No. 12-___

IN THE

Supreme Court of the United States

NEWELL WINDOW FURNISHINGS INC., KIRSCH DIVISION; NEWELL OPERATING COMPANY INC.; and the NEWELL RUBBERMAID HEALTH AND WELFARE PROGRAM 560,

Petitioners,

v.

WILLARD BENDER; DON LAMPE, CAROLYN CONNER; JAMES TAYLOR, ROGER SMOKER; ROSE ANN ROHR, individually and on behalf of themselves and all persons similarly situated,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER J. RILLO*
TESS J. FERRERA
DIANE M. SOUBLY
MATTHEW D. LAHEY
SUSAN J. LUKEN
SCHIFF HARDIN LLP
233 S. Wacker Dr. Suite 6600
Chicago IL 60606
(312) 258-5500
crillo@schiffhardin.com

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether, consistent with federal labor and employee benefits policy, collectively bargained retiree benefits should not be found "vested" for the life of the retiree when a collective bargaining agreement does not contain a "clear statement" that such benefits are vested and/or unalterable, nor any language that might reasonably be construed to provide such benefits, but does contain a provision limiting the insurance program providing benefits to the duration of the labor contract, and does incorporate booklets reserving the right to change or discontinue benefits.

2. Whether the Sixth Circuit's singular presumption of vesting retiree health care benefits based on the status of retirement has contravened federal labor and employee benefits policy by placing a "thumb on the scales" in favor of vesting, by impeding the development of a uniform federal labor law, and by adversely affecting the national uniform administration of benefit plans.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, the parties to the proceedings in the court whose judgment is sought to be reviewed were Willard Bender, Don Lampe, Carolyn Conner, James Taylor, Roger Smoker, and Rose Ann Rohr, individually and on behalf of themselves and all persons similarly situated; Newell Window Furnishings Inc., Kirsch Division; Newell Operating Company Inc.; and the Newell Rubbermaid Health Welfare Program 560. The International Union United Automobile Aerospace and Agricultural Implement Workers of American (UAW) was dismissed as a plaintiff in the district court based on its waiver and release in the Shutdown Agreement.

RULE 29.6 STATEMENT

Newell Window Furnishings Inc., Kirsch Division, is a wholly owned subsidiary of Newell Operating Company Inc., itself a wholly owned subsidiary of Newell Rubbermaid Inc. The Newell Rubbermaid Health and Welfare Program 560 is an affiliate of Newell Rubbermaid Inc. No publicly owned company owns 10% or more of Newell Rubbermaid Inc.'s stock.

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NEWELL WINDOW FURNISHINGS INC., KIRSCH DIVISION; NEWELL OPERATING COMPANY INC.; and the NEWELL RUBBERMAID HEALTH AND WELFARE PROGRAM 560,
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WILLARD BENDER; DON LAMPE, CAROLYN CONNER; JAMES TAYLOR, ROGER SMOKER; ROSE ANN ROHR, individually and on behalf of themselves and all persons similarly situated,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Newell Window Furnishings Inc., Kirsch Division; Newell Operating Company Inc., and the Newell Rubbermaid Health and Welfare Program 560 hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in *Bender v. Newell Window Furnishings, Inc., Kirsch Division*, 681 F.3d 253 (6th Cir. 2012).

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Sixth Circuit is reported at 681 F.3d 253 (6th Cir. 2012) and is reproduced at Petitioner's Appendix ("Pet. App.") 1a-39a. The opinion of the United States District Court for the Western District of Michigan is reported at 725 F. Supp. 2d 642 (W.D. Mich. 2010) and reproduced at Pet. App. 40a-83a.

JURISDICTION

The opinion and judgment of the court of appeals were issued on May 3, 2012. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

The district court had jurisdiction of this case under Section 301(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. §185, and Section 502(e)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132(e)(1). The Sixth Circuit had jurisdiction of this case pursuant to 28 U.S.C. §1292(a)(1).

STATUTORY PROVISIONS INVOLVED

Section 301 of the LMRA, 29 U.S.C. §185, provides in pertinent part:

> 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.

Section 502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B), provides:

> (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 . . . .

INTRODUCTION

Collectively bargained retiree health care benefit claims have given rise to differing treatments by the federal courts. The Sixth Circuit alone has adhered to a presumption in favor of vesting such benefits, in conflict with the LMRA and ERISA.

This Court has repeatedly declined to grant petitions for review in cases complaining of the effect of such a presumption, perhaps believing the issue merely one of contract interpretation. However, the protracted split in the federal circuits engendered by the Sixth Circuit's decision in *Int'l Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983) ("*Yard-Man*"), has eroded federal labor and employee benefits policy and has undermined the development of uniform federal labor law and the uniform national administration of employee welfare benefit plans.

Instead of a consistent and uniform body of federal labor law and employee benefit law decisions, the circuit split over the correct legal standard to determine collectively bargained retiree benefits has pro-

duced a hodge-podge of interpretations of similar labor contract and plan provisions. Benefits that Congress clearly recognized should not vest because of the volatility of health care costs now vest in the collective bargaining context, as some courts place a "thumb on the scale" in favor of status vesting, ignore unambiguous contract terms, and identify a questionable ambiguity in a labor contract's terms in order to forage through extrinsic evidence to find the parties' intent to vest such benefits.

In the years since *Yard-Man*, federal courts have also declined to enforce durational provisions limiting such benefits to the labor contract term and have downplayed the significance of a history of changed benefits or reservations of the right to change or amend benefits. Some courts, like the district court in this case, have even placed the burden on employers to prove, by a clear statement in labor contracts, that retiree benefits do *not* vest for life.

Because of its persistent adherence to *Yard-Man* the Sixth Circuit has become the forum of choice for retirees who worked and resided, and whose labor contracts were negotiated, in other federal circuits. Unions and retirees alike believe that the Sixth Circuit is much more willing to find a plan document ambiguous and to permit district courts to consider extrinsic evidence:

> There is a stark conflict in the federal circuit courts as to the proper test for deciding whether plan documents are ambiguous. . . . Nevertheless, it is far from certain that the Supreme Court will agree to resolve the dispute any time soon. . . . Until the Supreme Court speaks on this question, the outcome of important cases will fre-

> quently depend on the circuit in which the case is heard, and forum shopping will inevitably motivate some litigants.[1]

This Court should grant leave to resolve the split in the circuits, to disavow the *Yard-Man* presumption in favor of a "clear statement" of vesting rule, to stem forum-shopping, and to align principles of contract interpretation with federal labor and employee benefit policy.

STATEMENT OF THE CASE

Respondents, six bargaining unit retirees who retired from Newell's predecessors on or before January 1, 1994 or surviving spouses of such employees, filed a class action on behalf of themselves and all eligible spouses, surviving spouses and dependents, alleging entitlement to lifetime, unalterable retiree health care benefits at no cost. On cross-motions for summary judgment, the district court granted plaintiffs' motion and denied Newell's, finding that 1) Newell was bound as a successor liable under certain CBAs, 2) plaintiffs were entitled to employer-paid health care benefits for life and/or full reimbursement of Medicare Part B premiums; and 3) plaintiffs' claims were not time-barred. (Pet. App. 3a-4a, 40a-83a.)[2]

Respondents claimed a substantial continuity of operations after Petitioner Newell Window Furnish-

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[1] William T. Payne, *Lawsuits Challenging the Termination or Modification of Retiree Welfare Benefits: A Plaintiff's Perspective*, 10 Labor Lawyer 91, 118-19 (1994).

[2] The third holding is not the subject of this petition. Petitioners dispute the first holding only to the extent that it subsumes the second holding.

ings and Newell Operating Company (hereafter "Newell") merged with Kirsch, Inc. (Kirsch) on December 11, 1998. The Opinions below set forth the various owners of the Sturgis, Michigan plant at which Respondents were employed. (Pet. App. 3a-4a, 42a-43a.) The plant closed pursuant to a Shutdown Agreement between Newell Window and the union in 2000. (*Id.*)

Newell's predecessor, Cooper Industries (Cooper), acquired Kirsch Company as a division in 1981 (*Id.*); and, at the time of Kirsch's formation as a subsidiary in 1996, Cooper transferred to Kirsch only those collective bargaining agreements (CBAs) in effect in 1996 by asset transfer agreement. (§7.3, Kirsch Asset Transfer Agreement, Pet. App. 8a-10a.) The Newell Purchase Agreement did not confer any rights or remedies upon any third parties other than an enumerated few which did not include retirees. (§11.1, Newell Purchase Agreement, Pet. App. 9a-10a, 62a-63a.)

A. The Collective Bargaining Agreements And SPDs

1. Durational limits

All of the CBAs at issue contained the following language relating to insurance, first negotiated in the spring of 1971 and thereafter repeated: "The insurance program as set forth in Exhibit A is agreed to *for the duration of this contract*." (Pet. App. 16a-17a; emphasis added.)

Section 5 of Exhibit A in each of the CBAs provided that retirees would receive "[t]he same benefits as for employees and their dependents as of [a particular

date]." (Pet. App. 14a-16a.)[3] For example, the 1971 CBA provided for "[t]he same benefits as for employees and their dependents as of July 1, 1971. (*Id.*)

2. SPDs incorporated by reference

From the 1971 CBA forward, Section 4 of Exhibit A expressly stated that the benefits provided by the insurance program were "set forth in a booklet and policy, a copy of each to be available to every employee." (Pet. App. 14a-15a.) The CBAs thus necessarily incorporated the benefits booklets and policy, without which the nature of the benefits due would not have been described.

In addition, the SPDs contained a reservation of the right to change or to discontinue the benefits that was unqualified: *i.e.*, the reservation of rights provision did not subject changes or discontinuation to the bargaining process. The 1978 Aetna booklet (the Aetna SPD), the sole booklet for the period represented by the 1971–1982 CBAs that Respondents produced, cautioned: "Change or Discontinuance of Plan –It is hoped that this Plan will be continued indefinitely, but, as is customary in group plans, the right of change or discontinuance at any time must be reserved." (Pet. App. 22a.) The SPDs that Cooper provided (the Cooper SPD) also detailed the terms of the health benefits incorporated into the 1985, 1988, 1991 and 1993 CBAs and contained an unqualified reservation of rights to amend or terminate the plan. (Pet. App. 22a-24a.)

[3] The 1980 CBA extended the benefits, as set forth in the booklet and policy underwritten by Aetna, to surviving spouses and dependents of deceased retirees. (Pet. App. 14a-15a, n.8.)

3. Changes in benefits

Beginning with the 1985 CBA, Section 5 changed the benefit for existing retirees and now required retirees age 62-65 and under age 65 surviving spouses (who did not remarry or have insurance through another employer) and dependents to pay a premium co-pay of $15 or $20. (Pet. App. 15a-16a.) The 1988 CBA increased the premium co-pay for age 62-65 retirees. (Pet. App. 44a-45a.)

The Cooper SPD also reduced the amount of the company's co-pay for outpatient surgery to 80% and contained an express reservation of the right to change the percentage of covered expenses and out-of-pocket limits. (Pet. App. 34 (n.12), 78a.)

Section 5 of Exhibit A of the 1993 Cooper CBA announced that employees retiring prior to January 1, 1994, would be covered under the Cooper Comprehensive Retiree Medical Plan but would "have the same cost-effective health benefits as those being granted active employees as of January 1, 1986." (Pet. App. 16a.)

In addition to the changes to premium co-pays described above, Cooper advised retirees on June 2, 1997 that the same benefits would generally be in effect upon the sale to Newell, but that the Cardiac Care Program would be discontinued. (Pet. App. 86a-87a.) In addition, Cooper advised retirees that no other changes were being made with respect to coverages "at this time", but that "Newell does, however, reserve the right to modify the coverage and benefits provided, as may be amended from time to time." (*Id.*)

The Aetna SPD also integrated pre-1987 retirees' benefits with Medicare. (Pet. App. 34a-35a.) The

Opinion below and the district court opinion relied upon testimony extrinsic to the SPD and determined that the plan coordinated, rather than integrated with Medicare. (Pet. App. 34a-35a, 78a-81a.)

4. The 1998 Agreement and the Shutdown Agreement relating to Medicare Part B reimbursement

As of 1989, Cooper restated the Kirsch Pension Plan, now providing for a cap on Medicare Part B premium reimbursements of $11.70. (Pet. App. 27a.) Cooper then adopted an amendment to the Plan document in 1993 that did not change the $11.70 limit for reimbursement.[4] After the merger with Newell, the Newell Pension Plan replaced the Cooper Pension Plan, effective August 1, 1998. (*Id.*)

During labor negotiations leading to the 1998 CBA, the union and Newell negotiated a supplement agreement confirming that reimbursement of Medicare Part B premiums for pre-August 1, 1998 retirees would continue as provided by the terms of the pension plan in place in 1991. (Pet. App. 29a-30a.)

The Shutdown Agreement provided that it controlled over the 1998 CBA (and thus its supplemental agreement) and terminated the 1998 CBA and its supplemental agreement on March 31, 2001. (Pet. App. 73a-74a.)

B. The Decisions Below

1. The district court opinion

Relying upon *Yard-Man* and its progeny, the district court held that the CBAs unambiguously pro-

[4] The pre-1980 CBAs did not provide full reimbursement of Medicare Part B premiums. (Pet. App. 46a.)

vided a vested right to lifetime retiree health care benefits at the levels in place for their respective retirement groups (pre-1986 and 1986-1993 retirees) at no cost, except for the co-pay paid by retirees age 62-65 and over age 65 spouses and dependents. (Pet. App. 64a-79a.) The district court also found retirees entitled to coordination, rather than integration with Medicare. (Pet. App. 79a-81a.) Relying upon extrinsic evidence and erroneously relying upon a 1980 Addendum (Pet. App. 28a), the district court further held that Newell must provide full Medicare Part B premium reimbursement to the full extent that the premiums exceeded the $11.70 cap for pre-August 1, 1998 retirees. (Pet. App. 46a-49a, 54a-56a.) The court also enjoined Petitioners from amending the Petitioner Plan or providing benefits inconsistent with its judgment. (Pet. App. 6a.)

In reaching its decision, the district court relied upon the *Yard-Man* presumption and found the durational clause ineffective as to retiree benefits because it was a "general" duration clause under recent Sixth Circuit precedent (*e.g., Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006) (finding such duration clauses "general" unless "retiree benefits" expressly mentioned). (Pet. App. 69a.) The district court also found the labor contract "plain" and unambiguous, but considered extrinsic evidence. (Pet. App. 41a, 49a-56a.) The district court refused to recognize the reservations of rights provisions in the SPDs, downplayed the significance of benefit reductions over time, and placed the burden on Newell of rebutting extrinsic evidence with language that "*actually expressed an unambiguous intention not to confer vested benefits.*" (Pet. App. 41a (emphasis added), 68a-72a.) Although the district court found Respondents' benefits subject to coordination (rather

than integration) with Medicare, it did not consider whether the presence of a coordination/integration provision contemplated benefit changes. (*Id.*)

2. The Court of Appeals opinion

Again relying upon the *Yard-Man* presumption and its progeny, the Sixth Circuit affirmed the district court and found Respondents entitled to vested lifetime retiree health care benefits. Quoting extensively from *Yard-Man* as the seminal case on the methodology to be followed, the Opinion below acknowledged that *Yard-Man* has led to "differing results"; and that, even if one viewed the teaching of *Yard-Man* as an inference and not a presumption, "this court has described the inference as acting like a 'thumb on the scales' or 'nudge' in favor of vesting." (Pet. App. 13a.) The Opinion below also recognized that the *Yard-Man* presumption had led to divergent results for hourly and salaried employees. (Pet. App. at 11a, n.6.)

Nevertheless, the Opinion then gave the same short shrift that the district court had to the durational clauses in the insurance provisions of all of the CBAs. (Pet. App. 16a-17a.)

The Opinion below then disregarded certain holdings relating to the incorporation of SPDs in labor contracts discussed in *dicta* in *Schreiber v. Philips Display Components Co.*, 580 F.3d 355, 365 n.12 (6th Cir. 2009), simply because they appeared in *dicta.* (Pet. App. 17a-19a.) The Opinion rejected Petitioners' argument that the CBAs repeatedly incorporated the SPDs by express reference to the booklets and policy. (*Id.*) The Opinion below also refused to find the reservation of rights clauses sufficiently unqualified to enforce. (Pet. App. 20a-25a.) Contrary to the

clear antecedent reference to "plan" in the SPD provision delineating a rule of construction in case of conflict between the "legal document" and the SPD, the Opinion asserted that the CBA could be the "legal document." (Pet. App. 23a-24a.)

As to the Medicare Part B premium reimbursement, the Opinion below conceded that the district court erred in holding that an expired memorandum providing for Medicare Part B premiums for active employees could provide the basis for the retirees' claim to full Medicare Part B reimbursements. (Pet. App. at 28a.) The Opinion treated that error as harmless. Because it found the Supplemental Agreement ambiguous, the Opinion again looked to extrinsic evidence and found that Newell reimbursed the full Medicare Part B premium for pre-August 1, 1998 retirees. (Pet. App. 29a-33a.)

Finally, as to the issue of integration or coordination with Medicare, the Opinion in essence found the SPD ambiguous and relied upon extrinsic evidence to determine whether the CBAs promised coordination or integration with Medicare. (Pet. App. 34a-35a.)

REASONS FOR GRANTING THE PETITION

This Court should intervene to determine 1) the correct legal standard to apply in determining whether collectively bargained retiree health care benefits vest for life, one that is consistent with federal labor and employee benefits policy; and 2) if the benefits vest for life, whether the levels or costs of the benefits can be reasonably altered or changed, in light of the collectively bargained language that creates the benefit (including durational provisions and reservations of rights to change or modify bene-

fits) and in light of prior reductions in benefits without challenge.

The repeated consideration of these questions has produced a deep-seated, well-documented conflict among the courts of appeals. This conflict, and its adverse impact on the development of uniform federal labor law and employee benefits law, is squarely implicated in this case, a case that would have been decided differently in federal circuits other than the Sixth.

Unlike the Sixth Circuit, which clings to the *Yard-Man* inference or presumption, other federal circuits correctly recognize that, in order to conclude that an employer has agreed to undertake the open-ended, expensive commitment of lifetime retiree health care benefits, that agreement must be clearly stated in, or reasonably construed from, the collectively bargained language. Rather than follow a "clear statement" rule or a "reasonable construction" rule, the Sixth Circuit is willing to *infer* the employer's agreement to assume this liability, an inference that could not be drawn without a strong implicit presumption that benefits should be vested for life.

Beginning with a "thumb on the scales" in favor of vesting conflicts with federal labor and employee benefits policy. This Court should grant leave to reaffirm a fundamental principle of federal labor law: the presumption that benefits expire upon contract expiration unless the parties clearly and unequivocally provide otherwise. This Court also should grant leave to reaffirm a fundamental principle of federal employee benefits law: welfare benefits do not vest by statute, are subject to volatility in the marketplace, and should only vest as an extra-ERISA commitment by clear statement. To return parties to

the bargaining table and to plan drafting without a presumption based on status (the *Yard-Man* inference) and with a presumption consistent with both federal labor law and ERISA, this Court should grant plenary consideration in this case.

Moreover, the long and unresolved split in the circuits has frustrated the efforts of employers with operations in several states to establish a consistent, nationwide approach to retiree benefits. As a result of this outcome-determinative and irreconcilable split, forum shopping has forced plans and their sponsors and administrators to defend contract language at great expense in circuits where a handful of retirees may now reside (after retirement) but never worked, and where benefit plans and labor contracts were not in fact negotiated or administered. The national venue provisions in the LMRA and ERISA should work in tandem with a consistent and uniform federal labor and employee benefits law, regardless of where suit is filed. Again, this Court should grant plenary consideration to restore integrity to federal labor and employee benefit law policy.

The conflict among the circuits subjects employers, unions, and employees to multiple and conflicting rules of law. The resulting fragmented legal regime is both fundamentally unfair and plainly inconsistent with the statutory interests in uniform interpretation of collective bargaining agreements embodied in Section 301 of the LMRA and in the national uniform administration of benefit plans embodied in ERISA.

I. THE CIRCUITS REMAIN IN IRRECONCILABLE CONFLICT ABOUT THE STANDARD FOR DETERMINING WHETHER COLLECTIVELY BARGAINED RETIREE HEALTH-CARE BENEFITS VEST FOR LIFE.

A. The Courts Of Appeal Recognize The Lack Of Consistency And Uniformity In Their Approaches.

Because this Court has not yet granted leave in order to evaluate the various legal standards followed in light of federal labor and employee benefits policy, the courts of appeals have fashioned very different standards which even they recognize frustrate the development of consistent federal law. See, *e.g.*, *Senior* v. *NSTAR Elec.& Gas Corp.*, 449 F.3d 206, 216 (1st Cir. 2006) (noting that "the circuits have taken somewhat different approaches to resolving the question of whether a labor agreement has created vested rights in benefits"); *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000) (observing that the courts of appeals that have addressed the issue are "all over the lot"); *Am. Fed'n of Grain Millers* v. *Int'l Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997) (noting that "the circuits disagree as to exactly what language is required to create a promise to vest retiree medical benefits").

B. The *Yard-Man* Inference Remains a Much Criticized Outlier.

The Third Circuit adheres to a clear statement rule that rejects a presumption of vesting, while the Second and Seventh Circuits decline to presume vesting from silence and require some language that can reasonably be construed to confer vested benefits.

The First, Fifth and Sixth Circuits believe that they follow no presumption whatsoever; and the Fourth, Eighth, Ninth and Eleventh Circuits appear to resolve collectively bargained retiree benefits cases without employing any presumption. In the almost 30 years since the Sixth Circuit adopted the *Yard-Man* presumption, most federal circuits have expressed some discomfort with the *Yard-Man* approach.

As an outlier even among its sister circuits, the Sixth Circuit itself has attempted to re-characterize its presumption as merely an inference, but cannot deny that it is an inference that places a "thumb on the scales" in favor of vesting.

1. The "clear statement" rule

The Third Circuit follows the clear statement rule, the rule Petitioners believe remains most consistent with federal labor policy. *See: Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 207 (1991) (presumption that benefits expire upon contract expiration unless labor contract clearly and expressly states otherwise). The Third Circuit, which has declined to adopt the *Yard-Man* inference of status vesting, explicitly requires a clear statement of vesting beyond labor contract expiration. *In'tl Union, UAW v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999).

This approach is also consistent with federal employee benefits policy, and many courts (including the Sixth) require a clear statement to determine whether *salaried* retiree health-care benefits (provided solely by an ERISA plan document) are vested. See *Sprague* v. *Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (*en banc*) (requiring that, in a salaried plan, the intent to vest retiree health-care benefits be

found in the plan documents and be stated in clear and express language); *Chiles* v. *Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996) (same); *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 58 F.3d 896, 902 (3d Cir. 1995) (same); *Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994) (same); *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993) (same).[5]

The clear statement rule for construing plan and SPD language in the salaried employee context need not be abandoned in the collectively bargained employee context, simply because of a gratuitous inference of status vesting.

2. No presumption of vesting from silence

The Seventh and the Second Circuits decline to presume that silence equates with the vesting of benefits. The Seventh Circuit presumes no vesting from silence "unless the plaintiff can show by objective evidence that the agreement is latently ambiguous." *Rossetto*, 217 F.3d at 547. *See also*, *Cherry v. Auburn Gear, Inc.*, 441 F.3d 476, 481 (7th Cir. 2006) (finding that "[t]he presumption that health care benefits do not exceed the life of an agreement imposes a high burden of proof upon the retirees"). The Second Circuit has rejected any inference of retiree benefit vesting when the labor agreement is silent on the issue of duration, stating that the documents must contain express language "capable of reasonably being interpreted" as creating a promise to vest benefits, and rejecting plaintiffs' "extensive linguistic

[5] Indeed, the court of appeals Opinion below (at n.6) recognized that, had this dispute related to salaried employees, the analysis would have been different. (Pet. App. at 11a.)

contortion[s]" seeking to "manufacture" an ambiguity. *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 134-35 (2d Cir. 1999).

3. The absence of any presumption approach

The First and the Fifth Circuits have declined to employ a presumption relating to vesting. *See Senior*, 449 F.3d at 216-18 & n. 16; *Int'l Ass'n of Machinists v. Masonite Corp.*, 122 F.3d 228, 231-32 (5th Cir. 1996) (declining to apply the *Yard-Man* inference).

The Sixth Circuit has protested that it does not follow a presumption, but merely an "inference" of vesting that "corroborates" other evidence of intent, *Yolton*, 435 F.3d at 575.

The Fourth, Eighth, Ninth, and Eleventh Circuits seem to resolve cases without employing any presumption whatsoever. *See: Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290-92 (4th Cir. 2012) (characterizing discussion of *Yard-Man* in earlier case as *dictum*, looking to contract language for manifestation of intent without status vesting inference, and concluding that durational language in SPD delimiting benefit program to duration of labor contract controlled); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.l2d 1512, 1516-20 (8th Cir. 1988) ("We believe that it is not at all inconsistent with labor policy to require plaintiffs to prove their case without the aid of 'gratuitous inferences.'"); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223-25 (9th Cir. 1984); *Stewart v. KHD Deutz Corp. of Am.*, 980 F.2d 698, 702 & n.3 (11th Cir. 1993).

4. The Yard-Man presumption

The *Yard-Man* presumption, first announced in 1983, sprang from the premise that retiree welfare benefits must vest upon the retiree attaining the status of retirement because retiree benefits constituted a permissive subject of bargaining. *See Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). In so concluding, this Court overturned the National Labor Relations Board's prior contrary position that such benefits were mandatory subjects of bargaining. *Id.* Utilizing this status vesting theory, the Sixth Circuit has scoured labor contracts that do not clearly and expressly provide for lifetime benefits for any nuanced language that it can label ambiguous and "corroborate" with extrinsic evidence of vesting.

Despite the Sixth Circuit's attempts to downplay the influence of the *Yard-Man* inference, *Yard-Man* is now deeply embedded in the structure of the law governing Section 301 cases, and continues to have a significant and often outcome-dispositive impact on Section 301 suits in the Sixth Circuit. See *Skinner Engine*, 188 F.3d at 140 (noting that "[t]he [*Yard-Man*] inference exerts a fair amount of influence in how these types of cases are resolved").

C. The Conflict In The Circuits As To The Proper Standard Is Unfairly Outcome-Determinative.

Given the various approaches taken by the federal courts in fashioning a standard to apply when determining whether collectively bargained retiree welfare benefits are vested, the outcome of a given case usually depends on the legal standard the court adopts and the legal forum where the case is liti-

gated. See Jeffrey S. Klein & Nicholas J. Pappas, *Recent Developments in Retiree Health Benefits Litigation*, N.Y.L.J., June 5, 2006, at 3 ("The past 23 years of litigation following the decision in the Yard-Man case reflect that the outcome of a particular case involving whether or not retiree medical benefits are vested depends not only on the facts . . . but also on the governing judicial precedent in the jurisdiction where the case is filed.").

Even if considered an inference, the *Yard-Man* framework clearly tilts the scales in favor of the retirees by presuming vesting, and by sometimes (as did the district court here) insisting upon a clear statement of non-vesting (all contrary to the *Litton* presumption, as discussed below in Part II.A.). Of the seventeen Section 301 cases that have produced published opinions in the Sixth Circuit since *Yard-Man*, the court has found that the retirees' benefits were vested or likely to be vested in all but three cases.[6] *See Bender*, 681 F.3d 253 (6th Cir. 2012) (Pet. App. 1a-39a) (vested); *Tackett v. M & G Polymers, USA LLC*, 561 F.3d 478 (6th Cir. 2009) (dismissal under Rule 12(b)(6) in favor of employer reversed); *Schreiber v. Philips Display Components Co.*, 480 F.3d 355 (6th Cir. 2009) (summary judgment in favor of employer reversed); *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064 (6th Cir. 2008) (vested); *Noe v. Poly-One Corp.*, 520 F.3d 548 (6th Cir. 2008) (vested); *Yolton*, 435 F.3d 571 (6th Cir. 2006) (vested); *McCoy v.*

[6] Finding that the benefits did not vest: *Bittinger v. Tecumseh Products Co.*, 83 F. Supp. 2d 851 (E.D. Mich. 1998), *aff'd* 201 F.3d 440 (6th Cir. 1999) (*per curiam* opinion affirming on grounds articulated in district court opinion); *Reese v. CNH America LLC*, 574 F.3d 315 (6th Cir. 2009); *Wood v. Detroit Diesel Corp.*, 607 F.3d 427 (6th Cir. 2010).

Meridian Auto. Sys., Inc., 390 F.3d 417 (6th Cir. 2004) (likely to be vested); *Maurer* v. *Joy Techs., Inc.*, 212 F.3d 907 (6th Cir. 2000) (vested); *Int'l Union, UAW v. BVR Liquidating*, 190 F.3d 768 (6th Cir. 1999) (vested); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996) (likely to be vested); *Armistead* v. *Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991) (vested); *Smith* v. *ABS Indus., Inc.*, 890 F.2d 841 (6th Cir. 1989) (vested); *Weimer* v. *Kurz-Kasch, Inc.*, 773 F.2d 669 (6th Cir. 1985) (vested); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985) (vested); *Int'l Union, UAW* v. *Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984) (vested); *Yard-Man*, 716 F.2d 1476 (vested).

Notably, the Sixth Circuit's record contrasts sharply with that of its neighbor, the Seventh Circuit, which has found the benefits to be vested in only three of thirteen cases.[7] The district court recognized that the Sixth and Seventh Circuits "differed on at least one important aspect of retiree vesting of healthcare benefits": the Sixth Circuit employed a

[7] *See Temme v. Bemis Co., Inc.*, 622 F.3d 730 (7th Cir. 2010) (vested); *Zielinski v. Pabst Brewing Co.*, 463 F.3d 615 (7th Cir. 2006) (not vested); *Barnett* v. *Ameren Corp.*, 436 F.3d 830 (7th Cir. 2006) (not vested); *Cherry*, 441 F.3d 476 (not vested); *Bland v. Fiatallis N. Am. Inc.*, 401 F.3d 779 (7th Cir. 2005) (summary judgment reversed); *Int'l Union, United Auto. Workers of Am.* v. *Rockford Powertrain, Inc.*, 350 F.3d 698 (7th Cir. 2003) (not vested); *Rossetto*, 217 F.3d 539 (remand for trial); *Pabst Brewing Co.* v. *Corrao*, 161 F.3d 434 (7th Cir. 1998) (not vested); *Diehl* v. *Twin Disc., Inc.*, 102 F.3d 301 (7th Cir. 1996) (vested); *Murphy* v. *Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995) (not vested); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (remand for trial); *Senn* v. *United Dominion Indus.*, 951 F.2d 806 (7th Cir. 1992) (not vested); *Ryan* v. *Chromalloy Am. Corp.*, 877 F.2d 598 (7th Cir. 1989) (not vested). This inter-circuit inconsistency cries out for resolution by this Court.

status vesting inference and the Seventh Circuit refused to infer vesting from silence. (Pet. App. 58a, n. 2.) Furthermore, unlike the *Yard-Man* approach, which invites the review of extrinsic evidence in almost every instance to "corroborate" the parties' intent, the Seventh Circuit does not permit extrinsic evidence to vary the terms of an unambiguous contract, but merely to explain a latent ambiguity. *See, e.g., Rosetto, supra.*

Moreover, had this case arisen in the Seventh Circuit, a finding of vested retiree benefits would not necessarily result in a finding of unalterable benefits for life. *See Zielinski*, 463 F.3d 615 (holding that a retiree benefit continued "for life" might be reasonably construed as providing a benefit that can be reasonably changed within that lifetime, *e.g.*, to take into account economic inflation or medical inflation). Here, under such an analysis, the CBAs' insurance provisions with their durational term and the benefits provisions with successive effective dates, coupled with the reservations of rights provisions in SPDs, could reasonably have been construed to mean that benefits would continue for life, but subject to the levels and scope of benefits for actives as each labor contract redefined those levels and scope. The Opinions fail to reach any such analysis. That failure is all the more puzzling where reductions and changes in benefits occurred but went unchallenged by the union or by retirees, changes demonstrating that the retiree benefits were not intended to be unaltered for life: *e.g.*, the reduction in co-pay for outpatient surgery, the discontinuation of the Cardiac Care Program, and the reservation of the right to change the percentage of covered expenses and out-of-pocket limits.

In short, the circuit split over the legal standard to apply is outcome-determinative, and the Sixth Circuit has refined a faulty analysis into a requirement that an employer prove by clear statements otherwise that benefits do not vest for life and are not alterable. The burden of proof that should remain with plaintiff-retirees has impermissibly shifted.

D. The Circuit Split Has Fostered Inconsistent Interpretations Of Express Durational Provisions For Benefit Programs In Labor Contracts.

The *Yard-Man* approach has fostered inconsistent interpretations of similar contract provisions. Unlike other circuits, the Sixth Circuit ignores the distinction between a "general" duration provision that simply limits the term of the labor contract and a "specific" duration provision that expressly refers to the benefit program and links its duration to the fixed term of the contract.

The presence of two separate duration provisions, one "general" (or governing the termination of all terms of the labor contract, consistent with the *Litton* presumption), and one "specific" (relating to the benefit program), can only logically lead to the conclusion that the specific duration clause embodied in writing the parties' intent that none of the employee welfare benefits, including retiree welfare benefits, survive labor contract expiration. Consistent with prior Sixth Circuit cases, the Opinions below conflate the two types of duration provisions. (Pet. App. at 16a-17a, 69a.) *See Yolton*, 435 F.3d at 580-81; *Noe*, 520 F.3d at 553-58. Conflating the two turns the general durational clause into surplusage and renders the specific

durational clause irrelevant as to some sub-groups of employees or former employees.

In contrast to the Sixth Circuit, the Eighth, Second and Fourth Circuits have refused to find a perpetual commitment of lifetime retiree benefits when specific durational provisions expressly refer to benefit programs as running for the fixed period of the labor contract. The Eighth Circuit has reasoned that such durational provisions demonstrate an intent to limit benefits, and that any other reading would render the provisions null and void. *Anderson*, 836 F.2d at 1519 (durational provision "show[ed] an intent to limit benefits to the duration of the agreement. It would render the durational clauses nugatory to hold that benefits continue for life even though the agreement which provides the benefits expires on a certain date.").

Like the Eighth Circuit, the Second Circuit has also found that guaranteeing a level of benefits "during the term of the agreement" created a benefit obligation running only for the fixed period of the labor contract and no longer. *Am. Federation of Grain Millers*, 116 F.3d at 981.

Similarly, in a recent opinion affirming the denial of a preliminary injunction because plaintiffs could not show a substantial likelihood of success on the merits, the Fourth Circuit enforced the same durational provision, there in an SPD and here in the insurance program provision of the labor contract itself, providing that the insurance benefits last only for the duration of the labor contract. *Dewhurst*, 649 F.3d at 292.

Far from encouraging consistency and uniform interpretation of labor contract durational provisions,

the differing approaches among the circuits will persist in creating uncertainty at the bargaining table and in plan administration, particularly for national employers.

E. The Circuit Split Has Encouraged Forum-Shopping.

The circuit split over the legal standard to follow when determining the duration and scope of collectively bargained retiree benefits has led to unseemly forum-shopping. Unions and their retired members attempt to find retirees who reside in the Sixth Circuit no matter where the plants where they worked were located, the plans under which they claim were or are administered, and the labor contacts were negotiated.

In *Yolton*, for example, well aware that the Sixth Circuit infers that retiree benefits vest for life, the retirees there, who actually worked in the Seventh and Eighth Circuits that have rejected the *Yard-Man* inference, filed in the Sixth. In another example of forum and perhaps judge shopping, retirees filed two cases in the Sixth Circuit against Boeing Company, voluntarily dismissing the first in Michigan and filing a second in Tennessee. Both cases were filed to avoid litigating in the Seventh Circuit, where Boeing had filed for declaratory judgment and where its plans were administered. *See, Boeing Company v. March*, Case No. 06cv4997 (N.D. Ill. 2006), ¶¶ 32, 34. In a most recent example of forum shopping, in *Reese v. CNH America*, Case No. 11-1359, pending before the Sixth Circuit, the named plaintiffs obtained venue in the Sixth Circuit, even though CNH has never had facilities anywhere in the Sixth Circuit, and even though plaintiffs worked in CNH facilities located in

the Seventh and Eleventh Circuit. (Pet. App. 88a-90a.)

Respondents may argue that selecting a forum represents a legitimate strategic choice of their counsel. However, the national venue provisions in the LMRA and ERISA assume that there will be a national and uniform federal labor and employee benefits policy and body of law. Because this Court has not yet intervened since the Sixth Circuit created the *Yard-Man* inference, there is no consistent body of federal law, and the national venue provisions cannot function as intended.

Given the varying approaches in federal circuits and the increased forum-shopping the split has caused, this Court should grant certiorari to address the appropriate legal standard to follow in reviewing collectively bargained retiree health care benefits to ensure one consistent federal labor and employee benefit policy.

II. THE PROTRACTED AND DEEP-SEATED CIRCUIT SPLIT FRUSTRATES FEDERAL LABOR AND EMPLOYEE BENEFIT POLICY.

A. The Circuit Split And Adherence To The *Yard-Man* Inference Conflict With Federal Labor Policy.

Placing a "thumb on the scales" under the *Yard-Man* analysis also frustrates the federal labor policy of allowing the parties complete freedom to bargain. As with the problems created under ERISA, conflicts among the circuits lessen the likelihood of a uniform body of federal labor law addressing the same subject.

After the passage of the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, this Court recognized that "[t]he theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustment and agreements which the Act in itself does not attempt to compel." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). This federal labor policy contemplates permitting the parties to negotiate and to apply their own contracts without interference from a court or other third parties, and that such "ownership" of contracts by the contracting parties will maximize the potential for effective and stable labor relations. *See H. K. Porter Co. v. NLRB*, 379 U.S. 99, 103 (1970).

Instead of allowing for that freedom to bargain, for example, the Opinions below rewrote the parties' unambiguous labor contract provisions restricting reimbursement of Medicare Part B premiums to the pension plan cap of $11.70 for pre-August 1, 1993 retirees, *i.e.*, the amount set in the 1991 Pension Plan. Again employing the *Yard-Man* framework, the Opinions strove to find some sort of ambiguity that would permit them to consider extrinsic evidence that the company had reimbursed the Medicare Part B premium in full. Although the Opinions recognized that the company could have done so, not because of any labor contract promise, but in order to comply with Age Discrimination in Employment Act as the Equal Employment Opportunity Commission then interpreted the act, the courts concluded from extrinsic correspondence that the parties intended a full reimbursement, contrary to the terms of the 1998 Supplemental Agreement (Pet. App. 27a-33a) and in violation of the federal labor policy that courts should

not foray into the substance of collective bargaining. *See United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960).

Further inconsistent with federal labor policy that seeks to enforce the parties' entire agreement reached through collective bargaining, the Opinions below declined to find reservations of rights in the booklets and policy incorporated by reference into the CBAs. Absent that incorporation, the CBAs contained no description of the nature and scope of benefits granted to employees and retirees and their dependents, as Petitioners argued below. The court of appeals Opinion required "explicit" language of incorporation for the reservation of rights provision. (Pet. App. 19a.) Yet even without that language of express incorporation, the Opinion selectively enforced the terms of the benefits found only in the booklets and policy.

Instead of recognizing that the parties had contracted to include the terms of the booklet and policy within the labor contract itself, the Opinions below treated the documents as separate and therefore discussed the booklets as "unilateral modifications" (Pet. App. 20a-25a), rather than as labor contract terms within the four corners of the labor contract that required interpretation together as one integrated whole. Applying an extremely narrow exception from *Prater v. Ohio Educ. Ass'n*, 505 F.3d 437, 444 (6th Cir. 2007), to the Sixth Circuit's prior willingness to allow reservations of rights in widely disseminated SPDs to modify CBA terms, *Maurer*, 212 F.3d at 919, the Opinions held that, even though the unions and retirees had never grieved the assertions of the booklets' reservations of rights, the provisions could not be enforced. Although the Opinion

below conceded that the reservations of rights here were not subject to the collective bargaining process, it then followed the Sixth Circuit's extreme formulation of the "prohibition on unilateral modification" in a labor contract's "zipper" provision (*i.e.*, one prohibiting amendment without mutual assent). The court did not permit the SPDs to fall within the exception "as long as the summary did not explicitly renounce the [*entire*] CBA." (Pet. App. 21a-22a; emphasis added.)

In addition to federal labor policies that flow from allowing the parties freedom in collective bargaining, this Court has fashioned a federal policy presumption that presumes that contract terms, including benefit terms, expire upon contract expiration, *unless the parties clearly provide otherwise*. *Litton*, 501 U.S. at 207 (emphasis added). Adhering to the *Litton* presumption provides the parties complete freedom to bargain for new terms once the labor contract ends.

The Opinions below employed the status vesting inference so at odds with the *Litton* presumption (and thus with this Court's prior precedent) as they reviewed labor contract language (the insurance provision with the specific durational limitation) negotiated in the spring of 1971 *before* this Court had reversed the NLRB's conclusion that retiree welfare benefits were mandatory subjects of bargaining. In that timeframe, the NLRB's position that retiree benefits were mandatory subjects of bargaining prevailed, and there could be no inference drawn based on status vesting under *Pittsburgh Plate* Glass. Without recognizing that the language in all of the CBAs was language negotiated when retiree benefits were a mandatory subject of bargaining, the courts below simply followed the *Yard-Man* framework.

Additionally, federal labor policy consistently strives for uniform interpretations of CBAs under federal law. The federal labor policy that underlies preemption of state law mandates that CBAs be subject to uniform interpretation under federal law in order to promote labor peace. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962) ("Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult. . . .").

This Court has recognized that the realm of labor negotiations and the interpretation of labor agreements call for uniform law. *Lucas Flour*, 359 U.S. at 103. This Court has also cautioned: "[t]he need for uniformity . . . is greatest where its absence would threaten the smooth functioning of those consensual processes that the federal labor law is chiefly designed to promote – the formulation of the collective bargaining agreement and the private settlement of disputes under it." (*Id.). See, UAW, AFL-CIO v. Hoosier Cardinal Corp.*, 383 U.S. 696, 702 (1966).

Contrary to the goal of federal labor policy that there should be a federal common law of uniform contract interpretation, the protracted split in the circuits and the Sixth Circuit's adherence to the discredited *Yard-Man* inference has fostered inconsistent and thus unsettled interpretations of the same or similar contract provisions. For example, as discussed above in Parts I.D. the circuits have reached differing interpretations of durational provisions relating to employee welfare benefit programs in labor contracts.

In short, this discord among the federal circuits has precluded the development of uniform federal labor policy and has resulted in federal labor law decisions

inconsistent with federal labor policy. Petitioners respectfully submit that this Court should grant plenary consideration in this matter, and upon plenary consideration should adopt the clear statement rule as the one most conforming to the *Litton* presumption.

B. The Circuit Split And Adherence To The *Yard-Man* Inference Conflict With Federal Employee Benefits Policy.

Congress expressly exempted employee welfare benefits from ERISA's stringent vesting requirements. 29 U.S.C. §1053. As a result of this congressional judgment, ERISA provides, consistent with the *Litton* presumption, that welfare benefits do not automatically vest.

As this Court has remarked, Congress declined to vest employee welfare benefits under ERISA. *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995) (noting that ERISA does not mandate minimum vesting requirements for welfare benefits (citing *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990)). Congress did not impose such vesting "for fear that placing such a burden on employers would inhibit the establishment of such plans" and because it sought "to keep costs within reasonable limits" by permitting benefit amendment in a widely fluctuating market of unpredictable health care costs. *Adams*, 905 F.2d at 47:

> Congress evidenced its recognition of the need for flexibility in rejecting automatic vesting of welfare plans. Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning

> fixed annuities [for pension benefit plans] are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take into account of inflation, changes in medical practice and technology, and increases in the cost of treatment independent of inflation. These unstable variables prevent accurate prediction of future needs and costs.

Moore v. Metro Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988).

Because Respondents seek a benefit that would endure for the duration of retirement, and because the Sixth Circuit declines to apply the same clear statement rule to collectively bargained benefits that it applies in salaried retiree cases that are "pure" ERISA cases, the Sixth Circuit's approach has undercut federal employee benefits policy. Insisting as it does upon a gratuitous inference, the *Yard-Man* approach has contributed to a protracted split in the circuits as well, one which undermines the uniform administration of employee welfare benefit plans.

Petitioners respectfully suggest that this Court should grant plenary consideration in this case, and upon plenary consideration should resolve the split in the circuits by adopting a single legal standard in both bargained and non-bargained cases, and by requiring that any extra-ERISA commitment be effected with clear and express language.

III. THE ISSUE IS RECURRING AND IMPORTANT.

There can be no doubt that the question presented in this petition is recurring. Since the Sixth Circuit decided *Yard-Man*, the federal courts have confronted

a steady stream of litigation over retiree health-care benefits, and there is every indication that this stream will continue as active work forces supporting retiree benefits continue to decrease and health care costs continue to escalate.

As described above, the persistence of the conflict among the courts of appeals, as well as the adherence by the Sixth Circuit to the *Yard-Man* inference, frustrates federal labor policy. The conflict described in this petition undermines the uniformity Congress sought to achieve by enacting LMRA §301, which stands as 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." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 209 (1985).

Similarly, the conflict described in this petition, as well as the adherence by the Sixth Circuit to its *Yard-Man* inference in the context of collectively bargained retiree benefits, frustrates federal employee benefits policy. Adherence to a status vesting inference also contravenes Congress' recognition that employee welfare benefits should not vest, due to their volatility, absent a clear statement of vesting.

The increased litigation regarding retiree benefits occasioned by the circuit split and the race to the Sixth Circuit have contributed to work force reductions driven in part by escalating retiree benefit costs.[8] The shrinking American work force of active employees struggles to support an ever-increasing retiree population as baby boomers retire: while ac-

[8] Gregory Parker Rogers, *Rethinking Yard-Man: A Return to Fundamental Contract Principles in Retiree Benefits Litigation*, 37 Emory L.J. 1033 (Fall 1988) at 1033-34.

tive employees outnumbered Social Security recipients by 5 to 1 in the 1960's, by 2050 that ratio will drop to less than 2 to 1.[9] At the same time, health care costs have increased dramatically. Once so slight a cost that workers diverted little more than a few cents per hour worked toward benefits,[10] health care costs have steadily increased annually, before the current recession by double digit inflation,[11] and during the current recession to a level that has discouraged employers from expanding their work forces.[12]

Because of the circuit split, national employers and sponsors or administrators of national plans in particular, *i.e.*¸ those most likely to continue to offer at least some form of retiree health care benefits to early retirees and to Medicare-eligible retirees, find that they cannot predict with certainty how to bargain over retiree benefits, as the Sixth Circuit continues to chip away at language once found to describe only transitory retiree health care benefits tied to labor contract duration. Beyond the bargain-

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[9] *Assessing Retiree Health Legacy Costs: Is America Prepared for a Health Retirement?*, available online at http://edworkforce.house.gov/issues/107th/workforce/retireehealthcare/factsheet.htm.

[10] Peter M. Kelly, *Welfare Benefit Plans in Corporate Acquisitions and Dispositions*, 20 Real Property, Probate and Trust Journal 1045 (1985).

[11] Kaiser/Hewitt 2005 Survey at vi n.8; *Findings from the Kaiser/Hewitt 2004 Survey on Retiree Health Benefits* at vii, available online at http://www.kff.org/medicare/7194/index.cfm.

[12] Aon/Hewitt News Release, *U.S. Health Care Cost Rate Increases Reach Highest Levels in Five Years*, available online at http://aonmediaroom.com; and Abelson, *Health Care Costs Rising Sharply This Year*, New York Times, September 27, 2011, available online at http://www.newyorktimes.com/2011/9/28.

ing table, employers cannot predict where they will be haled into court by retirees determined to secure by judicial decree what they failed to gain in negotiations.

This Court's attention is urgently required to end this deep and persistent conflict and to announce a legal standard for determining collectively bargained retiree benefits consistent with federal labor and employee benefits policy.

CONCLUSION

For the foregoing reasons discussed in this petition, the writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER J. RILLO*
TESS J. FERRERA
DIANE M. SOUBLY
MATTHEW D. LAHEY
SUSAN J. LUKEN
SCHIFF HARDIN LLP
233 S. Wacker Dr. Suite 6600
Chicago IL 60606
(312) 258-5500
crillo@schiffhardin.com

August 1, 2012

*Counsel of Record

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1335

WILLARD BENDER; DON LAMPE; CAROLYN CONNER; JAMES TAYLOR; ROGER SMOKER; ROSE ANN ROHR, INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED,
Plaintiffs-Appellees,

INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Plaintiff,

v.

NEWELL WINDOW FURNISHINGS, INC., KIRSCH DIVISION; NEWELL OPERATING COMPANY, INC.; AND THE NEWELL RUBBERMAID HEALTH AND WELFARE PROGRAM 560,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Michigan
at Grand Rapids
No. 1:06-CV-113—Robert J. Jonker, District Judge

Argued: April 10, 2012
Decided and Filed: May 3, 2012

Before: GUY, COLE, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Jack F. Fuchs, THOMPSON HINE LLP, Cincinnati, Ohio, for Appellants. Michael L. Fayette, PINSKY, SMITH, FAYETTE & KENNEDY, LLP, Grand Rapids, Michigan, for Appellees. ON BRIEF: Jack F. Fuchs, Stephen L. Richey, THOMPSON HINE LLP, Cincinnati, Ohio, for Appellants. Michael L. Fayette, PINSKY, SMITH, FAYETTE & KENNEDY, LLP, Grand Rapids, Michigan, for Appellees.

OPINION

RALPH B. GUY, JR., Circuit Judge. This appeal concerns the contractual right to continued healthcare benefits for members of a certified class of retirees, their spouses, surviving spouses, and eligible dependents under § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(1)(B), and § 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185. Defendants Newell Operating Company, Inc. (Newell), its subsidiary Newell Window Furnishings, Inc., Kirsch Division (Newell Window), and the Newell Rubbermaid Health and Welfare Program 560 (Newell Plan), appeal from the judgment entered in favor of plaintiffs, which included monetary damages for the individual plaintiffs and declaratory and injunctive relief requiring that defendants provide vested lifetime healthcare benefits to the class members depending on the relevant date of retirement.

Appealing the order granting summary judgment to plaintiffs, defendants challenge the district court's determinations: (1) that Newell Window is bound as a successor liable under earlier collective bargaining agreements (CBAs) to which it was not a party; (2) that members of the plaintiff class had vested rights to company-paid health insurance and/or Medicare Part B premium reimbursements; and (3) that the plaintiffs' claims were not barred by the applicable six-year statute of limitations. For the reasons that follow, the district court's judgment is affirmed.[1]

I.

The retirees were all bargaining-unit employees of a plant located in Sturgis, Michigan, that manufactured window furnishings such as drapery hardware and window blinds. The bargaining-unit employees were represented by former UAW Local 797 (Union), although their employer changed several times during the relevant period. The Sturgis plant was owned by and was the headquarters for Kirsch Company, a Michigan corporation, until it was acquired as a division of Cooper Industries, Inc., in 1981. In 1997, Cooper Industries transferred the Kirsch assets to a newly formed subsidiary named Kirsch, Inc., and then sold that subsidiary to the Newell Company. Newell changed the name back to Kirsch Company, and, in 1998, merged Kirsch with another Newell

[1] Defendants also argue, without much development, that the certification of a single class of plaintiffs should be vacated for a lack of commonality and because the district court has retained jurisdiction over the matter. "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Dillery v. City of Sandusky*, 398 F.3d 562, 569 (6th Cir. 2005). Nor is there a basis for us to review the district court's decision to retain jurisdiction.

subsidiary to form what is now Newell Window. Newell Window closed the Sturgis plant pursuant to a Shutdown Agreement negotiated with the Union in 2000. This litigation arose out of Newell's announcement in November 2005 that it would consolidate all retiree healthcare plans for administration by CIGNA Healthcare, and that a premium of $40 per month would be charged to all retirees across the board effective January 1, 2006.

This case was not the first to be filed. Rather, anticipating litigation and seeking to control the forum, Newell, Newell Window, and the Newell Plan quickly filed suit in federal court in the Northern District of Illinois against the Union and nearly 500 retirees seeking declaration that the changes were lawful. One month later, the Union and four retiree plaintiffs filed this action, individually and on behalf of a purported class, in the Western District of Michigan alleging that the benefit changes violated ERISA and breached the CBAs in violation of the LMRA. The Illinois suit was ultimately dismissed on jurisdictional grounds in favor of this action, and that decision was affirmed by the Seventh Circuit. *See Newell Operating Co. v. UAW*, 532 F.3d 583 (7th Cir. 2008) (*overruled on other grounds by Envision Healthcare, Inc. v. PreferredOne Ins. Co.*, 604 F.3d 983 (7th Cir. 2010)). The forum dispute is not before us, but, as will be discussed later, the district court considered allegations made in the Illinois case in deciding the question of successor liability.

Once the forum dispute was resolved, and after a tentative settlement fell apart, the retiree plaintiffs filed a third amended class action complaint that dropped the Union as a plaintiff, added two more retirees as named plaintiffs, and brought new claims

for full reimbursement of Medicare Part B premiums.[2] The district court granted, in part, the plaintiffs' motion for class certification—declining to establish the three subclasses proposed by plaintiffs but certifying a single class of all former Newell Window, Kirsch Company, or Cooper Industries bargaining-unit employees at the Sturgis facility who retired on or before July 31, 1998, and their spouses, surviving spouses, and eligible dependents. Although probably known to the parties, there are no representations on appeal as to the number or identity of the class members.

Defendants filed a flurry of motions for summary judgment in December 2009, including separate motions by Newell, the Newell Plan, and Newell Window. Plaintiffs filed responses, as well as their own joint motion for summary judgment. After review of the voluminous record and full briefing, the district court denied the defendants' motions and granted the plaintiffs' motion for summary judgment for the reasons articulated in its opinion and order entered July 6, 2010. *See Bender v. Newell Window Furnishings, Inc*., 725 F. Supp. 2d 642 (W.D. Mich. 2010). Defendants' timely motion for reconsideration was denied, and judgment was finally entered in February 2011.

The corrected judgment awarded damages, plus interest, to the individual plaintiffs for medical insurance and/or Medicare Part B premiums, the

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[2] There is no challenge to the district court's dismissal of the Union based on its waiver and release in the Shutdown Agreement. Accordingly, except where noted, reference to "plaintiffs" is to the named retiree plaintiffs.

amounts of which are not in dispute on appeal.[3] With respect to the class claims, the district court declared that some of the class members were entitled to vested lifetime healthcare benefits "at the levels in place for their respective retirement groups (pre-1986 retirees and 1986 - 1993 retirees) prior to the changes imposed by Defendants beginning January 1, 2006." Further, the district court declared that, with the exception of certain retirees age 62 to 65, the benefits must be provided at no cost to the class; decided that pre-1986 retirees were entitled to coordination (rather than integration) of Medicare Part B benefits; and determined that all retirees and spouses (but not dependents) were entitled to vested lifetime reimbursement of Medicare Part B premiums from Newell to the full extent that the premiums exceeded a "capped" monthly contribution from the Pension Plan of $11.70. Defendants were also enjoined from amending the plans or providing benefits inconsistent with the judgment. Finally, while recognizing that there were no class claims for money damages, the district court retained jurisdiction to implement and enforce the judgment including "to conduct all appropriate proceedings to address the appropriate remedy for Class Members for past conduct by Defendants that has been inconsistent with the terms of this Judgment." Defendants' timely appeal followed. To date, the only further proceedings con-

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[3] Specifically, damages were awarded to Roger Smoker for only Medicare Part B reimbursements ($3,894.90); to Carolyn Connor for both medical insurance premiums and Medicare Part B reimbursements ($5,407.20); and to William Bender, James Taylor, Donald Lampe, and Rose Ann Rohr for only medical insurance premiums ($2,240.00 each). These plaintiffs were representative of different levels of benefits within the certified class.

ducted in the district court were related to plaintiffs' pending motion for attorney fees and costs.

II.

We review de novo the district court's grant of summary judgment, as well as decisions on questions of contract interpretation. *Noe v. PolyOne Corp.*, 520 F.3d 548, 551 (6th Cir. 2008); *Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 914 (6th Cir. 2000).

A. Successor Liability[4]

Defendants take issue with the determination that Newell Window is liable as a successor for whatever retiree healthcare benefits vested under the pre-1998 CBAs entered into between its predecessors and the Union. It is true that "a successor corporation generally is not liable for its predecessors liabilities unless expressly assumed." *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 586 (6th Cir. 2006) (citing *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 279, 286-88 (1972)). Here, the district court found an assumption of liability (although there seems to be no question that there was also a substantial continuation of operations at the plant by Newell Window and its

[4] Defendants do not dispute that Newell Operating Company, as the sponsor of the healthcare benefit plan, and the Newell Plan, as the provider of the retiree healthcare benefits in dispute, were proper defendants in this action. The district court concluded as much based on their participation in the declaratory judgment action filed in Illinois. *See Bender*, 725 F. Supp. 2d at 655 ("If [Newell Operating and the Plan] were proper plaintiffs in Illinois, they are proper defendants here."). Nor do these defendants deny that "their presence is necessary to ensure complete and effective relief, as they themselves must have recognized when they fired the first shot as plaintiffs in Illinois." *Id*.

predecessors). *See Wood v. Int'l Bhd. of Teamsters*, 807 F.2d 493, 498-99 (6th Cir. 1986).

Defendants argue that the district court improperly applied judicial estoppel based on statements made in the Illinois complaint alleging that Newell Window was a successor to Cooper and Kirsch Company with respect to healthcare benefits. *Bender*, 725 F. Supp. 2d at 654. That is, defendants argue, judicial estoppel applies only "to a party who has *successfully* and unequivocally asserted a position in a prior proceeding." *Edwards v. Aetna Life Ins. Co*., 690 F.2d 595, 598 (6th Cir. 1982) (emphasis added). However, while it is true that the Illinois complaint was dismissed, it is clear that the district court did not rely on judicial estoppel but properly recognized the Illinois complaint as containing a "party admission" that could be considered with the other evidence in the record. *See Barnes v. Owens-Corning Fiberglas Corp*., 201 F.3d 815, 829 (6th Cir. 2000); *Dixie Sand & Gravel Corp. v. Holland*, 255 F.2d 304, 310 (6th Cir. 1958). The admission that Newell Window was a successor in interest was confirmed by other documentary evidence (including the transfer agreements and a partially disclosed "due diligence" memorandum), and the defendants' course of conduct. For example, a letter from June 1997 addressed to Kirsch retirees stated: "Because Newell has assumed Kirsch's ongoing commitments to its retirees for medical coverage, your benefits will not be changed."

Defendants also renew the argument that retiree healthcare benefit liabilities were "cut off" either because they were not transferred by Cooper to its subsidiary, or because of a reservation-of-rights provision in the transfer agreement between Cooper and Newell. These arguments are no more persuasive

on appeal. First, defendants argue that the 1997 Amended and Restated Asset Transfer Agreement between Cooper Industries and Kirsch, Inc. (Cooper-Kirsch Agreement), transferred only liabilities for CBAs *in effect* at the time (or, in other words, only liability for unexpired CBAs). However, the provision relied upon, § 7.3, does not represent the retention of such liabilities by Cooper and reflects Kirsch's express assumption of "all collective bargaining agreements and all Liabilities associated therewith, that are in effect between any Cooper Company and a union or other collective bargaining representative covering Employees or Former Employees." Also, as the district court found, § 4.1.11 expressly provides for the assumption of liabilities associated with "Employee Benefit Plans in which Employees or Former Employees participate or have participated." The definition of "Employee Benefit Plans" includes plans that provided "post-retirement or post-employment benefits." Further, § 8.6 acknowledged that "Certain Employees and Former Employees are covered by welfare benefit programs maintained by [Cooper]" and provided that "Kirsch shall become a participating employer in the Cooper Welfare Plans." The district court did not err in rejecting this claim.

Alternatively, defendants rely on the reservation-of-rights clause in § 6.4(f) of the 1997 Purchase and Sale Agreement between Cooper and Newell (Cooper-Newell Agreement), under which Newell agreed to provide "Former employees," *i.e.*, retirees, with "medical and life insurance coverage identical to that provided to them . . . under the Cooper Welfare Benefit Plans." Also found in § 6(f) is the following clause:

> Buyer shall retain the right to amend or terminate Buyer's Welfare Benefit Plans as

> they pertain to said Employees and Former Employees; *provided, however*, Buyer shall provide the Employees listed on Schedule 6.4(f) with up to five years coverage . . . for retiree medical benefits under Buyer's Welfare Benefit Plans on terms substantially similar to those available to Buyer's active employees.

Elsewhere, Newell expressly assumed Cooper's liabilities under prior CBAs in § 5.12, which defined Cooper's obligations as including "any obligation, commitment, liability or responsibility of Seller, its Affiliates or its or their Predecessors . . . existing as of Closing under . . . (iii) *any labor or collective bargaining agreements relating to the Kirsch Companies*" and provided that "Buyer expressly agrees that it shall assume Seller's Company Obligations to the extent related to the Kirsch Companies, effective on the Closing Date, and shall thereafter discharge the same in accordance with their terms." (Emphasis added.)[5] Finally, the reservation of the right to amend or terminate the Newell Plan could not alter the retiree healthcare benefits to the extent that they had already vested. *Bender*, 725 F. Supp. 2d at 655 ("Indeed, no subsequent agreement between the companies or between the company and the Union could lawfully do so.") (citing *Wood v. Detroit Diesel Corp.*, 607 F.3d 427, 434-35 (6th Cir. 2010); *Prater v. Ohio Educ. Ass'n*, 505 F.3d 437, 444 (6th Cir. 2007)).

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[5] Closer examination of the five-year coverage language reflects that it is a promise to provide the 25 listed employees on Schedule 6(f), who were described as "active employees," with up to five years of *future* medical benefits upon their retirement.

The district court did not err in finding that Newell Window is the successor in interest to the pre-1998 CBAs. Whether and to what extent retiree health insurance and/or Medicare Part B premium reimbursements were vested is a separate question from whether Newell Window is a successor to the earlier obligations.

B. Vesting of Bargained-for Welfare Benefits – Legal Framework

Retiree healthcare benefit plans are welfare benefit plans under ERISA, but, unlike pension plans, are not subject to mandatory vesting requirements. *Maurer*, 212 F.3d at 914. As a result, vesting of retiree welfare benefits is a matter of contractual agreement. *Id*. If the parties intend for welfare benefits to vest and the agreement to that effect is breached, there is an ERISA violation as well as an LMRA violation. *Id*. Vesting occurs upon retirement, not eligibility for retirement, *see Winnett v. Caterpillar, Inc*. (*Winnett I*), 553 F.3d 1000, 1011 (6th Cir. 2009), while "an employer is free to terminate any *unvested* welfare benefits upon the expiration of the relevant CBA," *Noe*, 520 F.3d at 552 (emphasis added). Significantly, in this circuit, a court may find vested welfare benefits "under a CBA even if the intent to vest has not been explicitly set out in the agreement." *Maurer*, 212 F.3d at 915; *see also Noe*, 520 F.3d at 552.[6]

[6] However, "[w]hen the health plan was *not* collectively bargained, we require a clear statement before we will infer that an employer meant to promise health benefits for life." *Reese v. CNH Anz., LLC*, 574 F.3d 315, 321 (6th Cir. 2009) (citing *Sprague v. Gen. Motors Corp*., 133 F.3d 388, 400 (6th Cir. 1998)).

Although governed by substantive federal law, we apply traditional rules of contract interpretation "as long as their application is consistent with federal labor policies." *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983). Under *Yard-Man*, the seminal case governing whether parties to a CBA intended welfare benefits to vest,

> courts must first examine the CBA language for clear manifestations of an intent to vest. [*Yard-Man*, 716 F.2d at 1479]. 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. *[UAW] 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. *[United Mine Workers] v. Apogee Coal Co*., 330 F.3d 740, 744 (6th Cir. 2003).

Noe, 520 F.3d at 552. If the issue cannot be resolved by summary judgment, it is now settled that there would be no right to a jury trial of these claims. *Reese v. CNH Am., LLC*, 574 F.3d 315, 327-28 (6th Cir. 2009).

Although no legal presumption arises and plaintiffs continue to bear the burden of proving that vesting has occurred, this court will apply the *Yard-Man* inference "so long as we can find either explicit contractual language or extrinsic evidence indicating an intent to vest." *Reese*, 574 F.3d at 321 (citing *Yolton*, 435 F.3d at 580) (internal quotation marks omitted). While application of *Yard-Man* has led to differing results, this court has described the inference as acting like a "thumb on the scales" or "nudge" in favor of vesting. *Id*.[7]

As the district court explained, although many CBAs were entered into during the period from 1971 to 1998, the plaintiff class can be divided into three subgroups who claim benefits based on an employee's retirement: (1) before 1986; (2) from 1986 through the

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[7] Defendants ask this court to abandon adherence to *Yard-Man* in order to preserve the issue for *en banc* or Supreme Court review, but offer no basis for this panel to overrule *Yard-Man*. *See United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000) ("This panel may not overrule the decision of another panel; the earlier determination is binding authority unless a decision of the United States Supreme Court mandates modification or this Court sitting en banc overrules the prior decision.").

end of 1993; and (3) after 1993 (or more precisely, on or after January 1, 1994, but on or before July 31, 1998). The first two groups were found to have vested (although somewhat different) rights to lifetime health insurance benefits, and all three groups were found to have vested rights to full reimbursement of Medicare Part B premiums for retirees and spouses (but not dependents). Although both health insurance and Medicare Part B reimbursements are contractually based welfare benefits, they are discussed separately because the provisions and arguments are distinct.

C. Vesting of Medical Insurance Benefits

Pre-1986. Five CBAs used the same language to establish medical insurance programs for employees, including "'group insurance benefits, paid by the Company and underwritten by Aetna Life Insurance Company.'" *Bender*, 725 F. Supp. 2d at 646 (citations omitted). Each CBA provided that "'[t]he benefits of the program are set forth in a booklet and policy, a copy of each to be available to every employee.'" *Id*. The CBAs also expressly extended "' [t]he same benefits [to retirees] as for the employees and their dependents'" and specifically stated that "'[t]he Company agree[d] to pay the cost of such insurance for the retiree and his dependents.'" *Id*. As defendants point out, the 1982 CBA negotiated by Cooper provided that retiree medical insurance would be the same as for employees and dependents "as of July 1, 1980." Also, spouses and eligible dependents of deceased retirees could remain under "Kirsch Group Medical Coverage at Company expense" provided

that spouses did not remarry or become eligible for insurance through another employer.[8]

1986 to 1993. Three CBAs between 1985 and 1993 provided retirees with the "same benefits as for the employees and their dependents as of January 1, 1986," namely "group insurance paid by the Company." This granted the same health insurance benefits as above, except that the CBAs required retirees aged 62 to 65 to pay $20 per month toward the cost of such insurance (as would spouses and dependents of deceased retirees who were eligible to remain under the Cooper Comprehensive Health Care Plan). Also, as above, the CBAs each referred to a "booklet and policy" as setting forth the benefits of the program.

However, the 1993 CBA also included a negotiated end to health insurance benefits for *future* retirees. Specifically, effective with retirements on or after January 1, 1994, the CBA provided for a maximum of five years of post-retirement medical coverage, no coverage for the retiree or spouse past the age of 65, and monthly contributions toward the cost of the plan in an amount to be set when the employee retired. In fact, as noted above, no claim for medical insurance benefits is made on behalf of class members in the third group (post-1993 retirements). This change is nonetheless relevant because these negotiated changes contrast with the simultaneous continuation

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[8] Defendants state in passing that surviving spouses of deceased retirees were not provided with health insurance until the 1980 CBA. Plaintiffs' only response seems to be that the corrected judgment provided vested benefits at levels in place at the time of retirement, which suggests agreement on the surviving spouse question. There is no indication whether the class actually includes any member claiming health insurance as a surviving spouse or dependent of a pre-1980 retiree.

of health insurance benefits for employees retiring *prior* to the change.

That is, the 1993 CBA expressly provided that "Employees retiring prior to January 1, 1994, (Deletion) will be covered under the Cooper Industries Comprehensive Retiree Medical Plan (1/93 GWI), but, will have the same cost effective health benefits as those being granted active employees as of *January 1, 1986*." (Emphasis added.) Again, retirees aged 62 to 65 would pay $20 per month toward the cost of such insurance for the retiree and his dependents (as would spouses and dependents of deceased retirees who were eligible to remain under the Cooper Comprehensive Health Care Plan). Further, the CBA provided that employees who retire before January 1, 1994, "will retain retirement medical coverage under the Cooper Comprehensive Retiree Medical Plan" and "will receive a lump sum wage payment of $300 upon retirement." The district court found, and the extrinsic evidence established, that the prospective reduction of post-retirement healthcare benefits offered an obvious incentive for employees to retire before January 1, 1994 (and resulted in a greater than usual number of retirements at the end of 1993). *Bender*, 725 F. Supp. 2d at 647.

Intent and Durational Clauses. The district court found that the provisions granting retiree health insurance benefits suggested that, once retired, those benefits would continue indefinitely and without cost; except for those who retired under the CBAs that expressly limited the duration or required specific contributions toward the cost. Defendants argued in the district court that there was no vesting because each of the CBAs provided that "[t]he insurance

program as set forth in Exhibit A is agreed to for the *duration of this contract*." (Emphasis added.)

However, "[a]bsent specific durational language referring to retiree benefits themselves, courts have held that the general durational language says nothing about those retiree benefits." *Noe*, 520 F.3d at 554. Unlike the specific limitation on the duration of health insurance for those retiring on or after January 1, 1994, this language was general in nature and did not create ambiguity regarding the intention that medical insurance benefits continue for those who had already retired. *See Maurer*, 212 F.3d at 917-18. Rather, the district court concluded that plaintiffs had met their burden of demonstrating that the CBAs unambiguously gave bargaining-unit employees who retired prior to January 1, 1994, a vested right to health insurance benefits. In addition, as discussed below, the district court also found that even if ambiguous, the extrinsic evidence was overwhelmingly one-sided in favor of lifetime vesting of medical insurance benefits for those claiming benefits based on retirements prior to January 1, 1994 (pre-1986 and 1/1/86-12/31/93). We turn to the defendants' principal arguments.

1. Incorporation by Reference

First, defendants contend that the CBAs do not reflect an intention to vest because reservation-of-rights language in three summary plan descriptions (SPDs) were incorporated into the CBAs such that it would stand on "equal footing" with the provisions from which vesting might be inferred. The incorporation language defendants rely upon, which is the same in each CBA, stated that the "benefits of the program are set forth in a booklet and policy, a copy of each to be available to every employee." The dis-

trict court did not address defendants' argument, which is based on dicta from *Schreiber v. Philips Display Components Co*., 580 F.3d 355, 365 n.12 (6th Cir. 2009).

In *Schreiber*, the district court found the durational language to have unambiguously precluded vesting. Reversing, this court found there was ambiguity that should have led the district court to consider the SPDs regardless of whether the subsequently issued SPDs may be properly regarded as extrinsic evidence of the parties' original intent. *Id*. In dicta that followed, the court suggested that repeated references to the SPDs in the CBA at issue in *Schreiber*

> may be enough to incorporate by reference portions of the SPDs into the CBA. Courts generally cite contract language that is more explicit in its action [of incorporation], though in some cases they have found mere references to SPDs and plan booklets "sufficient to incorporate by reference." *Int'l Ass'n of Machinists and Aerospace Workers v. ISP Chems., Inc*., 261 Fed. App'x 841, 847-48 (6th Cir. 2008) (unpublished disposition); *see also* 11 Williston on Contracts § 30.25 (4th ed.) ("Interpretation of several connected writings"). *Compare Yolton*, 435 F.3d at 580 (looking to a durational clause in the CBA stating "the insurance plan 'will run concurrently with [the CBA] and is hereby made part of this Agreement.'" (quoting the CBA)), and *Int'l Union, UAW v. Aluminum Co of Am*., 932 F. Supp. 997, 1001 (N.D. Ohio 1996) ("Separate booklets describing these benefits are incorporated herein and made a part of this Agreement."), *with Bailey v. AK*

> *Steel Corp*., 2006 WL 2727732 at *1 (S.D. Ohio Sept. 22, 2006) (unpublished disposition) ("Each CBA incorporates by reference the health benefit plan . . .").

Id. Lastly, this court added that "the district court would have been on solid ground had it interpreted the SPDs alongside the CBA before reaching the ambiguity issue." *Id*.

Here, the CBAs refer to a "booklet and policy," but do not include any explicit language of incorporation. Nor does the dicta in *Schreiber* compel a finding of reversible error based on this reference. In fact, in another case upon which the defendants rely, the district court acknowledged the *Schreiber* decision but concluded that simply referring to an SPD that was to be distributed to qualifying employees was not sufficient to constitute incorporation by reference. *See Moore v. Menasha Corp*., 724 F. Supp. 2d 795, 804 n.3 (W.D. Mich. 2010) (*appeal pending* No. 10-2171). Finally, defendants' reliance on *United Steelworkers of America v. Commonwealth Aluminum*, 162 F.3d 447, 449 (6th Cir. 1998), is misplaced. Although the question in that case had to do with the arbitrability of grievances related to the denial of group benefits, the CBA in that case expressly stated that the group insurance booklets "*are incorporated herein* and made a part of this Labor Agreement by such reference." *Id*. (emphasis added). No similar explicit incorporation language has been identified in this case. The district court did not err in rejecting the defendants' incorporation-by-reference argument. Nonetheless, both *Schreiber* and *Moore* indicate that when no incorporation is found, the SPDs may be considered as extrinsic evidence in evaluating the intent to vest retiree welfare benefits.

2. Unilateral Modification

Defendants argue, in the alternative, that the district court erred in concluding that reservation-of-rights language found in the three SPDs themselves did not preclude the vesting of retiree health insurance benefits. *See Reese*, 574 F.3d at 323-24; *Prater*, 505 F.3d at 444-45; *McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417, 424-25 (6th Cir. 2004). This line of cases recognizes an exception to the general rule—applicable to collective bargaining agreements—that "'an existing contract cannot be unilaterally modified.'" *Prater*, 505 F.3d at 443 ("Were it otherwise, the option of either party to modify a contract unilaterally would defeat the essential purpose of reaching an agreement in the first place—to bind the parties prospectively.").

The exception arose out of the holding in *Maurer* that a widely distributed SPD, issued after the CBA had been signed, prevented retiree health benefits from vesting because the union had failed to contest the SPD's express reservation of the right to "curtail or eliminate coverage for any treatment, procedure, or service *regardless of whether [the employee is currently] receiving treatment*." *Maurer*, 212 F.3d at 913 (emphasis added). That is, once the unqualified unilateral right was asserted in the SPD, "'the Union was obligated to grieve or enter suit' if it disagreed with the employer's assertion of authority—even if that assumption of authority came after the effective date of the relevant collective bargaining agreement." *Prater*, 505 F.3d at 444 (quoting *Maurer*, 212 F.3d at 919).

However, as explained in *Prater*, to read *Maurer* broadly would "run headlong into the rule that a plan summary 'cannot vitiate contractually vested *or bargained-for-rights*.'" *Prater*, 505 F.3d at 444 (citation omitted). As a result, the *Maurer* exception for unilateral modification has been expressly limited to "'unqualified reservation-of-rights language,' that claims a 'unilateral right by the employer to terminate coverage without regard to existing or future collective bargaining agreements.'" *Id*. (citations omitted). Although this standard is necessarily case specific, *McCoy*, *Prater*, and *Reese* each found the reservation of rights were not sufficiently unqualified so as to fairly be expected to prompt an immediate protest by the union.[9]

The reasons given in those cases included: (1) that the SPD acknowledged that termination or modification would be subject to the provisions of any applicable CBA (*McCoy* and *Prater*), or that any conflict would be governed by the official plan documents or labor agreements (*Reese*); (2) that, unlike in *Maurer*, the reservation of rights did not assert an explicit right to terminate coverage for even current treatment (*Prater*); and (3), "[p]erhaps most importantly," the CBA expressly provided that it could not be amended without mutual signed consent of the parties (*Prater*). Elaborating on the last of these, we explained that the prohibition on unilateral modifica-

[9] Although plaintiffs overstate the Supreme Court's holding in *Cigna* as overruling *Maurer*, the decision does warrant caution concerning the force to be given language found in the SPDs themselves. *See Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011). In *Cigna*, an ERISA action to recover amounts due under an ERISA plan, the Court clarified that the provisions of an SPD could not be enforced as terms of the ERISA plan itself.

tion in the CBA meant that the union could not be required to protest the SPD as long as "the summary does not explicitly renounce the [CBA]." *Prater*, 505 F.3d at 445.[10]

Aetna Summary. Defendants rely specifically on a provision from the first "booklet," a 1978 Aetna Group Plan (Aetna Summary) covering various group insurance benefits, including medical insurance, which stated among its "general provisions":

> **Change or Discontinuance of Plan**—It is hoped that this Plan will be continued indefinitely, but, as is customary in group plans, the right of change or discontinuance at any time must be reserved.

Also, after specifying the benefits for the various group plans, a separate "summary" stated: "Your contributions toward the cost of the contributory coverages provided by this Plan will be deducted from your pay and they are subject to change." Despite defendants' comparison to *Maurer*, the Aetna reservation of rights did not specifically claim a unilateral right to terminate coverage without regard for existing or future CBAs.

Cooper SPDs. Defendants also rely on a Cooper Industries Health Care Plan–Retired Employees marked with "10/89-STD" on the back (1989 Cooper SPD) and a Cooper Industries Comprehensive Retiree Medical Plan marked "1/93 GWI" (1993 Cooper SPD). Defendants contend, in particular, that the 1989 Cooper SPD mandates reversal of the judgment

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[10] *But see Prater*, 505 F.3d at 444 ("To our knowledge, no court of appeals has forced unions to file grievances in the face of a summary plan description that purported to remove a promise of lifetime health benefits.").

with respect to all post-1985 retirees (*i.e.*, the 1986 to 1993 group). Under the heading "background information," the 1989 Cooper SPD states:

> **Amendment or Termination of the Plan:** Although the Company expects to continue the Plan in its present form, the Company may amend the Plan from time to time, or it may terminate the Plan altogether at some point. Amendments to the Plan could result in changes in the benefit eligibility rules under the Plan, and in the benefit provisions under the Plan. A termination of the Plan could mean that all benefit payments immediately cease, or that benefit payments would be discontinued at some future date. An amendment or termination of the Plan could affect your eligibility for benefits under the Plan. The Company will notify you if it changes or terminates the Plan.

The exact same language was used in the 1993 Cooper SPD.

The district court found that this reservation was not sufficiently unqualified because the SPDs otherwise reaffirmed that the CBAs would control any conflict. *Bender*, 725 F. Supp. 2d at 659 (relying on *Prater* and *Reese*). Specifically, both Cooper SPDs included the same introductory provisions explaining, in part, that: "This booklet is a 'plain language' summary of your retiree health care benefits. . . . The highlights of the plan in easy to understand language appear in this space at the beginning of each section." This introduction concluded with the following explanation:

> At the top of each section is a brief explanation of the information in that section. This is followed by a general explanation of important information you should know about the plan. *Sometimes, when plain language is used to explain the provisions of what is essentially a legal document, disagreements arise between the meaning given in the explanation and the wording of the legal document. We do not expect that to happen, but if it should, the wording in the legal document will apply*.

(Emphasis added.) Attempting to distinguish *Prater* and *Reese*, defendants argue that the deference given to "a legal document" in this provision must mean deference to the "formal plan" rather than to the CBA. It is true that the SPDs in *Prater* and *Reese* specifically acknowledged that the CBAs would control. But, the record in this case does not appear to contain any "formal plan" associated with the Cooper SPDs, and the CBAs provided health insurance benefits "as set forth in a booklet and policy." The district court did not err in finding that the Cooper SPDs did not include an unqualified assertion of a unilateral right to end retiree medical insurance benefits without regard for existing or future CBAs.[11]

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[11] Having reached this conclusion, we do not address plaintiffs' alternative arguments (1) that the Cooper SPDs were not actually distributed to employees; (2) the 1989 Cooper SPD may not have been the "booklet" referred to in the CBAs between 1985 to 1993; and (3) that the 1993 Cooper SPD did not apply to bargaining-unit employees who retired prior to January 1, 1994.

However, even when the *Maurer* exception does not apply, the summaries nonetheless "serve as extrinsic evidence regarding the extent of the employer's promise of future healthcare benefits and whether the parties intended the benefits to vest." *Prater*, 505 F.3d at 445.

3. Extrinsic Evidence

The district court found that the parties unambiguously intended that retiree health insurance benefits would vest for bargaining-unit retirees (and their eligible spouses and dependents) who retired prior to January 1, 1994, but that, even if the CBAs were deemed to be ambiguous, "the entire record of extrinsic evidence demonstrates, without a single contradictory voice, that the parties intended to vest lifetime retiree healthcare benefits." *Bender*, 725 F. Supp. 2d at 661. We agree.

The district court's statement of facts outlined the extensive extrinsic evidence with respect to both medical insurance benefits, *id*. at 649-51, and Medicare Part B reimbursements, *id*. at 651-52. Later, the district court succinctly summarized the extrinsic evidence regarding vesting of medical insurance benefits as follows:

> Individuals from both sides of the bargaining table, including members of company management and Union representatives, testified at deposition and stated in affidavits that the company and the employees intended to provide retirees with fully paid, vested, lifetime medical benefits. Mr. Keasey, a participant in most of the negotiations and a drafter of the collective bargaining agreements; Ms. McCurry, the administrator of

> health insurance and pension benefits at the Sturgis plant; Mr. Lampe, another main participant in the collective bargaining agreement negotiations; and Mr. Oetman, an International Representative for the union at the Sturgis plant from 1984 through 1995, all stated that the Union and the company intended to vest lifetime group health insurance for the retirees. The letters Cooper Industries sent to employees of the Sturgis plant on their retirement, the company's economic offers from various negotiations, and the retirement applications also demonstrate this intent. Even Defendants' own due diligence at the time of purchase shows that the agreements vested lifetime benefits. Its attorneys' "summary of the retiree medical and life insurance benefits" states that union employees who retired before January 1, 1994, are entitled to "[l]ifetime retiree coverage" of medical benefits.

Id. at 661. Defendants protest the district court's characterization of the due diligence memo prepared in connection with Newell's purchase of Kirsch from Cooper as being directly adverse to their position. As the district court explained, only two pages of that memo have been disclosed because they were provided to Great West Life in connection with the transfer of insurance coverage from Aetna. However, defendants' argument—that this memo described the benefits as "lifetime benefits" but never said they were "vested, inalterable or immutable"—is not persuasive and does not undermine its value as extrinsic evidence that the parties had intended retiree health insurance benefits to vest. Nor does the reservation-of-rights language in the 1997 letter sent to Kirsch

retirees, or in the SPDs discussed above, overcome the heavily one-sided evidence that the parties intended health insurance benefits would vest for those who retired prior to January 1, 1994.

D. Vesting of Medicare Part B Premium Reimbursement

Retirees were required to enroll in Medicare Part B and, until 1980, retirees were reimbursed for the entire cost of the Medicare Part B premium from the Pension Plan. Indeed, the CBAs prior to 1980 called for amendment of the Pension Plan to pay a benefit equal to the amount of the Medicare Part B premium (*i.e.*, 1971 CBA calls for Pension Plan to pay Medicare benefit of $5.60 per month for retirees and spouses). Pension benefits are subject to mandatory vesting under ERISA, and no right to modify or terminate the pension benefit is asserted by defendants in this case.

The last increase in this benefit was adopted by way of an Amendment to the Kirsch-UAW Retirement Income Plan. Adopting a "cap" on this benefit, the pension plan provided that: "Effective July 1, 1980, and adjusted on each July 1 thereafter, the monthly amount payable [for this benefit], shall be the rate then in effect for Medicare Cost . . . *but not to exceed in any event the amount of $11.70*." (Emphasis added.) At that time, the rate was $9.60. As a practical matter, however, once the Medicare Part B premium exceeded $11.70 (when that occurred exactly is not clear), retirees continued to be reimbursed in full for the premiums with the difference being contributed by the employer. The question is whether the parties' intended that the portion reimbursed by the employer would vest at the time of retirement.

Defendants main argument is that there was no contractual right to receive reimbursement for Medicare Part B premiums in excess of the pension benefit. The district court found that the right had its origin in the 1980 Addendum to the 1977 CBA, which made changes to benefits for active employees out of concerns related to the Age Discrimination in Employment Act (ADEA). Specifically, this Addendum eliminated mandatory retirement at age 65, and provided that:

> Active employees attaining age 65 will be required to subscribe to Medicare Part B *with Kirsch Company reimbursing said employees for the full cost of such Medicare coverage*. This will allow active employees, age 65 and over, to maintain the same level of benefits enjoyed prior to age 65.

(Emphasis added.) The district court reasoned that this right was then extended to retirees "by provisions that gave the retirees all the health benefits given to active employees as of June 1, 1980." *Bender*, 725 F. Supp. 2d at 648. However, as defendants point out, the CBA actually gave retirees "the same benefits as for the employees and their dependents as of *July* 1, 1980." (Emphasis added.) Because the Addendum expired before July 1, 1980, and this language was omitted from subsequent CBAs, plaintiffs concede that the reimbursement benefit was not directly extended to retirees. While this error admittedly undermines part of the district court's reasoning on this issue, it is not clear that it requires a different result.

Plaintiffs argue that it does not matter because the employees' right to full reimbursement continued under the "evergreen" clause in the absence of an express agreement to end it. That benefit, then, existed as of July 1, 1980, and was extended to retirees until it was modified by the 1998 Settlement Agreement discussed below. In fact, when the Addendum agreed to pay Medicare Part B premiums in full for active employees age 65 or older, the same Medicare Part B premiums for retirees were already being paid in full by the pension plan.

The parties' understanding is more clearly reflected in a written Settlement Agreement entitled "Medicare Part 'B' Coverage," which provided in full:

> As part of the 1998 Settlement between the parties and the implementation of the Newell Pension Plan effective August 1, 1998, it is understood and agreed as follows.
>
> 1. The payment of Medicare Part "B" coverage that was provided for under the Pension Plan in effect in 1991, but deleted from the plan during 1991, and then reimbursed to retirees, from assets of the company, shall be continued for retirees of record as of July 31, 1998.
>
> 2. Effective August 1, 1998, the Company shall continue to reimburse retirees for said Medicare Part "B" coverage provided they retire to pension on or after August 1, 1998, but on or before July 31, 2002, and provided further, the Company reimbursement for said coverage shall not exceed forty three dollars and eighty cents ($43.80) per month for each eligible retiree and/or retiree spouse.

> 3. Employees retiring to pension on or after August 1, 1998 shall not be eligible for spouse reimbursement for Medicare Part "B" coverage unless they have selected a spousal form of pension benefit.
>
> 4. Employees retiring to pension on or after August 1, 2002 will not be eligible for Medicare Part "B" coverage reimbursement from the Company.

Defendants argue that the agreement in paragraph 1 to continue to reimburse retirees of record as of July 31, 1998, for Medicare Part B coverage referred only to the pension benefit payment of $11.70 per month. Although not a model of clarity, it does say the Medicare Part B coverage "reimbursed to retirees, from assets of the company, shall be continued for retirees of record as of July 31, 1998." This not only seems to refer to the reimbursements being made by the employer in excess of the pension benefit, but also would mean Newell was ending the reimbursement for *existing* retirees while merely phasing out the same reimbursement for *future* retirees. In fact, there is no dispute that the Settlement expressly created a "cap" on the employer reimbursement for those entering retirement on or after August 1, 1998, but before July 31, 2002; ended spousal reimbursement for those retiring on or after August 1, 1998; and ended the employer reimbursement completely for those retiring on or after August 1, 2002. The district court did not err in finding that this Settlement confirmed the arrangement in place since the 1980s—that the company would reimburse retirees for any cost of the Medicare Part B premium in excess of the pension plan benefit. *Bender*, 725 F. Supp. 2d at 648. It was not error to conclude that the CBAs were

ambiguous with respect to whether the right to full reimbursement of Medicare Part B premiums was vested for "retirees of record as of July 31, 1998."

The district court outlined the extrinsic evidence supporting the conclusion that the parties intended the Medicare Part B premium reimbursement benefit to vest for retirees of record as of July 31, 1998, *id*., at 651-52, and then summarized that evidence as follows:

> The evidence also demonstrates the intent to vest full reimbursement for Medicare Part B insurance. The 1985 bargaining summary, for example, states that the company will reimburse the retirees and their spouses for the cost of the Medicare Part B premium. The retirement letters and application packages sent by the company between 1988 and 1993 state exactly the same thing. Mr. Oetman, an International Representative for the union at the Sturgis plant from 1984 through 1995, and Mr. Webster, the International Representative for the union after Mr. Oetman, also confirmed that the company and the Union intended to vest full reimbursement for Medicare Part B insurance. Mr. Webster was also part of the team that negotiated the 1998 Settlement Agreement for Medicare Part B reimbursement, and he stated that the 1998 Settlement Agreement was intended to vest full Medicare Part B reimbursement for those who retired prior to August 1, 1998.

Id. at 661. Mr. Oetman, stated that in the 1985 negotiations, "'the Company agreed to pay the Medicare Part B reimbursement so long as the retiree was

receiving Medicare. This meant for life.'" *Id*. at 651-52 (citation omitted). Mr. Webster explained that he was contacted several times after the plant closed by pre-August 1, 1998 retirees who were not getting completely reimbursed. He testified, however, that once he contacted Newell the reimbursements were increased to cover the full amount of the new Medicare Part B premium.

Defendants argue that the district court mischaracterized Mr. Webster's affidavit, which did not explicitly state that the Settlement Agreement intended to vest the right to full reimbursement. It may be inferred from what he did say, however:

> 3. I assisted the Local Union in negotiation of the agreement entitled "Medicare Part 'B' Coverage" initiated on June 5, 1998, ... That agreement accomplished several things. First and foremost, it confirmed that the Employer's obligation to pay the Medicare Part B reimbursement to those who retired prior to August 1, 1998. For those two retired on or after that date, it confirmed the Employer's obligation to pay a flat amount—$43.80—towards the Medicare Part B reimbursement. This meant that those who retired on or after August 1, 1998 would not receive any additional reimbursement despite the fact that the Medicare Part B premiums would more than likely increase in the future.

Defendants also claim the district court erred by ignoring the deposition testimony of Webster's counterpart, Joe Marotti, who negotiated the 1998 Settlement Agreement for Newell, because Marotti testified that he understood the first paragraph to repre-

sent a maximum premium reimbursement of $11.70. In fact, Marotti explained that he assumed that it did because the Pension Plan provided a benefit "not to exceed $11.70," but acknowledged that he actually did not know. Marotti added that he intended that the Settlement Agreement would preserve the "status quo" with respect to past retirees and "freeze" the reimbursement at $43.80 for those future retirees who would retire between July 31, 1998, and June 31, 2002. Nor is it persuasive that McCurry, who had some human resources responsibilities at the Sturgis plant prior to its closing, questioned whether Newell was obligated to reimburse retirees for the increases in Medicare Part B premiums. McCurry made clear that she communicated this to someone at Newell, but was advised that she was wrong and instructed to pay the full amount of Medicare Part B reimbursements for anyone who retired as of July 31, 1998.

Despite the misreading of the relevant date in the CBA, the evidence supports the district court's conclusion that the parties intended that full reimbursement of the Medicare Part B premiums in excess of the pension benefit would vest for those who retired on or before July 31, 1998.

E. Benefit Levels

Corrected Judgment. Defendants challenge several aspects of the district court's corrected judgment. First, defendants claim it was error to declare that vested healthcare benefits would be at levels in place as of December 31, 2005, rather than as of the respective dates of retirement. However, the district court's declaration actually referred to the "levels in place for their respective retirement groups (pre-1986

retirees and 1986- 1993 retirees) prior to the changes imposed by Defendants beginning January 1, 2006."

Second, as noted earlier, defendants argued that the judgment improperly included spouses of retirees who retired prior to the 1980 CBA, since coverage for spouses of employees (and therefore retirees) was not added until the 1980 CBA. Plaintiffs do not seem to disagree, responding that the judgment was consistent with this because it declares a right to medical insurance coverage based on the provisions in place for the respective retirement groups. If defendants require clarification, it should be directed to the district court.

Third, defendants claim it was error to declare that benefits for 1986-1993 retirees shall include 100% of "out-patient expenses," thereby eliminating the 20% copay for *all* outpatient treatments, when the district court's opinion only eliminated copays for "outpatient and diagnostic services." However, because the judgment declares the benefit for "out-patient expenses as specified in the Court's Opinion," there is no obvious error and the district court should be able to clarify if necessary.[12]

Coordination with Medicare (Pre-1986 Retirees). Lastly, defendants contend that the district court erred in finding that the parties intended to provide pre-1986 retirees with coordinated (rather than integrated) health insurance benefits. Coordinated benefits would mean 100% coverage between Medicare

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[12] Nor is the district court's determination with respect to outpatient expenses undermined by the statement in the Cooper SPDs describing the plan as generally paying 80% of most medical expenses beyond the annual deductibles. *See Bender*, 725 F. Supp. 2d at 663.

and health insurance, while integration would result in payment of no more than what the health insurance would pay in the absence of Medicare. Defendants rely on the statement in the Aetna SPD that, "when Medicare benefits are available, the benefits of this plan will be reduced. Medicare and the plan together will now provide a level of benefits *at least as high* as that previously provided by the plan alone." (Emphasis added.) However, this neither precludes coordination nor specifies integration of Medicare benefits. Nor do defendants deny that the pre-1986 CBAs provided "the same coordination of benefits as the General Motors-UAW," or that the extrinsic evidence showed that the parties intended coordination of benefits prior to 1986 and changed to an integrated program beginning in 1986. *Bender*, 725 F. Supp. 2d at 663-64.

Finally, continued reliance on evidence that medical insurance was integrated with Medicare when coverage was transferred to Great West is misplaced. Although the application for insurance with Great West did not reflect coordination of benefits, the evidence established that (1) Great West was expected to duplicate the coverage provided by Aetna; and (2) Great West corrected the error at Newell's direction several months later to provide pre-1986 retirees, only, with coordination of benefits with Medicare. If anything, this evidence supports the plaintiffs' contention that the parties intended that there be a vested right to coordination of benefits for pre-1986 retirees.

F. Statute of Limitations

The district court rejected defendants' argument that both medical insurance and Medicare Part B reimbursement claims were time barred. This court addressed the accrual of similar ERISA and LMRA claims for vested lifetime healthcare benefits in *Winnett v. Caterpillar, Inc*. (*Winnett II*), 609 F.3d 404 (6th Cir. 2010). Because Congress did not provide a statute of limitations for these claims, courts must borrow from the forum state's most analogous cause of action. *Id*. at 408. Here, as the district court concluded, the plaintiffs' ERISA and LMRA claims are governed by Michigan's six-year statute of limitations for breach of contract. *Bender*, 725 F. Supp. 2d at 664 (citing *Santino v. Provident Life and Acc. Ins. Co*., 276 F.3d 772, 776 (6th Cir. 2001) (ERISA); *Biros v. Spaulding-Evenflo Co*., No. 88-712, 1989 WL 201625, at *3 (W.D. Mich. Aug. 1, 1989)). "Although state law sets the length of the statute of limitations, 'federal law' establishes when the 'statute of limitations begins to run.'" *Winnett II*, 609 F.3d at 408 (citation omitted). On the question of when the plaintiffs' claims accrued, we explained that:

> Under federal law, as under most laws, the limitations clock starts ticking "*when the claimant discovers or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation*." *Noble v. Chrysler Motors Corp*., 32 F.3d 997, 1000 (6th Cir. 1994) (LMRA); [*Muir*], 992 F.2d at 598 (ERISA). In the context of this contractual claim—the refusal to honor a promise of free, unalterable, lifetime healthcare benefits—the parties agree *the clock starts when the breach becomes "clear and unequivocal*."

Morrison v. Marsh & McLennan Co., 439 F.3d 295, 302 (6th Cir. 2006).

609 F.3d at 408-09 (emphasis added). Although the same factors at play in *Winnett II* are at issue here, the district court did not err in rejecting the defendants' statute-of-limitations defense in this case.

First, with respect to plaintiffs' claims that defendants breached the vested right to medical insurance benefits by requiring retirees to pay a portion of the premium, it is defendants' contention that the claims accrued for all plaintiffs no later than June 1997 when Newell sent retirees a letter asserting a "right to modify the coverage and benefits provided, as may be amended from time to time." In support, defendants rely on the fact that Bender was concerned that this letter was asserting a right that defendants did not have under the CBAs. Despite assurances that followed, defendants argue that this letter notified plaintiffs that Newell "no longer was willing to provide free, unalterable, lifetime healthcare benefits." *Id*. at 409. Indeed, defendants argue that these claims accrued even earlier with the reservation language in the 1978, 1989 and 1993 SPDs.

Unlike this case, however, *Winnett II* involved a "clear repudiation" of the promise of vested health insurance benefits where the SPDs spelled out that specific benefit changes would apply to existing retirees and would result in a cap on the employer's contributions; there were immediate benefit changes; it was expected that the VEBA trust funds would be exhausted; and the reservation-of-rights language was sufficiently unqualified so as to trigger an obligation by the union to object. *See id.* Here, the reservation-of-rights provisions were not unqualified, did not reflect "clear repudiation" of vested health insurance

benefits for retirees, and did not result in any immediate changes in benefits. The district court did not err in finding that the health insurance claims accrued with the letter sent in November 2005 notifying retirees (including pre-1986 and 1986-1993 groups) of the intention to charge premiums effective January 1, 2006. Since the complaint was filed well within six years of the accrual, these claims were timely.

Second, defendants argue that the claims of plaintiffs Connor and Smoker for full reimbursement of Medicare Part B premiums accrued when those premiums exceeded the amount of their monthly reimbursement. Defendants maintain that starting sometime in 2000 or 2001, the Medicare Part B premiums first exceeded the reimbursements they were receiving of $50.00 and $43.80, respectively. As the district court found, however, defendants may have "inadvertently mishandled the claims of a handful of retirees, but the undisputed evidence shows that Defendants' promptly and fully corrected the mistakes." *Bender*, 725 F. Supp. 2d at 665. Also, as this court emphasized in *Winnett II*, such claims should accrue at the same time for each subclass of retirees. *Id*. at 664-65. Because the retiree claims for full reimbursement of Medicare Part B premiums did not accrue until defendants announced their intention to discontinue making full reimbursement in 2006, these claims are timely even if the claims added in March 2009 do not relate back to the filing of the original complaint. The district court did not err in finding the Medicare Part B premium reimbursement claims of Connor and Smoker were timely.

III.

For the reasons set forth above, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:06-CV-113
Hon. Robert J. Jonker

WILLARD BENDER, *et al*.,
Plaintiffs,

v.

NEWELL WINDOW FURNISHINGS, INC., et al.
Defendants.

OPINION

This is a contract dispute between employees who retired from a manufacturing plant in Sturgis, Michigan, and the company that later reduced their healthcare benefits. There are two issues at stake in this case: (1) whether a series of collective bargaining agreements granted the retirees vested, lifetime healthcare benefits upon retirement, and, if so, (2) the scope of those benefits. Both sides have moved for summary judgment. After a careful review of the record, the Court agrees that this matter is ripe for decision as a matter of law.

A prime objective of contract law is to protect the justified expectations of the parties. *See UAW v. Yard-Man, Inc*., 716 F.2d 1476, 1479 (6th Cir. 1983); *see also*, *e.g*., RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 141 cmt. g, 187 cmt. e (1971). In this case, the language of the contract and the extrinsic

evidence permit only one conclusion: the collective bargaining agreements created vested, lifetime healthcare benefits for those employees who retired under them. Uncontradicted testimony from all sides of the bargaining table agrees that the parties intended their contracts to give the plant's retirees vested, lifetime healthcare benefits, including insurance benefits and full Medicare Part B reimbursement. Even the representatives who negotiated on behalf of management agree with the retirees on these points.

To avoid the impact of this uncontradicted evidence of the parties' actual intention, Defendants would have to show that the contract language the parties used to express their intention utterly failed to do so, and that the language actually expressed an unambiguous intention not to confer vested benefits. Defendants cannot make such a showing. To the contrary, the contract language is so plain that when Defendants were investigating purchasing the Sturgis plant, their own attorneys reviewed the collective bargaining agreements and concluded that the retirees were entitled under them to vested, lifetime benefits. Here, where the language of the collective bargaining agreements, the extrinsic evidence of the actual negotiators on both sides of the table, and Defendants' own after-the-fact due diligence memorandum from the time they purchased the Sturgis plant all agree on the key point of lifetime vesting of healthcare benefits for qualified retirees, there is no reason for trial, and summary judgment for Plaintiffs is appropriate.

FACTS

I. The Parties

When it was in operation, the Sturgis plant manufactured window furnishings, primarily drapery hardware and window blinds. Plaintiffs represent a class of bargaining-unit employees who retired from the Sturgis plant before July 31, 1998, and their spouses, surviving spouses, and eligible dependents. The Sturgis plant shut down in 2003. Defendants are the last owners of the plant and the successors in interest to the collective bargaining agreements on which this dispute is premised. Newell Rubbermaid Health and Welfare Program 506 (the "Plan") is the benefit plan, established by the collective bargaining agreements, that provides certain health and insurance benefits to the Plaintiffs.

II. Transfers in the Ownership of the Plant and its Liabilities

Several different companies owned and operated the Sturgis plant over the years. In the 1970s, Kirsh Company owned and operated the Sturgis plant. In 1981, Cooper Industries purchased the Sturgis plant from Kirsch Company. Cooper Industries called the Sturgis plant Kirsch Company, and made it a wholly owned division of Cooper Industries. In 1996, in anticipation of selling the Sturgis plant, Cooper Industries created Kirsch Incorporated, a Delaware corporation, as a new subsidiary. Cooper Industries transferred the Sturgis plant and its related assets and liabilities to Kirsch Inc. in exchange for the corporate stock of Kirsch Inc. The Asset Transfer Agreement expressly transferred to Kirsch Inc. the liabilities related to the collective bargaining agreements. (Newell Master Ex. BW.) Newell Company

then purchased the Kirsch Inc. stock from Cooper Industries. (Newell Master Ex. BY.) Newell Company changed the name of Kirsch Inc. to Kirsch Company. Kirsch Company was operated as a wholly owned subsidiary of Newell, then later merged into Newell Window Furnishings, Inc. and run as a division. These documents establish that Defendants are successors in liability to the benefits guaranteed under the collective bargaining agreements.

III. The Collective Bargaining Agreements

While the Sturgis plant was operational, the Union and the company that owned the plant negotiated a collective bargaining agreement approximately every three years. Each collective bargaining agreement guaranteed certain health benefits to employees who retired during the time the agreement was in effect, along with their spouses, surviving spouses, and dependents.

A. Language in the Collective Bargaining Agreements

1. General Healthcare Benefits

The relevant provisions of the collective bargaining agreements for the retirees fall into three distinct time frames: the 1971 to 1985 agreements; the 1985 to 1993 agreements; and the 1993 and later agreements. Each group of contracts establishes somewhat different benefit levels, but all contracts include some common language relevant to the vesting issue.

There are five collective bargaining agreements covering the Sturgis plant in the first time frame, between 1971 and 1985. These agreements used identical language to provide retirees and their dependents with health insurance benefits. Each

established an insurance program for employees, including "group insurance benefits, paid by the Company and underwritten by Aetna Life Insurance Company." In each collective bargaining agreement, "[t]he benefits of the program are set forth in a booklet and policy, a copy of each to be available to every employee." Each agreement provides these benefits to retirees by guaranteeing "[t]he same benefits [to retirees] as for the employees and their dependents." Furthermore, "[t]he Company agree[d] to pay the cost of such insurance for the retiree and his dependents." (docket no. 219-11 & 12, Defendants' Master Ex. BT, at 728, 791-94 (1971-1974 collective bargaining agreement); docket no. 227-17, Plaintiffs' Master Ex. 16.16, at 638, 654-56 (1974-1977 collective bargaining agreement); docket no. 227-16, Plaintiffs' Master Ex. 16.15, at 495, 555-57 (1977-1980 collective bargaining agreement); docket no. 227-15, Plaintiffs' Master Ex. 16.14, at 400, 417-20 (1980-1983 collective bargaining agreement); docket no. 229-2, Plaintiffs' Master Ex. 17.7, at 56, 101-05) (1982-1985 collective bargaining agreement).)

The three collective bargaining agreements covering 1985 through 1993 changed some of the benefits provided to retirees. In particular, they required that retirees aged 62-65 pay $20 per month toward the cost of their insurance. (docket no. 229-3, Plaintiffs' Master Ex. 17.8, at 44, 101-05 (1985-1988 collective bargaining agreement); docket no. 229-4, Plaintiffs' Master Ex. 17.9, at 43, 79-81; docket no. 229-5, Plaintiffs' Master Ex. 17.10, at 44, 80-84 (1991-1993 collective bargaining agreement).) In all other material respects, the 1985-1993 collective bargaining agreements provided the same benefits as those provided under the 1971-1985 agreements. Moreover, the

language germane to the retiree vesting was identical to the earlier contract language.

The 1993 collective bargaining agreement changed materially the ability of the Sturgis plant's employees to retire with insurance benefits. It provides that employees who retired before January 1, 1994, are covered under the Cooper Industries Comprehensive Retiree Medical Plan, with the benefits guaranteed under the previous collective bargaining agreements. (docket no. 229-6, Plaintiffs' Master Ex. 17.11, at 95.) Employees who retired on or after January 1, 1994, however, were entitled to significantly reduced benefits. Those benefits included, at most, "five years of post-retirement medical coverage," with no coverage past the age of 65. (*Id*. at 94-95.) Additionally, employees who retired after January 1, 1994, are required to contribute to the plan a monthly dollar amount set at the time the employee retired. (*Id*. at 94-95.) The vesting language for employees retiring before January 1, 1994, traces the vesting language used in the earlier collective bargaining agreements. Moreover, the prospective reduction of retiree healthcare benefits provided an obvious incentive for employees to retire before the key January 1, 1994, date.

2. Medicare Part B Benefits

One independent aspect of the overall retiree health-care benefit is Medicare Part B insurance. The Medicare Part B benefit pays for the retirees' Medicare Part B insurance, which dovetails with the retirees' group health insurance to provide an overall package of healthcare benefits. Medicare Part B insurance comes at a cost to qualified participants. The premium charge from the government has increased over time, from an average of $5.70 per

person per month in 1971 to $110.50 today. The question is how much, if any, of the premiums the retirees are obligated to pay under the agreements.

The collective bargaining agreements require retirees to enroll in Medicare Part B, and they provide two mechanisms for paying the Medicare Part B insurance premiums of the retirees. First, the early collective bargaining agreements provided that "the Pension Agreement, dated July 1, 1957, as amended" would cover the premium amount applicable at the time. (*See, e.g*, docket no. 227-18, Plaintiff's Master Ex. 16.17, at 751.) Each collective bargaining agreement called for amendment to the Pension Agreement to provide an increase in the Medicare Part B premium benefit so that it would match the premium then in effect. For instance, the 1971 agreement provided a "Medicare benefit of $5.60 per month for the retiree and spouse." (*Id*.) Similarly, the 1977 Pension Agreement increased the benefit to $6.70, then the premium in effect, for retired employees who were "enrolled in Medicare Part B." (docket no. 227-22, Plaintiffs' Master Ex. 16.21, at 945.) The 1977 Pension Agreement further increased the payment to $7.70 as of July 1, 1977. (*Id*. at 947.) Under the early collective bargaining agreements, the Pension Agreement fully paid for the retirees' Medicare Part B premium cost.

Second, beginning in 1980, the collective bargaining agreements guaranteed that the company would reimburse the retiree for any portion of the Medicare Part B premium not covered by the Pension Agreement. At that time, the Pension Agreement stated that the pension plan would pay a Medicare Part B premium benefit at "the rate then in effect . . . but not to exceed in any event the amount of $11.70."

(docket no. 175-18, Plaintiffs' Bates no. 976.) That was the last amendment to the Pension Agreement that increased the Pension Agreement's contribution to the Medicare Part B premium. Indeed, from that point on, it appears that the company and the Union could not agree upon amendments to the Pension Agreement that corresponded with each new collective bargaining agreement. In practice, however, full, reimbursement of the Medicare Part B premiums continued with the company paying directly any amounts above the pension plan contribution. Retirees bore no out-of-pocket expense for the Medicare Part B premium.

Separate contract provisions document and implement the agreement. The collective bargaining agreements required active employees who reached the age of 65 to sign up for Medicare Part B and guaranteed that the company would reimburse the employee for the full cost. For example, the 1980 addendum to the 1977 collective bargaining agreement stated:

> Active employees attaining age 65 will be required to subscribe to Medicare-Part B with Kirsch Company reimbursing said employees for the full cost of such Medicare coverage. This will allow active employees, age 65 and over, to maintain the same level of benefits enjoyed prior to age 65.

(docket no. 194-3, Plaintiffs' Bates no. 829.) This health benefit was then provided to the retirees, their spouses, and dependents by provisions that gave the retirees all the health benefits given to active employees as of June 1, 1980. (*See, e.g.*, docket no. 229-2, Plaintiffs' Master Ex. 17.7, at 105.) Accordingly, beginning in the 1980s, the retiree's Medicare Part B

premium was paid in part by the Pension Agreement and in part by reimbursement from the company. But regardless of what sources paid the premium, one thing was clear: the retirees had no out-of-pocket obligation to contribute to the Medicare Part B premium. Rather, employer sources committed to cover the full cost.

A later settlement agreement between the Union and the company documents the same arrangement, providing retirees with payment of the full Medicare Part B insurance premium through reimbursement from the company. The issue leading to the Settlement Agreement involved only a source of payment issue: namely, whether the pension plan money or company money would cover the Medicare Part B reimbursement costs, and in what amounts. There is no evidence that the retirees themselves systematically received anything less than full reimbursement from whatever source throughout the period. The 1998 Settlement Agreement did resolve the funding source issue, and in so doing reinforced the vested contractual obligation of full Medicare Part B premium reimbursement for qualified retirees.

The Settlement Agreement recognized, of course, that the pension plan contribution – whatever it turned out to be – was vested as a matter of ERISA law. *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064, 1069 (6th Cir. 2008). The question was what additional amounts the company would independently reimburse for Medicare Part B premium costs above the pension plan contribution. For all "retirees of record as of July 31, 1998," the Settlement Agreement provided full "Medicare Part 'B' coverage that was provided for under the Pension Plan in effect in 1991, but deleted from the plan during 1991, and then

reimbursed to retirees, from assets of the company." (Docket no. 227-19, Plaintiffs' Master Ex. 16.18.) It thereby confirms that the company will reimburse these retirees for any cost of the Medicare Part B premium that is greater than the pension payment (*see id*.), just as it had been doing since the 1980s. The class of retirees covered by this case includes only those who retired July 31, 1998 or earlier. This is the group guaranteed full reimbursement under the Settlement Agreement. For employees who retired to pension after that date but before August 1, 2002, by contrast, the Settlement Agreement provides that the company will reimburse Medicare Part B coverage up to $43.80 per month for each eligible person. (*Id*.)

B. Extrinsic Evidence of the Parties' Intent

The extrinsic evidence in this case is entirely one-sided. It demonstrates that the parties intended to vest lifetime healthcare benefits for qualifying retirees.

1. General Healthcare Benefits

Robert Keasey, the Manager of Labor Relations at the Sturgis plant during the time it was owned by Kirsch and Cooper Industries, testified at deposition that the company intended to provide retirees with fully paid, vested, lifetime medical benefits. He was directly involved in the negotiations with the Union over the collective bargaining agreements, and he had an "[e]xtensive role" in drafting the language in the agreements. (docket 224-10, Plaintiffs' Master Ex. 9, at 17.) He participated in the negotiations of all of the collective bargaining agreements except for the 1988 collective bargaining agreement, when he was out of the state. (*Id*. at 15.) He stated that the com-

pany referred to the benefits as "cradle to the grave," and that a retiree had the insurance plan "until you died." (*Id*. at 18.) He further stated that the company described the pre-1986 insurance benefits as the "First Dollar Plan," because "there was no deductibles, everything was paid, you just went to the doctor . . . and it was 100 percent." (*Id*. at 20.) Mr. Keasey also testified that if an employee was vested under the pension plan, the employee was covered by the retiree health insurance. (*Id*. at 21.) He also stated that the extent and nature of the retiree benefits was very thoroughly discussed in negotiations because they were very important to the parties, and that there was "nobody in the negotiating room who could have understood it any different [than] people had insurance for the rest of their life." (*Id*. at 25.)

Mr. Keasey also explained the shifts in the benefits that occurred in 1986 and 1994. He stated that Cooper Industries took over the Sturgis plant in 1981 and made clear in the negotiations over the 1985 collective bargaining agreement that it was going to change the retiree health insurance benefits "or there would be no [plant] in Sturgis." (*Id*. at 26.) The Cooper Comprehensive Plan was not as favorable as the First Dollar Plan, but it was still a lifetime plan. (*Id*. at 31, 39.) He stated that this understanding was expressed clearly at the negotiations by the Union and the company. (*Id*. at 31-32, 52-53.)

Indeed, in the 1993 negotiations, Cooper Industries eliminated the "cradle to the grave" concept and limited the time in which retirees were eligible to receive insurance benefits. (*Id*. at 18, 30.) The Union and the company negotiated a delay before the change took place, however, to give "a window period for employees to decide whether they wanted to retire early or

continue on and lose their insurance all together." (*Id*. at 30-31.) Mr. Keasey testified that, immediately prior to the change, the number of employees who retired went up significantly. (*Id*. at 32.)

Sandi McCurry, the administrator of health insurance and pension benefits at the Sturgis plant, also stated in her affidavit that the company intended to provide retirees with fully paid, vested, lifetime medical benefits. She worked at the Sturgis plant from 1974 until the plant closed in 2001. (docket no. 224-7, Plaintiffs' Master Ex. 6, ¶ 2.) From 1988 on, she oversaw the administration of health insurance for the employees and the retirees. (*Id*.) Just before the plant closed, she also oversaw the pension administration. (*Id*.) She stated that the retiree benefits were lifetime for employees who retired prior to January 1, 1994. (*Id*. at ¶ 8.) Additionally, she stated that there was an unusually high number of retirements just prior to January 1, 1994, because of the prospective change from lifetime insurance. (*Id*. at ¶ 13.) She also stated that, as part of her duties for Newell, she had prepared summaries of the benefits for various groups of the retirees. (*Id*. at 3.) In 1998, she communicated with Linda Fazio of Newell Company and confirmed that for all retiree groups prior to January 1, 1994, there were no monthly premium charges for insurance. (*Id*. at ¶ 9; docket no. 229-11, Plaintiffs' Ex. 17.16.) She described the only exception as the $20 premium payment from age 62 to 65 that was required of employees who retired between January 1, 1986, and January 1, 1994. (docket no. 224-7, Plaintiffs' Master Ex. 6, ¶ 7.)

Donald Lampe, a participant in the 1993 collective bargaining agreement negotiations, stated in his affidavit and at deposition that the company understood the collective bargaining agreement provided lifetime insurance at no cost to the retiree and the retiree's spouse other than the $20 payment for retirees aged 62 to 65. (docket no. 224-5, Plaintiffs' Master Ex. 4, ¶ 4; docket no. 2252, Plaintiffs' Master Ex. 10, 6, 9.) He stated that Bernard Koehne, the company's lead negotiator, confirmed this understanding at the negotiations. (docket no. 224-5, Plaintiffs' Master Ex. 4, ¶¶ 4, 10; docket no. 225-2, Plaintiffs' Master Ex. 10, 9 ("Bernie Koen [sic] told us that if you got out by the end of the year of '93, you'd have your lifetime benefits.").) His notes, taken during the 1993 negotiations, also state that Mr. Koehne took this position in the negotiations. (docket no. 224-5, Plaintiffs' Master Ex. 4, ¶ 10; docket no. 227-26, Plaintiffs' Master Ex. 16.25.) Additionally, Mr. Lampe stated that the collective bargaining agreements provided the same benefits during the same time periods described by Mr. Keasey. (docket no. 224-5, Plaintiffs' Master Ex. 4, ¶¶ 5-11.) He stated that during his entire career, "there was never any dispute between the Company and the Union concerning the application of the retiree medical insurance benefit language in the contract." (*Id*. at ¶ 14.)

Donald Oetman, an International Representative for the union at the Sturgis plant from 1984 through 1995, stated that the parties intended that retirees receive lifetime medical benefits, including Medicare Part B reimbursements. (docket no. 224-6, Plaintiffs' Master Ex. 5, ¶ 4.) He was one of the union negotiators for the 1985 collective bargaining agreement. (*Id*. at ¶¶ 2, 3.) He stated that, in the 1985 negotiations, "the Company agreed to pay the Medicare Part B

reimbursement so long as the retiree was receiving Medicare. This meant for life." (*Id*.) He stated in addition that, during the 1993 negotiations when the lifetime benefits were phased out for employees retiring after January 1, 1994, the parties intended that employees retiring prior to this date would lock into the lifetime benefits that had previously been offered at the plant. (*Id*. ¶ 6.)

In short, the testimony of company management, union representatives, and line employees is unanimous and uncontradicted: The parties to the collective bargaining agreements intended to vest lifetime health-care benefits for employees retiring before January 1, 1994.

The extrinsic documents tell the same story. The company documents from the time of the negotiations, like the company's economic offer during the 1985 negotiations, states that retirees are "covered under the group medical program . . . except that, from age 62 to 65, retiree contribution will be $20.00 per month for individual coverage and $20.00 per month for family coverage." (docket no. 227-28, Plaintiffs' Master Ex. 16.27.) The company also described this intent in the letters Cooper Industries sent to employees of the Sturgis plant on their retirement. When an employee announced his retirement, the company sent him a letter outlining his pension and insurance benefits. All of these letters state there is no charge for retiree health insurance benefits. For example, the company sent a letter to a prospective retiree on April 26, 1988, stating:

> Beginning January 1, 1986, Cooper Industries provided a new retiree medical plan for all Kirsch UAW employees and retirees whose retirement commenced on or after January 1,

> 1986. . . . Your cost for coverage will be $20 each month from age 62 until age 65 ($20 for yourself and for your spouse). There is no charge beyond age 65. . . ."

(docket no. 227-27, Plaintiffs' Master Ex. 16.26.) This language was included in letters the company sent to prospective retirees through 1993. (*See, e.g.*, docket no. 227-4, Plaintiffs' Master Ex. 16.3 (a letter sent to a retiree in 1992); docket no. 227-3, Plaintiffs' Master Ex. 16.2 (a letter sent to a retiree in 1993).) Similarly, the retirement applications the company sent to an employee when she retired also specify that there is no charge for retiree medical insurance, other than the $20 monthly premiums for retirees between the ages of 62-65 in the 1986-1993 retiree group. (*See, e.g.*, docket no. 227-2, Plaintiffs' Master Ex. 16.1 (Mr. Bender's retirement papers); docket no. 227-7, Plaintiffs' Master Ex. 16.6 (Mr. Lampe's retirement papers).) These retirement applications state that, under the 1985 contract, a retiree must pay $20 each month toward the cost of his insurance if he is between the ages of 62 and 65. The applications do not describe or require any other premium payment by the retiree. (*Id.*)

2. Medicare Part B Benefits

The extrinsic documentary evidence further demonstrates that the parties intended the pre-August 1, 1998, retirees receive full reimbursement for the Medicare Part B insurance premium. The 1985 bargaining summary, for example, states that Cooper Industries "will reimburse the retiree and spouse for the cost of the Part 'B' Medicare contribution." (docket no. 227-28, Plaintiffs' Master Ex. 16.27.) Similarly, in 1988, Cooper Industries' Labor Relations Manager sent a letter to the employees describing the agreed

upon medical benefits. (docket no. 227-27, Plaintiffs' Master Ex. 16.26.) It stated that "[t]he Company will reimburse the retiree and spouse for the cost of Part '13' Medicare contributions." (*Id*.) The same letter was sent in 1992 and 1993 to employees who had indicated that they intended to retire. (*See, e.g*., docket no. 227-4, Plaintiffs' Master Ex. 16.3.) Additionally, the retirement applications show that the company was reimbursing Medicare Part B insurance premiums for retirees. (*See, e.g*., docket no. 227-2, Plaintiffs' Master Ex. 16.1 (Mr. Bender's retirement papers); docket no. 227-7, Plaintiffs' Master Ex. 16.6 (Mr. Lampe's retirement papers).)

The testimony also demonstrates this intent. For example, Donald Oetman, an International Representative for the union at the Sturgis plant from 1984 through 1995, stated that the parties intended that retirees receive lifetime medical benefits, including Medicare Part B reimbursements. (docket no. 224-6, Plaintiffs' Master Ex. 5, ¶ 4.) He stated that, in the 1985 negotiations, "the Company agreed to pay the Medicare Part B reimbursement so long as the retiree was receiving Medicare. This meant for life." (*Id*.)

William Webster, the International Representative for the union after Mr. Oetman, also confirmed the Medicare Part B reimbursement. He was part of the team that negotiated the 1998 Settlement Agreement for Medicare Part B reimbursement. (*Id*.) He stated that the 1998 Settlement Agreement required the company "to pay the Medicare Part B reimbursement to those who retired prior to August 1, 1998." (*Id*.) For those who retired after that date, the company would reimburse only a flat amount of $43.80, even if Medicare Part B premiums increased above that

threshold in the future. (*Id*.) He also stated that, after the plant closed, pre-August 1, 1998 retirees sometimes called him to complain that they were not receiving full reimbursement, usually after an increase in the Medicare Part B. (*Id*. at 5.) Whenever he received such a call, he contacted a representative at Newell, and in each case, Newell increased the reimbursement to the new level. (*Id*.)

There is no contrary testimony in the record.

C. Defendants' Due Diligence Memorandum

Newell Company conducted due diligence on the Sturgis plant in 1997, just before Defendants purchased the Sturgis plant from Cooper Industries. As part of this information gathering, Defendants' legal counsel, Schiff Hardin & Waite, sent them a memorandum that sets forth "a summary of the retiree medical and life insurance benefits currently provided to Kirsch employees." (docket no. 226-4, Plaintiff's Master Exhibit 15.3.) The memorandum, dated January 21, 1997, was prepared by Lauralyn B. Bengel, a partner at the law firm who specializes in retirement and welfare plans under ERISA. Copies of it were sent to Stuart Goodman, another partner at the firm; Dale Mattschullat, the Vice President and General Counsel of Newell Company who signed the Kirsch purchase agreement on behalf of Defendants; and Great West Life, the company Defendants hired to duplicate the Cooper-Aetna medical insurance plans for the Sturgis plant retirees.

During this litigation, the retirees did not receive a copy of this memorandum directly from the Defendants. Instead, a portion of the memorandum was turned over to Plaintiffs by a third party, insurance company Great West Life, in response to a subpoena

for documents. It appears from the fax information across the top of the memorandum that Defendants provided the memorandum to Great West Life sometime around May 1997, when, on behalf of Defendants, Great West Life was taking over the Cooper-Aetna medical insurance plans for the Sturgis plant retirees. Of course, by disclosing portions of the memorandum to a third party, the company waived whatever attorney-client privilege may otherwise have protected it, at least as to the disclosed portions. Defendants have not disclosed or offered to disclose the entire memorandum, and Plaintiffs have not sought to compel its production. Accordingly, there is no need to resolve whether the partial third-party disclosure operated as a broader waiver of privilege with respect to the entire document.

The portion of the memorandum actually disclosed to the third party is explicit, unqualified and adverse to the Defendants' position here. In the paragraph titled "Union Employees," the memorandum states: "If retired prior to 1-1-94: Lifetime retiree coverage." (*Id*.) Thus, the conclusion of Defendants' own due-diligence attorneys is consistent with all of the other evidence in this matter in calling for lifetime vesting of benefits for qualifying retirees.[1]

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[1] The record includes only a portion of the due diligence memorandum – namely, the portion covering retiree health care insurance. Whether another portion of the memorandum addresses reimbursement of Medicare Part B premiums, whether from the Pension Plan or the company, is an unknown. As the original recipients of the due diligence memorandum, Defendants are in the best position to eliminate the unknown. They have not done so.

IV. The Present Dispute

In 2005, Defendants notified the retirees that they were reducing the retirees' health benefits by requiring for the first time that retirees pay monthly premiums and by changing the co-payments provided in the Plan. (docket no. 31, July 9, 2007, Opinion, at 2.) More recently, Defendants also asserted that they are not required to fully reimburse the retirees' Medicare Part B insurance premium even for employees retiring prior to August 1, 1998, under the Settlement Agreement. Those were the first formal declarations by the Defendants of a claimed legal right to reduce the retirees' healthcare benefits.

The subject matter of this litigation began with a forum fight.[2] Defendants here fired the first shot by filing suit on January 12, 2006, in the Northern District of Illinois, seeking declaratory and injunctive relief. Specifically, Defendants (the plaintiffs in that action) sought a declaratory judgment that they had not breached the applicable collective bargaining agreements under the LMRA and had not violated ERISA when they changed the premiums and co-pays of the retirees. (*Id*. at 2-3.) Defendants individually joined and served every individual member of the

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[2] The law in the Sixth and Seventh Circuits differs on at least one important aspect of retiree vesting of healthcare benefits. The Sixth Circuit holds "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." *Cole v. ArvinMeritor, Inc*., 549 F.3d 1064, 1069 (6th Cir. 2008) (internal quotation marks and alteration omitted). The Seventh Circuit, by contrast, holds that in the absence of explicit language vesting the benefits, healthcare benefits are not vested. *See Cherry v. Auburn Gear, Inc*., 441 F.3d 476, 481 (7th Cir. 2006).

Plaintiff class in this action. On February 15, 2006, the Plaintiffs filed their class-action complaint against the Defendants in this Court. Plaintiffs alleged that Defendants breached the applicable collective bargaining agreements in violation of the LMRA, and that they breached the Plan under ERISA, by reducing healthcare benefits for retirees. Plaintiffs sought benefits and declaratory and injunctive relief. The Court provided numerous extensions in this action to permit the Northern District of Illinois to consider its jurisdiction over the related case. Ultimately, the Northern District of Illinois decided to dismiss the case before it in deference to the matter presently before this Court (*id*. at 3.), and the Seventh Circuit affirmed. *See Newell Operating Co. v. U.A.W*, 532 F.3d 583, 591-92 (7th Cir. 2008). This Court became the forum for decision on the merits.

The fundamental issue is whether the retirees health insurance and Medicare Part B reimbursement are vested, or whether Defendants retained the right to reduce, or even to eliminate, these benefits for the retirees. Assuming at least some retiree benefits are vested, the remaining issues are the particular way these benefit levels differ for class members depending on the benefit package in place at the time of a qualifying retirement. These issues are framed by eight motions for summary judgment. Newell Operating Company filed a motion for summary judgment (docket no. 160). The Plan filed a motion for summary judgment (docket no. 166). Newell Window Furnishings filed separate motions for summary judgment as to each of the named Plaintiffs Mr. Smoker (docket no. 162), Ms. Rohr (docket no. 164), Ms. Connor (docket no. 168), Mr. Lampe (docket no. 173), and Mr. Taylor and Mr. Bender (docket no. 176). Finally, Plaintiffs also filed a motion for sum-

mary judgment (docket no. 171). Plaintiffs and Defendants filed responses and replies to each of the motions (docket nos. 188, 189, 194, 195, 196, 198, 199, 200, 201). Defendants further filed a surreply to Plaintiffs' motion for summary judgment (docket no. 203). Oral argument occurred on April 14, 2010. (*See* docket no. 222) The Court has been well briefed and is prepared to decide the motions.

ANALYSIS

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Schreiber v. Philips Display Components Co.*, 580 F.3d 355, 363 (6th Cir. 2009) (quoting Fed. R. Civ. P. 56). The moving party must "inform the district court of the basis for its motion," and it must identify "those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any which it believes demonstrate the absence of a genuine issue of material fact." *Id*. (internal quotation marks omitted). "In considering a motion for summary judgment, the district court must construe all reasonable inferences in favor of the nonmoving party." *Id*. (quotation omitted). Applying these standards, Plaintiffs are entitled to summary judgment because the language of the collective bargaining agreements and all the extrinsic evidence tell one uncontradicted story: The parties who negotiated the agreements at issue intended to provide lifetime, vested healthcare benefits for retirees at levels established as of key milestone retirement dates. In particular, all Plaintiffs whose qualifying retirement was on or before July 31, 1998,

are entitled to full reimbursement of the Medicare Part B premium. Other healthcare benefit levels for Plaintiffs depend on precisely when the qualifying retirement occurred.

I. Defendants are liable as successors for the retirees' healthcare benefits.

All of the collective bargaining agreements in this action arise from bargaining between one Union and the owners of one plant in Sturgis, Michigan, that, for the entire time it was open, made window furnishings. All of Plaintiffs are retirees from that Sturgis plant. The same Union represented all of them while they were employees. All of them manufactured the same goods. The only thing that changed over the years was who owned the Sturgis plant. Defendants are the successors in liability to all of those collective bargaining agreements.

A. Newell Window is liable for the retirees' healthcare benefits.

Newell Window, a subsidiary of Newell Operating, is the successor to Kirsch Company, and it agreed to assume all liability arising from the benefit plans related to the Sturgis plant. Newell Window itself recognized this in its Illinois complaint. (*See* docket no. 230-10, Plaintiff's Master Ex. 24, complaint in *Newell Operating Co., Newell Rubbermaid Health & Welfare Program 506, & Newell Window Furnishings, Inc. v. U.A.W et al.*, No. 3:06-cv-50010 (N.D. Ill. 2007), ¶¶ 4, 7, 8.) In addition to this party admission, Newell Window's due diligence memorandum at the time it decided to acquire the Sturgis plant reinforces the point. (docket no. 226-4, Plaintiff's Master Exhibit 15.3.)

The underlying transactional documents confirm Newell's admission. Cooper Industries, the earlier owner of the Sturgis plant, transferred the Sturgis plant to Kirsch Inc.[3] (Newell Master Ex. BW §§ 4.1.13, 7.3.). Newell Company then purchased the Kirsch Inc. stock-and thereby, the Sturgis Plant-from Cooper Industries.[4] (Newell Master Ex. BY; *id*. § 5.12.) Each of the transfer agreements expressly transferred to the buyer all liabilities connected with the collective bargaining agreements, the pension agreements, and all pension, retirement, and post-employment benefits. (Newell Master Ex. BW §§ 4.1.13, 7.3; Newell Master Ex. BY § 5.12.) No subsequent agreement permitted Newell Window to amend or terminate the benefits that had already vested to the retirees under the Sturgis plant's plans and agreements. (*See* Newell Master Ex. BY § 6.4(f).) Indeed, no subsequent agreement between the companies or between the company and the Union could lawfully do so. *See, e.g., Wood v. Detroit Diesel Corp*., No. 09-1252, --- F.3d ----, 2010 WL 2195791, *6 (6th Cir. June 3, 2010) (holding that if the employees had a vested right to a benefit from their employer, then no subsequent agreement between the employer and another party could reduce that right); *see also Prater v. Ohio Educ. Ass'n*, 505 F.3d 437, 444 (6th Cir. 2007) (holding that employers are statutorily barred from effectuating unilateral modifications of existing collective bargaining agreements).

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[3] Cooper Industries created Kirsch Inc. in 1996 for the purpose of selling the Sturgis plant to Newell Company.

[4] Newell Company changed the name of Kirsch Inc. to Kirsch Company. It later merged Kirsch Company into Newell Window Furnishings, Inc. and ran it as a division of Newell Company.

Accordingly, Newell Window is liable for the benefits guaranteed by the collective bargaining and pension agreements.

B. Newell Operating and the Plan are liable for the retirees' healthcare benefits.

Newell Operating is the sponsor of Welfare Program 506. (*See* docket no. 230-10, Plaintiff's Master Ex. 24, complaint in *Newell Operating Co., Newell Rubbermaid Health & Welfare Program 506, & Newell Window Furnishings, Inc. v. U.A.W. et al*., No. 3:06-cv-50010 (ND. Ill. 2007), ¶ 2.) Welfare Program 506 provides the retiree health care benefits that are disputed in this case. (*Id*. ¶ 3.) Together with Newell Window, Newell Operating and Welfare Program 506 filed in the Northern District of Illinois a declaratory judgment action in an attempt "to wrest the choice of forum from the natural plaintiffs." (*See id*. ¶ 14; docket no. 31, July 9, 2007 Opinion, at 2, 5-6.) The parties in the present action are the same as those in the declaratory judgment action in the Northern District of Illinois. Indeed, Newell Operating and Welfare Program 506—the very entities who contend in this action that they are not proper defendants—filed the reciprocal of this action, as plaintiffs seeking declaratory judgment, in the Northern District of Illinois. If they were proper plaintiffs in Illinois, they are proper defendants here. Their presence is necessary to ensure complete and effective relief, as they themselves must have recognized when they fired the first shot as plaintiffs in Illinois.

II. Under the collective bargaining agreements, the retirees have a vested right to healthcare benefits, including health insurance at levels determined at the applicable retirement date, and full reimbursement for Plaintiffs' Medicare Part B premium.

A. The Collective Bargaining Agreement Language

1. Legal Principles

"There are two types of employee benefit plans: pension plans and welfare-benefit plans." *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064, 1069 (6th Cir. 2008). Pension plans are subject to mandatory vesting under ERISA. *Id*. Welfare-benefit plans are not subject to mandatory vesting under ERISA. *Id*. Retiree healthcare-benefit plans are welfare-benefit plans and, accordingly, they are not subject to mandatory vesting under ERISA. *Id*. The parties to a collective bargaining agreement, however, may vest the retiree-healthcare benefits and thereby allow the benefits to survive the termination of their collective bargaining relationship. *UAW v. Yard-Man*, 716 F.2d 1476, 1479 (6th Cir. 1983). Whether the retiree insurance benefits vest is, like all contract questions, an issue of the parties' intent. *See id*.; *Cole*, 549 F.3d at 1069. This circuit's leading case for determining whether the parties to a collective bargaining agreement intended the benefits to vest is *Yard-Man*. *Cole*, 549 F.3d at 1069.

Under *Yard-Man*, a court must apply the basic rules of contract interpretation to determine whether the parties intended to vest the rights. *Id*. The court must first consider the language in the collective bargaining agreement "to see if clear manifestations of

an intent to vest are present." *Id*. In doing so, the court must construe each of the provisions consistently with the whole, and it should interpret the agreement "to avoid illusory promises and superfluous provisions." *Id*. If the collective bargaining agreement is ambiguous, however, "the court may resort to extrinsic evidence to ascertain whether the parties intended for the benefits to survive the agreement." *Id*. at 1070. If the available extrinsic evidence conclusively resolves the issue and no question of intent remains, then summary judgment is appropriate. *Id*. If the extrinsic evidence does not conclusively resolve the issue however, summary judgment is improper. *Id*.

Additionally, in determining whether the parties intended to vest benefits in a collective bargaining agreement, as opposed to some other type of contract, the court must apply a "*Yard-Man*, inference." *Reese v. CNH Am. LLC*, 574 F.3d 315, 321 (6th Cir. 2009). The *Yard-Man* inference requires a court to apply "a thumb on the scales" in favor of concluding that the benefits vested for life. *Id*. *Yard-Man* "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." *Cole*, 549 F.3d at 1069 (internal quotation marks and alteration omitted). Accordingly, if the court "can find either explicit contractual language or extrinsic evidence indicating an intent to vest benefits," it should conclude that the welfare benefits were vested and not "left to the contingencies of future negotiations." *Reese*, 574 F.3d at 321 (alteration omitted). This inference is not "a legal presumption that benefits vest," but it instead is merely an inclination in favor of vesting. *Id*.

Ultimately, the plaintiffs "bear the burden of proving that vesting has occurred." *Id*.

If the court concludes that the rights to healthcare coverage are vested in the agreement, the] an employer's unilateral termination of the healthcare coverage violates section 301 of the LMRA, *Id*. If the rights to healthcare coverage are not vested, however, an employer may terminate thy benefits after the agreement expires. *Id*.

2. Analysis

Here, the retirees have met their burden of demonstrating that the collective bargaining agreements unambiguously gave Sturgis plant employees who retired under them a vested right to healthcare benefits, including health insurance and Medicare Part B reimbursement. *See Reese*, 574 F.3d at 322. The language in the collective bargaining agreements is similar to the language discussed in *Reese*. *See id*. The agreements guarantee the retirees "[t]he same benefits as for the employees and their dependents." The benefits given to the active employees include group insurance benefits that are paid by the Company and reimbursement for the full cost of Medicare Part B coverage. (*See*, *e.g*., docket no. 229-2, Plaintiffs' Master Ex. 17.7, at 56, 101-105) (1982-1985 collective bargaining agreement).) Moreover, the agreements expressly provide that the company will "pay the cost of such insurance for the retiree and his dependents." (*See, e.g*., *id*.) This language unambiguously demonstrates the parties' intent that the benefits, both group health insurance and Medicare Part B insurance, are vested. *See Reese*, 574 F.3d at 322; *see also Golden v. Kelsey-Hayes Co*., 954 F. Supp. 1173, 1178 (E.D. Mich. 1997); *Cole*, 549 F.3d at 1070-71.

The 1998 Settlement Agreement language further demonstrates the parties' intent to vest reimbursement of the Medicare Part B insurance premium. It states that all "retirees of record as of July 31, 1998" will receive the full "Medicare Part 'B' coverage that was provided for under the Pension Plan in effect in 1991, but deleted from the plan during 1991, and then reimbursed to retirees, from assets of the company." (Docket no. 227-19, Plaintiffs' Master Ex. 16.18.) In the context of the settlement agreement, this language permits only one construction: namely, that the retirees will pay nothing toward the Medicare Part B premium and that the company will pay the full amount, with the first $11.70 of the premium paid by the Pension Plan and any additional premium paid directly by the company to cover the full cost. (*See id.*) Indeed, the Agreement provides that later-retiring employees will receive either a flat $43.80 reimbursement per month, regardless of how expensive the Medicare Part B premium becomes, or no Medicare Part B reimbursement at all. (*Id.*) Obviously, then, the earlier retirees were not capped at the lower reimbursement amount of $11.70. That would treat the later retirees better than the earlier ones, when the parties intent was just the opposite. Moreover, the uniform pattern of practice,[5] from the

[5] The record includes evidence of a handful of different payment of Medicare Part B reimbursement amounts for different retirees, but neither party can tie the instances to a uniform policy, practice, or claimed legal right. Until this dispute arose, a qualifying retiree receiving less than full reimbursement of Medicare Part B premiums simply informed the company, and the company bumped the retiree to full reimbursement. The instances of lesser reimbursement appear to be examples of inevitable mistakes or oversights that naturally arise in administering company plans for many different retirees over many years. They do not create a genuine issue of fact for trial.

1970s through 2006, when the controversy arose, was for the company to cover the full cost of the Medicare Part B premium for qualifying retirees, using a combination of sources. Employees paid nothing. This was the full Medicare Part B benefit guaranteed under the 1998 Settlement Agreement.

There are contextual clues, as well, that the parties' intended to provide lifetime benefits to the retirees. *See Reese*, 574 F.3d at 322. For example, some benefits provided by the collective bargaining agreements "were subject to express durational limitations while retiree health benefits were not." *Id*. "[T]he inclusion of specific durational limitations in other provisions suggests that retiree benefits, not so specifically limited, were intended to survive." *Id*. (alterations and quotation omitted). Additionally, the agreements provided either coordination or integration of the health insurance and Medicare Part B insurance, which shows that the parties intended to include both types of coverage in their agreements. *Cf. id*. Construing the provisions consistently with the whole and interpreting the agreement "to avoid illusory promises and superfluous provisions" also leads to the conclusion that the parties intended to vest the retirees benefits. *See Cole*, 549 F.3d at 1069. Indeed, if the benefits were not contractually vested for qualifying retirees, it would be impossible to make sense of the early retirement incentives of pre-January 1, 1994, for general healthcare, and pre-August 1, 1998, for Medicare Part B.

3. Rejection of Defendants' Arguments

Defendants contend that the collective bargaining agreements do not vest lifetime benefits. They make four arguments, none of which has merit.

First, Defendants contend that the collective bargaining agreements are of limited duration. It is true that the collective bargaining agreements contain general durational clauses that state, for example: "The insurance program as set forth in Exhibit A is agreed to for the duration of this contract." This kind of general clause, however, does not introduce any ambiguity regarding a specific promise of vested retiree benefits. *See Cole*, 549 F.3d at 1071, 1072. In this Circuit, "general durational clauses cannot trump contractual promises of lifetime retiree healthcare benefits." *Id*. at 1071. Instead, general durational clauses limit "the length of the CBAs and not the period of time contemplated for retiree benefits." *Id*.; *see also Yolton v. El Paso Tenn. Pipeline Co*., 435 F.3d 571 (6th Cir. 2006) (holding that general durational clauses affect only "*future* retirees-that is, someone who retired after the expiration of a particular CBA would not be entitled to the previous benefits, but is rather entitled only to those benefits newly negotiated under a new CBA"). A "general durational clause says nothing about the vesting of retiree benefits" unless it contains "specific durational language referring to the retiree benefits themselves." *Cole*, 549 F.3d at 1073 (quotation omitted). The durational clauses in this case do not specifically refer to the retiree benefits. *See id*. Nor do they unambiguously and expressly limit the duration of retirees' benefits. See id. Accordingly, they are general durational clauses that do not limit those benefits. *See id*.

Second, Defendants contend that the plan summary documents contain reservations of rights that permits them to amend the benefits. As a general rule, an existing contract or collective bargaining agreement "cannot be unilaterally modified." *Prater v. Ohio Educ. Ass'n*, 505 F.3d 437, 444 (6th Cir.

2007) (internal quotation marks omitted). Indeed, "employers are statutorily barred from effectuating unilateral modifications of existing collective bargaining agreements." *Id*. (alterations and internal quotation marks omitted). This general rule is qualified, however, by a special rule for plan summary documents. A plan summary document can prevent retiree benefits from vesting if (1) it includes "unqualified reservation-of-rights language," (2) the unqualified language provides the employer with a "unilateral right . . . to terminate coverage," and (3) the union fails to grieve or object to such language. *Reese*, 574 F.3d at 323; *Prater*, 505 F.3d at 444. Defendants contend that the plan summary documents in this case meet that test.

Defendants' contention is without merit. The reservation in the plan summary documents on which Defendants rely states merely: "It is hoped that this Plan will be continued indefinitely, but, as is customary in group plans, the right of change or discontinuance at any time must be reserved." (docket no. 189-47, Plaintiffs' Bates No. 1692, 1711.) This language is not an unqualified statement that the employer retained the unilateral right to amend and terminate the plan. *See Reese*, 574 F.3d at 323. Accordingly, Defendants fail the first requirement of the test. *See id*.

Defendants also fail the second requirement of the test. Even if a plan summary document contains language that recites an unqualified reservation of a unilateral right of termination, the language is not effective if the plan summary document also reaffirms the primacy of the underlying collective bargaining agreement. *See id*.; *Prater*, 505 F.3d at 444, 445. So, if a plan summary document contains

language "reminding readers that the contracts represent the full commitments between the parties," *Reese*, 574 F.3d at 323 (internal quotation marks omitted), then the contract documents trump any reservation language in the plan summary document. This is because a union cannot fairly be expected to protest when the plan summary document makes it clear that the collective bargaining agreement, not the plan summary document, controls the conflict. *Id*.; *Prater*, 505 F.3d at 445. That is what we have here. *See Prater*, 505 F.3d at 444. The plan summary documents state that where the plain language in the booklet contradicts or confuses the language in the legal documents, "the wording in the legal document will apply." (*See, e.g*., docket no. 189-16 at 3.) Each of the plan summary documents expressly affirms that the collective bargaining agreements control the benefits, not the plan summary documents. The summaries' failure to explicitly renounce the collective bargaining agreements prevents them from being be interpreted to permit Defendants to unilaterally terminate or amend the contractual benefits. *Prater*, 505 F.3d at 445.

Defendants' third contention against vesting is that there is a presumption that, in the absence of explicit language vesting the benefits, healthcare benefits are not vested. For this proposition, Defendants rely on Seventh Circuit precedent. *See Cherry v. Auburn Gear, Inc*., 441 F.3d 476, 481 (7th Cir. 2006). Although this presumption appears to be the law in the Seventh Circuit, *see id*., it does not apply in the Sixth Circuit, *see Cole*, 549 F.3d at 1069. Indeed, precisely the opposite presumption is true in the Sixth Circuit. See id. (holding that even if the agreement does not explicitly say that the rights are vested, a court may find that the parties intended to vest the rights). The

Sixth Circuit holds "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*. (internal quotation marks and alteration omitted). As discussed above, this inference does not create a legal presumption that retiree benefits are vested for life, but it exists "if the context and other available evidence indicate an intent to vest." *Id*. (quotation omitted). Defendants' reliance on contrary Seventh Circuit precedent is without merit.

Even in the Seventh Circuit, the language in these agreements would be held to provide vested, lifetime benefits. Each of the collective bargaining agreements provides fully paid insurance benefits to the active employees and full payment of Medicare Part B insurance premiums for employees over the age of 65. Each of the agreements gives to retirees the same health benefits enjoyed by the employees and their dependents. Furthermore, each of the agreements states that "[t]he Company agrees to pay the cost of such insurance for the retiree and his dependents." The contract language unambiguously demonstrates the parties' intent to vest lifetime healthcare benefits to the retirees. *See Reese*, 574 F.3d at 322; *Cole*, 549 F.3d at 1070-71; *Golden*, 954 F. Supp. at 1178. Indeed, Defendants have put forward no plan language that contradicts this unambiguous intent. Their argument relies on inapplicable agreements and extrinsic evidence in the plan summary documents which, for the reasons discussed above, do not actually contradict or challenge the language in the collective bargaining agreements.

Fourth, Defendants contend that the retirees do not have a vested right to reimbursement of the Medicare Part B insurance premium because the 2000 Shutdown Agreement terminated the 1998 collective bargaining agreement and the corresponding 1998 Settlement Agreement. This argument is without merit. First, the vested right arises from the earlier collective bargaining agreements, and no subsequent agreement between the Union and Defendants could lawfully permit Defendants to amend or terminate the benefits that had already vested to the retirees. *See*, *e.g.*, *Wood*, 2010 WL 2195791 at *6; *see also Prater*, 505 F.3d at 444. The Shutdown Agreement applies only to active members of the Union. (*See* docket no. 228-7, Plaintiffs' Master Ex. 17.6, at Defendants' Bates No. 2058 ("[I]t is agreed by the Company and the Union on behalf of itself and the employees it represents . . ." .) It is not an agreement between the retirees and Defendants, so it cannot trump the contractual promises of lifetime retiree healthcare benefits for those individuals whose right to reimbursement already vested. *Wood*, 2010 WL 2195791 at *6. Second, the 2000 Shutdown Agreement does not even purport to terminate the rights that had already vested under the 1998 Settlement Agreement. The 2000 Shutdown Agreement states:

> Upon acceptance of this Shutdown Agreement, this Shutdown Agreement <u>shall become an addendum to the current Collective Bargaining Agreement</u> between the Company and the Union (the stated term of which is June 6, 1998 through June 6, 2003). Upon acceptance of this Shutdown Agreement the parties shall be bound by this Shutdown Agreement and the current Collective Bargaining Agreement and relevant plan docu-

> ments as modified by this Shutdown Agreement. This Shutdown Agreement and the 1998 Collective Bargaining Agreement and all agreements supplemental thereto shall automatically terminate on March 31, 2001 . . . . If there is any conflict between the 1998 Collective Bargaining Agreement and this Shutdown Agreement, this Shutdown Agreement shall prevail.

(docket no. 159-24 Art. III § 1 (emphasis added).) By its terms, the 2000 Shutdown Agreement affects only the window in which the individuals who retired after the 2000 Shutdown Agreement could retire with the benefits of the amended 1998 collective bargaining agreement. It does not even purport to change the rights of those employees who had already retired. Accordingly, the 2000 Shutdown Agreement does not limit the reimbursement for the retirees for whom the benefit already vested.

The Plaintiffs have established for the purposes of summary judgment that the language of the collective bargaining agreements vest their right to lifetime health benefits.

B. Extrinsic Evidence

Even if the collective bargaining agreement language is ambiguous, however, the entire record of extrinsic evidence demonstrates, without a single contradictory voice, that the parties intended to vest lifetime retiree healthcare benefits. Individuals from both sides of the bargaining table, including members of company management and Union representatives, testified at deposition and stated in affidavits that the company and the employees intended to provide retirees with fully paid, vested, lifetime medical benefits. Mr. Keasey, a participant in most of the nego-

tiations and a drafter of the collective bargaining agreements; Ms. McCurry, the administrator of health insurance and pension benefits at the Sturgis plant; Mr. Lampe, another main participant in the collective bargaining agreement negotiations; and Mr. Oetman, an International Representative for the union at the Sturgis plant from 1984 through 1995, all stated that the Union and the company intended to vest lifetime group health insurance for the retirees. The letters Cooper Industries sent to employees of the Sturgis plant on their retirement, the company's economic offers from various negotiations, and the retirement applications also demonstrate this intent. Even Defendants' own due diligence at the time of purchase shows that the agreements vested lifetime benefits. Its attorneys' "summary of the retiree medical and life insurance benefits" states that union employees who retired before January 1, 1994, are entitled to "[l]ifetime retiree coverage" of medical benefits. (docket no. 226-4, Plaintiff's Master Exhibit 15.3.)

The evidence also demonstrates the intent to vest full reimbursement for Medicare Part B insurance. The 1985 bargaining summary, for example, states that the company will reimburse the retirees and their spouses for the cost of the Medicare Part B premium. The retirement letters and application packages sent by the company between 1988 and 1993 state exactly the same thing. Mr. Oetman, an International Representative for the union at the Sturgis plant from 1984 through 1995, and Mr. Webster, the International Representative for the union after Mr. Oetman, also confirmed that the company and the Union intended to vest full reimbursement for Medicare Part B insurance. Mr. Webster was also part of the team that negotiated

the 1998 Settlement Agreement for Medicare Part B reimbursement, and he stated that the 1998 Settlement Agreement was intended to vest full Medicare Part B reimbursement for those who retired prior to August 1, 1998.

The available extrinsic evidence would resolve in any circuit the issue of the parties' intent to vest. Indeed, it is so entirely one sided that no genuine question of intent can remain. Accordingly, summary judgment in favor of Plaintiffs is appropriate on the question of whether the parties intended to vest lifetime healthcare benefits for the retirees. Cole, 549 F.3d at 1069.

III. Level of Benefits

In addition to the basic dispute regarding whether the collective bargaining agreements vested the retirees' health benefits, the parties dispute whether certain benefits were provided under the collective bargaining agreements. The Court has addressed some of these issues already, and now will summarize its conclusions on all the disputed benefit levels presented by the parties. The Court has already stated the guiding principles: (1) all employees who retired before August 1, 1998, which includes the entire Plaintiff class, are entitled to full reimbursement of the premium cost of Medicare Part B insurance; (2) all employees who retired before January 1, 1986, are entitled to the full first dollar healthcare coverage without any contribution to the premium cost; (3) all employees who retired after January 1, 1986, but before January 1, 1994, are entitled to the level of health care coverage then in effect with the limited exception of a $20 per month contribution to the cost of coverage from age 62 to 65; and (4) all employees who retired on or after January 1, 1994, are

entitled to limited, if any, ongoing healthcare benefits other than the Medicare Part B reimbursement.

Plaintiffs move for summary judgment on two separate benefit-level issues, which appear to be the only meaningful disputes between the parties on special benefit levels. Plaintiffs contend that (1) employees who retired after 1985 but before January 1, 1994, are entitled to 100% coverage of outpatient surgery, diagnostic, and testing services; and (2) pre-1986 retirees are entitled to coordination of their group insurance and Medicare Part B insurance benefits in such a way that retirees incur no out-of-pocket expense. Defendants dispute these contentions. Under *Yard-Man*, a court must apply the basic rules of contract interpretation to determine whether the parties intended a particular right to survive the end of the contract. *See Cole*, 549 F.3d at 1069. The court must first consider the language in the collective bargaining agreement. *Id*. In doing so, the court must construe each of the provisions consistently with the whole, and it should interpret the agreement "to avoid illusory promises and superfluous provisions." *Id*. If the collective bargaining agreement is ambiguous, "the court may resort to extrinsic evidence to ascertain whether the parties intended for the benefits to survive the agreement." *Id*. at 1070. If the available extrinsic evidence conclusively resolves the issue and no question of intent remains, then summary judgment is appropriate. *Id*. If the extrinsic evidence does not conclusively resolve the issue, however, summary judgment is improper. *Id*.

A. Employees who retired between January 1, 1986, and January 1, 1994, are entitled to full reimbursement of outpatient services.

All of the evidence in the record shows that employees who retired between January 1, 1986, and January 1, 1994, are entitled to full reimbursement of outpatient services. *See id*. First, the language of later agreements supports this conclusion. The 1993 collective bargaining agreement states that "[e]ffective January 1, 1994, all outpatient coverage will be reimbursed at the 80% level instead of the present 100% coverage." (docket no. 228-5, Plaintiffs Master Ex. 17.4, at 89.) Mr. Keasey, who participated in the negotiations of the 1986 amendment, also testified that the parties intended outpatient surgery and diagnostics to be covered at 100% for employees who retired during this time period. (*See, e.g*., docket no. 224-9, Plaintiffs' Master Ex. 8, at 47-48.) Additionally, Ms. McCurry, the administrator of health insurance and pension benefits at the Sturgis plant until it closed, stated that the plans covering 1986 through 1993 provided 100% coverage for outpatient services. (docket no. 224-7, Plaintiffs' Master Ex. 6, ¶ 5.) The economic proposals from Cooper Industries that relate to the 1993 collective bargaining agreement also support this conclusion. They state that employees retiring on or after January 1, 1994, will receive 80% coverage for outpatient services "instead of the present 100% coverage." (docket nos. 227-24, 22725, Plaintiffs' Master Exs. 16.23, 16.24.) Even Defendants' summary of retiree benefits confirms this coverage for employees who retired between January 1, 1986, and January 1, 1994. It states that for employees who "[r]etired 1/1/86 to 12/31/93," coverage for "[o]utpatient diagnostic and Xrays" are covered at "100%." (docket no. 215-16, Defendants'

Master Ex. AX.) "For employees who "[r]etired on or after 1/1/94," by contrast, "[o]utpatient diagnostic and Xrays" are covered at "80%." (*Id*.) Accordingly, the retirees are entitled to summary judgment providing employees who retired from the Sturgis plant between January 1, 1986, and January 1, 1994, 100% coverage for outpatient surgery and diagnostic services. *Cole*, 549 F.3d at 1070.

B. Employees who retired before January 1, 1986, are entitled to coordination of benefits so that they incur no out-of pocket expense.

The issue here involves situations in which both Medicare Part B insurance and private company-provided health insurance cover a particular expense, but each insurance provides for only 80% reimbursement. Under the plans in effect here, Medicare Part B always provided primary coverage up to any applicable limits, such as the 80% reimbursement level. This is, in part, why employees and retirees were required to enroll in Medicare Part B. The issue is whether the retiree, or the private health care plan picked up the remaining 20% co-payment. Under the "coordinated" plan, the private insurance would pick up the 20% co-payment, as long as the amount was within the dollar amount the private insurance would have paid in the absence of any Medicare Part B payment. Under the "integrated" plan, however, the retiree picked up the 20% because the private health care benefit applied only if its stated benefit level exceeded the levels provided by Medicare Part B.

Up to 1986, the collective bargaining agreements provided "the same coordination of benefits as the General Motors – U.A.W." (*See, e.g*., docket no. 229-2, Plaintiffs' Master Ex. 17.7, at 56, 101-05 (1982-1985

collective bargaining agreement).) All of the extrinsic evidence in the record shows that before 1986, the parties intended to provide retirees with coordinated benefits that left the retiree with no out-of-pocket expense. Medicare Part B paid the claim first, and the retirees' group insurance picked up the remainder of the bill. Ms. McCurry, the administrator of health insurance and pension benefits at the Sturgis plant until it closed, stated that the pre-1986 agreements provided for insurance that coordinated with Medicare. (docket no. 224-7, Plaintiffs' Master Ex. 6, ¶ 4.) In 1986, the program changed to an "integrated" system. Ms. McCurry stated that beginning in 1986, the agreements provided for insurance that was integrated with Medicare. (docket no. 2247, Plaintiffs' Master Ex. 6, ¶ 6.) Cooper Industries sent a letter to its employees in 1988, which noted the change beginning January 1, 1986. It demonstrates that as of January 1, 1986, when and employee or retiree reached "age 65 and become eligible for Medicare, the benefit payable for our plan will be reduced by the amount paid by Medicare. This means your total benefits received from Medicare and our plan will normally total 80% of your covered expenses less deductibles." (docket no. 227-27, Plaintiffs' Master Ex. 16.26.) Before 1986, however, full coordination was in effect.

Even Defendants' summary of the retirees benefits confirms this. Defendant's summary states that, for employees who "[r]etired prior to 1/1/86," Medicare benefits are subject to "coordination" where "Medicare pays primary. Aetna pays secondary." (docket no. 215-16, Defendants' Master Ex. AX.) It further states: "Coordination of Benefits: Payment may be reduced so that the total you can receive under Medicare and Aetna will not be more than your total bill."

(*Id*.) By contrast, the summary states that, for employees who retired from "1/1/86 to 12/31/93," Medicare payments are subject to "Integration/Carve Out" where "Medicare pays primary. Aetna pays secondary." (*Id*.) Accordingly, the retirees are entitled to summary judgment on the fact that their insurance benefits were coordinated with Medicare benefits for those retirees who retired prior to January 1, 1986, so that they incurred no out-of-pocket expenses for matters covered by both Medicare Part B and private insurance. *See Cole*, 549 F.3d at 1070.

IV. Statute of Limitations

Defendants' final contention is that some of the retirees' claims for Medicare Part B reimbursement are barred by the statute of limitations. Defendants contend that there is a six-year statute of limitations under both the LMRA and ERISA. *See Santino v. Provident Life and Acc. Ins. Co*., 276 F.3d 772, 776 (6th Cir. 2001) (holding that Michigan's six-year statute of limitations for breaches of contract is most analogous and should be used for ERISA violations); *Biros v. Spalding-Evenflo Co*., No. 88-712, 1989 WL 201625, *3 (W.D. Mich. Aug. 1, 1989) (holding that Michigan's six-year statute of limitations for breaches of contract is most analogous and should be used for LMRA violations); *see also Winnett v. Caterpillar, Inc*., No. 08-6236, --- F.3d ----, 2010 WL 2499512, *4 (6th Cir. June 22, 2010). They submit that some of the retirees' have been receiving less than full reimbursement for Medicare Part B insurance for more than six years, and they therefore contend that these retirees' claims for full Medicare Part B reimbursement are barred.

Defendants' contention is without merit. Under Sixth Circuit precedent, Plaintiffs claims accrued less than six years before Plaintiffs filed this action. *See Winnett*, 2010 WL 2499512, *5. In *Winnett*, the Sixth Circuit held that an employer must clearly repudiate the rights provided by a collective bargaining agreement before the retirees claims will accrue. *Id*. Retirees claims do not accrue when they feel the affects of the change, but when the employer gives unequivocal notice that it is repudiating the collective bargaining agreement. *Id*. at *5, 6. The accrual of this cause of action "turns on when []class members knew of [Defendants' announced] change in benefits, not when they *felt* its effects." *Id*. (citing *Carey v. Local 363 Pension Plan*, 201 F.3d 44, 47-48 (2d Cir. 1999) (holding that a cause of action accrues upon "clear repudiation," not when the benefits are denied); *Union Pac. R.R. v. Beckham*, 138 F.3d 325, 330-31 (8th Cir. 1998) (same); *Daill v. Local 73 Pension Fund*, 100 F.3d 62, 65-67 (7th Cir. 1996) (same)). Indeed, the limitations period must be keyed to the time when the Defendants announce the repudiation because it must start at the same point "for every employee or retiree." *Id*.

Here, Defendants announced their repudiation of the terms of the collective bargaining agreement in 2005 and 2006. *Id*. Before that time, Defendants may have inadvertently mishandled the claims of a handful of retirees, but the undisputed evidence shows that Defendants' promptly and fully corrected the mistakes. (*See*, *e.g*., docket no. 224-8, Plaintiffs' Master Ex. 7, ¶ 5.) It was only recently that Defendants gave notice of their intent not to be bound by their agreement. Plaintiff's claims "accrue[d] on the date of the company's announcement and notice," and they filed this action within six years of those

announcements. Accordingly, Plaintiffs claims are timely. *Winnett*, 2010 WL 2499512, *5-7.

Conclusion

The collective bargaining agreements unambiguously establish that the Plaintiff retirees, their spouses and dependents are entitled to vested, lifetime health benefits, including group insurance at various levels in effect at the time of retirement, and full reimbursement of Medicare Part B insurance premiums. The language of the agreements, the contextual clues, and the extrinsic evidence all establishes this conclusion. Even the representatives who negotiated on behalf of the company and Defendants' own legal due diligence analysis agree on this point. Because the collective bargaining agreements vest the benefits and there is no contradictory testimony or extrinsic evidence to dispute the levels of benefits established by the Plaintiffs, summary judgment for Plaintiffs is appropriate.

Dated: July 6, 2010

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE

APPENDIX C

Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. §185, provides in pertinent part:

> 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.

APPENDIX D

Sections 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132(a)(1)(B), provides in pertinent part:

> (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 . . . .

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 05/19/2011]

No. 11-4484

WILLARD BENDER, *et al.*,
Plaintiffs-Appellees,

v.

NEWELL WINDOW FURNISHINGS, INC., *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Michigan,
Case No. 1:06-cv-00113
The Honorable Robert J. Jonker, U.S. District Judge

APPELLANTS' BRIEF

JACK F. FUCHS, ESQ.
STEPHEN L. RICHEY, ESQ.
Thompson Hine LLP
312 Walnut Street
Suite 1400
Cincinnati, Ohio 45202
(513) 352-6700
(513) 241-4771 (facsimile)

Attorneys for Defendants-Appellants

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* * *

J. Cooper Changed Retiree Benefits Without Greivances

In 1986, Cooper altered retiree health benefits at the Sturgis facility. (R.E.175 #10, Keasey tr. 26). Indeed, management employees who were told that they would receive "cradle to grave" benefits were not provided them upon retirement. *(Id.,* Keasey tr. 19).[3]

On June 2, 1997, Cooper advised Retirees that while most benefits would remain the same upon its sale of the Sturgis plant, Newell reserved the right upon purchase to change coverages and benefits:

> The Cardiac Care Program will, however, no longer be in effect. No other changes are being made with respect to your coverage at this time. **Newell does, however, reserve the right to modify the coverage and benefits provided, as may be amended from time to time.**

(R.E.174 #7, Notice) (emphasis in original). Retiree Bender viewed this Notice as breaching CBA promises. (R.E.189-11 #1, Bender tr. 72-73). Nevertheless, neither Bender nor the UAW took any action in response to the Notice. *(Id.).*

K. Outpatient Care for 1986-1993 UAW Local 797 Retirees Was Subject to Copayments

The Cooper SPD confirms that pre-1994 Retirees received only 80% coverage for outpatient care, including outpatient coverage. (R.E.189 #15, Cooper SPD). The Opinion ignores the explanation of benefits forms ("EOBs") in the

* * *

[3] Mr. Keasey's testimony adverse to Newell appears to have been influenced by his loss of retiree health benefits.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed 07/05/2011]

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Case No. 11-1359

———

JACK REESE, FRANCES ELAINE PIDDE, JAMES CICHANOFSKY, ROGER MILLER, GEORGE NOWLIN, and RONALD HITT,
Plaintiffs/Appellees,

v.

CNH AMERICA LLC and CNH GLOBAL N.V.,
Defendants/Appellants.

———

On Appeal from the United States District Court
Eastern District of Michigan

———

REPLY BRIEF OF CNH AMERICA LLC AND CNH GLOBAL N.V.

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Bobby R. Burchfield
Joshua David Rogaczewski
McDermott Will & Emery LLP
600 13th Street, Northwest
Washington, D.C. 20005-3096
Telephone: 202.756.8000
Facsimile: 202.756.8087

Attorneys for CNH America LLC and CNH Global N.V.

Dated: July 5, 2011

* * *

> all retirees, and one that is inconsistent with unalterable and irreducible health benefits . . . .

Reese, 574 F.3d at 326. Although Plaintiffs contend that most (but not all) hospitals and physicians in the geographic areas where some class members had worked were in the network in 1998, this assertion proves very little.[8] To the extent Plaintiffs stayed in the network for their care, that was the very point of the plan, and allowed CNH to achieve the anticipated cost savings. Equally important, however, there was no guarantee the hospitals or physicians would *remain* in the network indefinitely, or that an individual retiree would not need services outside the network. Just as significant, the named Plaintiffs obtained venue in the Sixth Circuit—even though CNH has never had facilities anywhere within the Sixth Circuit—because they now live *outside* the geographic area where CNH had facilities.[9] There cer-

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[8] Plaintiffs', own evidence shows that the new network did not include *all* providers. (R. 273 Ex. A Ex. 29: Mar. 16, 1998, Case Prop., p. 1 (noting that 5% of providers that served participants in Iowa were not in the proposed network); R. 273 Ex. A Ex. 43: Apr. 8, 1998, Alliance PCP Comparison, p. 1 (noting that 13% of primary-care physicians in Iowa were not in the proposed network).) Plaintiffs also continue to tout removal of the "reasonable and customary" limitation from the 1998 plan. (Pls. Br. 23-24.) As shown (CNH Br. 32), the 1998 plan maintained this limitation for out-of-network services. Moreover, Plaintiffs were not impacted by the limitation under the indemnity plan so long as they did not agree with the provider to pay the billed amount. (R. 273 Ex. A Ex. 7: 1995 GBP § 2(E)(6).)

[9] Only *one* of the Plaintiffs who prevailed below resides near the location where he worked for CNH or its business predecessor. (R. 59: Am. Compl. ¶ 7 (Jack Reese lives in Fenton, Michigan, but worked in Bettendorf, Iowa); *id.* ¶ 8 (Frances Elaine Pidde lives in Martin, Michigan, but worked in East

tainly was no guarantee that an individual retiree, who might move to Detroit or perhaps even to Florida or Arizona, would have access to as many network care options near that new home.

Plaintiffs' reading of *Reese* also cannot be squared with subsequent decisions applying *Reese*. It is not surprising that Plaintiffs, having taken the position in the district court and again in this Court that *Reese* was wrongly decided, read those subsequent decisions in a strained and unreasonable way. The Court heard argument in *Winnett v. Caterpillar, Inc.*, 609 F.3d 404 (6th Cir. 2010), less than a month after Plaintiffs' rehearing petition in *Reese* was denied, 583 F.3d 955 (6th Cir. 2009). Notably, Judge Sutton served on the *Winnett* panel. According to *Winnett*, "[f]irst and foremost, [*Reese*] confirms that the introduction of managed care is not a 'minor benefit change.' That, indeed, is a key proposition that *Reese* rejects." 609 F.3d at 413. *Winnett* specifically held that Caterpillar's imposition of a 30% copayment on retirees seeking out of network services was "a very real limitation on their benefit program." *Id.* at 412. In view of the overriding significance placed by Plaintiffs on Judge Sutton's opinion concurring in the denial

* * *

Moline, Illinois); *id.* ¶ 9 (James Cichanofsky lives in Crystal Falls, Michigan, but worked in Racine, Wisconsin); *id.* ¶ 10 (Roger Miller lives in Menominee, Michigan, but worked in Racine, Wisconsin); *id.* ¶ 11 (George Nowlin lives in Memphis, Tennessee, but worked in Southaven, Mississippi).)