benefit obligations via the purchase agreement, but the union and the company then reaffirmed the cap and benefit obligations so as to defeat the continued vitality of that argument.

Fourth, the premise of Plaintiffs' claim, that termination of benefits for retirees who fail to contribute, similarly fails because termination does not present a breach. For the period of time at issue, there are no guaranteed benefits absent retiree contributions. This means the asserted terminations do not breach the CBAs.

The end result is that Plaintiffs have failed to meet their burden of proving that jurisdiction exists. Count I of the amended complaint targets "specified lifetime health care benefits," and the specified benefits include sharing costs. The retirees are entitled to an employer contribution toward health benefits, but they must pay premium contributions; there is simply no contractual right to contribution-free health benefits, even if agreements have long deferred the eventual collection of the retirees' shares. The company's right to terminate benefits for retirees' failure to contribute is implicit.

Therefore, the evidence before this Court indicates that because the caps scheme has continued to apply, Defendants are correct in asserting that there is no breach of the CBA. Absent a breach by Defendants, this Court lacks jurisdiction over the § 301 claim constituting Count I of the amended complaint. *See United Gov't Sec. Officers of Am. v. Akal Sec., Inc.*, 475 F. Supp. 2d 732, (S.D. Ohio 2006) (holding that there is no viable § 301 claim where there is no breach of a CBA); *cf. Bauer v. RBX Indus., Inc.*, 368 F.3d 569, 578 (6th Cir. 2004) ("Jurisdiction in a § 301 claim is premised upon the existence of a contract, which an employer subsequently breaches. Section 301 opens the federal courthouse only to '[s]uits for violation of contracts.'" (quoting 29 U.S.C. § 185(a))).

But even assuming that the Court should indeed presume jurisdiction and proceed under Rule 12(b)(6) as Plaintiffs suggest, dismissal is still warranted. Because much of this analysis in regard to the Rule 12(b)(6) attack on the Count I § 301 claim involves the same analysis related to Plaintiffs' ERISA claims in Counts II and III, the Court shall proceed to discuss the Rule 12(b)(6) inquiry together.

Defendants move for dismissal of these counts pursuant to Rule 12(b)(6), for failure to state a claim upon which this Court can grant relief. Defendants argue that the Court cannot grant relief on Count I because there is no breach, given that retirees have no right to lifetime health benefits without mandated retiree contributions. Defendants then posit that dismissal of the ERISA Section 502(a)(1)(B) component of Count II is warranted because the incorporated letters referenced above provide that the issue of retiree health benefits is a mandatory subject of bargaining, which indicates that the retirees' health benefits were and are not vested as lifetime benefits as Plaintiffs contend. Defendants' rationale here is that because 29 U.S.C. § 1132(a)(1)(B) only permits a plan participant "to recover benefits due to him under the terms of his plan," the retirees cannot proceed under this ERISA provision because the parties' [sic] agreed only to retiree medical benefits contingent on retiree contributions. Thus, Defendants reason, in the absence of a retiree contribution, there is no right to an employer contribution. The analysis is that no retiree contribution equals no benefit due, which means there is no due benefit to recover under § 1132(a)(1)(B).

Defendants also seek a Rule 12(b)(6) dismissal of the ERISA Section 502(a)(3) component of Count II and the entirety of Count III essentially on the grounds that the section is unavailable because ERISA Section 502(a)(1)(B) already provides a remedy. Plaintiffs argue that this is an incorrect construction of both ERISA and their amended complaint and that there have been actionable fiduciary misrepresentations.

A medical benefit plan is a type of welfare benefit plan, which means that it is not subject to automatic or mandatory vesting under ERISA, but can be vested by agreement of the parties. *Bauer*, 368 F.3d at 584. What proves unusual in this case is that the context of this Rule 12(b)(6) aspect of the motion to dismiss precludes this Court from considering the letter agreements of the parties here, even if the Court could and did consider this material in regard to the dismissal of Count I.

In addressing above the motion to dismiss Count I, this Court conducted a Rule 12(b)(1) factual inquiry that permitted and necessitated review of extrinsic evidence (i.e., Defendants' declarations, which presented the cap letters as applicable to the dispute). As Plaintiffs correctly note in their briefing, however, a Rule 12(b)(6) inquiry mandates a different approach. Under Rule 12(b)(6), the Court cannot engage in such a factual inquiry, but must accept the factual allegations contained in Plaintiffs' amended complaint as true and then decide whether these facts present a plausible claim to relief. Plaintiffs assert that the Rule 12(b)(6) inquiry means that the Court must necessarily accept that the plan documents and CBAs confer lifetime health care benefits on the retirees and that the plans and CBAs preclude termination by Defendants. Thus, Plaintiffs conclude, the pleading presents a potentially viable claim under Counts I and II.

Defendants indeed attack Counts I and II by relying on the letter agreements, which as discussed above rely on the declarations for validation. Although the Court can consider documents referenced in the amended complaint, the pleading generally makes vague references to the parties' agreements without specifying what constitutes the bulk of the agreements; it is only through the extrinsic evidence that the Court was persuaded above that the letters mattered. Defendants also rely on summary plan descriptions, which do not grow out of the pleading but are extrinsic to the amended complaint. To consider this material, the Court would have to convert the Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment.

Rule 12 permits such conversion, stating:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

FED. R. CIV. P. 12(b). What this means is that generally a court must provide the parties notice of its intent to convert, although under various circumstances notice is not always required. *See Cunningham v. Osram Sylvania, Inc.*, 221 F. App'x 420 (6th Cir. 2007) (concession of both parties in Rule 12(b)(6) briefing that conversion is appropriate negates need for notice of intent to convert).

Weighing against conversion and consequent consideration of Defendants' extrinsic materials is the fact that Plaintiffs have raised a demand to conduct discovery on the alleged fiduciary misrepresentations. (Doc. # 62, at 3 ("Plaintiffs are entitled, at a minimum, to conduct discovery on this claim.").) The Court in its discretion therefore declines to consider material extrinsic to the pleadings in regard to the motion to dismiss Counts I through III, which means that conversion is not necessary. Proceeding to address the motion within the confines of a Rule 12(b)(6) inquiry, then, the Court nonetheless concludes that dismissal is warranted.

The aforementioned *Cunningham v. Osram Sylvania*, *Inc.* notably informs this conclusion. In *Cunningham*, the Sixth Circuit described the relevant facts of that similar § 301 case as follows:

> The plaintiffs are former Sylvania employees who retired in 1998 and 2002. They brought this action on the theory that Sylvania's announcement in 2003 that its contribution to their medical insurance premiums would henceforth be "capped" at scheduled amounts constituted a unilateral modification of non-modifiable lifetime benefits granted to retirees under union contracts between their union, UAW Local 1608, and Sylvania. The company's action came in the wake of provisions in collective bargaining agreements dating back to 1993, the year that Sylvania purchased the Kentucky facility where the plaintiffs were employed. After

> Sylvania took over the plant, the health insurance benefits for retirees fell into two categories, based on age and length of service. The first category covered those employees who were under the age of 45 on the date of purchase and who were eligible to receive a percentage of the premium at company expense, based on their years of employment and capped at a certain amount set out in a separate schedule. Those over the age of 45 on the purchase date were subject to the same eligibility formulas, but the amounts to which they were entitled were not capped. As medical insurance costs began to rise precipitously in the decade following Sylvania's takeover of the plant, however, the company negotiated minor changes in the collective bargaining agreements with the UAW and, outside the contract, made certain other changes in the retirees' health insurance coverage. Finally, in 2003, after failing to secure a change in the most recent contract, the company notified retirees that the distinction between the capped and uncapped premiums had been removed from the plan and that, henceforth, all health insurance premiums would be subject to a cap on amounts paid by the company. In response, the plaintiffs brought suit, alleging that this unilateral change in benefits was in violation of the LMRA.

221 F. App'x. at 421-22. This description of retirement benefit scheme based on age and length of service roughly tracks the scheme in the instant case.

The *Cunningham* scheme provided that retirees over 45 with sufficient years of employment were entitled to receive uncapped company contributions to their health benefit premiums. This echoes the amended pleading's assertion in the instant case that retirees with "95 or more points 'will receive a full Company contribution towards the cost of benefits described in Exhibit B-1.'" (Doc. # 14 ¶ 14.)

To support this assertion, Plaintiffs' amended complaint cites an excerpted copy of the 2000 Pension, Insurance and Service Award Agreement "attached here as 'Exhibit A.'" (Doc. # 14 ¶ 14.) But no such exhibit is attached to the amended complaint. The original complaint (Doc. # 1) did, however, include the exhibit. Assuming arguendo that this Court can consider the original complaint's attachment when construing the assertions of the amended complaint, the Court must conclude that dismissal is warranted.

The Sixth Circuit explained in *Cunningham* that the complaint in that case

> omitted any facts to support the bald conclusions that "[t]he insurance benefits conferred on all retirees by the Agreements are lifetime benefits to which plaintiffs and other retirees from the Winchester, Kentucky plant are entitled for the remainder of their lives" and that those benefits "cannot be unilaterally modified or terminated by the defendant without the consent of the retirees."

221 F. App'x at 422. The court of appeals therefore concluded that "[b]ecause this proposition was pleaded without factual support of any kind, in our judgment the district court could have entered an order of dismissal for failure to state a claim under Rule 12(b)(6)."[2] *Id.*

The amended complaint *sub judice* similarly asserts that "[u]nder the terms of the applicable collective bargaining agreements, [each named retiree (and in some instances his spouse)] are entitled to lifetime health care benefits, which defendants are obligated to provide." (Doc. # 14 ¶¶ 9, 10, 11.) The amended pleading similarly asserts that class members

> became vested in retiree health care benefits and became entitled to receive lifetime health care benefits, and their spouses and surviving spouses became vested and entitled to receive health care benefits for life or until remarriage, as were the surviving spouses of certain employees who died while employed at the Plant.

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[2] Because the district court under review in *Cunningham* had instead elected to consider extrinsic evidence, the court of appeals proceeded to treat the district court's disposition of the motion to dismiss under a Rule 56 inquiry. 221 F. App'x at 422-24. This Court has declined to consider extrinsic material in regard to the Rule 12(b)(6) aspect of Defendants' motion to dismiss.

(Doc. # 14 ¶ 15.) Finally, echoing the language in *Cunningham*, the amended complaint concludes that "defendants violated these rights by shifting a large part of the costs of those benefits from defendants to Class Members, and have terminated or planned to terminate the benefits of those Class Members unable to pay or who otherwise do not pay the added costs imposed by defendants." (Doc. # 14 ¶ 16.)

This Court concludes that, as in *Cunningham*, because Plaintiffs have plead propositions without factual support of any kind, dismissal under Rule 12(b)(6) is warranted. Plaintiffs amended complaint quotes paragraph 11 of the agreement constituting Exhibit A. Review of that agreement indicates that it does indeed state that qualifying retirees "will receive a full Company contribution towards the cost of the benefits described in this Exhibit B-1 * * * * *" (Doc. # 1-2, at 3 ¶ 11.) But many of the conclusions Plaintiffs draw from that statement exceed factual allegations that this Court must accept as true in the Rule 12(b)(6) context. Instead, Plaintiffs assert unsupported contentions including legal conclusions.

The relevant agreement paragraph does not present vesting or preclude monthly retiree premiums and the termination of benefits for failure to pay those premiums. To reach that conclusion would be to ignore both the language employed in the quoted sentence and other sentences in that paragraph that Plaintiffs have elected not to quote in their pleading.

Applying simple principles of contract construction to the key sentence upon which Plaintiffs rely—"Employees * * * will receive a full Company contribution towards the cost of the benefits described in this Exhibit B-1 * * * * " (Doc. # 1-2, at 3 ¶ 11)—the Court must recognize that "full" modifies "Company contribution" in the quoted sentence, not "cost." What the sentence therefore says is that qualifying retirees will receive the total amount of the company's *potential* contribution toward the cost of health benefits, not that the company will cover the full cost of the benefits if the benefits exceed the total potential (i.e., capped) contribution. "[A] full Company contribution" is consistent with caps.

This construction distinguishes the agreement language at issue here from those cases to which Plaintiffs direct this Court as containing "virtually identical CBA language [that] has been held to constitute a lifetime promise of retiree medical benefits" (Doc. # 61 at 3 n.1) For example, the language creating vested lifetime benefits in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Loral Corp.*, read as follows: "Employees who retire and who are eligible under the Loral Systems Group Retirement Plan for Bargaining Unit Employees for a pension (other than a deferred vested pension), shall receive the benefits described in this Section B * * * * " 873 F. Supp. 57, 63 (N.D. Ohio 1994), *aff'd*, 107 F.3d 11, 1997 WL 49077, at *2 (6th Cir. 1997) (unpublished table decision). The distinction is obvious: that case's "shall receive the benefits" contrasts significantly with the instant case's "will receive a full Company contribution towards the costs of the benefits." The former promises benefits, while the latter promises a contribution that context places within a contingent retiree-contribution scheme; there is no guarantee here that the employer contribution is either unqualified or sufficient to cover the cost of benefits.[3] The agreement in the case *sub judice* distinguishes this case from those in which a presumption of lifetime benefits—which the Sixth Circuit has described as the "*Yard-Man* inference"—proves correct. *See Loral Corp.*, 1997 WL 49077, at *2.

Additionally, Plaintiffs neglect that the referenced agreement paragraph also states that "[e]mployees will be required to pay the balance of the health care contribution, as estimated by the Company annually in advance, for the benefits described in this Exhibit B-1. Failure to pay the required medical contribution will result in cancellation of coverage." (Doc. # 1-2, at 3 ¶ 11.) The language of the paragraph in no way restricts the reference to "Employees" to mean only those retirees with less than the 95 qualifying points, which means that the agreement

[3] This same rationale distinguishes the lifetime-benefits case of *United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO, CLC v. Pirelli Armstrong Tire Corp.*, in which the documentation at issue provided that medical benefits "will be provided" without a termination provision, as opposed to a simple employer contribution scheme. 873 F. Supp. 1093, 1098 (M.D. Tenn. 1994).

paragraph contradicts the amended pleading's assertions of vesting of lifetime non-contingent benefits and that Defendants cannot require retiree contributions and terminate benefits for a failure to make such contributions. It is beyond question that the agreement also permits termination for retirees with less than 95 points who fail to make their contributions.

The apparent inferences Plaintiffs (explicitly or implicitly) ask this Court to draw are unreasonable and unwarranted in light of the foregoing language. There is thus no support for Plaintiffs' allegations behind the Count I § 301 claim or the Count II claim to enforce rights and enjoin plan violations.[4] There is also no support for lifetime benefits that cannot be terminated. The attachment exhibit in fact contravenes Plaintiffs' pleading in this regard, undercutting the plausibility of their claim to relief.

This leaves Count III. That count asserts a breach of fiduciary duty under ERISA, alleging according to Plaintiffs' own characterization that Defendants "breached their fiduciary duties by not administering the plans in a prudent manner, by failing to act for the exclusive purpose of providing benefits, and by wrongfully burdening participants and beneficiaries of the plans with monthly 'premiums,'

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[4] The lack of a foundation for an ERISA violation renders Defendants' arguments as to redundant sources of relief under the various ERISA provisions moot.

causing hardship to the retirees and, in many instances, termination of health benefits." (Doc. # 62, at 3 (tracking Amended Complaint, Doc. # 14 ¶ 34).) Even assuming arguendo that this is a viable cause of action under ERISA, Plaintiffs have failed to plead facts supporting imprudent conduct and a failure to act for the plan purpose. Moreover, as described above, Plaintiffs have failed to plead facts supporting the wrongful imposition of retiree contributions.

The Court notes that the briefing includes Plaintiffs' assertion that Count III also targets the specific allegation that Defendants misled prospective retirees with promises that they would receive "no cost" health benefits during their retirement. *See*, *e.g.*, Doc. # 62, at 3. It is important to note, however, that *nowhere in the amended complaint* do Plaintiffs plead this allegation or how or what Defendants purportedly did in this regard, beyond a reference in Count I that the CBAs promised retirees health benefits. It is a wholly unsupported factual contention derived from the briefing, and this Court is restricted under Rule 12(b)(6) to crediting the amended pleading, not briefing. Accordingly, Plaintiffs' belated contention is not sufficient to present a viable Count III upon which this Court could grant relief.

In summary, in addition to the 12(b)(1) attack on Count I, Plaintiffs' amended complaint also does not include "enough factual matter (taken as true) to suggest that" there is a foundation for Counts I, II, and III plausibly suggesting a right to relief. *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, ___, 127 S. Ct.

1955, 1965, 167 L. Ed. 2d 929 (2007). Because the pleading's factual allegations are not "enough to raise a right to relief above the speculative level," *see id.*, the Court must dismiss the complaint under Rule 12(b)(6).[5]

III. Conclusion

For the foregoing reasons, the Court GRANTS Defendant's motion to dismiss. (Doc. # 19.) The Court therefore need not address Plaintiffs' moot motion for a preliminary injunction (Doc. # 40) and Defendants' moot motion to strike the jury demand (Doc. # 20).

The Clerk shall enter judgment accordingly and terminate this case upon the docket records of the United States District Court for the Southern District of Ohio, Eastern Division, at Columbus.

IT IS SO ORDERED.

[5] The Court therefore need not and does not address Defendants' moot alternative "preemption" ground for dismissal of Count I under Rule 12(b)(1).

Nos. 12-3329/3407

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HOBERT FREEL TACKETT, ET AL.,	)	
Plaintiffs-Appellees,	)	ORDER
v.	)	(Filed Oct. 22, 2013)
M&G POLYMERS USA, LLC, ET AL.,	)	
Defendants-Appellants.	)	

BEFORE: KEITH and COLE, Circuit Judges.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

* Hon. Boyce F. Martin, Jr., who was a member of the panel rendering a decision in this appeal, retired on August 16, 2013.

submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

29 U.S.C. § 185

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C. § 1132(a)(1)(B)

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

* * *

(B) 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 terms of the plan;