No. 22-

IN THE

Supreme Court of the United States

KROGER LIMITED PARTNERSHIP I,

Petitioner,

v.

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 1995,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the universal standard for judgment on the pleadings apply to a Rule 12(c) motion to compel a labor arbitration or does the general principle of presumption in favor of arbitrability mean the federal courts must ignore the Rule 12(c) standards?

2. Do the federal courts lose their authority to decide arbitrability when to do so requires some consideration of the merits of the underlying dispute?

PARTIES TO THE PROCEEDING

Petitioner Kroger Limited Partnership I was the appellee below.

Respondent United Food & Commercial Workers, Local 1995 was the appellant below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to SCR 29.6, Kroger Limited Partnership I makes the following disclosure:

Kroger Limited Partnership is an affiliate of The Kroger Company, which is publicly traded on the New York Stock Exchange under the ticker name, KR.

RELATED CASES

United Food & Commercial Workers, Local 1995 v. The Kroger Co., et al., No. 3:20-cv-00948, U.S. District Court for the Middle District of Tennessee. Judgment entered January 7, 2022.

United Food & Commercial Workers, Local 1995 v. The Kroger Co. et al., No. 22-5085, U.S. Court of Appeals for the Sixth Circuit. Judgment entered October 14, 2022. Order denying petition for *en banc* rehearing entered December 19, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 51 F. 4th 197 and reproduced at Appendix ("App.") 1a – 33a. The judgment of the District Court dismissing The Kroger Co. without prejudice is unpublished but available at 2022 U.S. Dist. LEXIS 3479 and is reproduced at App. 34a – 48a. The judgment of the District Court granting United Food & Commercial Workers, Local 1995's motion for judgment on the pleadings is unpublished but available at 2021 U.S. Dist. LEXIS 189756 and is reproduced at App. 50 a-52a.

JURISDICTION

The Sixth Circuit filed its published decision on October 14, 2022. The court denied Petitioner's request for rehearing *en banc* on December 19, 2022. App. 77a-78a. This petition is due on March 20, 2023. U.S. Sup. Ct. R. 13. This petition is thus timely, and the Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent brought this case under Section 301 of Labor Management Relations Act of 1947, 29 U.S.C. § 185, which states:

(a)Venue, amount, and citizenship

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

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

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

(c)Jurisdiction

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

(d)Service of process

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

(e)Determination of question of agency

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

The Union moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), which states:

(c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

STATEMENT OF THE CASE

This case is about whether a collective bargaining agreement between Respondent, United Food and Commercial Workers Union, Local 1995, (the "Union") and Petitioner Kroger Limited Partnership I ("KLPI") requires arbitration where the Union seeks to expand the representational scope of the collective bargaining agreement to cover a separate entity's workforce that performs work expressly excluded from the collective bargaining agreement's coverage. The procedural posture

requires the Court to take KLPI's version of the facts as true. App. 23a.

1. KLPI is a subsidiary of The Kroger Co. ("Kroger"). App. 2a. In part, KLPI operates and manages Kroger-branded retail stores in Tennessee. *Id.* It has its own collective bargaining agreement with the Union. *Id.* The Union represents "all full-time and part-time employees" in KLPI's stores that are located in the "Nashville Division," which includes Nashville, Tennessee and the greater Knoxville, Tennessee area. *Id.* The collective bargaining agreement covers employees who perform services connected to handling merchandise "for sale" in KLPI's "retail establishments." *Id.*

   In mid-2020, The Kroger Co.'s "Supply Chain Division" opened a Knoxville Local Fulfillment Center. App. 3a. This facility operated as a warehouse. *Id.* After the warehouse opened, the Union filed a grievance with KLPI, claiming that the Union represented workers at the facility. *Id.* In its grievance, the Union claimed that employees who pick and deliver orders at the Knoxville Fulfillment Center were performing "fundamental[ly] bargaining unit work." *Id.* The Union attempted to liken these workers to unionized retail-store employees at KLPI's grocery stores and demanded that KLPI extend union benefits to these warehouse workers. *Id.*

   Because the Knoxville Local Fulfillment Center is merely a warehouse, not a grocery or other

"retail" store and because KLPI did not operate and had no relationship with the employees at the facility, KLPI refused to process the grievance. *Id.* The facility was not a "store covered by the collective bargaining agreement." *Id.*

The Union then pursued arbitration under Article VII § D of the CBA, which governs grievances that concern "the interpretation or application" of the collective bargaining agreement. App. 3a-4a. KLPI refused to arbitrate the grievance for the same reasons that it refused to process the Union's grievance. *Id.*

2. The Union sued The Kroger Co. to compel arbitration under § 301 of the Labor Management Relations Act and, in its amended complaint, added KLPI as a defendant. App. 4a. After both defendants timely answered, the Union moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). *Id.* The Union objected to KLPI's refusal to bind the non-KLPI employees of the Knoxville Local Fulfillment Center to the Nashville Division's collective bargaining agreement. App. 22a. KLPI argued in response that the Union cannot compel KLPI to arbitrate the grievance through an arbitration agreement contained in the parties' collective bargaining agreement because the collective bargaining agreement applies only to "employees" of KLPI employed "in the stores" of KLPI, and because KLPI denied a relationship with Fulfillment Center employees in its answer. *Id.*

3. The U.S. District Court for the Middle District of Tennessee held that the Union's claim was arbitrable under the collective bargaining agreement against KLPI. App. 4a. The District Court found that, because the Union sought only arbitration, and not any other type of "judgment," the Fed. R. Civ. P. 12(c) standard was skewed heavily in favor of the Union. App. 62a. Citing federal law's "heavy preference" for arbitration, the district court stated that it could not say with assurance that the only reasonable interpretation of the collective bargaining agreement excluded the grievance from arbitration. App. 64a. The district court rejected KLPI's argument that the merits are bound up with the question of arbitrability, stating that the "question of arbitrability is easily separable from the merits of the claim." App. 72a. The district court also rejected KLPI's argument that the Union's claim is preempted by the NLRB's jurisdiction. App. 73a. The district court deferred entering judgment at this time because the court decided that judgment was warranted against one, but not both, defendants. App. 75a.

   On January 7, 2022, the district court dismissed The Kroger Co. without prejudice. App. 48a. The court entered judgment on the pleadings against KLPI and compelled KLPI to arbitrate the grievance. *Id.*

   The Sixth Circuit Court of Appeals affirmed, agreeing with the district court that the Union's grievance fell within the substantive scope of the

arbitration agreement. App. 7a. The Court of Appeals applied the presumption of arbitrability to reach this conclusion. *Id.* The Sixth Circuit stated that no collective bargaining agreement provisions exclude the grievance from arbitration and that KLPI did not present "forceful evidence of a purpose to exclude the claim from arbitration." App. 8a. The Sixth Circuit agreed that the issue of arbitrability and the merits of the lawsuit can be separated. App. 10a. The Sixth Circuit also agreed with the district court's rejection of KLPI's jurisdictional argument. App. 21a.

Judge Larson filed a thorough dissent. App. 22a. She noted that, taking KLPI's claims as true, the Union's motion for judgment on the pleadings fails. *Id.* Specifically, taking as false the Union's assertion that the Fulfillment Center workers are KLPI "employees" working in a KLPI "store" such that the arbitration in the collective bargaining agreement applies, KLPI's denials prevail and judgment on the pleadings is improper. App. 24a. Judge Larson noted that the presumption of arbitrability does not change this result. App. 25a. Further, Judge Larson argued that this Court's decision in *Litton Financial Printing Division v. National Labor Relations Board*, 501 U.S. 190, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991), directed courts to interpret the underlying agreement when necessary to fulfill the duty to decide questions of arbitrability, even when that also means deciding the merits of the case. App. 28a. Judge Larson noted that the majority opinion wrongfully assumed that

Litton applied only to cases involving expired bargaining agreements, even though "a wealth of caselaw supports the conclusion that *Litton* requires courts to interpret an agreement when necessary to determine its scope, even if doing so incidentally decides the merits". App. 29a.

On December 19, 2022, the Sixth Circuit denied KLPI's petition for rehearing *en banc*, finding that the issues raised in the petition were fully considered already. App. 77a-78a.

REASONS FOR GRANTING REVIEW

This Court's review is warranted for the following reasons. First, in ruling that the general presumption in favor of arbitrability means that the federal courts can ignore the universal pleading requirements under the Rule 12(c) of the federal Rules of Civil Procedure, the decision below conflicts with the Court's precedents and splits with other circuit courts which have adhered to the Court's precedents. Second, the ruling below, in direct conflict with this Court's precedent, excuses the federal courts from their responsibility to decide the arbitrability of a labor dispute. This Court has ruled that federal courts must decide arbitrability even when to do so requires some consideration of the merits of the underlying dispute. In ruling otherwise, the Sixth Circuit decision also splits with other circuit courts, all of which have followed the Court's precedent. Both holdings of the decision below have the effect – without precedent – of restricting the federal courts' primary role in deciding arbitrability of labor disputes. Finally, this case provides an excellent vehicle because the decision below is a final judgment

on a clean set of facts on a motion for judgment on the pleadings under Rule 12(c).

The resulting effect of the decision below would be far reaching. The decision will encourage unions to compel arbitration against unrelated entities who are not parties to their collective bargaining agreement, and to force arbitration on the pleadings alone simply because the union has alleged in its complaint that such are related. The use of the presumption of arbitrability in this way is an unwarranted abandonment of the federal courts 'duty to decide arbitrability and the abandonment of the long established rules of pleading and Rule 12(c). If it is left to stand, the Panel's decision could encourage any party to an arbitration agreement to attempt to compel arbitration against unrelated entities in the hopes that an arbitrator (who is not bound by established principles of contract interpretation or precedent) will expand the labor agreement well beyond what the parties clearly intended. Moreover, since arbitration is now used in so many areas in addition to labor, it is important that federal courts not allow misuse and misapplication of the general presumption in favor of arbitrability.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT HOLDING THAT THE PRESUMPTION OF ARBITRABILITY DOES NOT AFFECT RULE 12(c) PLEADING REQUIREMENTS.

The Sixth Circuit Court of Appeals inexcusably ignored this Court's precedent when it incorrectly held that the presumption of arbitrability trumps well-established 12(c) standards. This Court has established

that Rule 12(c) requires that facts denied by an answer to a complaint must be taken as false when assessing a plaintiff's Rule 12(c) motion. *Beal v. Mo. Pac. R.R. Corp.*, 312 U.S. 45, 51 (1941). Several courts, unlike the Sixth Circuit in this case, have properly applied this standard. *See e.g. Dist. No. 1., Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n v. Liberty Mar. Corp.*, 933 F.3d 751, 761, 443 U.S. App. D.C. 29 (D.C. Cir. 2019) (labor arbitration); *Local 827, IBEW v. Verizon New Jersey, Inc.*, 458 F.3d 305 (3d Cir. Aug. 17, 2006) (labor arbitration). If the presumption of arbitrability were applied consistent with the Sixth Circuit's opinion, the established 12(c) standard would be effectively nullified.

Applying this Court's established 12(c) principles, this case is quite simple. In its answer, KLPI denied any relationship with the employees of the Knoxville Local Fulfillment Center. This alone refutes the allegations in the Complaint regarding KLPI's relationship with Fulfillment Center employees for purposes of a Rule 12(c) motion. In addition to its denial, KLPI affirmatively stated that it had no relationship to the Fulfillment Center employees in a letter attached to the Complaint. Because the lower courts were required to take this statement as true in the Rule 12(c) context, KLPI has no relationship with Fulfillment Center employees. This is true regardless of what the Union alleged in the Complaint, because these allegations must be taken as false when KLPI denied them.

With this in mind, it is obvious that the parties' bargaining agreement and its arbitration provision do not apply to the Union's grievance relating to Knoxville Local Fulfillment Center employees. Specifically, the bargaining

agreement applies only to KLPI "employees" employed in KLPI-operated "stores," and not to the employees of the non-retail Knoxville warehouse. Applying the proper standard, the proper result is clear. The District Court's judgment on the pleadings for the Union was improper, as was the Sixth Circuit's affirming this judgment.

The Sixth Circuit majority opinion attempts to ignore KLPI's denials in its answer and improperly puts the burden on KLPI to make allegations about the true employer of the Fulfillment Center employees, Vitacost.com, in its answer. But this Court's established precedent requires denials alone to controvert facts of the complaint for a Rule 12(c) motion. And, regardless, KLPI did "allege" its lack of relationship with Fulfillment Center employees in the letter attached to the amended Complaint.

The presumption of arbitrability does not change this result. The presumption should only be applied after the court applies the language of the arbitration agreement to the facts. *See Liberty Mar. Corp.*, 933 F.3d at 763. With the facts properly construed in KLPI's favor under the 12(c) standard, it is clear that the dispute falls outside of the scope of the bargaining agreement, and that the Sixth Circuit erroneously held otherwise.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT; FEDERAL COURTS MUST DECIDE ARBITRABILITY EVEN IF DOING SO REQUIRES CONSIDERATION OF THE MERITS.

By refusing to consider the merits of this case when doing so is necessary to determine the arbitrability in this

case, the Sixth Circuit misapplied this Court's precedent that has been on the books for decades. This Court, in *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991), ruled that federal courts must decide whether the parties agreed to arbitrate a dispute and that courts "cannot avoid that duty because [to do so] requires us to interpret a provision of the bargaining agreement" 501 U.S. at 209. This is exactly the situation the Sixth Circuit faced.

KLPI denied that it employed the Knoxville Local Fulfillment Center workers. Because of this, KLPI has no duty to arbitrate. Similarly, because there is no relationship between the Fulfillment Center workers and KLPI, the Union's grievance does not fall within the scope of the bargaining agreement. The question of arbitrability is inextricably intertwined with the merits of this case, so under *Litton* the federal court must decide the issue rather than abstaining and leaving it instead for the arbitrator to decide.

The Sixth Circuit majority groundlessly limits *Litton* to that case's specific facts, saying that it only applies when the question of arbitrability involves the interpretation and effect of the arbitration clause after contract expiration. The Sixth Circuit opinion not only conflicts with *Litton* itself, but also authoritative decisions from five other Courts of Appeal which have applied *Litton*. The decision below also creates a split among the circuit courts on this issue.

The Eighth Circuit, expressly following *Litton*, has held that a federal court must resolve the disputed issue of whether a discharged individual was an employee (and therefore covered by the bargaining agreement)

or a supervisor (when he would not be covered) to fulfill its duty to decide arbitrability. App. 12a. *International Brotherhood of Electrical Workers v. GKN Aerospace North America, Inc.,* 431 F. 3d 624 (8th Cir. 2005). The court had to decide some of the underlying grievance's merits to fulfill this duty. *Id. See also Newspaper Guild of St. Louis, Local 36047, TNG-CWA v. St. Louis Post Dispatch, LLC*, 641 F. 3d 263 (8th Cir. 2011).

Similarly the Tenth Circuit, relying on *Litton*, stated "[T]he Supreme Court tells us, the Court's duty to determine whether the party intended the dispute to be arbitrable trumps its duty to avoid reaching the merits." *Communications Workers of America v. Avaya, Inc.*, 693 F.3d 1295, 1300 (10th Cir. 2012). The Tenth Circuit said that the district court had to decide whether the individuals involved in the grievance were engineers who were covered by the bargaining agreement or managers who were not. This was true even if the determination would involve consideration of the merits.

The Third Circuit agrees. It ruled that the federal courts, and not the arbitrator, had to decide whether a bargaining agreement applied to a new store when resolution of this issue was required to decide arbitrability, even when the issue also included consideration of the grievance's merits. *Rite Aid of Pennsylvania, Inc. v. United Food & Commercial Workers Union, Local 1776*, 595 F.3d 128 (3d Cir. 2010). The Seventh Circuit has similarly stated that "the rule that the courts must decide arbitrator's jurisdiction takes precedence over the rule that courts are not to decide the merits of the underlying dispute," and "[i]f the court must, to decide the arbitrability issue, rule on the merits, so be it." *Indep.*

Lift Truck Builders Union v. Hyster Co., 2 F 3d 233, 236 (7th Cir. 1993). The Fourth Circuit has also acknowledged that "courts are permitted some latitude to interpret provisions of a bargaining agreement that impact the underlying merits of the dispute when it is necessary to determine whether the parties agreed to arbitrate the dispute." *United Steel Workers Local 850L v. Cont'l Tire North Am., Inc.*, 568 F.3d 158, 165 (4th Cir. 2009) (citing *Litton*, 501 U.S. at 208-09).

If the Sixth Circuit had correctly applied *Litton* like these other circuits have done, it would have reached a different, and correct, result in this case.

III. THIS CASE IS THE PROPER VEHICLE.

The questions presented are squarely implicated in the Sixth Circuit's published decision, with no vehicle problems. As the Sixth Circuit's opinion demonstrates, the sole issue below is whether the Union's grievance falls within the scope of the arbitration agreement. The Sixth Circuit addressed the issue of whether the presumption of arbitrability applies to a 12(c) motion and whether courts should consider the merits of the dispute when necessary to determine arbitrability. The questions presented are outcome-dispositive, and this Court's intervention will conclusively resolve not just the question presented, but the entire case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED OCTOBER 14, 2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-5085

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 1995,

Plaintiff-Appellee,

v.

KROGER CO.,

Defendant,

KROGER LIMITED PARTNERSHIP I,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:20-cv-00948—Eli J. Richardson, District Judge.

October 14, 2022, Decided
October 14, 2022, Filed

Before: SILER, McKEAGUE, and LARSEN, Circuit Judges. SILER, J., delivered the opinion of the court in which McKEAGUE, J., joined. LARSEN, J., delivered a separate dissenting opinion.

Appendix A

OPINION

SILER, Circuit Judge. Kroger Limited Partnership I appeals the district court's order granting the motion for judgment on the pleadings brought by United Food & Commercial Workers, Local 1995. For the following reasons, we **AFFIRM**.

I.

This is an arbitration dispute between Kroger Limited Partnership I ("KLPI") and United Food & Commercial Workers, Local 1995 (the "Union"). KLPI operates Kroger grocery stores throughout Tennessee. It is a separate entity within "The Kroger Company" family and has its own collective bargaining agreement ("CBA") with the Union. *Id.* For several years, the Union has represented "all full-time and part-time employees" in KLPI's stores that are located in the "Nashville Division." The Nashville Division includes Nashville, Tennessee, and the greater Knoxville, Tennessee, area. Unionized employees perform any services connected to handling merchandise "for sale" in KLPI's "retail establishments[.]"

Over several years, KLPI has operated different retail-store configurations within the Nashville Division. They included rural stores, urban stores, small stores, large stores, stores with and without gas stations, and so-called "Marketplace" stores with large non-grocery departments. Through a series of CBAs, the Union has represented all retail-store employees working in these stores. And the Union has immediately represented the

employees in any new store that KLPI opened in the Nashville Division.

After several years of cooperation, KLPI and the Union found themselves at an impasse. In mid-2020, the "Supply Chain Division" of The Kroger Company opened a warehouse called the Knoxville Local Fulfillment Center. Soon after the warehouse opened, the Union filed a grievance with The Kroger Company, claiming that the Union represented employees at that facility—which the Union called the "Knoxville eCommerce Store." In its grievance, the Union described how employees at the warehouse fill orders placed not by Kroger grocery stores, but by Walgreens pharmacies. The Union complained that employees who pick and deliver these orders for Kroger's so-called "customer" were performing "fundamental[ly] bargaining[-]unit work." The Union called these employees "pickers" and "drivers" and likened them to unionized retail-store employees at KLPI's grocery stores. The Union therefore demanded The Kroger Company and KLPI extend union benefits to the "pickers" and "drivers."

KLPI refused to process the Union's grievance for itself or the Kroger Company. It claimed that the Knoxville Local Fulfillment Center is a warehouse, not a grocery store, and that it is part of The Kroger Company's "supply chain network," which is independent from retail stores operated by KLPI. KLPI also explained that it has no relationship with employees at the facility and, consequently, that the facility is not a "store covered by the CBA." In response, the Union pursued arbitration under Article VII § D of their CBA, which governs

grievances that concern "the interpretation or application of this [CBA]." KLPI, however, refused to arbitrate the grievance.

The Union sued The Kroger Company to compel arbitration and, in its amended complaint, added KLPI as a defendant. The Kroger Company and KLPI answered. In response, the Union moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The district court determined the Union's claim was arbitrable under the CBA but denied the motion as to The Kroger Company because the answer had denied The Kroger Company was a party to the agreement. The district court granted the motion as to KLPI, however, and ordered arbitration.[1] KLPI now appeals the district court's order granting in part the Union's motion for judgment on the pleadings.

II.

We review de novo a district court's order granting a Rule 12(c) motion for judgment on the pleadings. *Anders v. Cuevas*, 984 F.3d 1166, 1174 (6th Cir. 2021). Under Rule 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). We assess such motions "using the same standard that applies to a review of a motion to dismiss under Rule 12(b)(6)," *Moderwell v. Cuyahoga Cnty.*, 997 F.3d 653, 659 (6th Cir. 2021) (citation

1. Upon the Union's subsequent motion, the district court dismissed The Kroger Company without prejudice. That order is not on appeal.

omitted)—that is, with one caveat. When the plaintiff, as opposed to the defendant, moves for judgment on the pleadings, instead of asking whether the "complaint . . . contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citation omitted), we ask "whether the plaintiff's petition, stripped of those allegations which are denied by the defendant's answer, would leave the petition stating a cause of action against the defendant." 61A Am. Jur. 2d *Pleading* § 497; *see also Bass v. Hoagland*, 172 F.2d 205, 207 (5th Cir. 1949) ("[T]he fact allegations of the answer are to be taken as true, but those of the complaint are taken as true only where and to the extent that they do not conflict with those of the answer.").

With that one caveat, the same rules apply. We may consider exhibits that are referenced in the complaint and central to its claims. *See Brent v. Wayne Cnty. Dep't of Hum. Servs.*, 901 F.3d 656, 695 (6th Cir. 2018) (citing *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008)). We will not blindly accept legal conclusions nor draw unwarranted factual inferences from either the complaint or the answer. *See Barber v. Charter Twp. of Springfield*, 31 F.4th 382, 387 (6th Cir. 2022) (citation omitted). After we accept the answer's well-pleaded allegations as true and construe the pleadings and exhibits in a light most favorable to the defendant, "the motion may be granted only if the [plaintiff] is nevertheless clearly entitled to judgment." *S. Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973); *see also Murray v. Ohio Adult Parole Auth.*, 916

F.2d 713, at *2 [published in full-text format at 1990 U.S. App. LEXIS 18358] (6th Cir. 1990) (Table) (citing *Nat'l Metro. Bank v. United States*, 323 U.S. 454, 456-57, 65 S. Ct. 354, 89 L. Ed. 383 (1945)).

III.

A. Arbitration Agreement

Our consideration of the Union's arbitration claim has a settled framework. *See AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). We "engage in a limited review" to determine whether the grievance is arbitrable. *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 624 (6th Cir. 2003). To do so, we must find "a valid agreement to arbitrate" and determine whether the grievance "falls within the substantive scope of that agreement." *Id.* The parties agree Article VII § D of their CBA includes a mandatory arbitration agreement, which governs grievances that concern "the interpretation or application of this [CBA]." While the district court passingly expressed its concern that this section only permitted, as opposed to mandated, arbitration, the parties have not raised this concern on appeal. So we need only determine whether the Union's grievance falls within the substantive scope of their arbitration agreement. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) ("[C]ourts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement nor . . . its enforceability or applicability to the dispute is in

issue. *Where a party contests* either or both matters, the court must resolve the disagreement." (emphasis added) (internal quotation and citations omitted)).

The Union's grievance clearly falls within the substantive scope of the arbitration agreement. In its grievance, the Union asserted that KLPI must recognize the Union as the employee representative at the Knoxville Local Fulfillment Center. The grievance is based on the Union's allegation that the Knoxville Local Fulfillment Center is a "store[] of the Kroger Company, Nashville Division," under Article 3 § A of the CBA. According to that section, this would establish the Union as the "sole and exclusive bargaining agent for all full-time and part-time employees" at the Knoxville Local Fulfillment Center. The Union's grievance thus falls within the scope of arbitration agreement because it concerns the "interpretation or application of this [CBA]"—that is, Article 3 § A of the CBA.

As it falls within the scope of the arbitration agreement, we apply the presumption of arbitrability to the grievance. *AT&T Techs., Inc.*, 475 U.S. at 650. This presumption requires us to "resolve any doubts in favor of arbitration" and prohibits denying an order to arbitrate "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am. v. Mead Corp., Fine Paper Div.*, 21 F.3d 128, 131 (6th Cir. 1994) (citing *AT&T Techs., Inc.*, 475 U.S. at 648-51). This presumption is "particularly applicable" in the case of a "broad" arbitration agreement, like the one here.

See, e.g., United Steelworkers of Am. v. Cooper Tire & Rubber Co., 474 F.3d 271, 279 (6th Cir. 2007) (applying the presumption of arbitrability to an arbitration agreement covering "any dispute . . . as to the interpretation or application of this Agreement."). To rebut the presumption of arbitrability, KLPI must identify either an "express provision excluding [the] . . . grievance from arbitration" or "forceful evidence of a purpose to exclude the claim from arbitration." *AT&T Techs., Inc.*, 475 U.S. at 650 (citation omitted). KLPI can do neither.

i. Express Exclusion

KLPI contends that three provisions in the CBA expressly exclude the Union's grievance from arbitration. For example, KLPI notes that Article 3 § A—the clause relied upon by the Union—only establishes the Union as the employee representative for "The Kroger Company, Nashville Division," *i.e.*, KLPI's grocery stores. This provision excludes the Union's grievance from arbitration, KLPI believes, because employees at the Knoxville Local Fulfillment Center are employed by The Kroger "Supply Chain Division"—not KLPI. But the Union argues that, if The Kroger "Supply Chain Division" employs the individuals, then KLPI breached Article 3 § A of the CBA when The Kroger Company surreptitiously opened a warehouse through the "Supply Chain Division," instead of a grocery "store" through KLPI. Put another way, the grievance assumes Article 3 § A *required* KLPI to employ the warehouse employees.

KLPI also points to the provision limiting "bargaining[-]unit work" to services related to selling products "in the Employer's retail establishments." This provision equally excludes the Union's grievance, KLPI argues, because the Knoxville Local Fulfillment Center is a warehouse, not a "retail establishment." Third, and relatedly, KLPI points to the provision that permits only union members to stock products that were distributed "through a Kroger distribution system." KLPI claims this provision implies that employees of the "Kroger distribution system" are not covered by the CBA, and consequently the Union's grievance is excluded from arbitration because the warehouse employees it seeks to represent are a part of that "distribution system." The Union agrees that the CBA does not cover warehouses. Its argument is that the Fulfillment Center is "the latest iteration of a Kroger store because it receives Kroger product from the Kroger supply chain, stocks Kroger product on its shelves, and then sells Kroger product to the public -- albeit to different individual Walgreens stores."

But none of these provisions KLPI points to "clearly and unambiguously" exclude the Union's grievance from arbitration. *Bakery, Confectionery, Tobacco Workers and Grain Millers Int'l Union AFL-CIO v. Kellogg Co.*, 904 F.3d 435, 444 (6th Cir. 2018) (cleaned up) (citation omitted). And, because "we cannot say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, [we] must resolve any doubts in favor of arbitration." *Id.* In fact, far from expressly excluding the grievance, these three provisions—according to KLPI—resolve it. And

so the grievance necessarily raises a dispute over the "interpretation or application of this [CBA]." In other words, the provisions on which KLPI relies go to the merits of the Union's grievance, not the threshold question of whether the contract requires the dispute to be resolved through arbitration.

KLPI believes that were we to apply any of these provisions to the Union's claim, we would see that KLPI never agreed to arbitrate such a baseless grievance. KLPI points to *United Steelworkers of Am., Loc. No. 1617 v. Gen. Fireproofing Co.*, 464 F.2d 726 (6th Cir. 1972), where we interpreted the parties' CBA before we denied an order to arbitrate. *Id.* at 729. There, the union's grievance concerned the discharge of a supervisory employee. *Id.* Yet the parties' arbitration clause only covered disputes "between an employee and the Company," and the CBA defined "employee" to exclude "supervisors." *Id.* Because of this, we found "by its terms[,] [the CBA] does not impose upon the Company any duty to arbitrate a dispute concerning discharge of a supervisor." *Id.* But in that case, the CBA did not "permit the possible inference" that a supervisor was covered as an "employee," so we simply relied on the "express exclusion" of a supervisor's grievance from arbitration. *See id.* KLPI has not identified here a similar exclusion of the Union's grievance, and the CBA does not prevent the possible inference that the fulfillment center and the individuals working there are covered by the CBA.[2]

2. KLPI also directs us to *Rite Aid of Pennsylvania, Inc. v. United Food & Com. Workers Union, Loc. 1776*, 595 F.3d 128 (3d Cir. 2010), where a union brought a similar grievance, and the

ii. Forceful Evidence

KLPI also contends that it has presented "forceful evidence of a purpose to exclude the claim from arbitration[.]" *AT&T Techs., Inc.*, 475 U.S. at 650 (citation omitted). It maintains discovery would have shown that the CBA does not apply to the Knoxville Local Fulfillment Center and resultantly that KLPI never agreed to arbitrate a grievance complaining that it did. So, KLPI argues, the district court wrongly granted the Union's motion before allowing discovery. We reject this argument as well.

KLPI's so-called "forceful evidence" primarily comes in the form of arguments by its attorneys. KLPI's attorneys spent several pages in the response below—and on appeal before us—arguing that the CBA does

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Third Circuit refused to order arbitration because the claim did not "rais[e] a legitimate question of the CBA's interpretation." *Id.* at 132. In that case, Rite Aid had denied the union access to Rite Aid's newly acquired drugstores, where the union sought to solicit membership. *Id.* at 130. The parties' CBA prohibited "any grievance that does not involve the *interpretation of any provision of this Agreement*;" *id.*, so the union brought a "store-access" grievance under three provisions of the CBA. *Id.* The Third Circuit thoroughly interpreted each of those provisions before deciding that the "store-access grievance does not fall within the scope of the CBA's arbitration clause." *Id.* at 136. We do not think such a thorough interpretation was warranted in that case. Instead, for the reasons outlined thoroughly in the *Rite Aid* dissent, we think that the Third Circuit should have saved the thorough interpretation for an arbitrator, as the parties agreed there, and similarly agreed here. *See id.* at 137-51 (Ambro, J., dissenting).

not apply to the Knoxville Fulfillment Center because a company called "Vitacost.com" employs all the warehouse employees there and that the "Supply Chain Division," which operates distribution warehouse for The Kroger Company, has an entirely distinct "labor structure" from KPLI's grocery stores. But KLPI did not include these "allegations" in its answer. *Bates v. Green Farms Condo. Ass'n*, 958 F.3d 470, 483 (6th Cir. 2020) ("[I]t is black-letter law that . . . a court evaluating a motion for judgment on the pleadings . . . must focus only on the allegations in the pleadings.").

Even were we to consider allegations outside the pleadings, the result would remain the same. The "forceful evidence" KLPI relies upon does not undermine the scope of the CBA's arbitration agreement—it goes to the merits of the Union's grievance. *See United Steelworkers of Am.*, 21 F.3d at 131 ("[W]here the agreement contains an arbitration clause, the court . . . should not deny an order to arbitrate 'unless it may be said with positive assurance that the *arbitration clause* is not susceptible of an interpretation that covers the asserted dispute.'" (citation omitted) (emphasis added). Regardless of whether The Kroger "Supply Chain Division," "Vitacost.com," or any other party is potentially implicated by an arbitrator's decision, the Union is not seeking to enforce the *arbitration agreement* against any of them. Our only inquiry is whether the Union's grievance falls within the scope of the arbitration agreement, and it clearly does.[3]

3. Here, the dissent believes we failed to credit the answer's allegation that KLPI has no employment relationship with employees at the Knoxville Local Fulfillment Center. Not so.

Although we ignored KLPI's arguments about *who* employs the warehouse employees, we accepted the allegation that *KLPI does not*—Rule 12(c) thus remains intact. Regardless, the thrust of the dissent's disagreement is the effect of this allegation on the question of arbitrability. The dissent reasons that if KLPI did not hire the warehouse employees then the warehouse could not be a "store" governed by the CBA. The dissent arrives at this conclusion by interpreting the word "store" in Article 3 § A of the CBA, finding warrant to do so in *Litton Financial Printing Division v. National Labor Relations Board*, 501 U.S. 190, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991) and extra-circuit caselaw purporting to value the duty to determine arbitrability higher than the duty to avoid deciding the merits when the issues are intertwined. And having determined that this CBA would not govern the warehouse, the dissent concludes the Union's grievance is not arbitrable—incidentally, deciding the merits of the Union's grievance en route. But even assuming *Litton* required us to define what a "store" is (or more specifically, isn't), *but see Litton*, 501 U.S. at 209 ("[W]e refuse to apply [the] presumption [of arbitrability] wholesale *in the context of an expired bargaining agreement*[.]" (emphasis added)), we need not abandon the presumption of arbitrability today: KLPI's allegation does not inescapably defeat this grievance, such that it no longer properly "concerns the interpretation or application of *this* [CBA]." *See United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567-68, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960) ("The function of the court . . . is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."). The Union's grievance in essence alleges that KLPI breached Article 3 § A of the CBA when The Kroger Company surreptitiously opened a warehouse through the "Supply Chain Division," instead of a grocery "store" through KLPI. Put another way, the grievance assumes Article 3 § A *required* KLPI to employ the warehouse employees. So unlike a grievance seeking to govern a Target in Nashville (thus, clearly having nothing to do with *this* CBA), the

Because the Union's grievance falls within the scope of the CBA's arbitration agreement, we affirm the district court's decision to compel arbitration.

B. Jurisdiction

KLPI lastly raises a jurisdictional argument. It argues any order enforcing the arbitration agreement invades the jurisdiction of the National Labor Relations Board. KLPI believes the Union's grievance arises solely under the National Labor Relations Act of 1935, and so the arbitrator lacks authority to resolve it. KLPI is wrong.

The National Labor Relations Board (the "Board") administers the National Labor Relations Act of 1935 (the "NLRA"). *See* 29 U.S.C. § 153. Section 7 of the NLRA "guarantees workers 'the right to self-organization[] [and] to form, join, or assist labor organizations." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624, 200 L. Ed. 2d 889 (2018) (citing 29 U.S.C. § 157). When a Union brings a claim "arguably subject to [section] 7 . . . of the

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grievance still concerns the "interpretation or application of *this* [CBA]" because it alleges *this* CBA *required* the warehouse to be a "store"—even if the Union's grievance fails because KLPI's allegation proves the warehouse is not. While the dissent correctly implies that The Kroger Company—not KLPI—presumably is responsible for opening a warehouse instead of a grocery store, an arbitrator must still interpret *this* CBA to dispose of the Union's arguably "frivolous," yet arbitrable, grievance. *AT&T Techs., Inc.*, 475 U.S. at 649. So the merits are not intertwined because we need not determine whether the Knoxville Local Fulfillment Center is governed by the CBA to conclude the parties agreed to arbitrate that question.

[NLRA]," we must yield to the Board's expertise and decline jurisdiction. *San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon*, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959). Nevertheless, Section 301(a) of the Labor Management Relations Act of 1947 ("LMRA") grants federal courts "jurisdiction over contractual disputes between employers and unions." *DiPonio Const. Co. v. Int'l Union of Bricklayers*, 687 F.3d 744, 749 (6th Cir. 2012); *see also* 29 U.S.C. § 185(a)). And this includes the jurisdiction to "grant the union specific enforcement of an arbitration clause[.]" *Int'l Bhd. of Elec. Workers, Loc. 71 v. Trafftech, Inc.*, 461 F.3d 690, 694 (6th Cir. 2006) (citation omitted). So, as we've long recognized, federal courts and the Board "have concurrent jurisdiction over some disputes." *DiPonio Const. Co.*, 687 F.3d at 749.

KLPI believes we lack jurisdiction nonetheless because the Union's arbitration claim is "primarily representational." Although we share jurisdiction with the Board in some instances, we do not enjoy concurrent jurisdiction with the Board over "primarily representational" claims. *Trafftech, Inc.*, 461 F.3d at 695 (citation omitted). A claim is "primarily representational" in one of two circumstances: (1) where the Board has already exercised jurisdiction over it and is either considering the matter or has already decided it, or (2) where the claim forces an "initial decision in the representation area." *Id.* (cleaned up). As the Board has never exercised jurisdiction over the Union's grievance, we must decide whether the arbitration claim forces a so-called "initial decision in the representation area."

A claim forces an "initial decision in the representation area" where the court or arbitrator *must* resolve a representational question under the NLRA to resolve the grievance. *See DiPonio Const. Co.*, 687 F.3d at 750 (citing *Trafftech, Inc.*, 461 F.3d at 695). For instance, KLPI argues, to resolve the Union's grievance, the arbitrator *must* decide whether, under the NLRA, the Union represents employees at the warehouse. Specifically, KLPI believes an arbitrator must determine whether, under the NLRA, employees at KLPI's grocery stores "constitute a single appropriate bargaining unit" with employees at the Knoxville Local Fulfillment Center.

For its part, the Union characterizes its grievance as a breach-of-contract claim under section 301(a) of the LMRA. The Union contends its grievance only raises "contractual" issues, *i.e.*, whether, by its terms, the CBA applies to employees at the Knoxville Local Fulfillment Center. If the Union is correct, we may retain jurisdiction. While it won't suffice to "simply refer[] to the claim as a 'breach of contract,'" we retain concurrent jurisdiction over claims that raise matters "primarily of contract interpretation," even if they "*potentially* implicat[e] representational issues." *Air Prods. & Chems., Inc.*, 300 F.3d at 672, 675 (emphasis added). Such circumstances can arise where the employer's conduct constitutes an unfair labor practice *and* a breach of the CBA. *DiPonio Const. Co.*, 687 F.3d at 749 (citation omitted). In such a circumstance, our concurrent jurisdiction provides "an independent forum for resolution of representational or contractual issues[.]" *Air Prods. & Chems., Inc.*, 300 F.3d at 673.

So is the Union's claim "primarily representational" or contractual? As evidence that it is contractual, the Union likens its grievance to the one in *Air Products & Chemicals, Inc*, where we exercised jurisdiction and ordered arbitration. 300 F.3d at 669. There, the Union submitted a grievance to exercise the employees' "seniority rights" to work at a newly opened facility. The employer dismissed the grievance, and the Union moved to compel arbitration. *Id.* at 669-70. We characterized the arbitration claim as a contractual claim because the Union sought to arbitrate a grievance grounded in the CBA; the union had relied on the CBA's provision granting "seniority rights" to certain employees who worked at older facilities. *Id.* at 675-76. Unlike the situation here, however, the parties in *Air Products & Chemicals, Inc.* never disputed whether the union *represented* those employees; they only disputed whether the CBA governed them at a new facility. *Id.* at 674. But the parties here dispute not only whether the CBA applies to the Knoxville Local Fulfillment Center but also whether the Union *represents* employees at the warehouse.

Nonetheless, this arbitration claim is contractual because the Union's grievance arises under the CBA—particularly under, what's commonly called, a "new-store" clause. A "new-store" clause provides for "employer recognition of a union as bargaining agent for its employees in the 'employer's present and future retail food store situated within the area.'" *Emp. Coordinator Labor Relations*, § 47:26. Although it does not characterize its grievance in this way, the Union clearly anchors its right to represent the warehouse employees in a "new-store"

clause. The Union relies on the provision in the CBA establishing it as the representative for employees at "*the stores* of the Kroger Company, Nashville Division." The Union argues this language applies to both present and future "stores" and that the Knoxville Local Fulfillment Center is such a "store." Properly construed we have jurisdiction over the Union's arbitration claim because the grievance presents the arbitrator with a matter "primarily of contract interpretation," *i.e.*, whether the CBA includes a "new-store" provision, which KLPI somehow breached. *Air Prods. & Chems., Inc.*, 300 F.3d at 672.

Compare the Union's claim with the one in *DHSC, LLC v. California Nurses Ass'n*, 700 F. App'x 466 (6th Cir. 2017), where enforcing an arbitration agreement would have forced a representational issue. In that case, the union and the employer could not agree on the terms of a CBA; so the union petitioned the Board to hold an election for the employees' representation. *Id.* at 467-68. The employer objected because it claimed the parties agreed exclusively to arbitrate election disputes—as opposed to seeking resolution from the Board. *Id.* at 469. The Board rejected that objection and, after an election, certified the union as the employees' representative. *Id.* at 469-71. Although the employer characterized its subsequent federal arbitration claim as a breach-of-contract claim, we recognized the claim was "primarily representational": for us to have decided whether the parties had an agreement exclusively to arbitrate election disputes, we would have implicitly decided whether the Board had the authority to certify the Union—clearly a representational issue. *See id.* at 473. But unlike the employer in *California Nurses*

Ass'n, KLPI acknowledges that the CBA obligates it to arbitrate the Union's grievances (it just argues not this one). So simply by enforcing *this* arbitration agreement, we will not be determining who the Union represents, including whether it represents the warehouse employees.

Nor does the arbitrator face those concerns presented in *International Brotherhood of Boilermakers v. Olympic Plating Indus., Inc.*, 870 F.2d 1085 (6th Cir. 1989). There, union members voted to disaffiliate with their union, and the employer entered a CBA with a different one. So the original union sued for an injunction to prevent the employer from recognizing the new union. *Id.* at 1087. We determined the claim was "primarily representational" because it required the court to "determine which of the two unions would be the authorized exclusive collective bargaining representative[.]" *Id.* But unlike the court in *Olympic Plating Industries, Inc.*, the arbitrator here need not determine whether, under the NLRA, the Union's bargaining unit includes employees at the Knoxville Local Fulfillment Center; if the Union is correct, the parties have already answered "yes" to that question through the "new-store" clause. *See Cappa v. Wiseman*, 659 F.2d 957, 960 (9th Cir. 1981) ("[P]arties to a collective bargaining arrangement may by agreement define the scope of the bargaining unit."); *see also Hotel Emps., Rest. Emps. Union, Loc. 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992) ("[W]hile the courts may not resolve representational issues, the parties may resolve these issues contractually.").

When all's said and done, a "new-store" clause is simply "interpreted to mean that the employer waives its right to a Board ordered election." *Retail Clerks Int'l Ass'n Local No. 455 v. NLRB*, 510 F.2d 802, 806, 166 U.S. App. D.C. 422 (D.C. Cir. 1975). So while the employer must "accept alternative methods" of proving employee support for the union, the "new-store" employees must still elect the Union. *NLRB. v. Retail Clerks Loc. 588, Retail Clerks Int'l Ass'n*, 587 F.2d 984, 986 n.2 (9th Cir. 1978). For instance, the Union's grievance complained that KLPI "should have contacted the Union prior to opening" the Knoxville Local Fulfillment Center and that KLPI should have "introduced [the employees] to a Representative of the Union." So the Union's grievance is premised on the notion that the Knoxville Local Fulfillment Center is a "new store," and thus the Union had a contractual right to establish majority support at the warehouse. And although KLPI agrees the Union "immediately represents bargaining unit employees" whenever KLPI opens a "new store," the Union alleges that KLPI failed to abide by this prior course of dealing here. *Cf. Rite Aid of Pennsylvania, Inc.*, 595 F.3d at 144-47 (Ambro, J., dissenting) ("[T]he Union seeks the opportunity through arbitration to demonstrate, based on the parties' past practices and/or custom, that they understood the [CBA] to grant the Union the right to enter newly acquired stores [to] solicit[] membership.").

If during arbitration a question remains about whether the warehouse employees wish to be represented by the Union, "[t]he superior authority of the Board may be invoked at any time." *Carey v. Westinghouse Elec. Corp.*,

375 U.S. 261, 272, 84 S. Ct. 401, 11 L. Ed. 2d 320 (1964). The Board does not lose its jurisdiction over this dispute "solely because we enforce the arbitration clause[.]" *Trafftech, Inc.*, 461 F.3d at 697 (citation omitted). So, at this point, any conflict between the arbitrator's decision and the Board's jurisdiction is speculative. *Cf. United Food & Com. Workers Union, Loc. 400 v. Shoppers Food Warehouse Corp.*, 35 F.3d 958, 962 (4th Cir. 1994) (rejecting argument that "the arbitration clause should not be enforced because the arbitrator's decision may conflict with . . . NLRB policy requiring a showing of majority status before [new][-]store clauses are enforced."). We affirm the district court's conclusion that this claim is not preempted by the NLRB.

CONCLUSION

We **AFFIRM** the district court's order granting the Union's motion for judgment on the pleadings and compelling KLPI to arbitrate the Union's grievance.

Appendix A

DISSENT

LARSEN, Circuit Judge, dissenting. The majority concludes that KLPI must arbitrate a dispute over employees whom KLPI says it does not employ, in a warehouse that KLPI says it does not control. Given the procedural posture, we must assume KLPI's claims are true. When we do, the Union's motion for judgment on the pleadings must fail. And the presumption of arbitrability cannot save it. Although I agree with the majority that we have jurisdiction to hear this case, I would reverse the district court's order granting the Union's motion for judgment on the pleadings. I respectfully dissent.

I.

The nature of the grievance here is undisputed: the Union objects to KLPI's refusal to bind employees of the Knoxville Local Fulfillment Center to the Nashville Division's CBA. May the Union compel KLPI to arbitrate that grievance through an arbitration agreement contained in the parties' CBA? KLPI says, "no." The CBA extends only to "employees" of KLPI employed "in the stores" of KLPI. KLPI says that it "has no relationship with employees at the" Fulfillment Center. If this factual claim is true, then surely KLPI can neither "bind" nor "refuse to bind" the Fulfillment Center employees to the CBA. Nor can that unrelated store be a "store covered by the CBA," at least insofar as the CBA governs relations between KLPI and the Union.[4]

4. The district court took as true the Kroger Company's denial that it was also party to the CBA, so it denied the Rule 12(c)

The procedural posture requires us to take KLPI's version of the facts as true. The Union sought to compel arbitration by seeking judgment on the pleadings under Federal Rule of Civil Procedure 12(c). Plaintiffs rarely use the Rule 12(c) procedure, so few cases discuss the standards for reviewing such a motion. But one thing is clear: any factual allegation denied by the answer must be taken as false when assessing a plaintiff's Rule 12(c) motion. *See Dist. No. 1., Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n v. Liberty Mar. Corp.*, 933 F.3d 751, 761, 443 U.S. App. D.C. 29 (D.C. Cir. 2019); *Beal v. Mo. Pac. R.R. Corp.*, 312 U.S. 45, 51, 61 S. Ct. 418, 85 L. Ed. 577 (1941); *see also* 61A Am. Jur. 2d *Pleading* § 497 (2022) ("Allegations of a complaint that are specifically denied by the answer must be eliminated from consideration in determining a plaintiff's motion for judgment on the pleadings."); 61A Am. Jur. 2d *Pleading* § 505 (2022) ("[A]ll allegations of the moving party which have been denied or controverted are taken as false.").

Against that backdrop, this case is straightforward. KLPI denied any relationship with the employees of the Fulfillment Center in the pleadings. KLPI told the Union that it did not "employ, hire, train, direct, supervise, or have any employment relationship with the individuals employed" at the Fulfillment Center. And, in response to

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motion as it related to the parent company, allowing the case to proceed to discovery on that fact question. If Kroger Company is a party to the CBA, and if the employees at the Fulfillment Center have some relationship with Kroger Company, then it is possible that Kroger Company should be made to arbitrate the grievance. But, at the request of the Union, Kroger Company has been dismissed without prejudice.

the complaint's claim that "[e]mployees at the [Fulfillment Center] are employed by [Kroger and KLPI]," KLPI admitted that Kroger's supply chain division employs those persons, but "otherwise denied" the claim. Taking KLPI's statements in the pleadings as true, KLPI has no employment relationship whatsoever with the employees of the Fulfillment Center. And we must strip the contrary facts from the Union's complaint when reviewing its Rule 12(c) motion.

On those facts, the parties' CBA and its accompanying arbitration provision do not govern. The arbitration provision covers any "interpretation or application of the contents of [the CBA]," so anything even plausibly within the four corners of the CBA is arbitrable. *Compare Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459, 470 (6th Cir. 2009), *with United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 410 (5th Cir. 1990). But the CBA extends only to "employees" of KLPI employed "in the stores" of KLPI. The CBA does not cover the employees of the totally unrelated Fulfillment Center any more than it would cover the employees of a newly built Target in Nashville or a Kroger in Hawaii. The Union therefore cannot force KLPI to arbitrate union representation at the Fulfillment Center.

The majority opinion sidesteps the effect of KLPI's denials by suggesting that KLPI should have included "allegations" about the true employer of the Fulfillment Center, vitacost.com, in the answer. Maj. Op. at 8. But denials alone (without further elaboration) are sufficient

to controvert facts of the complaint for a Rule 12(c) motion. *See Liberty Mar. Corp.*, 933 F.3d at 761-63 (reversing the district court's order granting the plaintiff's Rule 12(c) motion to compel arbitration because the court failed to consider the defendant's denials in the answer when determining whether an agreement to arbitrate existed); *see also* 61A Am. Jur. 2d *Pleading* §§ 497, 505. And even if allegations were required, the majority opinion acknowledges that, in a letter attached to the Union's amended complaint, KLPI explained that it had no relationship with the employees at the Fulfillment Center. Maj. Op. at 3. So in ruling on the Union's Rule 12(c) motion, we must take as *false* the Union's assertion that the Fulfillment Center workers are KLPI "employees" working in a KLPI "store." Judgment on the pleadings for the Union was, therefore, improper.

The presumption of arbitrability does not change this result. As the district court noted, the interplay between the Rule 12(c) standards and the presumption is complicated. Here, the Rule 12(c) standards favor KLPI. *See Liberty Mar. Corp.*, 933 F.3d at 760. The presumption favors the Union. *See United Steelworkers of Am. v. Cooper Tire & Rubber Co.*, 474 F.3d 271, 279-80 (6th Cir. 2007) (noting that the presumption is "particularly applicable" to "broad" arbitration provisions, like the one here). But the Rule 12(c) standard does not give way to the presumption of arbitrability. Instead, the presumption goes to work once we apply the agreement to the facts. *See Liberty Mar. Corp.*, 933 F.3d at 763 (recognizing that the presumption of arbitrability comes into play after it is determined that the parties had a contract to arbitrate).

Construing all the facts (including the denials in the answer) in the nonmovant's favor, we ask whether "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1980) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)). When the facts are properly construed in KLPI's favor for the purposes of the Union's Rule 12(c) motion, the dispute here involves employees and a facility wholly unrelated to KLPI. At this stage, then, the dispute is outside of the CBA.

II.

The majority opinion's approach also reveals a disagreement over a broader question: what to do when two principles governing arbitration intersect and conflict. Generally, four principles govern arbitration provisions in collective bargaining agreements. But the principles are also confusing and sometimes competing. *See Commc'n Workers of Am. v. Avaya, Inc.*, 693 F.3d 1295, 1300 (10th Cir. 2012).

First, arbitration is a matter of contract. *AT&T Techs.*, 475 U.S. at 648. A party cannot be required to submit to an arbitration it did not agree to. *Id.* Second, arbitrability is a question for courts to decide unless the parties "clearly and unmistakably" provide otherwise. *Id.* at 649. Third, in deciding arbitrability, a court should not rule on the potential merits of the underlying claims. *Id.* Even

"frivolous" claims should be sent to the arbitrator. *Id.* at 650. Fourth, where there is an arbitration clause, there is a presumption of arbitrability. *Id.* Arbitration is appropriate unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" and "[d]oubts should be resolved in favor of coverage." *Id.* (quoting *Warrior & Gulf Navigation*, 363 U.S. at 582-83). The presumption is especially strong when the arbitration clause is broad. *Id.* Then only the "most forceful evidence" of a purpose to exclude the claim from arbitration will prevail. *Id.* (quoting *Warrior & Gulf*, 363 U.S. at 584-85). And when the provision is so broad that it covers all questions of contract interpretation, the court's role "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960).

The problem arises when these principles collide. In this case, the "merits and its arbitrability are inextricably intertwined." *Rite Aid of Pa., Inc. v. United Food & Com. Workers Union, Loc. 1776*, 595 F.3d 128, 131 (3rd Cir. 2010). If the Fulfillment Center has KLPI employees, then this dispute is clearly arbitrable. And the Union likely wins on the merits, too. If the Fulfillment Center has no relation to KLPI, this dispute is not arbitrable, and the Union loses on the merits. So we end up stuck between the first principle, which tells us to interpret the scope of the agreement to determine arbitrability, and the third principle, which tells us not to resolve the merits. *AT&T Techs.*, 475 U.S. at 649; *see also Avaya*, 693 F.3d at 1300 (discussing the clashing principles and compiling cases).

Thankfully, the Supreme Court has told us what to do. In *Litton Financial Printing Division v. National Labor Relations Board*, the Court directed us to interpret the underlying agreement when necessary to fulfill our duty to decide questions of arbitrability, even when that also means deciding the merits. 501 U.S. 190, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991). The question in *Litton* was "whether a dispute over layoffs which occurred well after expiration of a collective-bargaining agreement must be said to arise under the agreement despite its expiration." *Id.* at 193. The Union and the dissenters argued that the merits of that question were not for the court because "that is an issue of contract interpretation to be submitted to an arbitrator in the first instance." *Id.* at 208. The Supreme Court disagreed. The Court emphasized that "[w]hether or not a [party] is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court, and a party cannot be forced to 'arbitrate the arbitrability question.'" *Id.* (quoting *AT&T Techs.*, 475 U.S. at 651). The Court also acknowledged the presumption of arbitrability, especially when, as in that case, "the agreement contains a broad arbitration clause." *Id.* at 209. But it nonetheless decided the merits: "Although doubts should be resolved in favor of coverage, we must determine whether the parties agreed to arbitrate this dispute, *and we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement*." *Id.* (emphasis added) (citation omitted).

Litton tells us how to resolve conflicts between our duties to resolve arbitrability questions and to abstain from the merits: interpret the agreement when necessary

to determine its scope, even if doing so incidentally decides the merits; otherwise, send the merits to an arbitrator. That means that *some* but not *all* frivolous claims will go to the arbitrator.

The majority opinion discounts *Litton*, mentioning it only in a footnote and suggesting that it applies only to cases involving expired bargaining agreements. *See* Maj. Op. at 8 n.3. But the majority offers no theory explaining why *Litton* should be limited to its facts; and no other circuit has read *Litton* that way. Instead, a wealth of caselaw supports the conclusion that *Litton* requires courts to interpret an agreement when necessary to determine its scope, even if doing so incidentally decides the merits.

In *International Brotherhood of Electrical Workers v. GKN Aerospace North America, Inc.* (*IBEW*), a union sought to compel arbitration of a dispute involving one of the GKN's supervisory employees. 431 F.3d 624, 626 (8th Cir. 2005) (Colloton, J.). The supervisor had been promoted, had obtained a withdrawal card from the union, and had ceased to be a member of any bargaining unit, years before the current CBA was signed. *Id.* at 626, 629. But he no longer wanted to work as a supervisor and sought to return to his work as an electrician. *Id.* at 626. Having no open electrician positions, GKN fired the supervisor. *Id.* The union filed a grievance on the supervisor's behalf, trying to return him to the bargaining unit, and seeking arbitration. *Id.* The court recognized the presumption in favor of arbitration, but also recognized a "tension" in the caselaw when "the merits of the claim are intertwined

with the question of arbitrability." *Id.* at 627. *Litton*, the court held, resolved the tension. After *Litton*, the "judicial responsibility to determine arbitrability takes precedence over the general rule to avoid consideration of the merits of a grievance." *Id.* at 628. So the question for the court was whether it was "'possible' for an arbitrator to decide in favor of the supervisor 'without thereby, in effect, amending the plain language of the agreement.'" *Id.* (citing *Peerless Pressed Metal Corp. v. Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO*, 451 F.2d 19, 20 (1st Cir. 1971)); *see also Gen. Tel. Co. v. Commc'n Workers of Am.*, 402 F.2d 255, 256 (9th Cir. 1968) (per curiam) (holding that employer was not required to arbitrate where "[t]o hold otherwise, would be to rewrite the contract between the parties"). The answer was "no." No arbitrator could rule for the plaintiff because he was "clearly . . . not an employee, covered by the agreement." *IBEW*, 431 F.3d at 629. So the dispute did not "arise under the Agreement" and was "not subject to arbitration." *Id.* at 630.

The Tenth Circuit followed suit in *Communication Workers of America v. Avaya, Inc.* There, the issue was whether "backbone engineers" were employees or managers, the latter being excluded from the CBA. 693 F.3d at 1296-97. Just as here, the arbitration provision extended to any "complaint involving the interpretation *or application* of any of the provisions of [the CBA]." *Id.* at 1297 (emphasis added) (alteration in original). Nonetheless, the court decided that *Litton* required it to "evaluate the threshold question of whether the parties consented to submit a particular dispute to arbitration," even if the threshold question decided the merits. *Id.* at

1300-01. "[T]he Supreme Court tells us, the court's duty to determine whether the party intended the dispute to be arbitrable trumps its duty to avoid reaching the merits." *Id.* at 1300. Looking at the agreement, the court concluded that "management" clearly meant any employee "designate[d] as [a] manager[]." *Id.* at 1301. So there was "no real dispute about the classification of backbone engineers" and there was only "one conclusion to draw from the record: the parties did not consent to submit the underlying dispute to arbitration." *Id.* at 1302.

The Seventh Circuit also agrees. After *Litton*, "the rule that courts must decide arbitrators' jurisdiction takes precedence over the rule that courts are not to decide the merits of the underlying dispute." *Indep. Lift Truck Builders Union v. Hyster Co.*, 2 F.3d 233, 236 (7th Cir. 1993). So "[i]f the court must, to decide the arbitrability issue, rule on the merits, so be it." *Id.* at 236.

The Third Circuit's decision in *Rite Aid of Pennsylvania, Inc. v. United Food & Commercial Workers Union, Local 1776* is so factually similar to this case that it is hard to distinguish. 595 F.3d 128. And it too, reached a result contrary to the majority's. There, Rite Aid had a CBA that covered certain drugstores in eastern Pennsylvania. *Id.* at 130. When Rite Aid acquired a chain of new stores, the Union sought arbitration, arguing that the CBA applied to "newly-acquired or newly-opened stores" within the CBA's geographic jurisdiction and that resolving the dispute required interpreting the CBA. *Id.* The court noted the broad arbitration provision and the presumption in favor of arbitration, but nonetheless

recognized a duty to see if there was "forceful evidence" suggesting that the parties intended to exclude the dispute from arbitration. *Id.* at 131-32. And, looking at the terms of the agreement, the court concluded that "a right of Union access to newly acquired stores simply cannot be plausibly derived from the [CBA]." *Id.* at 134. Thus, the CBA could not apply to the new stores' "employees because the Union does not presently represent those stores' employees." *Id.* The court concluded that the plaintiff's interpretation was not "sufficiently plausible" to send the dispute to arbitration. *Id.* The majority disagrees with *Rite Aid*, finding the dissent's reasoning more persuasive. But in so doing, the majority opinion has put our circuit at odds with four others, and in the company of none.

The majority opinion is also at odds with our own pre-*Litton* caselaw. In *United Steelworkers of America, Local No. 1617 v. General Fireproofing Co.*, the court was presented with an arbitration provision that, as in the present case, covered disputes over the "meaning and *application*" of the CBA. 464 F.2d 726, 729 (6th Cir. 1972) (emphasis added). Nevertheless, we declined to send the Union's grievance on behalf of a supervisor to the arbitrator because the CBA did not "permit the possible inference" that he was covered as an "employee." *Id.* at 730. We said that we could "not understand how an arbitrator could arbitrate a grievance of an employee who is not a member of the bargaining unit." *Id.* The majority opinion distinguishes *General Fireproofing* on the ground that the arbitration clause there covered only disputes "between an employee and the Company." Maj. Op. at 7. Because of this "express exclusion" of the grievance from arbitration, *see id.*, the majority opinion concludes that

the panel in *General Fireproofing* resolved the question of arbitrability without deciding the merits. According to the majority opinion, the CBA in the present case contains no similar exclusion. But it does. The "Dispute Procedure" section submits to arbitration only disputes between the KLPI and the "aggrieved employee." And the scope of the CBA extends only to KLPI employees in KLPI stores. So in my opinion, *General Fireproofing* controls; but even if not, *Litton* does.

* * *

"Whether or not a [party] is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court, and a party cannot be forced to 'arbitrate the arbitrability question.'" *Litton*, 501 U.S. at 208 (quoting *AT&T Techs.*, 475 U.S. at 651). Here, the parties' dispute falls outside the scope of the arbitration agreement. It is true that the arbitration provision is so broad that we are "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers*, 363 U.S. at 568. But on the face of the contract, this CBA applies only to KLPI "employees" at KLPI stores. So, if KLPI's answer is believed, an arbitrator could not rule for the Union without "amending the plain language of the agreement" by expanding the CBA's scope. *See Peerless Pressed Metal*, 451 F.2d at 20. And KLPI never agreed to arbitrate this dispute. *See AT&T Techs.*, 475 U.S. at 648.

I would reverse the district court's grant of the Union's Rule 12(c) motion and remand for further proceedings. I respectfully dissent.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION, FILED JANUARY 7, 2022

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

NO. 3:20-cv-00948

JUDGE RICHARDSON

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 1995,

Plaintiff,

v.

THE KROGER COMPANY and KROGER LIMITED PARTNERSHIP I,

Defendants.

MEMORANDUM OPINION

Pending before the Court in this action is "Plaintiff's Motion to Dismiss Defendant The Kroger Company Without Prejudice" (Doc. No. 42, "Motion.").

This is an action in which the plaintiff seeks a very specific and limited remedy. Specifically, Plaintiff ("the Union") brought this suit seeking to compel both Defendants to resolve in arbitration an issue concerning the application of a particular Collective Bargaining

Agreement ("CBA").[1] (Doc. No. 1). Within approximately 70 days of filing this action, the Union filed a Rule 12(c) motion for judgment on the pleadings seeking a judgment affording it such relief. (Doc. No. 19). On September 30, 2021, the Court granted the Union's motion with respect to one Defendant but not the other; in particular, it ordered Defendant Kroger Limited Partnership I ("KLPI") to arbitrate the applicable issue, but held that it could not, at least at that juncture, likewise order Defendant The Kroger Company to arbitrate, because it was not clear based solely on the pleadings that The Kroger Company was even a party to the CBA (Doc. Nos. 32 and 33). Anticipating disagreement between the parties as to how this entire case should proceed in light of the Court's finding that final judgment should be granted against one Defendant but not (at least at that time) the other Defendant, the Court wrote in its Order:

> Before entering judgment against KLPI, the Court seeks the parties' input as to how this case should proceed in light of this split resolution. Thus, by October 15, 2021, the parties shall file a joint notice (or, if necessary in light of an inability to agree, separate respective notices) as to whether KLPI should be ordered to arbitration without The Kroger Company, or whether a determination in this lawsuit of whether The Kroger Company is a party to the CBA (and thus should be sent to

1. This situation is to be contrasted with the situation where a plaintiff files an action seeking damages and, in response, the defendant asks the court to compel the plaintiff to submit the claim to arbitration.

> arbitration along with KLPI) should be resolved before KLPI is sent to arbitration.

(Doc. No. 33 at 1-2). In response to this dictate, after obtaining a short extension of the October 15 deadline, the parties (helpfully) filed a timely Joint Notice (Doc. No. 37). As to Plaintiff's position on the question(s) raised by the Court, the Joint Notice advised, in pertinent part:

> Plaintiff United Food & Commercial Workers, Local 1995 intends to move this Court for an order severing its claims against Defendant The Kroger Company and dismissing such claims without prejudice, in accordance with Rule 21 of the Federal Rules of Civil Procedure (or any other applicable Rules). Once such an order is issued, then Plaintiff will move for entry of judgment against Defendant Kroger Limited Partnership I ("KLP I"). If this Court is not inclined to issue an order dismissing Defendant The Kroger Company without prejudice, and will only entertain an order dismissing such claims with prejudice, then Plaintiff intends to take appropriate discovery to support a motion for summary judgment of its claims against Defendant The Kroger Company.

(*Id.* at 1). And the Joint Notice stated Defendants' position on such question(s), in pertinent part, as follows:

> The Court should resolve The Kroger Co.'s obligation to arbitrate before ordering KLP I to arbitrate, unless Plaintiff dismisses The

> Kroger Co. with prejudice. This would require a case management order setting deadlines for discovery, depositions, motions, and trial on the issue of whether The Kroger Co. is signatory to the bargaining agreement and obligated, along with KLP I, to arbitrate the grievance.

(*Id.* at 2).

As foretold in the Joint Notice, on November 18, 2021, Plaintiff moved (via the Motion) for dismissal of The Kroger Company without prejudice, pursuant to Federal Rule of Civil Procedure 21. Plaintiff was sufficiently clear that its request for dismissal was entirely dependent on the dismissal being without prejudice, and the Court therefore has construed the Motion (as it believes it is properly authorized to do) as one seeking either dismissal without prejudice, or no dismissal at all—which is to say that (given the Court's view of the Motion as all-or-nothing in that sense) to grant the Motion means to dismiss The Kroger Company without prejudice, and to deny the Motion means not to dismiss The Kroger Company at all.

Defendants, not surprisingly or inappropriately, have declined to suggest the alternative of dismissal *with* prejudice. Like Plaintiff, and now the Court, Defendants view the decision for the Court as whether to order that The Kroger Company be dismissed without prejudice or not be dismissed at all.[2]

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2. To the extent that Rule 21 would allow the Court "on its own" to dismiss The Kroger Company *with prejudice* based on the view that it would be "just" to do so, Fed. R. Civ. P. 21, the Court declines to consider exercising such discretion to do so.

The Court pauses to address the significance of this decision. The significance turns on the precise nature of the distinction between a dismissal "with prejudice" and a dismissal "without prejudice," a distinction that judges and lawyers tend (in the undersigned's view) to assume they fully grasp but rarely actually fully articulate. The Court will take care to articulate that distinction here, so that it is clear that the Court understands precisely the stakes here.

> . . . Rule 41. . . in discussing the effect of voluntary dismissal by the plaintiff, makes clear that an "adjudication upon the merits" is the opposite of a "dismissal without prejudice":
>
> > "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim."
> >
> > *See also* 18 Wright & Miller § 4435, at 329, n. 4 ("Both parts of Rule 41 ... use the phrase 'without prejudice' as a contrast to adjudication on the merits"); 9 *id.*, § 2373, at 396, n. 4 ("'[W]ith prejudice' is an acceptable form of shorthand for 'an adjudication upon the merits'"). *See also Goddard*

Appendix B

> [v. Security Title Ins. & Guarantee Co., 14 Cal.2d, 47, 54, 92 P.2d, 804, 808 (1939) (stating that a dismissal "with prejudice" evinces "[t]he intention of the court to make [the dismissal] on the merits"). The primary meaning of "dismissal without prejudice," we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim. That will also ordinarily (though not always) have the consequence of not barring the claim from *other* courts, but its primary meaning relates to the dismissing court itself. Thus, Black's Law Dictionary (7th ed.1999) defines "dismissed without prejudice" as "removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim," *id.*, at 48, 92 P.2d 804, and defines "dismissal without prejudice" as "[a] dismissal that does not bar the plaintiff from refiling the lawsuit within the applicable limitations period," *ibid.*

Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505-06, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001).

Semtek was referring to dismissal pursuant to Rule 41, rather than Rule 21, of the Federal Rules of Civil Procedure. However, the Court perceives no

reason why it should construe (or why the parties would have understood) the concepts of "with prejudice" and "without prejudice" any differently in the context of Rule 21. Indeed, *Semtek* merely expresses what the Court perceives to be the widely understood—if not always actually articulated—meaning of these two terms. *See Arangure v. Whitaker*, 911 F.3d 333, 347 (6th Cir. 2018) ("[A] judgment dismissing a case 'without prejudice' is not truly 'final.' Generally speaking, a dismissal 'without prejudice' means 'a dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim.' (quoting *Semtek*, 531 U.S at 505)); *see also* Restatement (Second) of Judgments § 20(1)(b). Such a judgment does not permanently foreclose a litigant from trying again, so it is not sufficiently 'final' to be given res judicata effect." *Id.* (brackets and one set of internal quotation marks omitted)).

The upshot is that in the context of Rule 21 (like Rule 41), "[d]ismissals without prejudice generally are not judgments on the merits for claim preclusion purposes." *Wheeler v. Dayton Police Dep't*, 807 F.3d 764, 767 (6th Cir. 2015). By contrast, "dismissals with prejudice generally are judgments on the merits that bar plaintiffs from refiling their claims in the court that dismissed them." *Id.* at 766. Or to put it only slightly differently, generally a "[d]ismissal without prejudice is a dismissal that does not operat[e] as an adjudication upon the merits, and thus does not have a res judicata effect," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) (internal quotation marks and citation omitted), the way a dismissal with prejudice (like

any adjudication deemed "on the merits") generally does.[3] This all likely comes as no surprise to the parties but is worth specifically articulating.

As noted above, the option of dismissal with prejudice is not even on the table here, and the Court herein has described the option of dismissal with prejudice only to place in context Plaintiff's contrasting requested relief of dismissal without prejudice. The question is whether to dismiss The Kroger Company without prejudice or not dismiss it at all.

Rule 21 authorizes the Court to drop a party to an action "on just terms." Fed. R. Civ. P. 21. The applicable "term" here is that the dismissal of The Kroger Company would be without prejudice, and so the question is whether dismissal without prejudice would be "just." As the above discussion makes clear, if there is a dismissal without prejudice, Plaintiff would generally (subject to any applicable statute of limitations) be able to file suit again against The Kroger Company, at least in this Court. So the question devolves to whether this possibility is just.

Guidance for answering that question is provided by *Grover by Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718 (6th Cir. 1994). There the court addressed how a court should decide whether to grant a plaintiff's request for dismissal without prejudice of an entire action under Rule 41(a)(2); the guidance, however, plainly appears applicable

3. On the other hand, the Court in *Semtek* noted a more recent (as of the time of that decision) trend for courts to recognize that not every adjudication deemed "on the merits" would necessarily be afforded claim-preclusive effect.

to a request to dismiss a party (as opposed to an entire action) without prejudice under Rule 21.[4] In *Grover*, the Sixth Circuit noted that "[t]he primary purpose of . . . the requirement of court approval [for the plaintiff's requested dismissal without prejudice] is to protect the nonmovant from unfair treatment." 33 F.3d at 718. And, not surprisingly, the court essentially equated "unfair treatment" with "plain legal prejudice" *Id.* The existence of plain legal prejudice is key to the non-movant's position; without it, a court's denial of the movant's request for dismissal without prejudice under Rule 41(a)(2) generally would not be an abuse of discretion. *Id.*[5] And the court

4. This is true in part due to the similarity of the language of the two rules. Rule 21 allows for the dropping of a party "on just terms," while Rule 41(a)(2) allows dismissal of an entire action upon such "terms that the court considers proper." Just as the question under Rule 41(a)(2) is whether dismissal of the entire action without prejudice would be "proper," the very similar question under Rule 21 is whether the dropping of the applicable party would be "just." Moreover, in *Grover* the Sixth Circuit noted that "[t]he primary purpose of the rule [41(a)(2)] in interposing the requirement of court approval is to protect the nonmovant from unfair treatment." 33 F.3d at 718.

5. The Court does not draw from this a binding rule that a dismissal without prejudice under Rule 21 generally cannot be an abuse of discretion absent plain legal prejudice to the non-movant. But what it can and does draw is the principle that the Court has wide discretion, under Rule 21 as under Rule 41(a)(2), to grant dismissal without prejudice absent plain legal prejudice to the non-movant. And the Court is inclined to exercise such discretion to grant a Rule 21 motion without plain legal prejudice because the Court believes that absent such prejudice, a plaintiff should not be forced to persist at a particular time with its claim(s) against a particular defendant if it has ceased to desire to pursue such claim(s) in the pending action due to changed circumstances.

noted that in considering whether a dismissal without prejudice would result in plain legal prejudice to the nonmovant,[6] "a court should consider such factors as the defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and whether a motion for summary judgment has been filed by the defendant." *Id.*

As Plaintiff notes in its reply in support of the Motion, (Doc. No. 46 at 1-2), Defendants do not address these factors when assessing whether they would suffer plain legal prejudice. Instead, Defendants merely downplay the importance of these factors and assert plain legal prejudice on the grounds that: (i) The Kroger Company "should know whether it needs to participate with [KLPI] in an arbitration," and a dismissal without prejudice would prevent it from knowing that; and (ii) a dismissal without prejudice "would create the possibility of a later second arbitration on the same issue and the possibility of inconsistent results." (Doc. No. 45 at 2). But there are three problems with Defendants' position.

First, Defendants cite no authority for the proposition that these alleged grounds reflect plain legal prejudice.

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6. Here, there are two non-movants, one being the Defendant (The Kroger Company) that would be dismissed without prejudice, and the other the Defendant that remains in the case (and is currently facing the prospect of entry of final judgment against it based on the Court's decision on Plaintiff's motion for judgment on the pleadings). The Court understands that the question is whether plain legal prejudice would be suffered by *either* Defendant. But Defendants do not really assert any prejudice to KLPI separate from the alleged prejudice to The Kroger Company.

Second, as to the first ground, it amounts to a complaint that The Kroger Company needs to know whether Plaintiff would prevail on Plaintiff's current claim against it (since, after all, Plaintiff's claim against The Kroger Company is precisely that The Kroger Company should participate in the arbitration). But the Court blindly cannot accept that "plain legal prejudice" can be based on a purported need to know whether the plaintiff would prevail on its claim(s) were it forced (contrary to its wishes) to persist in its claim(s) against a non-movant in the pending action; if it could be so based, then "plain legal error" could be found every time a defendant claims that it needs to stay in the lawsuit (together with its co-defendant(s)) to "know" whether the plaintiff would prevail against it were it to persist in the claim against that defendant. And Defendants' terse argument does not give the Court any reason to accept this argument. Finally, as to Defendants' second asserted ground of "plain legal prejudice," it is based on the possibility that there would in fact be a second arbitration (*i.e.*, a second arbitration involving The Kroger Company), but there would be a second arbitration involving The Kroger Company only if Plaintiff filed another lawsuit seeking to compel The Kroger Company into arbitration *and* Plaintiff succeeded in that second lawsuit. These potentialities are merely speculative; indeed, The Kroger Company's own position is that Plaintiff's success in a refiled lawsuit is extremely speculative.[7] (Doc. No. 25 at 5-6) ("KLP1 and its Nashville

7. In fairness to Defendants, their second asserted ground of plain legal prejudice is not based on "the *mere* prospect of a second lawsuit", which *Grover* made clear does not establish plain legal prejudice. 33 F.3d at 718 (emphasis added). After all, Defendants rely not just on the prospect of a second lawsuit, but rather on what

Division is the legal entity which is the party to the labor agreement with Plaintiff UFCW 1995, and is a subsidiary of The Kroger Co. The Kroger Co. has denied that it is party to the labor contract with UFCW Local 1995, and will demonstrate that it is not during discovery, and if necessary, trial.").

Defendants also argue that "the delay involved in leaving open the possibility of a second arbitration and inconsistent results is contrary to the federal labor policy which favors of prompt resolution of labor disputes." (Doc. No. 45 at 4 (citing *DelCostello v. Teamsters*, 462 U.S. 151, 168-169, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983))). Defendants' statement of federal policy here is accurate, but it does not address or implicate *plain legal prejudice* to The Kroger Company; if a particular dismissal without prejudice would run counter to this policy, that does not mean that it would inflict plain legal prejudice upon the party dismissed. And in any event, dismissal of The Kroger Company without prejudice in fact does not necessarily run counter to the federal policy favoring prompt resolution of labor disputes. As Plaintiff aptly notes, it

> is seeking to resolve this matter promptly by proceeding to arbitration at this time, but it cannot do so unless the Court enters

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would happen if The Kroger Company *lost* that lawsuit (and thus had to go to a second arbitration). On the other hand, this principle from *Grover* indirectly supports the notion that the Court, in assessing any asserted grounds of plain legal prejudice based in part on the prospect of a second lawsuit, should keep in mind that the second lawsuit is not certain, but merely prospective.

> final judgment requiring KLPI to proceed to arbitration. The Union, therefore, is seeking the dismissal of The Kroger Company without prejudice, rather than more than a year of additional litigation.

(Doc. No. 46 at 2). In other words, granting the Motion would result in this matter going promptly to arbitration (against KLPI), or to an appeal to the Sixth Circuit by KLPI, whereas a denial would not. So granting the Motion would speed up the resolution of Plaintiff's dispute with KLPI. It also would speed up the resolution of Plaintiff's dispute with The Kroger Company, unless Plaintiff were later to refile its claim against The Kroger Company in a second lawsuit; but again, it is mere speculation at this point that Plaintiff would do so.

Finally, the Court turns to the *Grover* factors, which the Court perceives as its primary guide in this Rule 21 context, as in the Rule 41(a)(2) context, as to whether dismissal without prejudice would result in plain legal prejudice to Defendants. Plaintiff writes:

> The *Grover* factors support the Union's request to dismiss The Kroger Company without prejudice. To date, the defendants have answered the complaints and responded to the Motion for Judgment on the Pleadings, and the defendants have not undertaken significant "effort and expense of preparation for trial." The Union has efficiently prosecuted this action by promptly filing its Motion for Judgment on

> the Pleadings and by now seeking to dismiss The Kroger Company before the parties have begun engaging in discovery. The Union, therefore, has not engaged in "excessive delay and lack of diligence . . . in prosecuting the action." The Union has amply explained its reason for seeking The Kroger Company's dismissal, and neither defendant has filed a motion for summary judgment.

(Doc. No. 43 at 3-4) (citations omitted). The Court agrees; the *Grover* factors indicate a lack of plain legal prejudice.

The Court concludes by noting that it does not deny that, at least under certain circumstances, it would have the discretion to deny the Motion even if it did not find plain legal prejudice. But to the extent that it would have such discretion in this case, it would decline to exercise it to deny the Motion. Defendants argue only that the Motion should be denied based on the asserted lack of plain legal prejudice, without arguing alternatively that the Court should deny the Motion even if it finds a lack of plain legal prejudice. And in any event, absent plain legal prejudice, the Court is strongly inclined to grant a plaintiff's motion to drop a party under Rule 21. After all, a plaintiff is "the master of its own complaint," *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002),and this principle counsels in favor of allowing a plaintiff to effectively amend its own complaint by dropping a party unless so doing would plainly prejudice one or more defendants.

Appendix B

CONCLUSION

The Court does not begrudge Defendants' preference for having The Kroger Company remain in this action at this time rather than being dismissed without prejudice. But as indicated herein, the Court is inclined to indulge Plaintiff's change in preference, based on changed procedural circumstances, for how to prosecute (or not prosecute) what are, after all, Plaintiff's own claims. That is to say, if Plaintiff wishes to drop (dismiss) one of the Defendants under Rule 21 under the term (condition) that the dismissal be "without prejudice"—*i.e.*, with the presumptive prerogative to file another action against that Defendant in this Court—the Court will assent thereto absent plain legal prejudice to Defendants. Such a result is indeed "just" and thus appropriate under Rule 21. Here, because the Court cannot find plain legal prejudice, that means that the Motion should be and will be granted.

An appropriate order will be entered.

/s/ Eli Richardson
ELI RICHARDSON
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, DATED NOVEMBER 16, 2021

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

NO. 3:20-cv-00948

UNITED FOOD & COMMERCIAL
WORKERS, LOCAL 1995,

Plaintiff,

v.

THE KROGER COMPANY, *et al.*,

Defendants.

JUDGE RICHARDSON

ORDER

The Court is in receipt of the parties' Joint Notice (Doc. No. 37), which was filed in response to the Court's Order (i) requesting the parties' positions "as to whether KLPI should be ordered to arbitration without The Kroger Company, or whether a determination in this lawsuit of whether The Kroger Company is a party to the CBA (and thus should be sent to arbitration along with KLPI)

should be resolved before KLPI is sent to arbitration"; and (ii) inviting the parties to include "a discussion of any related logistical or procedural matters they believe may be helpful to the Court and/or to the progression of this case." (Doc. No. 33 at 1-2). The Joint Notice reflected, in a commendably concise and focused manner that reflects favorably on counsel, the parties' respective positions on this issue.

It is clear to the Court that resolution of the issues alluded to in the Court's Order (Doc. No. 33) will be materially advanced by prioritizing the issue of whether the Court would, upon request of Plaintiff, dismiss Defendant The Kroger Company specifically *without* prejudice, or whether instead the Court would dismiss The Kroger Company upon request of Plaintiff only if the dismissal were (contrary to Plaintiff's wishes) specifically *with* prejudice. Circumstances indicate that it would be helpful for both sides to understand where the Court is coming from on this at this time. The Court believes that Plaintiff has the prerogative to move for dismissal (under Rule 21) of Defendant The Kroger Company specifically without prejudice, such that any grant of the motion would mean that Defendant The Kroger Company is dismissed without prejudice, and any denial would mean that defendant The Kroger Company is not dismissed at all (either with or without prejudge).[1] In other words, if

1. The Court has reached no decision as to which of these options it would choose. What it can say is the applicable law it has reviewed suggest that there well may be a colorable argument in favor of allowing dismissal without prejudice and a colorable argument against allowing dismissal without prejudice, To reiterate, if the

Plaintiff were to move to dismiss Defendant The Kroger Company without prejudice, Plaintiff would not be running the risk that the Court would (to Plaintiff's dismay) dismiss Defendant The Kroger Company with prejudge.

In short, Plaintiff at its option may move to dismiss Defendant The Kroger Company, conditioned on the requested dismissal being without prejudice. Absent an extension granted by the Court, Plaintiff shall do so by November 26, 2021, and Defendant shall respond within ten calendar days of the date Plaintiff files such motion. To the extent Plaintiff requests an opportunity to reply, or any party requests a modification of the schedule pronounces, the requestor(s) shall file a motion requesting the relief they seek.

IT IS SO ORDERED.

/s/Eli Richardson
ELI RICHARDSON
UNITED STATES DISTRICT JUDGE

Court accepts the latter argument, then The Kroger Company would not be dismissed at all (assuming Plaintiff had made clear that its request is for dismissal without prejudice or else no dismissal at all).

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION, FILED SEPTEMBER 30, 2021

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

NO. 3:20-cv-00948

JUDGE RICHARDSON

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 1995,

Plaintiff,

v.

THE KROGER COMPANY, *et al.*,

Defendants.

MEMORANDUM OPINION

Pending before the Court is Plaintiff United Food & Commercial Workers, Local 1995 ("Union")'s Motion for Judgment on the Pleadings and to Compel Arbitration (Doc. No. 19, "Motion"), supported by an accompanying Memorandum of Law. (Doc. No. 20). Defendants, The Kroger Company and Kroger Limited Partnership I ("KLPI"), filed a response (Doc. No. 25), and Plaintiff filed a reply. (Doc. No. 28, "Reply"). For the reasons stated herein, Plaintiff's Motion will be **GRANTED** in part and **DENIED** in part.

Appendix D

BACKGROUND[1]

Plaintiff is a labor organization, which is currently party to a collective bargaining agreement ("CBA") with The Kroger Company, Nashville Division. (Doc. Nos. 15 at ¶ 3, 15-1 at 6). The Kroger Company, Nashville Division is part of Defendant KLPI. (Doc. No. 15-1 at 4). An exclusive bargaining relationship has existed for many years between Plaintiff and KLPI. (Doc. No. 15 at ¶ 8). The parties› current CBA governs the term from May 12, 2019 through May 6, 2023. (*Id.*).

The current CBA contains an agreed-upon "Dispute Procedure" outlined in length in Article 7.[2] (Doc. No. 15-1 at 10-12). Article 7 reads in pertinent part as follows:

> A. The Union shall have the right to designate Stewards for each store. The store Stewards so designated shall not exceed four (4) per store [six (6) in Marketplace stores]. The store Stewards shall perform their duties with the least inconvenience to the Employer as possible. The Union shall have the authority to submit

1. The background facts are drawn from the Amended Complaint and the documents filed with the Amended Complaint. The Amended Complaint is the operative complaint in this matter. *See Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 306 (6th Cir. 2000). Unless noted, none of the facts recited herein are disputed by the parties.

2. The Court has chosen to include only the parts of Article 7 most relevant to the question of whether and under what circumstances a grievance is subject to mandatory arbitration.

grievances to arbitration and to withdraw and settle grievances. The Parties recognize the employee's right to appeal any decision not to arbitrate to the Executive Board of the Union, therefore, the Employer and the Union agree to extend the thirty (30) calendar day time period referred to in Deadlocks/Arbitrations when necessary, to allow for the review of such decisions. Any grievance arising out of scheduling must be presented by Saturday noon (or twenty-four (24) hours from the time the schedule is posted, whichever is later) of the week the schedule is posted by the employee involved; otherwise, said employee will be deemed not to have a valid grievance.

. . .

C. No Constructive Advice Record shall be used for progressive discipline nor in arbitration by either party after eighteen (18) months from the date of issuance. Last chance, final warning Agreements will remain in effect. Discharges/ suspension pending shall proceed directly to Step 3 of the grievance procedure within twenty-one (21) calendar days of the discharge/ suspension pending. All Constructive Advice Records will be forwarded to the Union Office within forty five (45) calendar days from the date the CAR was issued.

. . .

Appendix D

D. . . . *Should there be any grievance, dispute or complaint over the interpretation or application of the contents of this Agreement*, there shall be an earnest effort by the Parties to settle the matter promptly. The following steps shall be followed:

Step 1) A Step 1 meeting will be held within fourteen (14) calendar days of receipt of a grievance or the grievance may be considered denied and may proceed to Step 2, by conference between the aggrieved employee, the Steward, or both, and the Unit Manager. Written answer will be given to the Steward and the Union Representative within seven (7) calendar days of the Step 1 meeting. Grievance settlements at Step 1 are non-precedent setting. A Union Representative may be requested to be present at the meeting.

Step 2) After receiving a written answer from Step 1 or after the time limits in Step 1 have expired, the Union Representative may, within fourteen (14) calendar days, request a Step 2 meeting with the District Manager or designee. The request must be made in writing, and the Step 2 meeting will be held within fourteen (14) calendar days of receipt of written request or the grievance may be considered denied and may proceed to Step 3. Grievance settlements at Step 2 are non-precedent setting. Grievances heard at Step 2 shall be answered in writing to the Union Representative within seven (7)

calendar days of the meeting. If grievances aren't settled in Step 2, they may be referred to Step 3 as outlined below.

Step 3) After receiving a written answer from Step 2 or after the time limits in Step 2 have expired the Union Representative may, within fourteen (14) calendar days, request a Step 3 meeting with an official or officials of the Union and the Division President or a representative of the Employer so delegated by the Division President, or both. The request must be made in writing and the Step 3 meeting will be held within twenty-one (21) calendar days of receipt of written request. Grievances heard at Step 3 shall be answered in writing to the Union Representative within ten (10) calendar days of the meeting or the grievance may be considered denied. In the event that the last Step fails to settle satisfactorily the grievance, and either party wishes to submit it to arbitration, the party desiring arbitration must so advise the other party in writing within forty-five (45) days from the Step 3 written response.

. . .

Deadlocks/Arbitrations

If arbitration is requested, the request must be made to the Standing Panel of Arbitrators within forty-five (45) calendar days of receiving a written decision in Step 3 or after the time

> limits in Step 3 have expired. The party requesting arbitration must notify the other party of such request.
>
> . . .
>
> ***Arbitrator's Binding Decision***
>
> The decision of an arbitrator so selected shall be binding upon all Parties to the arbitration. All of the fees, costs and expenses of the arbitration shall be borne equally

(Doc. No. 15-1 at 10-12) (emphasis added). The Court does not see where Article VII expressly makes arbitration *mandatory* as opposed to merely permissive. And the (italicized) reference to the parties committing to earnestly resolving grievances (or disputes or complaints, though the Court herein is using the term "grievance") "over the interpretation or application of the contents of this Agreement" does not say that the parties have agreed specifically to *mandatory arbitration* of such grievances. Plaintiff nevertheless suggests in the Amended Complaint that the parties have agreed in Article VII that any grievance within the scope of Article VII—*i.e.*, any grievance "over the interpretation or application of the contents of this Agreement"—is subject to mandatory arbitration. (Doc. No. 1 at ¶ 11). And as Defendants have not challenged that suggestion (though of course Defendants challenge that it means the grievance here must be arbitrated), the Court accepts it for purposes of the instant Motion.

Notably, the references to arbitration are not very thorough and are spread throughout Article VII. In this sense, there is no one "arbitration clause" as such, but given its observations in the paragraph immediately above, the Court concludes that it is appropriate to conduct the analysis here as if there was an "arbitration clause" that provides for mandatory arbitration "over the interpretation or application of the contents of this [CBA]".

Sometime in early 2020, a Kroger facility, known as a Local Fulfilment Center, opened in Knoxville, Tennessee.[3] Employees at this facility are employed by the Kroger Company in some capacity. (Doc. No. 15 at ¶ 18). A dispute arose between the Union and KLPI as to whether Knoxville Local Fulfillment Center employees were covered by the parties' CBA. (*Id.* at ¶ 21). On June 5, 2020, an Organizing Director from the Union emailed KLPI's Nashville Division Human Resource Associate & Labor Manager, Charles Ervin, to file a grievance about the "exclusion of workers" at the Knoxville facility from Union membership. (Doc. No. 15-2 at 2). In that email, the Union also requested a date for a Step 3 meeting. (*Id.*). On June 9, 2020, Mr. Ervin responded to the Union and refused to process the grievance because "[t]he location is not a store covered by the CBA." (Doc. No. 15-3 at 2).

3. The Court draws this fact partially from Plaintiff's Amended Complaint at ¶ 17, which Defendants denied in full in their Answer. However, in their Response to Plaintiff's Motion for Judgment on the Pleadings, Defendants acknowledge some of the information as true. (Doc. No. 25 at 4-5).

Over the course of June and July, the Union tried on two occasions to begin arbitration proceedings. On June 29, 2020, the Union's Secretary-Treasurer emailed an arbitrator[4] to inform him of his selection "to hear an arbitration between Kroger Nashville Division and United Food and Commercial Workers Local Union 1995." (Doc. No. 15-4 at 2). Mr. Ervin, who was copied on the email, responded to inform the arbitrator that Kroger was refusing to process the grievance and would not consent to his jurisdiction. (*Id.*). The Union tried this tack again on July 7, 2020, with similar non-success. (*Id.* at 6). In November of 2020, Plaintiff filed the present action to compel Defendants to arbitration. On December 14, 2020, Plaintiff filed its First Amended Complaint. (Doc. No. 15, "Amended Complaint").

LEGAL STANDARD FOR RULE 12(C) MOTIONS, GENERALLY

The Federal Rules of Civil Procedure provide that after the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. Fed. R. Civ. P. 12(c). Traditionally, to evaluate a 12(c) motion, the court reviews the complaint in the light most favorable to the nonmoving party, accept the well-pled factual allegations as true, and determine whether the moving party is entitled to judgment as a matter of law. *Commercial Money Center, Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007). However,

4. The Union selected from the CBA's approved list of arbitrators (Doc. No. 15-1 at 12), choosing Patrick Hardin in the June 29th email and Samuel Nicholas, Jr. in the July 7th email.

in cases like the present one, where the party moving for judgment on the pleadings is the plaintiff rather than the defendant, a slightly different standard is required. In considering a motion by the plaintiff for judgment on the pleadings, the Court will determine whether "on the undenied facts alleged in the complaint and assuming as true all the material allegations of fact in the answer, the plaintiff is entitled to judgment as a matter of law." *Lowden v. Cty. of Clare*, 709 F. Supp. 2d 540, 546 (E.D. Mich. 2010) (quoting *U.S. v. Blumenthal*, 315 F.2d 351, 352, 4 V.I. 409 (3d Cir. 1963) ("[T]he question is whether the facts alleged in the answer are material in the sense that, if proved, they will constitute a legal defense to the plaintiff's claim.")). This standard generally provides a substantial advantage for a defendant, like Defendants here, opposing a plaintiff's 12(c) motion. But as explained more fully below, this advantage actually is more than eviscerated by the applicable substantive law—to which the Rule 12(c) standard must be applied—applicable to the particular (and limited) relief sought by Plaintiff in this lawsuit. In short, although in general there is in practical (if not necessarily legal) terms a presumption against entering judgment on the pleadings in favor of a plaintiff, there is in practical (and arguably also legal) terms a presumption in favor of entering judgment on the pleadings for a plaintiff seeking the limited relief Plaintiff is seeking here.

As a general rule, if matters outside the pleadings are presented on a Rule 12(c) motion and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d). *Max Arnold*

& Sons, LLC v. W.L. Hailey & Co., 452 F.3d 494, 503 (6th Cir. 2006) ("Because Plaintiff presented matters outside of the pleadings with respect to Defendant's Rule 12(c) motion, and because the district court did not exclude these matters, the district court should have converted the Rule 12(c) motion to a motion for summary judgment."). This applies even if the non-excluded material outside the pleadings is not actually relied upon or even considered at all by the court. *See id.* However, "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint[ ] also may be taken into account." *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008) (quoting *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001)). Notably, the Court has not considered any information that would mandate conversion of the instant Motion into one for summary judgment.[5]

5. It is odd, given that Defendants are responding to a Motion for Judgment on the Pleadings, they write in their Response that the facts they rely on are "almost entirely[] outside of the pleadings." (Doc. No. 25 at 2). Some of these facts would have been in the pleadings (specifically, Defendants' Answer) except that Defendants' chose to broadly deny facts alleged in Plaintiff's Complaint only to acknowledge such facts as true in later filings. However, even if Defendants have relied on matters that are both outside the pleadings and not cognizable on a 12(c) motion, the Court has excluded such matters from its consideration in making its decision on Plaintiff's Motion. Therefore, the Court need not and does not treat this Motion as a motion for summary judgment.

Appendix D

NATURE OF THE "JUDGMENT" SOUGHT BY PLAINTIFF, *I.E.*, A JUDGMENT MANDATING COMPELLED ARBITRATION

The outcome of the instant motion is driven heavily by the precise nature of the "judgment" Plaintiff seeks in this case via its motion for judgment on the pleadings under Rule12(c). The nature of that requested judgment is such that the standard under Rule 12(c)—which typically is skewed heavily in favor of a non-movant, especially a non-movant defendant—in this case actually is skewed heavily in favor of the Plaintiff even though it is the movant.

The kind of action Plaintiff has brought is unique in that Plaintiff's requested relief is to compel Defendants to arbitrate an alleged contract dispute. As the parties aptly put it in their recent joint status report to the Court, "there is only one issue in this case due to its unique status — whether the Defendants must arbitrate a grievance under the labor contract." (Doc. No. 31 at 1). Via this action, Plaintiff asks the Court only to require Defendants to submit to arbitration of the applicable grievance;[6] Plaintiff does not request some other form of relief, such as money damages. What Plaintiff seeks in this action is to require Defendants to resolve the grievance in arbitration (wherein Plaintiff would seek to obtain therein various

6. Beyond asking for attorney's fees, costs and expenses, Plaintiff prays in its complaint only for "an order directing the Company to submit to the arbitration of the Union's June 5, 2020 grievance and to participate in good faith with all procedures necessary to select an arbitrator, conduct a hearing, and secure a final and binding arbitration decision." (Doc. No. 1 at 7).

kinds of underlying substantive relief that Plaintiff is not seeking herein). In short, the Court is dealing here not with the more common situation of a *defendant's motion* to compel arbitration as a means to resolve the plaintiff's claims for relief as stated in the plaintiff's complaint filed in court, but rather with a *plaintiff's action* merely to compel arbitration of disputes with the defendant. As the parties jointly note, the result of this action is either that the Court compels arbitration or that it does not compel arbitration. (*Id.*).

STANDARDS APPLICABLE TO A RULE 12(C) MOTION FOR JUDGMENT ON AN ACTION SEEKING COMPELLED ARBITRATION

Plaintiff contends that the Court can determine the proper result (from among those two competing and irreconcilable possible results) via a judgment on the pleadings because "no discovery is required to demonstrate the existence of a binding collective bargaining agreement, the existence of a broad arbitration clause, and the existence of a dispute over the interpretation of the CBA's coverage language." (Doc. No. 19 at 5).

Defendants respond that viewing the pleadings in the light most favorable to them, "the Court must conclude that Defendants could prove a set of facts which would support a plausible defense that the grievance is not substantively arbitrable." (Doc. No. 25 at 1). Perhaps this is true; it seems likely that the Court could find such a set of facts at this stage, especially because in determining whether Plaintiff is entitled to judgment as a matter of law,

the Court must accept only the "*undenied* facts alleged in the complaint" and also must "assum[e] as true all the material allegations of fact in the answer." *See Lowden*, 709 F. Supp at 546 (emphasis added). The Court could see how, under this standard, the Court could conclude that the facts could plausibly suggest that the grievance is not arbitrable under the CBA.

But Defendants miss the mark because, under applicable law, it is not enough that Defendants could prove a set of facts that would plausibly suggest that the grievance is not substantively arbitrable. This is because federal law recognizes a heavy preference for arbitration, as the Sixth Circuit has explained:

> The Supreme Court has made it repeatedly clear that:
>
> > where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."
> >
> > *AT & T Technologies v. Communications Workers of America*, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 4

> L.Ed.2d 1409 (1960)). The presumption of arbitrability is particularly applicable to broad arbitration clauses. *AT & T Technologies*, 475 U.S. at 650, 106 S.Ct. 1415 (finding presumption of arbitrability particularly applicable to arbitration clause covering "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder"); *USW v. Mead Corp., Fine Paper Div.*, 21 F.3d 128, 132 (6th Cir.1994) (finding presumption of arbitrability particularly applicable to arbitration clause covering grievances "involving the interpretation of, or compliance with, this Agreement"); *International Union, UAW v. United Screw & Bolt Co.*, 941 F.2d 466, 472-473 (6th Cir.1991) (finding presumption of arbitrability particularly applicable to arbitration clause covering "matter[s] involving the interpretation or application of, or compliance with any of the terms of this Agreement").

United Steel Workers of Am. v. Century Aluminum of Kentucky, 157 F. App'x 869, 872 (6th Cir. 2005). These principles effectively deny Defendants the strong position held by a defendant opposing a plaintiff's motion for judgment on the pleadings in other, more typical kinds of cases. The upshot essentially is that Plaintiff is entitled—even right now, at this early stage—to the judgment it seeks in this lawsuit not only if it shows that that arbitration clause *must* be construed in its favor to cover the grievance here at issue, but also if it shows

merely that the arbitration clause *could* be construed in its favor. That is, if the arbitration clause is *at all* susceptible of an interpretation that covers the applicable grievance, then Plaintiff is entitled to judgment. Or to put the same concept in different terms (those suggested by *Century Aluminum*), Plaintiff is entitled to judgment if it cannot be said that the arbitration clause is not susceptible of an interpretation whereby it covers the applicable grievance. And if (considering whatever relevant facts the Court must accept as true on a Rule 12(c) motion) the arbitration clause is at all susceptible of an interpretation that covers the applicable grievance, then Plaintiff is entitled to judgment on the pleadings. This standard places Plaintiff in a strong position at the outset, even though the facts the Court accepts as true generally cut in favor of Defendants (since the Court accepts Defendants' version of the facts as to any disputed factual issue).

ANALYSIS

I. Even at the pleadings stage, it is clear that the applicable grievance is subject to arbitration.

Given the applicable standards, it is not hard to see why plaintiffs might be able to prevail on Rule 12(c) motion in this kind of case, which is exactly what the plaintiff did in *Century Aluminum*. There, the Court granted the plaintiff judgment on the pleadings because, "[r]esolving doubts in favor of arbitration as provided for under the CBA, we cannot say with positive assurance that the only reasonable interpretation of the LCA expressly excludes

the [dispute at issue] from arbitration."[7] *Id.* at 874. Judgment on the pleadings in favor of Plaintiff likewise would be appropriate here if the Court were to determine merely that it cannot say with assurance that the only reasonable interpretation of the CBA expressly excludes the applicable grievance from arbitration.

The Court takes a step back to note how it is that the Court could make this determination in Plaintiff's favor.[8] The Court first addresses the law governing the arbitration clause. Although the parties do not address the applicable law governing the interpretation of the arbitration clause, it has been said that "interpretation of the arbitration clause and grievance procedures contained within the collective bargaining agreement is governed by federal law." *Vera v. Saks & Co.*, 218 F. Supp. 2d 490, 493 (S.D.N.Y. 2002), *aff'd*, 335 F.3d 109 (2d Cir. 2003). The Court believes, however, that it is more precise and accurate to say that "[i]nterpretation of an arbitration clause of a collective bargaining agreement is governed by state contract law principles, although the Supreme

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7. In context, it is clear that the court meant to say, in substance, "resolving doubts in favor of arbitration (as provided for under the CBA), as we must under applicable law. . . ." That is, the court meant that it was resolving doubts in favor of arbitration because doing so was required under *applicable law*, and did not mean to say that it was resolving doubts in favor of arbitration based on *some language in the in the CBA specifically saying that doubts should be resolved in favor of arbitration*.

8. In so doing, the Court gives due attention to where (if ever) in the analysis the presence of disputed facts conceivably could defeat the Motion.

Court has instructed district courts that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Operative Plasterers & Cement Masons Int'l Ass'n v. International Bhd. of Painters & Allied Trades, Local Union 1486*, 954 F. Supp. 568, 571 (E.D.N.Y. 1997) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). To the extent that state law principles govern how a court goes about construing a contract—or considering what constructions could be considered reasonable—Kentucky law, Tennessee law or Alabama law all would be logical possibilities given the geographical scope of the CBA (Doc. No. 15-1 at 7), but the CBA simply does not indicate which state law governs. But in any event, the Court believes that whether Kentucky, Tennessee, Alabama, or federal principles are properly deemed applicable, the following analysis would be appropriate, as it is essentially axiomatic that a contractual provision must be construed based on the provision being deemed unambiguous (the primary possibility) or, if option one is inapplicable because the contract is ambiguous, then based on the contract being ambiguous (the secondary possibility).

More specifically, the first possibility for the Court to rule in Plaintiff's favor is for the Court to find as a matter of law (a) that the CBA on its face is unambiguous with respect to the question of whether the applicable grievance is within the scope of the arbitration clause,[9]

9. The threshold question of whether a contract is ambiguous is one of law. *See Park v. Unum Life Ins. Co. of America*, 702 F. Supp. 2d 934, 937 (E.D. Tenn. 2010).

and (b) the answer to that question (unambiguously) is yes, meaning the grievance must be arbitrated. The second possibility is for the Court, although finding that the CBA is ambiguous with respect to that question, to find based on undisputed facts that the ambiguity necessarily must be resolved with an affirmative answer to that question. Neither party speaks in terms of these two possibilities, but the Court finds it necessary to do so to explain whether it is appropriate to determine at this juncture that the arbitration clause could reasonably be construed to encompass the instant grievance—which as noted above is the only determination the Court need make on the instant Motion.

As for the first possibility, the Court looks for guidance to *Century Aluminum*, finding it highly persuasive though obviously non-binding (as it was not published in the Federal Reporter).[10] There the arbitration clause applied to grievances "concerning the interpretation or application of or compliance with the provisions of this Agreement." 157 F. App'x at 873. The arbitration clause here is quite similar in scope, covering as it does grievances concerning "the interpretation or application" of the CBA. True, it

10. *Century Aluminum* differs from the instant case in that it involves a construction not only of the inclusive scope of the arbitration clause, but also of a particular exclusion of certain grievances from a separate agreement (a so-called Last Chance Agreement) executed by the union member to which the grievance occurred. But the fact that *Century Aluminum* involved the latter additional issue, renders the case, if anything, even more telling because the court's resolution of the issue (a rejection of the applicability of the exclusion) served to further highlight the strength of the presumption in favor of arbitration.

does not cover grievances concerning "compliance with" the CBA, but the notion of "compliance with" the CBA is essentially subsumed in the notions of "the interpretation or application" of the CBA anyway. Such an arbitration clause is a "broad" arbitration clause, and thus renders the presumption of arbitrability of the instant grievance "particularly applicable." *Id. Century Aluminum* thus teaches that the Court must presume that the particular grievance in this case is arbitrable. It also teaches that the Court should look at the language of the arbitration clause itself, look at the nature of the grievance, and see whether the nature of the grievance can reasonably be said to fit within such language. *Id.* Although *Century Aluminum* did not use the terminology of "[un]ambiguous," its gist is clearly that if the arbitration clause is *unambiguous* as to whether the grievance reasonably can be said to fit within it, that is the end of the matter unless the party opposing arbitration can point to some exclusion taking the grievance out of mandatory arbitration.

The Court finds that the arbitration clause here *unambiguously* is broad enough that it is susceptible to a reasonable interpretation whereby it covers the alleged grievance. Or, to state it the alternative way, the arbitration clause is *unambiguous as to* whether it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute: the arbitration clause unambiguously indicates that this cannot be said. There is no dispute as to what the grievance is. As Defendants put it, the Union is objecting to the refusal "to bind the Supply Chain Division's Knoxville Fulfillment Center to the

Nashville Division's labor contract [.]" (Doc. No. 25 at 6). To the same effect, Plaintiff explains that the grievance "concern[s] whether the CBA applies to" the Knoxville Local Fulfillment Center. (Doc. No. 20 at 4). The language of the arbitration clause is such that it is unambiguous as to whether it reasonably could be construed to cover such a grievance. If anything, the arbitration clause unambiguously can *only* (and not just reasonably) be construed to cover such a grievance, which patently is a grievance concerning "the interpretation or applicability" of the CBA.

Because the arbitration clause unambiguously is broad enough to enable Plaintiff to prevail on the Motion, the Court need not consider the second possibility. In other words, because the arbitration clause is not ambiguous as to the question involved here, the Court need not and should not get into any underlying facts to determine whether the arbitration clause applies. The only facts that matter are those undisputed ones that enable the Court to reach the conclusion it has reached: the language of the arbitration clause and the nature of the grievance. As Plaintiff puts it (correctly, except perhaps insofar as Plaintiff states that The Kroger Company as well as KLPI are bound by the CBA):

> The Kroger Company and Kroger Limited Partnership I are bound by the Parties' CBA, and they have both agreed therein to submit to binding arbitration when the Union timely grieves a dispute "over the interpretation or application" of the CBA's coverage clause.

Appendix D

> These facts are not genuinely disputed, and they require compelling Kroger to arbitration.

(Doc. No. 28 at 1).

Seeking to avoid this result, Defendants point to a variety of disputed facts, claiming that they prevent judgment on the pleadings. But the argument is flawed because it: (1) fails to account for the fact that, as explained above, Defendants start behind the eight-ball on this Rule 12(c) motion (unlike defendants opposing Rule 12(c) motions in other kinds of cases); (2) the factual disputes to which it points are immaterial to whether the grievance must be arbitrated, and instead go to who should win the arbitration; and, relatedly; (3) puts the cart before the horse by asserting in essence that the CBA does not apply to the Knoxville Local Fulfillment Center, which is actually the very issue that is subject to arbitration and thus is for the arbitrators (and not this court) to decide.

Defendants also rely on the principle that where the merits of the claim are bound up with the question of arbitrability, the court's duty to determine whether the party intended the dispute be arbitrable trumps its duty to avoid searching the merits. (Doc. No. 25 at 9 (quoting *Communication Workers v. Avaya, Inc.*, 693 F.3d 1295, 1300 (10th Cir. 2012))). But that is inapplicable here, because the question of arbitrability is easily separable from the merits of the claim. Such a question is very straightforward and is dictated entirely by the *nature*, and not in any way by the merits, of the grievance.

Defendants make an additional argument,[11] namely, that for the Court to compel arbitration via this action, there would need to be a determination from the National Labor Relations Board ("NLRB") that the Supply Chain Division, which allegedly operates the Knoxville Local Fulfilment Center, "constitute[s] one appropriate bargaining unit" with The Kroger Company, Nashville Division. This argument is without merit for two reasons: (1) federal courts are authorized to "exercise jurisdiction over suits brought to enforce collective bargaining agreements," *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge*, 403 U.S. 274, 298, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971), and (2) the determination of whether the CBA applies to the Knoxville Local Fulfillment Center is a contract interpretation question properly left to the arbitrator, not a representational question subject to the NLRB's exclusive jurisdiction.[12] *See Paper, Allied Industrial, Chemical & Energy Workers Intern. Union v. Air Products & Chemicals, Inc.*, 300 F.3d 667 (6th Cir.

11. In the Reply, Plaintiff treats this argument as two distinct arguments: one relating to the NLRB's jurisdiction preempting federal courts' jurisdiction and the second relating to whether Plaintiff is seeking to combine disparate bargaining units. However, it is presented in Defendants' Response as a single argument, which is how the Court will address it.

12. The NLRB retains exclusive jurisdiction over labor-management disputes that are "primarily representational." *See Int'l Bhd. of Elec. Workers, Loc. 71 v. Trafftech, Inc.*, 461 F.3d 690, 695 (6th Cir. 2006). The Sixth Circuit recognizes "two types of situations in which a dispute will be treated as primarily representational: where the Board has already exercised jurisdiction over a matter and is either considering it or has already decided the matter." *Id.* Neither situation is applicable to this case.

2002) (finding that the question of whether a CBA between a company and a union—which covered the company's chemical plant—also covered the company's newly built power plant was a question of contract interpretation and could be compelled to arbitration by a federal court).

II. KLPI is subject to arbitration, but the Court cannot conclude at the pleading stage that The Kroger Company is subject to arbitration.

So the grievance here is subject to arbitration. And it is undisputed, and admitted by Defendants in their answer (Doc. No. 17), that KLPI is a party to the CBA. (Doc. No. 28 at 1 n.1 (citing Doc. No. 17 ¶ 8)). Thus, KLPI is subject to arbitration of the grievance. The Kroger Company, however, is another matter. Defendants deny that The Kroger Company is a party to the CBA. (Doc. No. 17 ¶ 8). This is problematic for Plaintiff, which seeks to send both KLPI and The Kroger Company to arbitration, because the heavy presumption in favor of arbitration does not entail a heavy presumption in favor of sending *any particular Defendant* to arbitration. Instead, to prevail on its Rule 12(c) motion as to The Kroger Company in particular, Plaintiff must satisfy the usual Rule 12(c) standard. Again, this means showing "on the undenied facts alleged in the complaint and assuming as true all the material allegations of fact in the answer, the plaintiff is entitled to judgment as a matter of law." *Lowden v. Cty. of Clare*, 709 F. Supp. 2d at 546. Thus, the Court must take as true Defendants' allegation (which the Court believes indeed qualifies as a factual allegation) that The Kroger Company is not a party to the CBA.

Notably, even if the Court could disregard this allegation on the grounds that (supposedly) it is irrefutably contradicted by the face of the CBA, the allegation is not irrefutably contradicted by the face of the CBA. True, it is irrefutable that "The Kroger Company, Nashville Division & The Kroger Company, Louisville Division" is a party (or, are parties) to the CBA. But on the face of the CBA, the Court cannot say whether this party (or these parties) are the same as Defendant The Kroger Company, *i.e.*, a particular "Ohio corporation with its corporate headquarters and principal place of business located at 1014 Vine Street, Cincinnati, Ohio 45202-1100." (Doc No. 15 at 2). Given prevailing convention regarding corporate names (meaning formal and informal names, and legal and assumed names), the Court simply cannot make this equation at this time. The Court understands why Plaintiff would assert this equation, but that matter is not a certain one. And there is no question that Defendants have set forth a factual basis for disputing this equation.

Accordingly, although the Court could make this equation later on in this litigation, and thereby deem The Kroger Company subject to arbitration along with KLPI, the Court declines to do so at this juncture.

CONCLUSION

For the reasons discussed, Plaintiff's Motion will be granted in part and denied in part. In particular, it will be granted as to KLPI and denied as to The Kroger Company. Moreover, the Court will solicit the parties' input as to how this case should proceed in light of this

split resolution, in particular, whether KLPI should be ordered to arbitration without The Kroger Company, or whether the issues as to The Kroger Company should be resolved before KLPI is sent to arbitration.

An appropriate order will be entered.

/s/ Eli Richardson
ELI RICHARDSON
UNITED STATES DISTRICT JUDGE

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED DECEMBER 19, 2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-5085

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 1995,

Plaintiff-Appellee,

v.

KROGER CO.,

Defendant,

KROGER LIMITED PARTNERSHIP I,

Defendant-Appellant.

ORDER

BEFORE: SILER, McKEAGUE, and LARSEN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision

of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Larsen would grant rehearing for the reasons stated in her dissent.

Entered by Order othe Court

/s/_____
Deborah S. Hunt, Clerk