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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 19a0569n.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18-5384

[Filed November 13, 2019]

JUDITH KERNS, et al.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
CATERPILLAR INC.,	)
	)
Defendant-Appellant.	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Before: BOGGS, KETHLEDGE, and NALBANDIAN, Circuit Judges.

KETHLEDGE, Circuit Judge. This twelve-year-old class action is the latest case in a series of disputes over the vesting of lifetime benefits in collective-

bargaining agreements. The plaintiffs here—surviving spouses of employees who retired under a collective-bargaining agreement—sued to obtain free healthcare benefits for life, which they say were promised under the agreement. The district court granted partial summary judgment for the plaintiffs, holding that they were entitled to those benefits. The defendant, Caterpillar, Inc., now appeals that decision, arguing (among other things) that the agreement's language prevented any benefits from vesting. We affirm in part and reverse in part.

I.

In 1998, Caterpillar, a construction-equipment manufacturer, entered into a new collective-bargaining agreement with its workforce, which was represented by United Auto Workers. That agreement included an "Insurance Plan Agreement," to which the parties attached a "Group Insurance Plan." The Plan in turn defined the employees' healthcare and retirement benefits. Section 5 of the Plan stated that, "following the death of a retired Employee," the company would continue to provide healthcare coverage "for the remainder of his surviving spouse's life without cost." Plan § 5.15. But the Plan also stated that "[b]enefits in accordance with this Section will be provided . . . for the duration of any Agreement to which this Plan is a part." Plan § 5.1.

Caterpillar and the UAW removed that "life without cost" language when they entered into a new collective-bargaining agreement in January 2005. Accordingly, Caterpillar notified the spouses of deceased employees that the company would soon be deducting healthcare

premiums from their monthly pension payments. After some of those spouses objected to that change, the company agreed in writing not to charge those premiums to spouses of employees who died before the 2005 agreement took effect—or "actual surviving spouses," as Caterpillar sometimes calls them here.

This litigation began in 2006. The plaintiffs are surviving spouses of employees who worked for Caterpillar, retired while the 1998 Plan Agreement and Plan were in effect, and have since died. Some of those employees died before the 1998 Plan Agreement terminated in 2005; some died afterward. All the plaintiffs sought injunctive and declaratory relief to the effect that, under the 1998 Agreement and Plan, they have a "vested" entitlement—meaning an entitlement that continues after the expiration of the agreement that gives rise to it—to free healthcare benefits for life.

The district court thereafter certified a single class that included spouses of Caterpillar employees who died while the 1998 Plan Agreement and Plan were in effect, and spouses of employees who died afterward. In 2010 the district court granted partial summary judgment for the plaintiffs, relying in large part on our *Yard-Man* decision. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (1983). Since then, however, the Supreme Court has emphatically rejected the rule of *Yard-Man*, which the Court said "plac[es] a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements." *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 935 (2015). Three years later the Court again reversed us in a case where

the Court heard echoes of *Yard-Man* in our opinion. *See CNH Indus. N.V. v. Reese*, 138 S. Ct. 761 (2018).

Those decisions prompted Caterpillar to file several motions for reconsideration, which the district court denied. Finally, in March 2018, the district court entered a final judgment. This appeal followed.

II.

We review the district court's grant of summary judgment de novo. *Tennial v. United Parcel Serv., Inc.*, 840 F.3d 292, 301 (6th Cir. 2016).

A.

Caterpillar makes two preliminary arguments. First, Caterpillar argues that the claims of "actual surviving spouses"—meaning again spouses of employees who both retired (or were eligible for retirement) and died while the 1998 Plan Agreement and Plan remained in effect—are moot because Caterpillar has not charged them premiums for the past 13 years and because "[t]here is no evidence" that Caterpillar plans to charge them premiums in the future. Caterpillar Br. at 40. But we determine mootness on a class-wide basis. *See Unan v. Lyon*, 853 F.3d 279, 285 (6th Cir. 2017). And many if not most members of the class—notably, the spouses of employees who retired while the 1998 Plan was in effect but died afterward—undisputedly have live claims. Caterpillar's mootness argument is therefore meritless.

That said, Caterpillar has abandoned any challenge to the district court's judgment to the extent the

judgment provides relief to actual surviving spouses. Specifically, Caterpillar now says that the claims of these spouses "have been resolved"; that their "rights have already been determined"; and that the only issue "remaining" for this court "is whether post-expiration spouses"—by which Caterpillar apparently means spouses of employees who retired while the 1998 Plan Agreement and Plan were in effect, but who died afterward—"are covered by the 1998 Contract." Caterpillar Reply Br. at 22–23. "The province of the court is, solely, to decide on the rights of individuals[.]" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). That Caterpillar itself—the appellant in this case—says the claims, which is to say the rights, of actual surviving spouses are "resolved" and "already determined," and that those claims are not among the issues "remaining" on appeal, leaves us with nothing to do as to those claims. Our decision in this appeal therefore does not affect the district court's adjudication of them.

Second, Caterpillar argues that the claims of the remaining plaintiffs (whom we refer to simply as "plaintiffs" or "post-termination spouses" from here) are time-barred. Caterpillar bears the burden of showing that the statute of limitations—here, six years—has run. *See Campbell v. Grand Trunk W. R.R.*, 238 F.3d 772, 775 (6th Cir. 2001). To trigger the statute of limitations, Caterpillar's refusal to pay the plaintiffs' benefits must have been "clear and unequivocal." *Winnett v. Caterpillar, Inc.*, 609 F.3d 404, 408–09 (6th Cir. 2010). The plaintiffs brought this suit in April 2006; thus, for the plaintiffs' claims to be time-barred, Caterpillar must have unequivocally put the plaintiffs

on notice no later than April 2000 that it would not pay the benefits at issue here. Suffice it to say that Caterpillar has not remotely made that showing. To the contrary, one of the documents that Caterpillar cites as providing notice itself recites that surviving spouses "will have coverage continued for his or her lifetime without cost." R. 223-1 at Page ID 6989. We therefore turn to the merits.

B.

Caterpillar argues that the 1998 Plan did not provide the plaintiffs with a vested entitlement to lifetime healthcare benefits without cost. We resolve that issue "according to 'ordinary principles of contract law.'" *Reese*, 138 S. Ct. at 763 (quoting *Tackett*, 135 S. Ct. at 933). One of those principles—sometimes overlooked under the *Yard-Man* approach, which the district court was bound to follow in its 2010 ruling—is that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Tackett*, 135 S. Ct. at 937.

Collective-bargaining agreements typically contain a "general durational" provision that states when the agreement ends. *See, e.g.*, *Cooper v. Honeywell Int'l, Inc.*, 884 F.3d 612, 616 (6th Cir. 2018). Discrete parts of the agreement may also have their own "specific" durational provision. *See Gallo v. Moen*, 813 F.3d 265, 271–73 (6th Cir. 2016). Moreover, unless an agreement says otherwise, promises subject to a durational provision do not vest—because contractual obligations end when the agreement ends. *See Tackett*, 135 S. Ct. at 937.

Here, the 1998 agreements included not only a general-durational provision for the Plan Agreement, but also a specific-durational provision for healthcare benefits under the Plan. The general-durational provision appears in § 9(a) of the Plan Agreement, which provides that "this Agreement shall remain in force until April 1, 2004" and that the Agreement may remain in force thereafter depending on certain actions or inaction of the parties. The durational provision specific to healthcare benefits appears in § 5.1 of the Plan, which provides that "[b]enefits in accordance with this Section"—which is the very section under which the plaintiffs claim benefits here—"will be provided to such Employee, retired Employee, and Dependents thereof for the duration of any Agreement to which this Plan is a part." We recently interpreted nearly identical language—"for the duration of this Agreement"—in a nearly identical context to mean that the employer had promised to provide healthcare benefits only "for as long as the agreement lasts[.]" *Watkins v. Honeywell Int'l Inc.*, 875 F.3d 321, 325 (6th Cir. 2017). We interpret the durational language in § 5.1 the same way here, which means that Caterpillar's obligation to provide healthcare benefits under § 5 of the Plan terminated when the Plan Agreement did. *Id.*; *see also Tackett*, 135 S. Ct. at 937. And the Plan Agreement terminated no later than January 10, 2005, which was the effective date of a different agreement in which Caterpillar and the UAW struck a different deal as to healthcare benefits. Hence the plaintiffs cannot claim any entitlement under § 5 of the 1998 Plan now.

The plaintiffs respond, understandably, that § 5.15 of the Plan promised that, "following the death of a retired employee," Caterpillar would provide the employee's spouse with healthcare benefits "for the remainder of [her] life without cost." Thus, the plaintiffs contend, the description of the benefit itself (specifically the use of the word "life") amounts to a separate durational provision, which is specific to the benefit at issue here and thus trumps the more general durational language in § 5.1. But our court rejected a materially identical argument in *Cooper*, where the parties' agreement promised to provide healthcare to retirees "until age 65[.]" 884 F.3d at 620. That promise, we held, expired when the agreement expired; for that benefit to have vested, rather, the agreement would have needed to "say something more—for example, 'retirees will continue to be covered under the plan until age 65, regardless of whether this CBA expires before they reach that age[.]'" *Id.* (emphasis omitted). And in another case—involving an agreement providing lifetime benefits to retiree spouses—we reasoned that, "if a retiree died after the last CBA expired, then Honeywell's promise has expired, and Honeywell is not obligated to provide the surviving spouse with lifetime healthcare benefits." *Fletcher v. Honeywell Int'l, Inc.*, 892 F.3d 217, 227 (6th Cir. 2018); *see also Cherry v. Auburn Gear, Inc.*, 441 F.3d 476, 483 (7th Cir. 2006) ("It is well established that 'lifetime' benefits can be limited to the duration of a contract"). Thus, under our precedents, Caterpillar is not obligated to provide lifetime healthcare benefits without cost to spouses of retirees who died after the Plan Agreement expired.

Finally, the plaintiffs invoke other language in the Plan Agreement's general-durational provision (*i.e.*, § 9(a)), to wit: "Termination of this Agreement shall not have the effect of automatically terminating the Plan." But again the more specific durational provision in § 5 of the Plan itself, construed as we construed materially identical language in *Watkins*, promised benefits under § 5 for only "as long as the agreement lasts[.]" 875 F.3d at 325. That same language in § 5—"for the duration of *any* Agreement to which *this* Plan is a part" (emphasis added)—indicates that the parties could have extended the duration of benefits under that section by attaching the Plan to another agreement. And in that case the termination of the prior Agreement would not have "automatically terminat[ed]" the Plan. But the parties in fact chose not to attach the Plan to another agreement—instead they agreed upon a different plan—which means that Caterpillar's obligation to provide benefits under § 5 to post-termination spouses terminated when the Plan Agreement did. *See Tackett*, 135 S. Ct. at 937.

* * *

The district court's judgment is affirmed as to surviving spouses of retirees who both retired (or were eligible to retire) and died while the 1998 Plan Agreement remained in effect; the court's judgment is reversed as to surviving spouses of retirees who died after the 1998 Plan terminated; and the case is remanded for proceedings consistent with this opinion.

APPENDIX B

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

Case No. 3:06-CV-1113

Hon. Aleta A. Trauger

[Filed March 30, 2018]

JUDITH K. KERNS, et al.,	)
	)
Class Plaintiffs,	)
	)
v.	)
	)
CATERPILLAR INC.,	)
	)
Defendant/	)
Third-Party Plaintiff,	)
	)
v.	)
	)
INTERNATIONAL UNION,	)
UAW, et al.	)
	)
Third-Party Defendants.	)
	)

FINAL JUDGMENT

Pursuant to Rule 23(c)(3) and Rule 58 of the Federal Rules of Civil Procedure, IT IS HEREBY ORDERED:

1. This class action case was bifurcated into a liability phase and a damages phase.

2. The Court certified this case as a class action (see R.79-80) under Rule 23(a) and Rule 23(b)(1) and (2) for the following described class:

> surviving spouses of former hourly employees: (1) who were represented by the UAW in collective bargaining; (2) who retired from Caterpillar on or after March 16, 1998 and before January 10, 2005; and (3) whose employment at Caterpillar's facilities in Memphis, TN, York, PA, Denver, CO, and Aurora, Peoria, East Peoria, Mapleton, Mossville, Morton, Decatur and Pontiac, IL was governed by the Central Labor Agreements and the related collective bargaining agreements. Any person who is presently the spouse of a living retiree cannot be a class member at this time.

3. As to liability, the Court's prior rulings, among other things: (a) granted partial summary judgment to the *Kerns* class plaintiffs and partial summary judgment to Caterpillar with respect to the class plaintiffs' claims (*See* R. 263); (b) granted dismissal of Caterpillar's third-party claims against Third Party Defendants UAW Local Nos. 145, 741, 786, 974, 1415, 1086, and 2096; ~~(d)~~ (c) granted dismissal for the Third-Party Defendant International Union, UAW with respect to Counts I and II of Caterpillar's Third Party

Complaint against it as a matter of law; and ~~(e)~~ (d) granted summary judgment to Third-Party Defendant International Union, UAW with respect to Counts III and IV of Caterpillar's Third-Party Complaint against it (*see* R. 129, 263)

4. As to damages, the Court's prior rulings set the parameters for class member damages. On December 29, 2017, the Court entered an Order (R.531) granting prejudgment interest to class plaintiffs, approving the parties' calculations of principal and prejudgment interest amounts due to be paid by Caterpillar to class members (R.528 Ex.1), and granting the Joint Stipulation of Calculations for Principal Damages and Prejudgment Interest (R.528). R.528, Ex. 1 sets forth the principal amount, prejudgment interest amount, and total for each class member who was listed on Ex.A (R.517), which includes interest calculated though 12/4/2017. Caterpillar shall pay each class member the applicable amount as is set forth on R.528, Ex.1.

5. Pursuant to the Court's prior rulings, Defendant Caterpillar Inc. is permanently enjoined from charging class members monthly premium charges associated with their Caterpillar-provided surviving spouse healthcare benefits for the remainder of their lifetimes.

6. The *Kerns* class members shall be entitled to post-judgment interest.

IT IS SO ORDERED. This is the final judgment in this case. The Clerk shall close the file.

Dated this 30th day of March, 2018.

/s/
UNITED STATES DISTRICT COURT JUDGE

APPENDIX C

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

Case No. 3:06-CV-1113

Hon. Aleta A. Trauger

[Filed December 29, 2017]

JUDITH K. KERNS, et al.,	)
	)
Class Plaintiffs,	)
	)
v.	)
	)
CATERPILLAR INC.,	)
	)
Defendant/	)
Third-Party Plaintiff,	)
	)
v.	)
	)
INTERNATIONAL UNION,	)
UAW, et al.	)
	)
Third-Party Defendants.	)
	)

ORDER AWARDING PREJUDGMENT INTEREST, APPROVING R.528 EXHIBIT 1, AND GRANTING THE JOINT STIPULATION OF CALCULATIONS FOR PRINCIPAL DAMAGES AND PREJUDGMENT INTEREST (R.528)

The Court, having considered the parties' Joint Stipulation of Calculations for Principal Damages and Prejudgment Interest and its Exhibit 1 (R.528), pursuant to Rule 23(c)(3) and Rule 58 of the Federal Rules of Civil Procedure, IT IS HEREBY ORDERED:

1. Prejudgment interest is awarded to the Plaintiff class;

2. Exhibit 1 (R.528) is approved, which provides the principal damages amount, the prejudgment interest amount as of December 4, 2017, and total damages for each class member who was listed on Ex. A (R.517) to be paid by Defendant Caterpillar, Inc. to class members.

3. The Joint Stipulation (R.528) is approved.

~~4. The Court shall enter a permanent injunction and a judgment providing for prejudgment interest as reflected on Ex. 1, and for post-judgment interest to the *Kerns* class.~~

IT IS SO ORDERED, this 29th day of December, 2017.

/s/
UNITED STATES DISTRICT COURT JUDGE

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APPENDIX D

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

Civil No. 3:06-cv-1113
Judge Trauger

[Filed September 29, 2017]

JUDITH KERNS, *et al.*,	)
	)
Plaintiff,	)
	)
v.	)
	)
CATERPILLAR, INC., *et al.*,	)
	)
Defendants.	)
	)

O R D E R

The court hereby approves the Joint Stipulated Report filed by the parties (Docket No. 517). Pursuant thereto, the court approves Exhibit A attached thereto, which reflects the principal damages due to certain class members under the court's previous rulings as of August 11, 2017. The schedule proposed within the Joint Stipulated Report is likewise hereby APPROVED.

It is so **ORDERED**.

ENTER this 29th day of September 2017.

/s/Aleta A. Trauger
ALETA A. TRAUGER
U.S. District Judge

APPENDIX E

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

Case No. 3:06-CV-1113
Judge Trauger

[Filed November 17, 2015]

JUDITH K. KERNS, et al., Plaintiffs,	)
v.	)
CATERPILLAR INC., Defendant/ Third-Party Plaintiff,	)
v.	)
INTERNATIONAL UNION, UAW, et al. Third-Party Defendants.	)

MEMORANDUM OPINION

Pending before the court is a Motion to Reconsider filed by Caterpillar, Inc. ("Caterpillar") (Docket No. 451), accompanied by a Memorandum in support (Docket No. 452). The plaintiffs have filed a response in

opposition (Docket No. 459), and Caterpillar has filed a Reply (Docket No. 466). The plaintiffs have also filed a Motion to Reconsider (Docket No. 464) and a Memorandum in support (Docket No. 465). Caterpillar has filed a response in opposition (Docket No. 467,) and the plaintiffs have filed a Reply (Docket No. 470). For the following reasons, the court will deny both motions.

I. Background

This is a class-action lawsuit brought on behalf of surviving spouses of former employees of Caterpillar who retired on or after March 16, 1998, and before January 10, 2005. Because the court has recounted the factual and procedural history of this case numerous times, familiarity with the facts will be assumed.[1] The plaintiffs filed this action in 2006, seeking relief under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and under § 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132. The plaintiffs allege that Caterpillar breached its contractual obligation to provide lifetime health benefits to surviving spouses of Caterpillar retirees at no cost.

On June 27, 2007, the court denied Caterpillar's motion to dismiss, rejecting its arguments that the

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[1] This case and *Winnett v. Caterpillar*, Case No. 3:06-0235, are related but not consolidated cases. By prior order dated March 26, 2010, this court granted the International Union, UAW's motions to dismiss Caterpillar's Third-Party Complaint against it in both *Kerns* and *Winnett*. (Docket No. 263.) Subsequently, through a series of decisions from this court and the Sixth Circuit, the court dismissed the *Winnett* plaintiffs' claims and closed that case. (Docket Nos. 326, 327.

court lacked subject matter jurisdiction over the plaintiffs' LMRA and ERISA claims, that the plaintiffs could not maintain an action on behalf of a hypothetical group of "future" surviving spouses that could not be readily identified, and that the claims of current surviving spouses were moot. (Docket No. 77, at 3.) The court also found that, because the parties had presented plausible, but competing, interpretations of the contractual language of the retiree benefits plan with respect to the alleged intention to confer lifetime health benefits to surviving spouses, extrinsic evidence could be introduced to resolve the ambiguity. (*Id.*, at 28.) However, because little discovery had been completed at that time, the court found that it was too early to determine whether, as a matter of law, the plaintiffs' benefits had vested and, if so, when they vested. (*Id.*, at 28–29.)

On March 26, 2010, the court ruled on the plaintiffs' and Caterpillar's cross motions for summary judgment and granted and denied each in part. (Docket No. 262.) The portion of the collective bargaining agreement ("CBA") between Caterpillar and the UAW that addresses the retiree health benefits for the *Kerns* plaintiffs is the 1998 Group Insurance Plan ("GIP"). A subsection of the 1998 GIP is the Insurance Plan Agreement ("IPA"). (Docket No. 222-9 at 1–3.) Contrary to the finding at the motion to dismiss stage that the contract language was ambiguous, in the summary judgment memorandum opinion, the court found that the language in Section 5.15 of the 1998 GIP (Docket No. 222-9, at 61) that provided that health care benefits "will be continued following the death of a retired Employee for the remainder of the surviving

spouse's life without cost" was "sufficient to unambiguously vest in the surviving spouse a right to lifetime 'no cost' health benefits." (*Id.*, at 35–36.) The court further found that, although it was not necessary to consider extrinsic evidence because Section 5.15 of the 1998 GIP was unambiguous, the extrinsic evidence before the court "plainly supports the plaintiffs' position." (*Id.*, at 36–37 n.18.)

Having concluded that lifetime benefits had vested for the surviving spouses and that Caterpillar had no viable affirmative defenses, the court turned to an analysis pursuant to *Reese v. CNH Am. LLC*, 574 F.3d 315 (6th Cir. 2009), which "stands for the proposition that, even if the retiree has a vested right to lifetime health benefits from his employer, unless there is some exceptional language that dictates that benefits can 'never vary,' that retiree is entitled to 'lifetime benefits subject to reasonable changes.'" (Docket No. 262, at 27 (quoting *Reese*, 574 F.3d at 326).) The court concluded that, pursuant to *Reese*, the additional deductibles, coinsurance, and increased out-of-pocket costs were permissible, but held that Caterpillar's imposition of monthly premiums violated ERISA and the LMRA. (*Id.*, at 39–41.) Accordingly, the court entered judgment for the plaintiffs on their claims related to Caterpillar's imposition of premiums. The summary judgment order resolved all liability issues between the plaintiffs and Caterpillar. (*Id.*, at 47–48.)

Still pending at the time of the court's March 26, 2010 summary judgment ruling was Caterpillar's October 16, 2008 appeal of the court's preliminary injunction order for a subclass of the *Winnett* plaintiffs.

On June 22, 2010, the Sixth Circuit reversed this court's *Winnett* preliminary injunction order, finding that the claims of the subclass were barred by the statute of limitations. (*Winnett* Docket No. 470.)

After the Sixth Circuit issued its ruling, Caterpillar filed motions to reconsider in both *Winnett* and *Kerns*. (*Winnett* Docket No. 475; *Kerns* Docket No. 266.) In the *Kerns* motion, Caterpillar argued that, by the logic of the Sixth Circuit's decision in *Winnett*, the *Kerns* plaintiffs' claims were also barred by the statute of limitations. (Docket No. 280, at 15.) On January 12, 2011, this court rejected Caterpillar's argument, based on factual differences between the claims of the plaintiffs in *Winnett* and *Kerns*. In particular, the *Winnett* plaintiffs sought to maintain the level of benefits under the 1988 GIP, not the 1998 GIP, which led to a different determination of when the *Kerns* plaintiffs' claims accrued. (*Id.*, at 16–17.)

The court also rejected Caterpillar's argument that the Sixth Circuit's intervening decision in *Wood v. Detroit Diesel Corp.*, 607 F.3d 427, 428 (6th Cir. 2010), justified a reconsideration of the court's ruling that the plaintiffs have a vested right to lifetime, premium-free health benefits under the 1998 GIP. (Docket No. 280, at 18 n.6.) The court concluded that, unlike in *Wood*—which found that, when various provisions of the agreements were read together, the only coherent interpretation was that plaintiffs are entitled to lifetime, capped health care benefits—this case has "no clearly conflicting language for the court to blend together, and, therefore, there is no basis for the court to reconsider its earlier ruling." *Id.* Accordingly, the

court granted Caterpillar's motion to reconsider in *Winnett* based on the statute of limitations, but denied its motion in *Kerns*. (Docket No. 280.)

On August 20, 2014, the court ruled on Caterpillar's motion for summary judgment on damages issues, in which Caterpillar argued that it was not liable for the out-of-pocket expenses incurred by surviving spouses who canceled their Caterpillar insurance. (Docket No. 408.) The court denied the portion of Caterpillar's motion that the court construed as a motion to strike certain damages, holding that, under Section 301 of the LMRA, Caterpillar is liable for the cost of replacement insurance and out-of-pocket expenses incurred by plaintiffs who obtained alternative insurance or became uninsured because Caterpillar breached the collective bargaining agreement. (*Id.*) The court granted Caterpillar's motion and entered judgment in its favor on the claims of four class members who had produced no admissible evidence demonstrating their damages or who had produced no admissible evidence that they terminated their Caterpillar insurance because of the imposition of premiums. (*Id.*) As to eight other class members who were the subjects of Caterpillar's motion for summary judgment, the court held the motion in abeyance and requested that those plaintiffs file a cross motion for summary judgment. (*Id.*) On January 16, 2015, the court granted the motion for summary judgment filed by the eight plaintiffs, entered judgment in their favor as to damages in the form of out-of-pocket expenses, and ordered Caterpillar to re-enroll these plaintiffs in its insurance plan without premiums. (Docket No. 432.)

II. Legal Standard

While the Federal Rules of Civil Procedure fail to explicitly address motions to reconsider interlocutory orders, "[d]istrict courts have authority both under common law and Rule 54(b) to reconsider interlocutory orders and to reopen any part of a case before entry of final judgment." *Rodriguez v. Tenn. Laborers Health & Welfare Fund*, 89 F. App'x 949, 959 (6th Cir. 2004) (citing *Mallory v. Eyrich*, 922 F.2d 1273, 1282 (6th Cir. 1991)); *accord In re Life Investors Ins. Co. of Am.*, 589 F.3d 319, 326 n. 6 (6th Cir. 2009). Thus, district courts may "afford such relief from interlocutory orders as justice requires." *Rodriguez*, 89 F. App'x at 959 (internal quotations marks and brackets omitted). "Courts traditionally will find justification for reconsidering interlocutory orders when there is (1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error of law or prevent manifest injustice." *Louisville/Jefferson Cnty., Metro. Gov't v. Hotels.com, L.P.*, 590 F.3d 381, 389 (6th Cir. 2009) (citing *Rodriguez*, 89 F. App'x at 959). This standard "vests significant discretion in district courts." *Rodriguez*, 89 F. App'x at 959 n. 7.

III. Caterpillar's Motion to Reconsider

Caterpillar moves the court to reconsider its prior rulings on the basis that, in *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), the Supreme Court abrogated *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. (UAW) v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), upon which this court relied in its previous rulings. The plaintiffs counter that *Tackett* does not require a change in this court's

previous rulings because this case involves express, unambiguous contract language that demonstrates the bargaining parties' intent to continue health care benefits for the lifetimes of the surviving spouses beyond the expiration of the 1998 GIP and that there is much extrinsic record evidence confirming that intent. They further argue that the court in this case did not apply the *Yard-Man* inferences that were overruled by *Tackett*.

A. The Supreme Court's *Tackett* Decision

In *Tackett*, the Supreme Court held that "*Yard–Man* violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements," "distorts the attempt 'to ascertain the intention of the parties,'" and "has no basis in ordinary principles of contract law." *Tackett*, 135 S. Ct. at 935 (quoting 11 R. Lord, Williston on Contracts § 30:2, 18 (4th ed. 2012)). Although the Supreme Court quoted with approval *Yard-Man*'s statement that "traditional rules of contractual interpretation require a clear manifestation of intent before conferring a benefit or obligation," *id.* at 936, it rejected numerous other aspects of the *Yard-Man* decision, including: (1) the conclusion that, "'when . . . parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree,'" *id.* at 935 (quoting *Yard-Man*, 716 F.2d at 1482); (2) the inference that "retiree health care benefits are not subjects of mandatory collective bargaining," which, the Supreme Court found, "rest[s] on a shaky factual foundation,"

given that parties "can and do voluntarily agree to make retiree benefits a subject of mandatory collective bargaining," *id.* at 936; (3) the reliance on the premise that "retiree benefits are a form of deferred compensation," when that characterization is contrary to ERISA, *id*; (4) the "refusal[al] to apply general durational clauses to provisions governing retiree benefits," *id.*; (5) the "misappl[ication] of traditional principles of contract law, including the illusory promises doctrine," *id.*; (6) the "fail[ure] even to consider the traditional principle that courts should not construe ambiguous writings to create lifetime promises," *id.* (citing 3 A. Corbin, Corbin on Contracts § 553, p. 216 (1960)); and (7) the "fail[ure] to consider the traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" *Id.* at 937 (quoting *Litton Financial Printing Div., Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190, 207 (1991)). As to the last point, the Court held:

> That principle does not preclude the conclusion that the parties intended to vest lifetime benefits for retirees. Indeed, we have already recognized that "a collective-bargaining agreement [may] provid[e] in explicit terms that certain benefits continue after the agreement's expiration." [*Litton*, 501 at 207]. But when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life.

Id. at 937.

Justice Ginsburg's concurrence states as follows:

> Under the "cardinal principle" of contract interpretation, "the intention of the parties, to be gathered from the whole instrument, must prevail." 11 R. Lord, Williston on Contracts § 30:2, p. 27 (4th ed. 2012) (Williston). To determine what the contracting parties intended, a court must examine the entire agreement in light of relevant industry-specific "customs, practices, usages, and terminology." *Id.*, § 30:4, at 55–58. When the intent of the parties is unambiguously expressed in the contract, that expression controls, and the court's inquiry should proceed no further. *Id.*, § 30:6, at 98–104. But when the contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties. *Id.*, § 30:7, at 116–124.

Id. at 937–38. The concurrence also clarifies that, although lower courts must not utilize *Yard-Man*'s "thumb on the scale in favor of vested retiree benefits," contractual provisions such as the ones in the *Tackett* case — providing that retirees "will receive" health-care benefits if they are "receiving a monthly pension" or that a surviving spouse will "continue to receive [the retiree's health-care] benefits ... until death or remarriage" — are "relevant to this examination." *Id.* at 938 (citations omitted). Finally, the concurrence advises the following:

> [N]o rule requires "clear and express" language in order to show that parties intended health-care benefits to vest. "[C]onstraints upon the

> employer after the expiration date of a collective-bargaining agreement," we have observed, may be derived from the agreement's "explicit terms," but they "may arise as well from ... implied terms of the expired agreement." *Litton Financial Printing Div., Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190, 203, 207 (1991).

Id.

B. The Court's Ruling on Caterpillar's Motion to Dismiss

In ruling on Caterpillar's motion to dismiss, this court explained:

> Retiree health benefits are addressed in . . . the IPA and the GIP. The IPA, like the CBA, was effective by its terms until April 1, 2004. The IPA expressly states: "Termination of this Agreement shall not have the effect of automatically terminating the Plan." "The Plan" refers to the GIP. This language indicates that, even though the Agreement (the CBA) expires by its terms on April 1, 2004, the GIP and the concomitant benefits provided thereby need not also expire.
>
> Section 5.1 on page 38 of the GIP, under Section V entitled "Medical Expense Benefits," provides:
>
> > A benefit shall be provided in accordance with this Section only for an Employee, while coverage for such benefit is in effect with respect to such Employee. **Benefits**

> **in accordance with this Section will be provided to such Employee, retired Employee, and Dependents thereof for the duration of any Agreement to which this Plan is a part.**
>
> (Ex. 7 to Docket No. 50) (emphasis added). Caterpillar reads this language to say that health benefits (including retiree health benefits) lasted only as long as the labor contracts themselves. (Docket No. 56 at 5–6). This type of specific durational language, urges Caterpillar, is fundamentally inconsistent with the plaintiffs' claim of vesting. (*Id*. at 6). Conversely, the plaintiffs read this language to require that Caterpillar provide benefits to employees, retirees, and dependents at least for the duration of the labor contracts. Thus, say plaintiffs, this language does not defeat their claim of vesting; if anything, it renders the language of the governing document ambiguous and opens up the court's inquiry to extrinsic evidence.

(Docket No. 77, at 24–25 (Motion to Dismiss Memorandum Opinion).)

Finding ambiguity in these provisions, the court concluded that extrinsic evidence of the parties' intentions could be introduced to resolve the ambiguity. (*Id*., at 25.) Although the court did discuss several *Yard-Man* inferences that pointed to an intent to vest—namely, language in the agreements that linked medical benefits to pension eligibility, the fact that

retirement benefits are a form of delayed compensation, and the inference that retiree benefits continue as long as the requisite "status" of being a retiree is maintained— the court found that it was premature to consider extrinsic evidence because little discovery had been conducted at that point. (*Id*., at 25–29.) Accordingly, the court denied Caterpillar's motion to dismiss.

C. The Court's Ruling on Caterpillar's Motion for Summary Judgment

Although this court discussed the *Yard-Man* inferences in its motion to dismiss ruling, its summary judgment ruling does not rely on *Yard-Man* inferences or even cite the case. The court set forth its analytical framework as follows:

> [I]n resolving a claim for vested health care benefits stemming from a collective bargaining agreement, the court uses basic canons of contractual interpretation, looking to the "explicit language" of the agreement for "clear manifestations of intent" to vest. That is, based upon the entire contract, the court examines whether the language of the contract indicates that the parties intended to make benefits under the contract unalterable by subsequent labor agreements.

(*Id*., at 26 (quoting *Reese*, 574 F.3d at 321).)

For the sake of judicial economy, the court issued a single memorandum opinion on the cross motions for summary judgment in both *Winnett* and *Kerns*. In the portion of the court's summary judgment ruling that

addressed the claims of the *Winnett* surviving spouse subclass (whose claims were governed by an earlier version of the GIP that had identical language in Section 5.15 as that contained in the 1998 GIP), the court concluded:

> Simply put, the 1992 unilateral implementation means what it says. That is, while the language is in force, once a retired employee dies, the surviving spouse is entitled to "continued" coverage "without cost." This is precisely the type of "explicit language" and "clear manifestation of intent" that must be found before the court can conclude, as a matter of law, that the parties intended benefits to vest under the agreement. *Yolton v. El Paso Tenn. Pipeline*, 435 F.3d 571, 578–79 (6th Cir. 2006). Caterpillar, for all of its efforts to find a way around the clear language, cannot point to a single provision in the 1992 unilateral implementation that negates the plain language discussed above. The language here is plainly unambiguous and indicates that the 1992 unilateral implementation provided surviving spouses with vested no-cost medical benefits.

(*Id.*, at 31–32.)

In the portion of the summary judgment ruling that addressed the *Kerns* plaintiffs' claims, the court similarly found that the identical language in Section 5.15 of the 1998 GIP—providing that health care benefits "will be continued following the death of a retired Employee for the remainder of the surviving spouse's life without cost"—was "sufficient to

unambiguously vest in the surviving spouse a right to lifetime "no cost" health benefits." (Docket No. 262, at 36.) Responding to Caterpillar's argument that this language was accidentally left in the 1998 GIP and was not consistent with the agreement reached in the bargaining process, the court held as follows:

> While it is not necessary to consider extrinsic evidence here, the extrinsic evidence submitted plainly supports the plaintiffs' position that there was no mistake. *See Cole v. ArvinMeritor*, 549 F.3d at 1064, 1075 (6th Cir. 2008) (where the contract language is unambiguous, the court is to apply that language without recourse to extrinsic evidence.) As discussed in previous opinions, the *Kerns* plaintiffs have submitted letters from Caterpillar to class members upon the death of their spouse in which Caterpillar represents that health care coverage will continue at "no cost," and the plaintiffs have also submitted evidence that appears to show that Caterpillar did not charge the VEBA [Voluntary Employee Benefits Association] for surviving spouse premiums. (See Docket Nos. 223 Ex. 10; Docket No. 218, at 13.) In response, Caterpillar largely relies on self-serving deposition testimony from its own representatives, while conceding that the VEBA was not charged for surviving spouses and that it sent the letters discussed above to surviving spouses. (Docket No. 246, at 7–13; Docket No. 219, at 6–7.)

(Docket No. 262, at 36–17 n. 18.)

D. The Impact of *Tackett* on the Court's Previous Rulings

The court's summary judgment ruling does not rely on, or even mention, the *Yard-Man* presumptions in reaching the conclusion that the health care benefits at issue here have vested. The court has reviewed its prior decisions in this matter, mindful of the traditional principles "that courts should not construe ambiguous writings to create lifetime promises" and that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement" that the Supreme Court reminded courts to consider in *Tackett*, 135 S. Ct. at 936–37 (internal citation omitted). Yet, utilizing basic canons of contractual interpretation to "ascertain the intention of the parties," without implementing *Yard-Man* presumptions or otherwise "placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements," *id.* at 935 (internal citations omitted), the court finds, again, that this collective agreement does, in fact, evidence a clear intention by the parties to vest lifetime benefits in this group of surviving spouses, by providing, "in explicit terms that certain benefits continue after the agreement's expiration." *Id.*at 937 (quoting *Litton*, 501 U.S. at 207).

Caterpillar argues that *Tackett* compels the court to reverse its finding that the surviving spouses have a vested right to lifetime, premium-free benefits because, "[v]iewed as a whole, the relevant 1998 labor contract language shows that at most, Plaintiffs' benefits 'vested' for no more than the duration of the 1998 labor contract, and subject to the financial caps imposed in

that contract for each 'covered individual." (Docket No. 452, at 12.) To the contrary, numerous contractual provisions indicate the intention of the parties to vest benefits. For example, after a long list of specific amendments to the GIP, which the parties had negotiated, Section 3 of the 1998 IPA provided the following: "The provisions of the Group Insurance Plan as in effect on September 30, 1991 *shall continue in effect until amended pursuant to the foregoing and thereafter to the extent not amended pursuant to the foregoing."* (Docket No. 222-9, at 10 (emphasis added).) Section 9(a) of the 1998 GIP provides that "Termination of [the CBA] shall not have the effect of automatically terminating the Plan." (Docket No. 222-9, at 13.) Section 5.15 of the 1998 GIP provides: "Dependents' Coverage will be continued following the death of a retired Employee for the remainder of his surviving spouse's life without cost." (Docket No. 222-9, at 61.) Section 6.2(c) of the 1998 GIP provides: "Such Dependents' Coverage for any such surviving spouse . . . will continue . . . for the remainder of her life without cost." (Docket No. 222-10, at 41.)

Thus, the court reiterates here its conclusion that the language in the 1998 GIP was "sufficient to unambiguously vest in the surviving spouse a right to lifetime "no cost" health benefits." (Docket No. 262, at 36.) Indeed, although Justice Ginsburg's concurrence in *Tackett* makes clear that "no rule requires 'clear and express' language in order to show that parties intended health-care benefits to vest," *Tackett*, 135 S. Ct. at 938, the agreement between the parties in this case does, in fact, contain clear and express language

of the parties' intention that this group of surviving spouses has vested health care benefits.

Furthermore, even if the contract language were ambiguous, the court has already concluded that the extrinsic evidence presented to the court "plainly supports the plaintiffs' position" that the benefits had vested. (Docket No. 262, at 36–17 n. 18.) The court has previously concluded that the letters Caterpillar undisputedly sent to the class members upon the death of their spouse, in which Caterpillar represented that health care coverage would continue at "no cost," supports a finding of vesting. (*Id.; see also* Docket No. 243, at 18–22.) Similarly, the court has also held that Caterpillar's practice of not charging the VEBA trust fund for surviving spouse premiums supports a finding of vesting. (*Id*.) The VEBA trust fund was created from contributions by the UAW and Caterpillar upon resolving the 1998 labor dispute to cover the retirees' share of the "above the cap" costs until the fund ran out of money. Consistent with its purpose, Caterpillar charged the VEBA for health coverage for retirees and their dependents while the retiree was still living. However, with very few exceptions, upon the death of the retiree, Caterpillar concedes that it no longer charged the VEBA for the cost of the coverage of the surviving spouse. (Docket No. 226, at 7–8; *see also*, Docket No. 243, at 27 (¶65), at 25–30 (¶¶ 60–73), at 15–16 (¶¶ 36–37).)

This previously cited extrinsic evidence also supports the court's rejection of Caterpillar's argument that the language regarding financial caps for each "covered individual" applied to surviving spouses, as

opposed to retirees. (*See* Docket No. 280, at 11 n. 3 (reiterating the court's previous finding in favor of the surviving spouses subclass in *Winnett* on this issue).) Caterpillar's practice of not charging VEBA for surviving spouses' above-the-cap expenses is strong evidence that the parties intended the newly-imposed premium cap to apply to retirees, not to surviving spouses, and that the parties did, in fact, intend for surviving spouses to have lifetime, no cost coverage, as stated in the 1998 GIP.

Indeed, there is a plethora of additional extrinsic evidence in this case supporting a finding that the parties intended to vest in the surviving spouses a right to lifetime, no cost, health benefits, including *inter alia*:

- The bargaining history between the parties shows that the language in Section 5.15 appears, verbatim, in the 1988 GIP (Docket No. 50-19, at 19), the unilateral 1992 implementation (Docket No. 50-13, at 20), and the 1998 GIP (Docket No. 22-9, at 61). As the court noted in its summary judgment ruling, "[a]fter considerable negotiations on the issue, the 2004 labor contract removed the 'without cost for life' language pertaining to surviving spouse medical benefits that, in form and/or substance, had been in every previous labor agreement discussed herein." (Docket No. 262, at 10.) The removal of the language in the 2004 labor contract has no effect on the *Kerns* plaintiffs.

- The November 1999 summary plan documents stated, "If you die following your retirement,

your surviving spouse will have coverage continued for his or her lifetime without cost." (Docket No. 222-13, at 54; *see also* Docket No. 223-1, at 58 ("If you die while eligible to retire or following your retirement, your surviving spouse will have coverage continued for his or her lifetime without cost.")

- Jerry Brust, Caterpillar's Director of Corporate Labor Relations at the time, testified during the *Winnett* preliminary injunction hearing. Again, the *Winnett* class members retired under an earlier version of the GIP that contained identical language in Section 5.15 as the 1998 GIP under which the *Kerns* class members retired. Thus, the court's conclusion about Mr. Brust's testimony in *Winnett* supports the conclusion the court has reached as to vesting in the *Kerns* case as well:

> The testimony of Caterpillar's then Director of Corporate Labor Relations supports vesting. In describing why Caterpillar announced potential changes in 1991, Brust claimed that "we wanted to give employees an opportunity—if they were contemplating retiring in the near future ... to make the decision whether they were going to in effect, cash in their chips and push them back from the table prior to January of '92 and retire knowing that they had locked in at that point." (Tr. 373). Brust's use of

> the phrase "locked in" suggests that Caterpillar knew these benefits could not be taken away.

Winnett v. Caterpillar, Inc., 579 F. Supp. 2d 1008, 1032 (M.D. Tenn. 2008) *rev'd*, 609 F.3d 404 (6th Cir. 2010). The Sixth Circuit's reversal of the court's preliminary injunction ruling was based on legal issues not relevant to the court's conclusion about Mr. Brust's testimony.

- The plaintiffs have produced evidence of a large number of letters and forms on which Caterpillar made written representations of its intention to provide healthcare benefits for life, without cost, to surviving spouses, the authenticity and accuracy of which Caterpillar does not dispute. For example, the plaintiffs have produced fourteen letters sent from Caterpillar to surviving spouses between September 1999 and 2002, shortly after the retiree passed away, stating that the spouse would have healthcare coverage for his or her lifetime. Some letters specifically said "at no cost." (Docket No. 243 at 18–23 (¶¶ 45–53) (quoting nine such letters); Docket No. 223-4 (list of 14 Survivors Lifetime Letters).)

- After Caterpillar sent a letter dated September 4, 2003 announcing imposition of premiums, Caterpillar received written and oral complaints from surviving spouses that the imposition of premiums was inconsistent with the promises Caterpillar had made. (Docket No. 243, at 31–32 (¶77).)

- The plaintiffs have produced letters that surviving spouses sent to Caterpillar after receiving a letter from Caterpillar dated October 10, 2005 (Docket No. 224-4), indicating its intention to begin imposing premiums. In each letter, the surviving spouses complained that this was inconsistent with promises Caterpillar had made to them or requested that Caterpillar investigate the matter. (Docket No. 243 at 32–34 (¶¶ 78–84).)

- Caterpillar sent three such surviving spouses letters dated in March 2006, confirming that they were entitled to lifetime, no cost coverage and attaching documentation of their right to such coverage. (Docket Nos. 234-7, 234-8, 234-9 (three surviving spouses' letters of complaint and Caterpillar's letters in response thereto).)

- Soon after Caterpillar sent these letters to the surviving spouses who complained, it sent letters to other surviving spouses indicating that, although there would be a delay in the collection of premiums, Caterpillar would begin charging premiums on April 1, 2006. (Docket No. 243, at 41 (¶108).)

- On April 13, 2006, the *Kerns* plaintiffs filed their Complaint in this matter. Plaintiffs have produced five letters sent by Caterpillar to *Kerns* surviving spouses, dated April 17, 2006, stating that Caterpillar had "elected to waive your health care premiums." (Docket No. 243, at 41 (¶111).)

- The plaintiffs also have presented evidence that, in 67 out of 96 benefits files Caterpillar provided for *Kerns* surviving spouses, there is a document prepared by Caterpillar and signed by the surviving spouse, usually shortly after her spouse died, called "Medical Expense Survivor's Coverage." Sixty-two of these forms indicated that "this survivor is eligible [for] retired coverage until lifetime" (or, in a few, until "death"). Sixty-three of the forms indicated that such coverage would be "free," at "no cost," "0"," or "none." (Docket No. 243, at 23–24 (¶55); 223-3 (list of 67 Survivors Medical Expense Survivor Coverage Forms).)

- Plaintiffs have provided evidence that five surviving spouses' files included a document titled "Survivor Insurance Information Cards" that indicate that there would be no cost to the surviving spouse for health coverage. (*See, e.g.*, Docket No. 243, at 24–25 (Caterpillar's Resp. to Pl.'s SUMF conceding the accuracy of the referenced forms).)

- Section 6.2(c) of the 1998 GIP ties pension eligibility to medical benefits. Although *Tackett* held that courts cannot presume vesting from this type of provision, Justice Ginsburg's concurrence clarifies that such tying language is "relevant" to the question of whether benefits have vested.

In sum, the court reiterates its previous conclusion that the various provisions of the contracts at issue in this case, when read together, demonstrate

unambiguously the parties' intention for the surviving spouses to have lifetime "no cost" health benefits. In the alternative, if the provisions cited by Caterpillar create ambiguity as to the parties' intentions, the extrinsic evidence before the court overwhelmingly supports the court's conclusion. Because the court finds nothing in the Supreme Court's *Tackett* decision that changes its previous rulings in this matter,[2] Caterpillar's second motion to reconsider will be denied.

IV. The Plaintiffs' Motion to Reconsider

The plaintiffs argue that the court's conclusion in its March 26, 2010 summary judgment ruling that, although Caterpillar's imposition of monthly premiums violated ERISA and the LMRA, its imposition of additional deductibles, co-insurance, and increased out-of-pocket costs were lawful pursuant to *Reese v. CNH Am. LLC*, 574 F.3d 315 (6th Cir. 2009) (Docket No. 262, at 39–41), should be reconsidered based on an intervening change of controlling law and to prevent a manifest injustice. In its summary judgment ruling, the court held that *Reese* "stands for the proposition

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[2] The clear contractual language and overwhelming evidence supporting the court's decision in this case distinguish it from *Reese v. CNH Indus. N.V.*, No. CV 04-CV-70592, 2015 WL 5679827 (E.D. Mich. Sept. 28, 2015), in which the district court reconsidered and reversed its finding of vesting in light of *Tackett*. Unlike this case, in *Reese*, the district court found that, after setting aside the *Yard-Man* presumptions, "[t]he remainder of the reasons underlying the Court's prior conclusion that Plaintiffs are entitled to lifetime healthcare benefits are either not sufficient on their own to support that conclusion or are no longer viable reasons under *Tackett*." *Id.* at *9.

that, even if the retiree has a vested right to lifetime health benefits from his employer, unless there is some exceptional language that dictates that benefits can 'never vary,' that retiree is entitled to 'lifetime benefits subject to reasonable changes.'" (Docket No. 262, at 27 (quoting *Reese*, 574 F.3d at 326).)

The plaintiffs argue that *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO-CLC v. Kelsey-Hayes Co.*, 750 F.3d 546, 554 (6th Cir. 2014) *reh'g granted and opinion vacated*, 795 F.3d 525 (6th Cir. 2015), "corrected some common 'misapprehensions' about the *Reese* 'reasonable changes' holding, and clarified and severely limited *Reese* to its particular facts." (Docket No. 465, at 9.) The plaintiffs request that the court reconsider its summary judgment ruling and find that the *Kerns* class members are entitled to "receive the benefits set forth at the levels in the 1998 GIP for the remainder of their lives without premiums and without imposing the new deductibles, new co-insurance or other new costs." (*Id.*, at 10.)

The first problem with the plaintiffs' motion is that the Sixth Circuit has vacated the *Kelsey-Hayes* opinion on the basis of *Tackett* and, thus, the case has no precedential value. The plaintiffs counter that *Kelsey-Hayes* was vacated on grounds independent of *Reese*, which leads to the second problem with the plaintiffs' motion—*Kelsey-Hayes* does not represent a change in controlling law. *Kelsey-Hayes* is not in conflict with *Reese* or this court's application of *Reese*. The "misapprehension" *Kelsey-Hayes* was correcting was that of the *Kelsey-Hayes* defendants, not *Reese* or courts

applying *Reese*. In rejecting the argument of the *Kelsey-Hayes* defendants, the Sixth Circuit explained as follows:

> Underpinning many of defendants' arguments on appeal is a characterization of the *Reese* cases as a major sea-change in Sixth Circuit retiree benefits case law. . . . Specifically, defendants characterize *Reese's* conclusion that CNH could unilaterally alter the retirees' health care benefits to mean that all CBAs in the Sixth Circuit are always unilaterally alterable, regardless of a CBA's specific language. . . . We disagree with defendants and reject their interpretation of the *Reese* cases. Contrary to defendants' characterization, the *Reese* decisions are not a "significant change" in Sixth Circuit case law, but are entirely consistent with other Sixth Circuit retiree benefits cases insofar as the *Reese* courts simply examined the language of the CBA and the parties' conduct in reaching their conclusions. . . . In sum, the *Reese* courts concluded that there, the scope of the vested right to health care could be unilaterally altered because that is what the evidence indicated the parties intended in that case, not because all vested health care rights in all CBAs are subject to unilateral alteration as a matter of law.

Kelsey-Hayes, 750 F.3d at 554 (citations omitted).

The plaintiffs' real argument seems to be that the court misapplied *Reese* by interpreting it to mean that "all CBAs in the Sixth Circuit are always unilaterally alterable, regardless of a CBA's specific language," as

the *Kelsey-Hayes* defendants interpreted it. *Id*. But this court did not assume that the 1998 GIP was unilaterally alterable as a matter of law. To the contrary, the court clearly considered the specific facts of the agreements between these particular parties:

> For the same reasons as expressed in *Winnett*, the court finds that these additional charges, while undoubtedly imposing a financial burden on the class members, are "reasonable" and ancillary charges under *Reese*. As in *Reese*, while the plan documents say "no cost" or "no contributions," "no party to the case—the union, the employer, the retirees—viewed the benefits in this way." 574 F.3d at 324. That is, the *Kerns* plaintiffs concede that they are responsible for, at least, a $5/$15 (generic/brand) prescription drug co-payment and the assorted additional medical charges (including out-of-pocket costs) that come from seeing an out-of-network physician under the 1998 GIP, along with the costs of office visits. (Docket No. 250 at 17; Docket No. 240 at 4; Docket No. 253 at 15.) That is, aside from the imposition of premiums, the *Kerns* plaintiffs are not objecting to "costs," only "increased costs." This Plan, like the plan in Reese, is subject to reasonable adjustments, as part of the give-and-take of labor negotiations. Therefore, as in *Winnett*, Caterpillar has not violated ERISA or the LMRA by instituting these additional charges.

(Docket No. 262, at 40.)

The court also rejects the plaintiffs' argument that *Tackett* is inconsistent with this court's conclusion that Caterpillar's imposition of costs (other than premiums) were lawful. (Docket No. 465 at 18–19.) The plaintiffs quote the following from *Tackett*: "Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent." *Tackett*, 135 S. Ct. at 933 (citation omitted). The plaintiffs argue that, because the "for the remainder of his surviving spouse's life without cost" language in the 1998 GIP is unambiguous, under *Tackett*, the court must interpret the meaning of the contract in accordance with those express terms. But as Justice Ginsberg's concurrence in *Tackett* reiterates, "[u]nder the cardinal principle of contract interpretation, the intention of the parties, to be gathered from the *whole instrument*, must prevail." *Id.* (internal quotation marks and citation omitted). The language the plaintiffs focus on in Section 5.15 of the 1998 GIP must be read together with the provisions in that same document that set forth out-of-pocket costs that the plaintiffs have repeatedly conceded were legitimately imposed costs. Reading the 1998 GIP as a whole, the additional charges are "reasonable" and ancillary under *Reese*.

Some disagree with the Sixth Circuit's position in *Kelsey-Hayes* that *Reese* does not represent a major change in Sixth Circuit retiree benefits case law. S*ee, e.g., Reese v. CNH Indus. N.V.*, No. CV 04-CV-70592, 2015 WL 5679827 at n.1 (E.D. Mich. Sept. 28, 2015) ("[T]he *Reese* panels appear to have changed the definition of 'vested' inasmuch as they use that word to describe benefits that, while lasting for life, are subject

to unilateral reduction. . . . Prior to those decisions, 'vested' benefits referred to benefits that last forever at a fixed level.") (collecting Sixth Circuit cases stating that a unilateral reduction or modification of "vested" benefits would violate the LMRA). Indeed, the Supreme Court has held that, "[u]nder established contract principles, vested retirement rights may not be altered without the pensioner's consent. The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed." *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n. 20 (1971). Nonetheless, although some might argue that *Reese*'s "reasonable changes" analysis is inconsistent with prior Sixth Circuit and Supreme Court precedent, it is not necessarily inconsistent with *Tackett*. Unless the Supreme Court or the Sixth Circuit itself overrules *Reese*, this court is bound to follow it, as it has done in this case.

In conclusion, the court finds no basis for reconsideration of its conclusion that, pursuant to *Reese*, Caterpillar's imposition of additional deductibles, co-insurance, and increased out-of-pocket costs were "reasonable" charges and, as such, permissible under ERISA and the LMRA. Accordingly, the court will deny the plaintiffs' motion to reconsider.

CONCLUSION

For the foregoing reasons, the court will deny the motions to reconsider filed by Caterpillar (Docket No. 451) and Plaintiffs (Docket No. 464). All that remains of this litigation is to determine the plaintiffs' damages in a manner consistent with the court's rulings.

/s/Aleta A. Trauger
ALETA TRAUGER
UNITED STATES DISTRICT JUDGE

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

Case No. 3:06-CV-1113
Judge Trauger

[Filed November 17, 2015]

JUDITH K. KERNS, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
CATERPILLAR INC.,	)
Defendant/	)
Third-Party Plaintiff,	)
	)
v.	)
	)
INTERNATIONAL UNION,	)
UAW, et al.	)
Third-Party Defendants.	)
	)

ORDER

Pending before the court is a Motion to Reconsider filed by Caterpillar, Inc. (Docket No. 451) and a Motion to Reconsider filed by the plaintiffs (Docket No. 464). For the reasons provided in the accompanying Memorandum Opinion, both motions are DENIED.

All that remains of this litigation is to determine the plaintiffs' damages in a manner consistent with the court's rulings.

/s/Aleta A. Trauger
ALETA TRAUGER
UNITED STATES DISTRICT JUDGE

APPENDIX F

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

Civil No. 3:06-1113
Judge Trauger

[Filed January 23, 2015]

JUDITH KERNS, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
CATERPILLAR INC.,	)
	)
Defendant.	)
	)

O R D E R

The Kerns Class Plaintiff's Rule 60(a) Motion to Correct Dockets 431, 432 and 433 (Docket No. 434) is GRANTED. The last two sentences of the Order entered January 16, 2015 (Docket No. 432) are hereby VACATED as inadvertently included within the Order. There are still matters for the court's consideration.

It is further ORDERED that the typographical errors set out in paragraph 17 of the Motion are hereby

CORRECTED, and the several references to "the 1988 GIP" are hereby CORRECTED to read "the 1998 GIP".

It is further ORDERED that, by February 6, 2015, the parties shall submit a joint proposed schedule for the remaining damages claim procedure that must take place in this case.

It is so **ORDERED**.

ENTER this 23rd day of January 2015.

/s/Aleta A. Trauger
ALETA A. TRAUGER
U.S. District Judge

APPENDIX G

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

Case No. 3:06-CV-1113
Judge Trauger

[Filed January 16, 2015]

JUDITH K. KERNS, et al., Plaintiffs,	)
v.	)
CATERPILLAR INC., Defendant/ Third-Party Plaintiff,	)
v.	)
INTERNATIONAL UNION, UAW, et al. Third-Party Defendants.	)

MEMORANDUM

This is a class-action lawsuit brought on behalf of surviving spouses of former employees of Caterpillar, Inc. ("Caterpillar") who retired on or after March 16, 1998, and before January 10, 2005. This matter is

before the court on cross motions for summary judgment on the claims brought by eight individual class members against Caterpillar, Inc. ("Caterpillar"). Docket Nos. 385 (Caterpillar's motion), 409 (Plaintiffs' motion). For the reasons stated herein, judgment will be entered for the eight plaintiffs at issue: Beverly Carson, Wilma Farrenholz, Hattie Grace, Sharon Houser, Laura Mansfield, Florence Miller, Charlotte Seibert, and Nancy Virden. The court also will order Caterpillar to re-enroll these plaintiffs in its insurance plan without premiums.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Because the court has recounted the factual and procedural history of this case numerous times, familiarity with the facts will be assumed.[1] During the time period relevant to this lawsuit, the International Union, UAW ("UAW"), was the exclusive bargaining representative for employees at various Caterpillar facilities, primarily in Illinois. Under federal law, Caterpillar was obligated to negotiate with the UAW before making changes to the terms and conditions of employment. The labor agreement negotiated between Caterpillar and the UAW in 1988 (the "1988 Central

[1] This case and *Winnett v. Caterpillar*, Case No. 3:06-0235, are related but not consolidated cases. By prior order dated March 26, 2010, this court granted the International Union, UAW's motions to dismiss Caterpillar's Third-Party Complaint against it in both *Kerns* and *Winnett*. (Docket No. 263.) Subsequently, through a series of decisions from this court and the Sixth Circuit, the court dismissed the *Winnett* plaintiffs' claims and closed that case. (Docket Nos. 326, 327.

Labor Agreement") included provisions for health insurance benefits, including retiree health care, as set forth in an Insurance Plan Agreement between the parties, along with a Group Insurance Plan (the "1988 GIP"). The 1988 GIP provided that, following the death of a retired employee, coverage for the surviving spouse "will be continued . . . for the remainder of his surviving spouse's life without cost." Docket No. 243, at 7.

Upon the expiration of the 1988 Central Labor Agreement, Caterpillar and the UAW were unable to reach a new agreement. One area of dispute was the proposed changes to medical benefits for existing and future retirees. Unable to reach a new agreement, on March 31, 1992, Caterpillar advised the UAW and Caterpillar's employees that it would unilaterally implement portions of its final contract offer, which would result in increased medical costs for the retirees.

On November 20, 1992, as the parties continued to be unable to reach a new agreement, Caterpillar advised the UAW that, effective December 1, 1992, it would implement additional provisions from its final offer, including caps on the amount that Caterpillar would pay for future retiree health coverage (the "1992 unilateral implementation"). However, the December 1992 unilateral implementation did *not* change the following language from the 1988 GIP: "Coverage [for a surviving spouse] will be continued following the death of a retired Employee for the remainder of his surviving spouse's life without cost." Docket No. 243, at 10.

In March 1998, the parties finally ratified a successor agreement to the 1988 Central Labor Agreement. The 1998 GIP again retained the provision in the 1988 GIP providing that surviving spouses' medical coverage would be continued following the death of a retired employee for the remainder of the surviving spouse's life without cost.

After much negotiation, the 2004 labor contract removed the "without cost for life" language pertaining to surviving spouse medical benefits that, in form and/or substance, had been in the 1988, 1992, and 1998 Agreements. The 2004 GIP contains new language that clearly specifies that both retirees and their surviving spouses must contribute toward their medical costs.

In October 2005, Caterpillar mailed letters to surviving spouses indicating that, effective January 1, 2006, they would be required to pay a health care premium to maintain their coverage. Shortly thereafter, surviving spouses began sending Caterpillar complaints that they were entitled to lifetime coverage without cost, based, among other things, on letters Caterpillar had sent them following the death of their Caterpillar-retiree spouse, assuring them they would be entitled to coverage for life "without cost."

In April 2006, shortly after this lawsuit was filed, Caterpillar announced it would "waive" premiums for individuals whose spouses retired, or were eligible to retire, between January 1, 1992 and January 10, 2005 and then died prior to January 10, 2005, the effective date of the 2004 labor agreement. But Caterpillar continues to charge monthly premiums for surviving spouses whose Caterpillar-retiree spouse died after

January 10, 2005—after the 2004 labor agreement that removed the "without cost" language as to surviving spouses took effect.

On March 26, 2010, the court entered judgment as a matter of law for the *Kerns* plaintiffs, finding Caterpillar liable for violations of Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, and Section 502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), for improperly charging premiums to the class of individuals whose spouses retired from Caterpillar prior to the ratification of the 2004 Labor Agreement but died after its ratification.[2] Docket Nos. 262, 263. The court found that "a surviving spouse is not precluded from relief simply because her retiree-spouse happened to die after the ratification of the 2004 agreement." Docket No. 262, at 38–39. The court further held that lifetime no-cost medical benefits had vested for the *Kerns* class and that Caterpillar had no viable defenses. *Id.* at 39. However, upon consideration of the guidelines set forth by the Sixth Circuit in *Reese v. CNH America LLC*, 574 F.3d 315 (6th Cir. 2009), the court concluded that, although Caterpillar's imposition of premiums was unlawful, its imposition of new deductibles, co-insurance, and increased out-of-pocket costs *were* permissible. Docket No. 262, at 39–41.

On August 20, 2014, the court ruled on the portion of Caterpillar's Motion for Summary Judgment on

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[2] Caterpillar did not charge premiums to class members whose spouses both retired and died between 1992 and 2005. Docket No. 262, at 37.

Damages that it interpreted as a motion to strike plaintiffs' claims for damages for replacement insurance and out-of-pocket medical expenses. . Docket Nos. 407, 408 (Court Order and Memorandum). In that motion, Caterpillar conceded that, under the court's prior rulings, surviving spouses who paid premiums to stay enrolled in Caterpillar's insurance plan are entitled to damages for the amount they paid in unlawfully imposed premiums, but it argued that surviving spouses who *terminated* Caterpillar's insurance plan because of Caterpillar's breach are not legally entitled, under either ERISA or the LMRA, to recover damages for the cost of obtaining substitute coverage and reimbursement for out-of-pocket healthcare costs that would have been covered if Caterpillar had honored the 1988 GIP. The court disagreed and held that the surviving spouses who terminated their insurance because of the unlawful imposition of premiums were entitled to those damages under the LMRA. The court declined to reach the issue of whether the plaintiffs would be entitled to those damages under ERISA.

As to the portion of Caterpillar's motion that sought summary judgment on the claims brought by twelve surviving spouses who cancelled Caterpillar's insurance and sought damages for the cost of replacement insurance and out-of-pocket expenses, the court entered judgment for Caterpillar on the claims of four plaintiffs who had not produced sufficient evidence to withstand summary judgment. As to the remaining eight plaintiffs, the court indicated that it would hold Caterpillar's motion for summary judgment in abeyance and invited plaintiffs to file a cross motion for

summary judgment for those individuals. The court solicited this motion in light of its holding that these eight plaintiffs are, in fact, entitled to damages for replacement insurance and out-of-pocket expenses caused by Caterpillar's breach, and the apparent lack of genuine dispute that Caterpillar's breach was the proximate cause of these surviving spouses' incurring these damages.

To narrow and direct the issues for future briefing, the court reiterated its prior holding that Caterpillar had waived any argument that the surviving spouses failed to mitigate their damages, as it had not raised the issue as an affirmative defense in its Answer to the plaintiffs' Complaint. Docket No. 407, at 15 (citing Docket No. 262, at 39). The court further held that, even if Caterpillar had not waived a mitigation defense, it was without merit. The court also noted that Caterpillar seemed to believe that plaintiffs were obligated to present "objective" proof that, before cancelling their Caterpillar insurance, each plaintiff took steps to determine whether Caterpillar had alternative plan options available at lower cost or met with a financial advisor to determine whether maintaining the insurance was financially feasible. The court noted the lack of legal authority cited by Caterpillar for this position and asked the parties to brief the issue.

The eight surviving spouses filed the motion for summary judgment as requested by the court, and that motion is now ripe for review as a cross motion to that previously filed by Caterpillar. Given the court's prior orders, the question now before the court is whether

Caterpillar's unlawful imposition of premiums was the proximate cause for these eight surviving spouses' termination of Caterpillar's insurance. These plaintiffs also request that the court order Caterpillar to re-enroll these plaintiffs in the Caterpillar insurance plan, without monthly premiums.

ANALYSIS

I. Summary Judgment Standard

Rule 56 requires the court to grant a motion for summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed .R. Civ. P. 56(a). If a moving defendant shows that there is no genuine issue of material fact as to at least one essential element of the plaintiff's claim, the burden shifts to the plaintiff to provide evidence beyond the pleadings, "set[ting] forth specific facts showing that there is a genuine issue for trial." *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). "In evaluating the evidence, the court must draw all inferences in the light most favorable to the non-moving party." *Moldowan*, 578 F.3d at 374 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

At this stage, "'the judge's function is not . . . to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). But "[t]he mere existence of a scintilla of evidence in support of the

[non-moving party's] position will be insufficient," and the party's proof must be more than "merely colorable." *Anderson*, 477 U.S. 242 at 252. An issue of fact is "genuine" only if a reasonable jury could find for the non-moving party. *Moldowan*, 578 F.3d at 374 (citing *Anderson*, 477 U.S. at 252).

II. Liability

In cases arising under Section 301 of the LMRA, "it is federal substantive law which controls resolution of the contractual dispute." *UAW v. Yard-Man*, 716 F.2d 1476, 1487 (6th Cir. 1983). "In the absence of controlling federal law principles, however, we may look for guidance to general common law principles, including the substantive law of the state in which the contract arose." *Id.* (citation omitted). In Section 301 cases, "traditional rules for contractual interpretation are applied as long as their application is consistent with federal labor policies." *Id.* at 1479.

"In cases alleging violations of the LMRA, courts have held that the purpose of any award 'is to make employees whole for the losses suffered.'" *UAW Local 540 v. Baretz*, 159 F. Supp. 2d 968, 972 (E.D. Mich. 2001) (quoting *Aguinaga v. United Food & Commercial Workers Int'l Union*, 720 F. Supp. 862, 870 (D. Kan. 1989)). Accordingly, when a court finds that an employer breached its collective bargaining agreement with its employees, it "should attempt to fashion a remedy that will place the employees in the position they would have attained had the agreement been performed." *Id.* at 973 (citing *Int'l Bhd. of Elec. Workers v. A-1 Elec. Servs., Inc.*, 535 F.2d 1, 4 (10th Cir. 1979)).

Caterpillar argues that "in their moving papers Plaintiffs have offered no objective evidence to establish the requisite causal link between Caterpillar's imposition of premiums to the class members and their alleged out-of-pocket expenditures" and that they, instead, rely on "the class members' unsupported assertions to the effect that they cancelled their Caterpillar insurance because it was 'too expensive.'" Docket No. 429, at 2–3 (Caterpillar's Response). Caterpillar denies that it espoused an "objective affordability" theory and blames the class members for framing the issue in these terms when they testified "that they cancelled their Caterpillar insurance because they deemed it 'too expensive.'" *Id.* Caterpillar has created a red herring by arguing that the word choice used by lay witnesses in effect created a legal requirement that plaintiffs must prove that they could not afford the unlawfully imposed premiums. In fact, Caterpillar argues that not only must plaintiffs prove they could not afford the premiums, but they must also offer some sort of *objective proof* above and beyond their own testimony to prove the lack of affordability.

Although Caterpillar's briefs are filled with this unhelpful argument, it nonetheless cites the correct legal standard—that is, whether Illinois or Tennessee law governs this dispute, in order to recover for breach of contract, a plaintiff must prove that that the breach was the proximate cause of her damages. *See FM Indus., Inc. v. Citicorp Credit Servs., Inc.*, No. 07-1794, 2008 WL 717792, at *6 (N.D. Ill. Mar. 17, 2008) ("To prevail on its breach of contract claim, [plaintiff] must prove it suffered damages as a proximate result of

[defendant's] breach." (applying Illinois law); *Underwood v. Nat'l Alarm Serv., Inc.*, No. E2006-00107-COA-R3CV, 2007 WL 1412040, at *5 (Tenn. Ct. App. May 14, 2007) ("[A] plaintiff is entitled to recover damages for breach of contract if defendant's breach of contract was the direct and proximate cause of the damages which plaintiff allegedly sustained, without the contributing fault of the plaintiff."). Plaintiffs are not required to prove they were unable to afford Caterpillar's premiums, much less provide "objective proof" of this fact. They need only show that the unlawfully imposed premiums were the proximate cause of their termination of Caterpillar's health insurance.

Caterpillar next argues that it is not liable for these eight surviving spouses' damages because their decision to cancel their Caterpillar insurance coverage was not foreseeable to Caterpillar. *See Am. Anodco, Inc. v. Reynolds Metals Co.*, 743 F.2d 417, 424 (6th Cir. 1984). Caterpillar argues that the fact that only eight surviving spouses cancelled their Caterpillar insurance demonstrates that such a decision was unforeseeable because the majority of class members did not react in this manner. This argument is without merit and is not supported by any of the cases cited by Caterpillar or by any other retiree health-care cases reviewed by the court. It was entirely foreseeable that imposing premiums on a group of surviving spouses would result in some individuals' being unwilling or unable to pay the premiums, thereby losing their only insurance or, as was the case for some of the surviving spouses,

losing their secondary insurance.[3] The risk that the surviving spouses would be unable to afford to pay premiums for their insurance was created by Caterpillar's breach and must be borne by Caterpillar, the defaulting party.

Caterpillar further argues that these eight surviving spouses did not take any action to give the company a reason to believe they would suffer such consequential damages, such as contacting the company to discuss their circumstances prior to deciding to cancel their insurance or contacting the company *after* cancelling their insurance but before incurring additional expenses. Aside from the fact that these plaintiffs were not legally required to take such actions, this argument is entirely disingenuous. As the court's brief recitation of the facts above demonstrates, surviving spouses quickly objected to Caterpillar's October 2005 letter indicating that, effective January 1, 2006, they would have to pay premiums to maintain the health insurance the company had always promised would be "without cost for life." Perhaps these *particular* eight surviving spouses did not notify Caterpillar with their objections, but *some* surviving spouses did object to Caterpillar's announcement of its impending unlawful action soon after receiving notice of Caterpillar's intention to breach its agreements.

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[3] The plaintiffs also argue that, out of about 570 class members, only about 218 paid Caterpillar any premiums. After this lawsuit was filed, Caterpillar "waived" the premiums of surviving spouses whose retiree spouse died before January 10, 2005 and for some surviving spouses who objected to the imposition of premiums. Docket No. 430, at 16.

Furthermore, by April 2006, this lawsuit was filed as a class action to protect the rights of these plaintiffs under the 1988 GIP. In February 2007, the plaintiffs provided their answers to interrogatories, which further clarified the categories of damages and types of relief they were seeking. Almost nine years after the filing of this lawsuit, and almost five years after this court entered judgment for plaintiffs as to liability, Caterpillar has yet to re-enroll these plaintiffs in the premium-free health insurance coverage the company promised to them and to their now-deceased spouses and to which this court held years ago they had a vested right.

III. Plaintiffs' Evidence

Beverly Carson: After her husband's death, Ms. Carson made three monthly premium payments of $182.27 per month before cancelling her coverage. Caterpillar refunded her one month of coverage. She testified that, after her husband died, her finances were "crap." Docket No. 399-2, at 9. She filed for bankruptcy and went uninsured for over two years, until she became eligible for Medicare.

Wilma Farrenholz: Caterpillar argues that Ms. Farrenholz should not prevail on her claim for damages because she testified that she switched to a different insurance plan that gave her "better coverage for less money." Ms. Farrenholz has an adult disabled dependent daughter. Ms. Farrenholz paid Caterpillar premiums for herself and her daughter for about six months. She testified that she "decided to switch [insurance companies] because the premiums were

going up, and I thought it was too much." Docket No. 399-7, at 6.

Hattie Grace: Ms. Grace is eighty years old, has Alzheimer's, and lives in a nursing home. She no longer recognizes her son or her daughter-in-law, Naomi Grace, who serves as her power of attorney and was deposed in this matter. Naomi Grace participated in discussions with Hattie Grace about her decision to terminate the Caterpillar insurance. Naomi Grace testified that Hattie Grace felt that she could not financially manage the premiums. After terminating the Caterpillar coverage, Hattie Grace went on Medicare and later Medicaid. Caterpillar argues that Hattie Grace is not entitled to damages based on Naomi Grace's testimony that she had a discussion with Hattie Grace about cancelling the Caterpillar insurance, in which Hattie Grace had stated, "I don't use it, I don't need it, I don't want it." According to Caterpillar, this testimony undercuts the argument by plaintiffs' counsel that plaintiffs were forced to cancel insurance because of the premiums. Viewing this statement along with the rest of Naomi Grace's testimony, the court finds that there is no genuine dispute that Hattie Grace terminated her Caterpillar insurance because of the imposition of premiums.

Caterpillar further argues that judgment should not be entered for Hattie Grace because her claim is only supported by the inadmissible hearsay testimony of Naomi Grace. Hattie Grace's counsel points out that the statements to which Naomi Grace testified are not offered for the truth of the matter asserted, but only for evidence about what Hattie Grace believed to be true

and what her motivation was for terminating the Caterpillar insurance. *See* Fed. R. Evid. 801(c) (defining hearsay as an out-of-court statement offered to prove the truth of the matter asserted). Furthermore, even if the statement were introduced to prove the truth of the matter, Ms. Grace's counsel has identified other hearsay exceptions that would apply to this testimony.[4]

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[4] Federal Rule of Evidence 803 provides:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . (3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Hattie Grace's out-of-court statement about her motive, intent, and plan to drop Caterpillar's health care plan because of the premiums would be admissible as a hearsay exception, even if offered to prove the truth of the matter asserted.

Federal Rule of Evidence 807, the residual hearsay exception, may also provide an avenue for admissibility of this evidence, as all of the conditions of the exception appear to be satisfied:

> (a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:
>
> > (1) the statement has equivalent circumstantial guarantees of trustworthiness;
> >
> > (2) it is offered as evidence of a material fact;

Sharon Houser: Sharon Houser had health care coverage under her own plan through her past employment, which was her primary insurance. Her husband's Caterpillar policy was secondary. When Caterpillar informed her it would begin charging her $101 in premiums to maintain the Caterpillar insurance, she immediately terminated the coverage and lost the benefit of having dual coverage.

Laura Mansfield: By the time Caterpillar informed Ms. Mansfield it would begin charging her $87 per month in premiums, Ms. Mansfield had re-married. Her new husband was also a Caterpillar retiree. She remained eligible for Caterpillar's insurance as a surviving spouse of her first husband, despite her remarriage. The cost of being covered under her new spouse through Caterpillar was only $55 a month. She testified that she changed coverage because of the imposition of premiums. There is no genuine dispute that the imposition of premiums caused Ms. Mansfield to terminate her surviving-spouse coverage.

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(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Florence Miller: Ms. Miller had health-care coverage under her own plan through her past employment, which was her primary insurance. Her husband's Caterpillar policy was secondary. When Caterpillar informed her she would have to pay $111 monthly to keep the Caterpillar insurance, she immediately terminated it and lost any benefit from having secondary insurance.

Charlotte Seibert: Ms. Seibert paid Caterpillar's premiums of $87 a month in 2006, $111 in 2007, and $135.31 in 2008. At some point, she added coverage from her former employer, for which she initially paid about $20 a month and now pays almost $50 a month. In August 2008, when she became eligible for Medicare, she terminated her Caterpillar coverage to save money on premiums. She believes the Caterpillar coverage is better than what she has through her former employer and Medicare. Ms. Seibert is the only one of these plaintiffs Caterpillar has attempted to re-enroll. There is some disagreement between the parties about whether she is enrolled or not. Caterpillar states that she declined an offer to re-enroll because she did not want anything to affect her coverage from her former employer. She states that Caterpillar re-enrolled her, without premiums, effective January 1, 2014. In any event, she maintains that she does want the coverage from Caterpillar without premiums to which she is legally entitled.

Nancy Virden: After Ms. Virden's husband died, she paid only one month of Caterpillar's premium of $182.27 for coverage in June 2009. She states that she was unable to afford the premium. She has been

uninsured since losing her Caterpillar coverage. She has serious health conditions that require prescriptions and regular medical care. Caterpillar objects to her claim on the basis that she testified that, at the time she stopped paying premiums for her Caterpillar insurance, she would have been unable to afford co-payments, deductibles, or anything else. Caterpillar oversimplifies Ms. Virden's testimony. She testified that, at the time of her husband's death, she had been making co-payments for medical expenses connected to her heart attack and her resulting prescription drugs. When asked what portion of a prescription drug co-payment she would be unable to make, she said, "[t]he full amount of the prescription." Docket No. 399-26, at 12. When asked the cost of the prescription to which she was referring, she said it was around $180. When asked if she would have been able to make co-payments, she testified, "I'm not sure." *Id.* Whether or not Ms. Virden was certain that she would have been able to continue making co-payments or deductibles is not dispositive of this question. After reviewing her deposition testimony, it is clear to the court that there is no genuine dispute that Caterpillar's imposition of premiums was the proximate cause of Ms. Virden's decision to terminate her Caterpillar coverage and that she had, in fact, been managing to pay her deductible and co-payment amounts prior to terminating insurance. *See Entergy Ark., Inc. v. Nebraska*, 226 F. Supp. 2d 1047, 1153 (D. Neb. 2002) ("[Plaintiff] has proven its damages with the requisite degree of certainty . . . . The law does not allow [defendant] to breach its contract, and thereby inject uncertainty into the equation in order to create a defense to damages.").

The court finds no genuine dispute that Caterpillar's unlawful imposition of premiums was the proximate cause for each of these women's decision to terminate Caterpillar's insurance plan. Accordingly, the court will enter judgment for each of these plaintiffs. They are each entitled to be compensated for the cost of replacement insurance, if any, and any out-of-pocket expenses they would not have incurred, absent Caterpillar's breach of the 1988 GIP.

IV. Reinstatement of Caterpillar's Insurance Plan

Almost five years have passed since the court granted plaintiffs judgment as to Caterpillar's liability for violating their right to life-time, premium-free health insurance pursuant to the 1988 GIP. Aside from the obvious injustice of plaintiffs' having endured nine years without the premium-free health insurance that they were promised and to which they are legally entitled, the plaintiffs also argue that this remedy is necessary to enable to the parties to calculate damages according to the damages schedule and claims procedure to which the parties have already agreed, as these particular plaintiffs will continue to accrue damages until their premium-free Caterpillar insurance is restored. The court will grant plaintiffs' request for an order directing Caterpillar to re-enroll these eight plaintiffs to health insurance without premiums, if not already re-enrolled, including the disabled adult child of Wilma Farrenholz.

CONCLUSION

For the foregoing reasons, the court will grant the motion of plaintiffs Beverly Carson, Wilma Farrenholz,

Hattie Grace, Sharon Houser, Laura Mansfield, Florence Miller, Charlotte Seibert, and Nancy Virden for summary judgment. The court will enter judgment for each of these plaintiffs and will order Caterpillar to re-enroll each of them in its insurance plan without premiums and in keeping with the terms of the 1988 GIP and the 1992 unilateral implementation.

An appropriate order will issue.

/s/Aleta A. Trauger
ALETA TRAUGER
UNITED STATES DISTRICT JUDGE

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

Case No. 3: 06-CV-1113
Judge Trauger

[Filed January 16, 2015]

JUDITH K. KERNS, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
CATERPILLAR INC.,	)
Defendant/	)
Third-Party Plaintiff,	)
	)
v.	)
	)
INTERNATIONAL UNION,	)
UAW, et al.	)
Third-Party Defendants.	)
	)

Order

This matter is before the court on cross motions for summary judgment on the claims brought by eight individual class members against Caterpillar, Inc. Docket Nos. 385 (Caterpillar's motion), 409 (Plaintiffs' motion). For the reasons stated in the accompanying Memorandum, judgment is entered for the following plaintiffs: Beverly Carson, Wilma Farrenholz, Hattie Grace, Sharon Houser, Laura Mansfield, Florence

Miller, Charlotte Seibert, and Nancy Virden. Caterpillar is also ordered to re-enroll these plaintiffs in its insurance plan without premiums.

IT IS SO ORDERED. This Order is the final judgment in this case. The Clerk shall close the file.

/s/Aleta A. Trauger
ALETA TRAUGER
UNITED STATES DISTRICT JUDGE

APPENDIX H

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

Case No. 3: 06-CV-1113
Judge Trauger

[Filed August 20, 2014]

JUDITH K. KERNS, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
CATERPILLAR INC.,	)
Defendant/	)
Third-Party Plaintiff,	)
	)
INTERNATIONAL UNION,	)
UAW, et al.	)
Third-Party Defendants	)
	)

MEMORANDUM

This matter is before the court on Caterpillar's Motion for Summary Judgment on Damages Issues. (Docket Nos. 387-38). This motion has three sections. The first section seeks judgment for any claims raised by surviving spouses who are themselves Caterpillar employees. This section is moot, as plaintiffs' class

counsel have conceded these individuals are not Kerns class members and have withdrawn claims for damages or other relief sought on their behalf. The court construes the second section as a motion to strike plaintiffs' claim for damages for replacement insurance and out-of-pocket medical expenses. This portion of the motion will be denied. The third section is a motion for summary judgment on the claims raised by twelve individuals that Caterpillar argues have not produced sufficient evidence to withstand summary judgment. This portion of the motion will be granted as to four plaintiffs. As to the eight remaining plaintiffs, the court will hold defendant's motion in abeyance and invite plaintiffs to file a cross motion for summary judgment for those individuals.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

All that remains of this litigation is to determine plaintiffs' damages. Because the court has recounted the factual and procedural history of this case numerous times, familiarity with the facts will be assumed. This case and *Winnett v. Caterpillar* (Case No. 3:06-0235) are related but not consolidated cases. By prior order dated March 26, 2010, this court granted the UAW's motions to dismiss Caterpillar's Third-Party Complaint against it in both *Kerns* and *Winnett*. (Docket No. 263.) Subsequently, through a series of decisions from this court and the Sixth Circuit, the court dismissed the *Winnett* plaintiffs' claims and closed that case. (Docket No. 326-27.)

The *Kerns* plaintiffs are surviving spouses of former employees of Caterpillar who retired on or after March

16, 1998, and before January 10, 2005. The court has already entered judgment as a matter of law for the *Kerns* plaintiffs, finding Caterpillar liable for violations of Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, and Section 502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B) for improperly charging premiums to the class of individuals whose spouses died after the ratification of the 2004 Labor Agreement.[1] (Docket No. 262-63.) The court found that the 1992 unilateral implementation had explicitly "provided surviving spouses with vested no cost medical benefits." (Docket No. 262.) The court found that other costs Caterpillar had imposed on these plaintiffs, such as new deductibles, co-insurance, and increased out-of-pocket costs were permissible under *Reese v. CNH America LLC*, 574 F.3d 315 (6th Cir. 2009).

ANALYSIS

The plaintiffs' claims are brought under § 301 of the LMRA and § 502(a)(1)(B) of ERISA. Section 301 of the LMRA states: "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter. . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in

[1] As the court has noted in prior opinions, while the Kerns class consists only of "surviving spouses," the size of this class may grow in the future, as the living Caterpillar retirees who retired under the 1998 Plan pass on. (Kerns, 499 F. Supp. 2d 1005, 1023 (M.D. Tenn. 2007), Docket No. 262 at 39 n. 20.

controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a). Section 502(a)(1)(B) of ERISA states that a "civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

Summary judgment standard

Federal Rule of Civil Procedure 56(c) requires the court to grant a motion for summary judgment if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." If a moving defendant shows that there is no genuine issue of material fact as to at least one essential element of the plaintiff's claim, the burden shifts to the plaintiff to provide evidence beyond the pleadings, "set[ting] forth specific facts showing that there is a genuine issue for trial." *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). "In evaluating the evidence, the court must draw all inferences in the light most favorable to the [plaintiff]." *Moldowan*, 578 F.3d at 374.

"[T]he judge's function is not . . . to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). But "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient," and the plaintiff's proof must be more

than "merely colorable." *Anderson*, 477 U.S. at 249, 252. An issue of fact is "genuine" only if a reasonable jury could find for the plaintiff. *Moldowan*, 578 F.3d at 374 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

I. Motion for Summary Judgment as to Surviving Spouses Who Are Themselves Caterpillar Employees

Caterpillar's current motion for summary judgment on damages first seeks judgment on the claims of individuals who fall within the class definition in this action, but who the Company maintains are not entitled to damages because, although they are surviving spouses of Caterpillar retirees, they are also themselves Caterpillar employees entitled to their own "employee coverage" under the Company's health insurance plan. (Docket No. 387-1.) In plaintiff's response, class counsel assert that they had asked Caterpillar for information about this class of employees, but only obtained the requested details through reading Caterpillar's motion. Having now reviewed the information supplied by the motion, class counsel concede that these individuals are not entitled to relief on the basis of being a surviving spouse of a Caterpillar retiree. Accordingly, class counsel withdraw the claim that these individuals are *Kerns* class members and all claims for damages or other relief

sought on their behalf. (Id.)[2] Any issue related to these individuals is moot.

II. Motion to Strike Damages for Replacement Insurance and Out-of-Pocket Medical Expenses

A. Damages Available Under ERISA

Second, although Caterpillar concedes that individuals who paid premiums to maintain their Caterpillar health insurance are entitled to be reimbursed for costs of those premiums, Caterpillar now seeks summary judgment on the claims of twelve class members who cancelled their Caterpillar insurance because of the imposition of premiums and now seek damages for the cost of obtaining substitute coverage and reimbursement for out-of-pocket healthcare costs that would have been covered if Caterpillar had honored its agreement. Caterpillar characterizes these damages as extra-contractual consequential damages and asks this court to find that these damages cannot be recovered under the LMRA or ERISA. *See Simpson v. Ernst & Young*, 879 F.Supp.

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[2] Plaintiffs' class counsel also represent that they are not currently asserting damages claims for Karen Dechman, Minerva Evans (deceased) and Lori Kroenlein based on Caterpillar's recent representation that these individuals are not class members and that their deceased husbands were not retirees. Class counsel indicate an intent to preserve the right to appeal class description rulings, but they are not currently asserting damages claims on behalf of these individuals. (Docket No. 395-1 at 2-3 (Plaintiffs' brief)). In addition, class counsel indicate that they have removed Marie Chester, Imogene Gleichman, and Mary Thomas from the list of coverage termination issues. (Id. at 1 fn 2.)

802, 825 (S.D. Ohio 1994) ("In the context of ERISA, compensatory and punitive damages are often referred to as extra-contractual damages, not being available under the terms of a benefit plan.").

Caterpillar quotes *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), in which the Supreme Court stated that

> the statutory provision explicitly authorizing a beneficiary to bring an action to enforce his rights under the plan- §502(a)(1)(B) . . . says nothing about the recovery of extra-contractual damages, or about the possible consequences of delay in the plan administrators' processing of a disputed claim. Thus, there really is nothing at all in the statutory text to support the conclusion that such a delay gives rise to a private right of action for compensatory or punitive relief.

Id. at 144. Although the language Caterpillar quotes from *Russell* discusses the types of damages available under §502(a)(1)(B), the Court's holding in *Russell* actually related to a different section of ERISA, § 1109(a). The *Russell* Court only discussed § 502(a)(1)(B) for the purpose of demonstrating that its conclusion about the scope of damages available under § 1109(a) was "buttressed by the absence of any provision for the recovery of extra-contractual damages in § [502(a)(1)(B)][3]. . . ." *Int'l. Union UAW Local 91 v.*

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[3] For uniformity and ease of comprehension, the court will substitute the section numbers for ERISA when quoting cases that cite instead the United States Code section number.

Park-Ohio Indus., Inc., 876 F.2d 894, 1989 WL 63871 at *6 (6th Cir. 1989) (unpublished). The Sixth Circuit explained in its unpublished *Park Ohio* decision:

> Although the Supreme Court expressly limited its opinion to consideration of § 1109(a) and § [502(a)(2)], several circuits have extended the reasoning of *Russell* to preclude extra-contractual damages in cases brought under other subsections of § [502(a)]. . . . [W]e find *Russell* controlling and join the other circuits which have held that the language and structure, as well as the legislative history, of § [502] prohibit the allowance of such damages. . . . Accordingly, we affirm the district court's holding that extra-contractual compensatory damages are not available in actions under §§ [502(a)(1)(B)] or [502(a)(3)] of ERISA."

Id. at *7 (citations omitted).

The circuit cases cited by *Park-Ohio* in arriving at its holding related to the damages available under Section 502(a)(1)(B), including one from the Sixth Circuit, were based on claims raised under Section 502(a)(3), without any discussion of the differences between these two provisions. Plaintiffs argue that several of the cases cited by Caterpillar also blur the distinction between these two provisions. Plaintiffs argue that the Supreme Court's ruling in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) clarified that §502(a)(1)(B) provides both legal and equitable remedies, unlike §502(a)(3). Plaintiffs quote the following section of *Knudson*:

> In the very same section of ERISA as § 502(a)(3), Congress authorized "a participant or beneficiary" to bring a civil action "to enforce his rights under the terms of the plan," without reference to whether the relief sought is legal or equitable. 29 U.S.C. § 1132(a)(1)(B) (1194 ed.). But Congress did not extend the same authorization to fiduciaries. Rather, § 502(a)(3), by its terms, only allows for *equitable* relief.

534 U.S. at 220-21 (emphasis in original). The plaintiffs argue that the point of this comparison is that, unlike Section 502(a)(1)(B), Section 502(a)(3) does not authorize legal relief. Caterpillar counters that the plaintiffs' articulation of the issue as legal versus equitable remedies is a red herring, because the real issue is that their claim for extra-contractual consequential damages should be dismissed because they are not "benefits due under the terms of the plan." They further argue that *Knudson* was a case about § 502(a)(3) and that the language quoted by plaintiffs is *dicta*.

Because the court finds that the damages the plaintiffs seek are available under the LMRA, it does not reach the issue of their availability under ERISA.

B. Damages Available Under the LMRA

1. Preemption

Caterpillar argues that numerous courts have held that, in a hybrid ERISA/Section 301 case, a plaintiff may not circumvent the statutory scheme set forth in ERISA by recovering extra-contractual damages under the LMRA, when those damages are unavailable under

ERISA. The parties cite district court opinions that reach opposite holdings on this issue. Caterpillar relies heavily on *Gilbert v. Doehler-Jarvis, Inc.*, 137 F.Supp. 2d 916 (N.D. Ohio 2001), *vacated as moot*, 2004 WL 2848545 (6th Cir. 2004) (finding appeal moot because company entered bankruptcy). *Gilbert* involved retirees seeking to establish that their healthcare benefits were lifetime benefits that could not be terminated by their employer. The *Gilbert* plaintiffs raised their claims under § 502(a)(3) of ERISA (not §502(a)(1)(B)) which is the basis of the *Kerns*' plaintiffs' claims) and Section 301 of the LMRA. They sought compensation for the amounts they expended in seeking replacement insurance. After determining that the extra-contractual damages sought by plaintiffs were unavailable under ERISA, the *Gilbert* court held that "[t]he Retiree's action is, at its heart, an ERISA action. The fact that they chose to bring their action under § 301 as well as ERISA does not allow them to recover extracontractual damages that would not be available to them under ERISA." *Id* at 919.

For this proposition, *Gilbert* cited *Ragan v. Navistar Int'l Transp. Corp.,* No. 88-2623, 1989 WL 117486 (D. Kan. September 20, 1989), an unpublished district court opinion that held that, "to allow these [extra-contractual] damages under § 301 of the LMRA, as plaintiff suggests, for a claim based on a health benefits plan would constitute an inappropriate 'backdoor' means to an end which ERISA does not allow." *Id.* at *2.

Ragan, in turn, cites *United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499 (11th

Cir.1988), in which the Eleventh Circuit held that extra-contractual damages were not recoverable under § 502(a)(3) of ERISA or Section 301 of the LMRA. *Id.* at 1509-10. *Connors* based its decision on the Supreme Court's holding in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), which held that ERISA pre-empts state law claims related to failure to properly administer a plan. *Connors* extended *Dedeaux* to hold that ERISA also pre-empts claims under Section 301 of the LMRA. *Connors*, 855 F.2d at 1509.

Caterpillar also cites *Stewart v. KHD Deutz of America Corp.*, 75 F.3d 1522 (11th Cir. 1996), a case which held that plaintiffs were entitled to a jury trial in a LMRA case and in hybrid LMRA/ERISA cases. In *dicta*, *Stewart* repeated the *Connors* holding that, "if the retirees sought extracontractual damages under section 301 of the LMRA in a LMRA/ERISA action, their 301 claim would be barred." *Id.* at 1528.

Finally, Caterpillar cites *Zielinski v. Pabst Brewing Co*, 360 F. Supp. 2d 908 (E.D. Wis. 2005), which held that permitting emotional distress damages under § 301 "would allow plaintiffs to do an impermissible 'end-run' around the restrictions of ERISA," *Id.* at 924. *Zielinski* cites for this proposition *Connors, Gilbert, Ragan*, an unpublished opinion from the Western District of New York (*LaForest v. Honeywell Int'l, Inc.*, No. 03-6248, 2004 WL 1925490, at *9 (W.D.N.Y. Aug.27, 2004)), and *Stewart.* It is also important to note that the plaintiff retirees in *Zielinski* did not argue that damages for the premiums paid for replacement insurance were "available under the LMRA in a hybrid ERISA/LMRA action," and as a

result, the court found that the retirees had "implicitly conceded that damages for premiums paid for replacement insurance are not available under the LMRA." *Zielinski*, 360 F. Supp. at 923.

The court declines to follow this line of cases as urged by Caterpillar. These cases build one on top of another based on the holdings in unpublished and vacated district court opinions and an Eleventh Circuit opinion that appears not to be in keeping with the language of the ERISA statute or with Sixth Circuit jurisprudence on this topic. First, as the plaintiffs correctly assert, in enacting ERISA, Congress was clear that it did not intend to modify or preempt any existing federal law, which would include the law developed under § 301 of the LMRA. ERISA provides at 29 U.S.C. § 1144(d): "Nothing in this title shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States. . . or any rule or regulation issued under any such law." In keeping with the text of the statute, the Sixth Circuit has held that the "preemption provision of ERISA, 29 U.S.C. § 1144, preempts state law but does not supersede the federal common law of labor-management relations." *Morse v. Adams*, 857 F.2d 339 (6th Cir. 1998) (citations omitted).

There are numerous Sixth Circuit cases that analyze claims under ERISA and the LMRA, including prior orders from this court in this matter. For example, in *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991), the court held that a breach of a collective bargaining agreement's provisions for vested retirement benefits constituted a "breach of contract

under LMRA § 301," and, because the collective bargaining agreement ("CBA") was a benefits plan under ERISA, necessarily "was also a violation of ERISA." *Id.* at 1298. The court agrees with the plaintiffs' characterization that the *Armistead* court treated the ERISA claim as derivative, or secondary to, the LMRA claim.

In determining the accrual date of a § 301 cause of action for nonpayment of retiree benefits, the Sixth Circuit held the following:

> [W]e now turn to the issue of whether 29 U.S.C. § 1001 et seq. (ERISA) provides the exclusive remedy for plaintiffs. All parties assert that ERISA does not preempt the § 301 action and that an action could be maintained under either statute or both simultaneously. We agree. The court's decisions make it clear that such an action may be brought under ERISA . . . or under § 301. . . or both statutes simultaneously. . . . Accordingly, we conclude that ERISA is not the exclusive remedy and that the plaintiffs may maintain an action under § 301.

Biros v. Spaulding-Evenflo Co. Inc., 934 F.2d 740, 742 (6th Cir. 1991) (citations omitted). The court then analyzed the case under Section 301 to determine the accrual date of the action.

In a case involving a dispute over whether the plaintiffs had a right to a jury trial in a hybrid ERISA/LMRA claim, the Sixth Circuit reaffirmed its holding in *Biros*:

> The district court also concluded, erroneously, that the plaintiffs' case is controlled by ERISA § 502(a)(1)(B) under which we have held that there is no right to a jury trial. . . . In their briefs to this court, the parties devote considerable space to arguing the question of whether ERISA preempts the LMRA and the common law of contracts, and, if so, whether a jury trial is allowed under ERISA. We do not address this argument any further because we have stated quite clearly in prior decisions that plaintiffs may, under some circumstances, bring claims for retirement benefits under either ERISA or the LMRA, or under both statutes simultaneously. *E.g., Biros v. Spalding–Evenflo Co.*, 934 F.2d 740, 742 (6th Cir.1991).

Golden v. Kelsey-Hayes Co., 73 F.3d 648, 659 n.11 (6th Cir. 1996).

Thus, in keeping with the plain language of ERISA and with Sixth Circuit precedent, this court finds that ERISA is not the exclusive avenue for relief in a hybrid ERISA/LMRA case.

2. The Merits of the LMRA Claim

The court turns to the LMRA to determine whether Caterpillar is liable for the surviving spouses' costs in purchasing replacement insurance and other medical costs they would not have incurred if Caterpillar had honored its agreement. In *UAW v. Yard-Man*, 716 F.2d 1476 (6th Cir. 1983), the Sixth Circuit considered claims by retirees that their employer had breached the collective bargaining agreement by terminating life and

health insurance benefits of retired employees when the CBA expired and substituting the payment of "lump sum payments of the present value of the supplemental pension rights directly to each retiree." *Id.* at 1478. In determining whether the parties intended for retiree insurance benefits to continue beyond the expiration of the CBA, the court analyzed the issue under § 301:

> The enforcement and interpretation of collective bargaining agreements under § 301 is governed by substantive federal law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). However, traditional rules for contractual interpretation are applied as long as their application is consistent with federal labor policies. Id. at 457, 77 S.Ct. at 918.

Id. at 1479.

"In cases alleging violations of the LMRA, courts have held that the purpose of any award 'is to make employees whole for the losses suffered.'" *UAW Local 540 v. Baretz*, 159 F.Supp.2d 968, 972 (E.D. Mich. 2001) (quoting *Aguinaga v. United Food and Commercial Workers Int'l Union*, 720 F.Supp. 862, 870 (D.Kan. 1989)). Accordingly, when a court finds that an employer breached its CBA with its employees, it "should attempt to fashion a remedy that will place the employees in the position they would have attained had the agreement been performed." *Id.* at 973 (citing *Int'l Bhd. of Elec. Workers v. A-1 Elec. Servs., Inc.*, 535 F.2d 1, 4 (10th Cir.1979)).

The court finds that Caterpillar must compensate the surviving spouses for the costs of substitute insurance coverage and any out-of-pocket expenses that they would not have incurred but for Caterpillar's violation of their agreement. *See Baretz*, 159 F. Supp.2d at 973-75 (requiring employer to pay costs of replacement insurance and out-of-pocket medical expenses); *Yolton v. El Paso Tennessee Pipeline Co*, 2008 WL 275685 (E.D. Mich. 2008) (same result, also in a hybrid ERISA/LMRA case). The court agrees with the court in *Yolton*, which, in holding that the company was responsible for the costs of substitute insurance and out-of-pocket expenses, found that "[a]ny other result would be inequitable, as an employer could terminate retiree health insurance coverage and completely avoid paying the costs of that coverage for the months or even years that it takes to litigate whether the retirees are entitled to have their coverage reinstated." *Id.* at *4.

III. Motion for Summary Judgment on Individual Claims

A. Plaintiffs Who Did not Provide Deposition Testimony

Of the plaintiffs at issue in Caterpillar's motion for summary judgment, the court's rulings leave twelve surviving spouses who seek to be reimbursed for the cost of replacement insurance and out-of-pocket expenses. These surviving spouses were asked to complete a questionnaire created by the attorneys to determine their damages and their reasons for terminating their Caterpillar insurance. Caterpillar also sought to depose these twelve individuals. The

court grants Caterpillar's motion for summary judgment as to the claims of Jewlee Gulley, Viola Spencer, and Jeannette Street because these individuals were not produced for depositions nor did they submit completed questionnaires. Because these individuals have produced no evidence in response to Caterpillar's motion for summary judgment, their claims will be dismissed.

Josefina Ramirez submitted a questionnaire, which has her name on the signature line at the end of the form and is dated January 21, 2014, but she has not been deposed. Class counsel represent that she may spend time in Mexico, as her birth certificate and marriage certificate are both from Mexico. (Docket No. 399#19, Exhibit 45). The questionnaire, which appears to have been completed by Ms. Ramirez, indicates that she terminated her Caterpillar insurance because the monthly premium was "too much premium to pay." However, the court agrees with Caterpillar's objection that the questionnaire is inadmissible hearsay, and as a result will grant the motion for summary judgment on her claim. *See Smoot v. United Transp. Union*, 246 F.3d 633, 649 (6th Cir. 2001) ("'[I]t is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.'") (quoting *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir.1994)).

Hattie Grace did not herself testify but did provide deposition testimony from an individual who has her power of attorney. Her claim will be addressed below.

B. Plaintiffs Who Presented Evidence That They Obtained Replacement Insurance Because of Caterpillar's Imposition of Premiums

There remain eight surviving spouses seeking damages for replacement insurance and out-of-pocket expenses-- Beverly Carson, Wilma Farrenholz, Hattie Grace, Sharon Houser, Laura Mansfield, Florence Miller, Charlotte Seibert, and Nancy Virden. It is likely that these plaintiffs' claims can be resolved on summary judgment, but the court only has before it Caterpillar's motion for summary judgment. In the interest of judicial economy, the court invites these eight remaining plaintiffs to file a motion for summary judgment so the court can properly consider whether there is a dispute as to a genuine issue of material fact.

The court will rule on certain of Caterpillar's arguments as to these individuals to narrow the issues for future briefing. First, Caterpillar argues the court should grant summary judgment on the claims of surviving spouses who indicated on the written questionnaires and in deposition testimony that the imposition of premiums was the cause for their terminating Caterpillar's insurance. Caterpillar argues that their assertions are not sufficient to satisfy their burden of proof that Caterpillar's imposition of premiums was the proximate cause of the termination of insurance, as opposed to other costs the court held were permissible or because of other reasons unrelated to costs. Apparently seizing on the language used by many of these surviving spouses that they terminated their Caterpillar insurance because they could no

longer afford it once the premiums were imposed, Caterpillar argues that in response to its motion for summary judgment, these plaintiffs' were obligated to present proof that before canceling their Caterpillar insurance, they took steps to determine whether Caterpillar had "alternative plan options or elections available at lower cost," or met with a financial advisor to determine whether maintaining the insurance was financially feasible. (Docket 387-1 at 15.)

Thus, Caterpillar seems to believe that some sort of "objective" proof that the surviving spouses could not *afford* the unlawful Caterpillar premium is required to demonstrate proximate cause. Plaintiffs' class counsel represent that through the course of limited discovery on the issue of causation only, the parties narrowed down the initial list from sixty-two potential individuals to the current list. (Docket 395-1 at 24.) Clearly, many plaintiffs did not indicate that the imposition of premiums was the proximate cause of their terminating Caterpillar's insurance and incurring damages. Only the plaintiffs who offered testimony that the premiums were the proximate cause of their decision are at issue here. The court is unaware of, and Caterpillar did not cite any, authority for its positions that (1) plaintiffs must provide proof of lack of *affordability* as opposed to proof that the imposition of premiums was the proximate cause of their terminating Caterpillar's insurance, or (2) that plaintiffs' testimony as to the cause of their terminating Caterpillar's insurance is not sufficient to withstand summary judgment. It would seem to the court that whether Caterpillar's unlawfully imposed premiums were "affordable" or not, the plaintiffs, as

rational actors in the marketplace, would be entitled to mitigate their damages by seeking and obtaining lower cost insurance or deciding to go without insurance. In the parties' subsequent briefs, the court requests that the parties address these legal questions and support their positions with legal authority.

Second, Caterpillar argues that the surviving spouses did not mitigate their damages. As an initial matter, mitigation of damages is an affirmative defense, which Caterpillar did not raise in its Answer to plaintiffs' Complaint. In fact, this court explicitly held in its summary judgment order filed March 26, 2010 that "[t]he court has concluded that lifetime benefits vested for the Kerns class and Caterpillar has no viable affirmative defenses." (Docket No. 262 at 39.) At this late date, Caterpillar has waived this defense.

Even if it had not been waived, the court finds the argument to be without merit. These surviving spouses, faced with the company's unlawful imposition of premiums that they have testified they could not afford, did indeed mitigate their damages by obtaining less expensive insurance. Caterpillar offers no suggestion as to how these individuals should have mitigated their damages instead of obtaining lower cost insurance. Had an individual continued paying premiums and as a result been forced to declare bankruptcy or to face foreclosure on a home or any other of a myriad of financial woes that might have befallen her, Caterpillar likely would have objected that the individual should have mitigated her damages by obtaining replacement insurance at lower cost.

As it is, at least one of these plaintiffs, Ms. Beverly Carson, managed to pay only three months of premiums after the death of her husband, then stopped making the payments, declared bankruptcy, and went uninsured until becoming eligible for Medicare more than two years later. (Ex. 1, 27-28). That Ms. Carson had to declare bankruptcy and then continue to be uninsured for lack of ability to pay a monthly premium of $182.27 demonstrates her financial vulnerability. Plaintiff Nancy Virden only managed to pay the premium one month after the death of her husband. This year, she applied for Medicaid after a period of being without insurance, and she has health conditions that require prescriptions and regular medical care. (Ex. 1, 51-53). Caterpillar cites *Grothen v. Marshall Field &* Co, 625 N.E.2d 343, 347 (Ill. App. 1 Dist. 1993) for the proposition that, under Illinois law, the doctrine of mitigation of damages "imposes a duty upon the injured party to exercise reasonable diligence and ordinary care in attempting to minimize the damages after injury has been inflicted." The court finds that these plaintiffs, who obtained less expensive insurance or went uninsured, mitigated their damages the best they could given their financial situations.

1. **Plaintiff Seeking Cost of Replacement Insurance for Adult Disabled Child**

Wilma Farrenholz has submitted a questionnaire, supporting documentation, and was deposed. Caterpillar's motion for summary judgment on her claim will be denied. At the time Caterpillar imposed a premium on Ms. Farrenholz, her adult disabled child was also on the policy, and, because of the imposition

of premiums, she canceled her Caterpillar policy and contracted for less expensive insurance coverage for herself and her adult dependent child. Caterpillar objects that the child cannot recover damages in her own right because she is not a member of the class and that Ms. Farrenholz cannot recover for her because Ms. Farrenholz's claims are based on her status as a surviving spouse, not based on coverage for dependents of a surviving spouse.

The court disagrees. Under the 1992 unilateral implementation, Ms. Farrenholz was entitled to premium-free insurance coverage for herself and her dependent adult child. Caterpillar is liable for the amounts Ms. Farrenholz expended for replacement insurance for herself and her dependent child as well as out-of-pocket expenses for both individuals that would have been covered under the agreement. This result is necessary in order to provide Ms. Farrenholz with a remedy that will put her "in the position [she] would have attained had the agreement been performed." *Baretz*, 159 F.Supp.2d at 973.

2. **Plaintiff With Alzheimer's Disease**

Last, the court turns to Hattie Grace, who could not be deposed because she has Alzheimer's and does not even recognize her family members. Her daughter-in-law, Naomi Grace, who has Hattie Grace's power of attorney, submitted a questionnaire and was deposed. She testified that she had conversations with Hattie Grace before she was diagnosed with Alzheimer's that led to the decision to terminate the Caterpillar coverage because the premiums were no longer affordable. Caterpillar objects that Naomi Grace's

testimony would be inadmissible hearsay and that, without Hattie Grace testifying, she cannot substantiate her claim. Class counsel may have an evidentiary argument that would allow Naomi Grace to testify to what Hattie Grace told her. Further, Naomi Grace's testimony indicates that she herself was an integral part of the decision-making on the issue of terminating the Caterpillar insurance, and she could certainly testify to her personal knowledge about this matter.

Caterpillar's motion for judgment against these eight plaintiffs will be held in abeyance. The court would find it helpful for these eight plaintiffs to file a motion for summary judgment pursuant to Rule 56(c).[4] Having ruled that these eight plaintiffs are entitled to damages for *replacement insurance and out-of-pocket expenses they would not have incurred if Caterpillar* had honored its agreement with them, it appears to the court that there may not be a genuine dispute that Caterpillar's breach of its agreement was the proximate cause of their incurring these damages. As indicated, the court would find it helpful for the parties to brief the issue of whether plaintiffs must prove that Caterpillar's premiums were not "affordable" in some objective sense and, if so, what evidence they must present to establish that fact. Conversely, if plaintiffs

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[4] Rule 56(f) provides, "[a]fter giving notice and a reasonable time to respond, the court may: . .. . (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." The Advisory Committee Notes on the 2010 Amendments suggest, "[i]n many cases, it may prove useful first to invite a motion; the invited motion will automatically trigger he regular procedure of subdivision (c)."

are not required to prove they could not "afford" the insurance and, instead, need only provide evidence that the imposition of premiums was the proximate cause of their discontinuing their Caterpillar insurance, the court would also find it helpful for the parties to brief whether any evidence other than plaintiffs' testimony is necessary to prove that the imposition of premiums was the proximate cause. If there are any other genuine disputes of material fact that would preclude summary judgment for these eight plaintiffs in light of the court's rulings, the parties should obviously identify those as well.

CONCLUSION

For the foregoing reasons, the Court will deny Caterpillar's motion for summary judgment in part and grant it in part. The portion of its motion that relates to surviving spouses who were themselves Caterpillar employees is moot, as class counsel has withdrawn those claims. The portion of its motion the court construes as a motion to strike certain damages will be denied. Under Section 301 of the LMRA, Caterpillar is liable for the cost of replacement insurance and out-of-pocket expenses that would not have been incurred if it had honored the 1992 unilateral implementation for the surviving spouse plaintiffs who obtained alternative insurance or became uninsured. The portion of Caterpillar's motion that requests judgment against Caterpillar's motion for summary judgment against Jewlee Gulley, Viola Spencer, Jeannette Street, and Josefina Ramirez is granted because these individuals have produced no admissible evidence demonstrating their damages or reasons for

terminating their Caterpillar insurance. Caterpillar's motion requesting judgment against Beverly Carson, Sharon Houser, Laura Mansfield, Florence Miller, Charlotte Seibert, Nancy Virden, Wilma Farrenholz, and Hattie Grace will be held in abeyance to be considered as a cross motion for summary judgment upon these plaintiffs' filing of a summary judgment motion as the court has requested.

An appropriate order shall issue.

/s/Aleta A. Trauger
ALETA TRAUGER
UNITED STATES DISTRICT JUDGE

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

Case No. 3:06-CV-1113
Judge Trauger

[Filed August 20, 2014]

JUDITH K. KERNS, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
CATERPILLAR INC.,	)
Defendant/	)
Third-Party Plaintiff,	)
	)
INTERNATIONAL UNION, UAW, et al.	)
Third-Party Defendants.	)
	)

Order

This matter is before the court on Caterpillar's Motion for Summary Judgment on Damages Issues. (Docket No. 387). For the reasons articulated in the accompanying Memorandum, the court rules as follows:

The portion of Caterpillar's motion that relates to surviving spouses who were themselves Caterpillar employees is moot, as plaintiffs' class counsel have withdrawn those claims.

The portion of Caterpillar's motion the court construes as a motion to strike certain damages is DENIED. Under Section 301 of the LMRA, Caterpillar is liable for the cost of replacement insurance and out-of-pocket expenses incurred by plaintiffs who obtained alternative insurance or became uninsured because Caterpillar breached the 1992 unilateral implementation.

The portion of Caterpillar's motion that requests judgment on the claims of Jewlee Gulley, Viola Spencer, Jeannette Street, and Josefina Ramirez is GRANTED because these individuals have produced no admissible evidence demonstrating their damages or reasons for terminating their Caterpillar insurance.

The portion of Caterpillar's motion that requests judgment against Beverly Carson, Sharon Houser, Laura Mansfield, Florence Miller, Charlotte Seibert, Nancy Virden, Wilma Farrenholz, and Hattie Grace will be held in abeyance. The court requests these eight plaintiffs to file a motion for summary judgment as to these eight individuals within twenty days. Upon the filing of that motion, the court will consider the cross motions to determine whether summary judgment is appropriate for these remaining individuals' claims. If plaintiffs do not file for summary judgment within twenty days, the court will issue an order pursuant to Rule 56(f)(3) to provide the parties with notice and a reasonable time to respond to the court's intention to consider summary judgment independent of a motion.

IT IS SO ORDERED.

/s/Aleta A. Trauger
ALETA TRAUGER
UNITED STATES DISTRICT JUDGE

APPENDIX I

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

Case No. 3:06-0235
Judge Trauger

[Filed January 12, 2011]

GARY T. WINNETT, *et al.*,

Plaintiffs,

v.

CATERPILLAR INC.,

Defendant,

Case No. 3:06-1113
Judge Trauger

JUDITH K. KERNS, *et al.*,

Plaintiffs,

v.

CATERPILLAR INC.,)
)
Defendant.)
_____)

MEMORANDUM

These are two related, but not consolidated, cases. As with the court's March 26, 2010 ruling on the cross-motions for summary judgment in these cases, it is in the interest of judicial economy to address the pending motions in these two cases in one opinion. In each case, pending before the court is a Motion for Reconsideration filed by the defendant Caterpillar, Inc. (*Winnett* Docket No. 475; *Kerns* Docket No. 266). These motions have been fully briefed. For the reasons discussed herein, Caterpillar's motion will be granted in *Winnett* but denied in *Kerns*.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The court has recounted the factual and procedural history of these cases numerous times – most recently in the March 26, 2010 Memorandum that ruled on the parties' cross-motions for summary judgment – and, therefore, some familiarity with the facts will be assumed. (*See Winnett* Docket No. 463.)

Again, in these class actions the plaintiffs claim that Caterpillar – as their (or their spouse's) former employer – breached its promise (embodied in collective bargaining agreements and related documents) to provide "lifetime cost-free retiree health care." (Docket No. 470 at 2.) Through a series of decisions from this court and the Sixth Circuit, the number of plaintiffs

and claims have been whittled down and substantial conclusions regarding Caterpillar's liability have been reached.

Indeed, following the court's March 26, 2010 opinion, three groups of plaintiffs remained, all of whom, the court concluded, had established that Caterpillar had violated (or would violate) federal law in charging them premiums for their health care:

(1) in *Winnett*, the Caterpillar Logistics Services, or "CLS," subclass. These employees, who retired from Caterpillar between January 1, 1992 and March 16, 1998, provided distinct "warehousing and product distribution services to third parties" and, pursuant to a distinct "CLS" Agreement, retired under the extended terms of the 1988 CBA and related documents, which guaranteed retiree health care "without cost." (*Id.* at 2-3.)

(2) in *Winnett*, the surviving spouses of Caterpillar employees who retired between January 1, 1992 and March 16, 1998. In the summary judgment Memorandum, the court concluded that, at the time of their spouses' retirement, this subclass acquired a vested right to "no cost," or premium-free, health coverage (Docket No. 463 at 16, 33); and

(3) in *Kerns*, the surviving spouses of Caterpillar employees who retired between March 16, 1998 and January 10, 2005. (*Id.* at 19.) Again, in the summary judgment Memorandum, the court concluded that, at the time of their spouses' retirement, this class acquired a vested right to "no cost," or premium-free, health coverage. (*Id.* at 40-41.)

Indeed, the court concluded the March 26, 2010 Memorandum as follows:

> All liability issues between the parties (other than the UAW's counterclaims against Caterpillar) are resolved by this opinion.
>
> The *Winnett* plaintiffs are entitled to judgment as a matter of law on their remaining ERISA and LMRA claims as to the CLS subclass and the "surviving spouse" subclass, with potential damages having been incurred as to both of those subclasses due to Caterpillar's charging of premiums (but only premiums) to those subclasses as described above. Caterpillar is entitled to summary judgment on the other remaining claims in *Winnett*, and the court, through the attached Order, will amend the preliminary injunction entered earlier to reflect this.
>
> The *Kerns* plaintiffs are entitled to judgment as a matter of law on their remaining ERISA and LMRA claims, as the court finds that it was and would be improper for Caterpillar to charge premiums (but only premiums) to this class as described above, and potential damages have been incurred by this class to the extent that Caterpillar has charged premiums to certain members of this class, that is, those whose spouses died after the ratification of the 2004 Labor Agreement. Caterpillar is entitled to summary judgment on the other aspects of the plaintiffs' claims in *Kerns*. (*Id.* at 47-48.)

Still pending at the time of the court's March 26, 2010 Memorandum was the defendant's October 16,

2008 appeal of the court's Order granting the CLS subclass's Motion for Preliminary Injunction in *Winnett*. (Docket No. 310.) On June 22, 2010, while the parties were engaged in seemingly productive damages discovery following the court's March 26, 2010 opinion (*Winnett* Docket No. 469), the Sixth Circuit ruled on Caterpillar's appeal. (*Winnett* Docket No. 470.)

In that opinion, the Sixth Circuit concluded that the claims of the CLS subclass should be dismissed because they are barred by the statute of limitations. (*Id.* at 2.) It has been well-settled in this litigation that, if the plaintiffs had sufficient notice of their claims six years prior to the date of filing suit (*Winnett* March 28, 2006 and *Kerns* April 13, 2006), their claims are time-barred.

This court repeatedly rejected Caterpillar's arguments that the claims in these cases were barred by the six-year statute of limitations, most recently in the March 26, 2010 Memorandum. (*Winnett* Docket No. 463 at 25.) In ruling on the issue at the preliminary injunction stage in *Winnett*, the court focused on when health care for CLS retirees ceased to be "no cost," with an eye toward Caterpillar's threatened imposition of caps on the retiree healthcare premiums that it would pay. 579 F. Supp.2d at 1040. That is, while, in 1992, Caterpillar began raising the notion that caps on coverage might be imposed at some future time, Caterpillar's language was "indefinite and uncertain" until October 2004, when it started directly deducting health care premium charges from CLS retirees' pensions. *Id.*

As to the CLS subclass, while the court recognized that class members, as early as the 1998 CBA, had

been subject to (and accepted) the imposition of a managed care Network and certain other medical costs, the court viewed these changes as "minor" and insufficient to "start the clock" on the plaintiff's claims that Caterpillar was breaching its promise – embodied in the 1988 CBA – to lifetime cost-free health care. (*Id.* at 1041; *see also Winnett* Docket No. 470 at 5.) In ruling on the cross motions for summary judgment, the court viewed the statute of limitations issue – in both *Winnett* and *Kerns* – as largely resolved by the court's previous rulings and noted a lack of new evidence or authority suggesting that the court should depart from its settled conclusion on the statute of limitations issue. (Docket No. 463 at 25, 37.)

The Sixth Circuit viewed the statute of limitations issue from a somewhat different perspective than this court. The Sixth Circuit started from the basic premise that, "in the context of this contractual claim – the refusal to honor a promise of free, unalterable, lifetime healthcare benefits – the parties agree the clock starts when the breach becomes 'clear and unequivocal.'" (Docket No. 470 at 6 quoting *Morrison v. Marsh & McLennan Co.*, 439 F.3d 295, 302 (6th Cir. 2006)). And, if the CLS retirees "discovered or reasonably should have discovered Caterpillar no longer was willing to provide free, unalterable, lifetime healthcare benefits under the 1988 CBA at least six years . . . before March 28, 200[6], the claim must be dismissed as time barred." (*Id.*)

The Sixth Circuit found that, by 1998, "when the UAW and Caterpillar reached a new labor agreement that altered the healthcare benefits to retirees and for

the first time announced new costs for obtaining them, and Caterpillar applied the new agreement to the CLS retirees," the CLS subclass had at least constructive knowledge that Caterpillar was repudiating any promise – provided under the 1988 CBA – to provide free, lifetime health care coverage, and, therefore, the clock started running "at least by 1998," rendering the claims time barred. (*Id.* at 7.)

By 1998, not only was the 1988 CBA no longer applied to the CLS subclass, but, the appellate court found, Caterpillar "no longer honored the alleged promise of free, lifetime, unalterable healthcare benefits associated with the 1988 CBA." (*Id.*) Indeed, under the 1998 CBA, while the CLS subclass was still not directly charged premiums, Caterpillar (1) increased prescription drug co-pays, (2) placed limits on new dependants that could be added to a plan, (3) established the managed care Network, which only reimbursed 70 percent of expenses charged by non-network providers, and (4) added new limits to vision and dental care. (*Id.*)

The appellate court also found that, with the 1998 CBA, "Caterpillar announced two other significant changes: (1) it capped the amount it would contribute to each retiree's healthcare plan, and (2) it added a broader reservation-of-rights clause, giving the company an unfettered right 'to terminate the plan . . . subject to applicable collective bargaining agreements.'" (*Id.*) As to the caps, while the Sixth Circuit recognized that, under the 1998 agreements, the newly established VEBA Trust would "cover" the above-the-cap contributions for a time, the CLS subclass was – prior

to 2000 – notified that the VEBA Trust would eventually be "depleted," as occurred in 2004. (*Id.* at 7-8.)

The court concluded that "all of these notices of the various 1998 changes – especially the [summary] notice provided by the [November 1999 Summary Plan Description (SPD)] . . . provided the 'clear repudiation' necessary for the subclass's claims to accrue." (*Id.* at 8.) That is, the summary notice of "managed care, increased prescription drug co-pays, a limit on the number of dependents eligible to be in a plan, new limits on vision and dental care, and a 'limit' on 'company contributions'" all clearly disclaimed any promise of free, lifetime, health-care benefits, more than six years prior to the filing of *Winnett*. (*Id.*)

Further, the Sixth Circuit reiterated that the claims accrued when Caterpillar "announced the changes, not when the retirees first felt the changes." (*Id.* at 9.) And, while "notice is the touchstone of accrual," the plaintiffs still felt the effects of the changes prior to March 28, 2000, in the "increased charges for drug prescription co-pays, deductibles, and other out-of-pocket expenses," as alleged in the *Winnett* Complaint and confirmed by the testimony of certain subclass members during the preliminary injunction hearing. (*Id.* at 9-10.)

The court "complet[ed] the picture," by noting that, " if a company announces new authority to terminate or modify healthcare benefits," the employee's union must "grieve the change at that point or be precluded from later claiming that benefits had vested." (*Id.* at 10.) Using this analogy, the court concluded, again, that the plaintiffs' claims accrued not when they felt

the changes but when "the company notified the retirees of many changes – not just of an unfettered right to terminate healthcare benefits . . . but also of new co-pays, managed care, caps on company contributions to premiums, and changes to dental and vision benefits." (*Id.*)

The Sixth Circuit went on to reject the arguments advanced by the CLS subclass, namely that, until the VEBA Trust ran out and premiums were directly charged in 2004, the 1998 and 1999 notices of changes were too "indefinite and uncertain" for the CLS subclass to know of the alleged breach. (*Id.* at 11.) The Sixth Circuit found that the notices regarding the VEBA Trust left no doubt that, eventually, direct premium charges would be assessed against retirees and that the "other changes," that is, "managed care, increases in drug costs, changed eligibility criteria and new restrictions on adding dependants," left "even less doubt" that Caterpillar was repudiating any alleged promise of free, lifetime health care embodied in the 1988 CBA. (*Id.*)

Refuting that these "other changes" were "minor," the Sixth Circuit noted that the managed care Network "on its own marked a significant change from the health care the retirees enjoyed under the 1988 contract," imposing substantial costs if the retiree chose out-of-network care. (*Id.* at 12.) Acting as a "very real limitation on their benefit program," the court concluded that this change alone "should have put the subclass on notice that Caterpillar had altered their benefits." (*Id.* citing *Reese v. CNH Am. LLC*, 574 F.3d 315, 325 (6th Cir. 2009)). And, "once we add raised co-

pays, limits on dental and vision care and new eligibility criteria to the mix, not to mention Caterpillar's unfettered right to cancel benefits at any time, it is difficult to shrug off the 1998 changes as irrelevant to the accrual question." (*Id.*)

The court concluded by (1) clarifying that the key issue here was accrual, not the vesting of benefits or other issues, (2) rejecting the plaintiffs' "ripeness" argument, because, by 1998, it was clear that the benefits were "no longer unalterable" in light of the Network and other changes, no longer free, and no longer necessarily for life, in light of the reservation-of-rights clause, and (3) rejecting the plaintiffs' argument that Caterpillar had asserted untenable, "inconsistent" positions throughout this litigation and that Caterpillar's 1998-1999 conduct should be considered an "anticipatory breach." (*Id.* at 13-14.)

Following the Sixth Circuit's opinion, Caterpillar moved for reconsideration of the March 26, 2010 Memorandum in *Winnett* and *Kerns*, maintaining that the Sixth Circuit's rationale as to the CLS subclass applies equally to the remaining surviving spouse classes in those cases.

ANALYSIS

I. Motion for Reconsideration Standard

The Court of Appeals for the Sixth Circuit has observed that the "Federal Rules of Civil Procedure do not explicitly address motions for reconsideration of interlocutory orders" but has provided that "[d]istrict courts have authority both under common law and Rule 54(b) to reconsider interlocutory orders and to reopen

any part of a case before entry of final judgment." *Rodriguez v. Tennessee Laborers Health & Welfare Fund*, 89 Fed. Appx. 949, 959 (6th Cir. 2004) (citing *Mallory v. Eyrich*, 922 F.2d 1273, 1282 (6th Cir. 1991)). While district courts have "significant discretion" in deciding motions for reconsideration, "[t]raditionally, courts will find justification for reconsidering interlocutory orders when there is (1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice." *Rodriguez*, 89 Fed. Appx. at 959 (citing *Reich v. Hall Holding Co.*, 990 F. Supp. 955, 965 (N.D. Ohio 1998)). The Sixth Circuit's decision, which directly bears upon arguments made by the parties in these cases, provides sufficient ground for these Motions to Reconsider.

II. *Winnett*

There is no dispute that, in light of the Sixth Circuit's opinion, only the surviving spouse subclass has even arguably viable claims.[1]

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[1] The parties agree that the claims of the CLS subclass must be dismissed in light of the Sixth Circuit's opinion, and the defendant argues that the previously dismissed claims of the "main class" should also be found to be time barred under the Sixth Circuit's decision. (Docket No. 476 at 8-9.) While the plaintiffs do not challenge this proposition, the claims of the "main class" have already been dismissed and, therefore, there is no basis for reconsideration. (Docket No. 490.) Moreover, the defendant, in both *Winnett* and *Kerns*, maintains that the Sixth Circuit's June 3, 2010 *Wood v. Detroit Diesel* decision, 607 F.3d 427, dictates reconsideration of the merits of the remaining plaintiffs' claims. (*See Winnett* Docket No. 476 at 14-17.) As the court finds that the surviving spouse subclass's claims are time barred, it is not

The defendant argues that the surviving spouse subclass's claims should be dismissed because: (1) the surviving spouses, like the CLS subclass, seek relief under the 1988 CBA and (2) Caterpillar made the same repudiations of "any supposed promise to provide [free, lifetime] benefits under the 1988 contract" to the surviving spouse subclass as it did to the CLS subclass. (Docket No. 476 at 10.) Indeed, because the surviving spouses were dependents of non-CLS employees, they were subject to changes such as the Network and increased prescription drug co-pays in 1992, not 1998, strengthening the statute of limitations argument as to this subclass. (*Id.*) Indeed, while there is some dispute as to which Caterpillar employees and dependents received notice of what changes and when, there is no dispute that, in 1992, all plan participants received notice of the Network.[2] (*Id.*)

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necessary to reach this argument here – although the court will address *Wood* below, in the *Kerns* discussion.

[2] Without an eye toward claim accrual, in the summary judgment Memorandum, the court made the factually accurate statement that the "surviving spouse subclass . . . retired under the 1992 unilateral implementation," that is, this subclass's spouses all retired during the seven-year period of labor unrest in which Caterpillar unilaterally imposed terms of its final contract offer. (Docket No. 465 at 5, 30.) The plaintiffs argue here that the court, having made this statement, should view claim accrual based upon when the promises made in the 1992 unilateral implementation were repudiated. (Docket No. 490 at 5.) The Sixth Circuit's opinion, however, makes it clear that the contractual theory of liability stated in the Complaint – that is, a breach of the promises made in the 1988 CBA – governs for claim accrual purposes.

Moreover, Caterpillar argues, just as with the CLS subclass, "Caterpillar [] communicated these repudiations . . . in both 1998 (in the form of benefit summaries) and 1999 (through the issuance of a [] SPD that also included an 'unfettered right to terminate the plan')." (*Id.* at 11.) Therefore, the "Sixth Circuit's definitive ruling that these communications repudiated any alleged promise to provide unalterable benefits under the 1988 contract must also govern this court's summary judgment ruling on the spouse subclass." (*Id.*)

In response, the plaintiffs argue that there are key distinctions between the surviving spouse subclass and the CLS subclass that the Sixth Circuit would not have considered in its narrowly focused opinion. (Docket No. 490 at 4.) Most notably, as discussed in the March 26, 2010 Memorandum, the relevant plan documents, from 1988 to 2005, stated that surviving spouses, specifically and distinct from others covered by the plan, would receive health insurance "for life without cost" upon the death of their retiree spouse. (*Id.* at 2-3.)

Indeed, the plaintiffs point out that the relevant plan documents, from 1988 until 2005 (including the 1999 SPD heavily relied upon by the Sixth Circuit), consistently discussed impending caps on "retiree" health benefits, but, just as consistently, stated that surviving spouses would receive health care "without cost" upon the death of the spouse.[3] (*Id.* at 5-7.) The

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[3] As discussed in the summary judgment Memorandum, the parties (in both cases) continue to dispute whether this "without cost" language remained in the plan documents "in error," and the

plaintiffs also point to letters (discussed in the summary judgment Memorandum) to surviving spouses following the death of their spouse in which Caterpillar stated that health benefits would be "without cost." (*Id.* at 8.)

Moreover, the summary judgment record indicated that Caterpillar did not charge the VEBA Trust for premiums for surviving spouses – as it did for the CLS subclass, for instance – but rather directly paid the premiums for surviving spouses until 2005. (*Id.*) To the plaintiffs, "this confirms the fact that the surviving spouse benefit was never intended by Caterpillar to be limited by the premium cap imposed on retirees." (*Id.*) Therefore, "the claim asserted by the surviving spouse subclass for a vested, no-cost health insurance benefit did not accrue until December 2002 at the earliest," when Caterpillar notified them that they would be responsible for paying health care premiums once the VEBA Trust was exhausted. (*Id.* at 1-2.)

Moreover, the plaintiffs argue, because the Sixth Circuit's ruling was "principally based on the major changes announced by Caterpillar in 1998 and 1999 regarding the imposition of a cap on benefits and the introduction of the VEBA," the assorted other changes (the "shift to network, the managed care opinion, and

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defendant maintains that other language stating that caps would be imposed "per covered individual" dictate that surviving spouses were to be subject to the caps. (*See* Docket No. 476 at 11-12.) The court found in favor of the surviving spouse subclass on this issue in the summary judgment Memorandum, and there is no apparent reason to reconsider that conclusion now. (Docket No. 463 at 31-32.)

additional costs") announced (at the latest) in 1998 and 1999 cannot be seen as triggering accrual for this subclass. (*Id.* at 17.)

That is, while recognizing that the subclass was subject to these changes, the plaintiffs maintain that "there is no indication" from the Sixth Circuit's opinion that these moves "alone would have been sufficient to put them on notice that [they] would be subject to above-cap premium costs," particularly because, as discussed in the summary judgment Memorandum, some costs had always been imposed on surviving spouses and retirees, even those who indisputably retired with "no cost" benefits under the 1988 CBA. (*Id.* at 17-19.)[4]

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[4] The plaintiffs (both here and in *Kerns*) also argue that the "unfettered" reservation-of-rights clause was not notice of repudiation. (*Id.* at 13-17; *See also Kerns* Docket No. 276 at 6-7, 17-20.) This lengthy argument is largely premised on the Sixth Circuit's line of case law holding that "a reservation of rights clause cannot be imposed retroactively to take away vested benefits." (*Id.* citing *e.g. Sprague v. GM*, 133 F.3d 388, 400 (6th Cir. 1998)). Because, the plaintiffs argue, the rights of the surviving spouse subclass had vested before the reservation-of-rights clause was introduced (in the November 1999 SPD), the clause could not affect those rights, and, therefore, the clause "had no relevance to spouses of persons who had already retired, and so its inclusion could not possibly have put the surviving spouse subclass on notice of anything." (*Id.* at 13.) This argument misses the point of the Sixth Circuit opinion, which explored the record for conduct on Caterpillar's part indicating that it was not intending to abide by promises previously made. Clearly, the reservation-of-rights clause, from this perspective, is such evidence, no matter the Sixth Circuit's vesting rules. Additionally, the plaintiffs argue that the 1999 SPD contained additional language – not discussed in the Sixth Circuit opinion – further indicating that the reservation of

Under the logic of the Sixth Circuit decision, there is no substantive distinction between the position of the CLS subclass and the surviving spouse subclass, and, therefore, the claims of the surviving spouse subclass are time-barred. The plaintiffs' argument that the Sixth Circuit focused on the impending imposition of the caps and the VEBA Trust as being key accrual triggers simply misreads the opinion.

Over and over again, the Sixth Circuit deemed the assorted changes (the Network, increased drug costs, limits on dependants, increased dental and vision, etc.) announced in the 1998 CBA and further explained in the 1999 SPD as "major changes" to the plan benefits that should have alerted the CLS subclass that the promise of "free lifetime health care" under the 1988 CBA was repudiated. There is no dispute that all plan recipients – surviving spouses, dependents, etc. – were subject to these conditions and that these conditions were announced more than six years prior to the filing of this case. Additionally, the 1999 SPD contained the reservation-of-rights clause, which the Sixth Circuit

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rights was not truly "unfettered," but was "subject to the terms and conditions of the applicable documents." (*Id.* at 15-16.) The plaintiffs note that there were actually two 1999 SPDs – one that went to retirees covered by the Network and one that went to all other retirees – and that this later SPD (the "indemnity" SPD) contained this further limiting language. (*Id.*) The plaintiffs speculate that the Sixth Circuit may not have analyzed the "full record" on the issue, as it quoted only "limited portions" of the "network" SPD. (*Id.* at 16.) This court, however, cannot ignore the holding of the Sixth Circuit, which, as noted above, recognized that there was "subject to" language in the 1999 SPD but still concluded that, even in light of such language, the 1999 reservation of rights was unfettered and relevant for accrual purposes.

concluded gave Caterpillar an "unfettered" right to terminate the plan. This notice was given to subclass members more than six years prior to the filing of this case as well. If these notifications were sufficient to start the clock for the CLS subclass, then they are sufficient to start the clock for the surviving spouse subclass as well.

From the perspective of the Sixth Circuit's opinion, the fact that Caterpillar repeatedly stated that surviving spouses were entitled to "without cost" health coverage is of little moment. Again, as explained in the Sixth Circuit's opinion, the plaintiffs' theory is that the defendant breached its promise – made in the 1988 CBA – to provide "no cost" health insurance. (Docket No. 470 at 3.) While Caterpillar repeated the promise in various plan documents, it was also clear, under the Sixth Circuit's reasoning, that the promise was broken more than six years prior to the suit being filed – specifically through the charges and costs imposed in the 1998 CBA and the 1999 SPD.

Simply, the same actions that the Sixth Circuit focused upon as triggering accrual for the CLS subclass affected the surviving spouse subclass, and, therefore, the claims of the surviving spouse subclass must be considered time-barred as well. Under the logic of that opinion, the surviving spouse subclass knew no later than 1999 that Caterpillar was no longer providing no cost, unalterable benefits, just as the CLS subclass did. As the surviving spouse subclass seeks these same benefits, their claims must be dismissed in light of the Sixth Circuit's opinion.

III. *Kerns*

As noted above, the class in *Kerns* consists of surviving spouses whose spouse retired from Caterpillar between March 16, 1998 and January 10, 2005. These plaintiffs claim their right to unalterable, lifetime benefits under the 1998 CBA. (Docket No. 40 Ex. 1 at 6.)

The defendant argues that, despite these factual distinctions, the result compelled by the Sixth Circuit's opinion is the same. That is, "by 1998, and at the very latest by 1999 (when Caterpillar issued a new SPD)," the plaintiffs knew that Caterpillar was "not applying the 1998 contract in such a manner as to provide unalterable, cost-free surviving spouse benefits," in spite of the "no cost" language that remained in the SPD and other plan documents. (Docket No. 267 at 7.) That is, following the 1998 CBA, the plaintiffs (as dependents or surviving spouses) were subject to the Network, "with all of its associated co-pays and deductibles," increased co-pays for prescription drugs and new limits on vision and dental care, and, under the 1999 SPD, the "unfettered" reservation of rights. (*Id.* at 8-9.) Consistent with the Sixth Circuit opinion, the defendant argues, these changes marked a clear repudiation of any promise (contained elsewhere in the 1998 CBA) to provide "no cost" health care. (*Id.*)

In response, the *Kerns* plaintiffs make similar arguments to those advanced by the surviving spouse subclass in *Winnett*. (Docket No. 276 at 4, 14-15.) That is, they argue that the caps discussed in the 1998 plan documents apply only to "retirees" and surviving spouses are repeatedly distinguished as being entitled

to "no cost" health benefits. (*Id.*) They point to numerous letters in the record from Caterpillar to surviving spouses, asserting that health care benefits would be "no cost," and to the fact that the VEBA Trust was only charged for retirees' premiums, not surviving spouse's premiums (issues not before the Sixth Circuit in its most recent opinion). (*Id.* at 7-10.) The plaintiffs maintain that Caterpillar's representations that their health benefits would be "no cost" were so strong that, when Caterpillar attempted to charge premiums to this group in 2005, it (and the union) received a flood of complaints, and Caterpillar was forced to announce that it would "waive" premiums for surviving spouses whose spouse retired and died under the 1998 CBA. (*Id.* at 12-13.)

The plaintiffs also focus on the fact that they are suing under the 1998 CBA and not the 1988 CBA that the Sixth Circuit determined was the source of the plaintiffs' claims in *Winnett*. (*Id.* at 22.) Therefore, to the extent that the plaintiffs would be put on notice that the defendant was not providing "lifetime no cost health care benefits," such notice had to come after the 1998 CBA was instituted in March 1998. (*Id.* at 21.) And "the lifetime no cost" promise here must be viewed in the context of the limitations of the 1998 CBA. That is, "lifetime no cost" allowed for the associated charges that were contained in the 1998 CBA, including the Network, but it forbade premiums from being imposed on the *Kerns* plaintiffs – premiums that were not assessed until well within the filing window. (*Id.* at 22.)

While most of the plaintiffs' briefing is a re-assertion of the unsuccessful arguments discussed

above in *Winnett*, this final point is persuasive. While the plaintiffs in *Kerns* also claim entitlement to "lifetime no cost" health care benefits, the Complaint explicitly seeks "vested lifetime retiree healthcare benefits to the members of the Class *as set forth in the 1998 CBA* at no cost . . ." and the Complaint requests relief in the form of an injunction "to maintain the level of retiree health care benefits . . . as required by the terms of the 1998 CBA." (Docket No. 40 Ex. 1 at 5.)

That is, unlike the plaintiffs in *Winnett* – who explicitly sought to maintain the level of benefits under the 1988 CBA (*Winnett* Docket No. 61 at 10), that is, no Network or other assorted costs and restrictions, the plaintiffs in *Kerns* seek restoration of the benefits afforded by the 1998 CBA, which already included those limitations. Therefore, institution of programs such as the Network and increased co-pays under the 1998 CBA would not – unlike in *Winnett* – trigger accrual of the plaintiffs' claims here.

The only action by Caterpillar that arguably could have alerted the plaintiffs to the fact that the "no cost" benefits under the 1998 CBA might be restricted came in the 1999 SPD – specifically the reservation-of-rights clause therein. Even though the Sixth Circuit concluded that the 1999 SPD purported to give Caterpillar an "unfettered" right to terminate the benefits of the 1998 plan, the court concludes that the reservation of rights, standing alone, is not sufficient to trigger the accrual of the claims of the *Kerns* class.

That is, while the Sixth Circuit referred to the "unfettered" reservation of rights as a "significant" element supporting the defendant's argument in

Winnett, that opinion makes clear that it was the confluence of many repudiations that resulted in the *Winnett* plaintiffs' claims accruing prior to 2000. The court repeatedly focused on the imposition of the Network under the 1998 CBA, the increased prescription drug costs, the restrictions on dependents, and the increased vision costs, along with the impending caps and the reservation-of-rights clause, as, taken together, sufficient to trigger pre-2000 claim accrual for the CLS subclass. (Docket No. 470 at 7.)

Not only was the reservation-of-rights clause only one of these many elements, it, unlike the other elements, did not give notice that Caterpillar was actually reducing the scope of benefits provided under the relevant collective bargain agreement. Rather, it merely indicated that Caterpillar could, if it wanted to, take away benefits in the future.[5] Even viewing the reservation-of-rights clause as "unfettered" and "significant" to the claims accrual issue, it is too much to say that that clause – alone – should have put the plaintiffs on notice that Caterpillar was, in a "clear and unequivocal" manner, repudiating its promise to provide the benefits afforded by the 1998 CBA.

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[5] The plaintiffs claim that it is unclear how many of the *Kerns* class actually received the 1999 SPD, which contained the reservation-of-rights clause. (Docket No. 276 at 5.) The court's decision need not rest on this argument. Even if it were clear that all of the *Kerns* plaintiffs received the 1999 SPD prior to April 13, 2000, the court, again, does not view the reservation-of-rights clause therein as sufficient to trigger claim accrual.

Therefore, the defendants' Motion to Reconsider in *Kerns* will be denied.[6]

CONCLUSION

The defendant's Motion to Reconsider in *Winnett* will be granted. It appears that the only claims still pending in that case are counterclaims asserted by former third-party counter-plaintiff UAW against Caterpillar, which have been severed for separate trial

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[6] As noted above, the defendant argues that the Sixth Circuit's decision in *Wood* justifies reconsideration of the court's determination in the summary judgment Memorandum that the plaintiffs have a vested right to lifetime, premium-free health care under the 1998 CBA. (Docket No. 267 at 10-13.) In *Wood*, the Sixth Circuit determined that a CBA promise of "fully funded, lifetime health care benefits" must be read along with a series of "Cap Agreements" between the plaintiff's union and the employer, which limited the employer's yearly per-retiree expenditures. 607 F.3d at 428-31. Taking all of the agreements together, the "only coherent reading" was that the plaintiffs "are entitled to lifetime, capped health care benefits." *Id.* at 431. Caterpillar maintains that the court should perform a similar analysis here; that is, read the "per covered individual" language in the 1998 CBA as applying caps to all plan participants and blending that with the"for life without cost" language directly applicable to surviving spouses to find that the surviving spouses are entitled to "for life capped benefits." (Docket No. 267 at 13.) In the summary judgment Memorandum, the court – rejecting the "per covered individual" argument – found that the language in the 1998 CBA (and the multitude of subsequent documents) promising "for life without cost" benefits meant what it said and, applying other relevant Sixth Circuit law, concluded that the plaintiffs were entitled to premium-free health care for life. (Docket No. 262 at 36.) Unlike in *Wood*, there is no clearly conflicting language for the court to blend together, and, therefore, there is no basis for the court to reconsider its earlier ruling.

following the conclusion of *Winnett* and *Kerns*. (*Winnett* Docket No. 428.) In *Kerns*, the Motion to Reconsider will be denied. However, the status of any damages discovery prompted by the March 26, 2010 Memorandum is unclear. (*Winnett* Docket No. 474.) Therefore, in the accompanying Order, the court will set a telephone conference to discuss how to proceed.

An appropriate order will enter.

/s/Aleta A. Trauger

ALETA A. TRAUGER
United States District Judge

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

Case No. 3:06-0235
Judge Trauger

[Filed January 12, 2011]

GARY T. WINNETT, et al.,

Plaintiffs,

v.

CATERPILLAR INC.,

Defendant,

Case No. 3:06-1113
Judge Trauger

JUDITH K. KERNS, et al.,

Plaintiffs,

v.

CATERPILLAR INC.,

Defendant.

ORDER

For the reasons expressed in the accompanying Memorandum, the defendant's Motion to Reconsider in *Winnett* (Docket No. 475) is **GRANTED**, and the plaintiffs' claims in that case are now all **DISMISSED** and the injunction issued on October 16, 2008 is hereby **DISSOLVED**. The defendant's Motion to Reconsider in *Kerns* (Docket No. 266) is **DENIED,** and the court's liability findings in that case are unchanged.

It is further **ORDERED** that a telephone conference will be held with counsel on January 31, 2011 at 2:30 CST to discuss how to proceed as to the remaining issues in these cases.

It is so ordered.

Enter this 12th day of January 2011.

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

APPENDIX J

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

Case No. 3:06-0235
Judge Trauger

[Filed March 26, 2010]

GARY T. WINNETT, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
CATERPILLAR INC.,	)
	)
Defendant/	)
Third-Party Plaintiff,	)
	)
v.	)
	)
INTERNATIONAL UNION,	)
UAW, et al.	)
	)
Third-Party Defendants.	)
	)

Case No. 3:06-1113
Judge Trauger

JUDITH K. KERNS, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
CATERPILLAR INC.,	)
	)
Defendant/	)
Third-Party Plaintiff,	)
	)
v.	)
	)
INTERNATIONAL UNION,	)
UAW, et al.	)
	)
Third-Party Defendants.	)
	)

MEMORANDUM

These are two related, but not consolidated, cases. As can be seen herein, the overlap in the relevant facts dictates that it is in the interest of judicial economy to address the pending motions in these two cases in one opinion. In each case, pending before the court are Motions for Summary Judgment filed by the remaining third-party defendant, the International Union, UAW ("UAW"), the plaintiffs, and the defendant Caterpillar. (*Winnett* Docket Nos. 398, 404 and 410, respectively;

Kerns Docket Nos. 207, 213, and 214, respectively.)[1] In both cases, the UAW's motion will be granted, and Caterpillar's Third-Party Complaint against the UAW will be dismissed. Also, in both cases, the plaintiffs' and Caterpillar's motions will be granted in part and denied in part.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

As has been discussed in several previous opinions, the plaintiffs in these cases seek health insurance benefits from defendant Caterpillar, and these cases center around the meaning of certain language in various labor agreements entered into by the UAW and Caterpillar.[2] The *Winnett* case is pursued by

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[1] As discussed below, an additional motion to re-open discovery in both proceedings was filed by Caterpillar and that motion will be denied.

[2] Unless otherwise noted, the facts are drawn from the parties' statements of material facts, (*Winnett* Docket Nos. 431, 435, 436, 448, 453, and 454; *Kerns* Docket Nos. 241, 243, 244, 251, and 256) and related affidavits and exhibits. Although facts are drawn from submissions made by both parties, on a motion for summary judgment, all inferences are drawn in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S 574, 586 (1986); *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). As indicated above, the court has issued several previous opinions in these cases that provide additional factual background, including more lengthy quotations of some of the relevant contractual provisions. *See e.g. Winnett v. Caterpillar*, 496 F. Supp. 2d 904, 908-14 (M.D. Tenn. 2007); *Kerns v. Caterpillar*, 499 F. Supp.2d 1005, 1009-1017 (M.D. Tenn. 2007). While some repetition from the previous opinions is unavoidable, some basic familiarity with the dispute will be

individuals who either worked for Caterpillar or who had a spouse who did (Gary Winnett, Freda Jackson-Chittum, Casper Harris, William Dailey, Calvin Grogan, Kenneth Hammer, Charles Waterfield, and Michael Finn), and they pursue this litigation on behalf of themselves and their class. The *Kerns* litigation is pursued by three named plaintiffs, each of whom is the "surviving spouse" of an individual who worked at Caterpillar (Judith Kerns, Marcia Nalley, and Sandra Stewart), and they pursue this litigation on behalf of themselves and their class.

A. Basic Historical Background

The Caterpillar-UAW bargaining relationship began in the late 1940s and, over time, the relationship expanded to include employees at various Caterpillar facilities, primarily in Illinois. For the relevant time period, the UAW was the exclusive bargaining representative for these employees, and, under federal law, Caterpillar was obligated to negotiate with the UAW before making any changes to the terms and conditions of employment.

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assumed, and, therefore, not every fact provided in the parties' voluminous (and frequently highly repetitive) statements of material facts is discussed herein. Additionally, on January 27, 2009, the Sixth Circuit issued an opinion reversing this court on certain conclusions that the court reached in denying Caterpillar's Motion to Dismiss in *Winnett*. *See Winnett v. Caterpillar*, 553 F.3d 1000. As discussed herein, this opinion and the court's previous opinions substantially affect (and limit) the analysis and ultimate conclusions, and the court has tailored the factual discussion consistent with that analysis.

During the course of their bargaining relationship, Caterpillar and the UAW agreed to engage in multi-plant bargaining for most represented employees. This practice, known as "Central Bargaining," resulted in a labor contract, which included a Central Labor Agreement ("CLA") along with various related local agreements and benefits agreements. Beginning in 1952, Caterpillar retirees began to be eligible for limited medical coverage at defined monthly contribution levels. By the time of the 1988 Agreement, provisions for health insurance benefits, including retiree health care, were set forth in an Insurance Plan Agreement ("IPA") between Caterpillar and the UAW, along with a Group Insurance Plan ("GIP") and a Summary Plan Description ("SPD"), which was designed to clearly summarize the important provisions of the benefits agreement.

B. The 1988 Labor Agreement

As discussed in detail in previous opinions, Section 5 of the 1988 GIP set forth provisions regarding active employee and retiree health care. Section 5.1 provided that Caterpillar would provide coverage to employees "without cost." Section 5.15 provided that Caterpillar would also provide coverage for otherwise eligible retirees "without cost to any such retired Employee." The 1988 GIP also provided that, following the death of a retired employee, coverage for the surviving spouse "will be continued . . . for the remainder of [the] surviving spouse's life without cost." (*Kerns* Docket No. 243 at 7.) The 1988 IPA also stated that "Termination of this Agreement shall not have the effect of

automatically terminating the Plan," referring to the GIP. (*Winnett* Docket No. 436 at 19.)

The 1988 SPD summarized the benefits of the 1988 labor agreement. As to retirees, the 1988 SPD stated that, "[i]f you retire and are eligible for the immediate receipt of a pension (with at least 5 years of credited service) under the Non-Contributory Pension Plan, you will be eligible for the Retired Medical Benefit Plan, continued at no cost to you." (*Winnett* Docket No. 431 at 14.) The 1988 SPD went on to say that, "[i]f an active employee dies when eligible to retire or if a retired employee dies, the surviving spouse will have coverage for his or her lifetime at no cost to the survivor." (*Id.*) The 1988 SPD also contained a provision that allowed Caterpillar, "subject to the applicable collective bargaining agreements," to terminate the employee benefit plans. (*Id.*)

C. Negotiations and the Termination of the 1988 CLA

With the 1988 CLA set to expire later in the year, in July 1991, both Caterpillar and the UAW gave notice that they intended to terminate the 1988 CLA and negotiate modifications to the various labor agreements. In the Fall of 1991, Caterpillar and the UAW commenced negotiations concerning a successor labor agreement, with a labor dispute quickly developing as to acceptable terms. One area of particular dispute centered around changes to medical benefits for existing and future retirees that was proposed by Caterpillar. After a series of extensions, the UAW terminated the 1988 labor contract on

November 3, 1991 and commenced a selective strike at certain Caterpillar facilities.

On March 5, 1992, Caterpillar advised the UAW that it believed that the parties' negotiations were at a legal impasse. Thereafter, by letters dated March 31, 1992, Caterpillar announced (via notice to the UAW and Caterpillar's employees) that it would unilaterally implement portions of its final contract offer, including a health care coverage NetWork (which could result in certain out-of-pocket costs for plan participants who elected not to use NetWork physicians) and certain changes to retiree benefit coverage that would result in increased medical costs for the retiree. These changes were implemented on April 6, 1992, and, that summer, Caterpillar sent letters to the UAW and to all affected employees, retirees, dependents and surviving spouses, notifying them of the institution of the NetWork effective July 1, 1992..

As continued negotiations failed to produce an agreement, on November 20, 1992, Caterpillar advised the UAW that, effective December 1, 1992, it would implement additional provisions from its final offer, including caps on the amount that Caterpillar would pay for future retiree health coverage. That is, *beginning in the year 2000*, individuals who retired on or after January 1, 1992 would be responsible for an undetermined amount of "above the cap" health care costs.[3] The December 1992 unilateral implementation,

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[3] For instance, a November 19, 1992 letter from Caterpillar to its employees estimated that, in the year 2000, "the premium, if any, will be relatively small – in the range of $20 to $30 a month," and

however, continued to provide that coverage for surviving spouses would be "continued following the death of a retired Employee . . . without cost" for the "remainder of [the] surviving spouse's life." (*Kerns* Docket No. 243 at 10.) The approximately 744 individuals who retired between January 1, 1992 and December 1, 1992, were, according to Caterpillar, subject to the unilaterally implemented terms.

It is not disputed that employees who retired prior to January 1, 1992 are not subject to the retiree medical cost caps Caterpillar implemented in December 1992, although even pre-1992 retirees and their surviving spouses have always incurred some costs in the form of co-pays and/or limits on coverages. Indeed, despite the fact that the 1988 GIP states that retiree health benefits are provided at "no cost," the testimony from the preliminary injunction hearing in *Winnett* indicated that retirees who retired under a "no cost" scheme have always been responsible for the costs of office visits (including visits to specialists) and prescription drug co-payments. (*Winnett* Docket No. 298 at 256, 274, 365; Docket No. 299 at 549.)

D. Caterpillar Logistics Services - An Aside in the Timeline

Caterpillar Logistics Services, Inc. (CLS) was formed in 1987 as a Caterpillar subsidiary, the purpose of which was to market Caterpillar's global warehousing and product distribution expertise to

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the communication speculated that, by the year 2000, "the United States might have a national health care program which could eliminate the need for premiums." (Docket No. 435 at 6.)

third-party customers. As further discussed below, the *Winnett* class contains a CLS subclass, which consists of all hourly CLS employees (and their spouses) who were represented by the UAW during their employment and who retired between January 1, 1992 and March 16, 1998. In May 1988, Caterpillar and the UAW entered into the "CLS Agreement," which guaranteed that certain services provided to third parties would not be interrupted in the event of a strike, and, in the event of a strike, the 1988 CLA (including its benefits provisions) would remain in "full force and effect" for CLS employees past its expiration date and until the ratification of a successor agreement for CLS employees. (*Winnett* Docket No. 436 at 26-28.)

Additionally, Section 5(a) of the CLS Agreement provides that, upon ratification of a new CLA, "all terms" of that new CLA, would be "automatically applicable" to "Covered [CLS] Employees." (*Id*.) The CLS Agreement defines "Covered Employees" as "any employees within units covered by the Central Labor Agreement and who are engaged in work involving or related to Caterpillar parts distribution or CLS work." (*Id*.) The parties agree that the 1988 CLA continued to be in effect for CLS employees during the labor dispute from November 4, 1991 through March 16, 1998, and CLS employees, during this period, did not strike and worked under the 1988 CLA, with their pay, working conditions and benefits all being dictated by the terms of the 1988 CLA. It is also undisputed that all members of the CLS subclass retired prior to ratification of the successor labor agreement in 1998, and, until that ratification, received retirement benefits under the 1988 CLA.

E. The March 1998 Agreement

Negotiations continued between the UAW and Caterpillar until March 16, 1998, when a successor agreement was finally ratified. The 1998 GIP continued to include the same language in Section 5.15 that stated that surviving spouses' coverage "will be continued followed the death of a retired Employee for the remainder of [the] surviving spouse's life without cost."[4]

The 1998 IPA and GIP contained amended provisions concerning health benefits, including provisions that Caterpillar had unilaterally implemented in 1992, such as the NetWork and the caps. Specifically, the 1998 GIP states that, effective for employees retiring on or after January 1, 1992, Caterpillar's "maximum average annual cost per covered individual for retiree medical benefits . . . commencing January 1, 1999 shall be limited to the average annual cost per covered individual in 1997 projected to 1999." (*Kerns* Docket No. 241 at 40.) In April and June 1998, after substantial internal discussion, Caterpillar began to apply the NetWork provisions and retiree medical caps (along with several additional cost obligations for vision and dental coverage) to the CLS subclass and sent announcements regarding this to "all affected populations." (*Winnett* Docket No. 436 at 39.)

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[4] As discussed previously, Section 6.2(c) of the 1988, 1992, and 1998 labor agreements/implementations contained a similar provision. (*See Kerns* Docket No. 243 at 8-13.)

However, the actual financial impact of all of this was tempered by the VEBA agreement. Under this Agreement, Caterpillar and the UAW agreed to contribute approximately $35 million in funds previously accrued for active employees under the 1988 CLA to a Voluntary Employee Benefits Association (VEBA). The VEBA, which was operated by an independent trustee, paid expenses incurred by post-January 1, 1992 retirees and their dependents over and above the monetary caps implemented by Caterpillar. During the course of the 1998 CLA, most estimates were that VEBA money would be sufficient to pay medical "above the cap" costs through the end of the 1998 CLA in 2004.

After the 1998 labor agreement was reached, Caterpillar prepared "Summary of Benefit Changes" announcements, which advised that, consistent with earlier representations, contributions from Caterpillar would be limited as of 2000 for employees who retired after January 1, 1992. But, the summary stated, "VEBA assets will be used to cover the difference in monthly premiums after the year 2000 until trust assets are depleted. Retirees may be required to pay a monthly premium for coverage after the trust is depleted." (*Winnett* Docket No. 431 at 48.)

In 1999, Caterpillar issued a new SPD to all employees and retirees, which summarized the 1998 CLA. Referring to the VEBA and post-January 1, 1992 retirees, the 1999 SPD stated that, "once that fund is depleted, monthly premium contributions from retirees will be required." (*Id.* at 51.) Consistent with previous labor agreements, the 1999 SPD also stated that, "if

you die while eligible to retire or following your retirement, your surviving spouse will have coverage for his or her lifetime without cost." (*Id.*) The 1999 SPD also reserved Caterpillar's right to "discontinue or change the plans in the future." (*Id.*)

i. The LDSA

After the 1998 labor contract was signed, the UAW and Caterpillar entered into a Labor Dispute Settlement Agreement (LDSA). A primary purpose of the LDSA was to "resolve all litigation . . . arising from, related to or connected with the 1991-1998 labor dispute." (*Winnett* Docket No. 448 at 22.) In that agreement, the UAW agreed to cease "funding or otherwise supporting, directly or indirectly, any litigation filed by itself, its members or third parties against Caterpillar . . . arising out of, or related to or connected with the Labor Dispute," that is, the period from November 1991 to March 1998. (*Id.*) As discussed previously, the LDSA explicitly provides that claims arising after ratification of the 1998 CLA are not sufficiently connected to the Labor Dispute to implicate this provision. 583 F. Supp.2d at 903; *Kerns* Docket No. 94 Ex. 8 at 1.

F. The 2004 Agreement and Costs Directly Imposed

In late 2003 and early 2004, with the VEBA money close to exhausted, Caterpillar and the UAW commenced negotiations over a successor labor contract. The parties agreed to terms on the successor agreement in 2004, and that labor contract became effective on January 10, 2005. Under this agreement,

in lieu of a VEBA plan, Caterpillar agreed to pay 40 percent of the "above the cap" health care costs for retiree medical coverage, as well as the "below the cap" cost. The agreement also included medical benefit plan design changes, such as the imposition of deductibles and increased co-pays.

After considerable negotiations on the issue, the 2004 labor contract removed the "without cost for life" language pertaining to surviving spouse medical benefits that, in form and/or substance, had been in every previous labor agreement discussed herein. Indeed, the 2004 GIP contains new language that clearly specifies that both retirees and their surviving spouses must contribute toward their medical costs.

In October 2004, Caterpillar began directly charging post-1992 retirees monthly premiums associated with retiree medical costs in excess of the contractual caps. Caterpillar maintains that it began deducting premiums "at a much earlier time," but the effect of the deductions was obscured by the fact that VEBA was covering the costs while it was funded. (*Winnett* Docket No. 436 at 40.) The plaintiffs maintain that Caterpillar made a series of "tenuous" announcements during the 1999-2003 time period, indicating that, while the VEBA might one day be depleted, it was not a foregone conclusion that health insurance premiums would ever actually be paid by retirees, and, therefore, it was not until this 2004 time period that Caterpillar's changes "hit home."

In October 2005, Caterpillar representatives began mailing letters to surviving spouses indicating that, effective January 1, 2006, they would be required to

pay a health care premium to maintain their coverage. Shortly thereafter, Caterpillar began receiving objections from some of these surviving spouses, arguing that, based upon Caterpillar's previous representations, they were entitled to "without cost for life" coverage. These surviving spouses pointed to, among other things, letters that Caterpillar had sent them following the death of their spouse, assuring them that they would be entitled to coverage, for life, "without cost."

In April 2006, shortly after the *Kerns* lawsuit was filed, Caterpillar announced that it would "waive" premiums for those individuals whose spouse retired (or was eligible to retire) from Caterpillar between January 1, 1992 and January 10, 2005 and then died prior to January 10, 2005, the effective date of the 2004 labor agreement. Caterpillar continues to charge monthly premiums (usually well in excess of $100 per month) for those surviving spouses whose Caterpillar-retiree spouse died after January 10, 2005, that is, after the labor agreement that removed the "without cost" language as to surviving spouses was ratified. Regardless of the date of the death, however, Caterpillar, pursuant to the 2004 CLA, charges the surviving spouse a $300 deductible before health insurance applies and 10 percent of the post-deductible costs, up to an out-of-pocket maximum of $750 per year.

Beginning in 2006, Caterpillar began assessing additional charges to the CLS subclass under the 2004 CLA. That is, deductibles of $300 per individual or $600 for families before health insurance could apply,

deductibles and new costs for dental and vision coverage, along with 10 percent of the costs of treatment up to an out-of-pocket maximum of $750 for an individual and $1500 for a family per year.

i. The 2004 Agreement - limitations on UAW's conduct

The 2004 IPA also provides limitations on the UAW's conduct. Specifically, it states that the UAW shall not "engage or continue to engage in or in any manner sanction or encourage any strike, work stoppage, slowdown, or other interruption or impeding of work, or engage or continue to engage in any other use of economic force for the purpose of securing any modification, change, or termination of [the IPA or GIP], or for the purpose of securing the establishment of any new, different or additional plan for insurance or other benefits for death, sickness, accident, hospitalization or surgical or other medical services, or other welfare plans for the benefit of Employees or retired Employees, or the Dependents of either." (*Winnett* Docket No. 435 at 14-15.)

G. The UAW's Conduct as to This Litigation

As has been discussed in previous opinions, one issue in this case is whether the UAW has breached contractual agreements (specifically the LDSA and the 2004 IPA) with Caterpillar by providing support to the plaintiffs in this dispute. It is undisputed that the UAW sponsors the *Kerns* litigation, and that the UAW has retained Roger McClow and his firm to represent the plaintiffs in *Kerns*.

The UAW is not funding the *Winnett* lawsuit, has not retained counsel to represent the plaintiffs in the *Winnett* lawsuit, has informed local unions that it does not sponsor the *Winnett* lawsuit, and the UAW is not paying the attorneys' fees and expenses of *Winnett* counsel. Prior to the filing of the *Winnett* lawsuit, UAW's general counsel's office contacted Michael Mulder, an attorney for the *Winnett* plaintiffs, and advised him of "potential pitfalls" in pursuing the *Winnett* case.

The UAW does recognize that, on a couple of occasions in 2006, senior representatives from the UAW encouraged an individual plaintiff, Michael Finn, who was pursuing a similar case against Caterpillar in a federal district court in Illinois, to dismiss his Complaint in Illinois and to re-file his Complaint in this District, where it would be consolidated with *Winnett,* all of which happened. Additionally, in March 2005, McClow, at the request of individual Caterpillar workers in Peoria, Illinois visited with Caterpillar retirees for the purpose of developing a possible retiree lawsuit, but he ultimately elected not to represent those individuals. And, prior to the filing of the *Winnett* suit, McClow was retained by the UAW to be the Union's "eyes and ears as to what was going on with that lawsuit." (*Winnett* Docket No. 448 at 5.) There is also no dispute that, in the time prior to the filing the *Winnett* suit, various locals sent requests to the UAW to look into their complaints about Caterpillar, and the UAW did fact-finding as to the complaints from the locals.

Caterpillar also claims that the UAW has provided support to the *Winnett* plaintiffs as the litigation has proceeded. For instance, current and retired UAW officials provided affidavits in support of the *Winnett* plaintiffs' position on the motion to transfer, and UAW officials contacted the entity that administered the VEBA to determine whether Caterpillar charged the VEBA for coverage provided to surviving spouses. Caterpillar claims that this information has been useful to the plaintiffs in pursuing this litigation. (Docket No. 448 at 5, 10.)

H. Procedural History

I. *Winnett*

The *Winnett* plaintiffs filed their Complaint in this court on March 28, 2006. The *Kerns* plaintiffs filed their lawsuit on April 13, 2006 in the Western District of Tennessee. (Docket No. 243 at 42.) The *Kerns* litigation was transferred to this court on November 16, 2006. Since that time, this court and the Sixth Circuit have issued rulings that greatly influence the court's ruling here on the parties' summary judgment motions.

First, on May 16, 2007, this court denied Caterpillar's Motion to Dismiss in *Winnett*. *See Winnett v. Caterpillar*, 496 F. Supp.2d 904 (M.D. Tenn. 2007). In that opinion, after determining that the court had jurisdiction, the court determined that the relevant 1988 agreements created "a vesting right in the benefits at issue" and that those rights "vested when the employees attained retirement or pension eligibility." *Id.* at 921-22. The court also concluded that

the *Winnett* plaintiffs' claims were timely under the relevant six-year statute of limitations because the "indefinite and contingent" nature of Caterpillar's communications from 1992 to 2003 would not make it clear to the plaintiffs that they had suffered an injury until Caterpillar actually began making the challenged deductions directly from the employee in 2004, after the VEBA was exhausted. *Id.* at 927-28. Lastly, the court raised concerns about Count V, which alleged that Caterpillar violated ERISA Section 102 by not putting forth a compliant SPD following the December 1992 unilateral implementation (indeed, not putting forth a new SPD until 1999). *Id.* at 928-29. The court did not dismiss the count, but raised concerns that discovery would show that the relief sought was "duplicative" of other counts and that, through Count V, the plaintiffs were impermissibly seeking to obtain substantive relief for an alleged procedural violation of ERISA. *Id.*

On July 20, 2007, the court granted Caterpillar's motion to certify an appeal of the court's ruling to the Sixth Circuit. *Winnett v. Caterpillar*, 2007 WL 2123905 (M.D. Tenn. July 20, 2007). In that opinion, the court stated that it had previously "rejected Caterpillar's argument that actual retirement was necessary for vesting." *Id.* at *2. But, in light of the facts that (1) "most of the plaintiffs" in *Winnett* "ground their rights to lifetime no-cost retiree medical benefits" in the 1988 contracts, (2) the 1988 labor contracts expired on November 3, 1991, and (3) the plaintiffs and their putative class members all retired after November 3, 1991, the court recognized that much of the *Winnett* case rested on the court's conclusion that the rights

"vested" prior to retirement. *Id.* at *4-6. Therefore, the court certified an appeal on this issue to the Sixth Circuit. *Id.* at *7.

Shortly before certifying the appeal, the court granted the *Winnett* plaintiffs' motion for class certification. *Winnett v. Caterpillar*, 2007 WL 2044098, *1 (M.D. Tenn. July 12, 2007). Under Federal Rule of Civil Procedure 23(b)(1)-(2), the court certified a main class of retirees and surviving spouses "who are or were participants or beneficiaries in Caterpillar's plan that provided for retiree medical insurance benefits; (2) for whom the UAW had been the employees' collective bargaining representative at the time of their retirement from Caterpillar,; and (3) who began working for Caterpillar prior to the expiration of the 1988 labor agreement and who retired on or after January 1, 1992, and before March 16, 1998, and became eligible for the immediate commencement of a monthly pension (with at least five years of credited service) under the Non-Contributory Pension Plan upon retirement; and, in the case of beneficiaries of such retirees, who is a surviving participant spouse whose employee spouse fulfilled the conditions above leaving a spouse with a survivor pension." *Id.* at *2. The court also granted the *Winnett* plaintiffs' motion to certify three subclasses, that is, "(1) members of the main class who were eligible to retire prior to January 1, 1992; (2) members of the main class who worked (or whose employee spouses worked) under the CLS Agreement, and (3) members of the main class who are surviving spouses of Caterpillar retirees." *Id.* at *13.

On September 23, 2008, the Sixth Circuit ruled on Caterpillar's appeal in *Winnett*. The Sixth Circuit recognized that most of the claims in *Winnett* turn "on whether a 1988 collective labor agreement provided workers with a right to no-cost retiree medical benefits that vested *as soon as* the worker became eligible for retirement or a pension," and, reversing this court, the Sixth Circuit held "that it did not." 553 F.3d 1000, 1002 (emphasis in original). The Sixth Circuit concluded that, under the plain language of the 1988 labor agreement documents, "a claim based on retiree medical benefits vesting before workers retired fails as a matter of law." *Id.* at 1008. The Sixth Circuit focused on the "fundamental difference" between future retirees and active retirees, that is, workers who have not retired remain represented by a union and are free to choose whether to retire under the labor agreement in place at that time or whether to wait to retire and take their chances that the union will get them better terms in the next agreement. *Id.* at 1010. The Sixth Circuit, while recognizing that the CLS subclass members and the surviving spouses may continue to have viable claims "based on separate contractual provisions and distinct facts," directed this court to dismiss the plaintiffs' claims "which depend exclusively on the theory that retiree medical benefits vested before retirement." *Id.* at 1012.

While the appeal of the court's ruling on Caterpillar's motion to dismiss was pending before the Sixth Circuit, the court, after a three-day evidentiary hearing, granted the *Winnett* plaintiffs' Motion for Preliminary Injunction as to the CLS subclass. *Winnett v. Caterpillar*, 579 F. Supp. 2d 1008 (M.D. Tenn. Sept.

16, 2008). The court found that, "to succeed on the merits of their claim, the CLS subclass must show that the CLS Agreement extended the 1988 CLA beyond its expiration for the CLS subclass such that they retired under that contract and that the 1988 GIP provided a vested right to lifetime no-cost retiree benefits." *Id.* at 1022-1023. The court found that the CLS agreement, unambiguously, extended the 1988 CLA for the CLS subclass such that they retired under the 1988 CLA. *Id.* at 1025-27. Also, the court found that, unambiguously, the 1988 GIP provided a vested right to lifetime retiree health benefits, and that this finding was supported by the extrinsic evidence produced during the evidentiary hearing. *Id.* at 1032 ("even if the language of the GIP were ambiguous, there is also extrinsic evidence that indicates the parties intended the benefits to vest.")

The court also rejected a number of affirmative defenses that Caterpillar continues to advance in this litigation. Again, as to the six-year statute of limitations, the court found that the CLS subclass would not have clearly known that they had "suffered an injury" until 2004, when the VEBA was exhausted and Caterpillar actually began making the "challenged deductions," that is, rather than earlier, when Caterpillar instituted the NetWork, made small adjustments or sent messages implying that, in the near future, Caterpillar retirees would be responsible for premiums. *Id.* at 1040-41. ("Essentially, 'no cost' retirement health care to which the plaintiffs were entitled was still available if the retiree stayed in NetWork."). The court also rejected Caterpillar's estoppel defense. *Id.* at 1042. After concluding that the

CLS subclass had a substantial likelihood of succeeding on the merits, rejecting these affirmative defenses, and accounting for the other factors relevant to a motion for preliminary injunction, the court issued a preliminary injunction against Caterpillar, in favor of the CLS subclass.[5]

ii. *Kerns*

On June 27, 2007, the court denied Caterpillar's Motion to Dismiss the *Kerns* litigation. *Kerns v. Caterpillar*, 499 F. Supp. 1005 (M.D. Tenn. 2007). In *Kerns*, the plaintiffs are surviving spouses of former employees of Caterpillar who retired on or after March

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[5] Specifically, the court stated that "Caterpillar must provide the CLS subclass with the same level of retiree healthcare currently provided to Caterpillar retirees for whom the UAW had been the employees' collective bargaining representative at the time of their retirement from Caterpillar and who retired before January 1, 1992. Caterpillar is enjoined from deducting premium charges for the CLS subclass' retiree healthcare coverage and from charging the CLS subclass the following special charges, which are not part of the 1998 'Caterpillar Hourly Retirees Central Agreement Covered under the NetWork' Plan: premiums to maintain their retiree healthcare benefit; deductibles of $300 (individual) or $600 (family) before the health insurance applies; the retiree's share of a 90/10 split and maximum out-of-pocket payments, which require the CLS subclass to pay 10% of the costs of their post-deductible health care until the amount reaches the out-of-pocket maximums of $750 (individual) or $1500 (family); and individual and family deductibles for dental services and new costs for their vision plan." 579 F. Supp. 2d at 1043. The court subsequently denied Caterpillar's Motion to Stay the preliminary injunction pending appeal. *Winnett v. Caterpillar*, 2008 WL 5050103, *1 (M.D. Tenn. Nov. 20, 2008). Caterpillar has appealed the preliminary injunction ruling and that appeal is pending before the Sixth Circuit. (*Winnett* Docket No. 310.)

16, 1998 and before January 10, 2005. In ruling on the motion, the court indicated that there was significant evidence that the surviving spouses had a vested right to "no cost" health care under the labor agreements at issue and concluded that the proposed class only applied to "surviving spouses," although "a person who is presently the spouse of a living retiree might become a class member in the future, if and when he or she should meet the class definition and become a surviving spouse." *Id.* at 1020-23.

The court also rejected Caterpillar's argument that the *Kerns* claims are moot. That is, while Caterpillar maintains that it is not charging premiums to individuals whose retiree-spouse died prior to March 10, 2005, as indicated above, Caterpillar maintains that it has a legal right to charge these premium payments. Also, under ERISA, the plaintiffs are entitled to "clarify their rights to future benefits under an ERISA plan" and to challenge "benefit modifications" that Caterpillar has already made, in terms of higher prescription drug co-payments, new deductibles, new out-of-pocket maximums, and related charges. *Id.* at 1024-25.

On July 12, 2007, the court granted the plaintiffs' motion for class certification. *Kerns v. Caterpillar*, 2007 WL 2044092, *1 (M.D. Tenn. July 12, 2007). Pursuant to Federal Rule of Civil Procedure 23(b)(1)-(2), the court certified a class of "surviving spouses of former hourly employees: (1) who were represented by the UAW in collective bargaining; (2) who retired from Caterpillar on or after March 16, 1998 and before January 10, 2005, and (3) whose employment at

Caterpillar's facilities in Memphis, Tenn., York, Penn., Denver, Colorado, and Aurora, Peoria, East Peoria, Mapleton, Mossville, Morton, Decatur, and Pontiac, Illinois was governed by the CLAs and the related collective bargaining agreements." *Id.* at *2. Again, the court ruled that the class could not include living spouses. *See id*.

iii. UAW

Caterpillar filed a third-party Complaint against the UAW and various local unions in both *Winnett* and *Kerns* in 2007. (*Winnett* Docket No. 150; *Kerns* Docket No. 82.) The UAW and the local unions moved to dismiss. On May 1, 2008, the court dismissed most of the claims asserted by Caterpillar, allowing only Caterpillar's breach of contract claims against the UAW to proceed and only on the theory that the UAW breached the 2004 labor agreements (Count III) and the LDSA (count IV) by actively "encouraging and supporting" the *Winnett* and *Kerns* lawsuits. *See Kerns v. Caterpillar*, 583 F. Supp. 2d 885, 902-04 (M.D. Tenn. 2008).[6]

[6] In decisions that apply to both cases, the court also (1) ruled that the plaintiffs are not entitled to a jury trial on their claims (and the plaintiffs' trial against Caterpillar would be bifurcated) and (2) severed the trial of the third-party proceedings from the case asserted by the plaintiffs against Caterpillar. 2009 WL 3839755 (M.D. Tenn. Nov. 16, 2009); 2010 WL 424914, *5 (M.D. Tenn. Jan. 28, 2010).

ANALYSIS

The plaintiffs in *Winnett* and *Kerns* seek lifetime no-cost retiree health care benefits. Their claims are brought under Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, and under Section 502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B).[7] The defendant/third-party plaintiff, Caterpillar, alleges that third-party defendant, the UAW, breached a pair of agreements between the parties by supporting the plaintiffs' litigation, and, therefore, among other things, Caterpillar is entitled to damages and indemnification. The plaintiffs and Caterpillar have moved for summary judgment against each other, and the UAW has moved for summary judgment on Caterpillar's breach of contract claims.

I. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) requires the court to grant a motion for summary judgment if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is

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[7] Section 301 of the LMRA states: "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction . . . ." 29 U.S.C. § 185(a). Section 502(a)(1)(B) of ERISA states that a "civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

entitled to judgment as a matter of law." If a moving defendant shows that there is no genuine issue of material fact as to at least one essential element of the plaintiff's claim, the burden shifts to the plaintiff to provide evidence beyond the pleadings, "set[ting] forth specific facts showing that there is a genuine issue for trial." *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). "In evaluating the evidence, the court must draw all inferences in the light most favorable to the [plaintiff]." *Moldowan*, 578 F.3d at 374.

"'[T]he judge's function is not . . . to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). But "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient," and the plaintiff's proof must be more than "merely colorable." *Anderson*, 477 U.S. at 249, 252. An issue of fact is "genuine" only if a reasonable jury could find for the plaintiff. *Moldowan*, 578 F.3d at 374 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

II. The Plaintiffs' Claims

A. *Winnett*

The plaintiffs argue that, even in light of the Sixth Circuit's ruling, there are still four avenues of recovery available to this class or subclasses. That is, the plaintiffs seek summary judgment as to liability for (1) the group of class members who retired between January 1 and December, 1992, who had the terms of

the 1992 unilateral implementation imposed upon them retroactively; (2) the CLS sub-class, (3) the surviving spouse subclass, and (4) a claim on behalf of the class as a whole to vested, no-cost health insurance under the 1988 SPD. (Docket No. 405 at 1-2.)

i. The January 1-December 1992 subgroup

The plaintiffs claim that the 744 class members who retired between January 1, 1992 and December 1, 1992 are entitled to benefits under the 1988 Plan because "Caterpillar could not retroactively strip persons who had already retired of their vested health care benefits." (Docket No. 405 at 6.) The plaintiffs argue that retroactively applying an amendment to a collective bargaining agreement that would reduce benefits might render the contract illusory and it also would be inconsistent with the notion that benefits "vest" and cannot be taken away once employees retire. (*Id.* at 6-7.)(citing for controlling authority *Wulf v. Quantum Chem. Corp*, 26 F.3d 1368, 1378 (6th Cir. 1994)). *Wulf* stands for the proposition that, once a right becomes vested in the employee, an agreement that retroactively takes those rights away could very well be illusory. *See id.* Moreover, the plaintiffs suggest that it is unfair for Caterpillar to attempt to "claw

back" retiree benefits through retroactive application.[8] (Docket No. 405 at 8.)

In response, Caterpillar argues, correctly, that the "1988 contract expired before the Pre-December 1992 Group Retired," that is, there is no dispute that the 1988 Agreement terminated on November 3, 1991. (Docket No. 439 at 2.) Therefore, under the Sixth Circuit's holding in *Winnett*, the individuals in this subgroup retired outside of the 1988 Agreement, and their "retirement package . . . change[s] with the expiration of their collective labor agreement," that is, their retirement benefits did not vest under the 1988 Agreement because they did not retire under that Agreement. *Winnett*, 535 F.3d at 1011 (internal quotation omitted). While, particularly in their reply briefing, the plaintiffs cite an array of case law in support of the court's having jurisdiction to hear this claim and argue this issue at considerable length from a legal and equitable perspective, they fail to address the basic issue, which is that the Sixth Circuit's *Winnett* opinion clearly forecloses recovery for this subclass. (Docket No. 447 at 8-13.)

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[8] The plaintiffs also argue that the language in the 1988 IPA, discussed above, that "Termination of the Agreement shall not have the effect of automatically terminating the Plan," referring to the GIP, indicates that the November 3, 1991 termination did not have the effect of terminating this subgroup's right to benefits under the 1988 Plan. (Docket No. 405 at 7.) The Sixth Circuit considered this language (and another similar provision) in *Winnett* and concluded that this language was not sufficient to vest benefits under the 1988 Plan. 553 F.3d at 1009-10.

As to the plaintiffs' argument that retroactive application is unfair, while this court clearly has jurisdiction over this case, it does not have jurisdiction to consider this argument, which, in the context of this case, is an "unfair labor practice" argument and does not arise under ERISA or the LMRA, because the plaintiffs in this group retired outside of the 1988 Plan. *See e.g. Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 608-09 (6th Cir. 2004)("a federal district court does not have jurisdiction to determine whether an employer violates the NLRA by refusing to make contributions to a pension plan during contract negotiations, which is arguably an unfair labor practice.") Therefore, the claims of this group are not viable, and Caterpillar is entitled to summary judgment on this aspect of the plaintiffs' case.[9]

ii. The CLS subclass

The plaintiffs also seek summary judgment as to liability on the claims of the CLS subclass. (Docket No. 405 at 9.) As discussed above, at the preliminary injunction stage, the court concluded that the CLS

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[9] The plaintiffs also repeatedly mention that Caterpillar does not impose the 1992 CLA on individuals who retired between November 3, 1991 and December 31, 1991; rather they get the benefits of the 1988 CLA. (Docket No. 405 at 6.) In *Winnett*, the Sixth Circuit cautioned against relying on extrinsic evidence that is "irrelevant to when a worker's right to retiree medical benefits vests." 553 F.3d at 1012. Here, under the Sixth Circuit's holding in *Winnett*, rights under the 1988 labor agreements would not vest for anyone who did not retire under that agreement; how Caterpillar may have voluntarily chosen to treat one group of individuals, in this context, is not relevant to the vesting question as defined by the Sixth Circuit.

subclass retired with vested benefits pursuant to the terms of the 1988 CLA. The plaintiffs' argument here essentially re-hashes the rationale that the court used to arrive at its conclusion, which is fully explained in the preliminary injunction Memorandum. (Docket No. 405 at 9-12.) In response, and in its own motion for summary judgment, Caterpillar makes essentially the same challenges and arguments that it made at the preliminary injunction and Motion to Dismiss stage. (Docket No. 439 at 7-9; Docket No. 413 at 16-19.)

As discussed above, after a thorough review of the relevant documents and agreements at the preliminary injunction stage, the court concluded that the CLS agreement *unambiguously* extended the 1988 CLA beyond its expiration for the CLS subclass such that they retired under that contract and that the 1988 GIP provided a vested right to lifetime "no-cost" retiree healthcare benefits. Obviously, the language of the CLS Agreement has not changed in the intervening period between rounds of briefing. Therefore, the plaintiffs are entitled to summary judgment on the issue of *liability* as to this subclass.[10] That said, in the intervening

[10] As to all remaining plaintiffs, Caterpillar re-hashes its argument that the claims are time-barred and barred by the doctrine of estoppel. (Docket No. 439 at 21-25.) As to the statute of limitations issue, as discussed in the preliminary injunction opinion, the relevant issue under both ERISA and the LMRA is "when the plaintiffs should have become aware of Caterpillar's alleged breach of its contractual obligation," and the court determined that, the "indefinite and uncertain" language that Caterpillar had used regarding caps and potential future costs, the *de minimis* nature of some additional charges, and the fact that no-cost health care was essentially still available if the patient remained in the

period between the issuance of the preliminary injunction and the briefing here, the Sixth Circuit issued an opinion that has considerable impact on the *scope* of liability. *See Reese v. CNH America LLC*, 574 F.3d 315 (6th Cir. July 27, 2009)

At issue in *Reese* was a collective bargaining agreement that also granted retirees lifetime health-care benefits upon retirement. *Id.* at 318. The agreement provided that "no contributions" would be required from employees "for the Health Care Plans." *Id*. As here, as health care costs skyrocketed, the employer in *Reese* and the union bargained for certain adjustments to the health care benefits scheme, including a preferred-provider network that threatened

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NetWork all indicated that it was not until October 10, 2004, when Caterpillar started directly charging the plaintiffs, that "the clock" began to run, and, therefore, the claims were not barred by the six-year statute of limitations. 579 F. Supp. 2d at 1039-42. In largely relying on past arguments, Caterpillar has offered nothing that would persuade the court to decide this question differently here, and this conclusion extends to the "surviving spouse" subclass in *Winnett* and the *Kerns* class as well, as these groups were likewise not subject to direct charges until well within the six-year window. Caterpillar also rehashes its estoppel argument, arguing that, under this "flexible" doctrine, in fairness, the plaintiffs should not be allowed to retain the benefits of the 1998 and 2004 plans without accepting the costs. (Docket No. 439 at 24-25.) In the preliminary injunction opinion, the court rejected this argument on the theory that improvements to benefits over time are expected in the labor negotiation context and "do not undermine the principle that vested benefits cannot be altered without the retirees' consent." 579 F. Supp. 2d at 1042. There is no reason to deviate from this conclusion here, and this conclusion is extended to the "surviving spouse" subclass in *Winnett* and the *Kerns* class as well.

to increase certain costs for individuals who retired under the Health Care Plan. A class of retirees sued, seeking a declaratory judgment that they were entitled to life-time health care and that their benefits could not be reduced. *Id.*

The first issue was the whether the benefits provided by the labor agreement vested. *Reese* explains, as this court has in previous opinions, that, in resolving a claim for vested health care benefits stemming from a collective bargaining agreement, the court uses basic canons of contractual interpretation, looking to the "explicit language" of the agreement for "clear manifestations of intent" to vest. That is, based upon the entire contract, the court examines whether the language of the contract indicates that the parties intended to make benefits under the contract unalterable by subsequent labor agreements. *Id.* at 321; *Yotlon v. El Paso Tenn. Pipeline*, 435 F.3d 571, 578-79 (6th Cir. 2006). As noted above, as to the basic vesting question, under *Reese*, there is nothing for the court to re-consider, as the court applied this analysis previously and determined that there was an unambiguous intent to vest. *See Winnett*, 579 F. Supp. 2d at 1023-32.

However, as Caterpillar correctly points out, *Reese* recognizes that health care benefit plans present a unique issue, as labor agreements often lack precision on the issue, and bargainers frequently "have a history" of altering benefits over the course of the labor relationship. 574 F.3d at 324. Indeed, in *Reese*, while the labor agreement said "no contributions" from the retiree would be required, "no party to the case – the

union, the employer, the retirees – viewed the benefits in this way." *Id.* That is, even if the plan states "no contributions," it is not appropriate, in light of practical reality, to conclude that the health coverage obtained by someone who retired under a "no contributions" scheme "would be fixed and irreducible into perpetuity for all employees who retired under it." *Id.* at 325. Rather, a "no contributions" scheme, "at best, under our cases, establish[es] a right to lifetime health-care benefits, but not benefits that could not change from CBA to CBA." *Id.* In short, *Reese* stands for the proposition that, even if the retiree has a vested right to lifetime health benefits from his employer, unless there is some exceptional language that dictates that benefits can "never vary," that retiree is entitled to "lifetime benefits subject to reasonable changes." *Id.* at 326.

The court went on to state that "this conclusion makes sense not only in the narrow circumstances of this case but also within the broader context of ERISA, which contemplated just this sort of flexibility." *Id.* Indeed, citing House Reports from the time of the passage of ERISA, the court concluded that deeming "ancillary benefits" vested would "seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." *Id.* at 326-27 (internal quotation omitted). The matter of these "ancillary benefits," going forward – contract to contract – , is "left to employers, employees and unions to handle by contract." *Id.* at 327.

In conclusion, the court in *Reese* stated that, while the plaintiffs were entitled to vested lifetime retiree

health benefits, they had no entitlement to health benefits "maintained precisely at the level provided for" by the collective bargaining agreement under which they retired. *Id.* That is, while the former employer "cannot terminate all health-care benefits for retirees," it "may reasonably alter them." *Id.* The Sixth Circuit then "le[ft] it to the district court to decide how and in what circumstances" benefits may be altered and "to decide whether it is a matter amenable to judgment as a matter of law or not." *Id.*

As noted above, in issuing the preliminary injunction, this court concluded that the CLS subclass was entitled to health care benefits under the 1988 CLA and enjoined Caterpillar "from deducting premium charges for the CLS subclass' retiree healthcare coverage and from charging the CLS subclass the following specific charges . . . deductibles of $300 (individual) or $600 (family) before health insurance applies; the retiree's share of a 90/10 split and maximum out-of-pocket payments, which require the CLS subclass to pay 10% of the costs of their post-deductible health care until the amount reaches the out-of-pocket maximums of $750 (individual) or $1500 (family); and individual and family deductibles for dental services and new costs for their vision plan." 579 F. Supp. 2d at 1043.

Plainly, the intervening *Reese* decision dictates that a retiree's vested right to health coverage from his employer is subject to reasonable changes to "ancillary" aspects of the plan. Therefore, *Reese* cannot be read consistently with some of the restrictions set forth in the preliminary injunction. That is, adjustments to

vested retiree benefit coverage that resulted in a relatively modest deductible and out-of-pocket maximum costs cannot be viewed, in light of *Reese*, as unacceptable. This is particularly so because, as discussed above and as in *Reese*, health care coverage, even for retirees under the 1988 CLA, has never actually been no cost; that is, as recognized by all parties, co-pays and charges for office visits have always been a part of the costs borne by retirees with vested benefits under the 1988 CLA.[11] (Docket No. 436 at 10, Docket No. 454 at 13.)

That said, charging significant monthly premiums (often well in excess of $100 per month) to the CLS subclass cannot be viewed as a "reasonable" or "ancillary" change. The 1988 CLA provided that health benefits will be provided at "no cost." Even if reasonable adjustments through continued collective bargaining resulted in other acceptable incidental medical costs, the imposition of monthly premium charges, *just to maintain the "no cost" benefit*, goes too far. The evidence in this case shows that these premiums impose considerable yearly costs on the retiree and, moreover, the imposition of a premium for

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[11] Indeed, testimony from class members and David Stevens (Senior Labor Relations Consultant for Caterpillar) during the preliminary injunction hearing demonstrated that, even under the 1988 Plan, retirees would have to pay for costs of the office visit to their doctor and a specialist, along with co-payments on prescription drugs. (Docket No. 298 at 256, 274, 365; Docket No. 299 at 549.) Indeed, at the close of testimony, the court stated that "what has become clear to me during this hearing is that [the CLS subclass members] all along have been paying a certain amount of their healthcare costs." (Docket No. 299 at 567-68.)

the mere maintenance of health care coverage is flatly inconsistent with the letter and spirit of the notion that health care *coverage* will be provided at "no cost."

Therefore, the court will find that, as a matter of law, Caterpillar violated ERISA and the LMRA by charging premiums to CLS class members, and the court will continue to enjoin Caterpillar from charging health care premiums to the CLS class members. The other charges that were subject to the preliminary injunction must be recognized as alterable under *Reese*. Therefore, the court finds that these charges are permissible, and the court will lift the injunction (prospectively) as to these charges.[12]

iii. Surviving spouse subclass

Next, the plaintiffs move for summary judgment on the issue of liability on the claims of the surviving spouse subclass, whose spouses all retired under the 1992 unilateral implementation. (Docket No. 405 at 12.) As noted above, the 1992 unilateral implementation (as well the agreement that came before and after it) provided that, referring to surviving spouses, "coverage will be continued following the death of a retired Employee for the remainder of [the] surviving spouse's life without cost." (*Id.* at 13.) The

[12] As the parties have not had an opportunity to brief the issue, the court will not take a position at this time as to whether Caterpillar is entitled to attempt to recoup funds expended in relation to the deductibles and other "ancillary" charges that the court enjoined Caterpillar from assessing through the preliminary injunction. Absent resolution by the parties, this would be an issue for consideration during any damages briefing.

plaintiffs argue that this provision unambiguously provides the surviving spouse subclass with vested, no cost lifetime health insurance. (*Id.*) As the plaintiffs point out, the court, in the preliminary injunction opinion, determined that this language, as contained in the 1988 labor agreement, provided considerable evidence that the parties intended these benefits to vest. *Winnett*, 579 F. Supp.2d at 1030.

In response, Caterpillar argues that, in 1992, these subclass members were not "surviving spouses," but dependents, and, therefore, the language does not apply to them. (Docket No. 439 at 10.) Also, Caterpillar claims that "there is no evidence to suggest the subclass members ever saw or considered the 1992 GIP document that contains the 'for life without cost' language," but there is evidence that they received materials indicating that Caterpillar would begin implementing caps on retiree benefits. (*Id.)* Also, Caterpillar contends that this provision must be "read in conjunction with other provisions that clearly contemplated cost-sharing," including those issued by Caterpillar during the lengthy labor dispute during which co-payment obligations, the NetWork, and caps were discussed. (*Id.* at 11.)

Simply put, the 1992 unilateral implementation means what it says. That is, while the language is in force, once a retired employee dies, the surviving spouse is entitled to "continued" coverage "without cost." This is precisely the type of "explicit language" and "clear manifestation of intent" that must be found before the court can conclude, as a matter of law, that the parties intended benefits to vest under the

agreement. *Yotlon v. El Paso Tenn. Pipeline*, 435 F.3d 571, 578-79 (6th Cir. 2006). Caterpillar, for all of its efforts to find a way around the clear language, cannot point to a single provision in the 1992 unilateral implementation that negates the plain language discussed above. The language here is plainly unambiguous and indicates that the 1992 unilateral implementation provided surviving spouses with vested no-cost medical benefits.[13]

Again, however, under *Reese*, the finding that the benefits have vested leaves open the question of the scope of those benefits. First, as discussed above, Caterpillar argues that "the evidence demonstrates the surviving spouse subclass has suffered no actual injury attributable to premiums," because Caterpillar has "waived" premiums for this subclass.[14] (Docket No. 413

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[13] Caterpillar argues that "the failure to exclude the 'life without cost' language from the 1998 contract constitutes a mutual or unilateral mistake." (Docket No.439 at 11.) This argument is without merit, among other things, because the rights of the surviving spouses vested here under the 1992 unilateral implementation, which Caterpillar drafted and imposed, not the 1998 agreement. *See also Spectrum Health v. Valley Truck Parts*, 2008 WL 5273627, *4 (W.D. Mich Dec. 17, 2008)("Valley Truck was not entitled to ignore the Plan's plain language, even if it were the result of an unintended drafting error."); *Humphrey v. United Way of Texas Gulf Coast*, 590 F. Supp. 2d 837, 848 (S.D. Tex. 2008)("in the ERISA context . . . drafting errors are strictly construed against the drafter of the plan document . . . to allow a plan drafter to reform an unambiguous ERISA plan because of its own unilateral mistake is not appropriate.")

[14] Throughout briefing, Caterpillar has maintained that its waiver of premiums rendered the complaints of this sub-group moot. As discussed in the *Kerns* Motion to Dismiss opinion, because

at 24). Indeed, Caterpillar contends that it "is not charging the surviving spouse subclass members for any premiums or other costs associated with the caps." (Docket No. 439 at 12); *but see* Docket No. 451 at 10)(Caterpillar recognizing that it does charge premiums to a "handful of individuals" who "became surviving spouses during the term of the 2004 contract.")

Under the discussion above and *Reese*, Caterpillar is clearly prohibited from charging premiums to the *Winnett* surviving spouse subclass, because they have a vested right to "no cost" health care benefits and because, as concluded above, premiums are not a reasonably alterable benefit under a "no cost" scheme.[15]

Caterpillar maintains that it has a legal right to charge premiums to this sub-group, and because, under ERISA, the plaintiffs are entitled to "clarify their rights to future benefits under the plan" and to challenge "benefit modifications" that Caterpillar has already made, the claims of these groups are not moot. 499 F. Supp. 2d at 1024-25; *see also Winnett*, 2007 WL 2044098, at *4-5.

[15] As noted above, Caterpillar does charge a premium to certain surviving spouses, including those whose retiree-spouses died on or after March 10, 2005. As discussed in the *Kerns* section, the court concludes that the date of *retirement* determines whether the rights vested, not the date of death. Therefore, Caterpillar is not allowed to charge premiums to these *Winnett* surviving spouses, regardless of when their spouse died. While the plaintiffs claim that such surviving spouses are in the *Winnett* class (Docket No. 443 at 10), they recognize that it is not clear how many surviving spouses would fall into this category, and additional discovery will be necessary to determine the precise nature of the subclass and damages thereto. (Docket No. 405 at 12.)("As of December 1, 2006, there were approximately 545 class member survivors. By now, the number is undoubtedly greater as on that same date there were

As noted above, however, Caterpillar, pursuant to the 2004 CLA, does charge the surviving spouse a $300 deductible before health insurance applies and 10 percent of the post-deductible costs, up to an out-of-pocket cost of $750. (Docket No. 436 at 49-50.) These are essentially identical charges to those that the court found to be permissible under *Reese*, even though "no cost" health benefits vested for this sub-class. Therefore, through this opinion and subsequent order, Caterpillar is cautioned that it may not charge health insurance premiums to this subclass, but the "ancillary" costs from the 2004 CLA, about which the plaintiffs complain here, must be viewed as permissible under *Reese*.

iv. The 1988 SPD

The plaintiffs argue that the entire *Winnett* class is "entitled to vested no-cost retiree health insurance under the clear terms of the SPD in effect between October 31, 1991 and March 16, 1998." (Docket No. 405 at 17.) As noted above, the 1988 SPD provides that, "[i]f you retire and are eligible for the immediate receipt of a pension (with at least 5 years of credited service) under the Non-Contributory Pension Plan, you will be eligible for the Retired Medical Benefit Plan, continued at no cost to you." (Docket No. 431 at 14.)

The plaintiffs argue that, because a new SPD was not issued until 1999, the language in the 1988 SPD

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over 3,000 class member retirees who were married and living. Any disputes about the precise makeup of this subclass can be resolved in the damage phase of the case when further information from the defendant will be available.")

controls and, therefore, the entire class, which had all retired by the time of the 1999 SPD, is entitled to vested no-cost health benefits pursuant to the 1988 SPD. (Docket No. 405 at 18.) In support, the plaintiffs rely on a series of cases in which the Sixth Circuit found that, between conflicting language in an SPD and an *active* labor agreement, the language in the SPD controlled. *See Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 250 (6th Cir. 1996); *Haus v. Bechtel Jacobs Co., LLC*, 491 F.3d 557, 564 (6th Cir. 2007). The plaintiffs then launch into a lengthy discussion of two notices that Caterpillar did issue to UAW-represented Caterpillar employees that described the changes to retiree benefits brought about through the 1992 unilateral implementation. (Docket No. 405 at 19-25.) The plaintiffs challenge these notices as "misleading and incomplete" and argue that they did not provide the relevant employees with a good understanding of the benefit plan changes. (*Id.*)

As discussed above, while the court did not dismiss this claim ("Count V") at the Motion to Dismiss stage, it did express considerable concern that the plaintiffs were attempting to obtain substantive relief for a procedural violation of ERISA, which is not permitted. *Winnett*, 496 F. Supp. 2d at 928. That is, even if Caterpillar did not comply with ERISA's procedural requirements to specify "the circumstances which may result in disqualification, ineligibility, or denial or loss of benefits" by (1) not timely issuing an SPD after the 1992 unilateral implementation or (2) by providing an unclear explanation of the changes to the 1988 CLA, substantive recovery for these procedural violations is not permitted. *Id.* at 929 (citing *Lake v. Metro Life Ins.*

Co., 73 F.3d 1372, 1378 (6th Cir. 1996); *see also* 29 U.S.C. § 1022(b); *Sears v. Union Central Life Ins. Co*, 222 Fed. Appx. 474, 478-79 (6th Cir. 2007) (because failure to issue an SPD is a procedural violation, injunctive or substantive relief was not recoverable).

It is clear from the plaintiffs' briefing that the initial concerns raised by the court three years ago were well-founded. This claim, at bottom, alleges that Caterpillar's SPD-issuing policy during this time period was flawed and provided improper notice. This claim seeks substantive and injunctive relief for a procedural violation, and, therefore, the claim is not permitted. Moreover, the Sixth Circuit, in *Winnett*, found that, through the reservation of rights clause in the 1988 SPD, "the company may discontinue the retirement benefits of employees *who have yet to retire* when the agreement [not the SPD] ends." *Winnett*, 553 F.3d at 1010 (emphasis in original)(internal quotation omitted). Therefore, under settled ERISA law and the Sixth Circuit's holding in *Winnett*, the issues surrounding the timing of the SPD and the notice provided to the class cannot provide the relief sought here, and Caterpillar is entitled to summary judgment on this issue.

B. *Kerns*

As noted above, the *Kerns* class is comprised of individuals who are surviving spouses of Caterpillar employees who retired between March 16, 1998 and January 10, 2005.[16] That is, all of the class members'

[16] At one point, the plaintiffs also assert that "surviving spouses of deceased employees who died while eligible to retire on or after

spouses retired under a collective bargaining agreement that provided that health care benefits "will be continued following the death of a retired Employee for the remainder of the surviving spouse's life without cost." (Docket No. 243 at 12.) As discussed above in the surviving spouse section in *Winnett*, the court has concluded that this language is sufficient to unambiguously vest in the surviving spouse a right to lifetime "no cost" health benefits.[17]

Caterpillar offers a series of affirmative defenses, most of which have been, in large part, addressed in the *Winnett* discussion. Again, the court finds no merit in Caterpillar's "mistake" argument. That is, given the unambiguous language of the agreement and given that this language was repeated time and time again,

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March 16, 1998 and before January 10, 2005 have a vested right to lifetime health benefits . . . regardless of the expiration of the contract." (Docket No. 218 at 3.) This group of individuals is facially outside of the scope of the class that was certified, all three class representatives' spouses retired from Caterpillar, and argument did not focus on these individuals, so it is not clear on what grounds the plaintiffs seek relief for these individuals.

[17] In the Motion to Dismiss opinion, the court noted that, at that stage, despite "strong evidence" of an intent to vest, it would be premature "to rule on the merits as to whether the plaintiffs have a vested right in the lifetime benefits they seek." *Kerns*, 499 F. Supp. 2d at 1019. As discussed above, in light of the full record at the summary judgment stage, the court concludes that, using standard canons of contractual interpretation, the language "will be *continued* following the death of a retired Employee for the remainder of the surviving spouse's life without cost," unambiguously demonstrates an intent to vest the benefits for the surviving spouse.

Caterpillar's argument that this specific language as to surviving spouses was left in in error is not viable.[18]

Caterpillar also, as in *Winnett*, argues that the claims here are time-barred. (*See* Docket No. 246 at 13; Docket No. 219 at 4.) The court has repeatedly explained why these claims are not time-barred, and there is no reason to reiterate that discussion here.[19] Caterpillar also argues, again, that the claims of the surviving spouses are moot. (*See* Docket No. 219 at 8.) The court has also repeatedly addressed this issue and concluded that, because, among other things, the

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[18] While it is not necessary to consider extrinsic evidence here, the extrinsic evidence submitted plainly supports the plaintiffs' position that there was no mistake. *See Cole v. ArvinMeritor*, 549 F.3d at 1064, 1075 (6th Cir. 2008)(where the contract language is unambiguous, the court is to apply that language without recourse to extrinsic evidence.) As discussed in previous opinions, the *Kerns* plaintiffs have submitted letters from Caterpillar to class members upon the death of their spouse in which Caterpillar represents that health care coverage will continue at "no cost," and the plaintiffs have also submitted evidence that appears to show that Caterpillar did not charge the VEBA for surviving spouse premiums. (*See* Docket Nos. 223 Ex. 10; Docket No. 218 at 13.) In response, Caterpillar largely relies on self-serving deposition testimony from its own representatives, while conceding that the VEBA was not charged for surviving spouses and that it sent the letters discussed above to surviving spouses.. (Docket No. 246 at 7-13; Docket No. 219 at 6-7.)

[19] The court does find that, contrary to the *Kerns* plaintiffs' argument, Caterpillar did not waive the statute of limitations defense by not asserting it in its answer, as the *Kerns* class has failed to show prejudice from the omission and, given the prominence of this issue in the related *Winnett* case, prejudice would be very difficult to show. *See Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d at 1439, 1445 (6th Cir. 1993).

plaintiffs are entitled to seek declaratory relief under ERISA, and because Caterpillar still asserts that it has the right to withhold premiums and other benefits from the surviving spouses, the claims of this group are not moot. *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)(mootness is not implicated unless the facts make it "absolutely clear" that the challenged conduct will not reasonably recur).

That said, there is no dispute that, for class members whose spouse retired and then died all between 1992 and 2005, "Caterpillar is not charging . . . for any premiums or other costs associated with the caps." (Docket No. 240 at 16.) Caterpillar maintains, however, that it is permitted to (and does) charge premiums to surviving spouses whose spouse retired from Caterpillar prior to the ratification of the 2004 labor agreement but died after that agreement was ratified. (*Id.* at 17-18.) Caterpillar argues that any claims by this portion of the *Kerns* class are foreclosed by the Sixth Circuit's opinion in *Winnett*. That is, Caterpillar argues that, because *Winnett* holds that one must retire under the Plan in order to vest in retiree benefits under it, in order to qualify for "surviving spouse" retiree benefits, the individual must fully qualify as a "surviving spouse" during the term of the plan, that is, the spouse must retire and die during the term of the Plan. (*Id.* at 19.)

The court does not read *Winnett* this broadly. The primary issue before the Sixth Circuit in *Winnett* was whether rights could vest while the employee was "in service," and the court concluded that they could not,

largely because there is a "difference between retired workers and those who are still represented by a union." That is, workers must "balance the certainty of particular retirement benefits against the potential to keep earning money, while accepting the risk that a future collective bargaining agreement's retirement benefits may not be as favorable." 553 F.3d at 1010-11.

Caterpillar's interpretation, that *Winnett* stands for the proposition that all "contingencies upon which their right to benefits depended" must be met during the period that the agreement is in force, is simply not supported by the primary rationale for the *Winnett* decision. Indeed, the decision more clearly stands for the proposition that the "key moment" at which future benefits vest is the moment of retirement. (Docket No. 253 at 15-16.) Therefore, the court concludes that a surviving spouse is not precluded from relief simply because her retiree-spouse happened to die after the ratification of the 2004 agreement.[20][21]

The court has concluded that lifetime benefits vested for the *Kerns* class and Caterpillar has no viable

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[20] As noted in a prior opinion, while the *Kerns* class consists only of "surviving spouses," the size of the *Kerns* class may grow in the future, as the living Caterpillar retirees who retired under the 1998 Plan pass on. *Kerns*, 499 F. Supp. 2d at 1023.

[21] In a footnote, providing little explanation, Caterpillar argues that, because the 1998 CLA was "superseded" by the 2004 CLA, the plaintiffs' claim here falls under the exclusive jurisdiction of the NLRB. (Docket No. 253 at 15-16.) This argument is facially without merit because the statutes under which the plaintiffs sue provide that the plaintiffs may sue if a contract under which they had rights was breached.

affirmative defenses. The court, then, turns to the *Reese* analysis to determine whether the changes to the benefit plans at issue here run afoul of the dictates of that decision.

Consistent with the discussion above, the *Kerns* class does not primarily complain about premium costs because Caterpillar has waived premiums for most of class. Rather, the class complains that, "effective January 1, 2006, Caterpillar reduced the health care benefits for surviving spouses by: (1) imposing new deductibles, co-insurance and increased out-of-pocket costs" and (2) requiring "some class members [with post-ratification spouse deaths] to pay a monthly premium and stating that it has the right to charge a monthly premium for all class members (though it is 'waiving it' for the time being for some)." (Docket No. 218 at 2.)

To be clear, even though the language of the relevant labor agreement states that benefits are "no cost," the *Kerns* class does not assert that they are entitled to absolutely free medical benefits; rather, they "object to paying any cost increases above those set forth in the 1998 GIP," which, they claim, are: an annual deductible ($300 per individual and $600 per family), an annual out-of-pocket maximum charge ($1,000 per individual and $2,000 per family), and co-insurance that, effective January 1, 2006, requires them to pay 10 percent of in-network costs (rising to 20 percent in 2008) and a range from 10 percent to 50 percent of out-of-network costs depending on the service rendered. (Docket No. 241 at 16.) The plaintiffs also assert that Caterpillar has not reimbursed

plaintiff Stewart for increased prescription drug co-payments that it imposed on her from January 1 to November 1, 2006. (Docket No. 240 at 9.)

For the same reasons as expressed in *Winnett*, the court finds that these additional charges, while undoubtedly imposing a financial burden on the class members, are "reasonable" and ancillary charges under *Reese.* As in *Reese,* while the plan documents say "no cost" or "no contributions," "no party to the case – the union, the employer, the retirees – viewed the benefits in this way." 574 F.3d at 324. That is, the *Kerns* plaintiffs concede that they are responsible for, at least, a $5/$15 (generic/brand) prescription drug co-payment and the assorted additional medical charges (including out-of-pocket costs) that come from seeing an out-of-network physician under the 1998 GIP, along with the costs of office visits. (Docket No. 250 at 17; Docket No. 240 at 4; Docket No. 253 at 15.) That is, aside from the imposition of premiums, the *Kerns* plaintiffs are not objecting to "costs," only "increased costs."

This Plan, like the plan in *Reese*, is subject to reasonable adjustments, as part of the give-and-take of labor negotiations. Therefore, as in *Winnett*, Caterpillar has not violated ERISA or the LMRA by instituting these additional charges. However, for the same reasons as in *Winnett*, premiums to maintain health insurance coverage constitute a "different animal" from increased charges once an individual is using the health care system. Caterpillar may not lawfully charge premiums to the *Kerns* class members, regardless of the date of the death of the retiree-spouse. The surviving spouses who have been charged

premiums because their spouses died after March 10, 2005 have been damaged and their rights under ERISA and the LMRA have been violated.

C. Third-Party Complaint

On May 1, 2008, in essentially identical opinions that ruled on the UAW's Motion to Dismiss in *Winnett* and *Kerns*, the court dismissed much of Caterpillar's third-party Complaint against the UAW and several local labor unions. *See Winnett*, 2008 WL 1943995; *Kerns*, 583 F. Supp.2d 885. Indeed, the court dismissed all but Caterpillar's claims (asserted under Counts III and IV of its third-party Complaint) that the UAW breached the 2004 labor agreements (Count III) and the LDSA (Count IV) by actively "encouraging and supporting" the *Winnett* and *Kerns* lawsuits. *See Kerns*, 583 F. Supp. 2d at 902-04. Discovery has shown that Caterpillar's remaining claims against the UAW are without merit and should be dismissed.

First, Count IV alleges that, by "actively sponsor[ing], fund[ing], encourag[ing], and support[ing] the *Kerns* lawsuit, and "actively encourag[ing] and support[ing]" the *Winnett* litigation, the UAW breached the LDSA, which, as noted above, prohibits the UAW from "funding or otherwise supporting, directly or indirectly, any litigation filed by itself, its members or third parties against Caterpillar . . . arising out of, or related to or connected with the Labor Dispute," that is, the period from November 1991 to March 1998. (*See Kerns*, 583 F. Supp. 2d at 902; *Winnett* Docket No. 448 at 22.) As discussed in the Motion to Dismiss opinion, the LDSA explicitly provides that claims arising after ratification of the 1998 CLA are not sufficiently

connected to the Labor Dispute to implicate this provision. 583 F. Supp.2d at 903; *Kerns* Docket No. 94 Ex. 8 at 1.

At the Motion to Dismiss stage, the UAW argued that, because the plaintiffs' claims in the *Winnett* and *Kerns* litigation arose when the premiums and other costs were first directly assessed, the claims arose after ratification of the 1998 CLA. *Kerns*, 583 F. Supp.2d at 903. At that time, the court did not dismiss Count IV because Caterpillar had met its mild burden to state a claim upon which relief could be granted. *Id.* Now, however, the court has determined (repeatedly) that the plaintiffs' claims arose several years after ratification and, therefore, the provision of the LDSA under which Caterpillar sued cannot provide relief. Therefore, Count IV will be dismissed.

Count III is a breach of contract claim based upon the 2004 labor contracts. As discussed in the court's previous opinion, the 2004 labor contracts contain no explicit promise from the UAW "not to encourage or support any claims by Caterpillar retirees for vested benefits." *Id.* at 902. Yet, Caterpillar alleges that the UAW has breached the provision that prohibits the UAW from "engag[ing] or continu[ing] to engage in or in any manner sanction[ing] or encourag[ing] any strike, work stoppage, slowdown, or other interruption or impeding of work, or engag[ing] or continu[ing] to engage in any other *use of economic force* for the purpose of securing any modification, change, or termination of [the IPA or GIP], or for the purpose of securing the establishment of any new, different or additional plan for insurance or other benefits for

death, sickness, accident, hospitalization or surgical or other medical services, or other welfare plans for the benefit of Employees or retired Employees, or the Dependents of either." (*Winnett* Docket No. 435 at 14-15.)(emphasis added).

Caterpillar also alleges that the UAW's conduct has breached the 2004 labor contracts through "subversion." *Kerns*, 583 F. Supp.2d at 902. While, in its previous opinion, the court expressed some concerns about the viability of Caterpillar's Count III claims in the long run, the court found, that, "[v]iewing these allegations in the light most favorable to Caterpillar, these allegations are sufficient to withstand a Rule 12(b)(6) attack." *Id.*

Now, as to *Winnett*, the UAW argues that there is no factual basis for Caterpillar's claim that it "encouraged or supported" the *Winnett* litigation. (*Winnett* Docket No. 402 at 11-12.) That is, it is undisputed that the UAW is not funding the *Winnett* litigation, has not retained counsel for the *Winnett* plaintiffs and is not paying any fees or expenses associated with that case, and that, prior to the filing of the *Winnett* lawsuit, Michael Saggau of the UAW's general counsel's office spoke to counsel for the *Winnett* plaintiffs, advising them of "pitfalls" associated with this type of litigation. (*Id.* at 12.)

Moreover, the UAW argues, even if, prior to the *Winnett* filing, Mr. McClow visited some Caterpillar retirees to discuss a potential lawsuit, that conduct falls well short of "encouraging or supporting" the *Winnett* litigation. (*Id.* at 13.) Finally, while, after *Winnett* was filed, UAW representatives (1) submitted

affidavits in support of the plaintiffs' position on issues such as the motion to transfer, (2) encouraged Mr. Finn to move his case to this District and (3) conducted discovery into issues such as whether Caterpillar had billed the VEBA for surviving spouse medical expenses, these facts only show that the UAW was "seeking to protect its own interests, particularly the UAW's interest in minimizing the time and expense of the lawsuits on the UAW." (*Id.* at 14.) That is, knowing that "many of the key witnesses and documents" in the case would come from the UAW, the UAW sought to have this litigation conducted in a single, easily-assessable location, that is, Nashville, Tennessee. (*Id.*) And, on the conducting investigation/VEBA issue, the UAW argues that Caterpillar, having sued the UAW, can hardly complain when the UAW takes steps to discover the facts of the litigation in an attempt to vigorously defend itself. (*Winnett* Docket No. 452 at 6.)

While there is no dispute that the UAW is supporting the *Kerns* litigation financially and otherwise, the UAW argues that "the 2004 Labor Agreement does not preclude" the UAW's sponsorship of the litigation. (*Kerns* Docket No. 211 at 12.) The UAW points out that there is no "covenant not to sue" in the 2004 labor agreements between the UAW and Caterpillar and no other explicit language that would prohibit the UAW from supporting this litigation. (*Id.* at 14.) While there is a "no strike" provision in the 2004 IPA (quoted above), the UAW argues that "notably absent from the list of specific conduct in which the UAW may not engage is a prohibition on sponsoring litigation." (*Id.*)

Additionally, the UAW argues, Caterpillar's "subversion" argument must be rejected. That is, while breach may, in certain circumstances, be inferred from actions that are "inconsistent with" the existence of a contract, the UAW's actions here are not "inconsistent with" the existence of the 2004 labor agreements, as the UAW is sponsoring the *Kerns* plaintiffs' argument that they have a vested right to health benefits under a pre-2004 labor agreement. (*See id.* at 19.) This is particularly so here, where "the UAW and Caterpillar have long resorted to litigation to clarify their contractual rights" and to challenge each other's "interpretation or execution of the parties' various agreements." (*Id.* at 17.)

In a consolidated response, Caterpillar notes (again) that the UAW is sponsoring the *Kerns* lawsuit and re-hashes its evidence (the McClow meeting, the VEBA investigation, the motion to transfer affidavits, the discussion with Finn, etc.) in support of the argument that the UAW is "encouraging" the *Winnett* lawsuit. (*Winnett* Docket No. 437 at 4-9.) Next, Caterpillar argues that the UAW is "subverting" the 2004 labor agreement and breaching the implied covenant of good faith and fair dealing implied therein because it is "frustrat[ing] the purpose of the[] contract." (*Id.* at 9-13)(citing, *e.g. Safeco v. City of White House, Tenn.*, 36 F.3d 540, 548 (6th Cir. 1994); 23 WILLISTON ON CONTRACTS § 63:1 (refusal to recognize existence of a contract or to act consistently with the existence of a contract may be a breach).. Rather than a typical labor dispute between the parties over the meaning of a contract term, Caterpillar argues, the UAW is seeking to invalidate the terms of the 2004 agreement, which

specify that retirees and their surviving spouses are to pay specific dollar amounts for medical care. (*Id.* at 11.)

As indicated by the lack of "on point" case law Caterpillar put forth in support of its subversion argument, this is simply not a situation in which a "breach by subversion or bad faith" argument can credibly be raised. The UAW is simply not acting inconsistently with the *existence and validity of the* 2004 labor agreement or that agreement's covenant of good faith and fair dealing by supporting the argument that the plaintiffs have rights that vested under an earlier agreement. *See generally Safeco*, 36 F.3d at 548. The UAW is not supporting a position that disclaims the existence of the 2004 agreement or a position that is flatly inconsistent with its terms; it is, rather, supporting a position that the plaintiffs are not bound by certain regulations in that agreement because of the language of an earlier agreement. Caterpillar's subversion argument, therefore, fails as a matter of law.

Next, Caterpillar argues that the UAW's conduct here is explicitly prohibited by the 2004 IPA language that prohibits the UAW from using "any other . . . economic force for the purpose of securing any modification, change or termination of this Agreement." (*Winnett* Docket No. 437 at 13.) While Caterpillar concedes that this language is contained in what is "essentially a no strike clause," through this language, "the provision goes beyond the typical no strike clause." (*Id.* at 14.) Absent from Caterpillar's briefing is any case law that has extended language of this type to prohibit the support and funding of litigation.

Caterpillar is attempting to stretch this provision well beyond its reasonable interpretation. The "other use of economic force" language is surrounded by specific examples of prohibited conduct – all of which fall into the category of "causing a labor disruption." That is, this catch-all provision appears to be a term of art that seeks to prohibit conduct that would disrupt Caterpillar's ability to produce its products in a timely manner. *See also Brown v. Pro Football*, 782 F. Supp. 125, 135 (D.D.C. 1991)("'economic force' . . . includes strikes, lockouts, pickets, and the hiring of replacement workers."). While Caterpillar makes a clever argument, there is no indication – either from the contract or the record – that a broad prohibition on the support of litigation was the parties' intent, and there certainly would be much clearer and more logical ways to convey the point.

Rather, as the UAW points out, litigation over the terms of a collective bargaining agreement is a fairly common and accepted practice between these parties, and to say that the parties would have intended, through such vague and ill-connected language, to prohibit the support of litigation surrounding the labor agreement strains credulity. (*Winnett* Docket No. 452 at 12-13.) In sum, Caterpillar's argument that the "use of economic force" catch-all bars the UAW's conduct here fails as a matter of law. Therefore, Caterpillar cannot point to a provision in the 2004 labor agreement that the UAW has breached through its conduct in either case. With no viable arguments remaining,

Caterpillar's third-party Complaint against the UAW will be dismissed.[22]

CONCLUSION

All liability issues between the parties (other than the UAW's counterclaims against Caterpillar) are resolved by this opinion.

The *Winnett* plaintiffs are entitled to judgment as a matter of law on their remaining ERISA and LMRA claims as to the CLS subclass and the "surviving spouse" subclass, with potential damages having been incurred as to both of those subclasses due to Caterpillar's charging of premiums (but only premiums) to those subclasses as described above. Caterpillar is entitled to summary judgment on the other remaining claims in *Winnett*, and the court,

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[22] On March 18, 2009, in both the *Winnett* and *Kerns* litigation, Caterpillar filed a Motion to Re-Open Discovery for the Limited Purpose of Deposing Roger J. McClow, or in the Alternative, to Strike the Declaration of Roger J. McClow. (*Winnett* Docket No. 458; *Kerns* Docket No. 259.) The premise of this motion is that, throughout this litigation, McClow has been shielded from all manner of discovery by counsel's invocation of attorney-client privilege, yet McClow submitted an affidavit in summary judgment briefing refuting Caterpillar's assertion that he was working for the UAW when he met with the retirees in 2005. (*Kerns* Docket No. 260 at 1.) Caterpillar asks the court to either (1) compel Mr. McClow to appear for deposition to answer questions about the matter in his affidavit or (2) disregard and strike the affidavit. (*Id.* at 2.) As should be clear from the discussion herein (including the fact that the court has not relied on McClow's affidavit in reaching its conclusions), Caterpillar's claims fail regardless of the challenged statements in McClow's affidavit, and, therefore, Caterpillar's motion will be denied.

through the attached Order, will amend the preliminary injunction entered earlier to reflect this.

The *Kerns* plaintiffs are entitled to judgment as a matter of law on their remaining ERISA and LMRA claims, as the court finds that it was and would be improper for Caterpillar to charge premiums (but only premiums) to this class as described above, and potential damages have been incurred by this class to the extent that Caterpillar has charged premiums to certain members of this class, that is, those whose spouses died after the ratification of the 2004 Labor Agreement. Caterpillar is entitled to summary judgment on the other aspects of the plaintiffs' claims in *Kerns*.

An appropriate order will enter.

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

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

Case No. 3:06-0235
Judge Trauger

[Filed March 26, 2010]

GARY T. WINNETT, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
CATERPILLAR INC.,	)
	)
Defendant/	)
Third-Party Plaintiff,	)
	)
v.	)
	)
INTERNATIONAL UNION,	)
UAW, et al.	)
	)
Third-Party Defendants.	)
	)

Case No. 3:06-1113
Judge Trauger

JUDITH K. KERNS, et al.,	)
	)
Plaintiffs,	)

v.)
)
CATERPILLAR INC.,)
)
Defendant/)
Third-Party Plaintiff,)
)
v.)
)
INTERNATIONAL UNION,)
UAW, et al.)
)
Third-Party Defendants.)
_____)

ORDER

For the reasons expressed in the accompanying Memorandum, the Motion for Summary Judgment filed by the third-party defendant, the International Union, UAW ("UAW"), in these cases (*Winnett* Docket No. 398 and *Kerns* Docket No. 207) is **GRANTED** and Caterpillar's Motion to Re-Open Discovery for the Limited Purpose of Deposing Roger J. McClow, or in the Alternative, to Strike the Declaration of Roger J. McClow (*Winnett* Docket No. 458; *Kerns* Docket No. 259) is **DENIED**. Caterpillar's Third-Party Complaint against the UAW in these cases is **DISMISSED.**

The Motions for Summary Judgment filed by the *Winnett* (Docket No. 404) and *Kerns* plaintiffs (Docket No. 213) and by Caterpillar in these cases (*Winnett* Docket No. 410 and *Kerns* Docket No. 214) are **GRANTED IN PART AND DENIED IN PART** as described in the attached Memorandum. In *Winnett,*

Caterpillar remains enjoined from deducting premium charges for the CLS subclass' retiree healthcare coverage but, going forward, Caterpillar is no longer enjoined from charging the other "specific charges" mentioned in the court's September 16, 2008 Order (*Winnett* Docket No. 307).

As the liability issues that would have been the subject of the June 2010 and August 2010 trials set in these cases have been resolved, those trial settings will be removed from the calendar. The parties have indicated that additional discovery into damages will be necessary.

It is so ordered.

Enter this 26th day of March 2010.

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

APPENDIX K

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

Case No. 3:06-cv-01113
District Judge Trauger
Magistrate Judge Brown

Class Action

[Filed July 12, 2007]

JUDITH K. KERNS, MARCIA NALLEY, and SANDRA L. STEWART, on behalf of themselves and a similarly situated class,	)
Plaintiffs,	)
v.	)
CATERPILLAR, INC.,	)
Defendant.	)

MEMORANDUM

Currently pending before the court is a motion for class certification filed by the plaintiffs (Docket No. 60), the defendant's response thereto (Docket No. 66), and

the plaintiffs' reply (Docket No. 67). For the reasons explained herein, the plaintiffs' motion will be granted.

I. Introduction

This is an action for vested lifetime health care benefits. The plaintiffs are surviving spouses of former employees of Caterpillar, Inc. ("Caterpillar") who retired on or after March 16, 1998 and before January 10, 2005. According to the plaintiffs, this lawsuit was precipitated by Caterpillar's announcement in 2005 that, beginning in 2006, class members would be required to pay monthly premium sharing co-payments and that, effective in 2006, 2008, and 2010, Caterpillar was modifying the health care benefits, including making a series of increases to the prescription drug co-payments and imposing new deductibles and annual out-of-pocket maximums paid by the class.

On April 13, 2006, the plaintiffs originally filed this action in the Western District of Tennessee (W.D. Tenn. Case No. 2:06-cv-2213). The plaintiffs seek relief under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and under § 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, from the defendant Caterpillar for breach of a collective bargaining agreement ("CBA") and a welfare benefit plan.

The defendant provided health care benefits for the plaintiffs' spouses and the proposed class pursuant to successive CBA's with the United Auto Workers ("UAW"). According to the plaintiffs, the parties to the CBA's intended for these health care benefits for surviving spouses to vest and to continue beyond the

expiration of any particular contract. The plaintiffs claim that the defendant breached its promise to pay lifetime health benefits to surviving spouses at no cost when, in 2005, Caterpillar began charging surviving spouses for a portion of their medical care. The plaintiffs also complain they were charged increased co-payments for prescription drugs and other out-of-pocket expenses.

The plaintiffs seek declaratory judgment, preliminary and permanent injunctive relief requiring Caterpillar to maintain the level of health care benefits as required by the terms of the 1998 CBA, an order for the defendant to pay damages, plus interest, to the class for any losses suffered, an order for the defendant to pay damages for mental distress and anguish, and award of attorney's fees, punitive damages and costs, and any further relief.

On September 29, 2006, the defendant filed a motion to dismiss, contending that the court lacks subject matter jurisdiction over the plaintiffs' LMRA and ERISA claims; that the plaintiffs cannot maintain an action on behalf of a hypothetical group of "future" surviving spouses that cannot be readily identified; and that the claims of current surviving spouses--i.e., those who became surviving spouses while the 1998 labor contracts were in effect--are moot. (W.D. Tenn. Docket No. 31).

On November 9, 2006, the defendant filed a motion to transfer the case to the Central District of Illinois. (W.D. Tenn. Docket No. 36). The Honorable Jon Phipps McCalla denied the defendant's motion to transfer by order entered November 9, 2006, and, instead,

transferred the case to the Middle District of Tennessee, where a companion case, *Winnett v. Caterpillar, Inc.*, 3:06-cv-00235, was already pending.[1] (W.D. Tenn. Docket No. 39). On November 30, 2006, the plaintiffs filed their response in opposition to the defendant's motion to dismiss. (Docket No. 50).

On June 27, 2007, the court denied Caterpillar's motion to dismiss, finding that the court had subject matter jurisdiction over this suit and that the plaintiffs' surviving spouses claims were not moot. The court further found that it was too early in this litigation to determine whether the plaintiffs' right to lifetime, no-cost health benefits vested under the 1998 CLA and previous contracts. (Docket Nos. 77 and 78).

The plaintiffs have now filed a motion for class certification. (Docket No. 60). They seek to represent a putative class under Federal Rule of Civil Procedure 23(a) and (b) consisting of surviving spouses of former hourly employees: (1) who were represented by the UAW in collective bargaining; (2) who retired from Caterpillar on or after March 16, 1998 and before January 10, 2005; and (3) whose employment at Caterpillar's facilities in Memphis, TN, York, PA, Denver, CO, and Aurora, Peoria, East Peoria, Mapleton, Mossville, Morton, Decatur and Pontiac, IL was governed by the Central Labor Agreements and the related CBA's. (Docket No. 60 at 1-2). The plaintiffs assert that, based on the information provided thus far by Caterpillar, there are about 375-430 persons who currently meet the proposed class definition.

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[1] The *Winnett* case has not been consolidated with the instant case.

II. Facts

The relevant facts of this case are set forth in the court's memorandum opinion entered on June 27, 2007, and are incorporated herein by reference. (Docket No. 77 at pp. 1-18).

III. Analysis

The principal purpose of class actions is to achieve efficiency and economy of litigation, both with respect to the parties and the courts. *See Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159, 102 S. Ct. 2364, 72 L.Ed.2d 740 (1982). The Supreme Court has observed that, as an exception to the usual rule that litigation is conducted by and on behalf of individual named parties, "[c]lass relief is 'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class.'" *Id.* at 155 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L.Ed.2d 176 (1979)). The Court directs that, before certifying a class, district courts must conduct a "rigorous analysis" of the prerequisites of Rule 23 of the Federal Rules of Civil Procedure. *See Falcon*, 457 U.S. at 161. The Sixth Circuit has stated that district courts have broad discretion in deciding whether to certify a class, but that courts must exercise that discretion within the framework of Rule 23. *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 446 (6th Cir. 2002); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996).

Although a court considering class certification may not inquire into the merits of the underlying claim, a

class action may not be certified merely on the basis of its designation as such in the pleadings. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S. Ct. 2140, 40 L.Ed.2d 732 (1974); *In re Am. Med. Sys., Inc.*, 75 F.3d at 1079. In evaluating whether class certification is appropriate, "it may be necessary for the court to probe behind the pleadings...." *Falcon*, 457 U.S. at 160; *see also In re Am. Med. Sys., Inc.*, 75 F.3d at 1079; *Weathers v. Peters Realty* Corp., 499 F.2d 1197, 1200 (6th Cir. 1974). Moreover, the party seeking class certification bears the burden of establishing its right to it. *See Alkire v. Irving*, 330 F.3d 802, 820 (6th Cir. 2003); *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 522 (6th Cir. 1976).

A. *The plaintiffs have demonstrated that they meet the requirements of Rule 23(a).*

Any party seeking class certification must meet all four prerequisites of Rule 23(a)--numerosity, commonality, typicality, and adequacy of representation--before a class can be certified. *See Fed. R. Civ. P.* 23(a); *In re Am. Med. Sys., Inc.*, 75 F.3d at 1079. The court will discuss each of these prerequisites in turn.

Before moving to this discussion, however, the court notes that, in response to the plaintiffs' motion for class certification, Caterpillar attacks the court's jurisdiction over the plaintiffs' claims. Caterpillar also argues that the plaintiffs' claims are moot. These are the same arguments Caterpillar advanced in its motion to dismiss, which the court already has rejected. Moreover, the court should not consider the merits when ruling on a motion for class certification. *Fox v.*

Massey-Ferguson, Inc., 172 F.R.D. 653, 660 (E.D. Mich. 1995)(in ruling on a motion for class certification, "the court should not consider the merits of the action. Rather, the court must accept all of the factual allegations . . . as being correct and draw all reasonable inferences from these facts.").

1. *The plaintiffs have demonstrated numerosity*.

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." *Fed. R. Civ. P.* 23(a)(1). In *Senter*, the Sixth Circuit explained that there is "no specific number below which class action relief is automatically precluded" and that it is the circumstances of the case, not a strict numerical test, that determines impracticability of joinder. *See Senter v. Gen. Motors Corp*., 532 F.2d 511, 523 n. 24 (6th Cir. 1976). When class size reaches substantial proportions, however, the impracticability requirement is usually satisfied by the numbers alone. *In re Am. Med. Sys., Inc.*, 75 F.3d at 1079.

Apart from class size, factors that courts should consider in determining whether joinder is impracticable include the geographical dispersion of class members, the injunctive nature of the action, how easily class members can be identified, judicial efficiency, fear of harassment, and the relatively small size of individual claims. *See* Alba Conte & Herbert Newberg, 1 *Newberg on Class Actions* § 3:6 (4th ed. 2003) (hereinafter "*Newberg*"); *see also Saur v. Snappy Apple Farms, Inc*., 203 F.R.D. 281, 286 (W.D. Mich. 2001).

There are over 400 surviving spouses in this proposed class. (Docket No. 60 at 10). The plaintiffs state that there may be additional class members who are not yet identified who will become class members in the future. (*Id.* at 11). The proposed class members are elderly and live in many different states. (*Id.* at 12). The court finds that the size of the proposed class, consisting of elderly and geographically dispersed persons, fulfills the numerosity requirement. *See e.g., Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884-85 (6th Cir. 1997)(affirming district court's certification of class, agreeing that the joinder of 1100 retirees and surviving spouses would be impracticable); *Reese v. CNH Am., LLC*, 227 F.R.D. 483, (E.D. Mich. 2005)(citing *Bittinger* and finding that joinder of approximately 1450 retirees and surviving spouses is impracticable, thus the numerosity requirement is fulfilled).

2. *The plaintiffs have demonstrated commonality.*

In order to establish commonality, the plaintiffs must demonstrate that "there are questions of law or fact common to the class" under Rule 23(a)(2). *See Fed. R. Civ. P.* 23(a)(2). One leading treatise characterizes the commonality prerequisite as interdependent with the numerosity prerequisite. *See Newberg* § 3:10. It notes that these two factors form the conceptual basis for determining whether a class action is the appropriate vehicle for the resolution of a particular matter. *See id.*

The Sixth Circuit has characterized the commonality requirement as "qualitative rather than

quantitative" and has observed that "[v]ariations in the circumstances of class members are acceptable, as long as they have at least one issue in common." *See Bacon,* 370 F.3d at 570; *In re Am. Med. Sys., Inc.,* 75 F.3d at 1080. It has also noted that not every common issue will satisfy this requirement but rather that "[w]hat we are looking for is a common issue the resolution of which will advance the litigation." *See Sprague v. Gen. Motors Corp.,* 133 F.3d 388, 397 (6th Cir. 1998).

Here, the class members and the proposed class members share the common legal questions of whether the negotiated agreements provide for fully paid lifetime health care benefits without cost and whether Caterpillar's challenged actions are actionable under the LMRA and ERISA. While there may be some distinctions in the facts supporting class members' claims, the commonality requirement of Rule 23(a)(2) does not require that *all* questions of law or fact be common. The issue of whether Caterpillar violated vested rights under either the LMRA or ERISA would resolve a common issue for the entire group. In *Bittinger*, the Sixth Circuit held that the common question of whether a collective bargaining agreement guaranteed lifetime, fully-funded benefits was sufficient to establish commonality. 123 F.3d 877, 884; *see also Fox v. Massey-Ferguson, Inc.*, 172 F.R.D. 653, 661 (E.D. Mich. 1995) (finding that commonality was present where all proposed class members sought the same continuing lifetime health care benefits allegedly promised to them in collective bargaining and insurance agreements, even though there may have been distinct oral and written representations on which the plaintiffs relied). The court finds that the plaintiffs

in the instant case have established the necessary commonality under Rule 23(a).

3. *The plaintiffs have demonstrated typicality*.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Fed. R. Civ. P.* 23(a)(3). Typicality requires the representative to be a member of the class and share at least a common element of fact or law with the class. *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). "Like the test for commonality, the test for typicality is not demanding and the interests and claims of the various plaintiffs need not be identical." *Reese v. CNH Am., LLC*, 227 F.R.D. 483, 487 (E.D. Mich. 2005)(citing *Bittinger*, 123 F.3d at 884)); *see also Rutherford v. City of Cleveland*, 137 F.3d 905, 909 (6th Cir. 1998)(recognizing that the commonality and typicality requirements "tend to merge," and that "[b]oth serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class members are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.")).

Together with Rule 23(a)(4)'s requirement that the representative party adequately protect the interests of the class, the typicality requirement focuses on the characteristics of the class representatives. *See Newberg* § 3:13. The Sixth Circuit has adopted Newberg's characterization of the typicality requirement. As depicted in this characterization, "[t]ypicality determines whether a sufficient relationship exists between the injury to the named

plaintiff and the conduct affecting the class, such that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong done to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *See In re Am. Med. Sys., Inc.*, 75 F.3d at 1082 (citing 1 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 3:13 (3d ed. 1992)). A representative's claim may be considered typical, despite the fact that evidence relevant to his or her claim varies from other class members, some class members would be subject to different defenses, and the members may have suffered varying levels of injury. *See Bittinger*, 123 F.3d at 884-885.

In the instant case, Caterpillar argues that the plaintiffs cannot satisfy Rule 23's typicality requirement because their claims are moot. Caterpillar also argues that because some of the plaintiffs can prove their claims without necessarily proving the claims of the putative class members, the typicality requirement cannot be met.

The court already has rejected Caterpillar's argument that the plaintiffs' claims are moot, and the court finds that the typicality requirement necessary for class certification is satisfied in this case. The named representatives, like the proposed class members, contend that Caterpillar is wrongfully

threatening to modify, or already has modified, the level of health insurance benefits to which they allegedly are entitled under the governing CBA and plans. Their claims are based on the same legal theory--that the relevant agreements provide retirees and surviving spouses of retirees fully-paid lifetime health care benefits without cost.

Factually, Kerns, Nalley, and Stewart are similarly situated to the other surviving spouses in the proposed class. Kerns' and Nalley's husbands retired on or after January 1, 1992, and before January 10, 2005, under the negotiated 1998 CLA and its Benefit Agreements and Plans (including the 1998 IPA and GIP). Kerns' and Nalley's husbands died on June 10, 2002, and May 26, 2003, respectively, during the effective term of the negotiated 1998 CLA and its Benefit Agreements and Plans. Stewart's husband stopped working on or about August 14, 1998, and went on disability status. He died on June 28, 2004, after the expiration of the 1998 CLA and before January 10, 2005 (the effective date of the 2004 CLA and its Benefit Agreements and Plans). It is unclear whether he retired from Caterpillar or was eligible to retire when he died; in any event, the plaintiffs' theory is that Stewart is entitled to the vested lifetime health care benefits at no cost as his surviving spouse.[2] Nalley is on Medicare while Kerns and Stewart are not.

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[2] The plaintiffs point out that they are awaiting the complete files from Caterpillar providing this information. (Docket No. 67 at 5). The plaintiffs have produced two documents indicating that Mr. Stewart had a retirement date of September 1, 1998. (*Id*. at 5-6.)

In *Reese v. CNH America LLC*, the court certified a class of retirees and surviving spouses. The retirees had worked at facilities in five states and had retired over a ten-year period. The class representatives were all retirees. As the case progressed, additional surviving spouses "grew into" the class and became class members, but all of the class representatives remained retirees. The court in *Reese* found that the proposed class met all the requirements for certification, noting that, "like the test for commonality, the test for typicality is not demanding and the interests and claims of the various plaintiffs need not be identical." 227 F.R.D. 483, 487-88. As in *Reese*, the court here finds that the "factual and legal variations . . . do not render the proposed Class unworkable; nor do they demonstrate a lack of commonality and/or typicality." 227 F.R.D. at 488.

4. *The plaintiffs have demonstrated adequate representation.*

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P.* 23(a)(4). The Sixth Circuit has recognized that this adequacy of representation requirement encompasses two criteria: (1) the representative plaintiffs must have common interests with unnamed members of the class; and (2) it must appear that the representative plaintiffs will vigorously prosecute the interests of the class through qualified counsel. *Senter*, 532 F.2d at 525. The first criterion, that of common interest, essentially requires that there be no antagonism or conflict of interest between the representative plaintiffs and the other members of the

class that they seek to represent. *See In re Am. Med. Sys.*, 75 F.3d at 1083. The second criterion inquires into the competency of counsel. *See id.* The Sixth Circuit has observed that the adequacy of representation prerequisite overlaps with the typicality requirement because, "in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members." *Id.* That court has also noted that this prerequisite is essential to due process because a final judgment in a class action is binding on all class members. *Id.*

As to the first criterion, the named plaintiffs share a keen interest in declaring the rights of the entire class to vested, lifetime health care benefits under the 1998 agreements and plans, without any premium-sharing payment by them and without the modifications that have reduced their benefits and imposed new out-of-pocket costs since January 1, 2006. Caterpillar's actions have been directed at the entire proposed class, and the class members have been affected in the same way (i.e., by Caterpillar's alleged unlawful withdrawal or modification of their healthcare insurance benefits). Caterpillar has not demonstrated that any antagonism exists among or between the named plaintiffs and the proposed class members. Thus, the court finds that Kerns, Nalley, and Stewart will fairly and adequately protect the interests of the class.

As to the second criterion, the plaintiffs assert that their class representatives and counsel have aptly demonstrated their adequacy throughout the long history of this litigation. (*See* Docket No. 250 at 55.)

Counsel has pursued discovery, successfully opposed Caterpillar's motion to dismiss, and prepared this class certification motion. Additionally, the plaintiffs assert that plaintiffs' counsel has "extensive experience in employment discrimination and specifically class action litigation before federal courts around the country." (*See id.* at 55-56.) The court has no reason to question counsel's qualifications, and the defendant does not contest the competency of plaintiffs' counsel. (Docket No. 66; Docket No. 67 at 10). Accordingly, the plaintiffs satisfy the second criterion of adequate representation and have, therefore, demonstrated that adequate representation exists in this case.

B. *The proposed class meets the requirements of Rule 23(b)(1) and (2).*

Having found that the plaintiffs have demonstrated the existence of each Rule 23(a) prerequisite,[3] the court now must determine whether the plaintiffs' case also falls within at least one of the subcategories of Rule 23(b). *See In re Am. Med. Sys.*, 75 F.3d at 1079. The plaintiffs contend that the facts here mandate class certification under either subsection (b)(1) or (b)(2). Caterpillar opposes class certification, but asserts that, if the court decides to certify any class or subclass in this matter, the plaintiffs' claims should be certified only pursuant to Rule 23(b)(2) because the plaintiffs seek injunctive and declaratory relief applicable to the class as a whole. (Docket No. 66 at 3).

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[3] Indeed, Caterpillar does not dispute numerosity, commonality, the adequacy of class counsel, or the fulfillment of the prerequisites of Rule 23(b)(1). (Docket No. 66).

Rule 23(b)(1) provides that an action may be maintained as a class action if the above four requirements of Rule 23(a) are met and if "the prosecution of separate actions by or against individual members of the class would create a risk of" either one of the following:

> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]

Fed. R. Civ. P. 23(b)(1).

In the instant case, the plaintiffs assert that, if this action does not proceed as a class action, the surviving spouses could file a multitude of individual lawsuits in numerous jurisdictions challenging Caterpillar's actions. Varying decisions, at odds with one another, could result. Caterpillar could then be required to continue to pay the full cost of insurance for some and not others. This result is the very result Rule 23(b)(1) is intended to avoid. *See Fox v. Massey-Ferguson*, 172 F.R.D. 653, 665 (E.D. Mich. 1995)(where the prosecution of separate actions could lead to inconsistent adjudications which would fail to establish

congruous standards of conduct for Massey-Ferguson, certification under Rule 23(b)(1) was appropriate). As explained by the court in *Massey-Ferguson*:

> If each retiree [or surviving spouse] separately adjudicated his or her claim, different results are inevitable, especially considering the fact that the retirees reside in different states. This would lead to the obvious conclusion that [the defendant] could prevail in some cases and lose in others which, in turn, would lead to inconsistent and, perhaps, inequitable results. Moreover, adjudications with respect to individual members could substantially impair the interests of those persons who are not parties to this lawsuit.

172 F.R.D. at 665. The court agrees with the plaintiffs. Absent class certification, if over 400 surviving spouses file individual lawsuits to challenge Caterpillar's modifications to their health insurance benefits, Caterpillar likely would face "incompatible standards of conduct paying the full-costs of benefits for some but not others." *Reese*, 227 F.R.D. 483, 489 (certifying class under Rule 23(b)(1) where retirees claimed the defendant violated ERISA and LMRA in denying retirement healthcare benefits). The court finds that, because of the risk of inconsistent judgments, certification is appropriate under Rule 23(b)(1).

Rule 23(b)(2) authorizes "mandatory" class actions under which potential class members do not have an automatic right to notice or a right to opt out of the

class. *See Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 645 (6th Cir. 2006). Certification under this rule is appropriate where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Fed. R .Civ. P.* 23(b)(2). In other words, class actions may be maintained under this rule when the primary relief sought is injunctive or declaratory. *See id.* advisory committee's note (noting that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages").

Here, the plaintiffs seek injunctive and declaratory relief to end Caterpillar's modifications to their health care benefits. Caterpillar's actions in this regard "affected the entire proposed class," making equitable relief appropriate. *See Fox v. Massey-Ferguson, Inc.*, 172 F.R.D. at 665 (granting certification under Rule 23(b)(1) and (b)(2)). The plaintiffs' request for declaratory and injunctive relief predominates over any monetary relief which may also be available.

Caterpillar concedes that the court could certify a class under Rule 23(b)(2) because the plaintiffs' "primary request for relief is injunctive and declaratory in nature--they ask the Court to declare that their rights to free lifetime retiree medical benefits were 'vested' and could not be changed, and restoration to that status." (Docket No. 66 at 15). Accordingly, the court finds that certification under Rule 23(b)(2) as well as (b)(1) is appropriate.

Rule 23(c)(1)(B) provides that, once a class is certified, the court must enter an order that "define[s] the class." Rule 23(c)(1)(C) further provides that an order defining the class may be thereafter further refined, altered, or amended. If necessary, the court can alter, amend, or further refine the class at a later time.

IV. Conclusion

For the reasons explained herein, the plaintiffs' motion for class certification (Docket No. 60) will be GRANTED.

An appropriate order will enter.

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

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

Case No. 3:06-cv-01113
District Judge Trauger
Magistrate Judge Brown

Class Action

[Filed July 12, 2007]

JUDITH K. KERNS, MARCIA NALLEY, and SANDRA L. STEWART, on behalf of themselves and a similarly situated class,	)
Plaintiffs,	)
v.	)
CATERPILLAR, INC.,	)
Defendant.	)

ORDER

For the reasons expressed in the accompanying Memorandum, the plaintiffs' motion for class certification (Docket No. 60) is GRANTED. The court certifies a class, pursuant to Rule 23(b)(1) and (2), consisting of the following:

> surviving spouses of former hourly employees: (1) who were represented by the UAW in collective bargaining; (2) who retired from Caterpillar on or after March 16, 1998 and before January 10, 2005; and (3) whose employment at Caterpillar's facilities in Memphis, TN, York, PA, Denver, CO, and Aurora, Peoria, East Peoria, Mapleton, Mossville, Morton, Decatur and Pontiac, IL was governed by the Central Labor Agreements and the related collective bargaining agreements. Any person who is presently the spouse of a living retiree cannot be a class member at this time.

The named plaintiffs are hereby designated as class representatives, and the plaintiffs' counsel is designated as class counsel.

It is so ordered.

Entered this 12th day of July 2007.

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

APPENDIX L

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

Case No. 3:06-cv-01113
District Judge Trauger
Magistrate Judge Brown

Class Action

[Filed June 27, 2007]

JUDITH K. KERNS, MARCIA NALLEY, and SANDRA L. STEWART, on behalf of themselves and a similarly situated class,	)
Plaintiffs,	)
v.	)
CATERPILLAR, INC.,	)
Defendant.	)

MEMORANDUM

Currently pending before the court is a motion to dismiss by the defendant (Docket No. 42), the plaintiffs' response thereto (Docket No. 50), and the defendant's

reply to that response (Docket No. 56). For the reasons explained herein, the defendant's motion will be DENIED.

I. Introduction

This is an action for vested lifetime health care benefits. The plaintiffs are surviving spouses of former employees of Caterpillar, Inc. ("Caterpillar") who retired on or after March 16, 1998 and before January 10, 2005. According to the plaintiffs, this lawsuit was precipitated by Caterpillar's announcement in 2005 that, beginning in 2006, class members would be required to pay monthly premium sharing co-payments and that, effective in 2006, 2008, and 2010, Caterpillar was modifying the health care benefits, including making a series of increases to the prescription drug co-payments and imposing new deductibles and annual out-of-pocket maximums paid by the class.

On April 13, 2006, the plaintiffs filed this action in the Western District of Tennessee (W.D. Tenn. Case No. 2:06-cv-2213). On September 29, 2006, the defendant filed a motion to dismiss. (W.D. Tenn. Docket No. 31). On November 9, 2006, the defendant filed a motion to transfer the case to the Central District of Illinois. (W.D. Tenn. Docket No. 36).

The Honorable Jon Phipps McCalla denied the defendant's motion to transfer by order entered November 9, 2006, and transferred the case to the Middle District of Tennessee, where a companion case, *Winnett v. Caterpillar, Inc.*, 3:06-cv-00235, is pending.[1]

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[1] The *Winnett* case has not been consolidated with the instant case.

(W.D. Tenn. Docket No. 39). On November 30, 2006, the plaintiffs filed their response in opposition to the defendant's motion to dismiss. (Docket No. 50).

The plaintiffs seek relief under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and under § 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, from the defendant Caterpillar for breach of a collective bargaining agreement ("CBA") and a welfare benefit plan.

The defendant provided health care benefits for the plaintiffs' spouses and the class pursuant to successive CBA's with the United Auto Workers ("UAW"). According to the plaintiffs, the parties to the CBA's intended for these health care benefits for surviving spouses to vest and to continue beyond the expiration of any particular contract. The plaintiffs claim that the defendant breached its promise to pay lifetime health benefits to surviving spouses at no cost when, in 2005, Caterpillar began charging surviving spouses for a portion of their medical care. The plaintiffs also complain they were charged increased co-payments for prescription drugs and other out-of-pocket expenses.

The plaintiffs seek declaratory judgment, preliminary and permanent injunctive relief requiring Caterpillar to maintain the level of health care benefits as required by the terms of the 1998 CBA, an order for the defendant to pay damages, plus interest, to the class for any losses suffered, an order for the defendant to pay damages for mental distress and anguish, an award of attorney's fees, punitive damages and costs, and any further relief. The plaintiffs also seek to

represent a putative class under Federal Rule of Civil Procedure 23(a) and (b) consisting of surviving spouses of former hourly employees: (1) who were represented by the UAW in collective bargaining; (2) who retired from Caterpillar on or after March 16, 1998 and before January 10, 2005; and (3) whose employment at Caterpillar's facilities in Memphis, TN, York, PA, Denver, CO, and Aurora, Peoria, East Peoria, Mapleton, Mossville, Morton, Decatur and Pontiac, IL was governed by the Central Labor Agreements and the related CBA's. (Docket No. 60 at 1-2).

In its motion to dismiss, Caterpillar contends that the court lacks subject matter jurisdiction over the plaintiffs' LMRA and ERISA claims. (Docket No. 43 at 11-16). In addition, Caterpillar contends that the plaintiffs cannot maintain an action on behalf of a hypothetical group of "future" surviving spouses that cannot be readily identified. (Docket No. 43 at 16-18). Caterpillar also contends that the claims of current surviving spouses--i.e., those who became surviving spouses while the 1998 labor contracts were in effect--are moot. (Docket No. 43 at 18-20). Therefore, Caterpillar concludes, this case should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

In response, the plaintiffs assert that the court has subject matter jurisdiction over this suit; the plaintiffs' rights and the rights of the proposed class members vested under the 1998 Central Labor Agreement ("CLA") and previous contracts, regardless of the expiration of the 1998 agreements and regardless of the date the retiree died; that their proposed class consists only of present surviving spouses; and that the claims

of those surviving spouses are not moot. (Docket No. 80).

II. Facts

The facts are taken from the parties' briefs filed in connection with Caterpillar's motion to dismiss as well as those briefs submitted in connection with the plaintiffs' motion for class certification, the evidence submitted in support of those briefs, and the Amended Complaint. Where facts are disputed, the court so notes.

A. *The Caterpillar-UAW Collective Bargaining Relationship*

The Caterpillar-UAW bargaining relationship began with the UAW's 1948 certification as the union for Caterpillar employees in East Peoria, Illinois. *(*Aff. of David W. Stevens, ¶ 8, Docket No. 44). Over time, Caterpillar's UAW bargaining relationship expanded to include employees at multiple facilities, primarily in Illinois. *(Id.,* ¶¶ 9-10). Eventually, Caterpillar and the UAW agreed to engage in multi-plant bargaining for most Caterpillar UAW-represented employees. (*Id.* ¶ 9). This came to be known as "Central Bargaining," and the resulting labor contracts included a CLA, and related local agreements and benefits agreements. *(Id.)*

During the parties' nearly 60-year collective bargaining relationship, Caterpillar and the UAW have negotiated a series of labor contracts governing the terms and conditions of employment for the company's UAW-represented employees, including their retiree benefits. (*Id.*, ¶ 11). As part of their bargaining relationship, the parties also have historically

negotiated changes in the benefits for existing retirees and their spouses, which have been uniformly acquiesced in by retirees, their dependents, and surviving spouses. (*Id.*)

B. *Pre-1988 CLAs and SPDs*

Historically, medical benefits for retirees' surviving spouses have not been set forth in the CLA's themselves, but in separate Insurance Plan Agreements ("IPA's") and attached Group Insurance Plans ("GIP's"). These benefits were also described in the SPD's. (Ex. 3 to Docket No. 50, Aff. of James Richard Atwood at 6-9). According to James Richard Atwood, who is the administrative assistant to UAW International Vice President and Director and of the Ag Imp Department with respect to all matters relating to Caterpillar negotiations and contract administration, over the decades, these negotiated agreements and plans set forth a vested right to lifetime health care benefits for surviving spouses. (*Id.* ¶¶ 18, 21).

Section 5.15 on page 25 of the "1976 CLA Insurance Plan Agreement and Group Insurance Plan for 12/17/1976 (effective on the Monday following ratification) until 10/1/1979 CLA" ("1976 IPA") provides as to surviving spouses:

> [S]uch Dependents' Coverage will be continued following the death of a retired Employee for the remainder of his surviving spouse's life without cost.

(Ex. 10 to Docket No. 50). Section 6.2(c) on page 40 of the 1976 IPA provides as to surviving spouses:

> [S]uch Dependents' Coverage for any such surviving spouse . . . will continue in effect . . . for the remainder of her life without cost.

(*Id.*)

Section 5.15 on page 26 of the "1979 Benefit Plans and Agreements, UAW and Local 974 Insurance Program, Retirement Plan and Supplemental Unemployment Benefit Plan" ("1979 IPA") provides as to surviving spouses:

> [S]uch Dependents' Coverage will be continued following the death of a retired Employee for the remainder of his surviving spouse's life without cost.

(Ex. 4 to Docket No. 50). Section 6.2(c) on pages 45-46 of the 1979 IPA provides as to surviving spouses:

> [S]uch Dependents' Coverage for any such surviving spouse . . . will continue in effect . . . for the remainder of her life without cost.

(*Id.*)

C. *The 1988-91 Insurance Benefits*

1. *The 1988 IPA and GIP*

The 1988 CLA, like the preceding CLA's, did not contain any language substantively providing or incorporating by reference any health insurance benefits, including retiree health care. (Aff. of David W. Stevens, ¶ 12, Docket No. 44). Rather, such benefits

were set forth in the 1988 IPA between Caterpillar and the UAW, along with the appended 1988 GIP. *(Id.,* ¶ 12, Exs. 1-2). The 1988 IPA was effective by its terms until October 1, 1991. (*Id.*, ¶ 12, Ex. 1, § 9.) Pursuant to Section 2 of the 1988 IPA, Caterpillar agreed to "continue to maintain for eligible Employees the Group Insurance Plan which was in effect on the day preceding the date…" of the 1988 IPA, subject to the amendments outlined in the 1988 IPA. *(Id.,* ¶ 12, Ex. 1, § 2.) The 1988 IPA further provided that the "provisions of the Group Insurance Plan as in effect on September 30, 1988, shall continue in effect until amended pursuant to the foregoing and thereafter to the extent not amended pursuant to the foregoing." *(Id.,* ¶ 12, Ex. 1, § 3.) It further provided: "Termination of this Agreement shall not have the effect of automatically terminating the Plan." (*Id.*, Ex. 1, § 9).

Section 2.1 of the 1988 GIP provided that Caterpillar would "maintain the Plan herein described…" and would "pay such part of the cost thereof as is not provided by Employee contributions…." *(Id.,* ¶ 12, Ex. 2, § 2.1). Section 5 of the 1988 GIP set forth provisions regarding active and retiree health care. *(Id.,* ¶ 12, Ex. 2, § 5.) As is relevant to this case, paragraph 5.1 provided that:

> A benefit shall be provided in accordance with this Section only for an Employee, while coverage for such benefit is in effect with respect to him, or a Dependent of an Employee, while Dependents' Coverage for such benefit is in effect with respect to such Employee. Benefits in accordance

> with this Section will be provided by his Employer without cost to the Employee except as otherwise provided in paragraph 6.1(a) *[Termination of Coverage]*….

(Id., ¶ 12, Ex. 2, § 5.1.).

With respect to retirees and surviving spouses, Section 5.15 on page 32 of the 1988 GIP provided:

> Retired Employees who satisfy the requirements hereinafter set forth shall be entitled to the same benefits provided in this Section V as if they were Employees. Coverage in accordance with this paragraph 5.15 shall be provided without cost to any such retired Employee. Such benefits to the extent provided in this paragraph 5.15 will be provided after his retirement from active service for a retired Employee if he has at least 5 years of credited service under the Non-Contributory Pension Plan at his retirement and is eligible for the immediate commencement of a monthly pension under the Non-Contributory Pension Plan or would be eligible for such immediate commencement but for his election to defer commencement of his pension. Coverage shall take effect on his retirement date….
>
> * * *

> Dependents' Coverage shall be in effect in accordance with this paragraph 5.15 while Personal Coverage is in effect with respect to (a) all Dependents of a retired Employee who were covered hereunder on the day preceding his retirement and (b) any person who becomes a Dependent after the retirement of a retired Employee if such retired Employee either was covered for Dependents' Coverage prior to retirement or had no Dependents prior to retirement, and **such Dependents' Coverage will be continued following the death of a retired Employee for the remainder of his surviving spouse's life without cost**. For purposes of this paragraph 5.15 only, the terms "Employee" and "Employee's", wherever appearing in other sections hereof, shall be deemed to read "retired Employee" and "retired Employee's", respectively.

(Id., ¶ 12, Ex. 2, ¶ 5.15)(emphasis added). Section 6.2(c) on page 56 provides as to surviving spouses:

> [S]uch Dependents' Coverage for any such surviving spouse . . . will continue in effect . . . for the remainder of her life without cost.

(*Id.*)

2. *The 1988 SPD*

In addition to the above documents, UAW-represented employees were provided with a SPD (the "1988 SPD"). *(Id.,* ¶ 13, Ex. 3.) According to Caterpillar, as active employees during the term of the 1988 labor contracts, all of the named plaintiffs or their Caterpillar spouses would have received the 1988 SPD. *(Id.,* ¶ 13.) With respect to retiree medical benefits, the 1988 SPD advised active employees:

> If you retire and are eligible for the immediate receipt of a pension (with at least 5 years of credited service) under the Non-Contributory Pension Plan, you will be eligible for the Retired Medical Benefit Plan, continued at no cost to you.

(Id., ¶ 13, Ex. 3, p. 38.)

With respect to surviving spouse health insurance, the 1988 SPD stated:

> If an active employee dies when eligible to retire or if a retired employee dies, the surviving spouse will have coverage for his or her lifetime at no cost to the survivor.

(Id., ¶ 13, Ex. 3, p. 36.)

Finally, the 1988 SPD contained the following "Plan Termination Provisions":

> Subject to the applicable collective bargaining agreements, the company reserves the right to terminate the

> employee benefit Plans. A Plan termination may result in the denial or loss of benefits that a participant or beneficiary might otherwise expect to receive.
>
> * * *
>
> **Insurance**
>
> If the Insurance Plan were to terminate, medical benefits would be payable only for services or materials received, and hospital confinements which commenced, prior to the date of termination; and disability benefits would be payable only for disabilities that commenced prior to such date.

(Id., ¶ 13, Ex. 3, p. 98.)

D. *Expiration of the 1988 Labor Contracts and the 1992 Unilateral Implementations*

Prior to the expiration of the 1988 labor contracts, both Caterpillar and the UAW gave notice in July 1991, pursuant to Section 8(d) of the National Labor Relations Act, of their intent to terminate and negotiate modifications to the 1988 labor contracts, including the 1988 IPA. *(Id.,* ¶ 14, Exs. 4-5.) Thereafter in the fall of 1991, Caterpillar and the UAW commenced negotiations. *(Id.,* ¶ 15.) A labor dispute quickly emerged regarding acceptable terms for the successor agreements. *(Id.)* Caterpillar's proposals included, *inter alia*: (a) the introduction of a health care network, whereby active employees and retirees within

a covered area would be required to receive services from an "in-network" provider, or else pay a defined percentage of the cost of the services; and (b) monetary limits or "caps" on the amounts Caterpillar would pay for future retiree health coverage. *(Id.,* ¶ 16.) Caterpillar and the UAW provided information regarding these proposals to represented employees. *(Id.,* ¶ 17, Exs. 6-7.)

On September 28, 1991, Caterpillar and the UAW agreed to extend the 1988 labor contracts. *(Id.,* ¶ 18.) This extension continued until midnight on November 3, 1991, when the UAW canceled the extension, terminated the 1988 labor contracts, and commenced a selective strike at certain CLA facilities.[2] *(Id*.)

By letter dated March 5, 1992, Caterpillar advised the UAW that it believed the parties' negotiations were at a legal impasse. *(Id.,* ¶ 20.) Thereafter, by letters dated March 31, 1992, Caterpillar advised the UAW and its UAW-represented employees that, effective April 6, 1992, the Company would unilaterally implement portions of its final contract offer. (*Id.*, ¶ 20, Exs. 9-10.) The terms to be implemented included the

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[2] The only exception was at those CLA facilities covered by a separate agreement negotiated by Caterpillar and the UAW called the Caterpillar Logistics Services ("CLS") Agreement. *(Id.,* ¶ 19, Ex. 8.) The CLS Agreement continued the 1988 labor contracts for CLA employees working at a facility covered by the CLS Agreement until after the parties negotiated a successor labor agreement. *(Id.,* ¶ 19, Ex. 8, p. 5.) The record does not reflect at this time whether any members of the proposed Kerns class bear any relationship to the CLS Agreement.

health care network provisions applicable to active and retired employees. *(Id.,* ¶ 20.)

E. *The UAW's Response to Caterpillar's Implementation*

In response to Caterpillar's announcement, the UAW expanded the work stoppage it had commenced in November 1991. *(Id.,* ¶ 21.) The UAW, disagreeing that Caterpillar had the right to institute new terms of employment, also filed unfair labor practice charges with the NLRB, alleging that Caterpillar's unilateral action violated § 8(a)(5) of the NLRA because no lawful impasse existed in the parties' negotiations. *(Id.,* ¶ 21.) The NLRB investigated the UAW's allegations and determined the charges had no merit. *(Id.)* Caterpillar then was entitled to declare and unilaterally implement its proposed changes. The UAW then withdrew the charges. (*Id.*, ¶ 21.)

While the UAW's charges were pending, it announced on April 14, 1992 that it was recessing its work stoppage against Caterpillar and ordering its members back to work. *(Id.,* ¶ 22.)[3]

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[3] Relying on the Seventh Circuit's decision in *McNealy v. Caterpillar Inc.,* 139 F.3d 1113, 1120-23 (7th Cir. 1998), the defendant contends that the UAW's action in this regard created an implied-in-fact successor labor contract that included the terms Caterpillar implemented in 1992. However, the plaintiffs argue that that decision was subsequently vacated by a 2000 NLRB ruling. (Docket No. 113 at 6).

F. *Caterpillar's Second Unilateral Implementation*

After the UAW recessed its strike and UAW-represented employees returned to work under Caterpillar's implemented terms, the parties continued to negotiate over the terms of successor labor contracts. *(Id.,* ¶ 23.) These negotiations during the remainder of 1992 did not produce an agreement. *(Id.)* Accordingly, by letter dated November 20, 1992, Caterpillar advised the UAW that, effective December 1, 1992, it would unilaterally implement additional provisions of its final offer, including the above-described caps on the amount Caterpillar would pay for future retiree health coverage for post-January 1, 1992 retirees. *(Id.,* ¶ 24; Ex. 11.) A summary of these changes was sent to all UAW-represented employees and affected retirees. *(Id.,* ¶ 25; Ex. 12-13.) Unlike the April 1992 implementation, the UAW did not file charges with the NLRB or otherwise seek to challenge the December 1992 implementation. *(Id.,* ¶ 26.)

Caterpillar's 1992 unilaterally implemented benefit plans documents set forth new provisions in Section 5.15 as to retirees who retire after January 1, 1992, and then set forth the old, prior lifetime language for surviving spouses:

> Effective for Employees retiring on and after January 1, 1992, the Company's maximum average annual cost per covered individual for retiree medical benefits . . . commencing January 1, 1999 shall be limited to the average annual cost per covered individual in 1997 projected to 1999.

***

> Retiree contributions toward coverage in each year after 1998 will be equal to the average annual cost per covered individual . . . in the second prior year . . . projected forward 2 years minus the limit on the Company's cost described above.

***

> [S]uch Dependents' Coverage will be continued following the death of a retired Employee for the remainder of his surviving spouse's life without cost.

(§ 5.15, pp. 37-38 of Ex. 6 to Docket No. 50). Section 6.2(c) on pages 68-69 provides as to surviving spouses:

> [S]uch Dependents' Coverage for any such surviving spouse . . . will continue in effect . . . for the remainder of her life without cost.

(Ex. 6 to Docket No. 50).

G. *The 1998 CLA and Establishment of the VEBA*

Caterpillar and the UAW continued negotiations until March 1998, at which time they reached agreement on comprehensive successor labor contracts that incorporated, *inter alia*, the unilaterally implemented retiree health care provisions described above (i.e., the networks and the caps). *(Id.,* ¶ 27.) Like the 1988 CLA, the new 1998 CLA did not contain any health insurance provisions. *(Id.*) Rather, the parties agreed to a new IPA (the "1998 IPA") with appended

GIP (the "1998 GIP) that contained the amended provisions. *(Id.,* ¶ 27, Exs. 14-15.) The 1998 labor contracts were ratified by Caterpillar's UAW-represented active employees, including the employee-spouses through whom the named plaintiffs derived their benefits as dependents. (*Id.* ¶¶ 24-25).

The 1998 IPA was effective by its terms until April 1, 2004. (Ex. to Docket No. 50, § 9.) The 1998 IPA further provided that the "provisions of the Group Insurance Plan as in effect on September 30, 1991, shall continue in effect until amended pursuant to the foregoing and thereafter to the extent not amended pursuant to the foregoing." *(Id.* § 3.) It further provided: "Termination of this Agreement shall not have the effect of automatically terminating the Plan." (*Id.* § 9).

Pursuant to Section 2 of the 1998 IPA, Caterpillar would "maintain the Plan herein described…" and would "pay such part of the cost thereof as is not provided by Employee contributions…." *(Id.* § 2.1).

Under Section V, entitled "Medical Expense Benefits," Section 5.1 on page 38 of the 1998 IPA and GIP provides:

> A benefit shall be provided in accordance with this Section only for an Employee, while coverage for such benefit is in effect with respect to such Employee. Benefits in accordance with this Section will be provided to such Employee, retired Employee, and Dependents thereof for the

> duration of any Agreement to which this Plan is a part.

(Ex. 7 to Docket No. 50).

Section 5.15 on page 59 of the 1998 IPA and GIP provides the same language as before the 1992 unilateral implementations:

> [S]uch Dependents' Coverage will be continued following the death of a retired Employee for the remainder of his surviving spouse's life without cost.

(Ex. 7 to Docket No. 50). Section 6.2(c) on page 104 provides as to surviving spouses:

> [S]uch Dependents' Coverage for any such surviving spouse . . . will continue in effect . . . for the remainder of her life without cost.

(*Id.*)

Concurrent with the above agreements, Caterpillar and the UAW also agreed to contribute approximately $35 million in funds previously accrued for active employees under the 1988 CLA to a voluntary employee benefits association[4] ("VEBA"). *(Id.,* ¶ 30, Exs. 18-19.) The VEBA was independent of Caterpillar

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[4] *See* 26 U.S.C. § 501(c)(9) (VEBA is a tax-exempt program providing to members, their dependents, or designated beneficiaries life, sick, accident, or other benefits "if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual.").

and was created to pay expenses incurred by post-January 1, 1992 covered retirees and their dependents, over and above the caps implemented by Caterpillar in 1992. *(Id.,* ¶¶ 30-31, Ex. 20.) Beyond agreeing to the redistribution of this money, Caterpillar made no promise to provide any additional or future funding to the VEBA. *(Id.,* ¶ 30.)

H. *The 2004 Labor Contracts*

By the time the 1998 labor contracts were nearing expiration, the money Caterpillar and the UAW had agreed to contribute to the VEBA was almost completely depleted. *(Id.,* ¶ 32.) Accordingly, by letters dated December 2, 2002, September 2, 2003 and July 9, 2004, post-1991 retirees were advised that, consistent with the terms of the 1998 IPA and GIP, if and when the money in the VEBA was exhausted, the retirees could or would have to begin paying premiums in the amount of health care coverage costs that exceeded the caps. *(Id.,* ¶ 32; Exs. 21-23.)

During this same time period, Caterpillar and the UAW commenced negotiations over successor labor contracts and eventually agreed upon terms of successor labor contracts on December 15, 2004. *(Id.,* ¶ 33.) Once again, their agreement included an IPA (the "2004 IPA") and a GIP (the "2004 GIP"). *(Id.)* In pertinent part, Caterpillar and the UAW agreed that, rather than having retirees pay 100 percent of the costs of retiree health insurance above the caps (as had been previously established in 1992 and allegedly ratified in 1998), on a going forward basis, Caterpillar would share in the "above the cap" costs on a 40/60 basis. *(Id.)*

For the first time, the lifetime language for surviving spouses was absent from Section 5.15, which became Section 5.30(b) at pages 71-72, and Section 6.2(c), which became Section 6.2(b) at page 81. (Ex. 1 to Docket No. 50, Aff. of James Richard Atwood). Under new Sections 5.31 and 5.32 at pages 72-76, there were new deductibles, co-insurance, out-of-pocket maximums and related changes. (*Id.*) The prescription drug co-payments were increased in Section 5.11(c) at pages 41-42 to $5/$20/$35.[5] (*Id.*)

I. *Caterpillar's Alleged 2005 Modifications to the Health Care Benefits and Communications with the Class*

On October 10, 2005, Caterpillar sent the class letters stating that:

> This letter is to update you on some of the benefit items that impact you as a result of the bargaining agreement signed by Caterpillar Inc. and the United Auto Workers (UAW) effective January 10, 2005.
>
> The agreement provides that survivors ... will pay healthcare premiums effective February 1, 2005. Since the agreement

[5] According to the plaintiffs and disputed by Caterpillar, under the 2004 IPA and GIP (effective January 10, 2005) the new $5/$20/$35 prescription drug co-payments were to take effect on January 1, 2006 only for retirement dates on or after January 10, 2005, and not before. (Docket No. 50 at 8 n.6). The plaintiffs contend that Caterpillar unlawfully applied the changes to class members whose deceased spouses retired prior to January 10, 2005. (*Id.*)

> went into effect, we have taken the time to verify our records. We have delayed healthcare premiums to ensure that we charge correctly.
>
> ***
>
> If you choose to maintain your medical coverage, healthcare premiums will start effective January 1, 2006. You will not be required to pay premiums retroactively from February 1, 2005 through December 31, 2005. You will receive a premium invoice directly in the mail in January or, if applicable, the premium will be deducted from your February 1, 2006 pension check for January coverage. In early November, you will receive an enrollment kit with a Personal Fact Sheet from Fidelity acknowledging your new premium rates. Your new premium rates are as follows: [listing various monthly premium sharing co-payments of $87, $174, $170, $83 and $166].

(Ex. 3 to Docket No. 50). The defendant sent Sandra Stewart letters announcing that in order to keep her health care benefits, beginning in January 2006, she would have to pay $87 per month (see Pls.' Exs. 2-3, 6/17/2006 Affidavit of Sandra Stewart with attachments, including Caterpillar 10/10/2005 and 11/14/2005 letters to Stewart). For 6 months in 2006 (January until June), Caterpillar deducted $87 per month from the survivor pension benefit for Sandra Stewart for this monthly premium sharing payment

(sees Pls.' Ex. 2-3, earning statement dated February 1, 2006, showing a monthly deduction of $87).

In late 2005, Caterpillar sent out enrollment packets to class members, again listing monthly premium sharing co-payments for class members to pay in 2006 (see Pls.' Ex. 3, November 14, 2005 Caterpillar mailing to Stewart).

In February 2006, Caterpillar began deducting $87 per month for Sandra Stewart's coverage beginning in January (see Pls.' Exs. 2-3). Caterpillar deducted $87 each month for 6 months and later refunded those monies to her.

On March 29, 2006, Caterpillar sent a letter to Class members (see Pls.' Ex. 3) stating:

> You received a letter dated October 10, 2005 regarding healthcare premiums to begin on January 1, 2006. The letter indicated that you would begin paying the retiree premium for your healthcare coverage. There has been a delay in the collection of this premium. As a result, the premium will begin effective April 1, 2006 for healthcare coverage during that month. You will not be required to pay premiums retroactively. You will receive a premium invoice directly in the mail in April, which will be due May 1 or, if applicable, the premium will be deducted from your May 1, 2006 pension check for April coverage. Your new premium rates are as follows: [listing various coverages

> in 2006 for $87, $174, $170, $83 and $166 per month].

The plaintiffs filed this lawsuit on April 13, 2006. Within a few days, on April 17, 2006, Caterpillar sent class members a letter (see Pls.' Exs. 2-3) stating:

> You were previously informed that Caterpillar would begin collecting retiree premiums for healthcare coverage (in letters dated October 10, 2005 and March 29, 2006). To date, you have not been charged while Caterpillar evaluated other options regarding your healthcare premiums. As a result of this review, Caterpillar has elected to waive your healthcare premiums. You will not be charged a premium for healthcare coverage.

(Id., ¶ 34; Ex. 24.) All affected surviving spouses were so advised and, to date, they have not been charged any premiums. *(Id.,* ¶ 34).

J. *The Named Plaintiffs*

Plaintiff Kerns is the surviving spouse of former Caterpillar employee Jerome Kerns. (*Id.* ¶ 33). Mr. Kerns retired from Caterpillar in September 1998 and died in June 2002. (*Id.*) Plaintiff Nalley is the surviving spouse of former Caterpillar employee Bernard Nalley. (*Id.*) Mr. Nalley retired from Caterpillar in September 1998 and died in May 2003. (*Id.*) Plaintiff Stewart is the surviving spouse of former Caterpillar employee Elmer Stewart. (*Id.*) Mr. Stewart never retired from

Caterpillar; rather, he died in June 2004 while on long-term disability leave. (*Id.*)

III. Standard of Review

The defendant has brought this motion pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). When a defendant attacks subject matter jurisdiction under Rule 12(b)(1), the plaintiff must meet the burden of proving jurisdiction. *Golden v. Gorno Bros., Inc.,* 410 F.3d 879, 881 (6th Cir. 2005). In addition, the district court is empowered to resolve factual disputes when necessary to resolve challenges to subject matter jurisdiction. *United States v. Ritchie,* 15 F.3d 592, 598 (6th Cir. 1994), *cert. denied,* 513 U.S. 868, 115 S. Ct. 188, 130 L.Ed.2d 121 (1994). In so doing, the court may consider evidence outside the pleadings, and the record may be supplemented by affidavits. *Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003); *Rudd v. Baker Furniture*, 967 F. Supp. 984, 989 (M.D. Tenn. 1997). The court can do so without converting the Rule 12(b)(1) motion into a motion for summary judgment. *Rudd*, 967 F. Supp. at 989 (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)).

IV. Analysis

A. *The court has jurisdiction over the plaintiffs' Section 301 LMRA claims***.**

Caterpillar contends that the court lacks jurisdiction to decide the plaintiffs' Section 301 LMRA claims for benefits that allegedly arose under an expired or superseded labor contract. According to the defendant, the plaintiffs ground their claims in the

1998 IPA and appended GIP, and because that contract expired in April 2004 and was superseded by subsequent labor contracts, the court lacks jurisdiction over the plaintiffs' LMRA claims. In support of its position, Caterpillar cites *Bauer v. RBX Indus., Inc.*, 368 F.3d 569, 579 n.5 (6th Cir. 2004)("a federal court does not have jurisdiction to hear a § 301 claim premised upon an expired or superseded contract"); *Heussner v. Nat'l Gypsum Co.*, 887 F.2d 672, 676 (6th Cir. 1989)(same); and *Adcox v. Teledyne, Inc.*, 21 F.3d 1381 (6th Cir. 1994)(same).

However, the facts of the cases relied on by the defendant to support its contention that the court lacks subject matter jurisdiction are distinguishable. In *Heussner*, the plaintiffs sought to collect benefits accruing after the expiration of a CBA, on the theory that the successor agreement was entered into invalidly. 887 F.2d at 677. The Sixth Circuit determined that the district court lacked jurisdiction under § 301(a) over questions of the validity of collective bargaining contracts. *Id.* In *Bauer*, which involved a hybrid § 301 claim (unlike the instant case), the union reached a settlement that abrogated the previous CBA and extinguished benefits that had been provided by the prior CBA. 368 F.3d at 579. The Sixth Circuit held that: "The only contract in existence . . . was the Settlement. The Plaintiffs do not allege that RBX breached the Settlement, and to the extent they argue the Settlement was invalid, '[d]istrict courts do not . . . possess subject matter jurisdiction under Section 301(a) in cases concerning the validity of a contract.'" *Id.* at 578-79. The court specifically rejected the plaintiffs' claim that the benefits sought had vested

and thus could not have been affected by the settlement, "given that the terms of the Plans either specifically disclaim[ed] vesting or [were] silent on the issue." *Id.* at 584. *Adcox* involved a hybrid § 301 claim of "special distribution" benefits that did not vest before they were abolished by a successor contract, which the plaintiffs challenged as invalid. 21 F.3d 1381. The Sixth Circuit found that the district court had properly determined that it lacked jurisdiction to entertain a challenge under § 301 to validity of a CBA that had been superseded by a settlement agreement. *Id.* at 1388-89.

In this case, the plaintiffs seek to collect benefits that they claim accrued or vested *before* the CBA's expiration in April 2004. Thus, unlike the plaintiffs in *Heussner*, *Bauer*, and *Adcox*, the instant plaintiffs do not challenge the validity of any CBA or related agreement. Neither do the plaintiffs seek to modify any CBA or related agreement. Instead, these plaintiffs contend that the benefits they seek vested before ratification of a new contract, and thus survived. *See Int'l Union UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479-80 (6th Cir. 1983)("In settling a claim for vested benefits, the retiree does not modify the collective bargaining agreement."). *Heussner*, *Bauer*, and *Adcox,* then, are not controlling.

Section 301(a) of the LMRA provides federal jurisdiction over claims alleging breach of a CBA. 29 U.S.C. § 185(a); *see Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1293 (6th Cir. 1991); *Adcox*, 21 F.3d at 1385; *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. UAW*, 523 U.S. 653, 656-57, 118 S. Ct. 1626,

1678-79 (1998). Although a retiree health care benefit plan constitutes a welfare benefit plan under ERISA, 29 U.S.C. § 1001 *et seq*., unlike pension benefit plans, retiree health care benefit plans are not subject to mandatory vesting requirements. *Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 914 (6th Cir. 2000). If lifetime health care benefits exist for the plaintiffs, it is because the UAW and Caterpillar agreed to vest a welfare benefit plan. *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 654 (6th Cir. 1996); *see also Boyer v. Douglas Components Co.,* 986 F.2d 999, 1005 (6th Cir. 1993).

If a welfare benefit has not vested, "'after a CBA expires, an employer generally is free to modify or terminate any retiree medical benefits that the employer provided pursuant to that CBA.'" *Bittinger v. Tecumseh Prods. Co.,* 83 F. Supp.2d 851, 857 (E.D. Mich.1998) (quoting *Am. Fed'n of Grain Millers v. Int'l Multifoods,* 116 F.3d 976, 979 (2d Cir. 1997)). If a welfare benefit has vested, the employer's unilateral modification or reduction of those benefits constitutes a LMRA violation. *Maurer,* 212 F.3d at 914; *Yolton v. El Paso Tenn. Pipeline Co.,* 435 F.3d 571, 578 (6th Cir. 2006).

"If benefits have vested, then retirees must agree before the benefits can be modified, even by a subsequent CBA between the employer and active employees." *Maurer*, 212 F.3d 907, 918. "If the parties intended to vest benefits and the agreement establishing this is breached, there is an ERISA violation as well as a LMRA violation." *Maurer*, 212 F.3d at 914 (citation omitted). Whether the parties to a CBA provided for health insurance benefits for

retirees that would vest upon eligibility for retirement is a question of the intent of the parties. *See Yard-Man*, 716 F.2d at 1476. Therefore, the plaintiffs' claims require us to interpret the CBA, and the suit is properly before the court under Section 301 of the LMRA, 29 U.S.C. § 185.

B. *The court has jurisdiction over the plaintiffs' ERISA claims.*

The court's ruling as to jurisdiction over the plaintiffs' Section 301 LMRA claims does not automatically determine its ruling as to jurisdiction over the plaintiffs' ERISA claims because "the court's power to entertain the ERISA claims springs from a different statutory provision, as the court has jurisdiction over a § 1132(a)(1)(B) action pursuant to 29 U.S.C. § 1132(e)(1)." *Bauer*, 368 F.3d 569, 582 (finding that the court lacked jurisdiction over the plaintiffs' ERISA claims, and specifically rejecting the plaintiffs' claims that their welfare benefits had vested because the terms of the plans either specifically disclaimed vesting or were silent on the issue).

Precedents such as *Adcox*, *Heussner*, and *Bauer* dictate that federal courts have no power to hear an ERISA claim regarding a welfare benefit plan that has been superseded. *Bauer*, 368 F.3d at 584. However, the plaintiffs here assert that their rights to lifetime health benefits had vested contractually before termination of the CBA, and, therefore, the Union could not bargain them away and Caterpillar cannot now refuse to pay them. The same argument was made by the plaintiffs in *Adcox*. *See* 21 F.3d 1381, 1388-89. There, the court found that, because the benefits did not by the terms of

the governing contract vest, and the CBA had been superseded by a subsequent contract, the district court lacked jurisdiction under § 1132 to entertain a challenge to the first agreement's validity. *See id.* In the instant case, the plaintiffs contend that the pertinent language evidences an intent for their benefits to vest. The court has found that plaintiffs are not challenging the validity of any contract. Thus, as the court has jurisdiction over the instant plaintiffs' Section 301 LMRA claims, so does the court over the plaintiffs' ERISA claims under Sections 502(e) and (f) of ERISA, 29 U.S.C. § 1331.

C. *At this stage of the litigation, it would be premature for the court to rule on the merits as to whether the plaintiffs have a vested right in the lifetime health benefits they seek.*

The CBA's are contracts and, as a result, the court applies general principles of contract law to determine whether the retiree benefits sought in this case are vested. *Yard-Man*, 716 F.2d at 1479-80. *Yard-Man* recognized that parties to CBA's can agree to vest benefits that survive the termination of the agreement. *Id.* at 1479. Whether the benefits vest depends upon the intent of the parties. *Golden,* 73 F.3d at 654. "Courts can find that rights have vested under a CBA even if the intent to vest has not been explicitly set out in the agreement." *Maurer,* 212 F.3d at 915. In *Golden,* the Sixth Circuit clarified that, in determining the intent of the parties to a CBA, "basic rules of contract interpretation apply." *Golden,* 73 F.3d at 654.

Courts "should first look to the explicit language of the collective bargaining agreement for clear

manifestations of intent." *Yard-Man,* 716 F.2d at 1479. Moreover, courts "should also interpret each provision in question as part of the integrated whole. If possible, each provision should be construed consistently with the entire document and the relative positions and purposes of the parties." *Id.* As in all contracts, the collective bargaining agreement's terms must be construed so as to render none nugatory and avoid illusory promises. *Id.* at 1479-80. When ambiguities exist, courts may look to other words and phrases of the document and other extrinsic evidence. *Id.* at 1480; *see also Golden,* 73 F.3d at 654; *UAW v. BVR Liquidating*, 190 F.3d 768, 774 (6th Cir. 1999)(extrinsic evidence is admissible to determine an intent to vest benefits when the language of the collective bargaining agreement is ambiguous). The court should review the interpretation ultimately derived from its examination of the language, context, and other indicia of intent for consistency with federal labor policy. *Yard-Man*, 716 F.2d at 1479-80. With these principles in mind, the court considers whether the instant plaintiffs have a vested right to the lifetime medical benefits they seek.

a. *Durational language of the CBA, IPA, and GIP*

The governing CBA contains no provisions related to health benefits. Retiree health benefits are addressed in two other documents, the IPA and the GIP. The IPA, like the CBA, was effective by its terms until April 1, 2004. The IPA expressly states: "Termination of this Agreement shall not have the effect of automatically terminating the Plan." "The Plan" refers to the GIP. This language indicates that,

even though the Agreement (the CBA) expires by its terms on April 1, 2004, the GIP and the concomitant benefits provided thereby need not also expire.

Section 5.1 on page 38 of the GIP, under Section V entitled "Medical Expense Benefits," provides:

> A benefit shall be provided in accordance with this Section only for an Employee, while coverage for such benefit is in effect with respect to such Employee. **Benefits in accordance with this Section will be provided to such Employee, retired Employee, and Dependents thereof for the duration of any Agreement to which this Plan is a part**.

(Ex. 7 to Docket No. 50)(emphasis added). Caterpillar reads this language to say that health benefits (including retiree health benefits) lasted *only* as long as the labor contracts themselves. (Docket No. 56 at 5-6). This type of specific durational language, urges Caterpillar, is fundamentally inconsistent with the plaintiffs' claim of vesting. (*Id.* at 6). Conversely, the plaintiffs read this language to require that Caterpillar provide benefits to employees, retirees, and dependents *at least* for the duration of the labor contracts. Thus, say plaintiffs, this language does not defeat their claim of vesting; if anything, it renders the language of the governing document ambiguous and opens up the court's inquiry to extrinsic evidence.

As in *Smith v. ABS Indus., Inc.*, 890 F.2d 841 (6th Cir. 1989), the court finds that both the plaintiffs and

Caterpillar "have presented plausible interpretations of the contractual language of the retiree benefits plan." *Id.* at 846. Thus, extrinsic evidence may be properly introduced to resolve the ambiguity. *Id.*; *see also Park-Ohio Industries*, 876 F.2d 894 ("both parties have offered plausible interpretations of the agreement drawn from the contractual language itself [which] demonstrates that the provision is ambiguous. Neither of the two proffered interpretations is frivolous nor unreasonable on its face, and inquiry should be permitted into extrinsic circumstances."). Moreover, Caterpillar's reading of Section 5.1 of the 1998 GIP seemingly contradicts the IPA's express statement that termination of the CBA "shall not have the effect of automatically terminating" the GIP. *Yard-Man* admonishes the court, whenever possible, to construe each provision of the contract consistently with one another and with the entire document.

b. *Language tying retiree health benefits to pension eligibility*

The relevant language of the 1998 GIP is as follows:

> 5.15 Retiree Medical Insurance. Retired Employees who satisfy the requirements hereinafter set forth shall be entitled to the same benefits provided in this Section V as if they were Employees, subject to the provisions of paragraph 6.1(iv).
>
> ***
>
> For Employees retiring on and after May 1, 1992, such benefits to the extent provided in this paragraph 5.15 will be

> provided after his retirement from active service if he has accrued at least 10 years of credited service (5 years if hired after age 60) under the Non-Contributory Pension Plan after the earlier of age 45 or the date he has accrued 20 years of credited service under the Non-Contributory Pension Plan and at his retirement is eligible for the immediate commencement of a monthly pension under the Non-Contributory Pension Plan or would be eligible for such immediate commencement but for his election to defer commencement of his pension.
>
> Coverage shall take effect on his retirement date.
>
> ***
>
> Dependents' Coverage shall be in effect in accordance with this paragraph 5.15 while Personal Coverage is in effect with respect to all Dependents of a retired Employee who were covered hereunder on the day preceding his retirement, and such Dependents' Coverage will be continued following the death of a retired Employee for the remainder of his surviving spouse's life without cost.

(Ex. 7 to Docket No. 50). Section 6.2(c) on page 104 reiterates as to surviving spouses:

> [S]uch Dependents' Coverage for any such surviving spouse . . . will continue in

> effect . . . for the remainder of her life without cost.

(*Id.*) Significantly, this language links retiree and surviving spouses medical benefits to pension eligibility. The Sixth Circuit has held that this constitutes strong evidence of vesting. For example, in *Yolton*, a 2006 case, the Sixth Circuit affirmed the district court's finding that the plaintiffs' benefits had vested, explaining that

> . . . the district court interpreted the language of the agreement and found evidence that the defendants intended to confer lifetime benefits upon the plaintiffs. Of particular significance to the district court was language in the Group Insurance Plan that tied benefits to the pension plans . . . . Because the pension plan is a lifetime plan and the health insurance benefits are tied to the pension plan, the district court found that the health insurance benefits were vested and intended to be lifetime benefits.

435 F.3d at 580. In *Golden*, similar language in each of the CBA's tied retiree benefits and surviving spouse eligibility for health insurance coverage to eligibility for vested pension benefits. 73 F.3d at 656. The Sixth Circuit affirmed the district court's finding that, "[s]ince retirees are eligible to receive pension benefits for life . . . the parties intended that the company provide lifetime health benefits as well." *Id.* Similarly, in *McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417 (6th Cir. 2004), the Sixth Circuit affirmed the district

court's finding that the retiree plaintiffs had established a likelihood of success on the merits of their claim. *Id.* at 426. After finding that the collective bargaining agreement in that case incorporated a supplemental agreement, the Court held, "Because the Supplemental Agreement ties eligibility for retirement-health benefits to eligibility for a pension, in other words, there is little room for debate that the retirees' health benefits vested upon retirement under *Golden* . . . ." *Id.* at 422*; see Cole v. ArvinMeritor, Inc.*, 2006 WL 2620305, *7 (E.D. Mich. 2006)(because, *inter alia*, the governing contract ties retiree health benefits to pension status, it "constitutes an enforceable contractual promise of lifetime retiree health benefits to accompany lifetime pension benefits.").

Likewise, in this case, the language of paragraph 5.15 of the 1998 GIP unambiguously ties retiree health benefits to pension eligibility. Under the controlling law, such language constitutes strong evidence of an intent to vest.

c. *The Yard-Man inference*

"Retirement benefits are typically understood as a form of delayed compensation for present services, for which workers forego present wages." *Terrell v. Dura Mech. Components, Inc.*, 934 F. Supp. 874, 881 (N.D. Ohio 1996)(citing *Allied Chem. Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180)). As one court remarked: "It is unlikely that workers would leave a significant portion of their remuneration to the contingencies of future bargaining agreements, especially since they are presumably aware that the

union is not obliged to bargain for continued benefits for retirees." *Id.* (*citing Yard-Man*, 716 F.2d at 1482).

Indeed, the Sixth Circuit in *Yard-Man* explained that retiree benefits are, in a sense, "status" benefits that carry an inference that they continue as long as the requisite status is maintained. *Yard-Man*, 716 F.2d at 1483. "This contextual factor," according to the Sixth Circuit, can buttress "the already sufficient evidence of such intent in the language of the agreement itself." *Golden*, 954 F. Supp. at 1184 (citing *Yard-Man*, 716 F.2d at 1482).

Although the *Yard-Man* decision has generated controversy and its viability has been challenged, *Yard-Man* remains good law. *See Yolton*, 435 F.3d at 579-80 ("There is no need to revise, reconsider, or overrule *Yard-Man*."); *Golden*, 73 F.3d at 656 ("After considering the arguments the defendant makes, and the cases it cites, we conclude that *Yard-Man* is still good law, and controls this case.")

d. *Extrinsic evidence*

Next, having determined that the language of the governing contracts is ambiguous, it is appropriate for the court to consider extrinsic evidence, if any, of Caterpillar's alleged intent to confer lifetime health benefits to surviving spouses. However, at this early stage of the proceedings, there has not been significant discovery on this matter. (Docket No. 50 at 19). The plaintiffs represented to the court by brief filed on November 30, 2006, that "[d]uring discovery and review of benefit files, Plaintiffs expect to locate

additional evidence confirming that these are vested lifetime benefits." (*Id.* at n.10).

In their memorandum filed on April 26, 2007 in reply to Caterpillar's response to the plaintiffs' motion for class certification, the plaintiffs reference Caterpillar's medical expense survivor's coverage hourly forms for Plaintiffs Kerns and Nalley, which indicate, according to the plaintiffs, that at the time their spouses died, Caterpillar intended that they, as surviving spouses, would have "lifetime" coverage "at no cost." (Docket No. 67 at 5, Exs. 10 & 11). The plaintiffs represent that they "expect to locate similar forms for other class members once Defendant produces the additional files." (*Id.*) The plaintiffs further argue that, "at this stage of the case, without significant discovery, it would be premature" for the court to make a substantive determination as to whether Caterpillar intended to provide vested lifetime benefits to the surviving spouses. (*Id.* at 15).

The discovery cutoff deadline for this case, as established by the Joint Initial Case Management Order entered on December 29, 2006, is November 30, 2007. (Docket No. 98 at 4). Dispositive motions, in which the parties could better argue their positions with regard to vesting and present evidence gleaned through discovery in support of their positions, are not due until May 16, 2008. (*Id.*) The court finds that it is too soon in this case to issue a ruling as a matter of law as to whether the plaintiffs' benefits are vested and when, if ever, they vested. It is clear that the plaintiffs' claims should not be dismissed at this stage, notwithstanding Caterpillar's urging, considering the

language of the GIP tying retiree health benefits to pension eligibility, which the Sixth Circuit has found constitutes significant evidence of an intent to vest benefits.

D. *The proposed class is limited to surviving spouses.*

Caterpillar seeks dismissal of the plaintiffs' claims on behalf of "future" surviving spouses, alleging that these claims fail because such a group does not exist at this time. Nor, urges Caterpillar, is there any reasonable level of certainty as to who may fall within that group. (Docket No. 43 at 16). Caterpillar points out that no named Plaintiff falls within this purported group. (*Id.*)

In response to Caterpillar's motion to dismiss, the plaintiffs contend that it is common for individuals to "grow into" the class definition after the suit is filed. (Docket No. 50 at 4). Later, in their reply to Caterpillar's response to the plaintiff's motion for class certification, the plaintiffs clarify that the proposed class does not include persons who are not, at this time, surviving spouses. (Docket No. 67 at 2). Stated differently, the plaintiffs explain that "[a]ny person who is presently the spouse of a living retiree cannot presently be a class member." (*Id.*) This clarification resolves the concerns raised by Caterpillar in its motion to dismiss regarding the claims of a hypothetical group of future surviving spouses. A person who is presently the spouse of a living retiree might become a class member in the future, if and when he or she should meet the class definition and become a surviving spouse. The proposed class,

however, only includes surviving spouses--not spouses of living former employees.

E. *The named plaintiffs' claims are not moot.*

Caterpillar contends that the plaintiffs' surviving spouse claims must be dismissed because the plaintiffs did not suffer any Article III injury-in-fact and their claims are moot. According to Caterpillar, although the company notified surviving spouses of 1998-2004 retirees who died while the 1998 labor contracts were in effect of their obligation to contribute premium payments, Caterpillar later notified those surviving spouses by letter that it was waiving their premiums and, to date, none have been charged any premiums. Caterpillar also contends that the named plaintiffs have not suffered any injury in fact because Caterpillar only threatened to modify benefits and never actually modified benefits.

On the other hand, the plaintiffs allege that, as to the monthly premium sharing copayments, Caterpillar charged Plaintiff Stewart $87 per month from January until June 2006. Even though Caterpillar later refunded the money and stated (after this lawsuit was filed) that it had "elected to waive" the class member's healthcare premiums, the plaintiffs contend that Caterpillar could impose monthly health care premium sharing co-payments on the class at any time, should it change its mind. The plaintiffs also allege that, effective January 2006, Caterpillar changed the health care benefits by requiring higher prescription drug co-payments, new deductibles, new out-of-pocket maximums, and related charges, and that Caterpillar threatens to make further increases in 2008 and 2010.

The plaintiffs seek the restoration of the benefits they enjoyed prior to the January 1, 2006 changes.

"Under Article III of the Constitution, [a federal court's] jurisdiction extends only to actual cases and controversies. [A federal court] has no power to adjudicate disputes which are moot." *McPherson v. Mich. High. Sch. Athletic Ass'n, Inc.,* 119 F.3d 453, 458 (6th Cir. 1997) (internal quotation omitted). In general, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 189 (2000) (internal quotation omitted). A defendant's voluntary conduct may moot a case only if "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *id.,* and if "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Ammex, Inc. v. Cox,* 351 F.3d 697, 705 (6th Cir. 2003) (citing *County of Los Angeles v. Davis,* 440 U.S. 625, 631(1979)). The "heavy burden" of demonstrating that the challenged conduct will not resume rests on the party claiming mootness. *Friends of the Earth,* 528 U.S. at 189; *Ammex, Inc.,* 351 F.3d at 705.

On this record, viewed in the light most favorable to the plaintiffs, the court cannot find that Caterpillar has met this burden. Although Caterpillar represented to the plaintiffs in its April 17, 2006 letter that it "will not" impose premiums on the plaintiffs, Caterpillar

consistently has maintained the position in this lawsuit that the plaintiffs' benefits are not vested and that Caterpillar has a legal right to modify or terminate benefits at any time. Thus, Caterpillar's voluntary decision to waive the premiums *for now* in light of its position that the benefits are not vested and are subject to change does not "make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."

Moreover, Section 502(a)(1)(B) of ERISA specifically allows plan participants to bring an action for a declaratory judgment to clarify their rights to future benefits under an ERISA plan.

> If a plan participant or beneficiary believes that benefits promised to him under the terms of the plan are not provided, he can bring a suit seeking provision of those benefits. A participant or beneficiary can also bring suit generically to "enforce his rights" under the plan, or to clarify any of his rights to future benefits. Any dispute over the precise terms of the plan is resolved by a court under the de novo review standard.

Aetna Health Inc. v. Davila, 542 U.S. 200, 210 (2004). Here, the plaintiffs are participants in a negotiated ERISA benefit plan. They brought this lawsuit in part to clarify their rights to future benefits under the plan and to challenge the benefit modifications Caterpillar already has made, such as higher prescription drug co-payments, new deductibles, new out-of-pocket maximums, and related charges. The plaintiffs are

entitled to have those issues resolved now, and they should not have to wait until Caterpillar changes its mind and later elects to require them to pay healthcare premiums or implements the additional changes to their benefits. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 51, 53 (1987)("Under the civil enforcement provisions of § 502(a), a plan participant or beneficiary may sue to recover benefits due under the plan, to enforce the participant's rights under the plan, or to clarify rights to future benefits. Relief may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits.").

The court finds that Caterpillar's actions have raised a definite and concrete controversy regarding the plaintiffs' rights to benefits under the plan and, therefore, the plaintiffs may bring this action to clarify their rights to future benefits under the plan. The plaintiffs' claims are not moot.

V. Conclusion

For the reasons explained herein, the defendant's motion to dismiss (Docket No. 42) will be denied.

An appropriate order will enter.

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

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

Case No. 3:06-cv-01113
District Judge Trauger
Magistrate Judge Brown

Class Action

[Filed June 27, 2007]

JUDITH K. KERNS, MARCIA NALLEY, and SANDRA L. STEWART, on behalf of themselves and a similarly situated class,	)
Plaintiffs,	)
v.	)
CATERPILLAR, INC.,	)
Defendant.	)

ORDER

For the reasons expressed in the accompanying Memorandum, the defendant's motion to dismiss (Docket No. 42) is DENIED.

It is so ordered.

Entered this ___ day of _____, 2007.

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

APPENDIX M

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

Case No. 3:06-CV-1113

Hon. Aleta A. Trauger

[Filed December 6, 2017]

JUDITH K. KERNS, et al.,	)
	)
Class Plaintiffs,	)
	)
v.	)
	)
CATERPILLAR INC.,	)
	)
Defendant/	)
Third-Party Plaintiff,	)
	)
v.	)
	)
INTERNATIONAL UNION,	)
UAW, et al.	)
	)
Third-Party Defendants.	)
	)

JOINT STIPULATION OF CALCULATIONS FOR PRINCIPAL DAMAGES AND PREJUDGMENT INTEREST

Kerns Class Plaintiffs and Defendant Caterpillar Inc. submit the following Joint Stipulation of Calculations of Principal Damages and Prejudgment Interest pursuant to Section 6 of R.517 (approved in R.518; see also R.519-522, 524) as follows:

1. On August 28, 2017, Plaintiffs filed a motion for prejudgment interest (R.510). While Caterpillar preserves its position that no damages are due to any class members, if damages are to be paid, Caterpillar agreed that an award of prejudgment interest is appropriate (R.517).

2. On September 27, 2017, the parties filed a Joint Stipulated Report with its Ex. A (R.517). An order approving the Joint Stipulated Report and its Ex. A was entered September 29, 2017 (R.518). Section 6 on page 3 of the September 27, 2017 Joint Stipulated Report stated:

> The parties propose that within 35 days after approval of this report by the Court, they file a stipulated list showing the principal amount, prejudgment interest amount, and total for each class member who is listed on Ex. A. If the parties should encounter any disputes they cannot resolve regarding the prejudgment interest calculations, on or by the above 35 day due date for the report, they will each file a statement of their position. If the parties agree upon all the calculations, the Court shall enter

an order awarding prejudgment interest and approving the list with the calculations. The Court will also proceed to enter a judgment, including post-judgment interest and a permanent injunction.

3. For the interest rate for the prejudgment interest calculations, the parties agreed to use the average of the 1-year (52 week) constant maturity (nominal) U.S. Treasury yield rates, as published daily by the Federal Reserve System, from April 13, 2006 until the date of judgment (or some agreed upon end date between now and before judgment is issued so that it may be calculated in advance of judgment). On October 26, 2017, class counsel sent Caterpillar counsel documents, supporting materials and calculations for an updated average interest rate of 1.14789% for the time period April 13, 2006 through October 25, 2017 (updated from the prior calculated average rate of 1.14536% for the time period April 13, 2006 through August 24, 2017 (R.511, 517)).

4. On October 27, 2017, class counsel provided Caterpillar counsel with documents, formulas, assumptions and detailed calculations (including an Excel spreadsheet) detailing the principal amount, prejudgment interest amount, and total for each class member listed on Ex. A (R.517) using the updated average interest rate of 1.14789% (as of October 25, 2017).

5. On October 30, 2017, the parties filed joint motion to extend the 35-day due date under Section 6 of R.517 from November 3, 2017 to November 17, 2017 (R.519-520). On October 31, 2017, the Court granted

that extension (R.521). In the meantime, the parties had further discussions regarding the calculations.

6. On November 17, 2017, the parties filed joint motion to further extend the due date from November 17, 2017 to November 29, 2017 (R.522-523). On November 20, 2017, the Court granted that extension (R.524).

7. The parties have since held further communications and conference calls, including with the CPA who authored the formulas, and have exchanged various drafts. The parties have calculated the average interest rate and prejudgment interest amounts through December 4, 2017 (the latest date for which data is available given the December 6, 2017 filing due date).

8. The parties have updated the calculations for the average interest rate for the time period April 13, 2006 through December 4, 2017, which is now 1.15157%.

9. While Caterpillar and Plaintiffs each preserve their positions as to this Court's prior rulings, the parties stipulate and agree that the principal amount, prejudgment interest amount, and total for each class member who was listed on Ex. A (R.517) is accurately reflected on the stipulated list now provided on Ex. 1, which includes interest calculated through December 4, 2017. The total principal is $763,504.93; the total amount of prejudgment interest as of December 4, 2017 is $82,442.22; the grand total of principal damages plus prejudgment interest as of December 4, 2017 is $845,947.15.

WHEREFORE, the parties respectfully submit this joint stipulation providing the amounts listed on Ex. 1 as the principal damages amount, the prejudgment interest amount as of December 4, 2017, and total for each class member listed on Ex. A of the parties' September 27, 2017 Joint Stipulated Report (R.517).

Dated: December 6, 2017

Respectfully submitted,

JUDITH K. KERNS, et al.

By: /s/ Lisa M. Smith

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 6, 2017, a true and exact copy of the foregoing pleading was filed electronically in the U.S. District Court for the Middle District of Tennessee using the ECF system. Notice of this filing was sent by operation of the Court's electronic filing system to the following parties indicated on the electronic filing receipt:

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and a copy was sent by first class mail, with postage fully affixed thereon, and depositing same in a U.S. mail receptacle on the same day, to:

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Respectfully submitted,

By: /s/ Lisa M. Smith
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Dated: December 6, 2017

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Exhibit 1

Kerns v. Caterpillar

Principal and Prejudgment Interest Damages
Totals for 554

[*Fold-Out Exhibit, see next 10 pages*]

	A	B	C	D	E	F	N	O
1	**Interest Rate**	**1.15157%**						
2	**Calc End Date**	**12/4/2017**						
3								
4	**CM Last Name**	**CM First Name**	**Last 4 CM SSN**	**Cat Premiums Damages**	**Cov Term Damages**	**Principal Damages**	**Prej. Interest**	**Total**
5	Aberle	Wanda K.	1445	$0.00	$0.00	$0.00	$0.00	$0.00
6	Ackley	Linda	7711	$0.00	$0.00	$0.00	$0.00	$0.00
7	Adams	Nancy J.	1861	$0.00	$0.00	$0.00	$0.00	$0.00
8	Ahart	Lynn A.	8506	$2,550.85	$0.00	$2,550.85	$250.17	$2,801.02
9	Albrecht	Wendy	6890	$0.00	$0.00	$0.00	$0.00	$0.00
10	Allen, decd	Linda L.	9996	$4,268.49	$0.00	$4,268.49	$470.83	$4,739.32
11	Alsup	Sarah	9695	$0.00	$0.00	$0.00	$0.00	$0.00
12	Anselme	Linda	3298	$0.00	$0.00	$0.00	$0.00	$0.00
13	Anthony	Sonya K.	0211	$4,372.62	$0.00	$4,372.62	$424.22	$4,796.84
14	Aragon	Maria D.	9615	$0.00	$0.00	$0.00	$0.00	$0.00
15	Archdale	Elizabeth S.	1011	$0.00	$0.00	$0.00	$0.00	$0.00
16	Archdale	Linda L.	2111	$0.00	$0.00	$0.00	$0.00	$0.00
17	Ashburn	Janet P.	1118	$0.00	$0.00	$0.00	$0.00	$0.00
18	Athen, Decd	Jean M.	6020	$0.00	$0.00	$0.00	$0.00	$0.00
19	Autrey	Barbara A.	6221	$0.00	$0.00	$0.00	$0.00	$0.00
20	Babb	Peggy A.	8112	$0.00	$0.00	$0.00	$0.00	$0.00
21	Bacon	Sandra K.	5390	$4,573.94	$0.00	$4,573.94	$504.52	$5,078.46
22	Bacon, Decd	Rose	3282	$0.00	$0.00	$0.00	$0.00	$0.00
23	Baer	Mary A.	4930	$127.12	$0.00	$127.12	$11.80	$138.92
24	Baker	Mary E.	2920	$773.70	$0.00	$773.70	$72.21	$845.91
25	Baker, Decd	Ramona R.	5385	$5,438.60	$0.00	$5,438.60	$654.34	$6,092.94
26	Baney	Kara L.	0177	$0.00	$0.00	$0.00	$0.00	$0.00
27	Bankes	Elaine	4224	$0.00	$0.00	$0.00	$0.00	$0.00
28	Banks	Jacklyn J.	2997	$1,740.40	$0.00	$1,740.40	$169.75	$1,910.15
29	Bare	Patricia E.	7843	$0.00	$0.00	$0.00	$0.00	$0.00
30	Barnes	Elva L.	0062	$1,049.90	$0.00	$1,049.90	$98.54	$1,148.44
31	Barnes	Glenda F.	4373	$0.00	$0.00	$0.00	$0.00	$0.00
32	Barnett	Hertisteen	2687	$0.00	$0.00	$0.00	$0.00	$0.00
33	Barnhill	Gloria J.	5818	$0.00	$0.00	$0.00	$0.00	$0.00
34	Barraza	Maria	6076	$2,790.40	$0.00	$2,790.40	$291.41	$3,081.81
35	Barry	Linda J.	4748	$0.00	$0.00	$0.00	$0.00	$0.00
36	Barth	Marilyn E.	9609	$0.00	$0.00	$0.00	$0.00	$0.00
37	Becherer, Decd	Mary	6448	$0.00	$0.00	$0.00	$0.00	$0.00
38	Becker	Ada M.	2995	$0.00	$0.00	$0.00	$0.00	$0.00
39	Becker	Cindra	3894	$0.00	$0.00	$0.00	$0.00	$0.00
40	Beeney	Donna A.	9948	$0.00	$0.00	$0.00	$0.00	$0.00
41	Belcher	Linda J.	7585	$4,067.98	$0.00	$4,067.98	$444.36	$4,512.34
42	Belfield	Sharon S.	1033	$0.00	$0.00	$0.00	$0.00	$0.00
43	Bell	Sandra K.	8174	$0.00	$0.00	$0.00	$0.00	$0.00
44	Beoletto	Irene M.	8237	$0.00	$0.00	$0.00	$0.00	$0.00
45	Betsinger	Michelle M.	4839	$0.00	$0.00	$0.00	$0.00	$0.00
46	Beyer	Patsy R.	7622	$3,875.62	$0.00	$3,875.62	$396.50	$4,272.12
47	Binegar, Decd	Janet	1332	$0.00	$0.00	$0.00	$0.00	$0.00
48	Birmingham	Carolyn J.	8439	$0.00	$0.00	$0.00	$0.00	$0.00
49	Bischler	Nancy E.	2128	$2,377.41	$0.00	$2,377.41	$238.18	$2,615.59
50	Bitner	Teresa K.	2497	$0.00	$0.00	$0.00	$0.00	$0.00
51	Blackburn	Dana	7724	$0.00	$0.00	$0.00	$0.00	$0.00
52	Blair	Phyllis A.	7479	$635.60	$1,316.00	$1,951.60	$181.13	$2,132.73
53	Blaney	Patsy J.	1859	$0.00	$0.00	$0.00	$0.00	$0.00
54	Blouse	Glenda M.	0921	$0.00	$0.00	$0.00	$0.00	$0.00
55	Boeck	Julia A.	4597	$5,267.80	$0.00	$5,267.80	$595.19	$5,862.99
56	Bohannan	Elizabeth R.	9155	$0.00	$0.00	$0.00	$0.00	$0.00
57	Bolatto	Sherby V.	2774	$87.00	$0.00	$87.00	$12.72	$99.72
58	Bond	Martha	2590	$0.00	$0.00	$0.00	$0.00	$0.00
59	Boord	Mary A.	5128	$0.00	$0.00	$0.00	$0.00	$0.00

	A	B	C	D	E	F	N	O
4	CM Last Name	CM First Name	Last 4 CM SSN	Cat Premiums Damages	Cov Term Damages	Principal Damages	Prej. Interest	Total
60	Boswell	Helen E.	4435	$0.00	$0.00	$0.00	$0.00	$0.00
61	Bowersox, Decd	Geraldine M.	1889	$911.80	$0.00	$911.80	$85.58	$997.38
62	Brand	Rebecca	9184	$0.00	$0.00	$0.00	$0.00	$0.00
63	Brandon	Beverly D.	6635	$0.00	$0.00	$0.00	$0.00	$0.00
64	Brannan, Decd	Joyce A.	6490	$0.00	$0.00	$0.00	$0.00	$0.00
65	Brashier, Decd	Mary E.	5870	$6,249.11	$0.00	$6,249.11	$739.76	$6,988.87
66	Brewer	Sidney	6340	$0.00	$0.00	$0.00	$0.00	$0.00
67	Briggs, Decd	Sharon K.	1799	$1,188.00	$0.00	$1,188.00	$112.13	$1,300.13
68	Brinker	Harley D.	4682	$0.00	$0.00	$0.00	$0.00	$0.00
69	Brinkler	Marsha L.	4360	$0.00	$0.00	$0.00	$0.00	$0.00
70	Brisco	Betty	9298	$0.00	$0.00	$0.00	$0.00	$0.00
71	Bristol	Joan F.	7613	$4,755.56	$0.00	$4,755.56	$562.96	$5,318.52
72	Britton	Doris J.	1598	$1,457.23	$0.00	$1,457.23	$138.31	$1,595.54
73	Broadfield	Suellen E.	3443	$0.00	$0.00	$0.00	$0.00	$0.00
74	Brown	Anna M.	6309	$0.00	$0.00	$0.00	$0.00	$0.00
75	Bruce	Carole A.	9185	$0.00	$0.00	$0.00	$0.00	$0.00
76	Buchanan	Linda L.	3405	$1,457.23	$0.00	$1,457.23	$138.31	$1,595.54
77	Buffington	Cheryl L.	7920	$0.00	$0.00	$0.00	$0.00	$0.00
78	Burhans	Mary L.	0358	$4,227.98	$0.00	$4,227.98	$461.83	$4,689.81
79	Burkey	Deborah L.	1304	$0.00	$0.00	$0.00	$0.00	$0.00
80	Burrows	Louise M.	9695	$0.00	$0.00	$0.00	$0.00	$0.00
81	Callaway, Decd	Cleatis	2569	$806.64	$0.00	$806.64	$77.82	$884.46
82	Callihan	Nancy J.	9879	$0.00	$0.00	$0.00	$0.00	$0.00
83	Campbell	Carol	8192	$4,024.93	$0.00	$4,024.93	$420.33	$4,445.26
84	Canamore, Decd	Ninalee N.	9555	$2,154.70	$0.00	$2,154.70	$212.45	$2,367.15
85	Cannon	Kay A.	1750	$1,878.50	$0.00	$1,878.50	$183.24	$2,061.74
86	Carlson	Mary Anne	8747	$0.00	$0.00	$0.00	$0.00	$0.00
87	Carnell	Rosemary	5154	$0.00	$0.00	$0.00	$0.00	$0.00
88	Carreon	Guadalupe	8356	$2,396.64	$0.00	$2,396.64	$240.11	$2,636.75
89	Carroll Noss	Maia S.	8121	$0.00	$0.00	$0.00	$0.00	$0.00
90	Carson	Beverly L.	9711	$364.54	$1,628.83	$1,993.37	$141.52	$2,134.89
91	Carson	Linda R.	0188	$0.00	$0.00	$0.00	$0.00	$0.00
92	Castillo	Gracie	0728	$0.00	$0.00	$0.00	$0.00	$0.00
93	Chadwick, Decd	Muriel L.	9826	$2,292.80	$0.00	$2,292.80	$226.07	$2,518.87
94	Chapman	Peggy L.	5433	$0.00	$0.00	$0.00	$0.00	$0.00
95	Cheatham	Donna J.	0584	$773.70	$0.00	$773.70	$72.21	$845.91
96	Chester	Marie C.	9447	$0.00	$0.00	$0.00	$0.00	$0.00
97	Chianakas	Teresa	3403	$0.00	$0.00	$0.00	$0.00	$0.00
98	Clark	Doris V.	5136	$773.70	$0.00	$773.70	$72.21	$845.91
99	Clark	Olive M.	2063	$2,292.80	$0.00	$2,292.80	$230.92	$2,523.72
100	Clausen	Judy	8597	$0.00	$0.00	$0.00	$0.00	$0.00
101	Cobb	Clara L.	4114	$911.80	$0.00	$911.80	$92.76	$1,004.56
102	Coble	Sally M.	9986	$0.00	$0.00	$0.00	$0.00	$0.00
103	Cody	Carol A.	9746	$0.00	$0.00	$0.00	$0.00	$0.00
104	Coffey	Twila	2093	$0.00	$0.00	$0.00	$0.00	$0.00
105	Cole	Monica R.	5626	$728.15	$0.00	$728.15	$67.58	$795.73
106	Connett	Bonnie	9795	$0.00	$0.00	$0.00	$0.00	$0.00
107	Cooley	Nancy G.	4912	$0.00	$0.00	$0.00	$0.00	$0.00
108	Copenheaver	Lucy	1071	$0.00	$0.00	$0.00	$0.00	$0.00
109	Courson, Decd	Judith A.	9175	$0.00	$0.00	$0.00	$0.00	$0.00
110	Covington	Nancy	7351	$0.00	$0.00	$0.00	$0.00	$0.00
111	Coziahr	Loretta	0220	$0.00	$0.00	$0.00	$0.00	$0.00
112	Cranford	Sally A.	0519	$6,360.11	$0.00	$6,360.11	$752.90	$7,113.01
113	Crawford	Sharon K.	8416	$4,684.94	$0.00	$4,684.94	$511.75	$5,196.69
114	Crisp	Carolyn J.	3965	$0.00	$0.00	$0.00	$0.00	$0.00
115	Crooks	Sara N.	9544	$773.70	$0.00	$773.70	$72.21	$845.91
116	Crowell	Joyce G.	5408	$0.00	$0.00	$0.00	$0.00	$0.00
117	Cummings	Carolyn	8007	$0.00	$0.00	$0.00	$0.00	$0.00

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118	Cummins	Cheryl A.	7902	$0.00	$0.00	$0.00	$0.00	$0.00
119	Cunningham	Michelle	1261	$0.00	$0.00	$0.00	$0.00	$0.00
120	Dalrymple, Decd	Sherry	4527	$0.00	$0.00	$0.00	$0.00	$0.00
121	Dampeer	Dorothy N.	0754	$0.00	$0.00	$0.00	$0.00	$0.00
122	Davidson	Judith A.	9036	$0.00	$0.00	$0.00	$0.00	$0.00
123	Davis	Sheron L.	9873	$0.00	$0.00	$0.00	$0.00	$0.00
124	Davis, Decd	Carrie B.	0211	$0.00	$0.00	$0.00	$0.00	$0.00
125	Day	Rita	7946	$0.00	$0.00	$0.00	$0.00	$0.00
126	Deetz	Terri E.	8739	$0.00	$0.00	$0.00	$0.00	$0.00
127	Defreitas	Patricia A.	0641	$4,818.66	$0.00	$4,818.66	$585.67	$5,404.33
128	Dejesus	Maria D.	7776	$0.00	$0.00	$0.00	$0.00	$0.00
129	Dibble	Dorothy M.	1626	$0.00	$0.00	$0.00	$0.00	$0.00
130	Dibler	Edna M.	1985	$4,033.95	$0.00	$4,033.95	$423.42	$4,457.37
131	Dickinson	Diane M.	7244	$0.00	$0.00	$0.00	$0.00	$0.00
132	Ditzler	Shirley A.	1678	$0.00	$0.00	$0.00	$0.00	$0.00
133	Donley	Cynthia L.	4875	$0.00	$0.00	$0.00	$0.00	$0.00
134	Dorris	Mary L.	8720	$1,326.10	$0.00	$1,326.10	$126.56	$1,452.66
135	Dorsett, Decd	Janell	7442	$0.00	$0.00	$0.00	$0.00	$0.00
136	Downing	Linda I.	1451	$4,713.01	$0.00	$4,713.01	$504.74	$5,217.75
137	Draper	Ellen C.	9903	$254.24	$0.00	$254.24	$22.67	$276.91
138	Du Page	Denise M.	5867	$0.00	$0.00	$0.00	$0.00	$0.00
139	Dully	Marla M.	8818	$0.00	$0.00	$0.00	$0.00	$0.00
140	Durham	Phyllis D.	0913	$6,360.11	$0.00	$6,360.11	$752.90	$7,113.01
141	Dutton	Faye E.	1922	$773.70	$0.00	$773.70	$72.21	$845.91
142	Dye	Margaret	6171	$127.12	$0.00	$127.12	$11.53	$138.65
143	Eaton	Patricia A.	0647	$5,286.82	$0.00	$5,286.82	$588.82	$5,875.64
144	Eckes	Carrol L.	4797	$4,519.39	$0.00	$4,519.39	$493.67	$5,013.06
145	Einhaus, Decd	Rojene H.	9494	$0.00	$0.00	$0.00	$0.00	$0.00
146	Eisenhart	Helen J.	7852	$1,019.41	$0.00	$1,019.41	$89.32	$1,108.73
147	Ellington	Mardie K.	3391	$728.15	$0.00	$728.15	$75.27	$803.42
148	Ellis	Wanda M.	8837	$5,670.69	$0.00	$5,670.69	$671.29	$6,341.98
149	Emert, Decd	Shirley R.	0005	$291.26	$0.00	$291.26	$26.42	$317.68
150	Emery	Sarah J.	9216	$6,249.11	$0.00	$6,249.11	$739.76	$6,988.87
151	Enlow Reed	Marilyn K.	5642	$2,773.89	$0.00	$2,773.89	$303.00	$3,076.89
152	Epley	Sabina M.	3878	$0.00	$0.00	$0.00	$0.00	$0.00
153	Estes	Catherine	7905	$3,600.96	$0.00	$3,600.96	$370.31	$3,971.27
154	Evanoff-Johnson	Yvonne K.	2720	$0.00	$0.00	$0.00	$0.00	$0.00
155	Evitts, Decd	Charlene E.	3943	$0.00	$0.00	$0.00	$0.00	$0.00
156	Fake	Judy A.	9237	$3,600.49	$0.00	$3,600.49	$370.26	$3,970.75
157	Faralli	Martha K.	0668	$0.00	$0.00	$0.00	$0.00	$0.00
158	Farden	Marva D.	4045	$3,463.62	$0.00	$3,463.62	$358.03	$3,821.65
159	Farmer, Decd	Dorothy	4618	$0.00	$0.00	$0.00	$0.00	$0.00
160	Farrell	Ingrid E.	5238	$0.00	$0.00	$0.00	$0.00	$0.00
161	Farrenholz	Wilma D.	4377	$1,347.84	$9,807.00	$11,154.84	$902.47	$12,057.31
162	Farris	Patricia A.	0150	$564.01	$0.00	$564.01	$52.05	$616.06
163	Ferguson	Mildred A.	4686	$0.00	$0.00	$0.00	$0.00	$0.00
164	Fields	Clifford L.	2685	$318.00	$0.00	$318.00	$43.91	$361.91
165	Finlinson	Joyce	1559	$0.00	$0.00	$0.00	$0.00	$0.00
166	Fleming	Pamela S.	3738	$145.63	$0.00	$145.63	$13.06	$158.69
167	Fletcher	Patricia L.	5626	$0.00	$0.00	$0.00	$0.00	$0.00
168	Flores	Maria A.	4512	$2,769.70	$0.00	$2,769.70	$289.24	$3,058.94
169	Ford	Cheryl L.	3644	$0.00	$0.00	$0.00	$0.00	$0.00
170	Foster	Doris E.	8937	$1,878.50	$0.00	$1,878.50	$183.24	$2,061.74
171	Foster	La Jeania A.	3500	$6,103.95	$0.00	$6,103.95	$722.58	$6,826.53
172	Foutch	Jacqueline	1791	$0.00	$0.00	$0.00	$0.00	$0.00
173	Francisco	Eugenia L.	4213	$0.00	$0.00	$0.00	$0.00	$0.00
174	Frey	Gertrude M.	8998	$0.00	$0.00	$0.00	$0.00	$0.00
175	Friend	Brenda L.	0166	$3,519.77	$0.00	$3,519.77	$360.09	$3,879.86

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4	CM Last Name	CM First Name	Last 4 CM SSN	Cat Premiums Damages	Cov Term Damages	Principal Damages	Prej. Interest	Total
176	Fuentes	Mary Francisca	4517	$5,365.98	$0.00	$5,365.98	$638.12	$6,004.10
177	Fults	Cheryl L.	2202	$0.00	$0.00	$0.00	$0.00	$0.00
178	Furst	Nona J.	1198	$0.00	$0.00	$0.00	$0.00	$0.00
179	Futo	Elvira K.	7406	$4,146.71	$0.00	$4,146.71	$435.25	$4,581.96
180	Gambrill	Charlotte	5909	$0.00	$0.00	$0.00	$0.00	$0.00
181	Gardner	Cheryl L.	8110	$0.00	$0.00	$0.00	$0.00	$0.00
182	Garner	Barbara J.	6817	$2,368.58	$0.00	$2,368.58	$231.04	$2,599.62
183	Garza	Virginia M.	8856	$0.00	$0.00	$0.00	$0.00	$0.00
184	Gaul	Sharon	7543	$0.00	$0.00	$0.00	$0.00	$0.00
185	Gibson-Larson	Carole L.	7183	$10,854.22	$0.00	$10,854.22	$1,197.26	$12,051.48
186	Gilbert	Linda J.	7965	$0.00	$0.00	$0.00	$0.00	$0.00
187	Gilles	Sherry A.	9543	$0.00	$0.00	$0.00	$0.00	$0.00
188	Goad-Gregory	Suzanne	7010	$0.00	$0.00	$0.00	$0.00	$0.00
189	Goff	Doris A.	1610	$0.00	$0.00	$0.00	$0.00	$0.00
190	Gordon	Eloise	1423	$2,915.39	$0.00	$2,915.39	$289.00	$3,204.39
191	Gordon	Georgia A.	4194	$0.00	$0.00	$0.00	$0.00	$0.00
192	Gotwalt	Jane E.	1186	$5,280.80	$0.00	$5,280.80	$616.57	$5,897.37
193	Grace	Hattie F.	0946	$1,775.09	$0.00	$1,775.09	$206.90	$1,981.99
194	Graham	Mary L.	8567	$4,268.49	$0.00	$4,268.49	$445.76	$4,714.25
195	Grant	Wilma J.	0027	$4,162.16	$0.00	$4,162.16	$452.42	$4,614.58
196	Grapevine	Delores	7371	$2,485.10	$0.00	$2,485.10	$250.29	$2,735.39
197	Green	Kim	7949	$0.00	$0.00	$0.00	$0.00	$0.00
198	Greenslitt	Barbara	4094	$1,049.90	$0.00	$1,049.90	$99.10	$1,149.00
199	Gregory	Debra	5812	$2,004.04	$0.00	$2,004.04	$193.37	$2,197.41
200	Gronewold	Vicky	3136	$0.00	$0.00	$0.00	$0.00	$0.00
201	Grove	Barbara J.	8791	$5,529.36	$0.00	$5,529.36	$654.56	$6,183.92
202	Gruss	Martha L.	9357	$0.00	$0.00	$0.00	$0.00	$0.00
203	Guajardo	Sharon	9903	$5,709.01	$0.00	$5,709.01	$675.82	$6,384.83
204	Guidish	Catherine J.	8239	$0.00	$0.00	$0.00	$0.00	$0.00
205	Guilfoyle	Glenda G.	2381	$0.00	$0.00	$0.00	$0.00	$0.00
206	Gulley	Jewlee O.	4593	$0.00	$0.00	$0.00	$0.00	$0.00
207	Haar	Sally J.	8185	$0.00	$0.00	$0.00	$0.00	$0.00
208	Haarman	Karen R.	9987	$0.00	$0.00	$0.00	$0.00	$0.00
209	Hacker	Janet M.	5461	$0.00	$0.00	$0.00	$0.00	$0.00
210	Haick	Dorothy	5503	$4,219.39	$0.00	$4,219.39	$460.90	$4,680.29
211	Halpin	Margery S.	3713	$5,788.73	$0.00	$5,788.73	$685.26	$6,473.99
212	Happach	Arla M.	5253	$6,360.11	$0.00	$6,360.11	$752.90	$7,113.01
213	Hardesty	Roxie J.	4886	$0.00	$0.00	$0.00	$0.00	$0.00
214	Harkness	Victoria A.	8322	$0.00	$0.00	$0.00	$0.00	$0.00
215	Harper	Monzola J.	0128	$3,331.90	$0.00	$3,331.90	$347.96	$3,679.86
216	Harris	Jo Ella M.	3229	$2,154.70	$0.00	$2,154.70	$212.45	$2,367.15
217	Hartwig	Sharon A.	1797	$0.00	$0.00	$0.00	$0.00	$0.00
218	Harvey	Carol L.	9702	$0.00	$0.00	$0.00	$0.00	$0.00
219	Hawks, Decd	Vera J.	8370	$4,485.36	$0.00	$4,485.36	$494.75	$4,980.11
220	Hawley	Deborah F.	0123	$4,514.80	$0.00	$4,514.80	$478.70	$4,993.50
221	Head	Ann	6876	$0.00	$0.00	$0.00	$0.00	$0.00
222	Hedges	Valerie J.	9041	$8,705.70	$0.00	$8,705.70	$978.95	$9,684.65
223	Heiner	Cora M.	6796	$0.00	$0.00	$0.00	$0.00	$0.00
224	Helton	Grace O.	3103	$0.00	$0.00	$0.00	$0.00	$0.00
225	Helton	Janet Clare	9231	$0.00	$0.00	$0.00	$0.00	$0.00
226	Hemp	Marcia L.	0320	$728.15	$0.00	$728.15	$67.58	$795.73
227	Henderson	Joyce	6079	$0.00	$0.00	$0.00	$0.00	$0.00
228	Henderson	Mary E.	9472	$582.52	$0.00	$582.52	$53.76	$636.28
229	Henry	Judith K.	6205	$3,058.15	$0.00	$3,058.15	$316.12	$3,374.27
230	Hess	Annie M.	1266	$0.00	$0.00	$0.00	$0.00	$0.00
231	Heuck, Decd	Brenda J.	2633	$0.00	$0.00	$0.00	$0.00	$0.00
232	Hicks	Madonna E.	1361	$0.00	$0.00	$0.00	$0.00	$0.00
233	Hicks	Marilyn S.	1748	$0.00	$0.00	$0.00	$0.00	$0.00

	A	B	C	D	E	F	N	O
4	CM Last Name	CM First Name	Last 4 CM SSN	Cat Premiums Damages	Cov Term Damages	Principal Damages	Prej. Interest	Total
234	Hidden, Decd	Nancee A.	8558	$0.00	$0.00	$0.00	$0.00	$0.00
235	Hildebrand	Carole E.	5792	$0.00	$0.00	$0.00	$0.00	$0.00
236	Hill	Roberta A.	3589	$0.00	$0.00	$0.00	$0.00	$0.00
237	Himlin	Cheryl	6220	$0.00	$0.00	$0.00	$0.00	$0.00
238	Hockenbury, Decd	Margo F.	8487	$0.00	$0.00	$0.00	$0.00	$0.00
239	Holz	Linda C.	7995	$0.00	$0.00	$0.00	$0.00	$0.00
240	Hoover	Judy D.	3842	$0.00	$0.00	$0.00	$0.00	$0.00
241	Horn	Renee M.	2553	$0.00	$0.00	$0.00	$0.00	$0.00
242	Horning	Joyce B.	5355	$1,092.69	$0.00	$1,092.69	$102.56	$1,195.25
243	Horvath	Magdolna	1160	$0.00	$0.00	$0.00	$0.00	$0.00
244	Houser	Sharon	0974	$0.00	$4,347.16	$4,347.16	$345.03	$4,692.19
245	Howell	Sandra A.	2206	$0.00	$0.00	$0.00	$0.00	$0.00
246	Huffman	Christy S.	1662	$0.00	$0.00	$0.00	$0.00	$0.00
247	Hunt	Mary	1123	$4,485.36	$0.00	$4,485.36	$494.75	$4,980.11
248	Hunt, Decd	Karen C.	6682	$4,704.87	$0.00	$4,704.87	$518.96	$5,223.83
249	Hurst, Decd	June D.	5071	$4,168.89	$0.00	$4,168.89	$453.15	$4,622.04
250	Hyder	Pamela S.	1745	$5,316.11	$0.00	$5,316.11	$580.69	$5,896.80
251	Ihnes	Debora D.	9131	$0.00	$0.00	$0.00	$0.00	$0.00
252	Ingles	Thelma L.	9916	$2,785.09	$0.00	$2,785.09	$286.38	$3,071.47
253	Inman, Decd	Beverly A.	2562	$0.00	$0.00	$0.00	$0.00	$0.00
254	Ioerger	Judith E.	3029	$0.00	$0.00	$0.00	$0.00	$0.00
255	Jackson	Helen E.	7327	$0.00	$0.00	$0.00	$0.00	$0.00
256	Jackson	Marjorie A.	7407	$0.00	$0.00	$0.00	$0.00	$0.00
257	Jacobs	Linda A.	6364	$0.00	$0.00	$0.00	$0.00	$0.00
258	Jeffers	Candy L.	2316	$0.00	$0.00	$0.00	$0.00	$0.00
259	Johnson	Barbara J.	4138	$0.00	$0.00	$0.00	$0.00	$0.00
260	Johnson, Decd	Constance J.	5592	$0.00	$0.00	$0.00	$0.00	$0.00
261	Johnson, Decd	Dorothy A.	0033	$5,316.11	$0.00	$5,316.11	$580.69	$5,896.80
262	Jones	Carol L.	0665	$0.00	$0.00	$0.00	$0.00	$0.00
263	Jones	Clara M.	2114	$0.00	$0.00	$0.00	$0.00	$0.00
264	Kahler	Peggy L.	2389	$0.00	$0.00	$0.00	$0.00	$0.00
265	Keay	Mary F.	3565	$1,740.40	$0.00	$1,740.40	$168.85	$1,909.25
266	Keeney	Jean M.	2503	$5,139.15	$0.00	$5,139.15	$566.87	$5,706.02
267	Keeney	Patricia J.	8011	$6,471.11	$0.00	$6,471.11	$769.54	$7,240.65
268	Kelly	Carolyn S.	1910	$0.00	$0.00	$0.00	$0.00	$0.00
269	Kelly	Wallna J.	2394	$2,136.83	$0.00	$2,136.83	$214.08	$2,350.91
270	Kerns	Judith K.	2365	$0.00	$0.00	$0.00	$0.00	$0.00
271	Ketchmark	Iris	1270	$0.00	$0.00	$0.00	$0.00	$0.00
272	Khoury	Marie	6244	$728.15	$0.00	$728.15	$67.58	$795.73
273	Kidder	Ruth C.	8461	$0.00	$0.00	$0.00	$0.00	$0.00
274	Kilpatrick	Sara L.	9850	$0.00	$0.00	$0.00	$0.00	$0.00
275	Kimpler	Charlene S.	9680	$0.00	$0.00	$0.00	$0.00	$0.00
276	Kinard	Betsy R.	3433	$0.00	$0.00	$0.00	$0.00	$0.00
277	Kinder	Joy E.	7150	$5,760.11	$0.00	$5,760.11	$647.72	$6,407.83
278	King	Catherine	9017	$0.00	$0.00	$0.00	$0.00	$0.00
279	Knoblett	Clara J.	2486	$5,538.11	$0.00	$5,538.11	$619.78	$6,157.89
280	Koepp	Roland E.	7030	$0.00	$0.00	$0.00	$0.00	$0.00
281	Koontz	Joanne E.	6144	$0.00	$0.00	$0.00	$0.00	$0.00
282	Koontz, Decd	Cheryl L.	2257	$0.00	$0.00	$0.00	$0.00	$0.00
283	Kroh	Joyce I.	1018	$0.00	$0.00	$0.00	$0.00	$0.00
284	Krohn	Nora E.	9536	$0.00	$0.00	$0.00	$0.00	$0.00
285	Kroll, Decd	Nancy	1552	$4,586.36	$0.00	$4,586.36	$505.89	$5,092.25
286	Kunkle	Nancy S.	9938	$0.00	$0.00	$0.00	$0.00	$0.00
287	La Dew	Mary T.	8224	$2,292.80	$0.00	$2,292.80	$227.28	$2,520.08
288	Lago Sugnet, Decd	Deana L.	1382	$0.00	$0.00	$0.00	$0.00	$0.00
289	Lambie	Barbara A.	9049	$0.00	$0.00	$0.00	$0.00	$0.00
290	Lamm	Janie R.	4344	$4,403.80	$0.00	$4,403.80	$462.24	$4,866.04
291	Landes, Decd	Bonnie C.	3424	$0.00	$0.00	$0.00	$0.00	$0.00

	A	B	C	D	E	F	N	O
4	CM Last Name	CM First Name	Last 4 CM SSN	Cat Premiums Damages	Cov Term Damages	Principal Damages	Prej. Interest	Total
292	Landis	Ruth A.	1986	$0.00	$0.00	$0.00	$0.00	$0.00
293	Larkin	Joan M.	3103	$1,878.50	$0.00	$1,878.50	$183.24	$2,061.74
294	Larkin	Patricia A.	6480	$0.00	$0.00	$0.00	$0.00	$0.00
295	Lash	Debra S.	7776	$0.00	$0.00	$0.00	$0.00	$0.00
296	Laws, Decd	Ella D.	7968	$0.00	$0.00	$0.00	$0.00	$0.00
297	Leach	Julie	6084	$0.00	$0.00	$0.00	$0.00	$0.00
298	Leach	Virginia L.	5660	$0.00	$0.00	$0.00	$0.00	$0.00
299	Lewis	Freda	3300		$0.00	$0.00	$0.00	$0.00
300	Liberty	Linda	1688	$0.00	$0.00	$0.00	$0.00	$0.00
301	Lighter	Karen S.	5723	$635.60	$0.00	$635.60	$58.99	$694.59
302	Litz, Decd	Marcia M.	4568	$4,983.11	$0.00	$4,983.11	$541.65	$5,524.76
303	Lloyd	Eleanor G.	2120	$0.00	$0.00	$0.00	$0.00	$0.00
304	Longstreth	Carole A.	3512	$2,237.45	$0.00	$2,237.45	$218.25	$2,455.70
305	Lopez	Paula V.	1935	$0.00	$0.00	$0.00	$0.00	$0.00
306	Lowrance	Betty L.	4873	$0.00	$0.00	$0.00	$0.00	$0.00
307	Lowry, Decd	Jane A.	8393	$0.00	$0.00	$0.00	$0.00	$0.00
308	Lyle	Julie M.	4504	$0.00	$0.00	$0.00	$0.00	$0.00
309	Maestas	Mary R.	1035	$4,094.83	$0.00	$4,094.83	$445.10	$4,539.93
310	Mansfield	Laura	7773	$0.00	$10,474.99	$10,474.99	$754.38	$11,229.37
311	Marsa	Marlyn J.	5151	$0.00	$0.00	$0.00	$0.00	$0.00
312	Martin	Helen A.	1940	$0.00	$0.00	$0.00	$0.00	$0.00
313	Martin	Patricia L.	6076	$0.00	$0.00	$0.00	$0.00	$0.00
314	Martin	Sharon	7048	$2,154.70	$0.00	$2,154.70	$212.45	$2,367.15
315	Martinez	Guadalupe	8597	$0.00	$0.00	$0.00	$0.00	$0.00
316	Martinez	Mary L.	7634	$1,326.10	$0.00	$1,326.10	$126.56	$1,452.66
317	Mason	Willie E.	0826	$3,951.60	$0.00	$3,951.60	$427.42	$4,379.02
318	Matlock	Vera June	3728	$4,088.09	$0.00	$4,088.09	$444.37	$4,532.46
319	Mc Graw	Willadean	2431	$0.00	$0.00	$0.00	$0.00	$0.00
320	Mc Hone, Decd	Valerie M.	8394	$4,384.36	$0.00	$4,384.36	$481.26	$4,865.62
321	Mc Millan	Melody	7793	$0.00	$0.00	$0.00	$0.00	$0.00
322	McCall	Martha J.	6242	$0.00	$0.00	$0.00	$0.00	$0.00
323	McCarty	Rhea	7829	$0.00	$0.00	$0.00	$0.00	$0.00
324	McCauley	Vicki J.	7143	$4,428.11	$0.00	$4,428.11	$467.15	$4,895.26
325	McKenzie	Linda S.	5718	$0.00	$0.00	$0.00	$0.00	$0.00
326	Meanus	Dorothy J.	8879	$582.52	$0.00	$582.52	$53.76	$636.28
327	Mellon	Loann T.	1765	$4,761.11	$0.00	$4,761.11	$507.35	$5,268.46
328	Mendenhall	Dolly M.	0563	$3,990.46	$0.00	$3,990.46	$425.23	$4,415.69
329	Mendenhall Ricks	Linda M.	4462	$3,215.84	$0.00	$3,215.84	$334.12	$3,549.96
330	Meredith	Mary	6234	$123.07	$0.00	$123.07	$13.56	$136.63
331	Messinger	Barbara A.	2958	$0.00	$0.00	$0.00	$0.00	$0.00
332	Mettley	Deborah A.	4049	$5,427.11	$0.00	$5,427.11	$592.82	$6,019.93
333	Meyer	Donna E.	0291	$0.00	$0.00	$0.00	$0.00	$0.00
334	Miller	Florence H.	8285	$0.00	$4,824.07	$4,824.07	$387.95	$5,212.02
335	Miller	Joy L.	5682	$2,186.31	$0.00	$2,186.31	$212.11	$2,398.42
336	Miller	Patricia A.	2223	$4,106.12	$0.00	$4,106.12	$426.62	$4,532.74
337	Mines-Epperson	Leea J.	1166	$3,231.22	$0.00	$3,231.22	$337.44	$3,568.66
338	Minson	Maria A.	2091	$5,205.11	$0.00	$5,205.11	$568.57	$5,773.68
339	Mitchell	Barbara L.	2371	$6,360.11	$0.00	$6,360.11	$756.34	$7,116.45
340	Mobeck	Virginia M.	8183	$5,279.46	$0.00	$5,279.46	$610.72	$5,890.18
341	Montag	Sandra L.	4301	$0.00	$0.00	$0.00	$0.00	$0.00
342	Moore	Carolyn S.	8927	$2,368.58	$0.00	$2,368.58	$231.04	$2,599.62
343	Moore	Judith C.	9054	$3,677.64	$0.00	$3,677.64	$378.20	$4,055.84
344	Moore, Decd	Sandra K.	4423	$0.00	$0.00	$0.00	$0.00	$0.00
345	Morel	Mary E.	5887	$0.00	$0.00	$0.00	$0.00	$0.00
346	Morgan	Willa	0851	$0.00	$0.00	$0.00	$0.00	$0.00
347	Morse-Hale	Ruth E.	0497	$3,086.78	$0.00	$3,086.78	$310.89	$3,397.67
348	Moshier	Cheryl R.	4574	$0.00	$0.00	$0.00	$0.00	$0.00
349	Mudd	Marilee A.	6613	$0.00	$0.00	$0.00	$0.00	$0.00

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4	CM Last Name	CM First Name	Last 4 CM SSN	Cat Premiums Damages	Cov Term Damages	Principal Damages	Prej. Interest	Total
350	Mulligan	Vickie L.	1003	$0.00	$0.00	$0.00	$0.00	$0.00
351	Murphy Fulce, Decd	Laura M.	2984	$0.00	$0.00	$0.00	$0.00	$0.00
352	Myers	Jane E.	7637	$0.00	$0.00	$0.00	$0.00	$0.00
353	Nafziger	Lucinda R.	7538	$145.63	$0.00	$145.63	$13.21	$158.84
354	Nalley	Marcia L.	1936	$0.00	$0.00	$0.00	$0.00	$0.00
355	Nation	Tammra L.	7087	$0.00	$0.00	$0.00	$0.00	$0.00
356	Nauman	Charlene	9949	$5,202.05	$0.00	$5,202.05	$573.81	$5,775.86
357	Naylor, Decd	Sharon K.	2649	$2,577.34	$0.00	$2,577.34	$260.94	$2,838.28
358	Newby	Lucinda	8918	$0.00	$0.00	$0.00	$0.00	$0.00
359	Newton	Beverly A.	3834	$1,188.00	$0.00	$1,188.00	$112.75	$1,300.75
360	Norton	Anna M.	4611	$0.00	$0.00	$0.00	$0.00	$0.00
361	Oedewaldt	Sally Q.	1263	$2,415.87	$0.00	$2,415.87	$243.32	$2,659.19
362	Ortega	Ruth M.	2762	$6,669.09	$0.00	$6,669.09	$789.48	$7,458.57
363	Orton	Pamela S.	6011	$3,790.39	$0.00	$3,790.39	$391.81	$4,182.20
364	Painter	Mildred	3134	$0.00	$0.00	$0.00	$0.00	$0.00
365	Pakula	Sophie J.	7706	$0.00	$0.00	$0.00	$0.00	$0.00
366	Parker	Agnes	8256	$0.00	$0.00	$0.00	$0.00	$0.00
367	Parker	Emma J.	1456	$0.00	$0.00	$0.00	$0.00	$0.00
368	Parker	Phyllis Y.	6751	$0.00	$0.00	$0.00	$0.00	$0.00
369	Parks	Queen C.	0967	$3,367.57	$0.00	$3,367.57	$389.08	$3,756.65
370	Parnell, Decd	Jane C.	8102	$0.00	$0.00	$0.00	$0.00	$0.00
371	Paup	Edith C.	6060	$4,089.92	$0.00	$4,089.92	$438.01	$4,527.93
372	Payne	Margaret	1494	$0.00	$0.00	$0.00	$0.00	$0.00
373	Payne	Pamela G.	4086	$0.00	$0.00	$0.00	$0.00	$0.00
374	Peace Angelo Gonzalez	Zola C.	0206	$0.00	$0.00	$0.00	$0.00	$0.00
375	Pearl	Virginia	9597	$0.00	$0.00	$0.00	$0.00	$0.00
376	Pegues	Lillian W.	3453	$6,471.11	$0.00	$6,471.11	$766.04	$7,237.15
377	Peiffer	Patricia R.	5083	$773.70	$0.00	$773.70	$72.21	$845.91
378	Penning	Debra C.	4728	$0.00	$0.00	$0.00	$0.00	$0.00
379	Perkins	Shelia	9596	$6,526.51	$0.00	$6,526.51	$762.02	$7,288.53
380	Perryman Seitz	Kelli E.	6527	$2,368.58	$0.00	$2,368.58	$231.04	$2,599.62
381	Peyton, Decd	Geraldine	4665	$174.00	$0.00	$174.00	$25.34	$199.34
382	Phillips	Frances	1162	$353.83	$0.00	$353.83	$39.72	$393.55
383	Phillips Day	Sylvia E.	5996	$6,360.11	$0.00	$6,360.11	$752.90	$7,113.01
384	Pierce, Decd	Cheri	5287	$0.00	$0.00	$0.00	$0.00	$0.00
385	Pilcher	O June	3274	$0.00	$0.00	$0.00	$0.00	$0.00
386	Pine	Carol J.	3381	$2,051.33	$0.00	$2,051.33	$272.19	$2,323.52
387	Pittenger	Patricia M.	3877	$0.00	$0.00	$0.00	$0.00	$0.00
388	Podschweit	Rae Lynn	3551	$5,427.11	$0.00	$5,427.11	$598.63	$6,025.74
389	Poe	Anna E.	3980	$6,244.08	$0.00	$6,244.08	$719.49	$6,963.57
390	Poff	Mary E.	9989	$6,362.50	$0.00	$6,362.50	$753.18	$7,115.68
391	Pokarney	Dollie N.	2164	$0.00	$0.00	$0.00	$0.00	$0.00
392	Popish, Decd	Karen	3672	$3,531.21	$0.00	$3,531.21	$368.77	$3,899.98
393	Porter	Ruth M.	3147	$1,602.30	$0.00	$1,602.30	$154.61	$1,756.91
394	Potter, Decd	Nancy	7606	$0.00	$0.00	$0.00	$0.00	$0.00
395	Powers	Patricia J.	8500	$0.00	$0.00	$0.00	$0.00	$0.00
396	Price	Elois	4873	$0.00	$0.00	$0.00	$0.00	$0.00
397	Price	Gloria E.	7360	$0.00	$0.00	$0.00	$0.00	$0.00
398	Price Beck	Patricia A.	4880	$0.00	$0.00	$0.00	$0.00	$0.00
399	Prince	Betty S.	6883	$0.00	$0.00	$0.00	$0.00	$0.00
400	Purifoy, Decd	Ava L.	3893	$0.00	$0.00	$0.00	$0.00	$0.00
401	Ramer	Margaret A.	8319	$0.00	$0.00	$0.00	$0.00	$0.00
402	Ramirez	Josefina	8994	$5,620.59	$0.00	$5,620.59	$652.91	$6,273.50
403	Randle	Joan	5164	$0.00	$0.00	$0.00	$0.00	$0.00
404	Redfield, Decd	Carolyn S.	7799	$4,958.54	$0.00	$4,958.54	$541.64	$5,500.18
405	Reece	Linda L.	5482	$3,709.21	$0.00	$3,709.21	$381.44	$4,090.65
406	Reed	Frances K.	2798	$4,536.42	$0.00	$4,536.42	$480.99	$5,017.41
407	Reheard	Elizabeth J.	0955	$0.00	$0.00	$0.00	$0.00	$0.00

	A	B	C	D	E	F	N	O
4	CM Last Name	CM First Name	Last 4 CM SSN	Cat Premiums Damages	Cov Term Damages	Principal Damages	Prej. Interest	Total
408	Reidel	Ruth D.	3479	$0.00	$0.00	$0.00	$0.00	$0.00
409	Reisinger	Nancy L.	8970	$3,185.43	$0.00	$3,185.43	$332.66	$3,518.09
410	Rena, Decd	Thomas J.	8179	$1,129.33	$0.00	$1,129.33	$106.59	$1,235.92
411	Rennie	Jeri L.	0496	$582.52	$0.00	$582.52	$53.76	$636.28
412	Rewerts	Kathleen	9447	$0.00	$0.00	$0.00	$0.00	$0.00
413	Rhoades	Delanie Laurel	6942	$0.00	$0.00	$0.00	$0.00	$0.00
414	Rice	La Donna K.	6040	$5,507.48	$0.00	$5,507.48	$649.07	$6,156.55
415	Rice	Marcella A.	1653	$0.00	$0.00	$0.00	$0.00	$0.00
416	Richard	Barbara R.	7666	$0.00	$0.00	$0.00	$0.00	$0.00
417	Richardson	Flossie	1793	$0.00	$0.00	$0.00	$0.00	$0.00
418	Ridgeway, Decd	Ruthann	4520	$5,069.54	$0.00	$5,069.54	$559.19	$5,628.73
419	Ridings	Charlotte A.	1867	$0.00	$0.00	$0.00	$0.00	$0.00
420	Riefler	Judith L.	1143	$0.00	$0.00	$0.00	$0.00	$0.00
421	Riker	Dorcas L.	6321	$0.00	$0.00	$0.00	$0.00	$0.00
422	Roberts	Sharon	7442	$0.00	$0.00	$0.00	$0.00	$0.00
423	Robertson	Rita	5055	$6,360.11	$0.00	$6,360.11	$752.90	$7,113.01
424	Rodman	Caroline L.	4504	$4,016.34	$0.00	$4,016.34	$438.72	$4,455.06
425	Roelke	Diana E.	9663	$4,617.99	$0.00	$4,617.99	$506.91	$5,124.90
426	Rogers, Decd	Ria	9192	$0.00	$0.00	$0.00	$0.00	$0.00
427	Roper	Cathy L.	8623	$0.00	$0.00	$0.00	$0.00	$0.00
428	Rosson	Mary L.	8783	$4,827.71	$0.00	$4,827.71	$519.60	$5,347.31
429	Roth, Decd	Ruth	7262	$2,242.15	$0.00	$2,242.15	$238.80	$2,480.95
430	Rowley	Rita S.	7372	$0.00	$0.00	$0.00	$0.00	$0.00
431	Ruppert	Charlene R.	6068	$0.00	$0.00	$0.00	$0.00	$0.00
432	Russell	Wendy M.	7998	$0.00	$0.00	$0.00	$0.00	$0.00
433	Ryen	Sharon K.	5740	$0.00	$0.00	$0.00	$0.00	$0.00
434	Sandford	Suzette	0385	$145.63	$0.00	$145.63	$13.21	$158.84
435	Sandvos	Mary	6032	$0.00	$0.00	$0.00	$0.00	$0.00
436	Sapp	Caroline M.	7339	$0.00	$0.00	$0.00	$0.00	$0.00
437	Schaffer	Judy K.	7261	$4,336.15	$0.00	$4,336.15	$457.45	$4,793.60
438	Schappaugh	Sandra	4949	$3,274.36	$0.00	$3,274.36	$333.25	$3,607.61
439	Schaub	Donna M.	0436	$0.00	$0.00	$0.00	$0.00	$0.00
440	Schierbaum, Decd	Sharon	2771	$0.00	$0.00	$0.00	$0.00	$0.00
441	Schindler	Virginia C.	6971	$1,493.87	$0.00	$1,493.87	$141.77	$1,635.64
442	Schisler	Linda L.	3120	$0.00	$0.00	$0.00	$0.00	$0.00
443	Schmidgall	Janice E.	1331	$0.00	$0.00	$0.00	$0.00	$0.00
444	Schnetzka	Joyce A.	3042	$2,592.84	$0.00	$2,592.84	$262.51	$2,855.35
445	Schroeder	Deborah S.	1793	$5,245.81	$0.00	$5,245.81	$575.82	$5,821.63
446	Schumaker-Peck	Phyllis K.	9992	$0.00	$0.00	$0.00	$0.00	$0.00
447	Schwark	Brenda K.	8432	$0.00	$0.00	$0.00	$0.00	$0.00
448	Schwark, Decd	Susan K.	7805	$3,298.45	$0.00	$3,298.45	$339.20	$3,637.65
449	Schwartz, Decd	Barbara A.	7682	$0.00	$0.00	$0.00	$0.00	$0.00
450	Secretan	Rebecca S.	5364	$0.00	$0.00	$0.00	$0.00	$0.00
451	Seebold	Bereneice	2601	$4,355.16	$0.00	$4,355.16	$478.06	$4,833.22
452	Seemann	Sharon K.	2746	$0.00	$0.00	$0.00	$0.00	$0.00
453	Seibert	Charlotte M.	9409	$2,768.17	$2,332.83	$5,101.00	$479.55	$5,580.55
454	Servis	Melinda S.	9277	$0.00	$0.00	$0.00	$0.00	$0.00
455	Shanklin	Vickie L.	1077	$0.00	$0.00	$0.00	$0.00	$0.00
456	Sheffer	Howard A.	3967	$5,177.26	$0.00	$5,177.26	$607.28	$5,784.54
457	Shelton, Decd	Judith K.	6585	$0.00	$0.00	$0.00	$0.00	$0.00
458	Sherman, Decd	Florence M.	6003	$3,037.17	$0.00	$3,037.17	$304.28	$3,341.45
459	Shoemaker	Mary C.	8947	$5,205.11	$0.00	$5,205.11	$568.57	$5,773.68
460	Siar	Frances E.	8125	$0.00	$0.00	$0.00	$0.00	$0.00
461	Siler	Barbra	3867	$0.00	$0.00	$0.00	$0.00	$0.00
462	Simmons	Cynthia G.	0153	$0.00	$0.00	$0.00	$0.00	$0.00
463	Simons	Katie L.	8375	$6,471.11	$0.00	$6,471.11	$766.04	$7,237.15
464	Skaggs	Nancy A.	9411	$4,568.71	$0.00	$4,568.71	$486.85	$5,055.56
465	Slater, Decd	Linda A.	8547	$0.00	$0.00	$0.00	$0.00	$0.00

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4	CM Last Name	CM First Name	Last 4 CM SSN	Cat Premiums Damages	Cov Term Damages	Principal Damages	Prej. Interest	Total
466	Sledge	Kimberly J.	4994	$0.00	$0.00	$0.00	$0.00	$0.00
467	Smallwood	Rosalie M.	2180	$2,550.85	$0.00	$2,550.85	$248.82	$2,799.67
468	Smeltzer	Brenda S.	0003	$0.00	$0.00	$0.00	$0.00	$0.00
469	Smith	Bonita L.	1654	$5,427.11	$0.00	$5,427.11	$598.63	$6,025.74
470	Smith	Gloria J.	8459	$0.00	$0.00	$0.00	$0.00	$0.00
471	Smith	Joyce E.	7864	$0.00	$0.00	$0.00	$0.00	$0.00
472	Smith	Karla R.	6924	$4,742.61	$0.00	$4,742.61	$507.91	$5,250.52
473	Smith	Lela M.	9278	$40.00	$0.00	$40.00	$5.83	$45.83
474	Smith	Paula M.	3032	$0.00	$0.00	$0.00	$0.00	$0.00
475	Smith	Sylvia I.	3201	$0.00	$0.00	$0.00	$0.00	$0.00
476	Smith Henry	Susan K.	9998	$0.00	$0.00	$0.00	$0.00	$0.00
477	Smith, Decd	Betty J.	7613	$0.00	$0.00	$0.00	$0.00	$0.00
478	Snedden	Thelma	8400	$0.00	$0.00	$0.00	$0.00	$0.00
479	Snodgrass, Decd	Barbara A.	7051	$4,824.01	$0.00	$4,824.01	$521.78	$5,345.79
480	Souba	Patricia A.	9909	$0.00	$0.00	$0.00	$0.00	$0.00
481	Spencer	Carol M.	5074	$0.00	$0.00	$0.00	$0.00	$0.00
482	Spencer	Viola	2204	$0.00	$0.00	$0.00	$0.00	$0.00
483	Stambaugh, Decd	Nancy L.	3252	$0.00	$0.00	$0.00	$0.00	$0.00
484	Stanbery	Carol S.	3890	$5,469.56	$0.00	$5,469.56	$644.52	$6,114.08
485	Stark	Claris	2425	$4,587.21	$0.00	$4,587.21	$488.82	$5,076.03
486	Stark, Decd	Laura B.	0832	$0.00	$0.00	$0.00	$0.00	$0.00
487	Staub	Ann M.	3064	$0.00	$0.00	$0.00	$0.00	$0.00
488	Steck	Helen	7208	$0.00	$0.00	$0.00	$0.00	$0.00
489	Stewart	Sandra	8529	$0.00	$0.00	$0.00	$0.00	$0.00
490	Strange	Jeannie	8207	$0.00	$0.00	$0.00	$0.00	$0.00
491	Stratton	Sandra K.	8800	$0.00	$0.00	$0.00	$0.00	$0.00
492	Straw	Alva M.	2049	$0.00	$0.00	$0.00	$0.00	$0.00
493	Street, Decd	Jeannette	7607	$177.60	$0.00	$177.60	$23.17	$200.77
494	Summers	Darlene J.	2659	$0.00	$0.00	$0.00	$0.00	$0.00
495	Sundell, Decd	Donna J.	3434	$0.00	$0.00	$0.00	$0.00	$0.00
496	Supan	Judith A.	8919	$5,788.73	$0.00	$5,788.73	$685.26	$6,473.99
497	Sutton	Patricia	6167	$0.00	$0.00	$0.00	$0.00	$0.00
498	Sydnor	Margarite	1947	$381.36	$0.00	$381.36	$34.99	$416.35
499	Taylor, Decd	Sharrlene K.	4834	$0.00	$0.00	$0.00	$0.00	$0.00
500	Telford	Elissa R.	2675	$4,019.17	$0.00	$4,019.17	$419.73	$4,438.90
501	Thomas	Bonnie M.	4523	$0.00	$0.00	$0.00	$0.00	$0.00
502	Thomas	Brenda S.	6361	$6,471.11	$0.00	$6,471.11	$766.04	$7,237.15
503	Thomas	Mary M.	2585	$0.00	$0.00	$0.00	$0.00	$0.00
504	Thompson	Janice L.	7677	$0.00	$0.00	$0.00	$0.00	$0.00
505	Tittle	Dorothy J.	2665	$0.00	$0.00	$0.00	$0.00	$0.00
506	Todd	Lillie M.	2867	$0.00	$0.00	$0.00	$0.00	$0.00
507	Tovar	Maria	6942	$2,088.00	$0.00	$2,088.00	$292.81	$2,380.81
508	Trimmer	Cheryl S.	5366	$0.00	$0.00	$0.00	$0.00	$0.00
509	Troyer	Christine J.	7170	$0.00	$0.00	$0.00	$0.00	$0.00
510	Tunis	Rebecca J.	7069	$2,733.12	$0.00	$2,733.12	$266.60	$2,999.72
511	Turner	Sharon A.	4299	$0.00	$0.00	$0.00	$0.00	$0.00
512	Ulrich	Karen J.	2122	$0.00	$0.00	$0.00	$0.00	$0.00
513	Urey	Patricia A.	9002	$0.00	$0.00	$0.00	$0.00	$0.00
514	Vahling	Cheryl D.	4127	$5,427.11	$0.00	$5,427.11	$598.63	$6,025.74
515	Valle	Celia	0118	$0.00	$0.00	$0.00	$0.00	$0.00
516	Vaughn	Yvonne E.	9680	$0.00	$0.00	$0.00	$0.00	$0.00
517	Verble	Linda J.	8160	$0.00	$0.00	$0.00	$0.00	$0.00
518	Vickers, Decd	Arlo	9174	$0.00	$0.00	$0.00	$0.00	$0.00
519	Virden	Nancy K.	5670	$182.27	$0.00	$182.27	$18.63	$200.90
520	Vu	Lam Thi	2070	$0.00	$0.00	$0.00	$0.00	$0.00
521	Wagner	Anna M.	6576	$0.00	$0.00	$0.00	$0.00	$0.00
522	Wagner	Jimmie J.	9303	$87.00	$0.00	$87.00	$12.72	$99.72
523	Wagner	Lois	1543	$2,186.31	$0.00	$2,186.31	$212.11	$2,398.42

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4	CM Last Name	CM First Name	Last 4 CM SSN	Cat Premiums Damages	Cov Term Damages	Principal Damages	Prej. Interest	Total
524	Wagoner	Paula	9976	$0.00	$0.00	$0.00	$0.00	$0.00
525	Wakefield, Decd	Shirley M.	2852	$773.70	$0.00	$773.70	$72.21	$845.91
526	Walker	Rose M.	6177	$0.00	$0.00	$0.00	$0.00	$0.00
527	Ward	Karen S.	4734	$0.00	$0.00	$0.00	$0.00	$0.00
528	Warner	Peggy E.	4038	$2,915.39	$0.00	$2,915.39	$287.46	$3,202.85
529	Waters	Barbara	0370	$0.00	$0.00	$0.00	$0.00	$0.00
530	Watters	Barbara L.	7410	$5,279.36	$0.00	$5,279.36	$624.96	$5,904.32
531	Weaver	Eleanor F.	1632	$0.00	$0.00	$0.00	$0.00	$0.00
532	Weaver	Mary	5417	$0.00	$0.00	$0.00	$0.00	$0.00
533	Wehmeier	Joyce	3880	$0.00	$0.00	$0.00	$0.00	$0.00
534	Welch	Karel L.	0958	$5,641.71	$0.00	$5,641.71	$628.35	$6,270.06
535	Wells	Rosella M.	7492	$5,316.11	$0.00	$5,316.11	$583.54	$5,899.65
536	Wesby, Decd	Barbara	6897	$0.00	$0.00	$0.00	$0.00	$0.00
537	West Sr	Helen	6044	$4,485.36	$0.00	$4,485.36	$494.75	$4,980.11
538	Wheeler	Marlena K.	7730	$0.00	$0.00	$0.00	$0.00	$0.00
539	White	Linda L.	9290	$5,223.56	$0.00	$5,223.56	$570.58	$5,794.14
540	White Foley	Linda K.	9014	$111.00	$0.00	$111.00	$14.90	$125.90
541	White, Decd	Allean	9542	$0.00	$0.00	$0.00	$0.00	$0.00
542	Wiese	Sandra L.	2606	$0.00	$0.00	$0.00	$0.00	$0.00
543	Wilkerson	Shirley A.	0064	$0.00	$0.00	$0.00	$0.00	$0.00
544	Williams	Carol	4957	$5,427.11	$0.00	$5,427.11	$592.82	$6,019.93
545	Williams	Mary A.	5592	$436.89	$0.00	$436.89	$40.09	$476.98
546	Wilson	Jennifer L.	7375	$5,316.11	$0.00	$5,316.11	$629.31	$5,945.42
547	Wilson	Mary Lou	4772	$6,186.11	$0.00	$6,186.11	$702.27	$6,888.38
548	Wilson	Mildred Mae	3993	$0.00	$0.00	$0.00	$0.00	$0.00
549	Wilson	Patricia M.	3937	$0.00	$0.00	$0.00	$0.00	$0.00
550	Winders	Diane L.	7109	$0.00	$0.00	$0.00	$0.00	$0.00
551	Winkler	Patsy A.	9857	$0.00	$0.00	$0.00	$0.00	$0.00
552	Worley	Judith M.	1838	$3,812.48	$0.00	$3,812.48	$404.23	$4,216.71
553	Wray	Josephine	5488	$5,481.36	$0.00	$5,481.36	$648.87	$6,130.23
554	Wyman, Decd	Marilyn L.	9949	$0.00	$0.00	$0.00	$0.00	$0.00
555	Yohe	Diane E.	6883	$1,165.04	$0.00	$1,165.04	$107.52	$1,272.56
556	Young	Rhonda K.	1109	$0.00	$0.00	$0.00	$0.00	$0.00
557	Ziegenbein	Joyce I.	9291	$0.00	$0.00	$0.00	$0.00	$0.00
558	Zwetz	Roberta C.	4621	$0.00	$0.00	$0.00	$0.00	$0.00
559								
560								
561	554	Totals:		$728,774.05	$34,730.88	$763,504.93	$82,442.22	$845,947.15