APPENDIX TABLE OF CONTENTS

Page

APPENDIX A—Court of Appeals Opinion filed December 22, 2022 ..... 1a

APPENDIX B—District Court Memorandum Opinion and Order filed November 17, 2020 ..... 28a

APPENDIX C—Statutes

29 U.S.C. 158(a)(5), (b)(3), (d) 38a
29 U.S.C. 1132(g)(2) 41a
29 U.S.C. 1144(d) 42a
29 U.S.C. 1145 ..... 43a

APPENDIX A

In the United States Court of Appeals
For the Seventh Circuit

NO. 20-3437

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CHARLES A. WHOBREY, as Trustee,

Plaintiffs-Appellants,

v.

TRANSERVICE LOGISTICS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:20-cv-04610, **Ronald A. Guzmán**, *Judge*.

No. 20-3438

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CHARLES A. WHOBREY, as Trustee,

Plaintiffs-Appellants,

v.

ZENITH LOGISTICS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:20-cv-04611, **Ronald A. Guzmán**, *Judge*.

ARGUED SEPTEMBER 7, 2022 –
DECIDED DECEMBER 22, 2022

Before SYKES, *Chief Judge*, and HAMILTON and BRENNAN, *Circuit Judges.*

HAMILTON, *Circuit Judge*. Defendants Transervice Logistics, Inc. and Zenith Logistics, Inc. ("the employers") agreed that for the entire duration of two collective bargaining agreements, they would make pension contributions on behalf of covered employees to plaintiff Central States, Southeast and Southwest Areas Pension Fund. Both collective bargaining agreements contained so-called "evergreen clauses" that extended them a year at a time until either party provided timely written notice expressing an "intention to terminate" the agreements.

Both agreements were set to expire on January 31, 2019. After the window for timely notice of intention to terminate on that date had passed, the employers and the union signed new collective bargaining agreements requiring pension contributions to a different fund beginning February 1, 2019. The employers notified the plaintiff fund that they were ceasing contributions, relying on letters the union sent them back in November 2018. The question in these consolidated appeals is whether those letters expressed the union's intent to terminate the existing collective bargaining agreements, so as to satisfy the termination procedure in the evergreen clauses and end the employers'

obligations to contribute to the plaintiff fund on January 31, 2019.

Our answer is no. The supposed termination letters did not mention termination. They noted the date that the collective bargaining agreements would *expire* and expressed a desire to meet to negotiate new agreements. But neither of these points communicated an intent to *terminate* the existing agreements. In the context of an evergreen clause, expiration and termination are distinct concepts. A desire to negotiate a new contract is quite consistent with a desire to leave the existing agreement in place unless and until a new deal is reached. The old agreements thus renewed under the evergreen clauses, and the defendant employers remained obligated to contribute to the plaintiff fund for one more year. We therefore reverse the district court's dismissals for failure to state a claim for relief.

I. *Factual and Procedural Background*

The contracts relevant to these cases are two collective bargaining agreements between the employers and a union, and trust agreements between each employer and the plaintiff fund. We begin with the critical language from these contracts. We then describe how the letters from the union to the employers seeking negotiation of new collective bargaining agreements led to this lawsuit.

A. *The Agreements Obligating the Employers to Contribute to the Fund*

Defendants Transervice Logistics, Inc. and Zenith Logistics, Inc. are trucking logistics companies with employees belonging to General Drivers, Warehousemen & Helpers Local Union No. 89, an affiliate of the International Brotherhood of Teamsters. In 2013, the union entered into a collective bargaining agreement with each employer. The agreements are identical for purposes of this lawsuit. The agreements obligated the employers to make pension contributions to plaintiff Central States, Southeast and Southwest Areas Pension Fund, making this fund a third-party beneficiary of the agreements. Each employer also agreed to abide by the terms of the fund's Trust Agreement, which included that:

> An Employer is obliged to contribute to the Fund for the entire term of any collective bargaining agreement . . . (including any extension of a collective bargaining agreement through an evergreen clause . . .).

An "evergreen" clause is designed to promote stability in labor relations by providing that the terms of an existing collective bargaining agreement remain in effect, through automatic renewal, unless and until a party expressly terminates the agreement in a timely way. Each collective bargaining agreement in this case defined its duration through the following "evergreen" clause:

> This Agreement shall be effective as of February 1, 2013 and shall expire January 31, 2019; provided, however, that if neither party gives the other party written notice sixty (60) days prior to the said expiration date of such parties [sic] intention to terminate this Agreement, said Agreement shall continue for another year and from year to year thereafter, subject to sixty (60) days' notice of termination prior to any succeeding termination date.

Thus, each collective bargaining agreement would expire January 31, 2019 but would continue in effect on a yearly basis until either the union or employer provided the other with timely written notice of intention to terminate.

B. *The November 6th Negotiation Letters*

The union president sent a letter to each employer dated November 6, 2018, more than 60 days before the collective bargaining agreements were scheduled to expire. Each letter had the subject line "CONTRACT EXPIRATION" followed by the expiration date stated in the evergreen clause. The near-identical letters were three sentences long:

> Your present contract with General Drivers, Warehousemen, and Helpers, Local Union No. 89, expires as noted above.
>
> It is our desire to meet with you at an early date for the purpose of negotiating a new contract.

> We trust the forthcoming negotiations will result in an agreement that will be fair and just too [sic] all parties involved and that a better spirit of harmony and cooperation will be derived there from [sic].

These letters stated a desire to negotiate. Neither letter used the word "terminate" or any synonym. And neither employer replied to the letters saying it wanted the collective bargaining agreement to terminate. After the letters were sent, the employers and union met and negotiated new collective bargaining agreements taking effect on February 1, 2019. The new contracts required the employers to continue making pension contributions for employees, but to a different pension fund going forward.

In letters dated January 30, 2019, both employers told the plaintiff fund that they would no longer provide pension contributions. The employers stopped providing contributions to the fund after the week ending on February 2, 2019. The fund asked for proof that the employers and union had timely terminated the collective bargaining agreements. The employers responded with copies of the union's November 6th negotiation letters.

C. *District Court Proceedings*

In the fund's view, the November 6th negotiation letters did not terminate the agreements because they simply did not express an intention to terminate them. The fund believed the evergreen clauses extended both

collective bargaining agreements for an additional year, requiring the employers to continue contributing to the fund through January 31, 2020. The fund continued to bill the employers for these pension contributions, but the employers did not make those payments.

The fund filed a suit against each employer under section 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132. The fund alleged that by ceasing contributions without having properly terminated the collective bargaining agreements, the employers breached their respective Trust Agreements in violation of ERISA section 515, 29 U.S.C. § 1145. The fund seeks contributions to cover the unfunded period from February 1, 2019 through January 31, 2020 as well as interest, statutory damages, attorney fees, and costs. The fund alleges that Transervice owes approximately $2.6 million and that Zenith owes approximately $9.2 million in pension contributions for that additional year.

The employers moved to dismiss the complaints based on a termination defense, arguing that the November 6th negotiation letters served as effective notice of termination so that the collective bargaining agreements did not renew for another year under the evergreen clauses. The fund moved for partial summary judgment regarding contribution liability. The district court struck the fund's summary judgment motions as premature and granted the employers' motions, dismissing the cases with prejudice. The district court found that the November 6th negotiation letters "constituted an unequivocal expression of the intent to

terminate the current contract." *Central States, Southeast and Southwest Areas Pension Fund v. Transervice Logistics, Inc.*, 2020 WL 6747027, at *3 (N.D. Ill. Nov. 17, 2020). The fund has appealed in both cases.

II. *Standard of Review*

We review de novo a district court's grant of a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, meaning that we take a fresh look at the legal issues and do not defer to the district court on close calls. See, e.g., *Schultz v. Aviall, Inc. Long Term Disability Plan*, 670 F.3d 834, 836 (7th Cir. 2012). These appeals present only a question of law. Their outcome depends solely on the language of the collective bargaining agreements, the Trust Agreements, and the November 6th negotiation letters. The fund attached these documents to its complaints, and a "written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c). Our "interpretation of language in a plan governed by ERISA is controlled by federal common law, which draws on general principles of contract interpretation, at least to the extent that those principles are consistent with ERISA." *Schultz*, 670 F.3d at 838.

III. *Enforcing ERISA Plans*

Moving to the substantive law, we summarize in Part A the applicable ERISA provisions. We then explain in Part B why courts strictly interpret and enforce communications relied upon to terminate

collective bargaining agreements subject to evergreen clauses. In Part C we apply these principles to the union's November 6th negotiation letters and explain why those letters did not terminate the collective bargaining agreements under the terms of the evergreen clauses.

A. *ERISA*

ERISA protects employee benefit funds against uncertainty and employees against loss of benefits. ERISA section 502 in relevant part empowers a fund fiduciary to bring a civil action in a district court to enforce a contractual obligation to contribute to a multiemployer plan. 29 U.S.C. § 1132(a)(3)(B)(ii). In 1980, Congress added section 515 to ERISA, requiring employers who are obliged to contribute to multiemployer employee benefit plans under the terms of a collective bargaining agreement to do so "in accordance with the terms and conditions" of the agreement. 29 U.S.C. § 1145. Congress added section 515 to protect multiemployer benefit funds against "unnecessarily cumbersome and costly" litigation pursuing delinquent employers. *Central States, Southeast & Southwest Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1153 (7th Cir. 1989) (en banc), quoting 126 Cong. Rec. 23039 (1980) (Rep. Thompson). Section 515 makes clear that a court deciding a contribution obligation should hold the parties to the terms of their contracts as written.

In *Gerber Truck*, we held that section 515 means "that a plan may enforce the writings according to their terms, if 'not inconsistent with law.'" *Id.* at 1149, quoting 29 U.S.C. § 1145. Courts enforce documents as written under section 515 because third-party beneficiaries like the plaintiff fund here "take contracts as they find them." *Id.* at 1151. Most important, the fund is "entitled to enforce the writing[s] without regard to understandings or defenses applicable to the original parties." *Id.* at 1149–50, 1154 (rejecting argument that oral side agreement between employer and union affected terms of employer's duty to contribute to pension fund); accord, e.g., *Martin v. Garman Construction Co.*, 945 F.2d 1000, 1005 (7th Cir. 1991) (noting benefit plans may enforce contracts by their terms because "many of the defenses available under the NLRA or under traditional contract law do not fly under ERISA"). When an evergreen clause provides that termination will occur upon timely notice of intention to terminate, as in this case, anything short of a clear expression of such intent fails to qualify as effective termination notice under the terms of the evergreen clause.

B. *Evergreen Clauses: Strict Interpretation*

Even in the termination defense cases described below that were not brought under ERISA, we strictly interpreted evergreen clauses according to their terms. In the present cases, our strict adherence to the agreed-to language of the evergreen clauses is

strengthened by the governing ERISA provisions already described.[1]

There is no universal or standard form for an evergreen clause. When considering a termination defense involving an evergreen clause, "each [case] treats the question at hand as the best way to understand a particular contract." *Office & Professional Employees Int'l Union, Local 95 v. Wood County Telephone Co.*, 408 F.3d 314, 316 (7th Cir. 2005). We look to the language of the evergreen clause establishing the method of termination and analyze whether the alleged notice complied. See *Baker v. Fleet Maintenance, Inc.*, 409 F.2d 551, 554 (7th Cir. 1969) (ruling on termination by "consider[ing] the termination clause of the contract . . . in conjunction with the [alleged termination] letter"); *Oil, Chemical & Atomic Workers Int'l Union v. American Maize Prods. Co.*, 492 F.2d 409, 411–12 (7th Cir. 1974) (ruling on termination by comparing the intent of the letter to the notice requirement set forth in the agreement); *Rutherford v. Judge & Dolph, Ltd.*, 707 F.3d 710, 716 (7th Cir. 2013) (same).

"The terms of a collective bargaining agreement are to be enforced strictly when the terms are unambiguous." *Contempo Design, Inc. v. Chicago & Northeast Illinois District Council of Carpenters*, 226 F.3d 535, 546 (7th Cir. 2000). Strict compliance with an evergreen clause's requirements for termination is

[1] Evergreen clause cases have arisen under both ERISA and the Labor Management Relations Act, 29 U.S.C. § 301. The cases we cite and discuss have not applied different standards under the two statutes.

especially important when a third-party beneficiary such as the plaintiff fund must make decisions based on the conduct of the parties to the contract without being involved in or even privy to extrinsic evidence such as the course of negotiations.

Our strict enforcement of evergreen clauses and their requirements for a notice to terminate a collective bargaining agreement is consistent with the decisions of our colleagues in all other circuits that have addressed this issue. The First, Fifth, Sixth, and Eighth Circuits all require unequivocal notice to terminate a collective bargaining agreement with an evergreen clause. See *New England Carpenters Central Collection Agency v. Labonte Drywall Co.*, 795 F.3d 271, 277 (1st Cir. 2015) ("[S]tated intent to withdraw from [a collective bargaining relationship] is effective only if it is both timely and unequivocal."), quoting *Haas Electric, Inc. v. National Labor Relations Board*, 299 F.3d 23, 27 (1st Cir. 2002) (Stahl, J., concurring); *Louisiana Bricklayers & Trowel Trades Pension Fund & Welfare Fund v. Alfred Miller General Masonry Contracting Co.*, 157 F.3d 404, 409 (5th Cir. 1998) ("[W]hatever the letter did, it neither unequivocally indicated an intention to terminate the CBA, nor could it do so . . . '[N]otice to terminate must be clear and explicit.'"), quoting *Office & Professional Employees Int'l Union v. UAW, Westside Local 174*, 524 F.2d 1316, 1317 (6th Cir. 1975); *Orrand v. Scassa Asphalt, Inc.*, 794 F.3d 556, 564 (6th Cir. 2015) ("A notice to terminate must be clear and explicit."), quoting *Chattanooga Mailers Union v. Chattanooga News-Free Press Co.*, 524 F.2d 1305, 1312

(6th Cir. 1975); *Twin City Pipe Trades Service Ass'n v. Frank O'Laughlin Plumbing & Heating Co.*, 759 F.3d 881, 885 (8th Cir. 2014) (notice must "evince the unequivocal intent necessary to terminate participation in a CBA"). We agree with these cases' standard requiring unequivocal notice of a party's intent to terminate a collective bargaining agreement.

After reading our cases strictly enforcing the terms of collective bargaining agreements and multiemployer benefit plans, including their termination requirements in evergreen clauses, such as *Wood County Telephone*, 408 F.3d at 315, and *Rutherford*, 707 F.3d at 712, the district court here correctly understood our precedents to require "unambiguous, timely notice" that complies with the evergreen provision for effective termination. *Transervice Logistics*, 2020 WL 6747027, at *3. Our disagreement with our colleague on the district court is with the application of that standard to the letters in this case.

C. *The November 6th Negotiation Letters*

Each relevant collective bargaining agreement's evergreen clause said that the agreement "shall expire" on a certain date, but that the agreement would nonetheless "continue" and bind the parties on a year-to-year basis until one party provided the other with timely "written notice" expressing an "intention to terminate." There is nothing ambiguous about this language as applied to the facts here. The contract

language allows for termination, but only upon timely written notice of intent *to terminate.*

Nothing in the union's November 6th negotiation letters expressed any intent to terminate the existing agreements. The obvious import of the letters was that the union hoped to negotiate new agreements with the employers, but the letters said nothing about terminating the existing agreements regardless of whether or not new agreements were reached.

To avoid the legal consequences of this silence, the employers argue that the union's intention to terminate, regardless of the outcome of negotiations for new agreements, was made clear through several features of the letters: the mention of the agreements' expiration dates, the stated desire for a "new" contract, a notice of bargaining form attached to each letter, and extrinsic evidence of the negotiations that occurred between the union and employer after the letters were sent. None of these features of the November 6th negotiation letters, considered alone or together, expressed a timely intention *to terminate*.

1. *Reference to Expiration Date*

The subject line of the short letters was "CONTRACT EXPIRATION" followed by the expiration date from the evergreen clauses. The first sentence of each letter noted: "Your present contract with [the union], expires as noted above." The evergreen clauses themselves said that the agreements "shall expire January 31, 2019" before describing the active steps required to

terminate. January 31, 2019 was the date of "expiration" after which the contracts would continue until a party provided timely written notice of "intention to terminate."[2]

The district court reasoned that the letters indicated an intent to terminate because they mentioned the date of expiration "and did not imply any desire to change or continue the current contract past its expiration date." *Transervice Logistics*, 2020 WL 6747027, at *3. That reasoning reversed the logic of an evergreen clause. An evergreen clause does not require parties to express or do anything for the agreement to continue. Quite the opposite: evergreen clauses ensure an agreement will extend beyond its expiration date when parties take no action or take any action short of that required for termination. Here, the action required for termination was timely expression of intent to terminate. The letters' mere mentions of the expiration date did not express any such intent. As noted, expiration and termination are not equivalent for purposes of an evergreen clause.

The expiration date listed in an evergreen clause is merely the first date on which the agreement *could* terminate if timely notice was given. A collective bargaining agreement can "expire" without "terminating."

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[2] One letter misstated the expiration date as February 1 rather than January 31. The fund argues this misstatement made the letter ambiguous and insufficient to serve as notice to terminate. We find the letter insufficient because it does not express any intent to terminate. We do not need to consider whether or how the mistaken date affected the letter's meaning.

That's the whole point of an evergreen clause. See *Operating Engineers Local 139 Health Benefit Fund v. Gustafson Construction Corp.*, 258 F.3d 645, 649 (7th Cir. 2001) ("Although that contract expired in 1993, it contained an 'evergreen' clause: if neither party terminated the contract, it would be renewed automatically."); see also 29 U.S.C. § 158(d)(1) (recognizing difference between termination and expiration and requiring written notice "of the proposed *termination* or modification sixty days prior to the *expiration* date") (emphasis added). Parties use evergreen clauses to ensure that a collective bargaining agreement will remain in place until *at least* the stated expiration date, and then that the agreement will persist until the active steps required for termination are taken.

Preserving the legal difference between expiration and termination is not merely splitting legalistic hairs. The difference has important practical consequences for employees, unions, employers, and benefit plans. Parties include evergreen clauses in their collective bargaining agreements to ensure stability. These clauses carefully define the limited possibilities for how and when the rights and duties set forth in the agreement could end. The status quo will not change before an agreed-to notice period elapses, even if the parties are engaged in difficult negotiations. To conflate "expiration" with "termination" in the context of these evergreen clauses would be to ignore their purpose—and their own use of these two terms—which was to allow the agreements to persist beyond the

stated *expiration* date absent timely notice of intent to *terminate.*

Strict enforcement promotes stability by protecting funds and employee pensions against strategic attempts to evade an evergreen clause. Parties may wish to meet for renegotiation after it is too late to provide timely notice of termination and then decide whether to terminate the old agreement based on whether they succeed in reaching a new agreement. Drafting a letter mentioning an expiration date and later arguing whether it did or did not invoke termination, depending on the outcome of the negotiations, leaves third-party beneficiaries without the clarity they need to avoid the unfunded commitments and the costly litigation that section 515 is supposed to prevent. See, e.g., *Gerber Truck*, 870 F.2d at 1153. To be clear, we are not (quite) saying that the phrase "we intend to terminate" was required for effective notice. But the intention to terminate must be unequivocal and unmistakable.[3]

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[3] In fact, we have previously recognized that even using the word "terminate" does not necessarily make a notice effective for termination. See *Rutherford*, 707 F.3d at 717 (indicating that "terminates" phrased in the passive voice can be insufficient for termination notice when used without "expression of an intent to terminate"), citing *Wood County Telephone*, 408 F.3d at 316. And as a caution against a rigid requirement for using the word "terminate," the First Circuit found that a notice in an employer's blunt, layman's language unequivocally expressed an intent to terminate in *New England Carpenters Central Collection Agency v. Labonte Drywall Co.*, 795 F.3d at 278.

2. *Reference to Negotiating a "New" Contract*

The employers argue that because the union's letters stated a desire to negotiate a "new" contract, the union did not want the collective bargaining agreements to remain in place. The district court agreed: "how could there be a 'new' contract without a termination of the old one?" *Transervice Logistics*, 2020 WL 6747027, at *3. But when the union sent the November 6th negotiation letters, there was no guarantee that new collective bargaining agreements could be reached.

Courts enforce evergreen clauses according to their terms to preserve their crucial function: to allow an agreement to persist, even during renegotiation, unless and until one party decides to terminate. See *Wood County Telephone*, 408 F.3d at 315. If a collective bargaining agreement lapses, so do many of its terms, including arbitration requirements and no-strike clauses. See *Litton Financial Printing Division, a Division of Litton Business Systems, Inc. v. National Labor Relations Board*, 501 U.S. 190, 201, 205 (1991). With these important rights and duties at stake, we do not infer from a party's expressed desire to negotiate a new contract that it is ready to abandon the in-place agreement regardless of the outcome of the negotiations.

Under the evergreen clauses in these agreements, a desire to renegotiate was not equivalent to a desire to terminate. In *Wood County Telephone*, the

evergreen clause renewed the agreement "until terminated by sixty (60) day written notice." 408 F.3d at 315. The employer raised a termination defense, claiming that a letter stating a "desire to reopen this Agreement and to negotiate . . . for a successor agreement" provided sufficient notice for termination. *Id.* We rejected the defense. There was nothing inconsistent about wanting to negotiate a new agreement while also keeping the current agreement in place unless and until a new deal was reached. As we said in *Wood County Telephone*, keeping a collective bargaining agreement in place during negotiations for a new agreement "is the point of an evergreen clause . . . Keeping [the prior agreement] in force while the parties negotiate for a replacement reduces the risk of labor strife and lost productivity." *Id.*[4]

Consistent with this reasoning, other circuits have held that unless an evergreen clause states that notice

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[4] The exception that proves the rule is evident in *Oil, Chemical & Atomic Workers Int'l Union v. American Maize Prods. Co.*, 492 F.2d 409 (7th Cir. 1974). There we held that notice of a "desire to modify" *did* terminate a collective bargaining agreement. The employers here thus assert that *American Maize* held that a letter requesting renegotiation "sufficed to constitute termination notice under the contract." The key is "under the contract." We reached that result in *American Maize* because the governing evergreen clause expressly provided for termination upon notice of "desire[ ] to amend or terminate." 492 F.2d at 410–11. *American Maize* makes the general point that we enforce evergreen clauses strictly according to their terms. In this case, there is no such language saying that a desire to renegotiate would terminate the collective bargaining agreement. We therefore enforce these evergreen clauses as written. The union's stated desire to renegotiate was not equivalent to notice of an intention to terminate.

of a desire to negotiate is sufficient for termination, then a request to negotiate is not notice to terminate. See, e.g., *Orrand*, 794 F.3d at 564 ("A notice of modification is not a notice of termination and does not affect termination[.]"), quoting *Chattanooga Mailers Union*, 524 F.2d at 1312; *District No. 1—Marine Engineers Beneficial Ass'n v. GFC Crane Consultants, Inc.*, 331 F.3d 1287, 1290 (11th Cir. 2003) ("Notices to modify and notices to terminate are not equivalent except in the face of contractual language that equates those types of notice.").

In *Orrand*, the Sixth Circuit faced a case much like this one. An evergreen clause renewed the relevant collective bargaining agreement until either party "expressly terminated by notice." *Orrand*, 794 F.3d at 559. The employer believed that it had terminated the agreement through oral statements to the union's local representative. After that conversation, the union sent the employer a letter saying "that the CBA would expire by its terms" on an impending date and expressing a "desire to modify, amend, and/or negotiate a new agreement." *Id.* The employer did not reply. When the multiemployer benefit fund later sued the employer for delinquent contributions, the Sixth Circuit read the letter as "a request to modify the . . . CBA and not as a request to terminate [that] agreement." *Id.* at 565. *Orrand* therefore affirmed summary judgment for the benefit fund because the agreements requiring payment had not actually been terminated according to the contractual requirements.

The employer was required to make benefit contributions for the contested period.

Consistent with *Orrand* and our own precedents, the union's letters here expressed a desire to renegotiate, but they did not clearly express an intent to terminate and so did not meet the evergreen clauses' requirements for termination.

3. *Attached Notice of Bargaining (F-7) Form*

The employers also argue that a so-called "F-7" form sent along with each letter at issue showed the union's intent to terminate. The district court said that the F-7 form "buttressed" its conclusion that the union's negotiation letters conveyed intent to terminate the collective bargaining agreements. *Transervice Logistics*, 2020 WL 6747027, at *3.

The National Labor Relations Act requires a party to notify the Federal Mediation and Conciliation Service when a party desires to "terminate or modify" a collective bargaining agreement. 29 U.S.C. § 158(d)(3). The F-7 form is used to provide this notice. Here, the union selected an option categorizing the notice type as "renegotiation." This check mark indicated the same intent expressed in the union's letters: to negotiate. For the same reasons we explained above, this expression of a desire to negotiate did not express an intent to terminate the existing agreements.

4. *Extrinsic Evidence of Post-Letter Negotiations*

The employers encourage us to interpret the November 6th negotiation letters by considering extrinsic evidence. They rely on the later negotiations and the new agreements that they reached with the union on the eve of the expiration date. The employers argue that these negotiations confirmed that the intent of the union's letter was to terminate the collective bargaining agreements in place. The district court agreed, noting that "indeed, the effect of the letter was that the parties went on to negotiate and enter into new CBAs within the sixty-day notice period." *Transervice Logistics*, 2020 WL 6747027, at *3.

Even if this extrinsic evidence could properly be considered, it could not cure the letters' silence about termination. To terminate effectively, the union would have had to make clear in November 2018 that it intended to terminate the existing agreements *regardless of the outcome of the requested negotiations.* The ultimate success or failure of those negotiations simply does not tell us anything about the answer to that question. Relying on the later successful negotiations to determine the union's supposed intentions in November 2018 reverses the direction of time's arrow.

The bargained-for termination method in the evergreen clause required timely, written notice—at least 60 days before the expiration date. A notice that can be understood only with the benefit of hindsight, after knowing how the negotiations ended, is not

sufficient. Congress added section 515 to ERISA to ensure that multiemployer benefit funds could rely on the terms of agreements alone to determine funding obligations. *Gerber Truck*, 870 F.2d at 1153. Looking to extrinsic evidence in a section 515 lawsuit brought by a third-party beneficiary fund would be inconsistent with that purpose and the statutory language requiring contracts to be enforced according to their terms.

Some of our prior evergreen clause cases addressing termination defenses have not been as clear as they might have been with respect to extrinsic evidence like the timing of negotiations. Close reading of those opinions shows, however, that we have not actually relied on such extrinsic evidence to decide whether termination occurred. In *Baker*, we included extrinsic evidence of the intent of the letter's drafter in laying out the facts of the case, but our actual decision took the sound, familiar approach of interpreting "the termination clause of the contract . . . in conjunction with" the alleged notice letter, without relying on that extrinsic evidence. 409 F.2d at 554. In *Wood County Telephone*, we held that a letter was not effective termination notice based on only the letter and the terms of the evergreen clause. We did not rely on parol evidence. We noted that, "[i]f there were doubt . . . the district judge might have turned to parol evidence," but we did not go further than noting that the parol evidence all pointed in the same direction as the text of the notice, which had not expressed an intent to terminate. 408 F.3d at 316. And finally, in *Rutherford*, we found that the notice of

intent to terminate was unequivocal, so we did not consider parol evidence. 707 F.3d at 716.[5]

These prior mentions of parol extrinsic evidence do not alter the fundamental principle that if a contract is unambiguous, we will not consider extrinsic evidence in its interpretation, especially with respect to the rights of a third-party beneficiary that is entitled under ERISA to enforce the contracts as written. E.g., *Temme v. Bemis Co.*, 622 F.3d 730, 734–35 (7th Cir. 2010); *UAW v. Rockford Powertrain, Inc.*, 350 F.3d 698, 702–03 (7th Cir. 2003); *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 602 (7th Cir. 1989). Where a contract provides a time and method for giving notice of termination, an ambiguous or equivocal notice simply does not meet the unambiguous termination method

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[5] Some opinions of our colleagues in other circuits have left room for parol evidence on the issue of termination even as they insisted on unequivocal expressions of intent to terminate. In *Twin City Pipe Trades*, the Eighth Circuit found that the employer's notices did not express an unequivocal intent to terminate, 759 F.3d at 886, and said that the employer's later conduct indicated continued acceptance of the terms of the collective bargaining agreement, *id.* at 885. In *Laborers Pension Trust Fund-Detroit and Vicinity v. Interior Specialists Constr. Group, Inc.*, 394 F. App'x 285, 291–92 (6th Cir. 2010), the Sixth Circuit held in a non-precedential order that notices of intent to terminate were unequivocal, but the court declined to adopt a rule barring extrinsic evidence that would show the condition in the notice—unless the parties agreed on a new contract—had not been satisfied. The result of *Twin City Pipe Trades* did not depend on extrinsic evidence, and we do not disagree with *Laborers Pension Trust* on the use of extrinsic evidence to show that a clear and objective condition in an unequivocal notice of intent to terminate had not been satisfied.

required by contract. An equivocal notice does not open a door for parol or extrinsic evidence, at least in disputes with third-party beneficiaries like the plaintiff fund in these appeals.

5. *Equitable Argument*

Finally, the employers argue that judgment for the fund would be unfair because it would require the employers to "pay into two pension funds for the same hours worked for the same group of employees." This argument is understandable, especially given the amounts of money at stake. Yet section 515 of ERISA does not allow for consideration of this equitable defense, and for good reasons. We rejected a similar equitable defense in *Gerber Truck*. There, a benefit plan sought contributions on behalf of all union employees. The employer's defense was that it had reached an oral side agreement with the union to contribute on behalf of just three specific employees. We said that although "the upshot may be harsh . . . Section 515 does not admit of such an equitable defense." *Gerber Truck*, 870 F.2d at 1155.

As we explained in *Gerber Truck*, refusing to consider equitable defenses in section 515 suits and enforcing these contracts as written both complies with the terms of the statute and protects third-party beneficiary plans and workers. Our approach enables funds to determine how much money to allocate for each employee without concern for any private and elusive understanding between employers and unions outside

the written contracts. Funds consider their obligations to employees to be independent of the actual amounts contributed by employers. See 870 F.2d at 1153–54. So, if an employer refuses to contribute but a fund deems an employee entitled to corresponding benefits, the fund could be left "with unfunded obligations." *Id.* at 1153. Those unfunded obligations jeopardize the stability of multiemployer plans, and "plan beneficiaries risk losing their pension benefits." *Indiana Elec. Workers Pension Benefit Fund v. ManWeb Servs.*, 884 F.3d 770, 775 (7th Cir. 2018) (noting that unfunded obligations also "put financial pressure" on other contributors to the fund "and discourage new employers from joining").

Conclusion

The starting point for our analysis of whether termination of a collective bargaining agreement occurred is the terms of the contract, including the evergreen clause's requirements for termination. Here those requirements made clear that to terminate, one of the parties to the contract needed to express an active desire for the agreement to end. If the employers wanted the agreements to terminate and were not sure that the union's letters did so effectively, due to the absence of any reference to termination, they could have sent letters stating their own intent to terminate.

The letters here expressed a desire to renegotiate the collective bargaining agreements but not to terminate them regardless of the success of those

negotiations. The collective bargaining agreements therefore continued in force under the evergreen clauses. The employers remained contractually obligated to make pension contributions to the plaintiff fund through January 31, 2020. The judgments of the district court are REVERSED and the cases are REMANDED for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CHARLES A. WHOBREY, as Trustee, Plaintiffs, v. TRANSERVICE LOGISTICS, INC., Defendant.	No. 20 C 4610
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CHARLES A. WHOBREY, as Trustee, Plaintiffs, v. ZENITH LOGISTICS, INC., Defendant.	No. 20 C 4611 Judge Ronald A. Guzmán

MEMORANDUM OPINION AND ORDER

(Filed Nov. 17, 2020)

For the reasons explained below, defendants' motions to dismiss the complaints pursuant to Federal Rule of Civil Procedure 12(b)(6) are granted.

BACKGROUND

Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund and its Trustee, Charles A. Whobrey (collectively, the "Fund"), brought these ERISA actions seeking to recover from defendants Transervice Logistics Inc. ("Transervice") and Zenith Logistics, Inc. ("Zenith") a year's worth of contributions, interest, and liquidated damages for work performed by covered employees between February 2019 and February 2020.

Defendants move to dismiss the Fund's complaints under Federal Rule of Civil Procedure 12(b)(6).

DISCUSSION

For purposes of a motion to dismiss under Rule 12(b)(6), the Court construes the complaint in the light most favorable to the plaintiffs, accepts as true all well-pleaded facts therein, and draws all reasonable inferences in plaintiffs' favor. *See Bultasa Buddhist Temple of Chi. v. Nielsen*, 878 F.3d 570, 573 (7th Cir. 2017); *Bell v. City of Chi.*, 835 F.3d 736, 738 (7th Cir. 2016). To survive a Rule 12(b)(6) motion, a complaint "must contain 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 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). On a motion to dismiss, the Court may consider the allegations of the complaint itself, documents that are attached to the complaint, documents that are central to the complaint and are referred to in it, and information that is properly subject to judicial notice. *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013).

Under ERISA, 29 U.S.C. § 1145, "[e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." On January 31, 2013, Zenith entered into a collective bargaining agreement (the "Zenith 2013 CBA") with Local Union No. 89 of the International Brotherhood of Trustees (the "Union" or "Local 89"). (Case No. 20 C 4611, ECF No. 1, Zenith Compl. ¶ 9.) On February 8, 2013, Transervice entered into a collective bargaining agreement (the "Transervice 2013 CBA") with Local 89. (Case No. 20 C 4610, ECF No. 1, Transervice Compl. ¶ 9.) Both 2013 CBAs provided that certain full-time and part-time (referred to in the Zenith CBA as "casual") employees would be covered by the Fund. Transervice agreed in its CBA to

pay to the Fund the costs to maintain current pension benefits "for the life of the CBA with no cost to the employee." (*Id.* ¶ 11.) Zenith agreed in its CBA to pay certain weekly contribution amounts for covered employees at Zenith's Louisville location. (Zenith Compl. ¶ 11.) Defendants also agreed to be bound by the terms of the Fund's Trust Agreement and all of the rules and regulations adopted under it. Both 2013 CBAs contained the following provision, which included an "evergreen" clause:

> This Agreement shall be effective as of February 1, 2013 and shall expire January 31, 2019; provided, however, that if neither party gives the other party written notice sixty (60) days prior to the said expiration date of such parties [sic] intention to terminate this Agreement, said Agreement shall continue for another year and from year to year thereafter, subject to sixty (60) days' notice of termination prior to any succeeding termination date.

(Zenith Compl., Ex. 1, Zenith 2013 CBA, at 33; Transervice Compl., Ex. 1, Transervice 2013 CBA, at 38.) Unlike some CBAs that allow mid-term renegotiation or modification at a party's request, the 2013 CBAs did not contain such a "reopener" provision.

In February 2019, the Fund received a letter from Transervice that attached a copy of a new CBA that Transervice had entered into with Local 89. In the letter, Transervice stated that, effective January 31, 2019, its obligation to contribute to the Fund would cease and that Transervice would withdraw from the Fund

with respect to employees who were members of Local 89. The Fund received a similar letter from Zenith in February 2019. The 2019 CBAs provide that defendants' obligations to contribute to the Fund ceased on January 31, 2019, and that effective February 1, 2019, the covered employees would participate in a different pension plan, the IBT Consolidated Pension Plan. The week ending on February 2, 2019 was the last week for which Transervice and Zenith paid contributions to the plaintiff Fund on behalf of employees covered by the 2013 CBAs.

It is the Fund's position, however, that neither Transervice or Zenith nor Local 89 sent a timely written notice to the other party of an intent to terminate the 2013 CBA. Because there was no such notice, says the Fund, the 2013 CBAs continued for another year under their respective "evergreen" clauses, and defendants were obligated to contribute to the Fund for that additional year pursuant to the Fund's Trust Agreement.[1]

Defendants contend that the complaints must be dismissed because Local 89 did send written notices to Transervice and Zenith more than sixty days before

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[1] The Fund's Trust Agreement states in relevant part: "An Employer is obliged to contribute to the Fund for the entire term of any collective bargaining agreement or participation agreement or any other written agreement accepted by the Fund (including any extension of a collective bargaining agreement through an evergreen clause or through an extension agreement of eighteen months or less) on the terms stated in that collective bargaining agreement . . . ." (Case No. 20 C 4610, ECF No. 1-4, Trust Agreement, at 12.)

the 2013 CBAs expired, which they say made clear the Union's "intention to terminate" those CBAs. The letters were dated November 6, 2018 and bore the boldface header "CONTRACT EXPIRATION: 1/31/2019" for Transervice and "CONTRACT EXPIRATION: 2/01/2019" for Zenith. The body of the letters is identical and states as follows:

> Your present contract with General Drivers, Warehousemen, and Helpers, Local Union No. 89, expires as noted above.
>
> It is our desire to meet with you at an early date for the purpose of negotiating a new contract.
>
> We trust the forthcoming negotiations will result in an agreement that will be fair and just too [sic] all parties involved and that a better spirit of harmony and cooperation will be derived there from [sic].

(Case Nos. 20 C 4610 & 4611, ECF Nos. 1-2.) Enclosed with the letters was a copy of a "Form F-7" notice that the Union had submitted to the Federal Mediation and Conciliation Service ("FMCS"), an independent federal agency that must be notified if a party to a CBA notifies the other party of an intent to terminate or modify the agreement. The Form F-7 provides three checkboxes for "Notice Type"—"Initial Contract," "Reopener," and "Renegotiation." The Union had checked "Renegotiation" on each form and had provided the 2019 "contract expiration date" for each contract. (Case No. 20 C 4610, ECF No. 17; Case No. 20 C 4611, ECF No. 1-2.)

Defendants point out that the employees at issue were covered between February 2019 and February 2020 because the 2019 CBAs, copies of which are attached to the complaints, require defendants to make contributions to an entirely different pension fund, the IBT Consolidated Pension Plan. Defendants argue that there is no plausible construction of the Union's November 2018 notice and Form F-7 other than stating an intent to terminate the 2013 CBAs, and that the Fund is therefore pursuing windfall contributions. Defendants emphasize that the Fund's theory is not that the *Fund* failed to receive the notice that it required, but that neither party to either of the 2013 CBAs (each employer and the Union) provided sufficient notice of termination of the 2013 CBAs *to the other party*, even though after the Union sent its letters the parties proceeded to negotiate and execute new CBAs.

The Court must "interpret collective-bargaining agreements, including those establishing ERISA plans, according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435 (2015). Where the words of a written contract are clear and unambiguous, the meaning of the contract is ascertained in accord with its plainly-expressed intent. *Id.* The question is whether Local 89 provided an "unambiguous, timely notice" of its intent to terminate the 2013 CBAs—in other words, what this party to these particular CBAs set out to achieve with its chosen language. *See Rutherford v. Judge & Dolph Ltd.*, 707 F.3d 710, 712 (7th

Cir. 2013); *Off. & Prof'l Emps. Int'l Union, Local 95 v. Wood Cnty. Tel. Co.*, 408 F.3d 314, 316 (7th Cir. 2005). The parties agree that in order to demonstrate an intent to terminate an agreement, a communication need not explicitly use the word "terminate" or "termination."

In the subject line of its letter, the Union referred to the impending "expiration" of the contract, and it stated again in the body of the letter that the contract would "expire" on the stated date. The Union said that it desired to meet to negotiate "a *new* contract." (ECF No. 1-2 (emphasis added).) It did not refer to reopening, modifying, or renegotiating the current contract in any way and did not imply any desire to change or continue the current contract past its expiration date. The letter therefore constituted an unequivocal expression of the intent to terminate the current contract; as defendants point out, how could there be a "new" contract without a termination of the old one? This conclusion is buttressed by the Union's enclosure of the Form F-7, on which the Union did not check the "reopener" box, but chose "renegotiation," the only alternative for a contract that was not an initial contract. Under 29 U.S.C. § 158(d)(3), a party desiring "termination or modification" of a CBA is required to notify the FMCS of a potential labor dispute, and the form serves as that notice. The terms of the 2013 CBAs did not provide for modification; termination was the only alternative. And, indeed, the effect of the letter was that the parties went on to negotiate and enter into new CBAs within the sixty-day notice period. While the Union did not

use the word "terminate," the only reasonable reading of its letter is that it was conveying an intent to terminate the 2013 CBAs. Notably, the Fund does not provide any alternative construction of the letter that takes into account its entire text.

The Fund asserts that the Union's statement that it believed negotiations would bring a "better spirit of harmony and cooperation" indicates that its expectation was that "the relationship [with defendants] was continuing, not ending." (ECF No. 26, Pls.' Mem. Resp. at 6.) The Court agrees, but the Fund does not accurately frame the salient issue, which is under what governing document the contracting parties' relationship would continue. The Union clearly contemplated, and expressed, that the negotiations it desired would result in "a new contract," because the current one was "expiring." Given the terms of the 2013 CBAs, which did not provide for modification or reopening, the Union was stating its intent to terminate.

The Fund also cites *Wood County* for the proposition that "a mere reference to negotiations for a replacement agreement will not forestall an evergreen clause," (*id.* at 6–7), but *Wood County* is distinguishable. There, the union notified the employer of its "desire to reopen th[e] Agreement and to negotiate on wages, hours and conditions of employment for a successor agreement." 408 F.3d at 315. Local 89's letter, however, makes no reference to any desire to "reopen" or to otherwise modify the existing CBA. Other decisions cited by the Fund in support of its position are similarly distinguishable.

Local 89 provided defendants with unequivocal, timely notice of its intent to terminate the 2013 CBAs. Therefore, the Fund's complaints will be dismissed. Because there appears to be no possibility of successful amendment, the dismissals will be with prejudice.

CONCLUSION

Defendant Transervice Logistics Inc.'s motion to dismiss the complaint in 20 CV 4610 [18] is granted. Defendant Zenith Logistics, Inc.'s motion to dismiss the complaint in 20 CV 4611 [17] is granted. These actions are dismissed with prejudice. Civil cases terminated.

DATE: November 17, 2020

/s/ Ronald A. Guzmán
Hon. Ronald A. Guzmán
United States District Judge

APPENDIX C

29 U.S.C. § 158

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

* * *

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such

obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

> **(A)** The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

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29 U.S.C. § 1132

* * *

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

* * *

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

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29 U.S.C. § 1144

* * *

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

* * *

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29 U.S.C. § 1145

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.