No. 12-163

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

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ARGUMENT

Respondents oppose certiorari by contending that (1) this case presents no more than a fact-bound determination on the merits in accordance with well-settled principles of federal law interpreting labor agreements, and (2) the Sixth Circuit's decision,

following *Int'l Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983) ("*Yard-Man*"), is fully congruent with other circuit authority. Neither argument withstands analysis.

First, the Opinions here are not "fact-bound" but to the contrary illustrate the effect of *Yard-Man*. The appellate Opinion acknowledged that, unlike sister circuits, the Sixth applies different vesting rules to retiree benefits created under labor contracts:

> When the health plan [is] *not* collectively bargained, we require a clear statement before we will infer that an employer meant to promise health benefits for life.

Bender v. Newell Window Furnishings Inc., 681 F.3d 253, 261, n.6 (6th Cir. 2012) (citations omitted). Both Opinions expressly found the CBAs unambiguous, yet reviewed extrinsic evidence. Although the controverted evidence was in equipoise, the lower courts placed the *Yard-Man* "thumb on the scales," which inevitably tipped the equation in favor of vesting.

Second, five federal circuits (including most recently the Fourth Circuit) have rejected *Yard-Man* and its presumptive "thumb on the scales." The split is real, and it is issue-determinative. Where a case is litigated is outcome-determinative, a result contrary to this Court's long-standing principle that labor contracts should be interpreted under a uniform common law. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

This Court should grant leave to restore uniformity to federal labor and employee benefits law and to restore integrity to the judicial process under the Labor-Management Relations Act (LMRA), 29 U.S.C.

§185, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 *et seq*.

I. THE *YARD-MAN* RULE OF LAW TRUMPS TRADITIONAL CONTRACT INTERPRETATION.

The Opinions resort to extrinsic evidence in order to construe an unambiguous labor contract, in violation of traditional rules of contract interpretation. Applying the *Yard-Man* "thumb on the scales," the courts below forayed through controverted extrinsic evidence and drew unreasonable inferences against the non-movant Petitioners, in the guise of "confirming" the parties' intent under labor contracts the courts themselves found unambiguous.

A. The Sixth Circuit Violates A Cardinal Rule Of Contract Interpretation.

Where contracts are unambiguous, courts may not resort to extrinsic evidence. *Senn v. United Dominion Indus.*, 951 F.2d 806, 816 (7th Cir. 1992). See 11 Williston on Contracts §31.4 at 277-80 (4th Ed. 2009) ("If the language used by the parties is plain, complete and unambiguous, the intention of the parties must be gathered from that language, and from that language alone, regardless of what the actual or secret intentions of the parties may have been."). The Sixth Circuit abandoned that principle here.

Respondents state that Petitioners did not challenge the district court's interpretation of CBA terms (Resp. Brf. 10, 25). Yet Petitioners pointed out that reservations of rights provisions in benefits booklets and summary plan descriptions incorporated into the CBAs (and the only documents giving content to the benefits themselves) and benefit-

specific durational clauses in the insurance provisions unambiguously described transitory benefits (See Reply App. 2a-22a). Petitioners also detailed below the controverted nature of the extrinsic evidence on such issues as the applicability and distribution of benefit booklets, the capped Medicare Part B reimbursement, and unchallenged retiree benefit changes (See Reply App. 22a-28a, 30a-33a).

The Opinions drew unreasonable inferences against the non-movant Petitioners. Though Respondents claim that Petitioners' current counsel provided a "legal opinion" that the benefits were vested for life (Resp. Brf 1, 13-14), the district court drew the unreasonable inference that Petitioners must have intended lifetime benefits from an incomplete two-page excerpt that did not address whether the benefits (even if "lifetime") were unalterable or immutable, provided no legal analysis or opinion, and did not review documents (Reply App. 28a-30a).

Discrediting contrary extrinsic evidence and drawing unreasonable inferences against Petitioners, the Opinions breached the very rule of federal labor contract interpretation that Respondents espouse (Resp. Brf. 28) and impermissibly granted summary judgment.

B. Other Federal Circuits Reject Review Of Extrinsic Evidence Absent Ambiguity.

Other federal circuits that reject the *Yard-Man* inference also reject reviewing extrinsic evidence in the absence of ambiguity. For example, in *Senn*, 951 F.2d at 816, the Seventh Circuit reaffirmed that "lifetime" retiree benefits "should be determined without reference to extrinsic evidence if the terms of

the writings involved are unambiguous" and declined to review extrinsic evidence where the "writings involved" provided that benefits would "continue," because that circuit follows the *Litton* presumption.[1]

II. THE SIXTH CIRCUIT APPLIES A "THUMB ON THE SCALES" IN FAVOR OF VESTING.

A. The Sixth Circuit Applies The Discredited *Yard-Man* Inference.

To convince this Court to deny review, Respondents deny the existence of a dispositive presumption and contend that the burden of proof remains with plaintiffs,[2] and that the Sixth Circuit only applies the *Yard-Man* inference "in close cases" (Resp. Brf. 23-25). Neither contention is accurate.

Like Respondents, different panels of the Sixth Circuit may protest (perhaps too much) that they do not apply a legal "presumption" in favor of vesting. The appellate Opinion here admits 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).

---

[1] *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 207 (1991).

[2] Respondents erroneously claim that Petitioners did not challenge any shift of the burden of proof requiring Petitioners to show a clear statement of non-vesting (Resp. Brf. 23-24), Petitioners argued below that the district court had required Petitioners to disprove that retiree benefits had vested, contrary to *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996) (Reply App. 30a).

After *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 578-579 (6th Cir. 2006), and long after the earlier decisions cited in *Yolton*,[3] some Sixth Circuit panels have realized the "thumb on the scales" approach amounts to a presumption, whatever a particular panel chooses to call it: "there is a reasonable argument to be made that, while this court has repeatedly cautioned that *Yard-Man* does not create a presumption of vesting, we have gone on to apply just such a presumption." *Cole v. ArvinMeritor*, 549 F.3d 1064, 1074 (6th Cir. 2008).

B. *Yard-Man* Shifts The "Burden of Disproof" to Defendants, Contrary To Federal Labor And Employee Benefit Policy.

Following *Yard-Man*, Sixth Circuit decisions require employers to shoulder the burden of proof and to prove a negative under a "reverse" clear statement rule:

> What started out as a potential inference became an omnipresent presumption and now appears to have become a clear-statement rule. Unless a company can point to explicit language in the relevant agreement stating that "retiree benefits" terminate at a particular date or do not vest, the benefits seem to vest as a matter of law. What we con-

---

[3] The *Yolton* decision selectively quotes from cited cases. In *Int'l Union, UAW v. Cadillac Malleable Iron Co., Inc.*, 728 F.2d 807, 809 (6th Cir. 1984), the Sixth Circuit acknowledged no "legal presumption" but recognized that *Yard-Man* inference flowed from status vesting: "retiree benefits are in a sense 'status' benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained."

> tinually disclaim presuming we continually seem to presume.

Noe v. Polyone Corp., 520 F.3d 548, 568 (6th Cir. 2008) (Sutton, J. dissenting).

Respondents contend that the inference determines only "close" cases; however, the district court did not view this case as "close" but nonetheless applied *Yard-Man* to shift the burden of proof. Its Opinion announces that, in light of the unambiguous contract language and "uncontradicted" testimony, "[d]efendants 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" (Pet. App. 40a-41a).

C. The *Yard-Man* "Thumb on the Scales" Determines Outcome.

Respondents argue that the skewed results in the Sixth Circuit in favor of retirees do not demonstrate the existence of a presumption, given the many different industries involved with separate bargaining pasts (Resp. Brf. 32-34). Whatever the facts and whatever those separate bargaining pasts, the stark contrast of the results in the Sixth Circuit (following the *Yard-Man* inference) and the Seventh Circuit (following the *Litton* presumption) amounts to more than Dickensian coincidence. Where the presumption or inference is applied, almost 90% of the cases find lifetime benefits (Pet. Brf. 20-23). Where the opposite presumption is applied, one consistent with the *Litton* presumption in federal labor law, the reverse occurs (*Id.*).

If these results do not reveal that the *Yard-Man* inference is outcome-determinative, then it is puzzling that Respondents would begin their brief with the statement that "this case began with forum shopping by Newell" (Resp. Brf. 2). If, as Respondents contend, that the "numbers alone" do not demonstrate that any federal circuit split exists or that this matter would have been resolved differently in the Seventh Circuit (Resp. Brf. 33-34), Respondents should have chosen to do substantive battle in the first-filed case in the Seventh Circuit. Nonetheless, the UAW, then a plaintiff, chose to file and to fund, on its behalf and on behalf of a handful of retirees, a second case in Michigan and to fight over the forum,[4] in order to remain in the Sixth Circuit where retirees have won almost every case since *Yard-Man*, often on language that has lost in other federal circuits.[5]

On similar facts, the UAW lost its forum fight in *Maytag Corp. v. Int'l Union, UAW*, 687 F.3d 1076 (8th Cir. 2012), and lost its battle to win on self-serving extrinsic evidence over reservation of rights provisions in the SPDs. The Eighth Circuit (unlike

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[4] Respondents conveniently omit any reference to the UAW as plaintiff (voluntarily dismissed because it had waived suit against Petitioners in the Shutdown Agreement (Pet. App. 5a, n 2).

[5] It is also untenable that Respondents deny that the UAW and its retirees engaged in judge-shopping (Resp. Brf. 34) by filing two lawsuits against Boeing in Michigan and in Tennessee, dropping the Michigan action in favor of the action much more distant from the International's headquarters to stay before the district judge who had extended the *Yard-Man* inference to active employees in the *Winnett* case referenced by Respondents (Reply App. 33a-61a), who then transferred the Tennessee matter to Illinois (Reply App. 62a-74a).

the Sixth) enforced the reservations indicating the parties' intent.

III. RESPONDENTS DO NOT DEMONSTRATE A UNIFORM APPROACH IN THE FEDERAL CIRCUITS.

A. The Federal Circuits Themselves Acknowledge Their Split.

Respondents claim that there is no disagreement among the circuits about the framework for analyzing retiree benefit claims.

Although Respondents may be in denial, the federal circuits are not. See, *Senior* v. *NSTAR Elec.& Gas Corp.*, 449 F.3d 206, 216 (1st Cir. 2006) ("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) (federal circuits are "all over the lot"); *Am. Fed'n of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997) ("the circuits disagree as to exactly what language is required to create a promise to vest retiree medical benefits").

B. Other Federal Circuits Reject *Yard-Man.*

The circuits do not, as Respondents contend, follow a single harmonious approach consistent with *Yard-Man* (Resp. Brf. 26-29). Other federal circuits reject the status-vesting presumption as inconsistent with federal law and policy.

Respondents concede the Third Circuit's rejection of the *Yard-Man* presumption (Resp. Brf. 29): "We cannot agree with *Yard-Man* and its progeny that there exists a presumption of lifetime benefits in the

context of employee welfare benefits." *Int'l Union, UAW v. Skinner Engine Co.*, 188 F.3d 130, 140-41 (3d Cir. 1999). Respondents assert that the Third Circuit rejected *Yard-Man* because it believed that *Yard-Man* announced a "presumption" (id.), a distinction without a difference.

Other circuits cited by Respondents also flatly reject *Yard-Man.* The First Circuit finds no presumption based on status: *Senior*, 449 F.3d at 218: "our view is that, in a claim for benefits based on a labor agreement under the LMRA, federal labor law creates no presumption regarding vesting." Respondents' discussion of *Rossetto, supra*, is misleading. Far from recognizing a presumption that only "kicks in" when a CBA is silent (Resp. Brf. 28), the Seventh Circuit recognizes a presumption *against* vesting consistent with *Litton. Rossetto*, 217 F.3d at 543 (proceeding from the rebuttable presumption that "an employee's entitlement to such [retiree benefits] expires with the agreement creating the entitlement"). The Eighth Circuit has expressly rejected the *Yard-Man* inference in *Anderson v. Alpha Portland Industries*, 836 F.2d 1512, 1517 (8th Cir. 1985) ("We believe that it is not at all inconsistent with federal labor policy to require plaintiffs to prove their case without the use of gratuitous inferences"), as has the Fifth Circuit in *Nichols v. Alcatel*, 532 F.3d 364, 378 (5th Cir. 2008) (rejecting reliance on *Yard-Man*). Most recently, the Fourth Circuit has also rejected retirees' reliance on a presumption in favor of vesting, *Dewhurst v. Century Aluminum Co.*, 549 F.3d 287, 291-92 (4th Cir. 2011).

C. Other Federal Circuits Enforce Benefit-Specific Durational Provisions and Reservations of Rights.

Other federal circuits have enforced durational provisions and reservations of rights in or incorporated into CBAs.

Respondents mischaracterize Petitioners' analysis of the circuit split on benefit-specific durational provisions.[6] Petitioners do not argue that the Sixth Circuit "conflates" general and benefit-specific provisions (Resp. Brf. 30). Rather, Petitioners contend that failure to enforce such provisions unless the provisions expressly reference "retiree benefits" renders them nugatory.

As the dissent noted in *Noe*, the Sixth Circuit has illogically characterized benefit-specific durational clauses as "general" even though "benefit programs" would logically subsume retiree benefit programs. 520 F.3d at 568. Even more unfounded is *Yolton*'s reading of benefit-specific durational clauses as applicable only to "future retirees." 73 F.3d at 656.

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[6] Respondents also argue that Petitioners only mentioned the CBAs' durational limits in its Statement of Facts on appeal below, but Respondents themselves joined the issue both by footnote incorporation of argument (Resp. App. 13a, n10) and by additional express discussion in their own argumentative fact section (Resp. App. 11a-13a). Moreover, Petitioners relied upon the cases cited in *Schreiber v. Philips Display Components Co.*, 580 F3d. 355, 365, n12 (6th Cir. 2009), that expressly noted the interplay between benefit program-specific durational limits and reservation of rights provisions contained in booklets incorporated into the labor contracts. More to the point for purposes of this petition for review, both Opinions reached the issue (Pet. App. 16a-17a and 68a).

Other federal circuits enforce benefit-specific durational provisions. Respondents' attempt to distinguish *Anderson* on its facts is misleading, since the labor contracts there contained evergreen clauses, and the Eighth Circuit found that the reservation of rights provisions, the coordination of benefits provisions with other insurance, and the specific durational provisions (all present here as well) compelled the conclusion that the benefits would only continue for the duration of the labor agreement. Similarly, describing the Fourth Circuit's decision in *Dewhurst*, Respondents only state that the durational provisions were incorporated into the labor contracts and enforced; here, the specific durational provisions were contained in each labor contract without need for incorporation.

The Seventh Circuit has construed "continuing" as transitory. In *Senn*, 951 F.2d at 816, the Seventh Circuit adhered to the *Litton* presumption and construed benefit-conferring provisions stating that retiree benefits would "continue" (the very language that *Yard-Man* construed to mean "to continue for life" because of its status-vesting inference) to mean that the benefits would continue for the duration of the CBA.

Recently, as discussed above, the Eighth Circuit enforced reservations of rights provisions in SPDs, exactly as Petitioners here argued below, on "equal footing" with other CBA terms. *Maytag*, 687 F.3d at 1085-86.

D. Other Federal Circuits Reject Separate Rules for Bargained And Non-Bargained Employees.

The appellate Opinion recognized that the Sixth Circuit follows separate analyses to determine bene-

fit vesting for bargained and non-bargained employees, and that under its analyses for non-bargained employees the Sixth Circuit applies the clear statement rule that Petitioners sought (Pet. App. 11a, n.6).

Respondents contend that *Skinner*, *Rossetto*, and *Am. Fed'n. of Grain Millers* would not obtain a different result in the Sixth Circuit. However, each of those federal circuits has rejected such separate analyses. See *Skinner*, 188 F.3d at 139 (stating that the principles should "apply without regard as to whether the . . . welfare benefits are provided under a collective bargaining agreement, SPD, or other plan document; the same underlying considerations are present irrespective of the particular type of document at issue"); *Rossetto*, 217 F.3d at 544 ("The distinction between collective bargaining agreements and ERISA plans is not recognized in our cases"); *Am. Fed'n.*, 116 F.3d at 979-80 ("We will examine [both] the CBAs and the ERISA plan documents in light of this [single] standard.").

E. Other Federal Circuits Distinguish Between Duration and Scope Of Benefits.

Other federal circuits recognize that duration and scope are distinct. In *Zielinski v. Pabst Brewing Co.*, 463 F.3d 615 (7th Cir. 2006), the Seventh Circuit concluded that a finding of lifetime benefits does not foreclose an analysis of their scope, or whether they can change to reflect medical or economic inflation.

The Opinions never fully analyzed whether the reservations of rights, coupled with durational clauses and unchallenged benefit changes, reflected an intent that the benefits were not frozen intermin-

ably. See *Maytag*, 687 F.3d at 1084, n7. In fact, contrary to the CBAs, as Petitioners argued below, the district court awarded Respondents benefits at the levels that existed in 2005, and not "as of January 1, 1986" (Pet. App. 19a-20a). The decisions thus awarded retirees benefits never negotiated on their behalf.

CONCLUSION

For the reasons discussed here and in Petitioners' petition, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

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

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confer any rights or remedies upon any Person other than the parties hereto and their respective successors and permitted assigns." (*Id*., Newell Purchase Agreement § 11.1). As a result, Retirees cannot claim third-party beneficiary status as to any right under the Newell Purchase Agreement and Newell Window is entitled to reversal because under the LMRA and ERISA, there can be no "responsibility of [Appellants] that did not sign the agreements." *Joint Admin. Comm. v. Wash. Grout Intl, Inc*., 568 F.3d 626 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1089 (2010).

III. The UAW Local 797 CBAs Negotiated from 1971 Through 1993 Incorporated SPDs That Contained Unqualified Reservations of Rights Allowing Health Benefit Changes

Each of the pre-1998 CBAs that UAW Local 797 negotiated with the differing owners of the Sturgis, Michigan plant incorporated by reference health benefit booklets. Each booklet (or SPD) in the record contains an unqualified reservation of rights allowing the employer to alter or terminate health benefits.[2] Each SPD required copayments for outpatient care for all Retirees and integrated benefits with Medicare. The District Court award of benefits is not based on these booklets, but rather expands benefits not previously provided to Retirees. (R.E.242, Opinion); (R.E.262, Amended Judgment)

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[2] An SPD's reservation of rights is "qualified" if it provides that conflicts between the SPD and a CBA are resolved in favor of the CBA. *Reese v. CNH America L*LC, 574 F.3d 315, 323 (6th Cir. 2009).

A. The 1971, 1974, 1977, and 1980 CBAs That Kirsch Company Negotiated with UAW Local 797 Incorporated SPDs with Unqualified Reservations of Rights and Did Not Promise Retiree Prescription Drug Coverage

Kirsch Company entered into the 1971 CBA with UAW Local 797 to provide health benefits for active employees and retirees only for the "duration of this contract":

> Par. 36. Insurance.
>
> The insurance program as set forth in Exhibit A is agreed to for the duration of this contract.

(R.E.190 #11, 1971 CBA ¶ 32). Exhibit A provided retirees the following benefit:

> 5. GROUP HOSPITALIZATION AND SURGICAL INSURANCE -RETIREES
>
> * The same benefits as for the employees and their dependents as of July 1, 1971. The Company agrees to pay the cost of such insurance for the retiree and his dependents.

(*Id*., 1971 CBA, Exhibit A § 5). The 1971 CBA did not promise benefits to surviving spouses and dependants of deceased Retirees. (*Id*.). Section 4 of Exhibit A provided in relevant part:

> All eligible employees on the payroll and their dependents are covered by group insurance benefits paid by the Company and underwritten by the Aetna Life Insurance Company.

. . . . .

> **The benefits of the program are set forth in a booklet and policy, a copy of each to be available to every employee**.

(*Id*., 1971 CBA Exhibit A § 4) (emphasis added). The 1971 CBA did not promise prescription drug benefits to Retirees. (R.E.190 010-11, 1971 CBA). Moreover, the only benefits to which an employee or retiree was entitled are those "set forth in" the booklet and policy underwritten by Aetna.

Subsequent CBAs that Kirsch Company negotiated with UAW Local 797 contain similar provisions, although by underlined language the 1980 CBA extended benefits to surviving spouses and dependents of deceased retirees. (R.E.190 # 14, 1980 CBA § 36 & Appendix A, § 5). Benefits continued to be limited to those provided in the Aetna booklet. (*Id*., 1980 CBA Appendix A, § 4).

B. The Aetna Booklet, with Its Unqualified Reservation of Rights, Is Incorporated in the Pre-1985 CBAs

The 1978 Aetna Booklet identifies on the cover page of the base document and of the benefits summary that it applies to employees and retirees of Kirsch Company represented by UAW Local 797. (R.E.189 #45, 1978 Aetna SPD-base; R.E.190 #12, 1978 Aetna benefits summary). The individual copayments and deductibles are detailed in the Aetna benefits summary portion of the booklet. (R.E.190 #12, 1978 Aetna benefits summary). The health benefits provided a retiree in 1983, such as Rohr, were those provided since 1977. (R.E.169 #17, Rohr tr. 38-39).

The Aetna SPD contains an unrestricted reservation of rights to change costs incurred by Plan participants:

> **Your contributions** toward the cost of contributory coverages provided by this Plan will be deducted from your pay and they **are subject to change**.

(R.E.189 #45, 1978 Aetna SPD, at 01724). (emphasis added).

Finally, the Aetna SPD reserved in favor of Kirsch an **unqualified** right, without deference to any CBA, to change or discontinue the Kirsch health plan for retirees:

> **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.

(*Id*., at 01711) (bold in original).

C. The 1982 CBA That Cooper Negotiated with UAW Local 757 Incorporated an SPD Containing an Unqualified Reservation of Rights

Effective June 5, 1982, the UAW and Cooper negotiated a CBA that provides in relevant part:

> Par. 36. Insurance.
>
> The insurance program as set forth in Exhibit A is agreed to for the duration of this contract.

(R.E.159 # 8, 1982 CBA ¶ 36). Exhibit A provides in relevant part:

5. GROUP HOSPITALIZATION AND SURGICAL INSURANCE-RETIREES

> The same benefits as for the employees and their dependents **as of July 1, 1980**. The Company agrees to pay the cost of such insurance for the retiree and his dependents. Spouses and eligible dependents of deceased retirees may remain under the Kirsch Group Medical Coverage at Company expense provided:
>
> (a) spouses do not remarry.
>
> (b) spouses are not eligible for insurance coverage through another employer.

(R.E.159 #9, 1982 CBA Exhibit A) (emphasis added). The benefits for employees and their dependents as of July 1, 1980 were "set forth in a booklet and policy." (R.E.190 #14, 1980 CBA, Exhibit A § 4, at p. 94).

The 1982 CBA provides further:

> The benefits of the program are set forth in a booklet and policy, a copy of each to be available to every employee. . . .

(R.E.159 #9, 1982 CBA, Exhibit A, § 4).

The Aetna SPD is the sole pre-1985 booklet Retirees produced. (R.E.189 #45 & R.E.190 #12, Aetna SPD).

Finally, the 1982 CBA, like the other CBAs, contains an integration provision that bars the use of negotiating materials or parol evidence to vary the terms of the CBA:

> This Agreement, and the supplements, constitute the entire contract between the

> parties and settles all demands and issues which are subject to collective bargaining.

(R.E.159 #9, 1982 CBA ¶ 70).

D. The Cooper SPD

Cooper provided Retirees an SPD to detail the terms of the health benefits incorporated into the 1985, 1988 and 1991 CBAs (the "Cooper SPD"). (R.E.189 #14, Keasey tr. 88-89). The Cooper Plan SPD contains an unqualified reservation of rights:

> **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.

(R.E.189 #15, Cooper SPD at 15). This Reservation of Rights mandates reversal of the judgment for all post-1985 Retirees on the health issue.

The Cooper SPD also provided:

> The Company reserves the right to change the percentage of covered expenses the plan pays and to raise the plan's out-of-pocket limits as claim costs go up. If the Company

> finds that it is necessary to change the percentage of covered expenses the plan pays or to raise the plan's out-of-pocket limits, you will be notified.

(*Id*., Cooper SPD at 8). Finally, the Cooper SPD provided:

> If outpatient surgery is performed or treatment for a bona fide medical emergency is received in the office of a licensed medical practitioner, the Company will pay 80% of your expense for these services and supplies after you pay the annual deductible.

(*Id*., Cooper SPD at 7).

The Opinion, quoting one line from the Cooper SPD to the effect that "the wording in the legal document will apply," finds that the "[e]ach of the plan summary documents expressly affirms that the collective bargaining agreements control the benefits, not the plan summary documents." (R.E.242, Opinion at 28). The Cooper SPD, when all language is quoted, does not so provide:

> This booklet is a summary of the formal plan.
>
> 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.

(R.E.189 #15, Cooper SPD at 3). The only "legal document" referenced in the Cooper SPD is the formal plan. As a result, the Cooper SPD conditions the interpretation of the CBAs on the reservation of rights.

E. The 1985 CBA That Cooper Negotiated with UAW Local 747 Incorporated an SPD Containing an Unqualified Reservation of Rights

Effective June 5, 1985, UAW Local 797 and Cooper negotiated another three-year CBA, which provided:

> Par. 32. Insurance.
>
> The insurance program as set forth in Exhibit A is agreed to for the duration of this contract.

(R.E.159 #11, 1985 CBA ¶ 32). Section 5 of Exhibit A to the 1985 CBA provided:

> 5. GROUP HOSPITALIZATION AND SURGICAL INSURANCE-RETIREES
>
> The same bend' is as for the employees and their dependents as of July 1, 1986. The Retiree (age 62-65) agrees to pay $20.00 per month toward the cost of such insurance for the retiree and his dependents. Spouses and eligible dependents of deceased retirees may remain under the Cooper Comprehensive Care Plan at Company expense (under age 65, $20 per month paid by retirees' spouses and eligible dependents) provided:

(a) spouses do not remarry.

(b) spouses are not eligible for insurance coverage through another employer.

(*Id*., 1985 CBA Exhibit A § 5, at 86). The benefits available to Retirees under the 1988 CBA are those set forth in the Cooper SPD. (R.E.189 #15, Cooper SPD).

The 1985 CBA had an integration clause. (R.E.159 #11, 1985 CBA ¶ 66).

F. The 1988 CBA That Cooper Negotiated with UAW Local 797 Incorporated an SPD Containing an Unqualified Reservation of Rights

Effective January 30, 1988, UAW Local 797 and Cooper negotiated another three-year CBA, which provided:

> Par. 32. Insurarce.
>
> The insurance program as set forth in Exhibit A is agreed to for the duration of this contract.

(R.E.159 #13, 1988 CPA ¶ 32). Section 5 of Exhibit A to the 1989 CBA provides:

> 5. GROUP HOSPITALIZATION AND SURGICAL INSURANCE-RETIREES
>
> The same benefits as for the employees and their dependents as of July 1, 1986. The Retiree (age 62-65) agrees to pay $20.00 per month toward the cost of such insurance for the retiree and his dependents. Spouses and eligible dependents of deceased retirees may remain under the Cooper Comprehensive Care Plan at Company expense (under age

> $65, 320 per month paid by retirees' spouses and eligible dependents) provided:
>
> (a) spouses do not remarry.
>
> (b) spouses are not eligible for insurance coverage through another employer.

(R.E.159 #14, Exhibit A § 5). The benefits available to Retirees under the 1988 CBA are those set forth in the Cooper SPD. (R.E.189 #15, Cooper SPD).

The 1988 CBA had an integration clause. (R.E.159 #14, 1991 CBA ¶ 66).

G. The 1991 CBA That Cooper Negotiated with the UAW Local 797 Incorporated an SPD Containing an Unqualified Reservation of Rights

Effective June 7, 1991, the UAW and Cooper negotiated a CBA, which provided:

> **Par. 32. – Insurance.**
>
> The insurance program as set forth in Exhibit A is agreed to for the duration of this contract.

(R.E.159 #17, 1991 CBA ¶ 32) (emphasis in original). Exhibit A to the 1991 CBA provided:

> 5. GROUP HOSPITALIZATION AND SURGICAL INSURANCE – RETIREES.
>
> The same benefits as for the employees and their dependents as of January 1, 1986. The Retiree (62-65) agrees to pay $20 per month toward the cost of such insurance for the retiree and his dependents. Spouses and eligible dependents of deceased retirees may remain under the Cooper Comprehensive

> Health Care Plan at Company expense (under age 65, $20 per month paid by retirees' spouses and eligible dependents) provided:
>
> (a) spouses do not remarry.
>
> (b) spouses are not eligible for insurance coverage through another employer.

(*Id*., 1991 CBA Exhibit A § 5) (bold in original). The benefits available to Retirees under the 1991 CBA are those set forth in the Cooper SPD. (R.E.189 #15, Cooper SPD).

The 1991 CBA had an integration clause. (R.E.159 #17, 1991 CBA ¶ 66).

H. The 1993 CBA That Cooper Negotiated with UAW Local 797 Contained an Unqualified Reservation of Rights

1. The 1993 CBA

UAW Local 797 and Cooper negotiated a CBA, effective June 7, 1993, which provided:

> Par. 32. Insurance.
>
> The insurance program as set forth in Exhibit A is agreed to for the duration of this contract.

(R.E.159 #20, 1993 CBA ¶ 32). Exhibit A to the 1993 CBA provided:

> 5. GROUP HOSPITALIZATION AND SURGICAL INSURANCE – RETIREES.
>
> **A. <u>Employees retiring prior to January 1, 1994, (Deletion) will be covered under the Cooper Industries Comprehensive Retiree Medical</u>**

> **Plan (1/93 GWI), but, will have the same cost effective health benefits as those being granted active employees** as of January 1, 1986. The Retiree (62-65) agrees to pay $20 per month toward the cost of such insurance for the retiree and his dependents. Spouses and eligible dependents of deceased retirees may remain under the Cooper Comprehensive Health Care Plan at Company expense (under age 65, $20 per month paid by retirees' spouses and eligible dependents) provided:
>
> (a) spouses do not remarry.
>
> (b) spouses are not eligible for insurance coverage through another employer.

(R.E.159 #21, 1993 CBA Exhibit A, § 5) (emphasis in original).

The 1993 CBA had an integration clause. (Id., 1991 CBA ¶ 66).

2. Cooper's 1993 SPD

The 1993 CBA incorporated the 1993 Cooper Industries Comprehensive Retiree Medical Plan (1/93 GWI) ("1993 Cooper Retiree Plan"). (*Id*., 1993 CBA Exhibit A, § 5). The SPD for the 1993 Cooper Retiree Plan, distributed to the UAW negotiating team (R.E.172 #7, Lampe tr. 67-68), contained an unrestricted reservation of rights provision:

> ***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.

(R.E.172 #9, 1993 Cooper SPD, at 01026).

I. No UAW Local 797 Agreement with Newell Window Provides Retiree Health Benefits

The 1998 CBA that Newell Window negotiated with the UAW provides no retiree health benefits. (R.E.159 #22, 1998 CBA). The Shutdown Agreement provides no retiree health benefits. (R.E.159 #23, Shutdown Agreement).

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

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

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 record that required copayments for the early 1998 outpatient treatment of Conner's late spouse, who retired in 1993. (R.E.189 #10, Conner tr. 62-65); (R.E.189 ##11-12, Conner EOBs). These documents mandate vacation of paragraph 5 of the Amended Judgment. (R.E.262, Amended Judgment ¶ 5).

L. The Aetna SPD Integrated Pre-1986 Retirees' Benefits with Medicare

The Opinion concludes that 141 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." (R.E.242, Opinion at 35). The Opinion ignores that the Aetna SPD integrates Medicare benefits with the benefits provided by the Plan:

> Medicare benefits largely duplicate this plan's medical expense benefits. **The plan is designed so 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.

(R.E.189 #45, Aetna SPD at 01701) (emphasis added). This non-extrinsic evidence mandates vacation of paragraph 5 of the Amended Judgment. (R.E.262, Amended Judgment ¶ 5).

Extrinsic evidence ignored by the District Court, such as the testimony of Great-West's service providers, demonstrates that, since at least 1998, the pre-1986 Retirees' Plan benefits were integrated with Medicare:

> 22 Q. All three groups have Medicare benefits
>
> 23 integrated with plan benefits, correct?
>
> 24 A. Yes, according to the master application.
>
> 25 Q. And the master application is what
>
> 1 Newell-Rubbermaid agreed to and signed off on for
>
> 2 Great-West to set up the benefits, correct?
>
> 3 A. Yes.

(R.E.175 #15, Reid tr. 69-70) (emphasis added). This extrinsic evidence mandates reversal as to paragraph 5 of the Amended Judgment.

IV. No CBA Or Collectively Bargained Pension Plan Promised Retirees Reimbursement of Full Medicare Part B Premiums

A. Pre-1980 CBAs Limited Reimbursement of Medicare Part B Premiums

The 1971 CBA set $5.60 as the monthly Medicare premium reimbursement:

> Pay Medicare benefit of $5.60 per month for retiree and spouse, and active employee on the active payroll and spouse who has reached the age of 65 years, effective July 1, 1971.

(R.E.190 #11, 1971 CBA ¶66(a)(6)). The 1971 CBA did not provide for increasing reimbursement of increasing Medicare premium. (*Id.*)

In 1977, UAW Local 797 and Kirsch negotiated the Amendment and Restatement of Kirsch Company UAW Local 797 Retirement Income Plan ("1977 Pension Plan"), which provided a Special Age and Disability Benefit:

> Effective as of July 1, 1977, the monthly amount payable under this Section 4.17 to any person eligible therefor, shall be $7.70.

(R.E.172 #24, 1977 Pension Plan § 4.17). Monthly Medicare Part B premiums increased from $6.70 to $7.20 in July 1976 and to $7.70 in July 1977. (R.E.212 #3, CRS Medicare Report at CRS-5).

B. Reimbursement of Active Employee's Monthly Medicare Premiums Was Only in the 1980 Amendment of the 1977 CBA, And Subsequently Was Limited for Retirees to $11.70

Effective January 1, 1980, UAW Local 797 negotiated with Kirsch to amend the 1977 CBA to provide:

> 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.

(R.E.194 #3, 1980 CBA Amendment, at 00829). This provision was deleted from the 1980 CBA, which became effective on June 8, 1980. (R.E.190 ## 13-15, 1980 CBA).

Reimbursement of Medicare premiums for active employees is not in the 1982 CBA, (R.E.159 ## 7-9, 1982 CBA), the 1985 CBA, (R.E.159 ## 10-12, 1985 CBA), the 1988 CBA, (R.E.159 ## 13-15, 1988 CBA), the 1991 CBA, (R.E.159 ## 16-18, 1991 CBA), or the 1993 CBA. (R.E.159 ## 19-21, 1993 CBA).

Ignored in the Opinion is that Bender, who signed the 1980 CBA amendment and the 1981 collectively-bargained Pension Plan amendment that limited monthly reimbursement to $11.70, (R.E.165 #23, Pension Plan Amendment, at 0097), did not identify the 1977 CBA amendment as vesting Medicare Part B reimbursements applicable to his 1991 retirement, but instead identified the Pension Plan. (R.E.178 #2, Bender Interrogatory Response No. 6).

UAW Local 797 and Kirsch Company negotiated an amendment to the 1977 Pension Plan that provided for reimbursement of monthly Medicare Part B premiums, subject to a limit of $11.70, effective July 1, 1980:

> Section 4.17.
>
> Special Age and Disability Benefit. (second to final paragraph only) **Effective as of July 1, 1980**, and adjusted on each July 1 thereafter, **the monthly amount payable under Section 4.17** to any person eligible therefor, **shall be the rate then in effect for Medicare Cost** as of July 1 of each year, **but not to exceed in any event the amount of $11.70.**

(R.E.165 #23, Pension Plan Amendment, at 00976) (emphasis added).

No monthly Medicare premium ever equaled $11.70. (R.E.212 #3, CRS Medicare Report at CRS-5). Nevertheless, Watson Wyatt, as actuary for the Pension Plan, noted:

> This special monthly benefit is equal to the Social Security Medicare Part B premium (to a maximum of $11.70).

(R.E.165 #7, 1997 Actuarial Report Table 5, at 2).

In concluding that there was a document indicating a vesting of reimbursement of full Medicare Part B premiums, the Opinion misstates the wording of the 1982 CBA that active employee benefits "as of **June 1, 1980**" were provided Retirees under the 1982 CBA. (R.E.242, Opinion at 7). The 1982 CBA actually provides Retirees with those benefits provided active employees as of "July 1, 1980." (R.E.229 #1, 1982

CBA Appendix A, § 5, at page 105) (emphasis added). By July 1, 1980, the 1980 CBA, which did not reimburse active employees' Medicare premiums, was in place. Instead, under the terms of the July 1, 1980 amendment of the Pension Plan, (R.E.165 #23, Pension Plan Amendment, at 00976), reimbursement of monthly Medicare premiums for retirees were limited to $11.70 as of July 1, 1980.

C. The Pension Plan Limit of $11.70 in Medicare Reimbursements

In 1989, the Kirsch UAW Local 797 Retirement Income Plan was restated (the "UAW Pension Plan"). (R.E.178 #3, 1989 Pension Plan). The UAW Pension Plan provided in relevant part:

> 11.2. Amount. **The amount of the monthly special age and disability benefit payable to an eligible retired Employee or his eligible spouse shall be an amount equal to monthly cost of Medicare Part B coverage but in no event greater than $11.70**.

(*Id*., 1989 Pension Plan § 11.2) (emphasis added).

Cooper adopted an April 19, 1993 amendment to the UAW Pension Plan Document that did not change the $11.70 limit for reimbursement of monthly Medicare Part B premiums. (R.E.163 #4, 1993 Amendment, at WW0134-43). The Second Amendment to the UAW Pension Plan, executed on September 18, 1995, reaffirmed the UAW Pension Plan's Special Age and Disability Benefit:

> 15. Section 11.1 of the Plan is amended by the addition of the phrase "at least" after the word "is" and before the words "age 65."

(R.E.163 #5, 1995 Amendment at 'WW0149). Accordingly, "the Pension Plan in effect in 1991" limited reimbursement of monthly Medicare Part B premiums to $11.70.

D. The Replacement of the UAW Pension Plan by the Newell Pension Plan

The Newell Pension Plan replaced the UAW Pension Plan, effective August 1, 1998. (R.E.172 #14, Settlement Documents at NWL005000). As a result, one concern for UAW Local 797 during the 1998 CBA negotiations with Newell Window was whether the promise of Medicare Part B benefits in the UAW Pension Plan would continue. (R.E.224 #7, Webster Aff. ¶ 3). As part of the negotiations leading to the 1998 CBA, the UAW and Newell Window negotiated a supplemental 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:

> MEDICARE PART "B" COVERAGE
>
> 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, [sic] **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.**

(R.E.165, #4, 1998 Supplemental Agreement) (emphasis added). This language was designed to ensure that following the replacement of the UAW Pension Plan by the Newell Pension Plan on August 1, 1998 the pre-August 1, 1998 Retirees did not lose their right to the $11.70 monthly Medicare Part B premium reimbursement to which they were entitled under the UAW Pension Plan. (R.E.224 #7, Webster Aff. ¶ 3); (R.E.189 #22, Marotti tr. 25-26, 46-49).

V. The Shutdown Agreement Terminated All Supplemental Agreements to the 1998 CBA, Including the 1998 Supplemental Agreement

The UAW and Newell Window negotiated a Shutdown Agreement, dated October 2, 2000, to close the Sturgis facility. (R.E.159 #23, Shutdown Agreement). The Shutdown Agreement terminated all promises in the 1998 CBA and its supplemental agreements:

> Upon acceptance of this Shutdown Agreement the parties shall be bound by this Shutdown Agreement and the current Collective Bargaining Agreement and relevant plan documents 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. . . .

(*Id*., Shutdown Agreement Art. III, § 1, at 11).

* * * *

The District Court committed reversible error in selectively citing evidence favorable to Retirees, while disregarding evidence cited by Appellants and drawing all inferences against Appellants on the issues of

vesting of retiree health benefits, entitlement to Medicare Part B premium reimbursements, integration of Medicare and Plan benefits, and copayments for outpatient care. Among these abuses are: (1) the District Court's misstating the terms of the 1982 CBA regarding Retirees being entitled to employee benefits as of June 1, 1980 (rather than July 1, 1980), as noted *supra*; (2) misstating that the SPDs acknowledge that in a conflict the CBAs control; (3) ignoring on the Medicare Part B reimbursement issue the testimony of Joseph Marotti who negotiated the 1998 CBA and the Supplemental Agreement; (4) mischaracterizing the testimony of Bill Webster, the UAW negotiator in 1998, as stating that the 1998 Supplemental Agreement did more than confirm Newell's "obligation to pay the Medicare Part B reimbursement to those who retired prior to August 1, 1998" (R.E.224 #7, Webster Affidavit 3);[4] (5) ignoring the affidavit of Sandra McCurry (submitted by Retirees' counsel) that Newell had no obligation to pay monthly Medicare Part B premium reimbursements in excess of $11.70 (R.E.224 #6, McCurry Affidavit ¶ 12); (6) ignoring the Aetna SPD's provisions that Plan benefits were integrated with Medicare; (7) ignoring the testimony of Great-West's representative that since at least 1998 Plan benefits have been integrated with Medicare; (8) ignoring the Conner

[4] The Webster Affidavit was carefully drafted to suggest implicitly, but not to state, that the purpose of the 1998 CBA Supplemental Agreement was to provide full reimbursement; as worded, however, paragraph 3 of the Webster Affidavit more clearly takes a position that is consistent with the testimony of Mr. Marotti, *viz*., the purpose of the 1998 CBA Supplemental Agreement was to continue the UAW Pension Plan obligation of monthly reimbursements of $11.70, even though the UAW Pension Plan was being replaced by the Newell Pension Plan.

EOBs demonstrating that outpatient treatment has long been subject to a 20% copayment; (9) failing to mention the June 2, 1997 notice to Retirees that "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); and, (10) mischaracterizing the Schiff Memo as indicating a recognition of vesting, rather than as a summary of benefits being provided in 1997 by Cooper. The District Court's failure to consider evidence that either dictates judgment for Appellants or precludes summary judgment for Retirees, as well as drawing inferences (and engaging in speculation) adverse to Appellants, mandates reversal.

The District Court committed reversible error in disregarding *Winnett II* when the District Court held that Retirees' health claims were not time-barred as a result of the June 2, 1997 notice reserving in Newell an unqualified right to change health benefits. Even worse, the District Court committed reversible error in holding that Smoker's and Conner's receipt of less than full Medicare Part B premium reimbursements for more than six years before the assertion of the Medicare Part B premium reimbursement claim (and the addition of Smoker as a party) was not time-barred.

The District Court committed reversible error when it disregarded this Court's precedent in *UFCW Local 951 v. Mulder*, 31 F.3d 365, 371 (6th Cir. 1994), when holding that Newell Window was the successor to Cooper Industries and Kirsch Company, the entities that negotiated the CBAs on which Retirees base their claims. *See also CNH America LLC v. UAW*, 2011 U.S. App. LEXIS 9913 (6th Cir. May 16, 2011) (noting that successor operator of plant was deter-

mined not to be liable for CBAs negotiated by transferor of assets). Indeed, to the extent that Retirees claim to be third-party beneficiaries of the purchase agreement between Cooper and Newell, the claims are barred by the purchase agreement's provision that there are no third-party beneficiaries of that agreement. (R.E.159 #5, Newell Purchase Agreement § 11.1).

The District Court disregarded this Court's precedent in *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), when (based on its selective and inaccurate characterization of the record evidence) it shifted the burden to Appellants to prove that the CBAs precluded retiree benefits from vesting. No less significantly, the District Court awarded benefits based not on the CBAs or the SPDs incorporated into the CBAs, but on parole evidence that conflicts with the SPDs. *Yard-Man*, consistent with 29 U.S.C. §§ 185 & 186, applies only where writings provide some basis for the claimed vesting. *See Price v. Bd. of Trs. of the Ind. Laborer's Pension Fund*, 632 F.3d 288, 294 n.1 (6th Cir. 2011).

Finally, the District Court committed reversible error in certifying a single class of Retirees, surviving spouses, and eligible dependents and awarding retiree health benefits to all who could claim a benefit based on retirement on or before December 31, 1993 because of the differences in the CBAs. For example, as noted in the facts, surviving spouses were first entitled to retiree benefits only in 1980 so that pre-1980 Retiree surviving spouses are awarded a vested benefit to which they are not entitled. *See Winnett I*, 553 F.3d 1000 (6th Cir. 2009) (retirees entitled to benefits under terms of CBA under which

they retire). *Cf. UAW v. Gen. Motors Corp*., 497 F.3d 615, 631 (6th Cir. 2007) ("collective-bargaining agreements vest former union workers with their health-care benefits upon retirement").

No less significantly, in light of class certification, the District Court's Amended Judgment purports to retain jurisdiction "to address the appropriate remedy for [absent] Class Members for past conduct by Defendants that has been inconsistent with the terms of this Judgment." (R.E.262, Corrected Judgment ¶ 9). In light of the absence of any request for a remedy for absent class members in the nearly eleven months since the Opinion, class certification appears to be a means for any Retiree to bring a claim for damages no matter how dilatory that Retiree

* * * *

Pension Plan's $11.70 reimbursement. On this ground, the Amended Judgment must be reversed as to pre-1980 Retirees and surviving spouses.

In sum, this Court should reverse the Amended Judgment as to Medicare Part B premium reimbursements. (R.E.262, Amended Judgment ¶ 7).

III. The District Court Committed Reversible Error in Granting Summary Judgment for the Retirees Based on Its Weighing the Evidence and Its Failure to Acknowledge Uncontroverted Evidence or Conflicting Evidence Defeating Summary Judgment

On numerous occasions, the District Court's misstated and ignored relevant facts. As previously detailed, the District Court misstated the terms of the 1982 CBA in concluding that Retirees would be entitled to employee benefits as of June 1, 1980,

when there was a right to reimbursement of Medicare premiums, rather than July 1, 1980, when there was not.

As previously detailed, the District Court misstated that the SPDs acknowledge that the CBAs control benefits. Instead, the SPDs "set forth" and control benefits. (R.E.189 #45, 1978 Aetna SPD, at 01711); (R.E.189 #15, Cooper SPD at 15).

As previously detailed, the District Court ignored the testimony of Joseph Marotti who negotiated the 1998 CBA and the Supplemental Agreement. Mr. Marotti testified that the 1998 Supplemental Agreement limited monthly Medicare premium reimbursements to $11.70. (R.E.189 #22, Marotti tr. 26) ("And it would indicate to me, if I read it straight out, that those retiring prior to our contract would get $11.70 maximum.").

As previously detailed, the District Court mischaracterized the affidavit of Bill Webster, the UAW negotiator in 1998, who never testified that the 1998 Supplemental Agreement provided unlimited Medicare premium reimbursements. (R.E.224 #7, Webster Affidavit ¶ 3).

As previously detailed, the District Court ignored the McCurry affidavit that there was no obligation to pay monthly Medicare premium reimbursements in excess of $11.70. (R.E.224 #6, McCurry Affidavit ¶ 12).

As previously detailed, the District Court ignored the Aetna SPD's provisions that Plan benefits were integrated with Medicare. (R.E.189 #45, Aetna SPD at 01701).

As previously detailed, the District Court ignored the testimony of Great-West's representative that since at least 1998 Plan benefits have been integrated with Medicare. (R.E.175 #15, Reid tr. 69-70).

As previously detailed, the District Court ignored the Conner EOBs demonstrating that outpatient treatment has long been subject to a 20% copayment. (R.E.189 ##11-12, Conner EOBs); (R.E.189 #10, Conner tr. 62-65).

As previously detailed, the District Court failed to mention the June 2, 1997 notice to Retirees by which Newell claimed an unqualified reservation of rights. (R.E.174 #7, Notice).

Finally, the District Court mischaracterized the Schiff Memo, (R.E.242, Opinion at 16-17), an unauthenticated, hearsay two-page Schiff Hardin & Waite January 21, 1997 memorandum that "[s]et forth . . . a summary of the retiree medical and life insurance benefits currently provided to Kirsch employees." (R.E.175 #16, Schiff Memo, at GWL-129 to -130). The District Court misread the Schiff Memo in concluding that it "is explicit, unqualified and adverse to the [Appellants'] position here." (R.E.242, Opinion at 16). Only by drawing all inferences **against** Appellants could the District Court have found the Schiff Memo to be adverse to Appellants' position. The Schiff Memo states that pre-1994 union and pre-October 1989 nonunion retirees are eligible for "Lifetime retiree [medical] coverage," but did not state that the coverage was vested, inalterable or immutable. (R.E.175 #16, Schiff Memo, at GWL-129 to -130). If Schiff had so concluded, it would have used those terms. CNH America LLC v. UAW, 2011 U.S. App. LEXIS 9913, at [*6]-[*7] (6th Cir. May 16, 2011). The Schiff Memo contains no legal analysis, suggesting

that Schiff did not review CBAs or SPDs. Indeed, the District Court appears to conclude that Schiff misstated the law inasmuch as nonunion retiree benefits do not vest under *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.) (*en banc*), *cert. denied*, 524 U.S. 923 (1998), but opined correctly that union retiree benefits do. A fairer reading discloses that the Schiff Memo does not address vesting, but rather only is "a summary of the retiree medical and life insurance benefits currently provided." (R.E.175 #16, Schiff Memo, at GWL-129).

The District Court not only misread the Schiff Memo, but engaged in speculation adverse to Appellants:

> 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.

(R.E.242, Opinion at 16 n.1). Not only is this speculation baseless, but it does not "tak[e] all inferences in [Appellants'] favor," as required of a court considering summary judgment motions. *Kennedy v. City of Villa Hills*, 635 F.3d 210, 213 (6th Cir. 2011) (*quoting Swiecicki v. Delgado*, 463 F.3d 489, 497 (6th Cir. 2006)). Even worse, the second page of the Schiff Memo contains a "cc (w/o encl.)" line, which refutes the District Court's characterization of the Schiff Memo as incomplete. (R.E.175 #16, Schiff Memo at

GWL-130). The District Court's analysis of the Schiff Memo requires reversal by itself.

Reversal is mandated in light of the evidence ignored by the District Court. *Comm. v. Wash. Group Intl, Inc*., 568 F.3d 626 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1089 (2010). Reversal is mandated on this ground.

Additionally, Retirees claim to be third-party beneficiaries of the purchase agreement between Cooper and Newell. These claims fail because the purchase agreement precludes third-party beneficiaries. (R.E.220-6, Newell Purchase Agreement § 14.11). Reversal is mandated on this ground as well.

VI. The District Court Committed Reversible Error in Shifting the Burden of Proof to Appellants

The District Court imposed the burden of proof on Appellants to rebut the parole evidence advanced by the self-interested Retirees. (R.E.242, Opinion at 2). *Yard-Man* does not support the shifting of the burden of proof to Appellants. *Golden v. Kelsey-Hayes Co*., 73 F.3d 648, 656 (6th Cir. 1996). Reversal is dictated on this ground alone.

VII. The District Court Committed Reversible Error in Applying *Yard-Man*

The *Yard-Man* analysis requires a court evaluating vesting of benefits to begin with the language of the CBAs, which the District Court did not do. The *Yard-Man* inference is invoked only where a court is forced to discern "the intent of the parties from vague or ambiguous CBAs." *Golden*, 73 F.3d at 656. The District Court failed to identify any ambiguity in the CBAs, particularly in light of the SPDs incorporated

in those CBAs. Instead, the District Court's analysis began with a consideration of the extrinsic evidence submitted by Retirees, while

* * * *

35-36), is reversible error. The District Court's error demonstrates that no court should "substitute oral testimony for contractual language" because doing so will deprive the "parties of the protection of a written contract." *UAW, Local No. 1697 v. Skinner Engine Co.*, 188 F.3d 130, 146 (3d Cir. 1999) (*quoting Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607 (7th Cir.) (*en banc*), *cert. denied*, 510 U.S. 909 (1993)).

Third, the District Court eliminated copayments for **all** outpatient treatment of 1986-1993 Retirees despite the SPD and its own Opinion to the contrary. (R.E.262, Amended Judgment ¶ 5). The Opinion eliminated copayments only for "for outpatient surgery and diagnostic services." (R.E.242, Opinion at 35). No explanation exists for the Judgment's expansion of benefits to Retirees. Even worse, the Cooper SPD, which was incorporated in the 1985, 1988 and 1991 CBAs, expressly provides for 20% copayments of outpatient care. (R.E.189 #15, Cooper SPD at 7). The District Court's crediting parole evidence contradicting the written documents constituting the CBA, (R.E.242, Opinion at 34-35), is reversible error.

No less seriously, the District Court's Amended Judgment froze benefits, not at the levels set by the CBAs on which Retirees based their claims, but at the levels of benefits provided on December 31, 2005, and enjoined Appellants from amending the health plans or altering benefits. (R.E.262, Amended Judgment ¶¶ 4 & 9). This Court in Reese, unlike the District Court, recognized that a:

> CBA—unless it says otherwise—should be construed to permit modifications to benefits plans that are "reasonably commensurate" with the benefits provided in the 1998 CBA, "reasonable in light of changes in health care" and roughly consistent with the kinds of benefits provided to current employees. *Zielinski v. Pabst Brewing C*o., 463 F.3d 615, 619, 620 (7th Cir. 2006); *see also Diehl*, 102 F.3d at 310 (examining a CBA creating vested benefits and concluding that "we see nothing to indicate that the Shutdown Agreement established a right to a particular insurance carrier, or even to a particular plan").

Reese v. CNH America LLC, 574 F.3d 315, 326 (6th Cir. 2009). Contravening *Reese*, the District Court's Amended Judgment, without citation to any CBA language as support, entitles Retirees to the Plan in place on December 31, 2005, without any ability to make reasonable amendments in light of changes in health care. This Court should reverse the District Court's Amended Judgment on this ground as well.

In the alternative, and to preserve the issue for *en banc* or *certiorari* review, Appellants ask this Court to abandon its adherence to *Yard-Man*, which is inconsistent with its decision in *UAW v. Cleveland Gear Corp.*, 746 F.2d 1477 (mem.), 1984 U.S. App. LEXIS 13700 (6th Cir. 1984), *aff'g*, 1983 U.S. Dist. LEXIS 20400, at [*5]-[*7] (N.D. Ohio 1983), and the holdings of essentially all other circuits. *See, e.g., Nichols v. Alcatel USA, Inc.*, 532 F.3d 364 (5th Cir. 2008).

* * * *

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Case: 2:06-cv-13702
Assigned To: Zatkoff, Lawrence P
Referral Judge: Whalen, R. Steven
Filed: 08-21-2006 At 10:08 AM
CMP WOOD, *et al., v*. BOEING CO. (TAM)

JOSEPH J. WOOD, CLARENCE REYNOLDS, ANN CLARK AND LOWELL M. TERRY, ON BEHALF OF THEMSELVES AND A SIMILARLY SITUATED CLASS, AND THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Plaintiffs,

v.

THE BOEING COMPANY,

Defendant.

Class Action

COMPLAINT AND JURY DEMAND

Plaintiffs Joseph J. Wood, Clarence Reynolds, Ann Clark and Lowell M. Terry (the "Class Representatives") on behalf of themselves and all similarly situated persons in the proposed class described in this Complaint, by their attorneys, and the international Union, United Automobile, Aerospace and Agricultural Workers of America, UAW ("UAW"), by its

attorneys, file this Complaint against Defendant Boeing Company (hereinafter "Boeing") as follows:

1. This action is brought as a class action by the Class Representatives on behalf of themselves and a similarly situated class of retirees pursuant to Rule 23(a) and 23(b)(1) and (2) of the Federal Rules of Civil Procedure.

2. Count I is brought under §301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. §185, and seeks damages for breach of a collective bargaining agreement as well as declaratory and injunctive relief.

3. Count II is brought under §502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132(a)(1)(B), and seeks to recover benefits due and to clarify rights to benefits due under an employee welfare benefit plan.

JURISDICTION AND VENUE

4. This Court has jurisdiction over Count 1 under §301 of the LMRA, 29 U.S.C. §185. This Court has jurisdiction over Count H under §502(a)(1)(8), §502(a)(3), §502(e)(1), and §502(f) of ERISA, 29 U.S.C. §1132(a)(1)(B), §1132(a)(3), §1132(c)(1), §1132(f), and applicable federal common law. Venue in this judicial district is proper under §301 of LMRA, 29 U.S.C. §185, and §502(e)(2) and §502(f) of ERISA, 29 U.S.C. §1132(e)(2) and §1132(f).

PARTIES

5. Defendant Boeing is a Delaware corporation that does business in and is registered to do business in the State of Michigan. Boeing operates a division known as Boeing Rotocraft, (which has previously been known as Boeing Helicopters, Boeing Helicopter

Company and Boeing Vertol Company) which has a manufacturing facility in Ridley Township, Pennsylvania.

6. The UAW is a voluntary labor organization as defined in §2(5) of the National Labor Relations Act, 29 U.S.C. § 152(5). The UAW has its headquarters in Detroit, Michigan, within this judicial district.

7. Class Representative Joseph J. Wood resides at 611 Wood Street, Plymouth, Michigan, within this judicial district. Ile retired from Boeing on March 1, 2001. While he was employed at Boeing, he was represented in collective bargaining by the UAW.

8. Class Representative Clarence Reynolds resides at 4724 Bennington Road, Hillsboro, Ohio. He retired from Boeing in 2000. While he was employed at Boeing, he was represented in collective bargaining by the UAW.

9. Class Representative Ann Clark resides at 4724 Bennington. Road, Hillsboro, Ohio. She retired from Boeing in 1998. While she was employed at Boeing, she was represented in collective bargaining by the UAW.

10. Class Representative Lowell M. Terry resides at 214 Ironclad Drive, Columbus, Ohio. He retired from Boeing on August 1, 2001. While he was employed at Boeing, he was represented in collective bargaining by the UAW.

CLASS ACTION ALLEGATIONS

11. The Class Representatives bring this class action on behalf of themselves and other similarly situated Conner employees who retired from Boeing's division Boeing Rotocraft on or before March 11, 2006, and who, as employees, were represented by

the UAW in collective bargaining and their surviving spouses ("Class").

12. The exact number of members of the Class is not presently known, but is so numerous that joinder of individual members in this action is impracticable.

13. There are common questions of law and fact in the action that relate to and affect the rights of each member of the Class. The relief sought is common to the entire Class, as set forth below in Counts I and II of this Complaint.

14. The claims of the Class Representatives are typical of the claims of the Class in that the Class Representatives assert that Boeing is obligated to provide all members of the Class, including the Class Representatives, with the same collectively bargained retiree health care benefits.

15. There is no conflict between any Class Representative and other members of the Class with respect to this action.

16. The Class Representatives are the representative parties for the Class, and are able to and will fairly and adequately protect the interests of the Class.

17. The attorneys for the Class Representatives are experienced and capable in the field of labor law and ERISA and have success fully prosecuted numerous class actions of a similar nature.

18. Boeing has acted on grounds generally applicable to the Class, thereby making final injunctive relief or corresponding injunctive relief appropriate with respect to the Class as a whole.

19. This action is properly maintained as a class action in that the prosecution of separate actions by individual members would create a risk of adjudication with respect to individual members which would establish incompatible standards of conduct for Boeing.

20. This action is properly maintained as a class action in that the prosecution of separate actions by individual Class members would create a risk of with respect to individual members of the Class which would, as a practical matter, be dispositive oldie interests of the other members not parties to the adjudication, or would substantially impair or impede their ability to protect their interests.

COUNT I

VIOLATION OF COLLECTIVE BARGAINING AGREEMENT

21. Plaintiffs re-allege and incorporate by reference the above paragraphs as though fully set forth in this Count I.

22. Prior to their retirement, the UAW represented the Class Representatives and other members of the Class in the negotiation of collective bargaining agreements.

23. The UAW negotiated a series of collective bargaining agreements with Boeing Rotocraft obligated Boeing to provide vested lifetime retiree health care benefits for the members of the Class.

24. The relevant portions of the collective bargaining agreements provided that employees who were hired before January 1, 1993 and retired thereafter were entitled to fully paid health care coverage.

25. In July 2006, Boeing notified members of the Class that it intended to modify their health care benefits effective September 1, 2006.

26. Boeing's announced modifications to the health care plan are breaches of its contractual obligation to provide vested lifetime retiree health care benefits to the Class.

COUNT II
VIOLATION OF ERISA PLAN

27. Plaintiffs re-allege and incorporate by reference the above paragraphs of this Complaint as though set forth in this Count II.

28. Boeing was at all relevant times the relevant "employer" within the meaning of §3(5) of ERISA, 29 U.S.C. §1002(5).

29. The health care plan in the collectively bargained agreements described in paragraph 23 of this Complaint under which retiree health care benefits are provided to the Class Representatives and Class members is an "employee welfare benefit plan" within the meaning of §3(3), of ERISA 29 U.S.C. §1002(1).

30. Boeing is or was at relevant times the "plan sponsor" and/or "administrator" of the employee welfare benefit plan, within the meaning of §3(16)(A)-(B) of ERISA, 29 U.S.C. §1002(16)(A)-(B).

31. The Class Representatives and Class members are "participants" in the employee welfare benefit plan, within the meaning of §3(7) of ERISA, 29 U.S.C. §1002(7).

32. The terms of the employee welfare benefit plan requires the Boeing to provide vested lifetime retiree

health care benefits to the Class Representatives and the Class members.

33. Boeing's modifications in the retiree health care benefits of the Class Representatives and the Class members arc breaches of its obligations under the employee welfare benefit plan_

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Enter a declaratory judgment against Boeing under the LMRA and ERISA to provide retiree health care benefits to the Class Representatives and Class members for the lives of retirees and their surviving spouses.

B. Enter preliminary and permanent injunctive relief requiring the Boeing to maintain the level of retiree health care benefits established in the applicable collective bargaining agreements.

C. Order the Boeing to pay damages, plus interest, to the Class Representatives and Class members for any losses incurred as a result of its modification of their, health care benefits.

D. Award Plaintiffs attorney fees, punitive damages, and costs incurred of this action.

E. Grant such further relief as may be deemed necessary and proper.

JURY DEMAND

Plaintiffs request a jury trial of all issues so triable.

Respectfully submitted,

INTERNATIONAL UNION, UAW

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Roger J. McClow (P27170)
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rmcclow@kmsmc.com

Dated: August 21, 2006

IS 44
REV. 3/99)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

. (a) PLAINTIFFS
Joseph J. Wood, Clarence Reynolds, Ann Clark, Lowell M. Terry and International Union, UAW

DEFENDANTS
The Boeing Company

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Wayne County
(EXCEPT IN U.S. PLAINTIFF CASES) 26163

COUNTY OF RESIDENCE OF FIRST LISTED
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(C) ATTORNEYS (FIRM NAME, ADDRESS AND TELEPHONE NUMBER)

Roger J. McClow
600 Galleria Officentre, Suite 117
Southfield, MI 48034
248) 354-9650

Michael F. Saggau
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Detroit, MI 48214
(313) 926-5216

ATTORNEYS (IF KNOWN)

I. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- [ ] 1 U.S. Government Plaintiff
- [X] 3 Federal Question (U.S. Government Not a Party)
- [ ] 2 U.S. Government Defendant
- [ ] 4 Diversity (Indicate Citizenship of Parties in item III)

720

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(For Diversity Cases Only)

	PTF	DEF
Citizen of This State		4
Citizen of Another State		5
Citizen or Subject of a Foreign Country		6

Case: 2:06-cv-13702
Assigned To: Zatkoff, Lawrence P
Referral Judge: Whalen, R. Steven
Filed: 08-21-2006 At 10:08 AM
CMP WOOD, ET AL V. BOEING CO (TAM)

V. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
110 Insurance	PERSONAL INJURY	PERSONAL INJURY	610 Agriculture	422 Appeal 28 USC 158	400 State Reapportionment
120 Marine	310 Airplane	362 Personal Injury—Med. Malpractice	620 Other Food & Drug	423 Withdrawal 28 USC 157	410 Antitrust
130 Miller Act	315 Airplane Product Liability	365 Personal Injury—Product Liability	625 Drug Related Seizure of Property 21 USC 881		430 Banks and Banking
140 Negotiable Instrument	320 Assault, Libel & Slander	368 Asbestos Personal Injury Product Liability	630 Liquor Laws	PROPERTY RIGHTS	450 Commerce/ICC Rates/etc.
150 Recovery of Overpayment & Enforcement of Judgment	330 Federal Employers' Liability	PERSONAL PROPERTY	640 R.R. & Truck	820 Copyrights	460 Deportation
151 Medicare Act	340 Marine	370 Other Fraud	650 Airline Regs.	830 Patent	470 Racketeer Influenced and Corrupt Organizations
152 Recovery of Defaulted Student Loans (Excl. Veterans)	345 Marine Product Liability	371 Truth in Lending	660 Occupational Safety/Health	840 Trademark	810 Selective Service
153 Recovery of Overpayment of Veteran's Benefits	350 Motor Vehicle	380 Other Personal Property Damage	690 Other		850 Securities/Commodities/Exchange
160 Stockholders' Suits	355 Motor Vehicle Product Liability	385 Property Damage Product Liability	LABOR	SOCIAL SECURITY	875 Customer Challenge 12 USC 3410
190 Other Contract	360 Other Personal Injury		710 Fair Labor Standards Act	861 HIA (1395ff)	891 Agricultural Acts
195 Contract Product Liability			[X] 720 Labor/Mgmt. Relations	862 Black Lung (923)	892 Economic Stabilization Act
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	730 Labor/Mgmt. Reporting & Disclosure Act	863 DIWC/DIWW	893 Environmental Matters
210 Land Condemnation	441 Voting	510 Motions to Vacate Sentence	740 Railway Labor Act	864 SSID Title XVI	894 Energy Allocation Act
220 Foreclosure	442 Employment	HABEAS CORPUS	790 Other Labor Litigation	865 RSI (405(g))	895 Freedom of Information Act
230 Rent Lease & Ejectment	443 Housing/Accommodations	530 General	791 Empl. Ret. Inc. Security Act	FEDERAL TAX SUITS	900 Appeal of Fee Determination Under Equal Access to Justice
240 Torts to Land	444 Welfare	535 Death Penalty		870 Taxes (U.S. Plaintiff or Defendant	950 Constitutionality of State Statutes
245 Tort Product Liability	440 Other Civil Rights	540 Mandamus & Other		871 IRS — Third Party 26 USC 7609	890 Other Statutory Actions
290 All Other Real Property		550 Civil Rights			
		555 Prison Condition			

VI. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

[X] 1 Original Proceeding | [ ] 2 Removed from State Court | [ ] 3 Remanded from Appellate Court | [ ] 4 Reinstated or Reopened | [ ] 5 Transferred from another district (specify) | [ ] 6 Multidistrict Litigation | [ ] 7 Appeal to District Judge from Magistrate Judgment

VII. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUES UNLESS DIVERSITY)

This is an action for retiree health care benefits due under successive collective bargaining agreements brought pursuant to Section 301 of the Labor Management Relations Act, 29 USC 185 and the Employee Retirement Income Security Act, 29 USC 1101 et seq.

VII. REQUESTED IN COMPLAINT: [X] CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 — **DEMAND $** unliquidated — CHECK YES only if demanded in complaint: **JURY DEMAND:** [X] YES [ ] NO

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE August 21, 2006 — SIGNATURE OF ATTORNEY OF RECORD Roger J. McClow

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

PURSUANT TO LOCAL RULE 83.11

1. Is this a case that has been previously dismissed? ☐Yes ☒No

If yes, give the following information:

Court _____

Case No.: _____

Judge: _____

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.) ☐Yes ☒No

If yes, give the following information:

Court: _____

Case No.:_____

Judge: _____

Notes: _____

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Case No. 06-cv-13702
Hon. Lawrence P. Zatkoff

JOSEPH J. WOOD, CLARENCE REYNOLDS, ANN CLARK AND LOWELL M. TERRY, ON BEHALF OF THEMSELVES AND A SIMILARLY SITUATED CLASS, AND THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Plaintiffs,

v.

THE BOEING COMPANY,

Defendant.

Class Action

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MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.
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NOTICE OF VOLUNTARY DISMISSAL

Plaintiffs, by their undersigned counsel, hereby give notice, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, that they voluntarily dismiss the above action without prejudice.

INTERNATIONAL UNION, UAW

By: /s/ Michael F. Saggau
Daniel W. Sherrick, Esq. (P37171)
Michael F. Saggau (P35326)
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KLIMIST, McKNIGHT, SALE
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By: /s/ Roger J. McClow
Roger J. McClow (P27170)
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rmcclow@kmsmc.com

Dated: September 13, 2006

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2006, a copy of the foregoing Notice of Voluntary Dismissal was filed electronically. Notice of this filing will be sent to counsel for Defendant by operation of the Court's electronic filing system.

By: /s/ Roger J. McClow
Roger J. McClow (P27170)
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APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No.:_____
Class Action

JOHN R. MAYFIELD AND THOMAS J. SHERIDAN, ON BEHALF OF THEMSELVES AND A SIMILARLY SITUATED CLASS,

Plaintiffs,

v.

BOEING COMPANY,

Defendant.

COMPLAINT AND JURY DEMAND

Plaintiffs John R. Mayfield and Thomas J. Sheridan (the "Class Representatives"), on behalf of themselves and all similarly situated persons in the proposed class described in this Complaint, by and through their undersigned attorneys, complain against the Defendant Boeing Company ("Boeing") as follows:

1. This action is brought as a class action by the Class Representatives on behalf of themselves and a similarly situated class of retired employees of the Boeing Company and surviving spouses and dependants pursuant to Rule 23(a) and 23(b)(1) and (2) of the Federal Rules of Civil Procedure.

2. Count I is brought under § 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. §185, and seeks damages for breach of a collective bargaining agreement as well as injunctive relief.

3. Count II is brought under §502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132(a)(1)(B), and seeks to recover benefits due and to clarify rights to benefits under an employee welfare benefit plan.

JURISDICTION AND VENUE

4. This Court has jurisdiction over Count I under §301 of the LMRA, 29 U.S.C. §185. This Court has jurisdiction over Count II under §502(a)(1)(B), §502(a)(3), §502(c)(1), and §502(f) of ERISA, 29 U.S.C. §1132(a)(1)(B), §1132(a)(3), §1132(c)(1), §1132(f), and applicable federal common law. Venue in this judicial district is proper under §301 of the LMRA, 29 U.S.C. § 185, and §502(e)(2) and §502(f) of ERISA, 29 U.S.C. §1132(c)(2) and §1132(f).

PARTIES

5. Defendant Boeing Company is a Delaware corporation with its principal offices in Chicago, Illinois, and is registered to do business in the State of Tennessee. Boeing operates a division known as Boeing Rotocraft (which previously has been known as Boeing Helicopters, Boeing Helicopter Company and Boeing Vertol Company) which has a manufacturing facility in Ridley Township, Pennsylvania.

6. Class Representative John R. Mayfield resides at 2140 Highway 156, South Pittsburg, Tennessee. He retired from employment with Defendant Boeing at the Ridley Township plant in 1988. During Mr. Mayfield's employment with Boeing, he was repre-

sented in collective bargaining by International Union, United Automobile, Aerospace & Agricultural Implement Workers (hereinafter "UAW") and UAW Local 1069.

7. Class Representative Thomas Sheridan resides at 1314 Bakerville Rd., Waverly, Tennessee. He retired from employment with Defendant Boeing at the Ridley Township plant in 2003. During Mr. Sheridan's employment with Boeing, he was represented in collective bargaining by International Union, United Automobile, Aerospace & Agricultural Implement Workers (hereinafter "UAW") and UAW Local 1069.

CLASS ACTION ALLEGATIONS

8. The Class Representatives bring a class action on behalf of themselves and other similarly situated former employees of Boeing who retired from Boeing's division Boeing Rotocraft on or before March 11, 2006, and who, as employees, were represented by the UAW in collective bargaining, and surviving spouses and dependants of those former employees.

9. The exact number of members of the Class identified in the preceding paragraph is not presently known, but upon information and belief includes more than 1800 retirees and surviving spouses, and is therefore so numerous that joinder of individual members in this action is impracticable.

10. There are common questions of law and fact in the action that relate to and affect the rights of each member of the Class. The relief sought is common to the entire Class, as set forth below in Counts I and II of this Complaint.

11. The claims of the Class Representatives are typical of the Class they represent, in that the Class Representatives claim that Boeing is obligated to provide all members of the Class, including the Class Representatives, with the same collectively bargained plan of retiree health plan benefits. There is no conflict between any Class Representative and other members of the Class with respect to this action.

12. The Class Representatives are the representative parties for the Class, and are able to and will fairly and adequately protect the interests of the Class.

13. The attorneys for the Class Representatives are experienced and capable in the field of labor law and ERISA.

14. Boeing has acted on grounds generally applicable to the Class, thereby making final injunctive relief or corresponding injunctive relief appropriate with respect to the Class as a whole.

15. This action is properly maintained as a class action in that the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of other members not party to the adjudication, or would substantially impair or impede their ability to protect their interests.

COUNT I

VIOLATION OF COLLECTIVE BARGAINING AGREEMENT

16. Plaintiffs re-allege and incorporate by reference the above paragraphs as though fully set forth in this Count I.

17. The UAW is a labor organization as defined in §2(5) of the National Labor Relations Act, 29 U.S.C. §152(5).

18. Prior to their retirement, the UAW represented the Class Representatives and other members of the Class in the negotiation of collective bargaining agreements.

19. The UAW and Boeing negotiated a series of collective bargaining agreements that obligated Boeing to provide vested lifetime retiree health care benefits to the Class Representatives and Class members.

20. In July 2006, Boeing notified Class Representatives John R. Mayfield and Thomas J. Sheridan, and, upon information and belief, the retirees and surviving spouses of retirees who are members of the Class, that it intended to modify and reduce their health care benefits on September 1, 2006.

21. On September 1, 2006, Boeing reduced the health care benefits of Class Representatives John R. Mayfield and Thomas J. Sheridan, and, upon information and belief, the retirees and surviving spouses of retirees who are members of the Class.

22. Boeing's reduction of the health care benefits to the Class Representatives and Class members is a breach of its contractual obligation to provide vested lifetime retiree health care benefits to the Class Representatives and Class members.

23. Boeing's breach of its contractual obligations as set forth in this Count has caused the Class Representatives and other Class members monetary damages.

COUNT II

VIOLATION OF ERISA PLAN

24. Plaintiffs re-allege and incorporate by reference the above paragraphs of this Complaint as though set forth in this Count II.

25. Boeing was at all relevant times the relevant "employer" within the meaning of §3(5) of ERISA, 29 U.S.C. §1002(5).

26. The collectively bargained health care plan described in paragraph 20 of this Complaint is an "employee welfare benefit plan" within the meaning of §3(1) of ERISA, 29 U.S.C. §1002(1).

27. Boeing is or was at relevant times the "plan sponsor" and/or "administrator" of the employee welfare benefit plan, within the meaning of §3(16)(A)-(B) of ERISA, 29 U.S.C. §1002(16)(A)-(B).

28. The Class Representatives and Class members are "participants" in the employee welfare benefit plan, within the meaning of §3(7) of ERISA, 29 U.S.C. § 1002(7).

29. The terms of the employee welfare benefit plan require Boeing to provide vested lifetime retiree health care benefits to the Class Representatives and Class members.

30. Boeing's reduction of the retiree health care benefits effective September 1, 2006 of the Class Representatives and other Class members are violative of the terms of the employee welfare benefit plan and breach Boeing's obligations under the employee welfare benefit plan. RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Enter a declaratory judgment that Boeing is obligated under the LMRA and ERISA to provide vested lifetime retiree health care benefits to the Class Representatives and Class members as set forth in the applicable collective bargaining agreements.

B. Enter preliminary and permanent injunctive relief requiring Boeing to maintain the level ofretiree health care benefits in effect prior to the September 1, 2006 modifications, as required by the terms of the applicable collective bargaining agreements.

C. Order Boeing to pay damages, plus interest, to the Class Representatives and other members of the Class for any losses incurred as a result of its modification of the retiree health care benefits.

D. Award Plaintiffs attorney's fees, punitive damages, and costs incurred of this action.

E. Grant such further relief as may be deemed necessary and proper.

JURY DEMAND

Plaintiffs demand a jury trial of all issues so triable.

Respectfully submitted,

/s/ Samuel Morris
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& Bloomfield, P.C.
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Dated: September 12, 2006.

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No.: 3:06-CV-0883
Class Action

JOHN R. MAYFIELD AND THOMAS J. SHERIDAN, ON BEHALF OF THEMSELVES AND A SIMILARLY SITUATED CLASS,

Plaintiffs,

v.

BOEING COMPANY,

Defendant.

FIRST AMENDED COMPLAINT AND JURY DEMAND

Plaintiffs John R. Mayfield, Thomas J. Sheridan, Robert Mecleary and Jessie McKinney (the "Class Representatives"), on behalf of themselves and all similarly situated persons in the proposed class described in this Complaint, by and through their undersigned attorneys, complain against the Defendant Boeing Company ("Boeing") as follows:

1. This action is brought as a class action by the Class Representatives on behalf of themselves and a similarly situated class of retired employees of the Boeing Company and surviving spouses and dependants pursuant to Rule 23(a) and 23(b)(1) and (2) of the Federal Rules of Civil Procedure.

2. Count I is brought under § 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. §185, and seeks damages for breach of a collective bargaining agreement as well as injunctive relief.

3. Count II is brought under §502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132(a)(1)(B), and seeks to recover benefits due and to clarify rights to benefits under an employee welfare benefit plan.

JURISDICTION AND VENUE

4. This Court has jurisdiction over Count I under §301 of the LMRA, 29 U.S.C. §185. This Court has jurisdiction over Count II under §502(a)(1)(B), §502(a)(3), §502(c)(1), and §502(f) of ERISA, 29 U.S.C. § 1132(a)(1)(B), §1132(a)(3), §1132(c)(1), §1132(f), and applicable federal common law. Venue in this judicial district is proper under §301 of the LMRA, 29 U.S.C. § 185, and §502(e)(2) and §502(f) of ERISA, 29 U.S.C. §1132(c)(2) and §1132(f).

PARTIES

5. Defendant Boeing Company is a Delaware corporation with its principal offices in Chicago, Illinois, and is registered to do business in the State of Tennessee. Boeing operates a division known as Boeing Rotocraft (which previously has been known as Boeing Helicopters, Boeing Helicopter Company and Boeing Vertol Company) which has a manufacturing facility in Ridley Township, Pennsylvania.

6. Class Representative John R. Mayfield resides at 2140 Highway 156, South Pittsburg, Tennessee. He retired from employment with Defendant Boeing at the Ridley Township plant in 1988. During Mr. Mayfield's employment with Boeing, he was repre-

sented in collective bargaining by International Union, United Automobile, Aerospace & Agricultural Implement Workers (hereinafter "UAW") and UAW Local 1069.

7. Class Representative Thomas Sheridan resides at 1314 Bakerville Rd., Waverly, Tennessee. He retired from employment with Defendant Boeing at the Ridley Township plant in 2003. During Mr. Sheridan's employment with Boeing, he was represented in collective bargaining by International Union, United Automobile, Aerospace & Agricultural Implement Workers (hereinafter "UAW") and UAW Local 1069.

8. Class Representative Robert Mecleary resides at 506 Wampee Street Northwest, Calabash, North Carolina 28467. He retired from employment with Defendant Boeing at the Ridley Township plant in 1999. During Mr. Mecleary's employment with Boeing, he was represented in collective bargaining by International Union, United Automobile, Aerospace & Agricultural Implement Workers (hereinafter "UAW") and UAW Local 1069.

9. Class Representative Jessie McKinney resides at 1709 Conley Ridge Road, Penland, North Carolina, 28765. She is the surviving spouse of Ted E. McKinney, who retired from employment with Defendant Boeing at the Ridley Township plant in 1970. Ted E. McKinney died in November, 2003 and Jessie McKinney is entitled to lifetime health care benefits as the surviving spouse of Mr. McKinney. During Mr. McKinney's employment with Boeing, he was represented in collective bargaining by International Union, United Automobile, Aerospace & Agricultural Implement Workers (hereinafter "UAW") and UAW Local 1069.

CLASS ACTION ALLEGATIONS

10. The Class Representatives bring a class action on behalf of themselves and other similarly situated former employees of Boeing who retired from Boeing's division Boeing Rotocraft on or before March 11, 2006, and who, as employees, were represented by the UAW in collective bargaining, and surviving spouses and dependants of those former employees.

11. The exact number of members of the Class identified in the preceding paragraph is not presently known, but upon information and belief includes more than 1800 retirees and surviving spouses, and is therefore so numerous that joinder of individual members in this action is impracticable.

12. There are common questions of law and fact in the action that relate to and affect the rights of each member of the Class. The relief sought is common to the entire Class, as set forth below in Counts I and II of this Complaint.

13. The claims of the Class Representatives are typical of the Class they represent, in that the Class Representatives claim that Boeing is obligated to provide all members of the Class, including the Class Representatives, with the same collectively bargained plan of retiree health plan benefits. There is no conflict between any Class Representative and other members of the Class with respect to this action.

14. The Class Representatives are the representative parties for the Class, and are able to and will fairly and adequately protect the interests of the Class.

15. The attorneys for the Class Representatives are experienced and capable in the field of labor law and ERISA.

16. Boeing has acted on grounds generally applicable to the Class, thereby making final injunctive relief or corresponding injunctive relief appropriate with respect to the Class as a whole.

17. This action is properly maintained as a class action in that the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of other members not party to the adjudication, or would substantially impair or impede their ability to protect their interests.

COUNT I

VIOLATION OF COLLECTIVE BARGAINING AGREEMENT

18. Plaintiffs re-allege and incorporate by reference the above paragraphs as though fully set forth in this Count I.

19. The UAW is a labor organization as defined in §2(5) of the National Labor Relations Act, 29 U.S.C. §152(5).

20. Prior to their retirement, the UAW represented the Class Representatives and other members of the Class in the negotiation of collective bargaining agreements.

21. The UAW and Boeing negotiated a series of collective bargaining agreements that obligated Boeing to provide vested lifetime retiree health care

benefits to the Class Representatives and Class members.

22. In July 2006, Boeing notified Class Representatives John R. Mayfield, Thomas J. Sheridan, Robert Mecleary and Jessie McKinney, and, upon information and belief, the retirees and surviving spouses of retirees who are members of the Class, that it intended to modify and reduce their health care benefits on September 1, 2006.

23. On September 1, 2006, Boeing reduced the health care benefits of Class Representatives John R. Mayfield, Thomas J. Sheridan, Robert Mecleary and Jessie McKinney, and, upon information and belief, the retirees and surviving spouses of retirees who are members of the Class.

24. Boeing's reduction of the health care benefits to the Class Representatives and Class members is a breach of its contractual obligation to provide vested lifetime retiree health care benefits to the Class Representatives and Class members.

25. Boeing's breach of its contractual obligations as set forth in this Count has caused the Class Representatives and other Class members monetary damages.

COUNT II
VIOLATION OF ERISA PLAN

26. Plaintiffs re-allege and incorporate by reference the above paragraphs of this Complaint as though set forth in this Count II.

27. Boeing was at all relevant times the relevant "employer" within the meaning of §3(5) of ERISA, 29 U.S.C. §1002(5).

28. The collectively bargained health care plan described in paragraph 20 of this Complaint is an "employee welfare benefit plan" within the meaning of §3(1) of ERISA, 29 U.S.C. § 1002(1).

29. Boeing is or was at relevant times the "plan sponsor" and/or "administrator" of the employee welfare benefit plan, within the meaning of §3(16)(A)-(B) of ERISA, 29 U.S.C. § 1002(16)(A)-(B).

30. The Class Representatives and Class members are "participants" in the employee welfare benefit plan, within the meaning of §3(7) of ERISA, 29 U.S.C. §1002(7).

31. The terms of the employee welfare benefit plan require Boeing to provide vested lifetime retiree health care benefits to the Class Representatives and Class members.

32. Boeing's reduction of the retiree health care benefits effective September 1, 2006 of the Class Representatives and other Class members are violative of the terms of the employee welfare benefit plan and breach Boeing's obligations under the employee welfare benefit plan.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Enter a declaratory judgment that Boeing is obligated under the LMRA and ERISA to provide vested lifetime retiree health care benefits to the Class Representatives and Class members as set forth in the applicable collective bargaining agreements.

B. Enter preliminary and permanent injunctive relief requiring Boeing to maintain the level of retiree health care benefits in effect prior to the September 1, 2006 modifications, as required by the terms of the applicable collective bargaining agreements.

C. Order Boeing to pay damages, plus interest, to the Class Representatives and other members of the Class for any losses incurred as a result of its modification of the retiree health care benefits.

D. Award Plaintiffs attorney's fees, punitive damages, and costs incurred of this action.

E. Grant such further relief as may be deemed necessary and proper.

JURY DEMAND

Plaintiffs demand a jury trial of all issues so triable.

Respectfully submitted,

/s/ Deborah Godwin
Deborah Godwin (TN # 9972)
Samuel Morris (TN # 12506)
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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October, 2006, I electronically filed a true and accurate copy of the foregoing pleading with the Clerk of the Court using the CM/EMF system.

I also certify that I have on the same date mailed by United States Postal Service the documents to the following non-ECF participant:

Mr. W. James McNerney, Jr., President & CEO
Mr. J. Michael Luttig, Esq., General Counsel
The Boeing Company
100 N. Riverside
Chicago, IL 60606
Defendant

and

The Boeing Company.
C/O Corporation Service Company
2908 Poston Ave.
Nashville, TN 37203
Defendant's Registered Agent for Service in Tennessee

/s/ Deborah Godwin

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3:06-0883
Judge Trauger

JOHN R. MAYFIELD, THOMAS J. SHERIDAN, ROBERT MECLEARY, AND JESSIE MCKINNEY, ON BEHALF OF THEMSELVES) AND OF A SIMILARLY SITUATED CLASS,

Plaintiffs,

v.

THE BOEING COMPANY,

Defendant.

MEMORANDUM

Plaintiffs John Mayfield, Thomas Sheridan, Robert Mecleary, and Jessie McKinney have filed a Motion to Certify Class (Docket No. 7). Defendant The Boeing Company ("Boeing") has filed a Motion to Dismiss (Docket No. 15), to which the plaintiffs have responded (Docket No. 32), and the defendant has replied (Docket No. 38). In addition, the defendant has filed a Motion to Stay Proceedings and to Strike the Plaintiff's Motion for Class Certification (Docket No. 17), to which the plaintiffs have responded (Docket No. 33), and the defendant has replied (Docket No. 39), and the plaintiffs have filed a Motion to Commence Discovery (Docket No. 43) to which the defendant has responded (Docket No. 45). Due to considerations set forth in the defendant's response to

the plaintiffs' Motion to Commence Discovery, and for the reasons set forth below, this case will be transferred to the Northern District of Illinois, where a parallel litigation is proceeding. Accordingly, the court will lose jurisdiction over the pending motions, which will be transferred to the Northern District of Illinois.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs John Mayfield, Thomas Sheridan and Robert Mecleary are retired employees of defendant Boeing, and plaintiff Jessie McKinney is a surviving spouse of a retired Boeing employee.[1] Boeing, a Delaware corporation with its principal offices in Chicago, Illinois, operates a division known as Boeing Rotocraft, which manufactures helicopters and helicopter parts in Ridley Township, Pennsylvania. Mr. Mayfield, Mr. Sheridan, Mr. Mecleary, and Ms. McKinney's deceased spouse each worked at the Ridley Township Plant. Mr. Mayfield and Mr. Sheridan currently reside in Tennessee, while Mr. Mecleary and Ms. McKinney each reside in North Carolina.

The plaintiffs have filed this action on behalf of themselves and other similarly situated former employees who retired from Boeing on or before March 11, 2006, and were parties to a collective bar-

[1] Unless otherwise indicated, the facts have been drawn from the plaintiffs' First Amended Complaint (Docket No. 6), the plaintiffs' Motion for Class Certification (Docket No. 7), the plaintiffs' Response in Opposition to the Motion to Dismiss (Docket No. 32), the plaintiffs' Response in Opposition to the Motion to Stay Proceedings and to Strike (Docket No. 33), and the plaintiffs' Motion to Commence Discovery (Docket No. 43).

gaining agreement, negotiated by the International Union, United Automobile, Aerospace & Agricultural Implement Workers ("UAW"). The plaintiffs allege that, in July 2006, Boeing notified them of its intention to modify and reduce their health care benefits under that plan and that, on September 1, 2006, Boeing fulfilled its promise, reducing the benefits.

On September 13, 2006, plaintiffs John Mayfield and Thomas Sheridan filed this class action on behalf of themselves and all similarly situated persons, alleging (1) violation of the collective bargaining agreement and (2) violation of an employee welfare benefit plan as defined in § 3 of ERISA, 29 U.S.C. § 1002(1) *et seq*. On October 12, 2006, the plaintiffs filed an Amended Complaint, adding Mr. Mecleary and Ms. McKinney as named plaintiffs. On October 17, 2006, the plaintiffs filed a Motion to Certify Class. (Docket No. 7) On November 3, 2006, the defendant filed a Motion to Dismiss (Docket No. 15) and a Motion to Stay Proceedings and to Strike Plaintiffs' Motion for Class Certification. (Docket No. 17) On April 12, 2007, the plaintiffs filed a Motion to Commence Discovery.

Meanwhile, on September 15, 2006, Boeing and The Boeing Company Retiree Health and Welfare Plan filed a class action in the Northern District of Illinois against a class of retirees, surviving spouses and dependants and against the UAW, regarding "a series of collective bargaining agreements covering the Ridley Township facility." (Docket No. 16, Ex. 5 at p. 1, 6) In the Northern District of Illinois action, Boeing seeks a declaratory judgment that it may modify, amend, or terminate retiree health benefits under the collective bargaining agreements without violating ERISA or otherwise breaching the agree-

ments. (*Id*. at p. 9-10) Further, in the Northern District of Illinois action, the parties have participated in a Rule 16(b) scheduling conference and exchanged Rule 26(a)(1) disclosures, interrogatories, and a document request. Additionally, Boeing alleges to have noticed numerous depositions that were scheduled to begin in mid-May. (Docket No. 45 at p. 4-5)

ANALYSIS

I. Standard

> Transfer of venue is governed by 28 U.S.C. § 1404(a), which provides:
>
> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Section 1404(a) is a discretionary provision, the purpose of which is to "prevent the waste of time, energy, and money, and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense." *Forward Air, Inc. v. Dedicated Xpress Services, Inc*., No. 2:01-CV-48, 2001 WL 3407936 at *3 (E.D. Tenn. Dec. 31, 2001) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964)); *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 26-27 (1960)). Generally, the burden rests with the moving party to establish that venue should be transferred. *Blane v. American Investors Corp*., 934 F.Supp. 903, 907 (M.D. Tenn.1996). In order to meet that burden, the moving party typically must show that the relevant factors weigh strongly in favor of transfer. *Van Dusen v. Barrack*, 376 U.S. 612, 645-46 (1964) ("Section 1404(a) provides for transfer to a more convenient forum, not

to a forum likely to prove equally convenient or inconvenient."); *see also Southern Elec. Health Fund v. Bedrock Services*, No. 3:02-00309, 2003 WL 24272405 at *5 (M.D. Tenn. Jul. 23, 2003). The court should not transfer venue, "[u]nless the balance is strongly in favor of the defendant." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

In addition, the Sixth Circuit has held that "28 U.S.C. § 1404(a) does not require a motion; a district court may transfer a case *sua sponte*." *Carver v. Knox County Tennessee*, 887 F.2d 1287, 1291 (6th Cir. 1989) *cert. denied*, 495 U.S. 919, 110 S.Ct. 1949, 109 L.Ed.2d 311 (1990); *see also BlueCross Blueshield of Tennessee, Inc. v. Griffin*, No. 1:03-CV-140, 2004 WL 1854165 at *4 (E.D. Tenn. 2004) ("A Court has the authority under 28 U.S.C. § 1404(a) to *sua sponte* transfer a civil action to any other district where it might have been brought for the convenience of parties and witnesses, in the interest of justice.") When a district court is considering *sua sponte* transfer of venue, "it should make that possibility known to the parties so that they may present their views about the desirability of possible transfer and the possible destination." 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3844; *see also Moore v. Rohm & Haas Co.*, 446 F.3d 643, 647 (6th Cir. 2006) (reversing the district court's dismissal of a case for improper venue based in part on the district court's finding—without analyzing any of the relevant factors—that transfer could have been accomplished under § 1404).

In this case, although the defendant has not presented a formal motion, it brought the possibility of § 1404(a) transfer to the court's and the plaintiffs'

attention in its response to the plaintiffs' motion to commence discovery, presenting substantial authority in favor of transfer. Additionally, the existence of the concurrent action pending in the Northern District of Illinois has been noted in numerous memoranda filed by both parties in this case. Therefore, the court finds that the parties have been afforded ample opportunity to present their views regarding the desirability of transfer to the Northern District of Illinois. In considering whether to transfer this action *sua sponte*, the court will apply the typical rule that the burden of proof weighs against transfer, and that venue should not be transferred, "[u]nless the balance is strongly in favor of the defendant." *Gulf Oil Corp*., 330 U.S. at 508. With this standard in mind, the court turns to an analysis of the case at hand.

II. Proper Venue in the Northern District of Illinois

Before transferring venue under § 1404(a), the court must first establish that its own venue is proper and that venue in the transferee court is proper. *See Van Dusen*, 376 U.S. at 616 (transfer under § 1404(a) is limited to "those federal districts in which the action 'might have been brought') The parties have not disputed the propriety of venue in this court and, accordingly, the court finds that its exercise of venue is proper under § 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, and § 502(e)(2) and § 502(f) of ERISA, 29 U.S.C. §§ 1132(c)(2), (f).

Likewise, the court finds that venue is proper in the Northern District of Illinois, such that the present action might have been brought in that forum. The LMRA venue provision states:

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

29 U.S.C. § 185(a). Therefore, venue is proper in contract cases filed under the LMRA in any district where the court may properly exercise personal jurisdiction over the defendant. *See Moore*, 446 F.3d at 646.

The applicable ERISA venue language provides that venue is proper "in the district . . . where a defendant resides or may be found." 29 U.S.C. § 1132(e)(2). A defendant "'resides or may be found' for ERISA venue purposes, in any district in which its 'minimum contacts' would support the exercise of personal jurisdiction." *Id*., (citing *Waeltz v. Delta Pilots Ret. Plan*, 301 F.3d 804, 809-10 (7th Cir. 2002); *Varsic v. United States District Court*, 607 F.2d 245, 248-49 (9th Cir. 1979)).

Accordingly, venue is proper under both the LMRA and ERISA in the Northern District of Illinois, provided that the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Youn v. Track, Inc*., 324 F.3d 409, 417 (6th Cir.2003) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). Because Boeing maintains its principal offices in Chicago, Illinois, the court finds that its

contacts with the Northern District of Illinois are sufficiently "substantial" and "continuous and systematic" such that venue is proper in that forum under both statutes. *See Youn*, 324 F.3d at 418.

III. Balancing the Factors

Next the court must address whether or not the Northern District of Illinois is a more convenient forum than this one. *Van Dusen*, 376 U.S. at 645-46. In order to make that determination, we must consider "the private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public-interest concerns, such as systemic integrity and fairness, which come under the rubric of 'interests of justice.'" *Southern Elec. Health Fund*, No. 3:02-CV-00309, 2003 WL 24272405 at *5 (M.D. Tenn. 2003) (quoting *Moses v. Bus. Card Express, Inc.*, 929 F.2d 1131, 1137 (6th Cir. 1991)).

Factors that district courts typically balance are: "(1) the plaintiff's choice of forum; (2) the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; (3) relative advantages and obstacles to a fair trial; (4) the possibility of the existence of questions arising in the conflicts of laws; (5) the advantage of having a local court determine questions of local law; (6) all other considerations of a practical nature that make a trial easy, expeditious, and economical." *Id.* at *5 (citing *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991)); *Texas Bulf Sulphur Co. v. Ritter*, 371 F.2d 145, 147 (10th Cir. 1961).

Typically, in ERISA cases, courts give special deference to the plaintiffs' choice of forum, even in cases where the plaintiffs have brought putative class actions. *See, e.g.*, *Waeltz v. Delta Pilots Retirement Plan*, 301 F.3d 804, 809 (7th Cir. 2002); *Varsic v. United States District Court for the Central District of California*, 607 F.2d 245, 247-48 (9th Cir. 1979). Accordingly, the court must grant the plaintiffs' choice of forum in this court a high level of deference.

However, that deference does not end our analysis; the court must consider the remaining factors, such as "the private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public-interest concerns, as well as other public-interest concerns, such as systemic integrity and fairness, which come under the rubric of `interests of justice.'" *Southern Elec. Health Fund*, 2003 WL 24272405 at *5. These factors weigh heavily in favor of transfer. As the defendant has noted, discovery in the Northern District reveals that none of the parties' witnesses in that action—who are also likely to be called upon in this action—are located in Tennessee. In contrast, "almost all of Boeing's witnesses are located in Chicago." (Docket No. 45 at p. 3, n. 1) Further, in the Northern District of Illinois action, UAW has stated that documents relevant to the plan negotiations and administration are located in Detroit, which is substantially closer to Chicago than to Nashville. Boeing has stated that its documents are located in Chicago. Finally, and perhaps most significantly, the plan, apart from some functions that take place in Seattle, is administered in Chicago. These considerations lead the court to conclude that litigation would be significantly more "easy, expeditious, and economical" in the Northern District of Illinois than in this forum.

Most significantly, the progress of the action filed by Boeing in the Northern District of Illinois weighs heavily in favor of transferring venue. In *Carver*, 887 F.2d at 1290-93, the Sixth Circuit Court of Appeals reversed the district court's denial of a 1404(a) motion to transfer venue to a neighboring district where a parallel proceeding was underway, on the basis that consolidation of the cases implicated the "interest of justice," *id*. at 1291, n. 2, and because otherwise, the concurrent litigation "w[ould] have created an intolerable situation for the State of Tennessee contrary to the principles of comity and federalism." *Id*. at 1293; *see also Wright v. Jackson*, 505 F.2d 1229, 1232 (4th Cir. 1974) ("Common sense, as well as sound judicial administration, argues against having two separate decrees from two separate courts where a single decree from a single court will suffice."); *see also Church of Scientology of California v. Untied States Dept. of the Army*, 611 F.2d 738, 749 (9th Cir. 1979)(Affirming the lower court's deferring jurisdiction to another court before which the same issue was pending in accordance with the comity doctrine).

In addition, recently, in *Montgomery v. Schering-Plough Corp*., No. 07-194, 2007 WL 614156 at *3 (E.D. Penn. Feb. 22, 2007), the Eastern District of Pennsylvania transferred a class action to a jurisdiction where a concurrent action was pending. The court held that, "[e]ven if full deference were accorded to [the] [p]laintiff's choice," the defendant had met its burden to demonstrate the transfer was warranted because "[t]he pendency of a related case in the proposed transferee forum is a powerful reason to grant a motion to transfer." *Id*. Undergirding the importance of the related case were the following factors:

> (1) pretrial discovery can be conducted more efficiently; (2) the witnesses can be saved time and money, both with respect to pretrial and [with respect to] trial proceedings; (3) duplicitous litigation can be avoided, thereby eliminating unnecessary expense to the parties; [and] (4) inconsistent results can be avoided.

Id. Noting that "the cases need not be identical to be related," the court in Montgomery transferred the action to New Jersey for resolution along with the pending cases in that court. *Id*. The factors listed in *Montomery* apply equally well to the case at hand. Costs associated with pretrial discovery to the witnesses and to the parties will be reduced if both cases are tried in conjunction in the Northern District of Illinois, and the risk of inconsistent results may be avoided. Accordingly, the existence of the concurrent action in the Northern District of Illinois weighs heavily in favor of transfer.

Typically, under the "first to file" doctrine, the "entire action should be decided by the court in which an action was first filed," *Smith v. SEC*, 129 F.3d 356, 361 (6th Cir. 1997) (en banc). Because the case at hand was filed two days before the Northern District of Illinois action, a rigid application of the "first to file" doctrine would weigh in favor of the exercise of venue in this forum. However, in situations such as this one, where the second litigation has proceeded substantially further than the first litigation (and especially where the two actions were filed in such close temporal proximity), courts have modified the "first to file" rule in favor of the more advanced litigation. *See Orthman v. Apple River Campground*, 765 F.2d 119, 121 (8th Cir. 1985)

(dismissing a first-filed action for comity purposes because "the controversy [was] . . . further developed" in the concurrent action); *Church of Scientology*, 611 F.2d at 750 ("Under the circumstances, the goal of judicial efficiency will be best met if we overlook the `first to file' rule, and defer to the litigation in progress in the D.C. Circuit.") (citing *Florida v. United States*, 285 F.2d 596, 604 (8th Cir. 1960) ("There is no rigid or inflexible rule for determining priority of cases pending in federal courts involving the same subject matter."); *Zide Sport Shop of Ohio v. Ed Tobergte Associates, Inc.*, 16 Fed. Appx. 433, 437 (6th Cir. 2001) ("District courts have the discretion to dispense with the first-to-file rule where equity so demands.")

In the case at hand, due to the fact that the Northern District of Illinois action is already in the midst of discovery, and because the Northern District of Illinois is a more convenient forum for the parties and witnesses involved in this case, efficiency concerns—which undergird each aspect of Rule 1404(a) transfers—demand that the "first to file rule" not be strictly adhered to. Instead, for the reasons set forth above, the court will transfer venue over this action to the Northern District of Illinois.

CONCLUSION

For the reasons stated herein, this case will be transferred to the Northern District of Illinois. Accordingly, the plaintiffs' Motion to Certify Class (Docket No. 7), the defendant's Motion to Dismiss (Docket No. 15), the defendant's Motion to Stay Proceedings and to Strike (Docket No. 17), and the plaintiffs' Motion to Commence Discovery (Docket No. 43) will be transferred for determination to the United

States District Court for the Northern District of Illinois.

An appropriate order will enter.

/s/ Aleta A. Trauger
ALETA A. TRAUGER
United States District Judge