UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN F. SULLIVAN, WILLIAM E. PHILLIPS, KAREN N. WITHEE, PAUL J. SPECHT, and THOMAS O. OLSON, on behalf of themselves and all others similarly situated,

Plaintiffs,

No. 09-CV-00455

CUNA MUTUAL INSURANCE SOCIETY and CUNA MUTUAL GROUP MEDICAL CARE PLAN FOR RETIREES,

Defendants.

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Alan S. Gilbert
agilbert@sonnenschein.com
T. David Cowart
dcowart@sonnenschein.com
Jeffery S. Davis
jdavis@sonnenschein.com
SONNENSCHEIN NATH & ROSENTHAL LLP
233 S. Wacker Drive, Suite 7800
Chicago, IL 60606-6404
Telephone: (312) 876-8000
Facsimile: (312) 876-7934

Devon R. Baumbach
State Bar No. 1023009
drb@mellilaw.com
Thomas R. Crone
State Bar No. 1017265
tomcrone@mellilaw.com
MELLI LAW, S.C.
Ten East Doty, Suite 900
P.O. Box 1664
Madison, WI 53701-1664
Telephone: (608) 257-4812
Facsimile: (608) 258-7470

Attorneys for Defendants CUNA Mutual Insurance Society and CUNA Mutual Group Medical Care Plan for Retirees

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

INTRODUCTION

Plaintiffs' strained interpretation of one sentence about "exclusive benefits" in the CUNA Mutual 1995 welfare benefit plan does not come close, as a matter of law, to overcoming the Seventh Circuit's strong presumption that welfare benefit plans do not create lifetime benefits. Here, where all the relevant documents are before the Court and no discovery can change them, *Bell Atlantic v. Twombly* mandates that this case should not be allowed to move forward.

SUMMARY OF ARGUMENT

The one sentence in the 1995 CUNA Mutual Plan that plaintiffs rely upon is far from the "clear and express" vesting language the Seventh Circuit requires to overcome the strong presumption that welfare benefit plans do not create lifetime benefits. *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 784 (7th Cir. 2005) (quoting *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997)). The "exclusive benefit" sentence on which the plaintiffs base their case did not even exist in the CUNA Mutual Plan in 2008 when the Plan was changed to eliminate employer subsidies for retiree health benefits. It did not survive the 2007 Amendment. Plaintiffs have not put forth any basis in their Complaint or in their Memorandum in Opposition for the Court to ignore the 2007 Plan amendment that removed this provision.

Even if the 1995 Plan "exclusive benefit" sentence were somehow applicable in 2008 when the 2007 Plan was amended to remove employer subsidies while continuing to provide retirees health care benefits, that sentence does not present even a close case for vesting in view of its meaning and the Plan as a whole.

There is likewise no support for plaintiffs' argument that CUNA Mutual's accounting treatment of possible future benefit payments somehow created plan assets in which plaintiffs had a vested interest or which subjected CUNA Mutual to possible liability for wrongful

diversion under ERISA prohibited transaction or fiduciary duty rules. Courts have long distinguished between employer obligations and actual plan assets under ERISA. Indeed, plaintiffs' argument that CUNA Mutual's elimination of a liability on its books violated ERISA as a prohibited transaction or breach of fiduciary duty was rejected over 25 years ago by the United States Court of Appeals for the Fourth Circuit.

Nor can there be any real question here about whether plaintiffs' state law claims are preempted by ERISA. The essence of their claims is for relief under an ERISA plan, and nullification of an amendment of that plan.

The Supreme Court made it clear in *Bell Atlantic* and *Iqbal* that district courts should take seriously their gatekeeper role and not impose upon parties and the court system the expense of discovery and motion practice in cases that lack the basic plausibility to go forward. This is one of those cases. Plaintiffs presented the Court with all the relevant documents. The Court can and should decide as a matter of law whether those documents created Plan assets or vested benefits. Clearly, they do not. There simply is not enough here for this case to go forward.

ARGUMENT

I. THE COMPLAINT FAILS TO MEET THE NEW HEIGHTENED PLEADING REQUIREMENTS

There is no plausible argument under the strong controlling law in this Circuit that Plan participants have a vested lifetime right to subsidization of retiree health benefits. The exclusive benefit language does not mention such subsidies, let alone include language suggesting a lifetime, or vested right. And it was always made clear (including in the very document that included the "exclusive benefit" provision) that the Plan could be changed or terminated at any time.

To survive Rule 12(b)(6) dismissal, the factual allegations must be sufficient to raise a right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570

(2007). While plaintiffs give lip service to *Bell Atlantic*'s requirement that a complaint must state a claim to relief that is "plausible on its face," they nevertheless ask the Court to apply the superseded standard from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Plaintiffs assert, "[a] court will grant a motion to dismiss only if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," citing *Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008). (Opp. at 6).[1] But the Seventh Circuit in *Tamayo* said just the opposite, that the Supreme Court's *Bell Atlantic* decision "expressly disavowed" this "oft-quoted" standard from *Conley*.

As the Seventh Circuit has noted, "[t]he Court's specific concern in *Bell Atlantic* was with the burden of discovery imposed on a defendant by implausible allegations perhaps intended merely to extort a settlement that would spare the defendant that burden." *Cooney v. Rossiter*, No. 08-3675, 2009 U.S App. LEXIS 21468, *7 (7th Cir. Sept. 30, 2009). Thus, for a claim to be "plausible," "it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence supporting the plaintiff's allegations." *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (quoting *Bell Atlantic*, 550 U.S. at 556).

The pleading standard was further clarified in *Ashcroft v. Iqbal*, __U.S.__, 129 S.Ct. 1937, 1940 (2009). "[D]etermining whether a complaint states a plausible claim for relief [necessary to survive Rule 12(b)(6) dismissal] will … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Following *Iqbal*, the Seventh Circuit has said: "[i]n other words, the height of the pleading requirement is relative to the circumstances." *Cooney*, 2009 U.S. App. LEXIS 21468, at *8.

[1] "Compl." and "PL-COMP" refer to plaintiffs' Complaint and the documents attached to plaintiffs' Complaint, respectively; "Def. Mem." refers to Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss; "Opp." refers to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss.

Under the circumstances in this case, plaintiffs' claim is implausible. There can be no "reasonable expectation that discovery will reveal evidence supporting the plaintiffs' allegations" since the Court already has all the undisputed Plan documents pertinent to the issue at hand. (*See* PL-COMP 000001-62). As a matter of law, those documents do not support plaintiffs' claim that benefits under the CUNA Mutual Plan have vested. Further discovery and motion practice will do nothing to change this. This litigation should proceed no further.

II. PLAINTIFFS' ERISA CLAIMS FAIL TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED

A. CUNA Mutual's 2008 Amendments To The 2007 Plan Did Not Violate The Terms Of The Plan.

1. Plaintiffs Rely Upon Language No Longer in The 2007 Plan.

The sole basis for plaintiffs' claim to vested benefits is the "exclusive benefit" sentence from the 1995 Plan.[2] That language did not exist when the Plan was amended in 2008. It was eliminated in the 2007 Plan amendment and restatement. (PL-COMP 000043). Thus, in determining whether the 2008 amendment was permissible, the Court must look to the 2007 Plan, not the 1995 Plan. Even if the "exclusive benefit" sentence in the 1995 Plan had somehow introduced an ambiguity about whether CUNA Mutual could modify, amend, or terminate the subsidies under the Plan, any such ambiguity was resolved when the 2007 Plan, which contained no such "exclusive benefit" language, was adopted. *See Boeing Co. v. March*, ___ F. Supp. 2d ___, 2009 WL 2949631 at *24 (N.D. Ill. Sept. 9, 2009) (holding any potential ambiguity about the duration of benefits was resolved by subsequent amendment, and amended plan in effect at time of dispute controlled). The 2007 Plan, like the 1995 Plan, also had a clear reservation of rights provision (PL-COMP 000043).

[2] The "exclusive benefit" sentence reads: "No amendment shall cause any part of the Plan to be used for or diverted to purposes other than for the exclusive benefit of the Participants and or their [covered] dependents." (PL-COMP 000007).

Plaintiffs fail to allege any facts in their Complaint or explain in their Opposition Memorandum why the 2007 Amendment eliminating the "exclusive benefit" language was somehow prohibited or illegitimate. (Opp. at 12-27). Plaintiffs ignore that the 2008 Amendment dropping the Company subsidies of retiree health benefits amended the 2007 Plan, not the 1995 Plan. And without the "exclusive benefit" language from the 1995 Plan upon which plaintiffs expressly and repeatedly rely, all of their claims fail.

2. The Exclusive Benefit Language Is Not The Clear And Express Lifetime Vesting Language The Seventh Circuit Requires To Overcome The Presumption That Employers Are Free to Alter or Eliminate Welfare Benefit Plans.

a. The Strong Seventh Circuit Presumption Against Vesting Requires Dismissal.

Even if the exclusive benefit language of the 1995 Plan were somehow deemed to have survived the 2007 amendment, that language does not come close to meeting the Seventh Circuit's requirement that vesting of welfare benefits must be "found in clear and express language in plan documents." *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 784 (7th Cir. 2005) (quoting *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997)). The law is clear; there must be an affirmative promise to vest. *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 632 (7th Cir. 2004).

There is no affirmative promise to retirees in any version of the Plan that vests them in lifetime rights to company subsidies for their health insurance. *Compare Bland*, 401 F.3d at 785 (language provided that welfare benefit "… coverage remains in effect as long as you or your surviving spouse are living."). Plaintiffs cannot ignore this legal requirement by making the bald statement that "[a] plain reading of the 1995 Plan establishes that plaintiffs have a vested right to subsidized retiree health care." (Opp. at 18). Nowhere does the "exclusive benefit" provision or any other language in the Plan even mention such a right.

The Court should reject plaintiffs' attempt to dismiss the Seventh Circuit's presumption against vesting in welfare benefit plans as "weak." (Opp. at 17-18). This is directly contrary to overwhelming case law in the Seventh Circuit. For the Court's convenience we have attached as Exhibit A a list of the large number of cases in the Seventh Circuit since the 2000 decision in *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000), upholding employers' rights to amend or terminate welfare benefit plans and the few cases where courts found vesting may have occurred. As Exhibit A shows, courts in the Seventh Circuit have consistently found that welfare benefit plans may be freely amended unless the plan ***both*** contains clear vesting language and lacks a reservation of rights clause. (*See also, § II.A.2.e., infra,* at 14, discussing the Seventh Circuit's "disambiguating" ambiguities that might otherwise warrant reference to extrinsic evidence to determine if vesting has occurred). Neither element necessary to overcome the presumption is present here.

The need in the Seventh Circuit for a plaintiff to allege and prove both clear vesting language and the absence of a reservation of rights clause is exemplified by the statement in *Rossetto* upon which plaintiffs rely (Opp. at 17): "If there is language in the agreement to suggest a grant of lifetime benefits, *and* the suggestion is not negated by the agreement as a whole, the plaintiff is entitled to a trial." 217 F.3d at 547 (emphasis added). Neither aspect of that statement is present in this Plan. First, nothing in the Plan "suggest[s] a grant of lifetime benefits"; the "exclusive benefit" sentence upon which plaintiffs solely rely says nothing about lifetime benefits or subsidies.[3] Wholly absent are words like "vested," "lifetime" or "guaranteed." The Plan is, instead, silent and "there is a presumption against vesting when there is "silence" that "indicates that welfare benefits are not vested.'" *Bland*, 401 F.3d at 784 (*citing*

[3] The "exclusive benefit" sentence reads: "No amendment shall cause any part of the Plan to be used for or diverted to purposes other than for the exclusive benefit of the Participants and or their [covered] dependents." (PL-COMP 000007).

Vallone v. CNA Fin. Corp., 375 F.3d 623, 632 (7th Cir. 2004), *cert. denied*, 543 U.S. 1021 (2004) and *Rossetto*, 217 F.3d at 544.

Second, a review of the Plan as a whole leads inescapably to the conclusion that any "suggestion" of lifetime benefits is "negated by the agreement as a whole." In the Seventh Circuit, the courts have invariably found that the presence of reservation of rights to amend language in welfare benefit plans overcomes even clear "lifetime benefits" language, let alone the at best unclear, weak reed that plaintiffs here rely upon. *See, e.g., UAW v. Rockford Power Train, Inc*., 350 F.3d 698, 703 (7th Cir. 2003) ("we must resolve the tension between the lifetime benefits clause, and the Plan termination and reservation of rights clauses, by giving meaning to all of them. Reading the document in its entirety, the clauses explain that although the Plan … entitles retirees to health coverage for the duration of their lives … the terms of the Plan – including the Plan's continued existence – are subject to change at the will of" the employer) (citations omitted).

The Plan here includes (and has always included) the right to change its provisions (two times in the 1995 Plan). One of the reservations of rights provisions in the 1995 Plan also includes a specific provision allowing changes in employer subsidies of retiree health benefits. Section 7.1 of the 1995 Plan states:

> **7.1 Plan Termination and Changes**
>
> The Plan may at any time be amended or terminated by a written instrument signed by the President of the Employer and approved by the Board of Directors. ***From time to time, the Plan Administrator shall update the Enrollment Form to show the maximum amount of contributions.***

(PL-COMP 000020) (emphasis added).

Consistent with this provision, the employer subsidy and employee contribution levels were set forth on annual enrollment forms, and those forms changed over time. (*See* PL-COMP

000055-58). Even if there were a lingering doubt, the 1982 memorandum establishing CUNA Mutual's subsidy policy unambiguously stated that CUNA Mutual could eliminate the subsidy at any time by qualifying the policy with duration-limiting language, "while this policy remains in effect." (PL-COMP 000051-52). This duration-limiting language is even stronger than the duration-limiting language, "for the term of this agreement," that the Seventh Circuit has held prevents vesting. *Pabst Brewing Co., Inc. v. Corrao*, 161 F.3d 434, 441-42 (7th Cir. 1998).

Plaintiffs' argument requires the Court to ignore *Corrao* and all the other Seventh Circuit precedent. Instead, plaintiffs argue for adopting a rule that would have these express provisions allowing changes in the employer subsidies overridden by a general "exclusive benefit" clause that does not refer at all to employer contributions or anything else that supports the plaintiffs' strained inference that the sentence bars anything in the plan "that would result in a detriment to participants." (Opp. at 15). Plaintiffs' preferred result also would contravene the "well-settled principle of contract construction that where a contract contains both general and specific provisions relating to the same subject, the specific provision controls." *Medcom Holding Co. v. Baxter Travenol Lab, Inc.*, 984 F.2d 223, 227 (7th Cir. 1993).

b. The Plan's Strong, Clear Language Reserving the Right to Amend Requires Dismissal.

There can be no dispute as to the meaning of the Plan's reservation language. Language reserving an employer's right to amend a Plan (like that contained in every iteration of the Plan here) has been found to eclipse any language guaranteeing "lifetime benefits," even if the plan expressly uses the terms "lifetime benefits." *Vallone*, 375 F.3d at 633-34.

Plaintiffs' attempt to distinguish *Vallone* is flat wrong. They argue that they "do not rely on *Vallone*-type language granting them 'lifetime' benefits [and instead] rely on the explicit language of the reservations [sic] of rights provision itself, which precludes an amendment that causes any part of the 1995 Plan to be used for a purpose other than for plaintiffs' exclusive

benefit." (Opp. at 15). Plaintiffs' argument makes no sense. If the plan in *Vallone* that expressly stated it was providing "lifetime benefits" did not vest benefits under Seventh Circuit law when reservation of rights language was also in the plan, then this Plan's "exclusive benefit" clause that does not even refer to benefits or subsidies certainly cannot vest benefits when, like the plan in *Vallone*, the CUNA Mutual Plan has express reservation of rights language.

Plaintiffs' vesting theory is also inconsistent. Plaintiffs do not dispute that the Plan could be terminated in its entirety. This fact is impossible to reconcile with the concept that "the 1995 Plan establishes that plaintiffs have a vested right to subsidized retiree health care." (Opp. at 18).[4] It makes no sense for CUNA Mutual to be penalized for amending the plan (and therefore preserving retirees' rights to participate in the group health care plan, albeit without partial subsidies), when it unquestionably could have terminated the plan.

c. Courts Have Found That Exclusive Benefit Clauses Do Not Limit The Right To Modify Welfare Benefit Plans.

There is nothing about the "exclusive benefit" sentence that overcomes the strong presumption against vesting of rights under welfare benefit plans. At least three Courts of Appeal have had to determine whether welfare benefits could be modified or eliminated in plans that had "exclusive benefit" language in the reservation of rights clause, just like the CUNA Mutual 1995 Plan. In none of those cases did the court find the reservations of rights clause limited by the "exclusive benefit" language. Indeed, none of the courts even considered that an issue worth discussing.

[4] Plaintiffs' argument that the retiree enrollment forms vest the employer subsidies fails for the same reason the Seventh Circuit found the benefit calculation sheets did not vest benefits in *Rockford*, 350 F.3d at 705: they "do not attempt to override the terms" of the Plan. Indeed, the enrollment forms state that the premium and benefits are subject to change. (PL-COMP 000056-58).

In *Spacek v. Mar. Ass'n I L A Pension Plan*, 134 F.3d 283, 286, 293 (5th Cir. 1998) (*abrogated on other grounds by Central Laborers' Pension Fund v. Heinz*, 541 U.S. 759 (2004)) the plan read:

> The Trustees may amend the Plan, from time to time, in any manner not in conflict with the terms of the Trust; provided, however, that no such amendment will cause or permit any part of the Trust properties to be diverted to purposes other than for the exclusive benefit of the Participants or their spouses or permit any part of the Trust properties to revert to or become the property of the Employers.

The court held that this plan with "exclusive benefit" language did not prohibit adoption of an amendment modifying or terminating rights of retired employees, and called the plan's amendment provision "broad." *Id*. at 293.

In *Kerber v. Qwest Pension Plan*, 572 F.3d 1135, 1139 (10th Cir. 2009), the plan read:

> U S WEST expects this Plan to be permanent, but as future conditions cannot be foreseen it reserves the right to amend the Plan at any time, without prior notice to anyone. * * * Amendments may modify the rights and interests of Employees who are Participants in the Plan at the time thereof as well as future Participants but amendments may not diminish the accrued benefit of any Participant as of the effective date of such amendment or divert any funds in the Trust to purposes other than for the exclusive benefit of Participants and their beneficiaries.

The *Kerber* court upheld the district court judgment that the benefits in that plan with "exclusive benefit" language in the reservation of rights clause were not contractually vested. *Id*. at 1148-49.

In *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 94 (2d Cir. 2001), the plan read:

> Empire Blue Cross and Blue Shield maintains the Plans for the exclusive benefits [sic] of its employees. The company expects and intends to continue the Plans in your Benefits Program indefinitely, but reserves its right to end each of the Plans, if necessary. The company also reserves its right to amend each of the Plans at any time.

274 F.3d at 94. Notwithstanding the "exclusive benefits" language, the court held that benefits were not vested and the plan could be modified due to the reservation of rights language. *Id*. at 99-100.

No court has held, and the plaintiffs cannot cite any cases supporting their contention, that such "exclusive benefit" language prevents any future amendment of a plan when there is a reservation of rights clause allowing amendment of the plan. Based upon the Seventh Circuit's strong precedents on the right to amend welfare benefit plans, there can be no doubt that the Seventh Circuit would reach the same result as the other circuits and conclude, as a matter of law, that exclusive benefit language does not limit the right to modify or amend a plan when there is express plan language authorizing amendments at any time.

d. The Exclusive Benefit Sentence Refers to Plan Assets, Such as Insurance Contracts, Not to CUNA Mutual Accounting Entries.

Plaintiffs argue that the exclusive benefit clause in the 1995 Plan that refers to the "use" or "diversion" of "any part of the Plan" can only mean that plaintiffs have a vested lifetime right to receive employer subsidies for retiree health benefits. (Opp. at 20-21).[5] Plaintiffs state that "the only known assets of the plan would be funds set aside to pay for insurance premiums" and that "there is nothing else in the 1995 Plan [other than the accruals for paying health insurance premiums] that could be diverted." (Opp. at 4, 23). This ignores the plain language in Paragraph 6 of the 1995 Plan, which provides for the plan to purchase insurance contracts, which are "made a ***part of the Plan***." (PL-COMP 000007). These insurance contracts, which expressly are

[5] Plaintiffs argue that unlike exclusive benefits clauses that state that plan assets can only be used for the benefit of plan participants and beneficiaries, the instant Plan's prohibition against 'any part of the Plan" being used for other purposes is not limited to Plan assets. (Opp. at 20). Yet, they interpret the clause as preserving only the plaintiffs' employer subsidies, which they call "tangible assets." (Opp. at 7). In essence, they acknowledge that this provision must be read as similar provisions have always been read: limiting use of plan assets, not restricting plan modifications.

deemed to be "part of the Plan," are an example of plan assets covered by the exclusive benefits sentence that cannot be "used for, or diverted to purposes other than for the exclusive benefit of the Participants or their dependents covered by the Plan." *Id.*

The Plan contains no provision or even suggestion that CUNA Mutual accruals for future subsidies are "part of the Plan." This is hardly surprising. Under long-settled law, "corporate assets do not become plan assets merely because an employer has a corporate obligation to make payments to the plan." *Trs. of the Graphic Commc'ns Int'l Union Upper Midwest Local 1M Health & Welfare Plan v. Bjorkedal*, 516 F.3d 719, 732 (8th Cir. 2008); *see also In re Halpin*, 566 F.3d 286, 289-290 (2d Cir. 2009) (agreeing with Dept. of Labor position that employer contributions become an asset of the plan only after being paid); *Cline v. Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1234 (9th Cir. 2000) ("Until the employer pays the employer contributions over to the plan, the contributions do not become plan assets over which fiduciaries of the plan have a fiduciary obligation; this is true even where the employer is also a fiduciary of the plan."); *Cent. Ill. Carpenters Health & Welfare Trust Fund v. S & S Fashion Floors, Inc.*, 516 F. Supp. 2d 931, 938 (C.D.Ill. 2007) (distinguishing between funds withheld from employee wages and amounts never withheld but due and owing, and holding latter to not be plan assets). Indeed, the Supreme Court has also "strongly indicated that unpaid contributions are not plan assets." *See Halpin*, 566 F.3d at 291 (citing *Jackson v. United States*, ___ U.S. ___, 129 S.Ct. 1307, 173 L.Ed.2d 575 (2009) (Mem.), vacating and remanding 524 F.3d 532 (4th Cir. 2008)).[6]

[6] Further, when funds placed in a bank account for the purpose of paying plan benefits reverted back into a defendant's general fund upon amendment of the welfare plan, the Third Circuit held this to be a legitimate transaction under ERISA. *Deibler v. United Food and Commercial Workers' Local Union 23*, 973 F.2d 206, 211-12 (3d Cir. 1992). The court held that the funds and benefits had not vested due to the defendant's ability to amend or eliminate the plan, and thus reversion of those funds was allowed under the terms of the plan. *Id.*

Limiting the terms "part of the Plan" to what are deemed to be plan assets under ERISA is not only the most reasonable interpretation of the exclusive benefits clause, it is how exclusive benefits language has always been understood. (*See* Def. Mem. at 16-18).

e. There Is No Ambiguity Here For Which Extrinsic Evidence Can Be Considered.

It is unnecessary to consider extrinsic evidence, as plaintiffs seem to invite (Opp. at 18, heading 4). Since plaintiffs have attached all the Plan documents, the Court can easily review them on this motion to dismiss. That review demonstrates that the 1995 Plan is not ambiguous; it says nothing about vesting employer subsidies, let alone a lifetime promise to continue such subsidies. Based on the Seventh Circuit precedents, this presents an easy case to conclude that benefits have not vested. (*See* Ex. A.)

The Eighth Circuit cases cited by plaintiffs are all distinguishable. (Opp. at 19). They all involved plan language suggesting a vested right to welfare benefits, an unclear reservation of rights provision, or both. *See Halbach v. Great-West Life & Annuity Ins. Co.*, 561 F.3d 872, 878 (8th Cir. 2009) (reservation of rights clause included statement: "no such modification shall divest a Participant of benefits under the Plan to which he has become entitled prior to the effective date of the amendment"; ambiguity existed as to whether welfare benefits were covered by this provision); *Barker v. Ceridian Corp.*, 122 F.3d 628, 631-32 (8th Cir. 1997) ("*Barker I*") (reversing grant of summary judgment because ambiguity existed where plan documents promised: "company will continue paying all premiums until you and your dependents are no longer eligible for the plans" and "[n]otwithstanding termination of the Plan, a Participant who is Totally Disabled on the effective date of the Plan termination … shall continue to receive benefits in accordance with the terms of the Plan"); *Barker v. Ceridian Corp.*, 193 F.3d 976, 983 (8th Cir. 1999) ("*Barker II*") (after trial on issue of intent ordered by *Barker I*, determining district court's findings clearly erroneous in light of extrinsic evidence considered); *Jensen v.*

SIPCO, Inc., 38 F.3d 945, 950 (8th Cir. 1994) (finding district court properly considered extrinsic evidence where plan documents said company would pay medical benefits until retiree died, a spouse divorced, or a child married or reached age 19, and reservation of rights provisions were "not facially unambiguous--they leave at least some doubt as to whether [company] intended to reserve the right to change or terminate benefits to already retired pensioners, or only the right to make prospective changes….").

It is notable, but not surprising, that the plaintiffs do not rely on any Seventh Circuit cases to support their attempt to get beyond the clear language of the Plan. The Seventh Circuit has a very narrow view of what constitutes an ambiguous agreement that warrants resort to extrinsic evidence in construing welfare benefit plans. "We must remember that an ambiguity is 'something that makes it possible to interpret a document *reasonably* in more than one way.'" *Barnett v. Ameren Corp.*, 436 F.3d 830, 834 (7th Cir. 2006) (quoting *Rossetto*, 217 F.3d at 542) (emphasis in original). The Seventh Circuit has made it clear that a court should not find an ambiguity based on one isolated term in a welfare benefit plan, as plaintiffs ask the Court to do here. Rather, "[a] provision that seems ambiguous might be disambiguated elsewhere in the agreement." *Rossetto*, 217 F.3d at 545 (citations omitted). *See also*, *Bland*, 401 F.3d at 784 ("Only if the language of the plan document is ambiguous and these ambiguities are not clarified elsewhere in the document may we consider evidence of the parties' intent that is extrinsic to the writing.") (citation omitted).

The Seventh Circuit requires the "exclusive benefit" clause to be read in the context of the entire agreement. Applying this rule, the express provisions of Section 7.1 of the 1995 Plan allowing amendment or termination "at any time," including changes in the "Enrollment Form to show the maximum amount of contributions," along with the strong reservation of rights in

Section 10 of the preamble of that Plan, "disambiguate" and clarify any possible ambiguity created by the exclusive benefit sentence in the preamble.

B. Plaintiffs' Claims Under ERISA Alleging A Prohibited Transaction And Breach Of Fiduciary Duty Fail Because CUNA Mutual's Treatment Of Potential Benefit Payments As Accounting Liabilities Did Not Create "Plan Assets."

Accounting for and disclosing a general corporate contingent liability under a welfare benefit plan, as CUNA Mutual did for retiree health premiums prior to the 2008 Plan amendments, does not create "plan assets" under ERISA. Accordingly, plaintiffs failed to allege the essential elements for their prohibited transaction and breach of fiduciary duty claims since both require an allegation that "plan assets" have been mishandled.

Instead of pointing to any provision or authority under which defendants' accounting practices created "plan assets," plaintiffs state the simple accounting truism that eliminating a potential liability on its books can increase a company's income. (Opp. at 7). This says nothing whatsoever about the creation under ERISA of a "plan asset."

Plaintiffs also claim that the accounting accruals for the sick leave accounts used to pay for retiree health benefits under the pre-2008 plans "belonged" to the CUNA Mutual employees upon retirement. (Opp. at 23). But this is just another way of trying to claim that these accounting accruals vested benefits, which they clearly did not. The accruals were merely a method of accounting for the estimated benefits under the pre-2008 CUNA Mutual welfare benefit plan.

ERISA plan assets are not accounting entries or accrual forms; they are funds placed in a trust, separate account, or otherwise separately maintained as ERISA requires. *See, e.g.*, U.S. Dept. of Labor ("DOL") Opinion Letter 94-31A. Plaintiffs have not and could not allege that such separately maintained funds exist here. As the DOL clearly states, even segregation of employer funds to facilitate administration of a plan does not demonstrate an intent to create a

beneficial interest in those assets on behalf of the plan. *Id*. *A fortiori*, where CUNA Mutual has not even been alleged to have segregated funds, but has merely been alleged to have listed possible future payments as accounting entries, it has engaged in the accepted practice of maintaining an unfunded welfare plan without identifiable plan assets. (*See* Def. Mem. at 19). Plaintiffs have failed to cite any authority for the novel proposition that booking a general corporate contingent liability pursuant to FAS 106 turns an unfunded plan into a funded one or creates assets CUNA Mutual could not divert to itself. Without any assets to point to, plaintiffs' claims for ERISA violations for improper treatment of "plan assets" cannot stand.

Plaintiffs' accounting argument was flatly rejected over 25 years ago in *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied* 467 U.S. 1205 (1984). In *Sutton*, the appellants asserted, like plaintiffs here, that a company breached its fiduciary duty to plan participants and violated prohibited transaction rules because elimination of its liability for unfunded contingent benefits to be paid from the employer's corporate treasury, like the CUNA Mutual retiree health benefits here, "would aggregate approximately $300,000,000 and [the company] has avoided this liability." *Id*. at 410. The court rejected this argument and held that the elimination of the benefits payments did not violate ERISA's fiduciary duty or prohibited transaction rules, stating that "ERISA does not impress a trust upon [the employer's] corporate treasury for the payment of the contingent benefits." *Id.* at 411.

At least two other courts have reached the same conclusion, rejecting ERISA claims like plaintiffs here. *Cline v. Indus. Maint. Eng. & Contracting Co.*, 200 F.3d 1223, 1234 (9th Cir. 2000) (No prohibited transaction under ERISA when employer failed to contribute to plan, because "[u]ntil the employer pays the employer contributions over to the plan, the contributions do not become plan assets over which fiduciaries of the plan have a fiduciary obligation; this is true even where the employer is also a fiduciary of the plan."); *Kalda v. Sioux Valley Physician*

Partners, Inc., 394 F. Supp. 2d 1107, 1112-13 (D. S.D. 2005) (holding that "benefits that were recorded on CPC's records as a debt to the Plans [do not] constitute 'plan assets' under ERISA.").

Plaintiffs' inability to cite any case that supports their argument that CUNA Mutual's accounting treatment of future subsidies under the pre-2008 Plan somehow gives plaintiffs a right to those payments is not surprising. CUNA Mutual is certainly not the only plan sponsor to follow FAS 106 in including estimates of its liabilities for retiree benefits in its financial statements. If following prevailing accounting standards by disclosing liabilities transformed them into vested benefits, all the cases holding that welfare benefit plan sponsors can modify or terminate benefits have been wrongly decided. In each, like here, the employer "transferred a credit" to itself when it eliminated funding. (Opp. at 8).

C. Plaintiffs New Misrepresentation-Based Fiduciary Duty Claim Raised For The First Time In Their Opposition Cannot Stand.

Plaintiffs have no response to defendants' overwhelming authority that the plan amendments upon which they have based their breach of fiduciary duty claims were not fiduciary functions giving rise to such claims. (Def. Mem. at 12). This point must be seen as conceded. Instead, they completely switch their theory and argue, without any support in their Complaint, that there were misrepresentations that constituted a breach of fiduciary duty. (Opp. at 29). While they request leave to amend in a footnote (Opp. at 30 n.6), any amendment of the Complaint would be futile.

Plaintiffs argue that the alleged misrepresentations occurred in the election forms attached to the Complaint at PL-COMP 000055-58. Plaintiffs say: "Election forms provided by defendant to plaintiffs indicate that the employer contributions and subsidies for retiree health insurance premiums could not be taken away." (Opp. at 28). The Court can easily conclude that this allegation has no basis in fact. Since plaintiffs have attached the election forms to the

Complaint, a simple review demonstrates that plaintiffs' proposed new theory has no factual support. The forms expressly state: "I understand the premium is subject to change," (PL-COMP 000055-56) and "I understand the premiums and/or benefits are subject to change." (PL-COMP 000051-58). The Court should reject the proposed amendment as futile. *See Sharp Elecs. Corp. v. Metropolitan Life Ins. Co.*, 578 F.3d 505, 512-13 (2009).

Plaintiffs cite *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 579 F.3d 220 (3d Cir. 2009), for the proposition that "providing misinformation to plan participants is a breach of fiduciary duty." (Opp. at 28). However, in *Unisys*, unlike here, plaintiffs alleged the company orally misrepresented that retirees would enjoy plan benefits for their lifetimes, without the possibility of change. 579 F.3d at 231. The key fact in *Unisys* was that in all the alleged communications, "there was no mention of Unisys' right to amend or terminate the plan at any point in the future." *Id.*

The *Unisys* facts are not pled in this case, and are in fact conclusively refuted by the plaintiffs' Complaint. Unlike the statements in *In re Unisys*, the election forms that plaintiffs attached to the Complaint, along with the other Plan documents,[7] all unambiguously state that the Plan and its benefits are subject to change. Similar language was found by the Seventh Circuit not to create an expectation of lifetime benefits in *Rockford Powertrain*, 350 F.3d at 704-05**.** Consequently, even if plaintiffs could somehow point to some oral representations outside the Plan documents attached to their Complaint, their misrepresentation/fiduciary duty claim would be wholly barred by those same undisputed documents. *See Frahm v. Equitable Life Assurance Society*, 137 F.3d 955, 959-61 (7th Cir. 1998) (rejecting claims of fiduciary duty breach and estoppel based on oral advice stressing availability of "lifetime" benefits, where "[b]oth the plan

[7] Paragraph 6 of the 1995 Plan states that the election forms are part of the Plan. (PL-COMP 000007).

and the summary plan descriptions accurately told the plaintiffs that the Equitable had retained the right to change or even discontinue the medical-care plan.").

III. PLAINTIFFS' STATE LAW CLAIMS ARE PREEMPTED BY ERISA

Claims by a beneficiary for wrongful denial of benefits "no matter how they are styled," have been held by the Supreme Court to fall directly under ERISA. *Vallone*, 375 F.3d at 638 (citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)). Plaintiffs' state law claims must be dismissed here, because, "any way one look[s] at the case, it [is] really one for benefits under an ERISA plan, and thus the state-law theories [are] preempted by ERISA." *McDonald v. Household Int'l, Inc.*, 425 F.3d 424, 426 (7th Cir. 2005). Indeed, plaintiffs' complaint shows that "the central fact underlying each of the legal theories presented is that [plaintiffs] did not receive the … benefit … that [they were] promised." *Id*. at 428 (stating that when the wording of the plans themselves is material to a state law claim, that claim is preempted under ERISA); *see also Collins v. Ralston Purina Co.*, 147 F.3d 592, 595 (7th Cir. 1998) (holding that ERISA preempts a state law claim if a resolution of the claim "requires the court to interpret or apply the terms of an employee benefit plan…").

A. Plaintiffs Cannot Escape ERISA Preemption Under the *Davila* Test.

Plaintiffs have failed to rebut defendants' argument showing that all four of plaintiffs' state claims (breach of contract, promissory estoppel, breach of unilateral promise, and conversion) are preempted under ERISA pursuant to the two-prong test in *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004). (Def. Mem. at 25-31). First, plaintiffs do not address the second prong of defendants' *Davila* argument that no independent duty existed outside the terms of the Plan, and thus any argument on this point is waived. (Def. Mem. at 28-31); (Opp. at 10-12).

Plaintiffs' argument that the state law claims do not "relate to" ERISA because the only need for the Plan is to reference the documents to determine the amount owed, is simply wrong. (Opp. at 11). Plaintiffs cite myriad cases for the proposition that "a state-law claim is not preempted merely because it requires a cursory examination of ERISA plan provisions." *Id*. Plaintiffs in their Complaint ask the Court to do far more than a cursory exam: they are requesting that the Court find that premium subsidies for Plan benefits have become an ongoing legal obligation and that the 2008 Plan amendment violated ERISA. This request requires the Court "to interpret or apply the terms of an employee benefit plan," and that process of plan interpretation and analysis triggers ERISA preemption. *Trs. of the AFTRA Health Fund v. Biondi*, 303 F.3d 765, 780 (7th Cir. 2002) (quoting *Collins*, 147 F.3d at 595). Not only are the cases plaintiffs cite distinguishable here, but the language in every single case plaintiffs cite actually undercuts their argument. For example, in *Biondi*, the court reasoned that ERISA preemption did not apply, because "[t]he plaintiffs' fraud claim does not rely on the pension plan's operation or management." *Id*. Here, the sick leave subsidy's only purpose was to fund Plan benefits subject to the Plan's continuing existence.

Similarly, in *Martori Bros. Distrib. v. James Massengale*, 781 F.2d 1349, 1358-59, *modified*, 791 F.2d 799 (9th Cir. 1986), which the plaintiffs cite for the same proposition, ERISA did not preempt a law under which the damages were calculated by *comparing similar contracts* under a bad faith bargaining analysis, and the resulting "make-whole" orders did "not require any change whatsoever in existing ERISA plans." Here, plaintiffs ask the Court to change the terms of the CUNA Mutual Plan by overriding the 2008 Plan. In fact, the Ninth Circuit noted that the underlying principle of ERISA preemption is that a state law is preempted when the conduct sought to be regulated "is 'part of the administration of an employee benefit plan.'" *Id*. at 1358 (quoting *Scott v. Gulf Oil Co.*, 754 F.2d 1499, 1505 (9th Cir. 1985)). All four of

plaintiffs' state law claims are based on laws that would regulate the administration of the CUNA Mutual Plan, and the disbursement of benefits under that Plan. As the court in *Martori* explained, ERISA was mainly concerned with "failure to pay employees the benefits promised," which is exactly the claim plaintiffs make here. *Id*. at 1359 (quoting *California Hosp. Ass'n v. Henning*, 770 F.2d 856, 859 (9th Cir. 1985)).

In *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1406 (11th Cir. 1994), the court distinguishes cases where ERISA preemption applies by stating that "the plaintiffs' claims in this case center on Sears' alleged fraud concerning the elimination of the plaintiffs' jobs, *not fraud concerning an ERISA plan or any other benefits package*." (emphasis added). The court recognizes that claims relating to benefits plans, such as plaintiffs' claims here regarding the CUNA Mutual Plan, are clearly subject to ERISA preemption. *Id*. Again, a case plaintiffs cite to try to prove their point actually undermines the very point they are attempting to make.

Hospice of Metro Denver, Inc. v. Group Health Ins. of Okla., Inc., 944 F.2d 752, 754 (10th Cir. 1991) does not help plaintiffs' argument either. That case holds that the state law claim there was not preempted because it "does *not* seek to enforce or modify the terms of the plan." *Id*. at 754 (emphasis added). Here, "enforcing the terms of the plan" is exactly what plaintiffs are trying to do.

Finally, *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120 (4th Cir. 1989) is similar to *Forbus* in that the claims related to wrongful termination, with the court distinguishing this from preempted claims like "determin[ing] whether any benefits are paid" or "directly affecting the administration of benefits under the plan" (citations omitted). Moreover, the *Pizlo* court actually upheld the circuit court's dismissal of claims very similar to plaintiffs' claims in this case. *Id.* ("Counts … are preempted by ERISA because they rest on an allegation that the pension plan

was modified by informal and unauthorized amendment which, as a matter of law, is impermissible").

In sum, every case plaintiffs cite not only fails to support their assertion that their state law claims are not preempted, but provides more authority for defendants' argument that these claims should clearly be dismissed as a matter of law because they relate to an ERISA plan under the *Davila* test.

B. The Sick Leave Accounts Used Solely For Plan Benefit Subsidies Did Not Constitute "Payroll Practices" Excluded From ERISA.

Plaintiffs' allegations in the Complaint demonstrate that the sick leave accounts under the CUNA Mutual Plan do not stand alone outside ERISA due to ERISA payroll practice exemption. Plaintiffs allege that they were unavailable outside the terms of the Plan, stating that "Non-Union plaintiffs[8] were not given the option of taking a cash payout of the accumulated balance of the sick leave account at retirement." (Compl. at ¶ 24). Plaintiffs also allege that the accounts were "for the ***sole*** use of paying the difference between each plaintiff's total annual health insurance premium and defendants' contribution to the annual health insurance premium until the balance in the sick leave account was exhausted." (Compl. at ¶ 25) (emphasis added). The accounts were *contingent* upon an employee's retirement, participation in the Plan, *and* the continued existence of the Plan; thus, they were clearly part of the retiree medical plan, a plan unquestionably covered under ERISA.

Plaintiffs cannot reasonably claim that *Massachusetts v. Morash* shows that sick leave benefits are exempt payroll practices. *Morash* is not only easily distinguishable, but it in fact completely undercuts plaintiffs' argument claiming the sick leave accounts at issue here were exempt from ERISA. The court in *Morash* distinguishes "ordinary vacation payments" which

[8] Non-union plaintiffs are the only group alleging the state law claims based on the elimination of the sick leave subsidy.

are fixed, due at known times, and "do not depend on *contingencies* outside the employee's control," from those types of benefits that "accumulate over a period of time and *are payable only upon the occurrence of a contingency* outside the control of an employee." *Massachusetts v. Morash*, 490 U.S. 107, 115-116 (1989) (emphasis added). While the former are not covered under ERISA, the latter fall within the scope of ERISA, and they are what we have in this case.

The same distinguishing factors apply to the plaintiffs' other cited case, *Alaska Airlines, Inc. v. Oregon Bureau of Labor*. In *Alaska Airlines*, current (not retired) employees were being paid "at the employee's regular rate of compensation in the pay check for the period when the leave is taken." 122 F.3d 812, 813 (9th Cir. 1997). Unlike this case, the sick leave payments in the *Alaska Airlines* case were "payments of the employee's 'normal compensation' for sick time." *Id*. at 814. This is entirely different from this case, where plaintiffs admit there were no payments under the terms of the Plan outside the contingency of retirement, Plan participation, and the ERISA plan's continued existence. (Compl. at ¶¶ 24, 25).

The same principles are evident in both ERISA Opinion Letters plaintiffs cite. (Opp. at 9). In both cases, employees under the respective plans were receiving payment of unused sick leave pursuant to their normal compensation at percentages of their salary rate, in the form of cash payouts at the end of each year or upon retirement. *See* ERISA Op. Letter 94-40A, 1994 ERISA LEXIS 65 (Dec. 7, 1994); ERISA Op. Letter 79-48A, 1979 ERISA LEXIS 43 (July 30, 1979). Plaintiffs admit in the Complaint that this is not the way the sick leave accounts in the CUNA Mutual Plan functioned. (Compl. at ¶¶ 24, 25). Plaintiffs admit that non-union plaintiffs were not compensated with a cash payout under the terms of the Plan, and the benefits were structured to be contingent upon retirement, enrollment and participation in the Plan, and the continued existence of the Plan. (Compl. at ¶¶ 22-25). No authority plaintiffs cite applies to the types of accounts at issue here, and plaintiffs cannot escape the fact that the CUNA Mutual

welfare benefit Plan itself is not an exempt payroll practice, but rather falls squarely under ERISA preemption. Because the sick leave accounts are part of an ERISA plan, plaintiffs' state law claims based upon them are preempted and must be dismissed by this Court.

CONCLUSION

For the reasons stated above and in Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss, defendants respectfully request this Court to dismiss plaintiffs' claims in their entirety.

Respectfully submitted,

By: /s/ Jeffery S. Davis
Alan S. Gilbert, Esq.*
T. David Cowart, Esq.*
Jeffery S. Davis, Esq.*
(*Admitted *pro hac vice*)
SONNENSCHEIN NATH & ROSENTHAL LLP
233 S. Wacker Drive, Suite 7800
Chicago, Illinois 60606
Telephone: (312) 876-8000
Facsimile: (312) 876-7934

- *and* –

Devon R. Baumbach, Esq.
MELLI LAW, S.C.
Ten E. Doty Street, Suite 900
P.O. Box 1664
Madison, WI 53701-1664
Telephone: (608) 257-4812
Facsimile: (608) 258-7470

Attorneys for Defendants

Dated: October 30, 2009
Chicago, Illinois

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN F. SULLIVAN, WILLIAM E. PHILLIPS, KAREN N. WITHEE, PAUL J. SPECHT, and THOMAS O. OLSON, on behalf of themselves and all others similarly situated,

Plaintiffs,

No. 09-CV-00455

CUNA MUTUAL INSURANCE SOCIETY and CUNA MUTUAL GROUP MEDICAL CARE PLAN FOR RETIREES,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2009, I electronically filed the preceding with the Clerk of the Court using the CM/ECF system which will send notification of such filing to registered users, including the following:

James A. Olson (*jolson@lawtoncates.com*)
Dixon R. Gahnz (*dgahnz@lawtoncates.com*)
Heather L. Curnutt (*hcurnutt@lawtoncates.com*)
Lawton & Cates, S.C.
10 East Doty Street, Suite 400
P.O. Box 2965
Madison, WI 53701-2965

- and –

Mark D. DeBofsky (*mdebofsky@ddbchicago.com*)
Daley, DeBofsky & Bryant
55 W. Monroe Street, Suite 2440
Chicago, IL 60603

/s/ Jeffery S. Davis