

Nos. 06-1964 & 06-2101

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ARTEMIS COFFIN, et al.,

Plaintiffs-Appellants/Cross-Appellees,

v.

BOWATER INCORPORATED, et al.,

Defendants-Appellees/Cross-Appellants.

On Appeal from the
United States District Court
for the District of Maine

BRIEF OF DEFENDANT-APPELLEE/CROSS-APPELLANT

BOWATER INCORPORATED

***** PUBLIC REDACTED VERSION *****

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Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1, Defendant-Appellee/Cross-Appellant Bowater Incorporated states that it has no parent company or publicly held company that owns 10% or more of its stock.

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Jurisdictional Statement

The district court had jurisdiction under 29 U.S.C. § 185(a) and § 1132(e)(1). The district court entered a final judgment on June 19, 2006. JA286–87. Plaintiffs filed a notice of appeal that day, JA288–89, and Bowater filed a notice of appeal on July 12, 2006. Defs. Notice of Appeal (d/e 198). This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented

1. Whether the district court correctly held that the applicable collective bargaining agreements – each of which expressly limits retiree health benefits to “[d]uring the term of this labor agreement” – are unambiguous and preclude Plaintiffs’ claims for vested benefits.
2. Whether the district court erred when it held that the sale of a subsidiary does not terminate welfare plans that had been maintained by the subsidiary’s former parent for the subsidiary’s retirees, even though:
(i) the former parent’s board of directors had authorized termination of the plans; (ii) a duly authorized officer of the former parent signed an agreement terminating the parent’s obligations; and (iii) the subsidiary’s

retirees thereafter received benefits directly from the subsidiary under its new ownership.

3. Whether the district court correctly affirmed as “entirely reasonable” the Plan Administrator’s determination that a newly adopted plan – which by its terms “replace[d] and supersede[d]” prior plans – terminated the prior plans upon which Plaintiffs rely.

Statement of the Case

This case arises out of the bankruptcy of Great Northern Paper, Inc. (“GNP”). Plaintiffs are a class of former GNP employees. They worked for GNP, retired from GNP, and received retiree medical benefits from GNP. GNP declared bankruptcy in 2003 and stopped paying retiree medical benefits. Plaintiffs now seek a new funding source for those benefits.

Plaintiffs assert claims under the Labor Management Relations Act (“LMRA”) and the Employee Retirement Income Security Act (“ERISA”). Under the LMRA, Plaintiffs assert that their collective bargaining agreements (“CBAs”) promised them lifetime retiree health care benefits. Those CBAs, though, provide retiree health care benefits only “during the term of the labor agreement,” and they incorporate summary plan

descriptions (“SPDs”) which state that there are “no vested rights of any nature.” Under ERISA, Plaintiffs claim that the benefit plans upon which they rely continued in existence until 2004. Those plans, though, were terminated in 1999, when Bowater sold GNP, and in any event no later than 2003, when Bowater adopted a benefit plan that “supersede[d] and replace[d]” any prior benefit plans.

The district court granted Plaintiffs’ motion for class certification with respect to their ERISA claim (Count I), and their LMRA claims (Counts II and III). Add. 38. The district court adopted Plaintiffs’ class definition, and, after the parties reached a stipulation on a disputed issue of administrative exhaustion, revised that definition in accordance with the parties’ agreement. (d/e 135).

Following cross-motions for summary judgment, the district court granted Bowater summary judgment on Counts II and III, the LMRA counts. With respect to Count I, the ERISA count, the court granted Bowater summary judgment for the period starting January 1, 2003, and granted Plaintiffs summary judgment for the period prior to January 1, 2003. Add. 81. This appeal and cross-appeal followed.

Statement of Facts

Plaintiffs are former employees of GNP, a company that has been making paper for over 100 years. JA107-08. GNP was owned by Bowater from 1992 through August 17, 1999, when it was sold to Inexcon Maine, Inc. (“Inexcon”). GNP operated under Inexcon’s ownership for three years. Following a downturn in the paper industry, however, GNP was forced to declare bankruptcy in January 2003. As a result, GNP stopped providing health care benefits to its salaried and union retirees. Seeking a new funding source, Plaintiffs brought the present claims against Bowater.

1. Collective Bargaining Agreements

GNP negotiated a series of CBAs with various unions during the period 1992 to 1999. The parties refer to those unions as “OPEIU,” “UPGWA,” “UPIU” (which later became “PACE”), and the “Trades.” App. Br. 12. Bowater was not a party to any of those CBAs.

The CBAs contained integration clauses pursuant to which the CBAs (sometimes together with a document entitled “Details of Company Final Offer”) “represent the entire understanding of the parties,” and “contain[] all the terms and conditions of the settlement with respect to a new labor

agreement between the parties.” JA124-37 (¶¶41, 42, 50, 58, 62, 67, 69, 73). As one of the union negotiators testified, “[t]he CBA is the final agreement between the parties . . . what is understood between the parties and basically what the contract or the binding labor agreement between the parties ends up being.” JA940.

With respect to retiree health insurance, the CBAs – to the extent they promised retiree health benefits at all – limited health benefits to the term of the CBA. Most of the CBAs provided that “[d]uring the term of this labor agreement the Company will provide certain insurance for employees who retire on pension and will assume the entire cost of such retired employee’s insurance.” JA330 (emphasis added). *See also* JA474; JA508.¹

The CBAs incorporated by reference the terms of the GNP summary plan descriptions, providing that the “Health Care Plan shall be maintained as agreed upon by the parties and shall be described in a separate booklet (Summary Plan Description).” JA329; JA386; JA409; JA474; JA508; JA535; JA555. The incorporated SPDs explicitly stated that

¹ Some CBAs – including those for the OPEIU and UPGWA – did not refer to retiree health care benefits. App. Br. 13; JA142-43 (¶86).

health benefits were not vested and could be terminated by the plan sponsor, Bowater, at any time. For example, the SPD for the Point of Service-A plan (“POS-A”) provides:

The terms and conditions set forth in this booklet may not be modified by any oral statement. It is the intention of the Plan Sponsor to continue the Plan. However, the Plan Sponsor, in its sole discretion, may at any time modify or amend the provisions, terms and conditions of the Plan or may at any time terminate the Plan without the consent of any Participant or any other beneficiary under the Plan. *No vested rights of any nature are provided by the Plan.*

JA183-84 (¶194) (emphasis added). Similarly, the SPDs for both the Comprehensive and Basic Indemnity Medical Plan state that “[t]he right is reserved . . . for the Plan Sponsor to terminate, suspend, withdraw, amend or modify the Plan, covering any active Employee or current or future retiree, in whole or in part at any time.” JA184 (¶198).

2. Inexcon Acquisition of GNP

In 1999, Bowater agreed to sell GNP to Inexcon. That transaction, which closed on August 17, 1999, was memorialized in a 1999 Stock Purchase Agreement (“SPA”). Under the terms of that SPA (including Amendment Number One thereto), Inexcon assumed the liabilities for Other Post-Employment Benefits (“OPEB”) at GNP, a defined term that

included retiree health care benefits. Inexcon specifically assumed the obligation for the POS-A and Indemnity Plans. JA187-88 (¶¶209-11); JA1146 (¶4.12); JA1153 (¶4.20(a)); JA1200 ¶10; JA1369. Bowater, by contrast, assumed the liability for the GNP Pension Plans. JA1138 (¶2.05).

During labor negotiations before the sale of GNP, the unions were repeatedly informed that GNP under Inexcon's ownership would retain the obligations for all retiree health benefits. For example, on July 28, 1999, Inexcon's owner, Lambert Bedard, informed union representatives that GNP "will keep paying" the OPEB obligations for "all current retirees." JA154 (¶121); JA1250. On July 29, 1999, a union negotiator confirmed that "Inexcon would be responsible for all past and future retirees medical benefits." JA155 (¶123); JA1324. On August 3, 1999, it was again confirmed that "the retiree health care would go to Inexcon for Company paid insurance." JA155 (¶124); JA156 (¶126); JA1271; JA1341. In fact, it is undisputed that the Trades negotiator informed the Trades membership that GNP under Inexcon's ownership was assuming the retiree health care obligations. JA155 (¶125). GNP benefits personnel also informed GNP employees, both orally and in writing, that "Inexcon will have the liability for retirees medical insurance." JA156 (¶¶127-28).

During the 1999 labor negotiations, the union leadership acknowledged that retiree health benefits were not vested benefits. For example, one of the unions' lead negotiators stated in an internal memorandum that “

.” JA157 (¶130); SA6.² Another union negotiator acknowledged that the retiree health care benefit “currently expires when [the] Collective Bargaining [agreement] expires.” JA158 (¶132); JA1260.

3. The 1999 Agreements

The 1999 labor negotiations resulted in agreements with each of the GNP unions (the “1999 Agreements”). They provided that the terms of the 1995 CBAs would remain “in full force and effect” unless modified by the 1999 Agreements. JA632; JA646; JA653; JA664; JA677.

With respect to Bowater, the 1999 Agreements provide that “[u]pon the date of sale, all Bowater contractual obligations except those referred to

² The memorandum, sealed below, is in the sealed Supplemental Appendix.

in the Inexcon offer under ‘pensions’ shall cease.” JA163-65 (¶¶147, 151).³ Each agreement contains a section referred to as “the pension proposal.” JA161-66 (¶¶139, 147, 151, 155).⁴ In that section, each agreement provides that “Bowater will retain the liability for retirement benefits earned and accrued through the day of the sale.” JA161-65 (¶¶139, 148, 152, 156). The negotiator for the Trades union testified that he understood “retirement benefits earned and accrued” as referring to pension benefits, JA162 (¶140), and that he informed his membership that GNP was assuming the obligation for retiree health care benefits. JA155 (¶125). An explanatory sheet attached to each agreement explains the calculation of “retirement benefits earned and accrued”; it calls them “pension” benefits and provides a calculation solely of pension benefits. JA162 (¶141).

³ Similar language was used in the agreements with PACE and the Trades, which provided that “[e]xcept as specified in this proposal, all Bowater Incorporated obligations under the labor agreement shall cease on the effective date of the new agreement.” JA161-66 (¶¶138, 155).

⁴ The exact title of the pension proposal differs between agreements. In the PACE Agreement, the “pension proposal” is identified as Exhibit II; in the Trades, OPEIU and UPGWA agreements, it is identified as Exhibit A. JA632; JA646; JA653; JA664; JA677.

The only references to health benefits in the 1999 Agreements are in Exhibit IV of the PACE agreement and Exhibit C of the other agreements. They provided that “[e]xcept for those employees in paragraph A, employees who retire on or after the date of the sale shall be eligible for retiree medical coverage. The plan design shall be the same as that for active employees including any design changes in the future and the retiree shall pay the full premium.” JA162 (¶142). Paragraph A, in turn, provided: “Active employees on the date of sale shall have until October 1, 1999 to elect retirement and preserve their company-paid retiree health care.” *Id.* The term “Company” as used in the 1999 Agreements refers to GNP.⁵

⁵ The 1995 CBAs – which remained in full effect except as modified by the 1999 Agreements – define “Company” as GNP. JA127, JA132, JA138 (¶¶48, 59, 75). Further, as used in the 1999 Agreements, the term “company” plainly refers to GNP. For example, the 1999 Agreements provide that “[e]ffective January 1, 2000 the *company* contribution for health care coverage for active employees shall be capped at \$150 per month” and that “[s]hould it become necessary to have a layoff to achieve the desired reductions the *company* will offer severance to the employees not eligible for retirement. JA162–63 (¶143) (emphasis added). Given that Bowater was selling GNP as of August 17, 1999, the term “company” must refer to GNP, not Bowater.

4. Bedard Side-Letter

On August 10, 1999, Inexcon's Lambert Bedard provided a side-letter to the Trades addressing certain technical issues raised by the Trades in an August 9, 1999, meeting. During a meeting called with "Bedard and Bedard alone without interference from Bowater," JA166 (¶157), Trades representatives inquired about two items. First, "for people who retire Friday, will the 4.5% rate on the lump sum, bonus of \$5000 and \$28 per year offer still stand[?]" JA167 (¶161). Second, "if a person turns 55 between now and October 1, would they be able to retire with the health care benefit paid by the Company[?]" JA167 (¶160).

In response to those requests, Bedard provided a letter to the Trades union on August 10, 1999, which stated:

We have agreed to include those employees who will reach age 55 between the date of closing and September 30, 1999 and have at least 15 years of service, with those employees who are eligible to retire on the date of closing, in the offer to retire with the \$28 per month per year of service benefit level and the PBGC interest rate of 4.5% for lump sum calculations.

JA168 (¶164). The letter went on to state that those employees "will also be included with current Bowater retirees, and those who are eligible on the

date of closing, to preserve their lifetime company-paid retiree health care.” *Id.* That letter was signed only by Bedard, and was not part of the final 1999 Agreements as defined by the terms of those Agreements.

JA168-74 (¶¶164-75).⁶

Bedard himself understood that retiree health benefits continued only for the “life of agreement,” and that he could not “answer what would happen” in 2002 when the agreement expired. JA179 (¶182). Similarly, Donald McNeil, the president of GNP, also understood that there were “no guarantees” and that, although the company hoped that retiree health care benefits would “be lifetime,” the company was obligated to provide such benefits only for the duration of the CBA. GNP’s health benefits administrator also testified that such benefits only continued “until the

⁶ The documents included in the 1999 Agreements are specifically identified on the signature page of those agreements. That page states that the “terms and conditions” of the 1999 Agreements are each specifically “set forth in [a] memorandum” of a specific date and title. Those memoranda did not include the Bedard letter. JA172-74 (¶¶170-75). Because the Bedard letter is not included within the memoranda that contain the terms and conditions of the parties, that letter is not part of 1999 Agreements.

benefits are terminated or until there [is] a different benefit that's negotiated under the contract." JA177 (¶180).

5. Transfer and Termination of Benefit Plans

In anticipation of the sale of GNP, the Bowater Board of Directors specifically authorized "any one of the appropriate officers of the Corporation" – which included Bowater's CFO, David Maffucci – "to do such other things as may be necessary or appropriate in connection with the [Stock Purchase] Agreement and to consummate the Transaction, including, without limitation . . . amending, modifying, suspending or terminating any and all retirement, compensatory or welfare benefit plans . . . maintained by the Corporation or by GNP." JA188 (¶212). Maffucci then signed the SPA, pursuant to which, as previously noted, GNP assumed all obligations for the benefit plans at issue in this case, including the obligation to fund and sponsor them. In accordance with that agreement, Bowater instructed GNP to remove Bowater's name from those benefit plans and amended its Voluntary Employees' Beneficiary Association ("VEBA") trust document to remove the GNP benefit plans from those plans funded under the Trust. JA189 (¶215); JA276 (¶39); DX139 at BI0058836 (d/e 141).

As called for in the SPA and the 1999 Agreements, GNP provided benefits to its employees and retirees after the 1999 sale. JA70 (¶53). GNP retirees were provided new benefits cards identifying their plan as a GNP plan, and written communications to plan participants identified the plan provider as GNP. JA190-91 (¶¶218-21). Regular reports informed GNP retirees that their “health benefits are paid by Great Northern Paper, Inc.” and that “GNP is self-insured.” JA192-93 (¶¶224-27). GNP salaried retirees submitted their premium payments to GNP with checks that were made out to GNP. JA193 (¶228). Indeed, when GNP filed for bankruptcy in 2003, GNP retirees filed claims with the GNP Trustee seeking reimbursement of medical expenses. JA194 (¶230).

6. 2003 BI Benefit Plan

Effective January 1, 2003, Bowater established the Bowater Incorporated Benefit Plan (“BI Benefit Plan”), which is a “continuation, amendment and restatement of plans previously maintained by Bowater.” JA278 (¶44); JA877 (§1.01). Plaintiffs concede that the Plan was an “umbrella” plan created to provide Bowater greater administrative simplicity. JA91-92 (¶37). Indeed, the Plan’s terms expressly provide that “[a]ll Benefit Programs offered under the Plan shall constitute a single plan

for purposes of the annual reporting requirements of the Code and ERISA.” JA278 (¶¶44–45); JA877 (§1.03); JA979 (159:23–160:5).

Bowater’s Director of Compensation and Benefits, who helped create the BI Benefit Plan, testified that its purpose was “to create one single plan” and to ensure that no unidentified welfare benefit plan would continue in existence and require separate filings with the IRS and the Department of Labor. JA91–92 (¶37); JA1555 (¶6). To this end, the BI Benefit Plan “supersede[d] and replace[d] any program document defining the terms of or describing a Benefit Program that is not incorporated and made part of the Plan.” JA279–80 (¶51); JA877 (§1.03). It is undisputed that Plaintiffs are not eligible for benefits under the BI Benefit Plan. The specific terms of that plan are discussed in more detail below. *See infra* at 60–70.

7. Exhaustion

After filing benefit claims with Bowater, but before completing the administrative process, Plaintiffs served Bowater with their complaint in this matter. Bowater moved to dismiss Plaintiffs’ ERISA claim, in part, because Plaintiffs failed to allege facts sufficient to show the futility of exhausting their administrative remedies with Bowater. The District Court

agreed and required the named Plaintiffs to exhaust their administrative remedies, which they then did.

Bowater's Plan Administrator — who was granted discretion by the POS-A, Indemnity, and BI Benefit Plans to interpret and apply the plans' terms — denied named Plaintiffs' claims for several reasons, determining, *inter alia*: (1) that any obligation for retiree health benefits owed by Bowater to GNP retirees ended upon the sale of GNP to Inexcon in 1999; and (2) that Bowater's adoption of the BI Benefit Plan as of January 1, 2003, terminated any Bowater obligation for prior benefit plans, including the POS-A and Indemnity Plans. JA1473-76. Other claimants' claims were also denied for lack of proper documentation, for untimely submission, and for seeking reimbursement of expenses not covered by the POS-A and Indemnity Plans. *See, e.g.*, JA1466.

Prior to moving for class certification, Plaintiffs sought a ruling pursuant to Federal Rule of Civil Procedure 23(d) that the unnamed potential class members were not required to exhaust — or even file — their claims with Bowater. Finding the procedural basis for Plaintiffs' requested relief “shaky at best and non-existent at worst,” Add. 4, the district court denied the motion because application of a “vicarious

exhaustion” rule would “substantially modify and alter” the parties’ contractual relationship, an action the court found “wholly unwarranted at this time on the merits of the case,” and because vicarious exhaustion was not warranted where no class had been certified and where there had been no showing of similarity of claims. *Id.*⁷

Despite submitting three briefs in support of class certification, Plaintiffs never renewed their exhaustion argument. Rather, Plaintiffs proposed a class definition, accepted by the court, that limited the class to those who had fully exhausted their administrative remedies. Add. 20. At the court’s suggestion, Plaintiffs and Bowater then “conferred by telephone ‘to discuss obviating the need’ for putative class members to continue filing internal appeal letters as a prerequisite to participating in the ERISA” claim. Notice to Court, at 2 (d/e 130). The parties stipulated that the class would include those who had filed a claim by June 21, 2005, and who had

⁷ Although the district court noted that it intended this ruling to be the “law of the case,” the factual issues underlying the court’s decision — whether claims were factually similar and whether a class would be certified — hinged on the outcome of the class certification decision. Thus, it would have been incumbent on Plaintiffs to renew their request once that class certification ruling was made.

not as of that date failed to appeal the denial of that claim within 180 days.

Id. Based on that stipulation, the district court revised the class definition.

The district court granted Plaintiffs summary judgment on their ERISA claim for the period prior to 2003. Rather than renew their argument that the class must be expanded to include non-exhausted claimants, Plaintiffs again entered a stipulation with Bowater. Plaintiffs and Bowater agreed that damages for the pre-2003 period would be set at \$62,000. That stipulated amount is not dependent on the number of class members and will change only if this Court finds that Bowater had no liability for the period prior to January 1, 2003, in which case the amount is reduced to \$0. *See Stipulation as to Remedy ¶¶2, 5 (d/e 188).*

Summary of Argument

Each CBA upon which Plaintiffs rely expressly limited retiree health benefits to “[d]uring the term of this labor agreement.” Each CBA also incorporated by reference SPDs that expressly reserved Bowater’s right “to terminate, suspend, withdraw, amend or modify” those benefits “in whole or in part at any time.” These unambiguous terms preclude any claim for vested benefits.

Shortly before Bowater sold GNP to Inexcon, Bowater's Board of Directors adopted a resolution authorizing its CFO to take all necessary action in connection with the sale of GNP, including "amending . . . or terminating any and all . . . welfare benefit plans." So authorized, the CFO then signed an SPA that specifically terminated Bowater's obligation to provide health benefits to GNP retirees. At the same time, Bowater, Inexcon and the unions negotiated a set of agreements providing that "all Bowater Incorporated obligations under the labor agreement shall cease" upon GNP's sale to Inexcon.

Consistent with these various agreements, which memorialized the termination of Bowater's obligation to provide health benefits to GNP retirees, GNP – not Bowater – provided retiree health benefits to GNP retirees after Bowater sold GNP. For more than three years, GNP retirees paid premiums to GNP and received benefits from GNP. Indeed, when GNP declared bankruptcy in 2003, Plaintiffs, recognizing that GNP was responsible for their health benefits, filed claims in the bankruptcy court seeking reimbursement for medical expenses from the GNP estate.

Only after it became apparent that those claims would not be satisfied did Plaintiffs, seeking a new funding source, sue Bowater. They

did so despite the fact that Bowater had sold GNP more than three years before GNP's bankruptcy, despite the fact that the relevant collective bargaining agreements plainly limited health benefits to the duration of those agreements, and despite the fact that the plans under which they sought benefits had been terminated.

Seeking to avoid the plain meaning of the collective bargaining agreements, Plaintiffs point to a few scattered pieces of extrinsic evidence to suggest that the agreements, although clear on their face, are "latently" ambiguous. But Plaintiffs' extrinsic evidence is inadmissible, insufficient, and incomplete. It is inadmissible because the collective bargaining agreements are unambiguous as a matter of law. It is insufficient because, even if considered, it demonstrates no latent ambiguity. And it is incomplete because Plaintiffs disregard abundant contrary evidence. For example, Plaintiffs fail to tell this Court that in 1999 one of the unions' lead negotiators wrote that "

."

The district court, having correctly found the collective bargaining agreements to be unambiguous, properly granted Bowater summary judgment on Plaintiffs' LMRA claim. But, based on a misapplication of the

law and a clearly erroneous factual finding, the district court wrongly denied Bowater full summary judgment on Plaintiffs' ERISA claim. In deciding that the benefit plans were not terminated upon GNP's sale in 1999, the district court misunderstood ERISA's minimal amendment standards and mistakenly believed that Bowater's CFO had not been authorized to amend or terminate the plans. When the proper standard is applied to the actual facts, it is clear that Bowater was entitled to summary judgment on Plaintiffs' entire ERISA claim.

Notwithstanding its error with respect to the termination of Bowater's obligations in 1999, the district court correctly found that the plans upon which Plaintiffs rely were terminated no later than January 1, 2003, when the newly adopted BI Benefit Plan took effect. By its terms, the BI Benefit Plan "supersede[d] and replace[d]" prior plans, including those at issue here. Although Plaintiffs argue for a different interpretation of the BI Benefit Plan, the district court properly deferred to the Plan Administrator's interpretation, finding it "entirely reasonable."

Because Bowater was not contractually obligated to provide retiree health benefits beyond the term of the relevant collective bargaining agreements, and because Bowater in fact terminated the plans under which

those benefits were provided, Bowater is entitled to summary judgment on all of Plaintiffs' claims.

Standard of Review

The Court reviews *de novo* the district court's grant of summary judgment to each cross-appellant. See *Mandel v. Boston Phoenix, Inc.*, 456 F.3d 198, 204–05 (1st Cir. 2006). Summary judgment is appropriate if “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). This Court “may affirm on any ground supported by the record.” *Senior v. NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 216 (1st Cir. 2006).

Where, as here, an ERISA plan gives its administrator “discretionary authority to determine eligibility for benefits or to construe the terms of the plan,” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), the plan administrator's denial of benefits is subject only to “arbitrary and capricious” review. See *Leahy v. Raytheon Co.*, 315 F.3d 11, 15 (1st Cir. 2002). This Court's own review is also governed by that standard and the deference due the “underlying decision” of the plan administrator. *Carrasquillo v. Pharmacia Corp.*, 466 F.3d 13, 17 (1st Cir. 2006).

Argument

I. APPELLANTS' LMRA CLAIMS FAIL BECAUSE THE COLLECTIVE BARGAINING AGREEMENTS UNAMBIGUOUSLY ESTABLISH THAT RETIREE HEALTH BENEFITS WERE NOT VESTED

It is well established that “the benefits provided by a welfare plan generally are not vested and an employer can amend or terminate a welfare plan at any time.” *Am. Fed’n of Grain Millers v. Int’l Multifoods Corp.*, 116 F.3d 976, 979 (2d Cir. 1997). Thus, “[u]nlike pension benefits, which are subject to stringent vesting requirements under ERISA, welfare benefits, such as health care insurance, are vested only if so provided by contract.” *Int’l Ass’n of Machinists & Aerospace Workers v. Masonite Corp.*, 122 F.3d 228, 231 (5th Cir. 1997). Because “[e]mployers are ‘generally free . . . for any reason at any time, to adopt, modify or terminate welfare plans,’” *Senior v. NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 207 (1st Cir. 2006) (quoting *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995)), “[t]he retirees bear the burden of proving that their welfare plan benefits are vested and cannot be changed by the company.” *Id.* at 216.

Here, the relevant CBAs unambiguously limit retiree health benefits to “[d]uring the term of this labor agreement” and incorporate SPDs that expressly reserve the right to terminate those benefits. Thus, Plaintiffs’ retiree health benefits were not vested, and, as found by the district court, Bowater is entitled to summary judgment on Plaintiffs’ LMRA claims.

A. The Pre-1999 Agreements Unambiguously Limit Retiree Health Benefits to the Duration of the Agreements.

Plaintiffs concede that the pre-1999 Agreements limit retiree health benefits to “[d]uring the term of this labor agreement.” *See* App. Br. 47. Plaintiffs further concede that an outsider reading the CBAs would therefore understand that the contractual obligation to provide such benefits ran “*only* during the term of this agreement.” *Id.* (emphasis in original). Nonetheless, without even offering an alternative interpretation of that language, Plaintiffs contend that the CBAs are “latently ambiguous.” Claiming that the parties reached a “different” understanding than the one memorialized in the contracts’ language, Plaintiffs offer extrinsic evidence in order to rewrite the CBAs’ concededly clear durational language. Plaintiffs’ attempt to alter the terms of the CBAs is neither permitted by law nor supported by the facts.

1. The CBAs are unambiguous.

Courts that have interpreted CBAs containing express durational limitations, pursuant to which welfare benefits are guaranteed only “[d]uring the term of this labor agreement,” have repeatedly held that such limiting language establishes, as a matter of law, that the benefits are not vested.

For example, in *Grain Millers*, where the relevant CBA provided that there would be no reduction in retiree health benefits “[d]uring the term of this Agreement,” the Second Circuit rejected a claim for vested retiree health benefits after the term of the CBA ended. The court observed that “[p]romising to provide benefits for a certain period of time necessarily establishes that once that time period expires, the promise does as well.” 116 F.3d at 981. The court held that “the terms of the CBA unambiguously establish that [the employer] had no obligation to provide medical insurance to its retirees after the CBAs expired.” *Id.*

Similarly, in *Bittinger v. Tecumseh Products Co.*, 83 F. Supp. 2d 851 (E.D. Mich. 1998), the court rejected a claim to “vested, fully funded ‘lifetime’ benefits” because the relevant CBAs promised retiree health benefits “for the duration of the Labor Agreement.” The court found that

“the language utilized by the parties is unambiguous,” and that “[t]he promise to provide retirement benefits is expressly linked to the duration of the labor agreement.” *Id.* at 860. Accordingly, the court held that “[t]he company’s obligation to provide retirement benefits ended upon the expiration of the [relevant] CBA.” *Id.* at 861.

Indeed, courts are apparently unanimous in rejecting claims for vested welfare benefits where such benefits are expressly limited to the term of the relevant agreement. *See, e.g., Cherry v. Auburn Gear, Inc.*, 441 F.3d 476, 481–86 (7th Cir. 2006) (labor agreement did not provide vested benefits because the durational clause limiting benefits to “during the period of this agreement” was neither patently nor latently ambiguous); *Barnett v. Ameren Corp.*, 436 F.3d 830, 834–35 (7th Cir. 2006) (rejecting claim for vested retiree health benefits where such benefits were promised only “for the life of the Labor Agreement”); *Pabst Brewing Co. v. Corrao*, 161 F.3d 434, 441–42 (7th Cir. 1998) (labor agreement promising retiree health benefits “for the term of this Agreement” did not create vested right to such benefits); *In re Chateaugay Corp.*, 945 F.2d 1205, 1208 (2d Cir. 1991) (retiree health benefits “were no longer guaranteed” after expiration of CBA that had “guaranteed” retiree medical benefits “during the term of

this Agreement”); *District 29 v. Royal Coal Co.*, 768 F.2d 588, 591–92 (4th Cir. 1985) (employer’s obligation to provide retiree health benefits ceased upon expiration of CBA in which benefits were “guaranteed *during the term of this Agreement*”). Given the plain and undisputed language of the CBAs here – which limit the promise of retiree health benefits to “[d]uring the term of this labor agreement” – the district court properly rejected Plaintiffs’ claim for vested benefits.

2. The CBAs incorporated SPDs that expressly reserved Bowater’s right to terminate the plans.

The CBAs’ unambiguous durational clauses are reinforced by the terms of the SPDs that the CBAs incorporate by reference. Each CBA incorporates by reference the relevant SPDs, stating that health benefits “shall be maintained as agreed upon by the parties and shall be described in a separate booklet (summary plan description).” JA128–40 (¶¶51, 57, 63, 68, 71, 74, 78).⁸ It is undisputed that each of the incorporated SPDs

⁸ In the district court, Plaintiffs argued that the CBAs did not incorporate the SPDs. But the CBAs specifically provide that health benefits “shall be described in a separate booklet (summary plan description).” In *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992), the court relied on virtually identical language to find that the insurance booklets were “explicitly incorporated into” the CBAs and

expressly reserved Bowater's right to terminate the plan. The SPDs for the two Indemnity Plans stated: "The right is reserved in the Plan for the Plan Sponsor to terminate, suspend, withdraw, amend or modify the Plan, covering any active Employee or current or future retiree, in whole or in part at any time." JA184 (¶198). Similarly, the POS-A SPD stated that "the Plan Sponsor, in its sole discretion, may at any time modify or amend the provisions, terms and conditions of the Plan or may at any time terminate the Plan without the consent of any Participant or any other beneficiary under the Plan." JA183-84 (¶194). Indeed, lest there be any confusion, the POS-A SPD explicitly noted that "[n]o vested rights of any nature are provided by the Plan." *Id.*

Because the relevant SPDs reserved Bowater's right to terminate the respective plans, as a matter of law GNP retirees did *not* have vested health benefits. For example, in *Grain Millers*, 116 F.3d at 982, the court rejected

"constitute part of the contract rather than extrinsic evidence." *Id.* at 815 n.9. Moreover, this Court has recognized that "[u]nder general principles of contract law, a contract that does not explicitly incorporate another agreement may nonetheless implicitly incorporate that agreement." *Senior*, 449 F.3d at 219-20. Indeed, this Court has emphasized that "[g]iven the important informational role SPDs play under the ERISA scheme, it would be improper to ignore the terms provided by the SPDs." *Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224, 232 (1st Cir. 2006).

the plaintiffs' claim for vested benefits, stating that "if an employer has not promised vested benefits in a[n] SPD, and the employer expressly reserves the right to terminate the plan in the SPD, benefits promised in the SPD are not vested." See also *Baldwin v. Motor Components, LLC*, 2004 WL 1698600, at *5 (W.D.N.Y. Jan. 20, 2004) (rejecting retirees' claim for vested benefits where SPDs expressly reserved the right to "amend, change or terminate the plan . . . at any time").⁹

Despite the CBAs' express durational limits and the SPDs' equally express reservation of rights, Plaintiffs claim that the parties, in reality, agreed to "lifetime" benefits. But even if this were true, Plaintiffs' benefits would still not be vested. In a pair of companion cases decided earlier this year — *Senior* and *Balestracci* — this Court rejected precisely the type of claim advanced by Plaintiffs here. In those cases, the plaintiffs' former employer had promised certain benefits "for your life," but had, in an

⁹ Accord *UAW v. BVR Liquidating, Inc.*, 190 F.3d 768, 773 (6th Cir. 1999) ("the inclusion of a 'reservation of rights' provision establishes that there was no intent for benefits to vest"); *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 856 (4th Cir. 1994) (reservation-of-rights clause contained in SPD "standing alone, is more than sufficient to defeat plaintiffs' claim that the company provided vested benefits").

accompanying SPD, expressly reserved the right to terminate those benefits. This Court concluded that the benefits, although promised for life, were not vested. This Court held that “[t]he only reasonable reading of the [relevant plans] is that the company would provide lifetime benefits to its retirees *subject to* its reservation of the right to modify, alter, or terminate . . . plan coverage should future circumstances require such changes.” *Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224, 233 (1st Cir. 2006) (emphasis in original). *See also Senior*, 449 F.3d at 227 (rejecting LMRA claim for benefits that had been promised “for your life” where company reserved right to terminate benefits).

Other courts have similarly rejected claims for vested benefits where an employer’s promise of “lifetime” benefits was subject to a reservation-of-rights clause. In *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (en banc), for example, the plaintiffs claimed that their health benefits were vested, relying on language in an SPD providing retiree health coverage “at no cost” for their “lifetime.” The court rejected that claim because the SPD expressly reserved the employer’s right to “amend, modify, suspend, or terminate” the plan. The court held that the reservation-of-rights clause precluded any claim to vested benefits, finding

“no ambiguity in a summary plan description that tells participants both that the terms of the current plan entitle them to health insurance at no cost throughout retirement and that the terms of the current plan are subject to change.” *Id.* at 401. *See also Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1514–19 (8th Cir. 1988) (rejecting claim of vested benefits, despite promise of benefits “until death,” where employer “reserved the right to change, modify, or discontinue” the plan); *accord In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 58 F.3d 896, 904 (3d Cir. 1995); *Gable*, 35 F.3d at 857; *Alday v. Container Corp.*, 906 F.2d 660, 662 (11th Cir. 1990).

3. Extrinsic evidence is inadmissible because the CBAs and SPDs unambiguously preclude any claim for vested benefits.

Given the unambiguous terms of the CBAs and incorporated SPDs, the district court was correct not to consider extrinsic evidence before granting Bowater summary judgment on Plaintiffs’ LMRA claims. Where, as here, federal common law governs agreements whose “terms are clear and unambiguous,” courts “are obligated to enforce the language as it is written, without resort to extrinsic evidence or interpretive devices.” *S & O Liquidating P’ship v. C.I.R.*, 291 F.3d 454, 459 (7th Cir. 2002). Indeed, “[a]ll courts agree that if a document unambiguously indicates whether retiree

medical benefits are vested, the unambiguous language should be enforced.” *Grain Millers*, 116 F.3d at 980. See also *Bellino v. Schlumberger Techs., Inc.*, 944 F.2d 26, 32 (1st Cir. 1991) (“Basic contract and trust principles preclude federal courts from considering extrinsic evidence where the ERISA terms in question are unambiguous.”).

This fundamental principle applies here. As this Court recently reiterated, “[a]n unambiguous contract must be enforced according to its terms, under both the common law and labor law.” *Senior*, 449 F.3d at 219. See also *Volkman v. United Transp. Union*, 73 F.3d 1047, 1050 (10th Cir. 1996) (noting that “certain basic contract interpretation principles apply to construction of labor agreements,” including the principle that “[i]f the language of the agreement is unambiguous, it may be construed as a matter of law without resort to extrinsic evidence”); *Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 491–92 (2d Cir. 1988) (rejecting use of extrinsic evidence to prove vested benefits where employer “clearly reserved in the plan documents and in the SPDs the right to amend or terminate the plans”); *Gable*, 35 F.3d at 857 (finding “no need to consider plaintiffs’ extrinsic evidence” where “the master policy unambiguously reserved the company’s right to modify or terminate the plan”).

In an effort to evade the CBAs' unambiguous meaning and clear legal effect, Plaintiffs seek to distract this Court with inadmissible (and unpersuasive) extrinsic evidence. Plaintiffs do not pretend to be interpreting the CBA's terms, and offer no alternative meaning for the durational limit on retiree health benefits. Instead, conjuring the specter of a "latent ambiguity," Plaintiffs suggest that extrinsic evidence should be considered to determine whether the CBAs, although "seemingly clear on [their] face, should be accorded a meaning different from the meaning indicated by the bare words." App. Br. 49. But extrinsic evidence is "not admissible either to contradict or alter express terms" of an unambiguous contract. *Den Norske Bank AS v. First Nat'l Bank*, 75 F.3d 49, 52 (1st Cir. 1996). See also *Carr v. Philips Elecs. N. Am. Corp.*, 41 F. App'x 637, 641 (4th Cir. 2002) (in context of CBAs, courts "will bar extrinsic evidence that is inconsistent with an unambiguous writing").

In any event, Plaintiffs' imagined (but unidentified) "latent ambiguity" does not exist. A latent ambiguity is "[a]n ambiguity that does not readily appear in the language of a document, but instead *arises from a collateral matter* when the document's terms are applied or executed." Black's Law Dictionary (8th ed. 2004) (emphasis added). The classic

example of latent ambiguity is found in *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (Ex. 1864), where the contract called for delivery of cotton that was to be transported on the ship *Peerless* sailing from Bombay. Unbeknownst to the contracting parties, there were in fact two ships of the same name sailing from the same port. Extrinsic evidence of this objective, collateral fact was admissible to demonstrate that the seemingly clear contract was actually ambiguous. The other paradigmatic example of a latent ambiguity is where a contract employs a seemingly unambiguous, everyday term that in fact has a specialized meaning within the parties' industry. Extrinsic evidence of such objectively ascertainable trade usage is admissible to show that a seemingly clear contract actually has a different meaning than that which is, to a lay person, apparent on its face. *See, e.g., Bristow v. Drake Street Inc.*, 41 F.3d 345, 352 (7th Cir. 1994).

None of the extrinsic evidence proffered by Plaintiffs establishes a latent ambiguity in the pre-1999 Agreements. Plaintiffs – evidently recognizing that “there is no private, specialized meaning that the phrase ‘for the term of this Agreement’ might have other than its clear and common meaning,” 20 WILLISTON ON CONTRACTS § 55:27 (4th ed. 1990) – do not even suggest that the phrase “during the term of this labor

agreement” has a trade usage different from its everyday meaning. Nor do Plaintiffs offer evidence of an objective fact that would – like the existence of two ships *Peerless* – demonstrate ambiguity “aris[ing] from a collateral matter.” Rather than relating to collateral matters, the Plaintiffs’ extrinsic evidence reflects, at most, only certain persons’ isolated subjective understanding of what they thought the CBAs meant. *Cf.* App. Br. 56 (characterizing extrinsic evidence as evidence of “the parties’ mutual understanding”). There is no latent ambiguity.

Indeed, far from supporting Plaintiffs’ use of extrinsic evidence here, the cases Plaintiffs cite confirm that the CBAs are unambiguous as a matter of law and preclude any finding of vested retiree health benefits. Consider, for example, the case upon which Plaintiffs principally rely, *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000). *Cf.* App. Br. 50–52. Significantly, the contract at issue in *Rossetto* – unlike those at issue here – was “completely silent on [the] duration” of retiree health benefits. 217 F.3d at 545. It was only because of that silence that the court found any ambiguity. *Id.* at 546 (“the silence of the collective bargaining agreement

with respect to vesting makes the agreement genuinely ambiguous”).¹⁰ Indeed, the *Rossetto* court specifically contrasted the situation presented there with that presented in *Corrao*, where the contract “was amended to limit health and welfare benefits for the ‘term of this agreement.’” *Id.* at 545. That critical limiting phrase, present here as in *Corrao* but absent in *Rossetto*, rendered the contract in *Corrao* unambiguous as a matter of law. Dispositive of Plaintiffs’ claims here, the *Corrao* court specifically *rejected* the argument that “the phrase ‘for the term of this Agreement’ is one of those contractual terms that may seem clear on its face but in reality is ambiguous, rather like the ship *Peerless* or the use of specialized trade jargon.” *Corrao*, 161 F.3d at 441. Accordingly, finding “no room in the language of this agreement to turn to [plaintiff’s] extrinsic evidence,” *id.* at 442, the *Corrao* court affirmed dismissal of the plaintiff’s claim for vested retiree health benefits, holding it clearly precluded by the unambiguous terms of the collective bargaining agreement.

¹⁰ Plaintiffs’ suggest, *cf.* App. Br. 57, that *Rossetto* broadened the classic definition of ‘latent ambiguity,’ but the Seventh Circuit has subsequently reaffirmed that a latent ambiguity is one that “arises from a collateral matter when the *document’s terms* are applied or executed.” *Cherry*, 441 F.3d at 481–86 (internal quotation marks omitted).

Notably, the plaintiff in *Corrao*, like Plaintiffs here, sought to introduce extrinsic evidence drawn from the employer's own files to prove "that neither party intended to destroy the retirees' right to lifetime medical benefits" when they signed the contract limiting such benefits to "the term of this Agreement." *Id.* at 441. Given the clarity of the contractual language (which is identical to that at issue here), the court held such extrinsic evidence — whether deemed "objective" or not — to be inadmissible. *Id.* at 442.

Thus, Plaintiffs' reliance on *Rossetto* is utterly misplaced.¹¹ In

¹¹ The other cases Plaintiffs cite in support of the proposition that extrinsic evidence should be considered, *cf.* App. Br. 49–50, are equally unavailing. Notably, three of the four cases are arbitration cases. But, given the "exceedingly narrow scope of judicial review of labor arbitration decisions," *Loveless v. Eastern Air Lines, Inc.*, 681 F.2d 1272, 1275 (11th Cir. 1982), arbitration cases say little about how a *court* should interpret a contract. Moreover, even if arbitration cases were broadly applicable, the cases cited by Plaintiffs simply do not support the consideration of extrinsic evidence here. In *Findorff*, the contract at issue, which failed to define a crucial term, was patently ambiguous. See *Local 139 v. J.H. Findorff & Son, Inc.*, 393 F.3d 742, 746 (7th Cir. 2004) ("there is neither a 'clear' meaning (nor a definition of any kind) for the vital phrase 'work covered by this Agreement'"). Similarly, in *Ozark Air*, the "admittedly ambiguous" contract "lack[ed] . . . any definition" of a central term. *Ozark Air Lines, Inc. v. Air Line Pilots Assoc., Int'l*, 744 F.2d 1347, 1351–52 (8th Cir. 1984). Contrary to Plaintiffs' suggestion, the fact that the arbitrators in *Findorff* and *Ozark Air* resorted to extrinsic evidence when interpreting facially

Rossetto, the Seventh Circuit considered extrinsic evidence only

because the contract at issue there, unlike those at issue here, was

“completely silent” as to the duration of retiree health benefits. When

ambiguous contracts says nothing about whether a court should consider extrinsic evidence when interpreting CBAs that are, as here, unambiguous as a matter of law. Although the contract at issue in *Loveless* was on its face unambiguous, both parties agreed – and the evidence conclusively demonstrated – that when drafting the contract the parties had actually intended a result contrary to that memorialized in the contract. See *Loveless*, 681 F.2d at 1278 (“Appellees do not argue that the arbitrators were factually incorrect in their finding” as to the parties’ “true intent”); see also *id.* at 1274 n.4 (describing evidence of parties’ intent). Thus, the question before the arbitrator was whether the parties’ undisputed intent should be given effect notwithstanding the contrary contractual language. In sustaining the arbitrator’s determination that it should, the Eleventh Circuit observed that “[p]erhaps this is not the result that a judge, applying ordinary principles of contract construction, would have reached” but held that “[i]n light of our narrow standard of review of arbitral awards, however, that fact is totally irrelevant.” *Id.* at 1280. Here, in contrast to *Loveless*: (i) a court must interpret the contract in the first instance, not review an arbitrator’s decision under a highly deferential standard; (ii) the parties, rather than agreeing that the contract failed to capture their true intent, vigorously contest that question; and, (iii) the extrinsic evidence that Plaintiffs proffer, rather than clearly establishing the parties’ purported intent, is at most inconclusive. See *infra* at 39 to 45. Nor does the fourth case, *White v. Roughton*, 689 F.2d 118 (7th Cir. 1982), advance Plaintiffs’ position. Although the decision contains broad dicta concerning the use of extrinsic evidence, the plaintiffs in *White* “made no effort to introduce extrinsic evidence,” and instead relied exclusively on the plain text of the operative document. *Id.* at 121. In sum, no case cited by Plaintiffs holds that a court should consider extrinsic evidence when interpreting a contract that expressly and unambiguously limits retiree health benefits to “[d]uring the term of this labor agreement.”

faced in *Corrao* with a contract — like those at issue here — that expressly limited retiree health benefits to “the term of this Agreement,” the Seventh Circuit held such evidence to be inadmissible.

4. Even if extrinsic evidence were admissible, it does not support Plaintiffs’ position.

Even if Plaintiffs’ slender (and highly selective) collection of extrinsic evidence were considered, it would not sustain a finding of ambiguity as to the meaning of the phrase “[d]uring the term of this labor agreement.”

Plaintiffs cite three documents that refer, respectively, to “lifetime” benefits, benefits “for life,” and benefits “until death,” and suggest that those documents support Plaintiffs’ interpretation of the CBAs. *See* App. Br. 54–55.¹² But, Plaintiffs conflate “lifetime” with “vested.”¹³ Bowater

¹² Plaintiffs omit material information about one of the documents and affirmatively mischaracterize another. Plaintiffs fail to note that the reference to health benefits “free until death,” *cf.* App. Br. 54 (citing JA1068), constitutes anonymous, unauthenticated, inadmissible hearsay, which Bowater moved to strike in the district court. *See* JA252-68 to -69. (The district court did not rule on Bowater’s motion.) Plaintiffs also mischaracterize the document that refers to “lifetime” benefits, *cf.* App. Br. 55 (citing JA1350), erroneously describing it as a response to a July 29, 1999, request by one of the unions’ negotiators for written “confirmation” of the parties’ purported mutual understanding. In fact, however, the unions never received such confirmation; rather, the document relied upon by Plaintiffs was apparently prepared in response to an August 9, 1999,

does not dispute that it intended to continue providing retirees with health benefits – indeed the SPDs provided that “[i]t is the intention of the Plan Sponsor to continue the Plan.” Nonetheless, as a matter of contract, such benefits were limited to “the term” of the CBA, and were subject to Bowater’s right “in its sole discretion” to “terminate the Plan.” JA183–84 (¶194). Courts, including this one, have consistently rejected the assertion that a promise of “lifetime” benefits, when coupled with an express reservation of rights, creates vested benefits. *See, e.g., Balestracci*, 449 F.3d at 233; *Senior*, 449 F.3d at 224; *Sprague*, 133 F.3d at 401; *Gable*, 35 F.3d at 857; *In re Unisys*, 58 F.3d at 904; *Alday*, 906 F.2d at 665; *Anderson*, 836 F.2d at 1514–19. Thus, extrinsic evidence of a few scattered references to “lifetime” benefits is, as a matter of law, insufficient to render ambiguous either the SPDs’ reservation-of-rights clauses or the CBAs’ durational limitations.

request regarding the treatment of employees who would turn 55 soon after GNP’s sale to Inexcon. *See* JA252-65 to -67. Ultimately, none of this matters, because even if both documents were admissible and as characterized by Plaintiffs, they do not render the phrase “[d]uring the term of this labor agreement” ambiguous.

¹³ Indeed, Donald McNeil, to whom Plaintiffs attribute two of the documents they cite, testified that “lifetime” did not mean “vested.” *See* JA178 (¶181).

Nor does Bowater's conduct support a finding of ambiguity.

Plaintiffs argue that GNP's decision not to force existing unionized retirees into the POS-A plan demonstrates Bowater's alleged belief that it was contractually prohibited from altering the health benefits of unionized retirees. *See* App. Br. 53. This is factually incorrect and legally invalid. First, in 1995, there were relatively few union retirees for whom GNP was responsible. Given the negligible savings to be had, GNP's conduct is equally consistent with a prudent discretionary decision to voluntarily forego its contractual rights rather than risk a disruptive confrontation with the unions. Second, Plaintiffs' course-of-conduct argument proves too much. GNP provided retiree health benefits to its non-unionized, salaried employees throughout the 1992 to 1999 period. If Plaintiffs' course-of-conduct argument were correct, then this fact would prove that Bowater believed it was contractually obligated to pay such benefits to GNP's salaried employees. But even Plaintiffs concede that Bowater had no such contractual obligation.

Third, courts have repeatedly held that course-of-conduct evidence similar to that proffered by Plaintiffs is insufficient to create an ambiguity where the relevant contract expressly limits benefits to "[d]uring the term

of this labor agreement.”¹⁴ For example, in *Barnett*, the employer contended that it was not contractually obligated to provide retiree health benefits although it had done so for decades. See 436 F.3d at 831. Despite that conduct and a “slew of extrinsic evidence,” the Seventh Circuit found no latent ambiguity, joining the other “courts [that] have rejected the argument that health-care benefits vest simply because a company has not reduced them in the past.” *Id.* at 835. See also *In re Unisys*, 58 F.3d at 906

¹⁴ In *Balestracci*, this Court explained why a company’s voluntary decision to provide extra-contractual benefits should not be used against the company:

The flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident; Congress recognized that “requir[ing] the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans.” Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, “they would err initially on the side of omission.”

449 F.3d at 230 (quoting *Inter-Modal Rail Employees Ass’n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 515 (1997)). Similarly, if employers knew that a voluntary decision to provide benefits beyond those contractually required could be interpreted as a creating an enforceable right to receive those benefits in perpetuity, employers, fearful of being encumbered by high fixed costs, would err on the side of caution and avoid providing extra-contractual benefits.

(“merely because the company had never chosen to exercise its reservations of rights prior to this litigation, did not mean that the company had waived its right to terminate the plans pursuant to these broad and unequivocal reservation of rights clauses”); *Howe v. Varsity Corp.*, 896 F.2d 1107, 1110 (8th Cir. 1990) (“Merely because defendants chose to exempt retirees from plan changes in the past does not mean that defendants considered themselves forever bound to do so.”).

Nor is latent ambiguity established by the actuarial calculations upon which Plaintiffs rely. *Cf.* App. Br. 53–54. Plaintiffs’ argument ignores three salient facts: First, it ignores the fact that Financial Accounting Standard 106 *mandates* that a company, for accounting purposes, “shall presume that the [retiree benefit] plan will continue in effect in the absence of evidence that it will not continue.” JA252-71 to -72 (¶P141). Second, it ignores the fact that the consultant who performed the calculations specifically noted that GNP’s retiree health benefits were *not* vested. *Id.* Third, it ignores the fact that the actuarial calculations applied equally to salaried employees, who were not party to any CBA. Thus, the consultant’s application of a mandatory accounting assumption is not evidence that Bowater believed that the benefits vested.

In sum, none of Plaintiffs' extrinsic evidence creates an ambiguity as to the meaning of the phrase "[d]uring the term of this labor agreement." Moreover, Plaintiffs ignore ample extrinsic evidence contrary to their litigation position. For example, in a July 1999 internal memorandum, one of the unions' lead negotiators stated that "

" SA6 (emphasis added). Of

course, because the CBAs are unambiguous, Bowater does not believe that this Court should consider any extrinsic evidence. Nonetheless, it is plain that the extrinsic evidence taken as a whole falls far short of supporting Plaintiffs' contention that the language limiting retiree health benefits to "[d]uring the term of this labor agreement" is ambiguous.¹⁵

¹⁵ In addition to being without factual support, Plaintiffs' attempt to evade the CBAs' unequivocal durational limitation violates basic rules of contract interpretation. Plaintiffs' interpretation of the CBAs, according to which retiree health benefits were vested, would render the limiting phrase "[d]uring the term of this labor agreement" mere surplusage. Such a result is strongly disfavored. See *Anderson*, 836 F.2d at 1519 ("It would render the durational clauses nugatory to hold that benefits continue for life even though the agreement which provides the benefits expires on a certain date."); see also *Crowe v. Bolduc*, 365 F.3d 86, 97 (1st Cir. 2004). To the extent Plaintiffs claim there was an additional agreement between the parties that – contrary to the CBAs' express durational limitation – provided for retiree health benefits after the CBAs' term, such an argument is precluded by the CBAs' integration clauses, which state that the CBAs contain "all the

Accordingly, the district court properly granted Bowater summary judgment on Count II, which asserts an LMRA claim on behalf of unionized GNP employees who retired between January 1, 1992 and August 17, 1999.

B. The 1999 Agreements Created No New Obligations With Respect to Retiree Health Benefits and Expressly Terminated Bowater’s Prior Obligations.

As Plaintiffs conceded below, the 1999 Agreements created no new obligations with respect to retiree health benefits. Indeed, the 1999 Agreements expressly terminated whatever prior obligations Bowater may have had. Accordingly, Bowater is entitled to summary judgment on Count III, which asserts an LMRA claim on behalf of unionized GNP employees who retired between August 17 and October 1, 1999.¹⁶

terms and conditions of the settlement with respect to a new labor agreement between the parties” and that the CBAs represent “the entire understanding of the parties.” JA124-40 (¶¶41, 42, 50, 62, 67, 69, 75, 81). *See Bozetarnik v. Mahland*, 195 F.3d 77, 83 (2d Cir. 1999) (holding that “integration clause and no-oral-modification clause in the collective bargaining agreement preclude the incorporation into the contract of implied terms that are inconsistent with the contract”).

¹⁶ As Plaintiffs acknowledge, “the District Court granted Bowater summary judgment on two *independent* grounds.” App. Br. 60 (emphasis added). First, the district court found that the 1999 Agreements “make clear” that “Bowater’s obligations terminated” as of GNP’s sale to Inexcon.

1. The 1999 Agreements expressly terminated Bowater's obligations.

The 1999 Agreements *terminated* any contractual obligations Bowater may have had under any GNP CBA. The 1999 Agreements expressly provide that “[u]pon the date of [GNP’s] sale [to Inexcon], all Bowater contractual obligations except those referred to in the Inexcon offer under ‘pensions’ shall cease.” *See supra* at 8–9. Thus, Bowater had no obligations to GNP employees retiring after GNP’s sale to Inexcon.

Notwithstanding this plain language, Plaintiffs argue that Bowater retained the obligation for retiree health care benefits. But Bowater did not retain those obligations under the 1999 Agreements. The only references to

Add. 77. Second, the district court concluded that the Bedard side-letter, even if assumed to be a part of the 1999 Agreements, was insufficient to create a vested right to retiree health benefits because it failed to do so in clear and unmistakable terms. Add. 79. Bowater recognizes that the district court’s second ground conflicts with this Court’s subsequent decision in *Senior*, which rejected the “clear and express statement test.” *Senior*, 449 F.3d at 216. Although Bowater believes that the clear statement rule is in fact the appropriate standard, *see, e.g., Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 632 (7th Cir. 2004); *UAW v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999); *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 667 (6th Cir. 1998); *Sprague*, 133 F.3d at 400; *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993), it is unnecessary to revisit that issue here, because Bowater is entitled to summary judgment under any standard. It is, moreover, well established that this Court “may affirm on any ground supported by the record.” *Senior*, 449 F.3d at 216.

retiree health care benefits in the 1999 Agreements refer to those benefits as “company-paid” benefits. JA162–63 (¶¶142, 144). In the 1999 Agreements, “company” meant GNP, not Bowater. *See supra* at 10 n.5. When the 1999 Agreements refer to Bowater obligations, Bowater is mentioned specifically by name. JA161 (¶139). Further, the SPA between Bowater and Inexcon expressly provides that GNP – not Bowater – would retain the obligation for all retiree health care benefits. JA148–50 (¶¶103–08), JA187–88 (¶¶209–12). Indeed, the unions not only understood that GNP was retaining the obligation for retiree health care benefits, but also informed their membership of this fact. *See supra* at 7. For three years after the sale, GNP (not Bowater) in fact provided those retiree health care benefits. JA70 (¶53); JA107 (¶¶2, 3); JA189 (¶216). Thus, there is no factual basis for concluding that Bowater retained any obligation for retiree health benefits in the 1999 Agreements.

The 1999 Agreements provide – in incorporated exhibits identified as the “pension proposal” – that “Bowater will retain the liability for retirement benefits earned and accrued through the day of sale.” JA252-83 (¶P172). Plaintiffs argue that the phrase “retirement benefits earned and accrued” refers to “both health and pension benefits.” App. Br. 61. But, as

found by the district court, *see* Add. 78, the phrase “retirement benefits earned and accrued” plainly refers to pension benefits only. First, in at least three places, the CBAs refer to the relevant exhibits as dealing specifically with pension benefits. *See, e.g.*, JA163–64 (¶147) (referring to Exhibit A as “the pension proposal”); JA165 (¶151) (Exhibit A, pursuant to which the company shall establish “a pension plan”); JA163–64 ¶147 (terminating “all Bowater contract obligations except those referred to in the Inexcon offer under ‘pensions’”). Second, the very same sentence — “Bowater will retain the liability for retirement benefits earned and accrued through the day of sale” — is used in connection with an illustrative example that clearly concerns pensions only. *See, e.g.*, JA162 (¶141). Third, the phrase “retirement benefits earned and accrued” cannot refer to health benefits because one does not “accrue” welfare benefits. *See* 26 C.F.R. § 1.411(a)-7(a)(1)(ii) (“accrued benefits do not include ancillary benefits . . . such as payment of medical expenses”). Fourth, retiree medical benefits are discussed separately (in Exhibit IV to the UPIU CBA and in Exhibit C to the remaining CBAs) and are referred to as “company-paid retiree health care.” JA636; JA649; JA656; JA667; JA680. Thus, contrary to Plaintiffs’ assertion, no reasonable fact-finder could conclude that Bowater

retained any obligations with respect to retiree health benefits under the 1999 Agreements. As the district court concluded, “Plaintiffs’ strained interpretation of the 1999 agreements does not generate a genuine issue of material fact.” Add. 78.

2. The 1999 Agreements do not provide vested retiree health benefits.

Plaintiffs place great weight on the Bedard side-letter, according to which employees who retired before September 30, 1999, would “preserve their lifetime company-paid retiree health care.” JA640. Even assuming *arguendo* that the letter is part of the 1999 Agreements, the 1999 Agreements still did not create a vested right to retiree health benefits.¹⁷

The 1999 Agreements expressly provide that the terms of the pre-1999 Agreements – including the language limiting retiree health benefits to the term of the agreements, and the language incorporating the SPDs – remain “in full force and effect” unless specifically modified by the 1999

¹⁷ In fact, the Bedard side-letter is *not* part of the 1999 Agreements. See *supra* at 12 & n.6.

agreements.¹⁸ *See supra* at 8. Plaintiffs have conceded that the Bedard side-letter “does not purport to make any ‘change’ to the understanding as to the duration of retiree health benefits.” Pls. Opp. to Defs. Mot. for S.J., at 24–25 n.23 (d/e 144).¹⁹ Thus, under the express terms of the 1999 Agreements and on Plaintiffs’ own theory, the right to retiree health benefits claimed in Count III, like the right claimed in Count II, is ultimately derived from, and defined by, the pre-1999 Agreements. Yet, as discussed above, *see supra* at 24–45, those CBAs plainly limit the duration of retiree health benefits to “[d]uring the term of this labor agreement” and thus unambiguously preclude any claim for vested retiree health benefits.²⁰

¹⁸ The parties to the 1999 Agreements knew how to amend the language of the pre-1999 Agreements when they so desired. *See, e.g.*, JA683–84 (explicitly amending Articles XVII and XXIV of the 1995 Trades CBA).

¹⁹ In this sense, even if the Bedard side-letter were a part of the 1999 Agreements, it would be like the ERPs at issue in *Senior*, the effect of which “was to give the employees who retired under them the same . . . benefits the other employees had.” *Senior*, 449 F.3d at 222.

²⁰ As explained above, *see supra* at 29–31, the fact that the Bedard side-letter refers to “lifetime” benefits does not change this result.

Bowater was, therefore, properly granted summary judgment on Plaintiffs' LMRA claims.

II. PLAINTIFFS' ERISA CLAIM FAILS BECAUSE THE PLANS WERE TERMINATED

This Court recognizes that “[e]mployers are ‘generally free . . . for any reason at any time, to adopt, modify or terminate welfare plans.’” *Senior*, 449 F.3d at 207 (quoting *Curtiss-Wright*, 514 U.S. at 78). Here, the relevant ERISA plans were terminated. They were terminated – both as a matter of law and as a matter of fact – in 1999, when Bowater sold GNP to Inexcon. That termination was then reaffirmed in 2003, when Bowater created the BI Benefit Plan.

The district court granted Bowater partial summary judgment on Plaintiffs' ERISA claim, holding that the plans were terminated as of 2003, but had not been terminated in 1999. Bowater now cross-appeals the denial of summary judgment as to the 1999 termination.

A. Contrary to the District Court's Finding, the ERISA Plans Were Terminated in 1999.

1. The plans were automatically terminated when Bowater sold the GNP subsidiary.

The Bowater plans at issue here terminated automatically, as a matter of law, when Bowater sold GNP in 1999.

When a parent corporation sells a subsidiary, any welfare benefit plan that had been maintained by the former parent for the subsidiary's employees terminates by operation of law upon divestiture of the subsidiary:

Under ERISA, an employee welfare benefit plan terminates as to employees in a division, where, as occurred here, the division is spun-off to another company that provides welfare benefits. Moreover, the original employer has no responsibility for ensuring that benefits be paid under the new welfare benefit plan.

Conkin v. CNF Transp., Inc., 2004 WL 1774775, at *7 (D. Wyo. May 2, 2004).

See also Chiles v. Ceridian Corp., 95 F.3d 1505, 1515-16 (10th Cir. 1996)

(welfare benefits plan terminated upon sale of division where sales documents relieved parent company of its funding obligations and employees received coverage under purchaser's plan); *Bradwell v. GAF Corp.*, 954 F.2d 798, 801 (2d Cir. 1992) (employees did not retain welfare

benefits after division was sold by former employer); *Sejman v. Warner-Lambert Co.*, 889 F.2d 1346, 1348–49 (4th Cir. 1989) (welfare benefits sponsored by former parent company no longer controlling after sale of corporate division). By definition, ERISA plans require a mechanism for funding and administering the plan. When those elements are terminated as a result of the sale of a corporate subsidiary, so too is the plan. *Chiles*, 95 F.3d at 1516; *see also Myron v. Trust Co. Bank Long Term Disability Benefit Plan*, 522 F. Supp. 511, 516 (N.D. Ga. 1981) (holding that “funding and administration are integral parts of a ‘plan’ under ERISA” and that a plan does not “continue in existence regardless of changes in funding or administration”).

Here, there is no dispute that Bowater sold GNP to Inexcon. Nor is there any dispute that under the 1999 SPA, GNP assumed all the welfare benefit plans at issue in this case, and accordingly provided retiree welfare benefits from 1999 through 2002. JA187–94 (¶¶209–10, 217–30). Thus, as in *Chiles*, the new owner assumed responsibility for providing coverage that had previously been sponsored by the prior owner.

Given that the SPA ended Bowater's responsibility for the GNP welfare plans, those plans were terminated as a matter of law upon GNP's sale to Inexcon.

2. The plans were in fact terminated upon the sale of GNP.

Even if the sale of a subsidiary did not always trigger automatic termination as a matter of law, it is clear, on the facts of this case, that the plans maintained by Bowater for GNP employees were terminated upon Bowater's sale of GNP to Inexcon.

In *Chiles*, the Tenth Circuit noted four facts that supported a finding of termination upon the division's divestiture: (1) new trustees were appointed for the buyer's replacement plan; (2) the buyer became the administrator of the new plan; (3) the seller transferred money to fund the new plan; and, (4) the buyer assumed the seller's obligations with respect to plan participants. 95 F.3d at 1516. Similar facts in this case demonstrate that the plans upon which Plaintiffs rely were terminated when Bowater sold GNP to Inexcon:

- The Bowater Board of Directors formally authorized certain Bowater officers — including Bowater's CFO, David Maffucci — to do whatever was necessary to facilitate the sale, "including, without limitation . . . amending, modifying, suspending or terminating any and all retirement, compensatory or welfare benefit plans . . .

maintained by the Corporation or GNP.” See Add. 51; JA89 (¶30); JA97 (¶¶21-22); JA188 (¶212).

- Under the terms of the SPA, which Maffucci signed, Inexcon assumed Bowater’s obligations for all non-pension benefits. See JA148-50 (¶¶103-108).
- Bowater, Inexcon, and the unions negotiated the 1999 Agreements, which expressly terminated Bowater’s contractual obligations for all non-pension benefits. See *supra* at 8-10.
- After the sale, Bowater instructed GNP to substitute “GNP” for “Bowater Incorporated” in the SPDs and removed the GNP plans from the Bowater VEBA trust. See JA188-89 (¶¶214-215); JA276 (¶39).
- After the sale, GNP sent Plaintiffs new benefit cards identifying GNP as the plan sponsor and repeatedly presented itself in writing as the plan sponsor. See JA190-94 (¶¶217-230).
- After the sale, Plaintiffs paid premiums due under the plans to GNP, not Bowater. See JA193 (¶228).
- After the sale, GNP, not Bowater, paid retiree health benefits to GNP retirees. See Add. 69 n.20; JA189 (¶216).

These facts demonstrate what all participants knew at the time: Bowater’s obligations under the GNP plans were terminated when Bowater sold GNP to Inexcon.

3. The district court erred insofar as it denied Bowater summary judgment on the 1999 termination.

The district court, noting a lack of First Circuit authority on the issue, mistakenly concluded that “the SPA did not, as a matter of law, serve to

terminate the welfare benefit plans upon which Plaintiffs base their claims.” Add. 70. The district court erred. It misapplied the governing law and made a clearly erroneous factual determination.

According to the district court, “[a]utomatic termination, achieved without following specified plan amendment procedures, simply cannot satisfy the requirements of ERISA.” Add. 68. Even if that were true, it is irrelevant on the facts of this case, where Bowater followed all necessary plan amendment procedures: A formal document (the Stock Purchase Agreement) signed by a duly authorized corporate officer (David Maffucci) expressly ended Bowater’s responsibility for the plans.

The district court misunderstood the law governing plan terminations. It rejected the automatic termination rule as inconsistent with the “formalistic nature” of ERISA, and found that the SPA did not terminate the plans because it “did not purport by its terms to be a plan termination.” Add. 68–69. In truth, the requirements for amending an ERISA plan are *de minimis*. See *Depenbrock v. Cigna Corp.*, 389 F.3d 78, 81 (3d Cir. 2004). So long as there is a “procedure for amending the plan” and “a procedure for identifying the persons who have authority to amend the plan,” *Curtiss-Wright*, 514 U.S. at 78 (alterations and internal quotation

marks omitted), “ERISA imposes no additional formalities on plan amendments.” *Halliburton Co. Benefits Comm. v. Graves*, 463 F.3d 360, 372 (5th Cir. 2006).

Nor does ERISA require “that a document claimed to be an amendment to a welfare plan be labeled as such.” *Id.* (merger agreement constitutes plan amendment although not so identified). *See also Allison v. Bank One-Denver*, 289 F.3d 1223, 1235 (10th Cir. 2002) (formal document may serve as a plan amendment or termination even “though not labeled as such”); *Horn v. Berdon, Inc. Defined Benefit Pension Plan*, 938 F.2d 125, 127 (9th Cir. 1991) (corporate resolution, although not labeled an “amendment,” constituted a plan amendment because “there is no requirement that documents claimed to collectively form the employee benefit plan be formally labeled as such”). Indeed, “it has long been a standard practice, recognized by the courts, to terminate a plan by adopting a board resolution.” *Aldridge v. Lily-Tulip, Inc.*, 40 F.3d 1202, 1210 (11th Cir. 1994).

The corporate action taken by Bowater was more than sufficient to satisfy the requirements for plan termination. The court’s contrary conclusion – that Bowater “never took any action at the time of the sale

conforming to the termination requirements of the Plans” (Add. 69) – was based on a clearly erroneous factual determination. The court mistakenly determined that Bowater did not “execute any document signed by either of the two Bowater officers who had the authority to terminate or amend Bowater-sponsored welfare benefit plans.” Add. 69 n.21 (quoting Pls. Mot. for S.J., at 5 (d/e 129)). That holding was based on Plaintiffs’ mistaken reference to a 1997 board resolution, which had authorized two Bowater executives – but not its CFO – to amend or terminate the company’s welfare plans. See JA88 (¶26). Plaintiffs subsequently conceded, however, that a July 1999 Board resolution authorized the SPA’s signatory, CFO David Maffucci, to take any action necessary in connection with the sale including “terminating any and all . . . welfare benefit plans.” See JA188 (¶212); JA268–69 (¶¶21–22). Thus, contrary to the district court’s finding, Bowater *did* execute a document, the SPA, which *was* signed by a corporate officer, Maffucci, who *did* have the authority to terminate the Bowater-sponsored welfare plans.

In addition to its factual error and its misunderstanding of ERISA’s *de minimis* amendment standards, the district court misread *Algie v. RCA Global Commc’ns, Inc.*, 60 F. 3d 956 (2d Cir. 1995) as conflicting with the

automatic termination rule established in *Chiles*. See Add. 68 (“this Court must evaluate the apparent conflicting positions espoused in *Chiles* and *Algie*”). No such conflict exists. The plan in *Algie* – unlike the plan in *Chiles* – was sponsored by the subsidiary itself, not by the erstwhile parent. See *Algie*, 60 F.3d at 961. Consequently, the sale of the subsidiary did not change the mechanism for funding or plan administration. Thus, what *Algie* rejected was the notion that the sale of a corporation automatically terminated welfare plans sponsored by *the corporation being sold*. That unremarkable holding in no way conflicts with the principle, recognized in *Chiles* (as well as *Conkin*, *Bradwell*, and *Sejman*) that when a parent corporation sells a subsidiary, any welfare benefit plans that *the former parent had maintained* for the subsidiary’s employees automatically terminate upon sale of the subsidiary.²¹

²¹ Notably, the *Algie* court distinguished *Bradwell* and *Sejman* on precisely the grounds identified here.

The present case is distinguishable in two crucial respects. First, the . . . plan was not sponsored by the old parent corporation, but by the sold unit, . . . which had its own corporate identity. Second, the jury specifically found that the plaintiffs in this case were still employed by [the divested subsidiary], not its new parent . . ., at the time they were discharged. Thus, in contrast to *Bradwell* and *Sejman*, at the time

In sum, because Bowater, through a duly authorized representative, executed a formal document at the time of GNP's sale that ended Bowater's obligation to maintain the plans in question, those plans were terminated, both in fact and by operation of law. Bowater is, therefore, entitled to summary judgment on Plaintiffs' ERISA claim in its entirety.

B. As Found by the District Court, the ERISA Plans Were Terminated No Later than 2003.

Effective January 1, 2003, Bowater adopted the BI Benefit Plan. Given its purpose and text, Bowater's Plan Administrator determined that the Plan effectively terminated the POS-A and Indemnity Plans.²² After "carefully review[ing]" the BI Benefit Plan, the district court found the Plan Administrator's interpretation "entirely reasonable." Add. 73. The Plan Administrator's determination was correct, and is subject to highly deferential review. Plaintiffs' arguments to the contrary are without merit.

plaintiffs in this case were discharged they were still employed by the corporation that sponsored the plan for the benefit of its employees.

Algie, 60 F.3d at 961.

²² Plaintiffs do not dispute that by its terms the BI Benefit Plan provides them no benefits. They argue only that the Plan did not amend or modify the POS-A and Indemnity Plans.

1. The Plan Administrator correctly determined that the BI Benefit Plan terminated the POS-A and Indemnity Plans.

The BI Benefit Plan was created to consolidate Bowater's benefit plans into one "umbrella" plan to "provide Bowater greater administrative simplicity." JA91-92 (¶37); JA100 (¶44). The Plan achieved this objective by first listing the Benefit Programs to be *made part* of the BI Benefit Plan, and by then superseding and replacing – and thus effectively terminating – any program document describing a "Benefit Program that is not incorporated and made part of the Plan." Despite the purpose and simplicity of the BI Benefit Plan, Plaintiffs rely on "informal" plan documents that do not exist to support a hypothetical alternative interpretation that is inconsistent with the Plan's text.

The BI Benefit Plan was meant to consolidate all Bowater-sponsored welfare benefit plans into one plan to avoid the administrative burden – including filing separate Form 5500s and separate tax returns – of maintaining multiple benefit plans. This intention appears on the face of the Plan, which states that "[a]ll Benefit Programs offered under the Plan shall constitute a single plan for purposes of the annual reporting requirements of the Code and ERISA." JA278 (¶45). The Plan itself states,

without limitation, that it “is a continuation, amendment and restatement of plans previously maintained by the Company.” Bowater’s Plan Administrator testified that the Plan was intended to incorporate and “sweep in all the health and welfare plans” into “a single” plan document. JA979–80.

Nonetheless, Plaintiffs contend that the Plan amended and restated only some – but not all – Bowater plans. Plaintiffs concede that the BI Benefit Plan is an “umbrella” plan “created to provide Bowater greater administrative simplicity in consolidating certain welfare plans.” JA91–92 (¶37). Although Plaintiffs claim that there was no specific intent to terminate the POS-A and Indemnity Plans, they provide no reason why Bowater would amend and restate some but not all plans, particularly given its goal of creating “a single” plan.

Instead, Plaintiffs posit the existence of “informal program documents” – including “informal memos, letters, or brochures.” App. Br. 30. Based solely on the supposed existence of such documents, Plaintiffs hypothesize an alternative interpretation by which the POS-A and Indemnity Plans continued to exist outside of the BI Benefit Plan. Fatal to Plaintiffs’ argument, however, is the lack of evidence (proffered by

Plaintiffs or otherwise) that any such “informal program documents” existed, let alone that the BI Benefit Plan was designed to eliminate them. Indeed, the only evidence in the record is to the contrary.²³

Plaintiffs’ textual argument – predicated on those imagined “informal” plan documents – fares no better. Under the heading “Benefit Programs” the BI Benefit Program states:

Benefits are provided to Participants and Dependents through one or more Benefit Programs sponsored or maintained by an Employer. . . . The separate Benefit Programs that are consolidated into the Plan are listed in Appendix A. Separate Program Documents which describe the specific benefits provided by each Benefit Program . . . shall be incorporated herein by this reference. **The Plan supersedes and replaces any program document defining the terms of or describing a Benefit Program that is not incorporated and made part of the Plan.**

JA877 (emphasis added). “Benefit Program” in turn “means a separate welfare plan program that is sponsored by an Employer and

²³ Bowater’s Director of Compensation and Benefits, Aaron Whitlock, who assisted in the creation of the BI Benefit Plan, submitted an affidavit stating: “I am not aware now, nor was I aware at the time the BI Benefit Plan was drafted, of any ‘informal’ program documents. In creating the BI Benefits Plan, there was no intent to supersede or replace any ‘informal’ program documents, or to differentiate between ‘formal’ or ‘informal’ program documents.” JA1562 (¶7).

which forms part of the Plan and is incorporated herein by this reference.” JA878.

Plaintiffs argue that the phrase “that is not incorporated and made part of the Plan” in the emphasized sentence modifies “program document,” not “Benefit Program.” The text belies that interpretation. First, the phrase “that is not incorporated and made part of the Plan” immediately follows “Benefit Program,” not “program document.” Second, the phrase “that is not incorporated and *made part of the plan*” tracks the language used in the definition of “Benefit Program” – a welfare plan “which *forms part of the Plan* and is incorporated herein” – and not (as Plaintiffs propose) the language from the preceding sentence related to “Program Documents” which shall be “incorporated herein.”

Third, if Plaintiffs were right that Bowater intended to supersede and replace “informal” documents such as “information brochures, handouts and the like,” App. Br. 32, the emphasized sentence would not need to use either the term “program document” or the phrase “not incorporated and made part of the plan.” Rather, it could simply state that the “Plan supersedes and replaces any *other* document defining the terms of or describing a Benefit Program.” Even the reference to “supersedes and

replaces” suggests that the reference is to formal program documents. One does not typically “supersede and replace” “informal” documents such as “information brochures, handouts and the like” with a 60-page Benefit Plan.

Plaintiffs argue that the Plan Administrator’s interpretation would read out the phrase “program document describing or defining the terms of a” Benefit Program. Far from reading out the phrase, that phrase is important to the goal of the Plan. The Plan was established to “continu[e], amend[] and restate[] plans previously maintained by the Company, *as set forth in the relevant summary plan descriptions and the Company’s welfare benefit plans.*” JA877 (emphasis added). The term “program document” (as opposed to “other” document) makes clear that the plan is referencing summary plan descriptions and plan documents.²⁴ Superseding and

²⁴ Plaintiffs argue that the lowercase “program document” is used in the emphasized sentence because the capitalized term “Program Document” references formal documents such as SPDs. Not so. The lowercase “program document” is used because the capitalized “Program Document” includes in its definition the capitalized term “Benefit Program,” which would ordinarily mean a Program “which forms part of the Plan and is incorporated herein.” Because the highlighted sentence references “Benefit Programs that are *not* incorporated and made part of the Plan,” the capitalized term “Program Document” is not used.

replacing “a Benefit Program that is not incorporated and made part of the Plan,” would accomplish only half the task. It would leave unmodified the summary plan documents and welfare benefit plans that describe that Benefit Program. By superseding and replacing “program documents” describing “Benefit Programs not incorporated and made part of the plan,” the BI Benefit plan supersedes and replaces, and therefore “amend[s] and restate[s]” the summary plan descriptions, the plan documents, and the programs themselves.

Similarly, Plaintiffs wrongly assume that the term “Program Document” cannot include Plaintiffs’ imaginary “informal documents.” “Program Document” is defined as “the written summary of the terms of each separate Benefit Program, that *may* consist of a summary plan description, separate plan document and/or Insurance Company contract or certificate.” JA884 (emphasis added). By its express terms, the definition of “Program Document” does not exclude the possibility that less formal plan documents may qualify as a Program Document. Rather,

Plaintiffs implicitly insert the term “only” – as if a Program Document “may *only* consist” of the documents listed.²⁵

Given the BI Benefit Plan’s purpose and text, Plaintiffs’ capitalization argument falls of its own weight. As the district court found, Plaintiffs’ position “ignores the context exception contained in the definition section.”

Add. 73.²⁶ This exception says that words in the Plan have their defined

²⁵ Plaintiffs’ argument that Bowater was distinguishing “formal” from “informal” program documents also fails on its legal premise. Informal plan documents do not create binding legal obligations unless they sufficiently meet the required elements to be deemed “plan documents.” See, e.g., *Cotton v. Mass. Mut. Life Ins. Co.*, 402 F.3d 1267, 1275 n.8 (11th Cir. 2005) (policy projections are “not plan documents” because they were “merely . . . informal communications that do not satisfy *any* of the requirements found in 29 U.S.C. § 1022”) *Gable*, 35 F.3d at 857 (documents were “informal communications that do not govern the company’s obligations under an ERISA plan”). Documents that meet the elements of a “plan document” would be included under the definition of “Program Document” (defined to include “plan documents”), while those that did not would impose no legal obligation. Thus, there would be no reason to draft a sentence to address supposed “informal” documents.

²⁶ Indeed, Plaintiffs concede that the interpretation adopted by the Plan Administrator and the district court “cannot be recognized without overriding the Plan’s own definition of the term ‘Benefit Program,’” and that in order to accept that interpretation one “is *compelled* to adopt a construction of §1.03 that forces a meaning on ‘Benefit Program’ that is different from the term’s defined meaning.” App. Br. 35 (emphasis added).

meanings “unless the context plainly requires a different meaning.”²⁷

JA878. That is the case here. The context is clear that the “Benefit Program” being referenced is one that is “not incorporated and made part of the plan.” This language tracks, and eliminates, *half* of the required elements of the defined term “Benefit Program” — that the Program “forms part of the Plan and is incorporated herein by this reference.” It leaves intact the other half of that definition, which defines a Benefit Program as “a separate welfare plan program that is sponsored by an Employer.” By using the capitalized term “Benefit Program” with the modifier “that is not incorporated and made part of the plan,” the document clarifies that it is referring to welfare plan programs sponsored

²⁷ Plaintiffs’ rigid interpretation of this provision — precluding a departure from the defined meaning if *any* alternative interpretation could be supplied — is unwarranted. “Context clauses” — such as ‘unless the context otherwise requires’ — “reflect the fact that definitions rarely work universally, and that one word can have different connotations in different constructions.” *Abdelgadar v. Gonzales*, 413 F.3d 668, 673 (7th Cir. 2005). See also *New England Tel. & Tel. Co. v. Pub. Utils. Comm’n*, 570 F. Supp. 1558, 1567 (D. Me. 1983) (the phrase “unless the context otherwise requires” “makes it clear that the definitions . . . are not intended to be exclusive, exhaustive or comprehensive . . . [but] are ‘guideline’ definitions whose scope and meaning are, as a general principle, to be varied as the context in which they are used . . . may require”), *vacated on other grounds*, 742 F.2d 1 (1st Cir. 1984).

by an Employer, and not to other “benefit programs,” which might include pension benefit plans or plans not sponsored by an “Employer.”²⁸

In sum, when read properly, Section 1.03 provides that the Plan incorporates the Benefit Programs listed in Appendix A, and the Program Documents describing them. Any other program document is superseded and replaced if it describes a “Benefit Program that is not incorporated and made part of the Plan.” Indeed, given that Section 1.03 is titled “Benefit Programs,” it follows that the section defines the contours of a Benefit Program (including which ones are incorporated and which are superseded), and is not attempting to distinguish “formal” program documents from “informal” ones, as Plaintiffs suggest.

²⁸ Elsewhere the Plan does use the lowercase term “benefit programs” when describing programs that may include “pension” programs. In Section 9.03 of the plan, it states that overpayments under the Plan may be recovered by the Administrator from benefits payable under any “Employer sponsored benefit programs.” The lowercase “benefit programs” can be used in that context because it is anticipated that the Company might recover overpayments from pension payments owed by the Company. Because “Benefit Programs” in the disputed sentence is intended to exclude pension plans, it is necessary to use the capitalized term and then eliminate from that defined term the qualifier “that are incorporated and made part of the plan.”

Plaintiffs' reinterpretation of the BI Benefit Plan finds no support in the Plan's language, and relies on an imputed motive – the elimination of “informal program documents” – that did not exist. Plaintiffs have fallen far short of carrying their burden to demonstrate that the BI Benefit Plan is not a valid amendment or termination of the POS-A and Indemnity Plans. *See Warren v. Cochrane*, 235 F. Supp. 2d 1, 7 (D. Me. 2002) (“[i]n an ERISA case challenging the validity of a plan amendment, a plaintiff bears the burden of demonstrating . . . the invalidity of the amendment”).

2. The Plan Administrator's determination is entitled to deference.

Plaintiffs' contortion of the 2003 BI Benefit Plan demonstrates why courts defer to the plan administrator's interpretation: doing otherwise invites far-fetched grammatical second-guessing. So long as the administrator's determination is “plausible in light of the record as a whole,” such a determination will be upheld. *Leahy*, 315 F.3d at 17. Such deference is particularly appropriate where, as here, the plan administrator is interpreting the terms of the plan itself, a subject on which the plan administrator has unique expertise. *See, e.g., Hutchins v. Champion Int'l*

Corp., 110 F.3d 1341, 1344 (8th Cir. 1997); *Pierre v. Conn. Gen. Life Ins.*, 932 F.2d 1552, 1559 (5th Cir. 1991).

It is well-established that when a plan gives its administrator “discretionary authority to determine eligibility for benefits or to construe the terms of the plan,” *Firestone*, 489 U.S. at 115, the plan administrator’s denial of benefits is subject only to “arbitrary and capricious” review. *Leahy*, 315 F.3d at 15. Here, it is undisputed that “[a]ll welfare benefit plans at issue,” including the BI Benefit Plan, gave such authority to the plan administrator. Add. 58. The district court found that the Plan Administrator’s interpretation of the plan not only survived ‘arbitrary and capricious’ review, but was “entirely reasonable.” Add. 73.

In a footnote, Plaintiffs claim that the interpretation of Aaron Whitlock, Bowater’s Plan Administrator, should be given little or no deference because of Bowater’s structural conflict of interest. App. Br. 28–29 n.5. While it is true that a plan administrator’s determination will be reviewed *de novo* where the administrator is personally conflicted or where there is actual animus, *see, e.g., Janeiro v. Urological Surgery Prof’l Ass’n*, 457 F.3d 130, 137–42 (1st Cir. 2006), a structural conflict of interest, such as Plaintiffs allege, does not alter the standard of review. It is “well-

established” that the mere “fact that ‘the plan administrator’ will have to pay [the plaintiff’s] claim[] out of its own assets does not change [the arbitrary and capricious] standard of review.” *Wright v. R.R. Donnelley & Sons Co. Group Benefits Plan*, 402 F.3d 67, 75 (1st Cir. 2005). *See also Janeiro*, 457 F.3d at 139 (accepting “the rule that a structural conflict by itself does not provide a basis for departing from the usual standard of review”).

This Court just reconfirmed that “where, as here, ‘a finding of eligibility means that the insurer will have to pay benefits out of its own pocket,’” “courts should apply ‘the arbitrary and capricious principle, with special emphasis on reasonableness, but with the burden on the claimant to show that the [insurer’s] decision was improperly motivated.’” *Tsoulas v. Liberty Life Assurance Co.*, 454 F.3d 69, 76 (1st Cir. 2006) (quoting *Pari-Fasano v. ITT Hartford Life & Accident Ins. Co.*, 230 F.3d 415, 418 (1st Cir. 2000)).

Despite this Court’s “well-established” precedent, Plaintiffs claim that the Plan Administrator deserves little or no deference because Bowater sold GNP and therefore purportedly does not face countervailing market forces in its dealings with GNP employees. App. Br. 28–29 n.5. This argument fails for three reasons. First, the alleged conflict is a structural one and thus fits within the rule that this Court reiterated in *Wright*.

Second, even after the sale of GNP, “the market presents competing incentives” for Bowater. *Pari-Fasano*, 230 F.3d at 419. As a going concern, Bowater will have to negotiate again and again with its employees and their unions, who will scrutinize how the company has implemented its ERISA plans past and present. The mere fact that the GNP retirees in Maine are “left isolated from the balance of Bowater’s workforce, who work in other states” (App. Br. 28 n.5) does not alter the analysis, particularly given that many of Bowater’s employees at its other plants are represented by the same unions that are paying Plaintiffs’ fees here. Third, if the standard of deference hinged on the geographic dispersion of an employer’s plants, as Plaintiffs propose, the standard itself would be impossible to administer, prompting ancillary litigation about how much “market force” in fact existed in any given case.

The BI Benefit Plan plainly amends and restates the GNP POS-A and Indemnity Plans. This is apparent from the face of the document itself. Moreover, any ambiguity must be resolved in favor of the interpretation rendered by the BI Plan administrator. *See Liston v. Unum Corp. Officer Severance Plan*, 330 F.3d 19, 24 (1st Cir. 2003) (noting that “the rationality standard tends to resolve doubts in favor of the administrator”). Unless

that interpretation is unreasonable – and the district court found it “entirely reasonable” – this Court should defer to that decision and hold that, as a result of the 2003 BI Benefit Plan, any obligation Bowater owed to Plaintiffs was terminated.

III. THE EXHAUSTION ISSUES ARE NOT PROPERLY BEFORE THIS COURT

Plaintiffs raise two issues concerning whether they were correctly required to exhaust their administrative remedies before proceeding with this action. *See* App. Br. 37–45. However, neither issue is properly before this Court. The first is moot, and the second – which in any event fails on the merits – has been waived.

A. Whether the Named Plaintiffs Were Properly Required to Exhaust Their Administrative Remedies Is Moot.

Plaintiffs assert that the district court erred in requiring the named Plaintiffs to exhaust their administrative remedies. Plaintiffs acknowledge, however, that the “named Plaintiffs in each proposed subclass ha[ve] exhausted their administrative remedies.” App. Br. 39. Accordingly, the question of whether the named Plaintiffs should have been required to exhaust their administrative remedies is moot.

B. Whether the Unnamed Class Members Were Properly Required to Exhaust Their Administrative Remedies Has Been Waived.

With respect to unnamed class members, Plaintiffs, invoking the doctrine of vicarious exhaustion, contend that the district court erred when it required them to exhaust their administrative remedies as a prerequisite to class membership.²⁹ *See* App. Br. 37. Plaintiffs, however, waived the issue in at least three ways. First, as Plaintiffs concede, they did not raise the exhaustion issue in their class certification motion. *See* App. Br. 40. Second, any error with respect to the class definition was invited by Plaintiffs when they proposed a class definition limiting the class to those who had exhausted their claims. *See* Add. 20. Third, Plaintiffs waived any challenge to the exhaustion requirement by entering a stipulation that required unnamed class members to file administrative claims but allowed them to “participate in Count I of this lawsuit without the need for them to file internal appeals.” Notice to Court at 2 (d/e 130). That stipulation represented a compromise with Bowater, which surrendered its right to insist that class members fully exhaust their administrative remedies by

²⁹ Plaintiffs never raised the futility argument with respect to the unnamed class members.

filing administrative appeals in the event their claims were denied. Plaintiffs are bound by that stipulation. *See Gomez v. Rivera*, 344 F.3d 103, 121 (1st Cir. 2003); *Morales v. Rullan*, 303 F.3d 1, 8 (1st Cir. 2002). Moreover, because Plaintiffs' stipulation induced the district court to amend the class definition, *see* Order Amending Class Definition, at 2 (d/e 135) (noting that the "stipulation requires modification of the class definition" and ordering a revised class definition "[p]ursuant to the stipulation reached by counsel addressing exhaustion of administrative remedies"), Plaintiffs are now judicially estopped from challenging that definition and the exhaustion requirement it embodies. *See Faigin v. Kelly*, 184 F.3d 67, 82 (1st Cir. 1999); *In re Cassidy*, 892 F.2d 637, 641-42 (7th Cir. 1990).

Plaintiffs' exhaustion argument also fails on its merits. The district court is given broad discretion both in defining a class and in excusing exhaustion of plan-mandated administrative remedies. *See, e.g., Bickley v. Caremark Rx, Inc.*, 461 F.3d 1325, 1328 (11th Cir. 2006) (decision "to apply or not apply the exhaustion of administrative remedies requirement for ERISA claims is a highly discretionary decision which we review only for a clear abuse of discretion); *Johnson v. Shalala*, 2 F.3d 918, 920 (9th Cir. 1993) ("We review a district court's class definition for an abuse of discretion.").

Plaintiffs cannot demonstrate that the court's vicarious exhaustion decision was clearly erroneous.

First, Plaintiffs concede that the vicarious exhaustion doctrine applies only where plaintiffs demonstrate that the class members' claims "are indeed very similar to those of the named plaintiff." App. Br. 43. In this case, the district court determined, based on the facts presented by Plaintiffs, that "there is no showing that in the details and circumstances or the remedy or benefit to be ultimately sought on these individual claims [of unnamed class members] there is any semblance of similarity."³⁰ Add. 7. Whether Plaintiffs may have later made a showing of factual similarity is irrelevant, because Plaintiffs did not raise the exhaustion issue again either during or after class certification.

Second, Plaintiffs had relied on Fed. R. Civ. P. 23(d) as the mechanism for raising their vicarious exhaustion argument. The district court found that Plaintiffs' reliance on Rule 23(d) was "shaky at best and

³⁰ Differences among class members included when the claims were filed, individualized issues of notice and reliance, and the types of benefits claimed by each claimant — which ranged from dental services, to insurance reimbursement, to prescription drugs.

non-existent at worst” and that the court had “no authority under Rule 23(d)” to excuse exhaustion. Add. 4, 7. Plaintiffs have not challenged that independent procedural basis for the district court’s decision. Thus, any error in rejecting Plaintiffs’ vicarious exhaustion argument is irrelevant.³¹

Conclusion

The judgment of the district court should therefore be affirmed insofar as it granted Bowater summary judgment and reversed insofar as it granted Plaintiffs summary judgment.

³¹ In any event, this Court need not reach the issue unless it vacates the summary judgment grant to Bowater as to the 2003 plan termination. The parties stipulated to the damages that Plaintiffs will receive if this Court affirms the district court’s determination that the ERISA plans were terminated as of January 1, 2003. *See* d/e 188. A modification of the class definition would not affect the amount of stipulated damages and would thus be moot if the decision below is sustained.

Respectfully submitted,

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Certificate of Compliance

I, Andrew Tauber, hereby certify that: (1) this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because it contains 16,499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and, (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface, namely Book Antiqua 14, using Microsoft Word 2002.

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Certificate of Service

I, Andrew Tauber, hereby certify that on November 22, 2006, I caused copies of the Brief of Defendant-Appellee/Cross-Appellant Bowater Incorporated in the above-captioned matter to be served by first class U.S.

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