UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS LOCAL 4-5025,	)	
Plaintiff,	)	
v.	)	**No. 07-CV-0122 S(F)**
E.I. DUPONT DE NEMOURS AND COMPANY,	)	
Defendant.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STAY ALL PROCEEDINGS

This case concerns the arbitrability of a grievance filed by Plaintiff United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers Local 4-5025 ("Local 4-5025") under the collective bargaining agreement ("CBA") in effect between Local 4-5025 and E.I. DuPont de Nemours and Company ("DuPont" or the "Company") at DuPont's Niagara Falls, New York plant. Local 4-5025 filed a grievance in September 2006 alleging that unilateral changes DuPont had announced to the benefits provided through its pension and welfare plans violated the parties' CBA. DuPont refused to submit the grievance to arbitration, despite the existence of a broad arbitration clause in the CBA. See Exh. D to Complaint. Local 4-5025, through counsel for the International Union with which it is affiliated – the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union ("the USW") – informed DuPont by letter dated February

8, 2007 that legal action would be taken to compel arbitration if DuPont did not, within ten days, agree to arbitrate grievances filed by two USW-affiliated Local Unions, in New Jersey and Delaware, challenging DuPont's benefit reductions as violating those Local Unions' CBAs. See Exhs. F & G to Complaint. Just ten days after the period set forth in those demand letters expired, DuPont brought a declaratory judgment action in the Eastern District of Virginia against the USW seeking a declaration as to the arbitrability of the grievance filed by Local 4-5025, as well as the grievances filed by the Delaware and New Jersey Local Unions. Two days later, Local 4-5025 filed this action to compel arbitration in the Western District of New York, where Local 4-5025 had filed its grievance and where Local 4-5025, its members, and the Niagara Falls plant all are located.

DuPont now asks this Court to stay this action in favor of the anticipatory declaratory judgment action it filed in the Eastern District of Virginia, hundreds of miles away from the Niagara Falls plant – an action to which Local 4-5025 is not even a party. DuPont invokes the "first-filed" rule, but that rule is inapplicable here, because Local 4-5025 is not a party to DuPont's Virginia suit. In any case, even if Local 4-5025 were a party to the Virginia action, it would be proper for this Court to allow this case to proceed, because (i) a stay of a "later-filed" action is not warranted where, as here, that action was filed only days after the "first-filed" suit; (ii) DuPont's Virginia action is an improper "preemptive strike" brought to deprive Local 4-5025, the natural plaintiff, of the ability to frame the issues and choose the forum for its claims; and (iii) the balance of convenience favors this forum.

Background

DuPont's employees in Niagara Falls, New York, are covered by a CBA between DuPont and Local 4-5025. On September 6, 2006, Local 4-5025 filed a grievance alleging that unilateral changes in various benefit programs that were announced by DuPont in August 2006 were in violation of provisions in the CBA prohibiting such modifications.[1] The grievance alleges violations only of the CBA, not of ERISA or of the DuPont benefit plans themselves.[2]

Also in August-September of 2006, USW-affiliated Local Unions in New Jersey and Delaware filed their own grievances against DuPont, alleging that DuPont's benefit cuts violated their own CBAs with DuPont.

In early September 2006, a USW representative wrote to DuPont expressing concern that DuPont's unilateral benefit cuts violated the various USW-affiliated Local Unions' CBAs, and proposing the scheduling of a "joint meeting, including the International Union and all affected Local Unions" to discuss the matter. See Declaration of James Briggs ("Briggs Decl.") (Exh. A to this Opposition) ¶ 8 and Exh. 1 thereto. Taking a position in marked contrast to its current allegation that it is engaged in a "nation-wide" dispute with labor unions over its benefit changes, see Memorandum in Support of Defendant E.I. DuPont de Nemours & Company's Motion to

[1] Contrary to DuPont's claim, see Memorandum in Support of Defendant E.I. DuPont de Nemours & Company's Motion to Stay All Proceedings at 3, the USW did not file any grievances against DuPont; Local 4-5025's grievance, and those filed by other USW Local Unions, were brought by the Local Unions alone. See Grievance, Exh. C to Complaint; Declaration of James Briggs (Exh. A to this Opposition) ¶ 5.

[2] DuPont's statement that the USW Local Unions' grievances "raise similar ERISA benefit eligibility issues" is incorrect, and appears to be an attempt to draw the Court's attention away from the fact that each Local Union's grievance actually alleges solely a violation of that Local Union's CBA, not a violation of ERISA or of any ERISA plan. Compare Memorandum in Support of Defendant E.I. DuPont de Nemours & Company's Motion to Stay All Proceedings at 4 with Exh. C to Complaint.

Stay All Proceedings ("DuPont Stay Memo") at 1, DuPont rejected the USW's proposal on the ground that the disputes were "local" ones:

> Our philosophy remains that union-management issues are local. Therefore, we believe they are best dealt with by knowledgeable union and management people at the local level.

Briggs Decl. ¶ 9 and Exh. 2 thereto (emphasis added).

In a letter sent to the President of Local 4-5025 on January 26, 2007, DuPont refused to arbitrate Local 4-5025's grievance. See Exh. D to Complaint. DuPont also refused to arbitrate the separate grievances filed by the USW-affiliated Local Unions in Delaware and New Jersey. On February 8, 2007, Richard Brean, the International Union's Senior Associate General Counsel, to whom DuPont's letters to the Local Union presidents had been referred for reply, informed DuPont that legal action would be initiated to compel arbitration of the New Jersey and Delaware grievances unless DuPont provided written notice within ten days that it would resume processing the grievances under the CBAs. See Exhs. F & G to Complaint. Mr. Brean's letters also stated that the Unions would "seek to recover their attorney's fees if DuPont files a declaratory judgment in an unlawful effort to thwart the exercise of our federally protected right to process and arbitrate grievances." Id.[3]

After receiving notice that suits against it were imminent, and notwithstanding its previously-stated position that disputes over the respective Local Union grievances were "local" matters, on February 28 DuPont filed a declaratory judgment action against the USW in the Eastern District of Virginia, seeking to block arbitration of the grievances filed by Local 4-5025 and by the New Jersey and Delaware Local Unions. See E.I. DuPont de Nemours & Co. v.

[3] Although the USW's February 8 letters did not refer to Local 4-5025's grievance specifically, DuPont understood the letters to indicate that suits would be filed to compel arbitration of all three grievances. See DuPont Stay Memo at 4.

United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied-Industrial and Serv. Workers Int'l Union, No. 3:07-cv-0103-HEH (E.D.Va. filed Feb. 28, 2007) (the "Virginia action"). DuPont's Virginia action was filed only twenty days DuPont had received notice that suits against it were imminent, and only ten days after the response period set forth in Mr. Brean's letters had expired.

DuPont's Virginia action does not name Local 4-5025 or the other two Local Unions as parties. Rather, only the USW has been sued; and DuPont has not disputed the fact that the Virginia court lacks personal jurisdiction over Local 4-5025 and the Delaware and New Jersey Local Unions. DuPont alleges that it chose Virginia as the forum for its action because DuPont previously had brought suit there against the Ampthill Rayon Workers Union ("ARWI") – an entirely separate and independent union which is not affiliated with the USW or Local 4-5025, and which, unlike Local 4-5025, does represent DuPont workers in Virginia.

Two days after DuPont's Virginia action was filed, on March 2, 2007, Local 4-5025 filed the instant suit to compel arbitration of its grievance.[4] The USW Local Unions in Delaware and New Jersey also filed suits to compel arbitration within hours or days after DuPont filed the Virginia action. These suits were filed in the District of Delaware and the District of New Jersey, respectively.

The USW has moved to dismiss DuPont's Virginia action on several grounds including, inter alia, that DuPont's suit is an improper anticipatory declaratory judgment action and that the Local Unions are indispensable parties who cannot be joined in Virginia. See Defendant's Brief

[4] DuPont states that "[m]ore than 5 weeks before this action was filed, DuPont filed suit to resolve a nation-wide dispute between DuPont and labor unions representing DuPont employees at DuPont facilities in five states." DuPont Stay Memo at 1. However, the action DuPont filed five weeks before this action was filed did not involve the USW-affiliated Local Unions or the USW at all – rather, it is a separate declaratory judgment action filed only against ARWI.

in Support of Motion to Dismiss and Defendant's Reply in Support of Motion to Dismiss (Exhs. B and C attached to this Opposition). Argument on the USW's motion to dismiss, and on a motion by DuPont to consolidate its Virginia action against the USW with the ARWI action, is scheduled for June 7.

If the USW's motion to dismiss the Virginia suit is granted, DuPont's Motion to Stay All Proceedings in this case will be moot. But even if the motion to dismiss is not granted, DuPont's Motion to Stay should be denied, as we now show.

Argument

I. THE "FIRST-FILED RULE" IS NOT APPLICABLE BECAUSE LOCAL 4-5025 IS NOT A PARTY TO THE VIRGINIA SUIT

The "first-filed rule" upon which DuPont's Motion to Stay is premised simply does not apply here, because Local 4-5025, the plaintiff in this case and the real party in interest to its dispute with DuPont, is not a party to DuPont's Virginia actions against the USW or ARWI and will not be bound by the outcome of those cases.

The first-filed rule—the principle that, when parallel suits are pending in different districts, the suit that was filed first should be given priority—comes into play when two suits involve the same issues and the same parties. See Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1203 (2d Cir. 1970); 800-Flowers v. Intercontinental Florist, Inc., 860 F. Supp. 128, 131 (S.D.N.Y. 1994). Because the plaintiff in this case is not a party to the Virginia action, the first-filed rule does not apply.

The case of Abovepeer, Inc. v. Recording Industry Ass'n of America, 166 F. Supp. 2d 655 (N.D.N.Y. 2001), is instructive in this regard. Abovepeer, which operated Aimster, a file-sharing service, sued the Recording Industry Association of America (RIAA) and certain individual recording companies in the Northern District of New York, seeking a declaration that Aimster did not "violate the copyright of any member of RIAA." About a month later, several separate suits were filed against Abovepeer in the Southern District of New York by a number of record companies, including some who were not parties to the N.D.N.Y. action. The court held that the first-filed rule applied as to the recording companies that had been named in the N.D.N.Y. action, but not as to the companies who were not parties to the N.D.N.Y. action at the time that the S.D.N.Y. actions were filed. The court held further that even if Abovepeer were allowed to amend its complaint to add those additional parties, the amended complaint would not relate back to the time of original filing, and consequently, Abovepeer's suit was not a "first-filed" action as to those additional parties, who were free to prosecute their own suits.

In thus holding the "first-filed" rule to be inapplicable to the companies not named as parties in Abovepeer's initial complaint, the Court noted that, although Abovepeer had cited a few cases in which the first-filed rule was held to apply even though the parties were non-identical, "none of the cases cited by Plaintiff involve a second-filed action brought by separate, independent plaintiffs with separate rights." Id. at 662 (collecting and distinguishing cases).[5]

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[5] The cases DuPont cites in support of its assertion that the first-filed rule can apply even though Local 4-5025 is absent from the Virginia litigation, see DuPont Stay Memo at 11, are distinguishable for reasons similar to those given by the court in Abovepeer. In Regions Bank v. Wieder & Mastroianni, P.C., 170 F. Supp. 2d 436 (S.D.N.Y. 2001), the court stayed a second-filed suit against a party not present in the first-filed suit, where the dispute was essentially between the parties to the first suit and might be completely resolved in the first-filed suit without the presence of the other party, which was only a middleman to the transaction in question and no longer had possession of the relevant funds. By contrast, Local 4-5025 is not a middleman to a transaction between DuPont and the USW; instead, the conflict is between DuPont and Local 4-5025, which filed a grievance against DuPont under the CBA to which it – not the USW – is a party. The other case cited by DuPont, Fleet Capital Corp. v. Mullins, No. 03 CIV. 6660, 2004 WL 548240, at *4 n.5 (S.D.N.Y.) (Mar. 18, 2004), merely cites Regions Bank in dictum for the proposition that there are circumstances in which the first-filed rule may apply when two actions involve different parties. But the actual holding in Fleet Capital was that a

And the court explained that "privity" did not exist in Abovepeer "between the various record companies," because, "[a]lthough the issues between the parties will be similar, each record company is a distinct party with its own rights." Id.

As in Abovepeer, DuPont's Virginia suits against the USW and ARWI cannot constitute "first-filed" actions with respect to Local 4-5025, because Local 4-5025, which is not a party to those actions, is a "distinct party with its own rights." DuPont has not argued, and could not reasonably argue, that "privity" exists between Local 4-5025 and the USW (much less between Local 4-5025 and ARWI). Privity exists only where the non-party is "represented . . . by another vested with the authority of representation," such as when one party acts as a fiduciary or organizational agent of the other, Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V. (Found. of the S'holders' Comm. Representing the Former S'holders of Saybolt Int'l B.V) v. Schreiber, 327 F.3d 173, 185 (2d Cir. 2003), or where the rights of the non-party are "derived from their association with" a party to the litigation, United States v. Int'l Bhd. of Teamsters, 931 F.2d 177, 186 (2d Cir. 1991). Such circumstances are not present here. As noted, the grievance as to which Local 4-5025 seeks to compel arbitration was filed by the Local Union, not by the USW. Furthermore, the authority to make decisions about the grievance, including not only whether to file a grievance in the first instance, but also what positions to assert in the grievance, whether and how to demand arbitration, and whether to settle, lies entirely with Local 4-5025, not with the USW. See Briggs Decl. ¶¶ 4-6. Indeed, the CBA itself, which the grievance seeks to enforce, is solely between DuPont and Local 4-5025; the USW is not a party to the CBA. See Briggs Decl. ¶ 3.

Texas suit was not the first-filed action with respect to Fleet, because Fleet was not named as a party to the Texas suit until after Fleet had filed suit in New York.

Thus, with respect to Local 4-5025's grievance, the USW is not "vested with the authority of representation," Schreiber, 327 F.3d at 185, and Local 4-5025's rights are not "derived from [its] association with [the USW]," Teamsters, 931 F.2d at 186, but rather from Local 4-5025's own CBA with DuPont, to which the USW is not even a party. To be sure, the USW does provide support and assistance to its Local Unions, including Local 4-5025, but this does not mean that the USW has the same legal rights in this dispute as has Local 4-5025 – any more than an attorney has the same rights as his clients, or stands in privity with a client, merely because the attorney provides representation and assistance to the client and seeks to advance the client's interests. See Richards v. Jefferson County, Ala., 517 U.S. 793, 796 (1996) (nonparties could not be bound by judgment even though their interests were "essentially identical" to those of parties to case). Having declared that the USW should not even be permitted to participate in a meeting with DuPont to discuss the Local Unions' grievances because each grievance should be resolved by the "union . . . people at the local level," see supra at 4,[6] DuPont cannot possibly maintain that the Local Unions' rights to arbitrate those grievances can properly be determined in litigation where only the USW, and not the Local Unions, is a party.

Indeed, because Local 4-5025 is not a party to the Virginia action, it cannot be bound by a judgment in that action. Consequently, staying this case could not further the cause of judicial efficiency; it would only delay the day in court to which Local 4-5025 unquestionably is entitled.

For these reasons, the first-filed rule is not applicable here, and DuPont has no grounds for a stay.

[6] It should be noted that the letter from a USW representative to which DuPont was responding did not suggest that the USW had any authority over the various Local Union's grievances. The requested meeting – unlike DuPont's Virginia litigation – would have included representatives of "all affected Local Unions." Briggs Decl. Exh. 1.

II. EVEN IF THE PARTIES TO THIS CASE AND THE VIRGINIA CASE WERE IDENTICAL, THIS ACTION SHOULD HAVE PRECEDENCE BECAUSE THE CASES WERE FILED ONLY DAYS APART, DUPONT'S VIRGINIA FILING IS AN IMPROPER ATTEMPT TO DENY LOCAL 4-5025 ITS RIGHT TO CHOOSE THE FORUM IN WHICH TO LITIGATE ITS CLAIM AGAINST DUPONT, AND THE BALANCE OF CONVENIENCE FAVORS THIS FORUM

Even if Local 4-5025 were a party to the Virginia suit, a stay in this case would be unwarranted for three reasons. First, the "first-filed" rule has little or no strength when, as here, the two suits were filed only days apart. Second, by its Virginia suit DuPont has engaged in a tactical maneuver that is regularly condemned by the courts: having been made aware that a suit alleging violations of law was about to be filed against it, the prospective defendant rushed to file a "preemptive" or "anticipatory" declaratory judgment action in the hope of depriving the natural plaintiff of the ability to frame the issues and to choose the forum for its claim. Third, the balance of convenience favors a New York forum over a Virginia forum hundreds of miles away from Local 4-5025, its members, and the Niagara Falls plant. We will discuss these three points in turn.

A. DuPont's Virginia action against the USW was filed on February 28, 2007, and this action was filed a mere two days later, on March 2, 2007.[7] Courts in the Second Circuit are in agreement that the first-filed rule "lack[s] significance" when, as here, the two actions were filed

[7] DuPont's brief also mentions the filing date of its action against ARWI, the independent Virginia union unaffiliated with USW, see DuPont Stay Memo at 2, 4. However, DuPont does not actually argue that the ARWI action is a "first-filed" suit that could justify a stay in this case. See DuPont Stay Memo at 6 (comparing this action to DuPont's Virginia action against the USW). Nor could DuPont argue that the ARWI action constituted a "first-filed" suit as to Local 4-5025. The ARWI action does not name Local 4-5025 or the USW as a party. See ARWI First Amended Complaint, Exh. 2 to Aff. in Support of DuPont's Motion to Stay. Even if DuPont had subsequently added Local 4-5025 or the USW to the ARWI action – which it has not done and would have no right to do – it would remain the case that that action was not filed against Local 4-5025, or even against the USW, until after Local 4-5025 had filed its action in this Court. Consequently, as to Local 4-5025, the action in this Court is the first-filed action. See Abovepeer, supra; Fleet Capital, supra note 5.

only days apart. Raytheon Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 306 F. Supp. 2d 346, 354 (S.D.N.Y. 2004); JewelAmerica v. Frontstep Solutions Group, Inc., No. 02 Civ. 1328, 2002 WL 1349754, at *1 n. 1 (S.D.N.Y. June 20, 2002); Mackey v. Durham, No. 00 Civ. 4721, 2000 WL 1191105, at *2 (S.D.N.Y. Aug. 22, 2000); Hanson PLC v. Metro-Goldwyn-Mayer, Inc., 932 F. Supp. 104, 107 (S.D.N.Y. 1996).

B. Furthermore, even if DuPont's Virginia action were truly "first filed" in any meaningful sense, this case presents a well-established exception to the first-filed rule. "The Declaratory Judgment Act was not designed to countenance . . . procedural manipulation of forums and actions," and such "misuse of the Declaratory Judgment Act to gain a procedural advantage and preempt the forum choice of the plaintiff in the coercive action militates in favor of dismissing the declaratory judgment action." Fed. Ins. Co. v. May Dep't Stores Co., 808 F. Supp. 347, 350 (S.D.N.Y. 1992) (quoting Great Am. Ins. Co. v. Houston Gen. Ins. Co., 735 F. Supp. 581, 586 (S.D.N.Y. 1990)). Consequently, when a "suit for declaratory judgment was filed in apparent anticipation" of an impending lawsuit by the natural plaintiff, it is appropriate to "allow the later filed action to proceed to judgment in the plaintiffs' chosen forum." Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 219 (2d Cir. 1978), overruled on other grounds, Pirone v. MacMillan, Inc., 894 F.2d 579 (2d Cir. 1990).

To decline jurisdiction in these circumstances is not only "appropriate," id.; it is the presumptively proper course. As the Seventh Circuit has put it, "a suit for declaratory judgment aimed solely at wresting the choice of forum from the 'natural' plaintiff will normally be dismissed." Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 10 F.3d 425, 431 (7th Cir. 1993). See also UAW v. Dana Corp., No. 99-7603, 1999 U.S. Dist. LEXIS 22525, at *18 (N.D. Ohio Dec. 6, 1999) (there is "a presumption that a first filed declaratory judgment action should be dismissed or stayed in favor of the substantive suit"); Cas. Indem. Exch. v. High Croft Enters., 714 F. Supp. 1190, 1193 (S.D. Fla. 1989) ("The declaratory remedy is not a tactical device whereby a party who would be a defendant in a coercive action may choose to be a plaintiff if he can beat the other party to the courthouse."); 12 Moore's Federal Practice § 57.42[3] (3d ed. 2006) (where a declaratory judgment action "was brought in anticipation of the coercive suit for the purpose of gaining the home court advantage, the coercive suit is usually given precedence").[8] Accord, e.g., NGS Am., Inc. v. Jefferson, 218 F.3d 519 (6th Cir. 2000); Anheuser-Busch, Inc. v. Supreme Int'l Corp., 167 F.3d 417 (8th Cir. 1999); EEOC v. Univ. of Pa., 850 F.2d 969 (3d Cir. 1988), aff'd on other grounds, 493 U.S. 182 (1990); Ven-Fuel, Inc. v. Dep't of the Treasury, 673 F.2d 1194 (11th Cir. 1982); Lateena Girls, LLC v. Latina Media Ventures, LLC, No. SA-06-CA-217-RF, 2006 WL 2547884, at *4 (W.D. Tex. Aug. 9, 2006); Remington Arms Co. v. Alliant Techsys., Inc., No. 03-1051, 2004 WL 444574 (M.D.N.C. Feb. 25, 2004); Touchstone Research Lab., Ltd. v. Anchor Equip. Sales, Inc., 294 F. Supp. 2d 823 (N.D. W. Va. 2003); Nutrition & Fitness, Inc. v. Blue Stuff, Inc., 264 F. Supp. 2d 357 (W.D.N.C. 2003); First Nationwide Mortgage Corp. v. FISI Madison, LLC, 219 F. Supp. 2d 669, 673 (D. Md. 2002).

The Second Circuit's decision in Factors is instructive on this point. Two days after Elvis Presley's death, Factors was granted an exclusive license to market Presley's name and likeness. Three days after Presley's death, Pro Arts began publishing and marketing a poster featuring a photograph of Presley and the words "In Memory." Factors wrote to Pro Arts warning Pro Arts that it would bring suit if Pro Arts did not stop selling the poster. Instead of ceasing sales of the poster, within a month of receiving the letter from Factors, Pro Arts filed a declaratory judgment

[8] The treatise notes that this is particularly true "[w]hen the case has limited connection to the declaratory relief forum." Id.

suit against Factors in Ohio, seeking a declaration of non-infringement. Five days later, Factors filed an affirmative suit in the Southern District of New York. Pro Arts moved to dismiss, stay, or transfer the New York action in favor of the first-filed Ohio action. The district court denied Pro Arts' motion, and the Second Circuit affirmed on the ground that the first-filed action was an improper anticipatory action. Noting that the right to pursue a declaratory judgment action "is not a prize to the winner of a race to the courthouses," Factors, 579 F.2d at 219 (citing Perez v. Ledesma, 401 U.S. 82, 119 n.12 (1971) (Brennan, J., dissenting)), the Court stated:

> Pro Arts' suit for declaratory judgment was filed in apparent anticipation of Factors' New York suit. When the declaratory judgment action has been triggered by a notice letter, this equitable consideration may be a factor in the decision to allow the later filed action to proceed to judgment in the plaintiffs' chosen forum.

Id.

Other courts in the Second Circuit have followed the reasoning of Factors. See, e.g., CGI Solutions, LLC v. Sailtime Licensing Group, LLC, No. 05 CIV 4120, 2005 WL 3097533, at *6 (S.D.N.Y. Nov. 17, 2005) (dismissing anticipatory declaratory judgment action filed three weeks after receipt of demand letter on grounds that allowing the action to proceed "would contravene the purposes of the Declaratory Judgment Act and would encourage forum-shopping"); Hanson, 932 F. Supp. 104 (dismissing first-filed declaratory judgment suit filed three days after receipt of cease-and-desist letter and one business day before second suit was filed); Fed. Ins. Co., 808 F. Supp. at 351 (S.D.N.Y. 1992) (dismissing declaratory judgment action triggered by notice letter and noting that "[b]y bringing an anticipatory declaratory judgment action, [the declaratory judgment plaintiff] deprived [the defendant] of its choice of forum"); Great Am. Ins. Co, 735 F. Supp. at 586 (dismissing anticipatory declaratory judgment suit triggered by notice letter, as a "classic example of a race to the courthouse").

Perhaps the closest analogues to this case are UAW v. Dana Corp., supra, and Crown Cork & Seal Co. v. United Steelworkers of America, No. 03-1381, 2004 U.S. Dist. LEXIS 760 (W.D. Pa. Jan. 9, 2004), both of which involved attempts by an employer to use a declaratory judgment action to pretermit anticipated suits by aggrieved employees or their union. In Dana Corp., as here, an employer brought an action seeking a declaration that a union was not entitled to enforce rights it was claiming under the arbitration provisions of a collective bargaining agreement. Reasoning that the union was the "true plaintiff" in the controversy, 1999 U.S. Dist. LEXIS at **12-13, the court declined to permit the employer "to preempt the choice of forum that otherwise would be for the union to make," id. at *15. The court required the employer to show cause why "further maintenance of [its] suit . . . should not be enjoined," id. at *17, and in a subsequent decision, the court enjoined the employer's suit, "remain[ing] firmly of the view that the union is the true plaintiff, and, as such, is entitled to choose its forum, and not to have that choice made for it by its adversary." UAW v. Dana Corp., No. 99-7603, 2000 U.S. Dist. LEXIS 12041, at *5 (N.D. Ohio Mar. 22, 2000).

Crown Cork & Seal, like this case, involved an employer's effort to obtain judicial approval of its decision to reduce employee benefits. The court held that "the proper plaintiffs in an action to determine whether the retirees' retirement benefits can be unilaterally changed . . . are the retirees and their Union. Further, that as the proper plaintiffs, the retirees and their Union should be permitted to select the forum of their choice so long as the selected forum has some nexus to the lawsuit." 2004 U.S. Dist. LEXIS 760 at *9. The court therefore dismissed the employer's declaratory judgment action. Id. at **9-11.

The same result is called for in this case. It is plain that Local 4-5025 is the natural plaintiff in this dispute, as was the union in Crown Cork & Seal, and that DuPont raced to the

Virginia court in order to deprive Local 4-5025, and the other USW Local Unions, of their right to select the forum(s) for litigation of their claims. Indeed, DuPont does not deny that it filed this defensive suit in anticipation that the unions were about to file coercive actions to compel arbitration of their grievances. See DuPont Stay Memo at 4. That is not to be permitted, whatever DuPont's reasons may be for preferring Virginia as its forum. See NGS Am., supra, 218 F.3d at 523 (dismissing anticipatory declaratory judgment action "[w]ithout pretending to divine the motives of [the declaratory judgment plaintiff] in bringing this action where it did").

DuPont argues that its attempt to force all litigation over its benefit cuts into the Eastern District of Virginia should not be characterized as forum shopping, because ARWI is located in the Eastern District of Virginia and DuPont, having sued ARWI there, wished to "have the underlying dispute resolved in one forum." DuPont Stay Memo at 7-8. But, whether DuPont chose the Virginia forum in order to seek a "more favorable forum," First Nationwide Mortgage Corp., 219 F. Supp. 2d at 673, or simply a more favorable "procedural posture," id., there can be no gainsaying that DuPont has engaged in forum shopping for the express purpose of preventing the Local Unions from being able to litigate their claims against DuPont in the forums of their choice. Indeed, DuPont asserts that its actions have been motivated by a desire not to "waste [its] resources" by allowing litigation to proceed in the forums the Local Unions – who are the natural plaintiffs – have selected. DuPont Stay Motion at 7. Although DuPont suggests that it also is seeking to preserve the Local Unions' resources, id., that suggestion is Kafkaesque. Local 4-5025 has no desire to conserve its resources by having the fate of its grievance determined in litigation in Virginia to which it is not even a party. Any "resource conservation" that might be achieved by allowing DuPont's forum-shopping gambit to succeed would benefit only DuPont, to the detriment of Local 4-5025.[9]

Furthermore, although DuPont purports to be vindicating an interest in "uniform[ity]," DuPont Stay Memo at 8, DuPont overlooks the fact that the respective CBAs and grievances simply are not uniform. DuPont itself has declared that the issues raised by the grievances concerning the benefit reductions "are local." See supra at 4. What is more, in its complaint in the Virginia action against the USW and in its brief in that case, DuPont pointed to facts unique to individual Local Unions (specifically, DuPont emphasized that one Local Union's CBA mentions certain benefit programs while another Local Union's CBA mentions different programs), and DuPont asserted that those differences affect the arbitrability of the respective grievances. See Complaint in DuPont v. USW, Exh. 1 to Aff. in Support of DuPont Motion to Stay, ¶¶ 61, 62; Plaintiff's Opposition to Defendant's Motion to Dismiss in DuPont v. USW, at 22 (Exh. D to this memorandum).

DuPont thus recognizes "uniformity" as an interest to be pursued only where it suits DuPont's own purposes. Had DuPont in fact been confronted with a situation in which it would be necessary and proper that all litigation concerning the benefits reductions should be conducted in the Eastern District of Virginia, DuPont would not have needed to file a preemptive strike against the USW in order to attempt to force that result; DuPont could simply have moved to transfer all litigation concerning the benefit reductions to the Virginia court. Apparently recognizing that it would lack a basis for seeking such a transfer, DuPont has taken matters into its own hands by attempting to force all litigation into the Eastern District of Virginia through the

[9] Also Kafkaesque is DuPont's assertion that Local 4-5025 and the other USW Local Unions were "forum-shopping" when they filed suits in the districts in which they and their members are located, in order to compel arbitration of the grievances they filed in those districts, under CBAs they entered into in those districts. See DuPont Stay Memo at 8.

filing of a complaint that seeks to determine the arbitrability and the merits of the New York, New Jersey and Delaware grievances even though Local 4-5025 and the other Local Unions that filed those grievances do not conduct any business in Virginia and have filed litigation to enforce their rights in the districts where they do conduct business.[10]

For these reasons, this is a clear case in which to apply the principle that a natural defendant will not be permitted to wrest the choice of forum from the natural plaintiff by filing a "preemptive strike" declaratory judgment action.

C. Finally, this suit should not be stayed in favor of the Virginia suit because the balance of convenience clearly favors a New York forum over a Virginia forum. The Second Circuit has long recognized that a "balance of convenience in favor of the second [filed suit]" is a reason to depart from the first-filed rule. CitiGroup Inc. v. City Holding Co., 97 F. Supp. 2d 549, 555 (S.D.N.Y. 2000) (citing First City Nat'l Bank & Trust Co. v. Simmons, 878 F.2d 76, 79 (2d Cir. 1989)). Weighing the balance of convenience requires consideration of the same factors that

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[10] DuPont's reliance on Rexam, Inc. v. United Steelworkers of America, No. 03-2998, 2003 WL 22477858 (D. Minn. Oct. 30, 2003), see DuPont Stay Memo at 8, is misplaced. In that case, the court found that the affected USW retirees whose benefits were at issue had as much of a connection to the forum in which the company had filed its declaratory judgment action (where one of the USW-represented facilities was located) as to any other forum. See 2003 WL 22477858 at *3. Nor was there any contention in Rexam that the company's choice of forum had operated to exclude from the litigation local unions whose rights were at issue and whose CBAs and grievances varied from each other. Finally, and perhaps most important, in Rexam the company did not file a declaratory judgment action until six months had elapsed from its last communication with the USW, and the court concluded in those circumstances that the company had not been aware that the union was about to file suit. See id. at *5. Here, in contrast, the unions gave DuPont unequivocal notice of their intention to file suit, and DuPont then promptly raced into court.

DuPont also argues that its role as an ERISA fiduciary justifies its pursuit of a uniform resolution of the various grievances. See DuPont Stay Memo at 8-9. However, DuPont does not have standing to pursue its purported ERISA claims, for the reasons stated in Defendant's Brief in Support of Motion to Dismiss at 13-16; Defendant's Reply in Support of Motion to Dismiss at 14-16 (Exhs. B and C attached to this Opposition). This suit is not about ERISA or fiduciary duties; it is about resolving through arbitration a grievance alleging a breach of a CBA.

apply to the decision of whether transfer is appropriate under 28 U.S.C. § 1404(a), namely (1) the convenience of witnesses, (2) the location of relevant documents, (3) the convenience of the parties, (4) the locus of operative facts, (5) the availability of process to compel the attendance of unwilling witnesses, (6) the relative means of the parties, (7) a forum's familiarity with the governing law, (8) the weight accorded a plaintiff's choice of forum, and (9) trial efficiency and the interests of justice, based on the totality of the circumstances. Id. at 561.

Here, the convenience of witnesses and parties, the location of relevant documents, the locus of operative facts, the plaintiff's choice of forum, and the interests of justice all point in favor of a New York forum. Local 4-5025 and DuPont both do business in New York, but Local 4-5025 does not do business in Virginia. Local 4-5025's officers, the Niagara Falls plant employees represented by Local 4-5025, and DuPont's Niagara Falls management employees are all located in New York, not Virginia. The CBA at issue in this case was entered into in New York, not Virginia; Local 4-5025's grievance was filed in New York, not Virginia; and any documentary evidence related to the CBA and the grievance will be located in New York, not Virginia. The plaintiff, Local 4-5025 chose a New York forum, and is not even subject to service of process in Virginia. The interests of justice clearly weigh in favor of allowing Local 4-5025's action to proceed in this forum.

As noted, DuPont has sought to justify its choice of a Virginia forum by portraying its Virginia action against the USW as connected to the ARWI action. However, ARWI is independent of the USW, of Local 4-5025, and of the Delaware and New York USW Local Unions. DuPont has no right to force the USW – much less Local 4-5025 – to litigate in Virginia merely because DuPont has sued some other union here.

* * * *

In sum, DuPont's motion for a stay is a non-starter because Local 4-5025 is not a party to DuPont's Virginia action. See supra at 6-9. And even if that dispositive point could be put aside, a stay is unwarranted because DuPont filed its action only two days before Local 4-5025 filed this suit; DuPont's action is an improper preemptive strike that should not be permitted to deprive the natural plaintiff, Local 4-5025, of the right to choose the forum; and the balance of convenience favors litigating this matter in New York, not Virginia.

Conclusion

For the foregoing reasons, DuPont's Motion to Stay All Proceedings should be denied.

Respectfully submitted,

/s/ Catherine Creighton_________________
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Counsel for Plaintiff
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers Local 4-5025

DATED: May 18, 2007
Buffalo, New York

Certificate of Service

I, hereby certify that on May 18, 2007, I electronically filed the foregoing with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

James D. Donathen, Esq.
Phillips Lytle
3400 HSBC Center
Buffalo NY 14203
jdonathen@phillipslytle.com

And I hereby certify that I have mailed the foregoing, by the United States Postal Service, to the following non-CM/ECF participants:

NONE

CREIGHTON, PEARCE, JOHNSEN & GIROUX
Attorneys for Plaintiffs

/s/ Catherine Creighton
Catherine Creighton, Of Counsel
560 Ellicott Square Building; 295 Main St
Buffalo, NY 14203
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS LOCAL 4-5025,	)	
Plaintiff,	)	
v.	)	**No. 07-CV-0122 S(F)**
E.I. DUPONT DE NEMOURS AND COMPANY,	)	
Defendant.	)	

Declaration of Jennifer L. Hunter in Support of Plaintiff's Opposition to Defendant's Motion to Stay All Proceedings

I, Jennifer L. Hunter, state as follows:

1. I am attorney duly licensed to practice law in the District of Columbia and the State of New York, and I have been granted admission *pro hac vice* to this Court. I am fully familiar with the facts set forth herein.

2. I make this affidavit in support of Plaintiff's Opposition to Defendant's Motion to Stay All Proceedings.

3. The following documents are annexed hereto and are made a part of the subject motion:

a. Exhibit A is a copy of the Declaration of James Briggs, with two attachments, filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied-Industrial and Service Workers International Union ("USW") in *E.I.*

Dupont De Nemours & Company v. USW, No. 3:07-cv-103-HEH (E.D. Va. filed Feb. 28, 2007) ("Virginia action").

b. Exhibit B is a copy of Defendant's Brief in Support of Motion to Dismiss filed in the Virginia action.

c. Exhibit C is a copy of Defendant's Reply in Support of Motion to Dismiss filed in the Virginia action.

d. Exhibit D is a copy of Plaintiff's Opposition to Defendant's Motion to Dismiss filed in the Virginia action.

4. For the reasons set forth in the accompanying Memorandum, the Court should deny Dupont's Motion to stay all proceedings.

I declare under penalty of perjury that the foregoing is true and correct.

Jennifer L. Hunter

Dated: May 18, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

E.I. DUPONT DE NEMOURS AND COMPANY, Plaintiff, v. UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, Defendant.	)	Civil Action No. 3:07-cv-0103-HEH

DECLARATION OF JAMES BRIGGS

James Briggs declares under penalty of perjury under the laws of the United States as follows:

1. I am employed as a Staff Representative by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW"). As a Staff Representative I provide assistance to various local unions that are affiliated with the USW. One of the local unions I regularly assist is Local 4-5025, which represents employees at the Niagara Plant of E.I. DuPont de Nemours and Co. ("DuPont") in Niagara Falls, New York. I make this declaration on the basis of personal knowledge and am competent to testify to the matters stated herein.

2. Local unions affiliated with the USW represent DuPont employees at six locations, including, among others, Deepwater, New Jersey (Local 943) and Edgemoor,

7. Although each local union possesses the full and exclusive authority to determine how its grievance will be handled, the USW is providing assistance to the local unions in this regard, as it regularly provides assistance to its affiliated local unions. For example, the USW Legal Department has assisted the locals, and the USW has also made outside counsel available to the locals.

8. Because DuPont has announced that the changes it has made in its benefit plans and programs will apply to each of the facilities, the local unions involved, with the USW's assistance, are coordinating certain aspects of their responses to DuPont's action. For example, the USW DuPont Council which assists local unions at DuPont facilities with various issues, sent a letter to DuPont's Vice President of Human Resources on September 1, 2006, proposing "that the parties schedule a joint meeting, including the International Union and all affected Local Unions," to discuss DuPont's unilaterally imposed benefit changes. Exhibit 1 to this declaration is a true and correct copy of that letter.

9. In response to that letter, DuPont's U.S. Region President, Willie C. Martin, sent a letter to the Chairman of the DuPont Council, which stated DuPont's position as follows:

> Our philosophy remains that union-management issues are local. Therefore, we believe they are best dealt with by knowledgeable union and management people at the local level.

Exhibit 2 to this declaration is a true and correct copy of that letter.

James Briggs

April 19, 2007

Delaware (Local 4-786), as well as Niagara Falls. Each of these locals is a party to a collective bargaining agreement ("CBA") with DuPont. Each CBA is applicable solely to the plant at which the particular local union represents employees. The provisions of the respective CBAs, including the provisions relating to employee benefits, are not identical, but vary from local to local.

3. Although the USW is a party, together with Local 4-786, to the Edgemoor CBA, the USW is not a party to the Deepwater or Niagara CBAs.

4. The Deepwater, Edgemoor and Niagara CBAs contain grievance arbitration provisions. At each location, decisions whether to file a grievance, whether to take a grievance to arbitration, what relief to request in arbitration, and whether to settle a grievance or an arbitration case are made solely by the officers and/or members of the local union, not by the USW.

5. When DuPont announced in August 2006 that it was unilaterally making changes in the benefits employees would receive under various benefit plans and programs, grievances were filed by Local 4-502.5, Local 943 and Local 4-786. No grievances were filed by the USW, and the decision of each local union to file a grievance was made by that local union, not by the USW. The grievances are not identical, nor are the CBA provisions that each grievance alleges to have been violated identical.

6. The decisions to demand arbitration of the three grievances referenced in paragraph 5 were made by each local union, not by the USW. All decisions as to what positions to assert in arbitration, and any decisions whether, or on what terms, to settle one or more of the grievances, will be made by each local union with respect to its own grievance, not by the USW.

UNITED STEELWORKERS

USW

UNITY AND STRENGTH FOR WORKERS

EXHIBIT

1

September 1, 2006

Mr. Jim Borel, Sr. Vice President
Human Resources
DuPont Corporation
DuPont Building
1007 Market Street
Wilmington, DE 19898

Dear Mr. Borel:

The International Union and the various DuPont Local Unions are deeply concerned about the changes to terms and conditions of employment of current and future bargaining unit members set forth in the August 28, 2006 e-mail which you sent to U.S. DuPont employees. At present, we lack sufficient information to determine whether the changes, which will not take effect until January 1, 2007, at the earliest, violate the various collective bargaining agreements, and I propose that the parties schedule a joint meeting including the International Union and all affected Local Unions so that we can learn and discuss the Company's contractual basis for the announced actions. Although no contract is currently in effect at the Yerkes plant, a Local 6992 representative will also attend.

We are flexible as to location and timing but believe it is in the interest of all parties to meet as quickly as possible. On behalf of the International Union and all affected Local Unions, I am also requesting that any time limits at each of the plants concerning the filing of a grievance concerning any changes announced in the August 28, 2006 e-mail be suspended until such time as the requested meeting is held.

I look forward to your prompt response. In addition, to facilitate our preparation for the meeting and to insure we have accurate copies of the latest versions of the affected plans, I request that you send me as quickly as possible the complete Pension and Retirement Plan, Savings and Investment Plan, Vacation Plan, and BeneFlex Medical Care Plan as well as copies of any proposed amendments to these plans.

Sincerely yours,

Kenneth O. Test

Kenneth O. Test
DuPont Council Chairman

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

3340 Perimeter Hill Drive, Nashville, TN 37211 • 615.834.8590 • www.usw.org

Mr. Jim Borel
DuPont Corporation
Page Two
September 1, 2006

cc: Leo Gerard, USW International President
Jerry Fernandez, Assistant to the USW International President
William Pienta, USW District 4 Director
Billy Thompson, USW District 8 Director
Frank Pittman, USW District Representative
John Barcellona, USW District Representative
Jim Briggs, USW District Representative
Paul Whitehead, USW General Counsel
Rich Brean, USW Associate General Counsel
Lynn Agee, USW Special Counsel
Dan Austin, USW Local 6992
Marty Freeburg, USW Local 4-5025
Mark Schilling, USW Local 4-786
Jim Rowe, USW Local 4-943
Greg Lowman, USW Local 2002
Ronnie Sanders, USW Local 1904
Gary Guralny, DuPont Council President
Joe Drexler, Manager Strategic Campaigns
Shawn Gilchrist, Strategic Campaigns

EXHIBIT

Z

DUPONT

The miracles of science

September 6, 2006

Mr. Kenneth O. Test
DuPont Council Chairman
United Steelworkers
3340 Perimeter Hill Drive
Nashville, TN 37211

Dear Mr. Test:

Your attached letter to Jim Borel, Senior Vice-President, has been forwarded to me for response. Our philosophy remains that union-management issues are local. Therefore, we believe they are best dealt with by knowledgeable union and management people at the local level. If the local union believes that they need additional information to adequately respond to any of the recent announcements, I suggest you recommend to them to request any needed information from their local site management.

Sincerely,

Willie C. Martin

Willie C. Martin
U. S. Region President

WCM:n

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

E.I. DUPONT DE NEMOURS AND COMPANY, Plaintiff, v. UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, Defendant.	)	Civil Action No. 3:07-cv-00103-HEH

I. DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS

Introduction

This action concerns grievances filed under the collective bargaining agreement ("CBAs") at three plants of plaintiff E. I. DuPont de Nemours and Company ("DuPont" or the "Company") by local unions affiliated with defendant United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union ("USW" or the "International Union"). Those plants are in Delaware, New Jersey and New York – not in Virginia.

The disputes arose when DuPont unilaterally made changes in the benefits provided through its pension and welfare plans. The local unions at the three plants filed grievances alleging that DuPont's actions violated the CBAs at the respective plants. DuPont refused to arbitrate the grievances as required by the CBAs, and letters were sent to DuPont on behalf of the unions informing the Company that, if it persisted in its refusal to arbitrate, the unions would file suit to compel arbitration. Barely ten days after the deadline for compliance that was set in those letters, DuPont filed this action, naming as defendant the International Union (not the local unions), and seeking, inter alia, a declaration that the grievances are not arbitrable and that the benefit changes do not violate the CBAs. A few hours after DuPont filed this action, the New Jersey local union filed an action in the District of New Jersey to compel DuPont to arbitrate that local's grievance. The next day, the Delaware local filed an action in the District of Delaware to compel arbitration of its grievance; and the day after that, the New York local filed such a suit in the Western District of New York.

We will show in this memorandum that DuPont's suit should be dismissed for several independent reasons.

First, "[i]t is appropriate for a federal district court to decline jurisdiction over a declaratory judgment action where the declaratory judgment action was filed in apparent anticipation of a suit in another forum." Yoder v. Heinold Commodities, Inc., 630 F. Supp. 756, 760 (E.D. Va. 1986). Because "the natural plaintiff's choice of forum and law will be disturbed only in exceptional circumstances," BASF Corp. v. Symington, 50 F.3d 555, 558-59 (8^{th} Cir. 1995), courts consistently dismiss declaratory judgment actions where, as here, the party whose conduct gave rise to the underlying dispute – the natural defendant –races to the forum in which it wishes to have the dispute resolved, thereby depriving the natural plaintiff of its right to select the forum. See infra at ___.

Although the ground just stated is sufficient to require dismissal of this action, dismissal also is warranted for the additional reason that the local unions are necessary parties to this litigation, but they have not been and could not be joined. See infra at ___.

Furthermore, to the extent that DuPont's action purports to be based on the Employee Retirement Income Security Act ("ERISA"), the Court lacks subject matter jurisdiction because ERISA does not provide for such actions by employers. See infra at ___.

Finally, DuPont's claim seeking a declaratory judgment that it did not breach the CBAs must be dismissed because federal labor law does not permit the courts to decide the merits of union grievances under a CBA. See infra at ___.

Background[1]

DuPont's employees at Edgemoor, Delaware; Deepwater, New Jersey; and Niagara Falls, New York, are covered by CBAs. Complaint ¶¶ 9, 11, 13. The parties to the New Jersey CBA are DuPont and the local union at the Deepwater Plant, see Exhibit 1, p.1; the parties to the New York CBA are DuPont and the local union at the Niagara Falls plant, see Exhibit 2, cover page and p. 1; and the parties to the Delaware CBA are DuPont and both the International Union and the local union at the Edgemoor plant, see Exhibit 3, pp. 1, 2.

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1 Our statement of the facts is based on DuPont's Complaint, except that, where the complaint refers to specified documents – CBAs, benefit plans and grievances – we rely on the actual text of the documents rather than on DuPont's characterizations of them. This reliance on the documents is proper for several reasons. First, the Court may consider evidence outside the pleadings in deciding a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction or a Rule 12(b)(7) motion for failure to join a necessary party, without converting the motion to one for summary judgment. See Evans v. B. F. Perkins Co., 166 F.3d 642, 617 (4th Cir. 1999) (Rule 12(b)(1)); English v. Cowell, 10 F.3d 434 (7th Cir. 1993) (Rule 12(b)(7)). Second, the documents we cite are relied upon in DuPont's complaint and are integral thereto; such documents are properly considered part of the complaint and may be relied upon even in ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim. See Phillips v. LCI Intern., Inc., 190 F.3d 609, 618 (4th Cir. 1999). Finally, "if the allegations of a complaint are contradicted by documents made a part thereof, the documents control and the court need not accept as true the allegations of the complaint." Barnum v. Millbrook Care Ltd. Partnership, 850 F.Supp. 1227, 1232-33 (S.D.N.Y. 1994). "[T]his rule also applies to the instruments supplied by the Defendant" that are referenced in the complaint but were not attached thereto. Id. at 1233.

At all three locations, grievances were filed in August-September 2006 alleging that, in making unilateral modifications to certain of its benefit plans, DuPont had violated the applicable CBA. See Complaint ¶¶ 45, 48, 51. The New Jersey and Delaware grievances identified the grievant as the local union. See Exhs. 4 and 5. The New York grievance did not identify the grievant, see Exh. 6, but subsequent correspondence establishes that this grievance likewise was filed by the affected local union.

Each grievance alleged that on August 28, 2006, DuPont had announced unilateral changes in various benefit plans that were in violation of CBA provisions prohibiting such modifications. See Exhs. 4-6. The allegations in the New Jersey and Delaware grievances were essentially identical, see Exhs. 4 and 5; but the New York grievance referred to certain plans and CBA provisions that differ from what was referenced in the other grievances. Compare Exh. 6 with Exhs. 4-5. All of the grievances alleged violations only of the CBA, not of the DuPont benefit plans themselves. See Exhs. 4-6.

In separate letters sent to the Presidents of the three local unions, DuPont refused to arbitrate the grievances. See Complaint ¶¶ 46, 49, 52; Exhs. 7-9. In response, on February 8, 2007, the USW informed DuPont that, if the Company persisted in refusing to arbitrate, legal action would be initiated to compel arbitration of the New Jersey and Delaware grievances. See Complaint ¶¶ 47, 50. That message was conveyed by Richard Brean, the International Union's Senior Associate General Counsel, to whom DuPont's letters to the local union presidents had been referred for reply. See Exhs. 10-11. Mr. Brean's February 8 letters stated that suits to compel arbitration would be filed unless DuPont provided written notice within ten days that it would resume processing the grievances under the CBAs. Id.

On February 28, 2007, only ten days after that ten-day period had expired, DuPont filed this action. Later that same day, an action to compel arbitration was filed by the New Jersey local union in the District of New Jersey; the next day, an action to compel arbitration was filed by the Delaware local in the District of Delaware; and the day after that, the New York local filed such a suit in the Western District of New York.[2]

In DuPont's action filed in this Court, the Company argues that the grievances filed by the Delaware, New Jersey and New York local unions are not arbitrable because, in DuPont's view, the grievances concern "eligibility for certain benefits contained in DuPont's ERISA plans," and DuPont maintains that such matters "are to be resolved exclusively through the procedures set forth in those plans, and/or in a civil enforcement action under Section 502 of ERISA." Complaint ¶ 66. See also id. ¶¶ 3, 15-44, 46, 49, 52, 55-57. On that basis, DuPont seeks declaratory and injunctive relief to prohibit arbitration of the grievances and to require that the issues raised by the grievances "are to be resolved exclusively through the procedures set forth in th[e] plans, and/or in a civil enforcement action under Section 502 of ERISA." Id. ¶¶ 66, 72. Yet, having alleged that the issues raised by the unions' grievances can only be resolved through "the procedures set forth in th[e] plans" or through an ERISA enforcement action brought by plan participants, DuPont proceeds to ask this Court to resolve the issue presented by the unions' grievances – namely, whether DuPont's unilateral modifications of the benefits in question violate the CBAs. See id. ¶¶ 68-69.

As we now show, DuPont's effort to block arbitration of the Delaware, New Jersey and New York grievances and to have this Court decide the merits of the grievances is not properly before this Court, and DuPont's complaint should be dismissed.

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2 This Court may take judicial notice of the filing of these three suits, which have been docketed as D.N.J. No. 1:07-cv-00965, D. Del. No. 07-126, and W.D.N.Y. No. 07-cv-0122.

Argument

I. THIS DECLARATORY JUDGMENT ACTION IS AN IMPROPER ATTEMPT TO DENY THE UNIONS THEIR RIGHT TO CHOOSE THE FORUM IN WHICH TO LITIGATE THEIR CLAIMS AGAINST DUPONT, AND AS SUCH THE COMPLAINT SHOULD BE DISMISSED

By this suit, DuPont has engaged in a tactical maneuver that is regularly condemned by the courts: having been made aware that a suit alleging violations of law was about to be filed against it, the prospective defendant rushed to file a "preemptive" or "anticipatory" declaratory judgment action in the hope of depriving the natural plaintiff of the ability to frame the issues and to choose the forum for its claims.

Such preemptive actions are contrary to the interests of justice because they seek to override "the natural plaintiff's choice of forum and law [which] will be disturbed only in exceptional circumstances." BASF Corp. v. Symington, 50 F.3d 555, 558-59 (8th Cir. 1995). Consequently, as this Court has held, it is "appropriate for a federal district court to decline jurisdiction over a declaratory judgment action where the declaratory judgment action was filed in apparent anticipation of a suit in another forum." Yoder v. Heinold Commodities, Inc., 630 F. Supp. 756, 760 (E.D. Va. 1986).

To decline jurisdiction in these circumstances is not only "appropriate," id.; it is the presumptively proper course. As the Seventh Circuit has put it, "a suit for declaratory judgment aimed solely at wresting the choice of forum from the 'natural' plaintiff will normally be dismissed." Allendale Mut. Ins. Co. v. Bull Data Systems, 10 F.3d 425, 431 (7th Cir. 1993). See also UAW v. Dana Corporation, 1999 U.S. Dist. LEXIS 22525* at 18-19 (N.D. Ohio 1999) (there is "a presumption that a first filed declaratory judgment action should be dismissed or stayed in favor of the substantive suit"); Casualty Indem. Exchange v. High Croft Enters., 714 F. Supp. 1150, 1193 (S.D. Fla. 1989) ("The declaratory remedy is not a tactical device whereby a party who would be a defendant in a coercive action may choose to be a plaintiff if he can beat the other party to the courthouse."). Accord, e.g., NGS American, Inc. v. Jefferson, 218 F.3d 519 (6th Cir. 2000); Anheuser-Busch, Inc. v. Supreme International Corp., 167 F.3d 417 (8th Cir. 1999); EEOC v. Univ. of Pennsylvania, 850 F.2d 969 (3d Cir. 1988), aff'd on other grounds, 493 U.S. 182 (1990); Ven-Fuel, Inc. v. Dep't of the Treasury, 673 F.2d 1194 (11th Cir. 1982); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), cert. denied, 440 U.S. 908 (1979), overruled on other grounds, Pirone v. MacMillan, Inc., 894 F.2d 579 (2d Cir. 1990); Remington Arms Co. v. Alliant Techsystems, Inc., 2004 WL 444574 (M.D.N.C. 2004); Touchstone Research Laboratory, Ltd. v. Anchor Equip. Sales, Inc., 294 F.Supp.2d 823 (N.D.W.V. 2003); Nutrition & Fitness, Inc. v. Blue Stuff, Inc., 264 F.Supp.2d 357 (W.D.N.C. 2003).

These holdings are based on the principle, long recognized by the Fourth Circuit, that the declaratory judgment action should not be used for the purpose of "anticipating the trial of an issue in a court of co-ordinate jurisdiction." Aetna Casualty & Surety Co. v. Quarles, 92 F.2d 321, 324 (4th Cir. 1937). See also Centennial Life Ins. Co. v. Poston, 88 F.3d 255 (4th Cir. 1996) (where a declaratory judgment suit is being used for "'procedural fencing'—that is, 'to provide another forum in a race for res judicata,'" courts should be hesitant to entertain the action)[3]. Because "the federal declaratory judgment is not a prize to the winner of the race to the courthouse," Tempco Elec. Heater Corp. v. Omega Engineering, 819 F.2d 746, 750 (7th Cir.

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[3] Even where the filing of a declaratory judgment action was not undertaken for the purpose of depriving the natural plaintiff of the right to select the forum, a federal court is not required to entertain such an action if the court concludes that it is more appropriate that the issues be resolved in an action pending elsewhere. See, e.g., New Wellington Financial Corp. v. Flagship Resort Development Corp., 416 F.3d 290, 296-98 and n.13 (4th Cir. 2005) (although the filing of a declaratory judgment action was not "mere procedural fencing," district court did not abuse its discretion in declining to entertain the action, where the issues could better be resolved in a later-filed state court action).

1987), anticipatory declaratory judgments are a necessary exception to the "first-filed" rule, which would otherwise suggest that the first suit to be filed should have preference over related suits filed later. See Remington Arms Co. v. Alliant Techsystems, Inc., 2004 WL 444574, at *2 (M.D.N.C. 2004).

Applying these principles, courts have dismissed anticipatory declaratory judgment suits in circumstances strikingly similar to those present here. For example, in Anheuser-Busch, supra, Supreme International Corporation, which held the trademark to certain penguin designs, wrote to Anheuser-Busch demanding that it cease using a penguin in an advertising campaign. The letter stated that Supreme had authorized its attorneys to take legal action unless Anheuser responded within five days. Eight days later, Anheuser filed a declaratory judgment action in the Eastern District of Missouri, seeking a declaration that its use of the penguin did not violate Supreme's trademark. Supreme filed an affirmative trademark infringement suit in the Southern District of Florida five days after that. The Eighth Circuit upheld the dismissal of Anheuser's declaratory judgment action, finding that Anheuser, as the natural defendant, should not be permitted to "race[ ] to the courthouse to usurp Supreme's forum choice." 167 F.3d at 49. See also Ven-Fuel, Inc. v. Dep't of the Treasury, 673 F.2d 1194 (11th Cir. 1982) (affirming dismissal of declaratory judgment suit filed the day after receipt of a letter threatening litigation and one week before the natural plaintiff filed the promised affirmative suit).

Similarly, in Yoder v. Heinold Commodities, Inc., this Court refused to defer to a first-filed declaratory judgment action in another district that was instituted ten days after the natural defendant received a demand letter from the natural plaintiff. The court relied on the principle that "[t]he federal declaratory judgment is not a prize to the winner of a race to the courthouse." 630 F.Supp. at 761 (citing Factors, 579 F.2d at 219).

Perhaps the closest analogues to this case are UAW v. Dana Corporation, supra, and Crown Cork & Seal Co. v. United Steelworkers of America, 2004 U.S. Dist. LEXIS 760 (W.D. Pa. 2004), both of which involved attempts by an employer to use a declaratory judgment action to pretermit anticipated suits by aggrieved employees or their union. In Dana Corporation, as here, an employer bought an action seeking a declaration that a union was not entitled to enforce rights it was claiming under the arbitration provisions of a collective bargaining agreement. Reasoning that the union was the "true plaintiff" in the controversy, id. at **12-13, the court declined to permit the employer "to preempt the choice of forum that otherwise would be for the union to make," id. at *15. The court required the employer to show cause why "further maintenance of [its] suit . . . should not be enjoined," id. at *17, and in a subsequent decision, the court enjoined the employer's suit, "remain[ing] firmly of the view that the union is the true plaintiff, and, as such, is entitled to choose its forum, and not to have that choice made for it by its adversary." 2000 U.S. Dist. LEXIS 12041 at *5.

Crown Cork & Seal, like this case, involved an employer's effort to obtain judicial approval of its decision to reduce employee benefits. The court held that "the proper plaintiffs in an action to determine whether the retirees' retirement benefits can be unilaterally changed . . . are the retirees and their Union. Further, as the proper plaintiffs, the retirees and their Union should be permitted to select the forum of their choice so long as the selected forum has some nexus to the lawsuit." 2004 U.S. Dist. LEXIS 760 at *9. The court therefore dismissed the employer's declaratory judgment action. Id. at **9-11.

The same result is called for in this case. It is plain that the unions are the natural plaintiffs in this dispute, and that DuPont raced to this Court in order to deprive the unions of their right to select the forum(s) for litigation of their claims. That is not to be permitted, whatever DuPont's reasons may be for preferring this forum. See NGS American, supra, 218 F.3d at 523 (dismissing anticipatory declaratory judgment action "[w]ithout pretending to divine the motives of [the declaratory judgment plaintiff] in bringing this action where it did")[4]. None of the collective bargaining agreements at issue in this case was entered into in Virginia, and none of the Local Unions whose grievances are at issue is located in or does any business here. None of the Dupont plants whose employees the local unions represent, none of the employees themselves, and none of the documentary evidence, is located in Virginia. Indeed, DuPont, presumably recognizing that this Court would not have jurisdiction over the local unions, has filed this case only against the International Union, which did not file any of the grievances and is not even a party to two of the CBAs in question.

In these circumstances the unions, as the natural plaintiffs, have legitimate reasons for choosing to pursue their claims in the jurisdictions where the local unions and the affected plants are located, rather than in Virginia. And in any event, as we have shown, under the caselaw the right to choose the forum is the unions, not DuPont's. The Company's preemptive action should therefore be dismissed.

4 DuPont has sought to portray this suit as connected to the declaratory judgment suit it has filed against an independent union representing DuPont employees in Virginia. E.I. DuPont de Nemours & Co. v. Ampthill Rayon Workers, 3:07cv52. However, that union is entirely independent of USW and of the Delaware, New Jersey and New York local unions, and DuPont has no right to force these unions to litigate in Virginia merely because DuPont has sued some other union here.

II. THE COMPLAINT MUST BE DISMISSED UNDER FED. R. CIV. P. 12(b)(7) FOR FAILURE TO JOIN THE LOCAL UNIONS, WHO ARE NECESSARY PARTIES

Under Fed. R. Civ. P. 19, the local unions in Delaware, New York, and New Jersey are necessary parties to this action. Because DuPont has brought suit many hundreds of miles away from where those local unions are located, they cannot be added as parties. The case therefore must be dismissed under Fed. R. Civ. P. 12(b)(7).

Rule 12(b)(7) allows for the dismissal of a case for "failure to join a party under Rule 19." The latter rule "creates a two-part inquiry":

> first, whether a party is necessary to a proceeding because of its relationship to the matter under consideration; and second, if a necessary party is unavailable, whether the proceeding can continue in that party's absence. If it cannot, the party is indispensable and the action should be dismissed.

Teamsters Local Union No. 171 v. Keal Driveaway Co., 173 F.3d 915, 917-18 (4th Cir. 1999).

Keal Driveway establishes that a local union is a necessary party to a case which will require a court to make a decision about a grievance filed by the local union, and that the court must dismiss the action if the local union cannot be added as a party. In Keal Driveaway, one local union, Local 964, brought a grievance challenging the seniority treatment of its members who were transferring to a different local, Local 171, after the employer, Keal, closed the terminal at which Local 964's members worked. Both locals and Keal participated in an arbitration procedure, and the arbitral panel agreed with Local 964's interpretation of the multiemployer CBA governing both locals. Local 171 then brought suit against Keal, seeking to vacate the arbitration award, but did not name Local 964 as a party. The Fourth Circuit held that Local 964 was a necessary party, for two reasons. First, because the purpose of Local 171's suit was to vacate an arbitral award based on an interpretation of the CBA "as a result of a grievance that Local 964 filed," permitting the suit to proceed without Local 964 would "impair or impede" its ability to protect its interests under its contract with the employer. Id. at 918 (citing Delta Fin. Corp. v. Comanduras & Assocs., 973 F.2d 301, 305 (4th Cir. 1992) (parties to a contract are necessary parties to a suit on that contract)). Second, permitting the suit to continue without Local 964 could subject Keal to conflicting legal obligations, because Local 964 could file suit in another forum and obtain a judgment which might conflict with the result in Local 171's case. Keal Driveaway at 918.

For the same reasons, the local unions are necessary parties to this suit. First, as was the case in Keal Driveaway, this suit concerns the arbitrability of the local unions' grievances under the local unions' CBAs, and to allow the suit to proceed in the absence of the local unions as parties would "impair or impede" their ability to protect their interests in this case. Second, permitting this suit to continue could lead to inconsistent legal obligations. DuPont does not and cannot seek an injunction against the local unions in this case; and as non-parties, they would not be bound by any judgment issued. See Richards v. Jefferson County, Ala., 517 U.S. 793, 798 (1996) (nonparties could not be bound by judgment even though their interests were "essentially identical" with those of parties to case). Thus, even if DuPont were successful in obtaining a declaration from this Court that the grievances at issue are not arbitrable, the local unions would be free to seek rulings from other courts – namely, the district courts in which they have filed affirmative suits – compelling Dupont to arbitrate the same grievances. See Owens-Illinois v. Meade, 186 F.3d 435, 441 (4th Cir. 1999) (where one court might compel arbitration while another might find that alternative judicial remedies were available, there was a "high potential for inconsistent judgments" and the absent party was a necessary one under Rule 19(a)). The "very real possibility of inconsistent adjudications weighs heavily in favor of finding that [the absent party] is a necessary party." Nat'l Union Fire Life Ins. Co. v. Rite Aid of South Carolina, 210 F.3d 246, 252 (4th Cir. 2000).

The second part of the Rule 19 inquiry focuses on whether the necessary party is unavailable, and if so, whether the proceeding can continue without it. Here, the local unions are located in Delaware, New Jersey, and New York, all more than 100 miles away from this court, and they do not do business in Virginia. This Court lacks personal jurisdiction over the local unions, and in addition, venue in this district would be improper as to them. Clearly, this case cannot properly proceed without the Local Unions' presence. As in Keal Driveaway, there is no way this court could issue a declaratory judgment or injunction without addressing the arbitrability of the local unions' grievances or the meaning of their CBAs, thus implicating the very interests which make the local unions necessary parties and deciding the very issues as to which there is a risk of inconsistent adjudication.

Thus, the local unions are indispensable parties under Rule 19(b), and without their presence this suit must be dismissed.

III. DUPONT'S COMPLAINT MUST BE DISMISSED TO THE EXTENT THAT IT IS BASED ON ERISA BECAUSE ERISA DOES NOT GRANT THE COMPANY STANDING TO BRING SUIT

To the extent that Dupont's action purports to be based on on ERISA, the suit must be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, because the statute does not confer standing on employers to bring actions of this kind.

As the Supreme Court has recognized, ERISA does not confer jurisdiction on the federal courts to hear "every question relating to plans covered by ERISA," Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 25 (1983), but instead carefully limits this power "to suits brought by certain parties." Id. at 21. See also Great-West Life & Annuity Ins.

Co. v. Knudson, 534 U.S. 204, 209 (2002) ("ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.") (internal citations omitted) (emphasis in original). Nor does the fact that Dupont's suit is for declaratory judgment confer standing upon it; the limitations ERISA imposes on the types of actions that can be brought, and on who may bring them, are equally applicable in the declaratory judgment context. Franchise Tax Board, 463 U.S. at 21.

No provision of ERISA provides jurisdiction for a suit such as DuPont has filed. Section 502 of ERISA, 29 U.S.C. § 1132(a), entitled "Persons empowered to bring a civil suit," does not provide for suits by an employer except in one narrow circumstance, namely to enforce the obligation of a multiemployer pension plan to send annual funding notices to various parties. See § 502(a)(8), 29 U.S.C. § 1132(a)(8). To be sure, § 502(a)(3) allows plan "fiduciaries" to sue to "(A) enjoin an act or practice which violates any provision of this subchapter or the terms of the plan, or (B) obtain other appropriate equitable relief . . . to enforce any provisions of this subchapter or the terms of the plan." But DuPont does not pretend to be suing as a fiduciary, and even if the Company attempted to engage in such a pretense, § 502(a)(3) would not provide a basis for this action.

In the first place, in bringing this action to establish its right to cut benefits, DuPont is acting on its own behalf as plan sponsor, not as a fiduciary, because the decision to amend or terminate an ERISA plan is a "settlor" function, not a fiduciary function. Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996) ("[P]lan sponsors who alter the terms of a[n ERISA] plan do not fall into the category of fiduciaries"); Sonoco Products., 338 F.3d at 373 ("[An employer] does not . . . act as a fiduciary simply by performing settlor-type functions such as establishing a plan and designing its benefits.") (citing Coyne & Delany, 98 F.3d at 1465).

Furthermore, in seeking a declaration that it had the right to cut benefits, Dupont is not seeking to "enforce," or to prevent the "violat[ion]" of, the terms of ERISA or of an ERISA plan, as is required to permit suit under ERISA § 502(a)(3). In Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520 (11th Cir. 1987), where an employer attempted to invoke § 502(a)(3) to obtain a declaratory judgment that its reductions in retiree health benefits did not violate ERISA, the Eleventh Circuit held that such an action was not one for "enforcement" of plan terms or of ERISA, because "enforcement" of plan terms "means an action to compel someone to do something or not to do something . . . that the plan requires be done or not done," id. at 1523, whereas a "defensive" action by a company that wishes to avoid making certain payments to plan participants is not an action to "enforce" the plan that may be brought under § 502(a)(3). Id. See also Massey Ferguson v. Gurley, 51 F.3d 102, 104 (7th Cir. 1995) (plan fiduciary's action in seeking a declaratory judgment of its non-liability to a plan participant was not a suit under § 502(a)(3) to "enforce" the terms of the plan); Transamerica Occidental Life Ins. Co. v. DiGregorio, 811 F.2d 1249 (9th Cir. 1987) (declaratory judgment action by an insurer seeking a clarification as to whether its policy required payment of certain benefits was not a suit to "enforce" the terms of the plan).

Nor does DuPont's request for relief barring arbitration of the unions' grievances constitute a cognizable fiduciary claim under § 502(a)(3). Arbitration – or a refusal to arbitrate – constitutes action by DuPont in its capacity as an employer and a party to a collective bargaining agreement, not in its capacity as fiduciary of an ERISA plan. And DuPont's statement that it needs a declaration of its "right" not to arbitrate the unions' grievances because of the risk that it will otherwise "expend substantial time and expense arbitrating benefit eligibility determinations," Complaint ¶ 66, reveals that this relief would benefit only DuPont, not the participants and beneficiaries of its ERISA plans. ERISA does not give a plan sponsor standing to bring claims "relat[ed] solely to its own injuries, and not to its fiduciary responsibilities to the plan or to the plan's participants and beneficiaries." Sonoco Prod. Co. v. Physicians Health Plan, Inc., 338 F.3d 366, 373 (4th Cir. 2003). Thus, in NGS American, supra, the Sixth Circuit rejected an attempt by an ERISA fiduciary to use § 502(a)(3) to obtain a declaratory judgment that a participant could not sue it in state court. The court held that a fiduciary's suit "questioning the permissibility of a private cause of action" was not an action to "enforce" ERISA terms." 218 F.3d at 529. See also Denny's, Inc. v. Cake, 364 F.3d 521, 527 (4th Cir. 2004) (agreeing with the NGS court's analysis). So too here, DuPont's effort to block the grievances that have been filed against it is not the action of a fiduciary seeking to enforce ERISA or the terms of an ERISA plan, and the action is not permitted by § 502(a)(3).

IV. COUNT II OF THE COMPLAINT MUST BE DISMISSED BECAUSE FEDERAL LABOR LAW DOES NOT PERMIT THE COURT TO DECIDE THE MERITS OF THE UNIONS' GRIEVANCES

In Count II of its complaint, DuPont asks this Court to decide the merits of the grievances the three local unions have filed, by declaring that DuPont's benefit cuts did not violate the CBAs. Complaint ¶¶ 68-69. Little discussion is needed to show that even on DuPont's theory of the case, this Court may not entertain that request.

Under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, if a dispute under a CBA is subject to arbitration, a court may not rule on the merits of the dispute. See, e.g., AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649-50 (1986); Steelworkers v. American Mfg. Co., 363 U.S, 504 (1960).

In its complaint, DuPont alleges that this dispute is not subject to arbitration because it must be "resolved exclusively through the procedures set forth in th[e] plans, and/or in a civil enforcement action under Section 502 of ERISA." Complaint ¶¶ 66. See supra at ___. Given DuPont's allegations, the case admits of only two possibilities. Either DuPont is correct in the contention just stated,[5] in which case the issues presented by the grievances must be resolved through the procedures allegedly provided in the plans or through an ERISA enforcement action; or DuPont is incorrect, in which case the grievances must be resolved through arbitration. In neither case would the Court have the authority to decide the merits of the grievances. Count II therefore must be dismissed for lack of jurisdiction and failure to state a claim.

[5] We strongly disagree with DuPont's contention in this regard, but that question is not before the Court at this time.

Conclusion

For the foregoing reasons, the complaint should be dismissed in its entirety.

Respectfully submitted,

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DATED: March ___, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

E.I. DUPONT DE NEMOURS AND COMPANY, Plaintiff, v. UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, Defendant.	)	Civil Action No. 3:07-cv-0103-HEH

DEFENDANTS' REPLY
<u>IN SUPPORT OF MOTION TO DISMISS</u>

This litigation concerns grievances filed by Local Unions in the States of New York, Delaware and New Jersey under separate collective bargaining agreements ("CBAs") each of which applies only to a facility in one of those states. Contrary to what one might think from reading Plaintiff's Opposition to Defendant's Motion to Dismiss ("DuPont Opp."), this suit is <u>not</u> about whether plaintiff E.I. du Pont de Nemours and Company ("DuPont") has violated the terms of any DuPont benefit plan, nor is it about whether DuPont has violated ERISA. The only dispute is whether DuPont has breached one or more of the Local Unions' CBAs by unilaterally modifying benefits and refusing to arbitrate the grievances.

In attempting to come up with a justification for bringing those out-of-state collective bargaining disputes to this Court – and for doing so in the absence of the three Local Unions whose grievances are at issue – DuPont manufactures an artificial controversy. Conspicuously ignoring what the grievances actually allege, see infra at 6 and n.5, DuPont prefers to argue from what it "considers" the grievances to involve, Complaint ¶¶ 46, 49, 52, and DuPont pretends that the three grievances really are about whether DuPont is abiding by the terms of the company's benefit plans and whether there has been a violation of ERISA.

DuPont's attempts to manufacture an issue it would like to address, rather than the disputes that actually exist, should be rejected. This artificial suit should be dismissed because it constitutes an improper use of the declaratory judgment procedure, see infra at 2-7, and because the Local Unions, who cannot be joined, are necessary parties, see infra at 8-14. In addition, the Court lacks jurisdiction over DuPont's purported ERISA claims, see infra at 14-16, and over DuPont's request for a declaration that it did not violate the CBAs, see infra at 16-17.

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE DUPONT IS IMPROPERLY SEEKING TO USE THE DECLARATORY JUDGMENT PROCEDURE TO DENY THE LOCAL UNIONS THEIR RIGHT TO CHOOSE THE FORUM IN WHICH TO LITIGATE THEIR CLAIMS AGAINST DUPONT

The only party that is alleged to have violated any law or to have breached any agreement in connection with this matter is DuPont; each Local Union claims that DuPont breached its CBA with that local by making unilateral benefit changes and refusing to arbitrate the issues under the CBAs. That is the only unlawful conduct that any entity involved in this matter has alleged; DuPont's complaint, although it is full of talk of DuPont's "rights," nowhere alleges that the Local Unions or the defendant international union ("USW") have engaged in any unlawful conduct.

Faced with that reality, DuPont is at pains to argue that an alleged wrongdoer may file a declaratory judgment action to seek an adjudication of its non-liability, or of its right not to have its liability determined through arbitration. See DuPont Opp. at 6-11. Where such a declaratory judgment action does not operate to block the natural plaintiff's choice of forum, it is indeed the case that the natural defendant (that is to say, the alleged wrongdoer) ordinarily may seek such declaratory relief.[1] That was the situation in virtually every case DuPont cites, as well as in the litigation DuPont has brought against a Virginia independent union, the Ampthill Rayon Workers ("ARWI").

But the matter is very different "where the declaratory judgment action was filed [by the natural defendant] in apparent anticipation of a suit in another forum." Yoder v. Heinold Commodities, Inc., 630 F. Supp. 756, 760 (E.D. Va. 1986) (emphasis added). Such a suit raises special concerns because it undercuts "the natural plaintiff's choice of forum and law [which] will be disturbed only in exceptional circumstances." BASF Corp. v. Symington, 50 F.3d 555, 558-59 (8th Cir. 1995). Although DuPont suggests that there is no principle that such preemptive declaratory judgment suits are disfavored, see DuPont Opp. at 11-12 and n.7 (attempting to distinguish each case cited by the USW on its facts), there is in fact "a presumption," UAW v. Dana Corp., No. 99-7603, 1999 U.S. Dist. LEXIS 22525, at *18 (N.D. Ohio Dec. 6, 1999), that "a first filed declaratory judgment action should be dismissed or stayed in favor of the substantive suit." Id. See cases cited in Defendant's Brief in Support of Motion to Dismiss ("Def. Br.") at 6-10. See also 12 Moore's Federal Practice § 57.42[3] (3d ed. 2006) (where a declaratory judgment action "was brought in anticipation of the coercive suit for the

[1] We hasten to add, however, that where – as is the case here – such an action would be contrary to the procedural scheme of a particular federal statue, see infra at 14-16, or would present matters that are reserved for another forum, see infra at 16-17, a suit for declaratory judgment will not lie.

purpose of gaining the home court advantage, the coercive suit is usually given precedence");[2] Lateena Girls, L.L.C. v. Latina Media Ventures, L.L.C., No. SA-06-CA-217-RF, 2006 WL 2547884, at *4 (W.D. Tex. Aug. 9, 2006) ("[t]he Court generally will not allow a party to secure its preferred forum by filing an action for a declaratory judgment when it has notice that another party intends to file suit involving the same issues in a different forum"); First Nationwide Mortgage Corp. v. FISI Madison, L.L.C., 219 F. Supp. 2d 669, 673 (D. Md. 2002) ("[declaratory judgment] actions are disfavored . . .when they are filed in anticipation of another lawsuit, in order to obtain a more favorable forum or procedural posture").

Attempting to fit within that rule even while failing to acknowledge that the rule exists, DuPont asserts that it is the "natural plaintiff" because it wishes to "clarify [its] rights and responsibilities." DuPont Opp. at 11. That, however, does not make DuPont the "natural plaintiff." The natural plaintiff is the party that claims that the other party has injured it in violation of law. See, e.g., BASF Corp., 50 F.3d at 557 ("Symington claims injury by BASF, and is therefore the natural plaintiff"); Crown Cork & Seal Co., Inc. v. United Steelworkers of Am., No. 03-1381, 2004 U.S. Dist. LEXIS 760, at *9 (W.D. Pa. Jan. 9, 2004) (employer's declaratory judgment action dismissed because "the proper plaintiffs in an action to determine whether the retirees' retirement benefits can be unilaterally changed . . . are the retirees and their Union"); Dana Corp., 1999 U.S. Dist. LEXIS at *19 (grievant, not employer, was the "true plaintiff"). Whatever interests DuPont may have in selecting the forum in which its refusal to

2 The treatise notes that this is particularly true "[w]hen the case has limited connection to the declaratory relief forum." Id.

arbitrate its alleged contract violations will be adjudicated, those interests are not the interests of a natural plaintiff, but of a natural defendant.[3]

DuPont argues that its attempt to force all litigation over its benefit cuts into this Court should not be characterized as forum shopping, because ARWI is located in this district and DuPont, having sued ARWI here, wishes "to ensure that the entirety of the dispute relating to the August 2006 announcement is resolved in one forum, to conserve resources and avoid the risk of possible inconsistent outcomes." DuPont Opp. at 13. But, whether DuPont is seeking a "more favorable forum," First Nationwide Mortgage Corp., 219 F. Supp. 2d at 673, or simply a more favorable "procedural posture," id., DuPont's acknowledgement that it brought this action to "conserve [its] resources" and to secure other benefits, DuPont Opp. at 13, is an admission that DuPont filed this action in the hope that it could thereby avoid litigating these contract disputes in the jurisdictions where the Local Unions would choose to sue. That decision, like any forum-shopping decision, may benefit DuPont, but it surely does not benefit the New York, New Jersey

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3 Furthermore, the "dispute" as to which DuPont attempts to portray itself as the "natural plaintiff" is not "the true dispute between the parties." Nutrition & Fitness, Inc. v. Blue Stuff, Inc., 264 F. Supp. 2d 357, 361 (W.D.N.C. 2003). The "true dispute" – indeed, the only matter as to which DuPont and the unions actually disagree – is whether DuPont has breached any or all of the Local Unions' CBAs by unilaterally changing benefits and refusing to arbitrate. DuPont, which has avoided even acknowledging what the grievances actually allege (compare Complaint ¶¶ 45-52 with Exhs. 4-6 to the Declaration of Richard J. Brean ("Brean Decl."), "did not bring the true dispute between the parties . . . into court." Nutrition & Fitness, 264 F. Supp. 2d at 361. This is a further reason why the Court should not entertain DuPont's declaratory judgment action. Id.

In effect, DuPont is seeking to "determin[e] the validity of a defense which [it has asserted] in the action[s] against it" that have been filed in New York, New Jersey and Delaware, Aetna Cas. & Sur. Co. v. Quarles, 92 F.2d 321, 325 (4th Cir. 1937); and DuPont's defense "could be equally well determined" – indeed, it could be better determined – "in th[ose] action[s]," id. Of course, the validity of DuPont's defense to the Local Unions' demands for arbitration is not before the Court for decision at this time. But we note in passing that DuPont's position – namely, that the parties to the CBAs intended to give DuPont, acting as administrator of its benefit plans, the final authority to decide whether it has committed a violation of a CBA, see DuPont Opp. at 9-10 – is extraordinarily implausible on its face.

and Delaware Local Unions whose grievances DuPont seeks to pretermit in this Virginia litigation.

Furthermore, although DuPont purports to be vindicating an interest in "uniform[ity]," DuPont Opp. at 8, DuPont overlooks the fact that the respective CBAs and grievances simply are not uniform. Indeed, both in its complaint and in its brief, DuPont points to facts unique to individual locals – specifically, DuPont emphasizes that one Local Union's CBA mentions certain benefit programs while another Local Union's CBA mentions different programs – and DuPont asserts that those differences affect the arbitrability of the respective grievances. See Complaint ¶¶ 61, 62; DuPont Opp. at 22. Nor is this the only respect in which the CBAs and the grievances do not lend themselves to the "uniformity" DuPont seeks to impose on the Local Unions' claims. For example, only the New York local, not the New Jersey and Delaware locals, has asserted in its grievance that DuPont has violated a notice provision in that local's CBA. Compare Exh. 6 with Exhs. 4 and 5.[4] And, although each of the three grievances relies on CBA provisions that limit the circumstances in which benefits may be "withdrawn from the employees" by DuPont,[5] the language on that subject in the various CBAs is not identical. Compare Exh. 1, p.12 (stating that a plan or practice cannot be withdrawn if it "is in effect at any other PLANT within the COMPANY") with Exh. 2, p. 46 and Exh. 3 p.11 (stating that a plan or practice cannot be withdrawn if it "is in effect within the COMPANY").

DuPont thus recognizes "uniformity" as an interest to be pursued only where it suits DuPont's own purposes. Had DuPont in fact been confronted with a situation in which it would

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4 Unless otherwise specified, all references to "Exh. __" are to the exhibits to the Brean Declaration filed with the motion to dismiss.

5 DuPont's complaint, in attempting to portray the grievances as challenging ERISA eligibility determinations, conspicuously fails to acknowledge that the grievances invoke these CBA provisions, which are nowhere quoted in DuPont's papers. Compare Complaint ¶¶ 45-52 with Exhs. 4-6.

be necessary and proper that all litigation concerning the benefits reductions should be conducted in this district, DuPont would not have needed to file a preemptive strike against the USW in order to attempt to force that result; DuPont could simply have moved to transfer all litigation concerning the benefit reductions to this Court. Apparently recognizing that it would lack a basis for seeking such a transfer, DuPont has taken matters into its own hands by forcing all litigation into this Court through the filing of a complaint that seeks to determine the arbitrability (and indeed the merits, see infra at 16-17) of the New York, New Jersey and Delaware grievances even though the Local Unions that filed those grievances do not conduct any business in this district and have filed litigation to enforce their rights in the districts where they do conduct business.[6]

For these reasons, DuPont's suit should be dismissed as an improper attempt to deprive the New York, New Jersey and Delaware Local Unions of the right to choose the forums in which to litigate their claims against DuPont.

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6 DuPont's reliance on Rexam v. United Steelworkers of America, No. Civ. 03-2998, 2003 WL 22477858 (D. Minn. Oct. 30, 2003), see DuPont Opp. at 8, is misplaced. In that case, the court found that the affected USW retirees whose benefits were at issue had as much of a connection to the forum in which the company had filed its declaratory judgment action (where one of the USW-represented facilities was located) as to any other forum. See 2003 WL 22477858 at *3. Nor was there any contention in Rexam that the company's choice of forum had operated to exclude from the litigation local unions whose rights were at issue and whose CBAs and grievances varied from each other. Finally, and perhaps most important, in Rexam the company did not file a declaratory judgment action until six months had elapsed from its last communication with the USW, and the court concluded in those circumstances that the company had not been aware that the union was about to file suit. See id. at *5. Here, in contrast, the unions gave DuPont unequivocal notice of their intention to file suit, and DuPont then promptly raced into court. See Def. Br. at 4-5. DuPont does not deny that it filed this defensive suit in anticipation that the unions were about to file coercive actions to compel arbitration of their grievances. See DuPont Opp. at 10.

II. THE LOCAL UNIONS ARE INDISPENSABLE PARTIES BECAUSE THE CBAS AND GRIEVANCES AT ISSUE ARE THEIRS, BECAUSE THEY HAVE DIFFERING INTERESTS WHICH CANNOT BE REPRESENTED SIMULTANEOUSLY BY THE USW, AND BECAUSE OF THE RISK OF INCONSISTENT OBLIGATIONS THAT WOULD RESULT FROM ALLOWING THIS SUIT TO CONTINUE

DuPont's effort to defeat the forum choices of the three Local Unions cannot be countenanced for another independent reason: the forum DuPont has selected is one in which the Local Unions are not even present. DuPont cannot join the Local Unions as parties, but they are necessary parties and the suit therefore must be dismissed.

A. The Local Unions are necessary parties because the subject matter of this litigation is the CBAs to which they are parties and the grievances they filed. DuPont's argument that the Local Unions need not be parties because the USW can represent their interests in this litigation is akin to an argument that, if an entity cannot itself be sued because it is not within the jurisdiction of the court, a plaintiff can simply sue the entity's attorney because that attorney is bound to represent the entity's interests. That is not the law.

1. Smith v. American Federation of Musicians, 46 F.R.D. 24 (S.D.N.Y. 1968), is instructive on this issue. In Smith, a union member sued an international union as a result of disciplinary action that had been taken against the member by a local union. The international agreed with the local's position and had in fact affirmed the local's action, see id. at 27; consequently, the court found that the international and the local "do, realistically speaking have a community of interest in this action." Id. Indeed, the court deemed it likely that if the local were joined, it would be represented by the same counsel as the international. Id. The court nevertheless held that the local union was a necessary party, because the underlying actions at

issue had been those of the local union, and a local union "should not be required to have its interests protected by the [international union] alone." Id.[7]

So too here. The grievances DuPont is asking this Court to bar were filed by three Local Unions, not by the USW, and for two of the three Local Unions, the CBA at issue is one to which only the Local Union, not the USW, is a party.[8] See Brean Decl. ¶¶ 2-6. Whatever may be the "community of interest," Id. at 27, between the USW and the Local Unions, the rights at stake are those of the Local Unions, and they are necessary parties. Smith, supra. See also Krulikowsky v. Metropolitan Dist. Council of Phila. & Vicinity, 270 F. Supp. 122 (E.D. Pa. 1967) (international union was necessary party to case to which local union was already a party, where a decision could affect the international's governing statutes).

As the Fourth Circuit held in the case on which DuPont principally relies, for purposes of Fed. R. Civ. P. 19(a)(2)(i), a litigant can serve as a proxy for an absent party only if the litigant has interests "identical" to that of the absentee. Ohio Valley Envtl. Coalition v. Bulen, 429 F.3d 493, 504 (4th Cir. 2005). The test is not simply whether the party that has been sued will assert a

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7 After finding that the local union was a necessary party, the Smith court noted that the local union could be properly served with process, and ordered it joined as a party. Later, the local union moved to dismiss the action against it on the ground that venue was improper. The court noted that the plaintiff would have no adequate remedy if the entire action were dismissed, because there was no court in which venue would be proper as to all three parties. The court weighed the competing interests and allowed the case to proceed without the local union. 47 F.R.D. 152, 155 (S.D.N.Y. 1969). No such weighing of interests would be required in this case, as it is undisputed that venue is proper as to all parties in the suits the Local Unions have filed in New York, New Jersey, and Delaware. Thus, dismissing this case would not deprive DuPont of the ability to make its arguments, because it could do so in those actions.

8 As the USW stated in its opening brief, the USW is a party to the Delaware CBA, along with DuPont and the Local Union at DuPont's Delaware plant. Defendant's Brief in Support of Motion to Dismiss at 3. However, only DuPont and the relevant Local Union are parties to the other two CBAs, and the USW is not a party to any of the grievances. Furthermore, even in the case of the Delaware local, the decision whether to pursue a grievance, and any decision to settle the grievance, is made by the Local Union, not by the USW. See Declaration of James Briggs (attached to this memorandum) ¶ 4-6.

position consistent with that of the absent party; the test is whether the interests of the party sued are identical to those of the absentee. Because the USW is not a party to the grievances at issue or to two of the CBAs, the USW's interests simply are not comparable to those of the Local Unions – any more than the fact that a party's attorney may be expected to advance positions on behalf of that party means that the attorney's interests are the same as the client's interests.

What is more, even the positions the USW would advance in this case could not fully serve – much less replicate "identical[ly]" – the interests of each of the Local Unions, for the simple reason that those interests are not the same for each Local Union. Although each Local Union has an interest in demonstrating that its grievance is arbitrable under its CBA, the CBAs and grievances differ in ways that might well lead the Local Unions to wish to make different arguments, both as to arbitrability and as to how DuPont's action violated its CBA. For example, DuPont itself has emphasized that the New York and Delaware CBAs do not mention the "Dental Assistance Plan" or the "Medical Care Assistance Plan," whereas the New Jersey CBA does mention both of those plans; and DuPont points to this difference as a reason why a declaration of nonarbitrability would be "particularly appropriate" with respect to the New York and Delaware grievances. See DuPont Opp. at 22. As we have noted, supra at 6, there are other differences as well in the grounds on which the grievances of each of the Local Unions are based and in the language of their respective CBAs. Whether the differences are significant or not is an issue as to which each of the Local Unions may well have different views and interests.

The Local Unions' interests may also differ as to settlement. Each Local Union has the authority to decide whether, and under what terms, it would settle its grievance. See Declaration of James Briggs ("Briggs Decl.") ¶¶ 4, 6 (attached to this memorandum). Depending on the preferences and demographics of the Local Unions' respective memberships and on each Local

Union's assessment of the strength of its own case, one or more of the Local Unions might be willing to settle its grievance while the others would not. Similarly, the Locals might have interests in settling on different terms.

As these examples demonstrate, the Local Unions' interests are not identical. Logically, then, the USW cannot have interests identical to those of each Local Union, and any position the USW might assert in this litigation, "as a practical matter," could certainly "impair or impede" the interests of one or more of the absent Local Unions. Fed. R. Civ. P. 19(a)(2)(i). For these reasons, the "identical interests" test of Ohio Valley Envtl. Coalition is not satisfied, and the Local Unions are necessary parties.

2. The mere fact that the USW is assisting the Local Unions with their grievances and that the USW suggested to DuPont that a meeting be held at which the USW and "all affected Local Unions" would be present, see Briggs Decl. ¶ 8 and Ex. 1 thereto, does not mean that the USW and the Local Unions have identical interests, or that the USW has the authority to determine the fate of the Local Unions' grievances. On the contrary, the meeting proposed by the USW—unlike this lawsuit—would have included each affected Local Union as a participant. That the USW is supporting and assisting the Local Unions with their claims does not make it unnecessary for the Local Unions to be parties, any more than a lawyer's support and assistance to a client would make it permissible to sue the lawyer rather than the client.

What is more, although DuPont has drawn the Court's attention to the USW's request for a joint meeting, see DuPont Opp. at 4 n.2, DuPont fails to inform the Court that DuPont rejected that request on grounds that are highly relevant here. Even though the USW was not suggesting that the various grievances be treated as one, but was merely suggesting a meeting among all affected entities, DuPont asserted that even such modest coordination would be improper, because, as DuPont put it:

> Our philosophy remains that union-management issues are local. Therefore, we believe they are best dealt with by knowledgeable union and management people at the local level.

Briggs Decl. ¶ 9 and Exhibit 2 thereto (emphasis added).

That letter gives the lie to DuPont's contention that its benefit reductions present a single uniform national issue and that the fate of the three Local Unions' grievances can properly be resolved by litigation to which only the USW and not the Local Unions is a party.

B. As set forth in the USW's opening brief, there is another reason why the Local Unions are necessary parties: permitting this suit to continue could result in "inconsistent obligations." Fed. R. Civ. P. 19(a)(2)(ii). Rule 19(a)(2) provides that an entity is a necessary party in either of two situations: where the entity's absence "may . . . as a practical matter impair or impede the person's ability to protect that interest," Rule 19(a)(2)(i), or where the entity's absence may "leave any of the persons already parties subject to a substantial risk of incurring . . . inconsistent obligations," Rule 19(a)(2)(ii). Even if DuPont could satisfy the "identical interests" standard of Ohio Valley Envtl. Coalition, which applies to the Rule 19(a)(2)(i) inquiry (and we have shown that it cannot), DuPont must also satisfy Rule 19(a)(2)(ii), which was not at issue in the Ohio Valley case (a case that involved a challenge to agency action rather than a dispute between private parties). See 429 F.3d at 504-05.

Each of the Local Unions has brought suit in the federal court in the district in which it (and the plant at which its members are employed) is located, to compel arbitration of its grievance. If those courts were to hold that DuPont is required to arbitrate one or more of the grievances, but this Court were to agree with DuPont's contention that all issues must be resolved exclusively through the plan procedures or through an ERISA suit by beneficiaries, a classic case of inconsistent obligations would arise. As the Fourth Circuit has stated, where "one court might compel arbitration" while another court, faced with a suit by absentees to the first suit, might reach the opposite conclusion about the same conflict, the potential for inconsistent obligations "weighs heavily" in favor of a finding that the absentees are necessary parties to the first suit. Owens-Illinois, Inc. v. Meade, 186 F.3d 435, 441 (4th Cir. 1999).

Of course, there could not be conflicting obligations if the Local Unions would be bound by a judgment in this litigation; but DuPont has not argued, and could not reasonably argue, that such would be the case. In order to be bound by a judgment against the USW, the Local Unions would have to be found to be in "privity" with the USW. But privity exists only where the non-party is "so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved." Martin v. American Bancorporation Ret. Plan, 407 F.3d 643, 651 (4th Cir. 2005) (quoting Jones v. S.E.C., 115 F.3d 1173, 1180 (4th Cir. 1997) (emphasis added).

Not only do the Local Unions have different interests which cannot all be represented simultaneously by the USW, as was demonstrated supra at 9-11, but by no means does the USW have the "same legal right in respect to the subject matter" of this suit as do the Local Unions. As discussed, the authority to make decisions about the grievances, including whether to file a grievance in the first instance, what positions to assert in the grievance, whether and how to demand arbitration, and whether to settle, lies entirely with the Local Unions, not with the USW. See Briggs Decl. ¶¶ 4-6. Although the USW does support and provide assistance to its local unions, it does not have the same legal rights in this dispute as they do. Indeed, having declared that the USW should not even be permitted to participate in a meeting with DuPont to discuss the

Local Unions' grievances because each grievance should be resolved by the "union . . . people at the local level," see supra at 12, DuPont cannot possibly maintain that the Local Unions' rights to arbitrate those grievances can properly be determined in litigation where only the USW, and not the Local Unions, is a party.

DuPont acknowledges that the Local Unions are "unavailab[le]" to be joined as parties to this suit," see DuPont Opp. at 17. This case must therefore be dismissed for failure to join a necessary party under Fed. R. Civ. P. 12(b)(7) and 19.

III. ERISA DOES NOT PROVIDE JURISDICTION FOR DUPONT'S SUIT

In response to the USW's argument that DuPont's suit must be dismissed to the extent that it purports to be based on ERISA, DuPont cites cases standing for unremarkable or irrelevant propositions, but it cannot cite any case holding that an employer or plan sponsor can bring suit under ERISA § 502(a)(3)(B) to seek a declaration that its actions in unilaterally amending an employee benefit plan did not violate a CBA.

DuPont makes a number of general assertions about ERISA actions which do not advance its cause. DuPont points out that employers who are also ERISA fiduciaries can bring certain types of ERISA suits in their capacity as fiduciaries, see, e.g., Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1466 (4th Cir. 1996) (employer was ERISA fiduciary "to the limited extent it exercised its discretionary responsibility 'to monitor appropriately' and remove the Plan Administrator and Plan Supervisor," and could bring ERISA claims relating to its fiduciary responsibility to conduct such monitoring), and that some actions taken by employers involve fiduciary rather than settlor functions, see, e.g., Sonoco Prods. Co. v. Physicians Health Plan Inc., 338 F.3d 366 (4th Cir. 2003) (acknowledging that some employer actions are those of a fiduciary, but holding that employer was not acting as fiduciary when it brought suit against insurer to protect its own interests rather than those of plan beneficiaries). However, none of this negates the well-established rule that an employer's decision to amend a benefit plan in order to cut benefits, as DuPont has done, is not a fiduciary function. See, e.g., Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996) ("[P]lan sponsors who alter the terms of [an ERISA] plan do not fall in the category of fiduciaries").[9]

DuPont also asserts that it is a fiduciary with respect to benefits determinations under its plans, see DuPont Opp. at 19, and DuPont cites cases holding that employers can seek declaratory judgments under ERISA when they would otherwise be subject to ERISA suits by those beneficiaries, id. at 21. See, e.g., Transamerica Occidental Life Ins. Co. v. DiGregorio, 811 F.2d 1249, 1253 (9th Cir. 1987); Rexam v. United Steelworkers of Am., 2003 WL 22477858, at *2 (D. Minn. Oct. 30, 2003). These cases represent one side of a circuit split as to which the Fourth Circuit has not yet taken a position.[10] But in any event, the cases DuPont cites are inapposite because the Local Unions are seeking to enforce the terms of their CBAs under

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9 DuPont fancifully argues that it can bring this suit as an ERISA fiduciary because it has a fiduciary duty to communicate truthfully with participants about their benefits under the plans. See DuPont Opp. at 19-20. Of course, the dispute between the Local Unions and DuPont is not about the truthfulness of any of DuPont's communications; it is about whether DuPont's unilateral cuts to its benefit plans violate the CBAs and whether the Local Unions' grievances are arbitrable. In any case, all of the decisions DuPont cites on this topic involve suits brought by plan participants against employers who have made misrepresentations about the benefits available to them. See, e.g., Estate of Becker v. Eastman Kodak Co., 120 F.3d 5 (2d Cir. 1997). None of these cases holds that an employer may seek a declaratory judgment about whether it was justified in cutting plan benefits under the theory that otherwise it will not know what to tell participants about their benefits.

10 For the other side, see, e.g., Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520 (11th Cir. 1987) (employer could not obtain a declaratory judgment that its reductions in benefits did not violate ERISA); Massey Ferguson Div. of Varity Corp. v. Gurley, 51 F.3d 102, 104 (7th Cir. 1995) (Plan Administrator cannot bring suit under ERISA § 502(a)(3) for declaratory judgment that a participant is not entitled to a disability pension; limiting Winstead v. J.C. Penney Co., 933 F.2d 576 (7th Cir. 1991), cited in DuPont Opp. at 8, to cases involving coordination of benefits between two or more plans).

Section 301 of the Labor Management Relations Act; they are not seeking to enforce the terms of a plan under ERISA.[11] Consequently, even the circuits that allow employers to bring declaratory judgment actions in certain circumstances to determine the merits of an ERISA claim that could otherwise be brought by participants would not recognize jurisdiction under ERISA for an employer suit seeking a declaration with respect to claims that are brought against it, not under ERISA, but under a CBA.

IV. COUNT II OF THE COMPLAINT MUST BE DISMISSED BECAUSE THE COURT LACKS JURISDICTION TO GRANT DECLARATORY RELIEF DETERMINING WHETHER DUPONT'S BENEFIT CUTS VIOLATE THE LOCAL UNIONS' CBAS

DuPont asserts that if the Court determines that the Local Unions' grievances (which DuPont incorrectly characterizes as "the USW's grievances") are not arbitrable, "the bar against a judicial determination of the merits of the underlying breach of contract claim falls away as a matter of law [and] the Court is then free to . . . determine whether DuPont violated the underlying collective bargaining agreements." DuPont Opp. at 23.

DuPont's argument misses the point. In any case in which arbitrability is at issue, the ultimate question for the Court is to determine the "method for the adjustment of their disputes" to which "the parties have agreed." Groves v. Ring Screw Works, 498 U.S. 168, 173-74 (1990). To be sure, where a court finds that the parties to a CBA that contains an arbitration clause

11 In its footnote 13, DuPont grudgingly acknowledges that the Local Unions' grievances actually involve "DuPont's authority to implement the amendments, rather than benefit decisions made under the amendments," but asserts that the "decision to implement the amendment is inextricably intertwined with the question of benefit eligibility determinations." DuPont Opp. at 23 n.13. However, ERISA certainly draws a distinction between an employer's decision to amend a benefit plan and a Plan Administrator's application of the terms of a plan to individual claims for benefits. See Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996) (holding that employers do not act as fiduciaries when they "adopt, modify, or terminate welfare plans," but do act as fiduciaries in the "exercise of discretionary authority or control over plan management or administration.")

intended that a particular matter should be excluded from arbitration, the court often will find that the parties' intention (explicit or implicit) was to permit the matter to be resolved through a suit for breach of contract. See id. at 174-76. But, under the allegations of DuPont's complaint, that is not what would flow from adopting DuPont's arguments against arbitrability in this case. DuPont alleges that the disputes the Local Unions are seeking to resolve through arbitration are not arbitrable because the disputes "are to be resolved exclusively through the procedures set forth in [DuPont's] plans, and/or in a civil enforcement action under Section 502 of ERISA." Complaint ¶ 66. If DuPont were to prevail on its claim, the result would not be to confer jurisdiction on the Court to determine whether DuPont did or did not violate the CBAs; rather, it would be to require that all aspects of this matter be resolved through the plan procedures or through an enforcement action by beneficiaries under Section 502 of ERISA.

Thus, it is not we who have "misstate[d] the nature of the relief sought by DuPont," DuPont Opp. at 22; it is DuPont that has failed to acknowledge that its own allegations contradict and foreclose the relief it requests insofar as that relief would take the form of a declaration by the Court as to whether DuPont has violated the Local Unions' CBAs.

DuPont's Count II should therefore be dismissed.

Conclusion

For the reasons stated in this brief and in Defendant's opening Brief in Support of Motion to Dismiss, the Motion to Dismiss should be granted and the Complaint should be dismissed in its entirety.

Respectfully submitted,

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Dated: April 26, 2007

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that a copy of the foregoing Defendant's Reply in Support of Motion to Dismiss was mailed to the following this 26th day of April, 2007:

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

E.I. DUPONT DE NEMOURS & COMPANY, Plaintiff, v. UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE INTERNATIONAL UNION, Defendant.	No. 07 CV 0103 (HEH)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Introduction

This case is part of a larger disagreement between Plaintiff E.I. du Pont de Nemours & Company ("DuPont") and labor unions representing DuPont employees at numerous facilities around the country. The dispute arises from DuPont's announcement, in August of last year, of various prospective changes to certain employee benefit plans that apply to eligible union and non-union DuPont employees nationwide. Certain of these benefit plans are regulated by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA").

The motion to dismiss filed by Defendant United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") misapprehends both the context of the dispute and the nature of the relief sought by DuPont in this case. As we explain below, DuPont, both in its role as a fiduciary of the various benefit plans, and as an employer subject to a variety of legal challenges regarding the changes announced in August, is perfectly entitled to seek resolution of the entire dispute in one forum. DuPont's decision to bring this action is particularly appropriate in light of other litigation filed by DuPont in this district, more than a month earlier, raising identical claims. There is no serious issue regarding the joinder of necessary parties; the USW and its local affiliates share identical interests such that the USW can properly represent the interests of the local unions in this litigation. DuPont seeks declaratory and injunctive relief it has standing to seek and which this Court is fully empowered to grant. Dismissal of this action would result in piecemeal litigation of identical legal issues and would be contrary to settled principles of judicial economy. Accordingly, the USW's motion to dismiss should be denied.

Factual Background

DuPont employs more than 30,000 employees nationwide, of which more than 4,500 are unionized. *See* Complaint, ¶ 5. The USW, either through or in conjunction with its local affiliates, is the exclusive collective bargaining representative for hourly production, maintenance, service and plant technical employees employed at five sites operated by DuPont. *Id.*, ¶ 6. These include DuPont's Edgemoor plant in Edge Moor, Delaware, its Chambersworks plant in Deepwater, New Jersey, and a chemical manufacturing plant in Niagara Falls, New York. *Id.* Another union, the Ampthill Rayon Workers, Inc. ("ARWI"), which is unaffiliated with the USW, represents employees at DuPont's Spruance Fiber Plant located in Ampthill, Virginia. *See id.*, ¶ 53.

DuPont maintains and makes available to eligible employees a number of benefit plans, including a Savings and Investment Plan, pension and retirement plans, life insurance, medical care assistance, dental care assistance, and a vacation buying plan. *See id.*, ¶¶ 15-42. DuPont, either directly or through DuPont employees or committees of such employees, is also a fiduciary of each of these ERISA benefit plans. *Id.*, ¶ 5. Eligible employees represented by DuPont's various labor unions may participate in these plans, according to the terms of collective bargaining agreements negotiated between DuPont and the unions.

On August 28, 2006, DuPont announced, to all of its U.S. employees, a number of prospective changes regarding eligibility for benefits under these benefit plans, some of which applied to current employees and some of which applied only to employees hired after December 31, 2006. *See id*, ¶¶ 20, 25, 27, 31,35, 39, 44. Most of these changes affected benefit plans regulated by ERISA and were effectuated through amendments to the plan made by the plan sponsors for the various plans.

ARWI filed a grievance over the benefit eligibility issues referenced in the August 28 announcement. DuPont denied the grievance and ARWI demanded arbitration. DuPont refused to arbitrate the grievance as presented. DuPont then filed suit against ARWI in this Court on January 24, 2007. *See* First Amended Complaint, Count II, *E.I. DuPont de Nemours v. Ampthill Rayon Workers, Inc.*, Case No. 3:07CV52 (E.D. Va.), ¶ 41 ("ARWI action").[1] In the ARWI action, DuPont seeks declaratory and injunctive relief, contending that ARWI's grievance is not arbitrable because it involves disputes over eligibility issues under the benefit plans that are affirmatively excluded from the arbitration process and subject to resolution exclusively through dispute resolution procedures established in the various benefit plans and/or through the civil enforcement mechanisms of ERISA.

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1 DuPont refers to and relies on this document in its Complaint, and it is therefore proper for this Court to consider, to the extent necessary, when ruling on USW's motion to dismiss under Rule 12(b)(6). *Phillips v. LCI Intern., Inc.*, 190 F.3d 609, 618 (4th Cir. 1999).

The USW followed the lead of ARWI. The USW and/or certain of its local affiliates filed grievances challenging the August 28 announcement, claiming that it violated the collective bargaining agreements in effect at those locations.[2] *See* Brean Decl., Exhs. 4-6. These grievances, like the ARWI grievance, raise similar ERISA benefit eligibility issues arising from the August 28 announcement and are virtually identical. *See* Brean Decl., Exhs. 4-6; Complaint, ¶¶ 46, 49, 52. The USW and/or its local affiliates, like ARWI, demanded arbitration of these grievances. *See id.* On February 8, 2007, more than two weeks after DuPont filed the ARWI action, the USW, through its Senior Associate General Counsel, threatened to file suit to compel arbitration of the Edgemoor and Chambersworks grievances. *Id.*, ¶¶ 47, 50; USW Brief at 4; Brean Decl., Exhs. 10-11. Thereafter, DuPont filed the Complaint in this case, seeking declaratory and injunctive relief, including an order that the grievances that the USW or its local affiliates filed related to the ERISA plan amendments are not arbitrable *Id.*, ¶¶ 63-65. The Complaint also seeks a declaration that DuPont's actions in amending the ERISA plans do not violate the applicable collective bargaining agreements. *Id.*, ¶¶ 67-69. DuPont sought leave to amend the complaint in the ARWI action on the same day to seek this latter aspect of declaratory relief.[3]

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2 Prior to filing these grievances, Kenneth O. Test, USW's DuPont Council Chairman, sought to arrange a meeting with DuPont, which would be attended by representatives from the International and local union affiliates at all six locations represented by the USW. *See* Huggett Decl., Exh. 5.

3 Shortly after DuPont initiated this action, three lawsuits were filed against the company in separate federal courts relating to the August 28 announcement – one in New York by a USW local affiliate, one in Delaware by both the USW and one of its local affiliates, and one in New Jersey by a USW local affiliate. DuPont has been served with process in the New York and Delaware actions, but not the New Jersey action. *See* Huggett Decl. at ¶ 5.

Because this Complaint involves the same conduct, raises the same legal issues, and seeks the exact same relief as the Amended Complaint in the ARWI action, DuPont designated this case as related to the ARWI action. At the April 5, 2007 pretrial conference in the ARWI action, DuPont advised the Court that it intends to move to consolidate the two cases. To that end, DuPont has filed this day a motion to consolidate the two cases.

Unions at various DuPont facilities have also filed a number of unfair labor practice charges against DuPont arising from the August 28 announcement. Specifically, prior to the time DuPont filed the Complaint in this matter, the USW and/or its local affiliates filed four separate unfair labor practice charges involving the Chambersworks, Edgemoor, Yerkes and Niagara Falls facilities. *See* Huggett Decl., Exhs. 3-6. Since the Complaint was filed, the USW and/or its local affiliates has filed an additional unfair labor practice charge with NLRB Region 9 in Cincinnati, involving DuPont's Louisville facility. *See id.*, Exh. 7. DuPont has also received an unfair labor practice charge filed with NLRB Region 5 in Baltimore by ARWI. *Id.*, Exh. 8. Each of these charges challenges DuPont's right under the various collective bargaining agreements and federal law to make the changes the company announced in August 2006. To the extent the charges challenge DuPont's rights under the collective bargaining agreements, they raise the same legal issues as presented in both this case and in the ARWI action.

Legal Standards

The USW has moved to dismiss this action under Rule 12(b)(1), for lack of subject matter jurisdiction, Rule 12(b)(6) for failure to state a claim on which relief can be granted, and Rule 12(b)(7) for failure to join necessary parties. The standards for evaluating such motions are well established.

Upon a motion brought pursuant to Rule 12(b)(1), the burden is on the plaintiff to prove the existence of subject matter jurisdiction, and the court may consider evidence outside the pleadings without converting the motion into one for summary judgment. *Evans v. B.F. Perkins Co., a Div. of Standex Intern. Corp.*, 166 F.3d 642, 647 (4th Cir. 1999). "The district court should grant the Rule 12(b)(1) motion to dismiss 'only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.'" *Id.* (quoting *Richmond, Fredericksburg & Potomac R. Co. v. United States,* 945 F.2d 765, 768 (4th Cir. 1991)).

When considering a motion to dismiss under Rule 12(b)(6), the court must presume as true all the well-pleaded allegations in the complaint and must draw all inferences in favor of the plaintiff. *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 229 (4th Cir. 2004). "[D]ismissal is inappropriate 'unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.'" *Id.* (quoting *Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1134 n.4 (4th Cir. 1993)).

In determining, under Rules 12(b)(7) and Rule 19(a)(1), whether an absent party should be joined or whether a case must be dismissed if an indispensable absent party cannot be joined, the court may consider material outside of the pleadings without converting the motion into one for summary judgment. *See English v. Cowell*, 10 F.3d 434 (7th Cir. 1993).

Argument

I. DuPont Properly Instituted This Action When Faced With A Demand To Arbitrate An Unarbitrable Grievance.

In its brief in support of its motion to dismiss ("USW Brief"), the USW invites this court to decline to exercise jurisdiction over this action, asserting that DuPont improperly filed a preemptive suit and deprived the local unions of the opportunity to select the forum in which to litigate this dispute. USW Brief at 2. The USW is incorrect; the timing of this case provides no basis for dismissal. "[T]he discretion to grant or refuse declaratory relief is a judicial discretion, and must find its basis in good reason." *Aetna Cas. & Surety Co. v. Quarles*, 92 F.2d 321, 324 (4th Cir. 1997) (internal quotation omitted). Good reason to decline to exercise jurisdiction does not exist in this case.

DuPont initiated litigation against ARWI on January 24, 2007, when it became clear that the company disagreed with that union over the proper procedure for resolving the dispute underlying the ARWI grievance. Undisputedly, this Court was the proper venue for that lawsuit, as the Spruance facility is located within this judicial district, and personal jurisdiction over ARWI is available here. *See* ARWI Complaint ¶ 8. At the time DuPont filed the ARWI action, the company was aware of the other grievances and unfair labor practice charges referenced above. DuPont decided to seek prompt resolution of its rights and obligations in this dispute. DuPont has two separate and legitimate interests in filing the ARWI action, which make DuPont the natural plaintiff in that case.

First, as a fiduciary of the various benefit plans regulated by ERISA, DuPont is explicitly entitled to bring an action to enforce the terms of the plans. *See* 29 U.S.C. § 1132(a)(3)(B)(ii). This right encompasses the right to seek a declaratory judgment as to the meaning of the terms of the plan, as well as the fiduciary's rights and obligations under plan terms. *See Bd. of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139 (2d Cir. 1997) (court has jurisdiction under ERISA Section 502(a)(3)(B) over plan administrator's request for declaratory judgment that it need not comply with participant's request for plan actuarial reports under ERISA Section 104(b)(4)); *Devlin Graphic Indus. Inc. Pension Plan v. Lewis*, No. 00 Civ. 6665LTSMHD, 2001 WL 310626 at *8 (S.D.N.Y. March 30, 2001) (federal court has exclusive jurisdiction under Section 502(a)(3)(B) to issue a declaratory judgment regarding whether a state court order improperly requires a fiduciary to act in a manner that violates ERISA and/or plan provisions); *Winstead v. J.C. Penney Co., Inc.*, 933 F.2d 576 (7th Cir. 1991) (ERISA Section 502(a)(3)(B) provides court with jurisdiction to grant declaratory relief sought by plan fiduciary to resolve coordination of benefits dispute between two health plans). The decisions are all consistent with the purpose underlying the Declaratory Judgment Act – to allow parties to a dispute to obtain a declaration regarding their respective rights and obligations before losses are sustained. *Winstead*, 933 F.2d at 578; *Rexam v. United Steelworkers of Am.*, No. Civ. 03-2998, 2003 WL 22477858, at *3 (D. Minn. Oct. 30, 2003) (fiduciary properly brought declaratory judgment action where it "desire[d] clarification about its ability to amend healthcare plans since several retirees have filed individual grievances" and where "[t]hese proceedings have been repetitious and costly, and there is a likelihood of continued similar litigation.").

DuPont is in a similar position to the plan fiduciaries in those cases. The benefit plans at issue here cover 30,000 DuPont employees working across the country. As the fiduciary of these plans, DuPont seeks clarification, in the wake of these legal challenges, to insure that the company continues to follow the terms of the plan. DuPont is obligated under ERISA to follow the terms of these benefit plans on a uniform basis. DuPont is understandably concerned about the prospects of inconsistent outcomes resulting from the various legal proceedings described herein. If, for example, one of the unions succeeds in its claim that DuPont does not have the right to make the changes announced on August 28, DuPont will face exposure for not having administered the plan according to its terms, an exposure that could extend to thousands of other plan participants. DuPont has an undeniably legitimate interest in maintaining "uniform nationwide administration" of its ERISA plans. *Retail Indus. Leaders Ass'n v. Felder*, 475 F.3d 180, 183 (4th Cir. 2007). In these circumstances, "simple prudence dictated" DuPont's decision to seek declaratory and injunctive relief from this Court in the ARWI matter. *Winstead,* 933 F.2d at 578. And, as we explain below, these same considerations justify DuPont's decision to bring this action against the USW, in order to have the entire dispute resolved in one forum.

Second, DuPont has a separate and legitimate interest in seeking a declaratory judgment regarding the arbitrability of the grievance filed by ARWI arising out of the August 28 announcement.[4] Arbitration is a matter of contract, and "the question of arbitrability -- whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance -- is undeniably an issue for judicial determination." *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986). Parties to a contract, including a collective bargaining agreement, can agree to exclude a particular subject from the scope of an arbitration clause. *See, e.g., Int'l Assoc. of Machinists & Aerospace Workers, Progressive Lodge No. 1000 v. Gen. Elec. Co.*, 865 F.2d 902, 904-06 (7th Cir. 1989) (employer had no duty to arbitrate grievances excluded from contractual arbitration provision); *Airlines Reporting Corp. v. McBride Tours & Travel, Inc.*, No. 1:06CV322 (JCC), 2006 WL 2079385, at *4 (E.D. Va. July 24, 2006) (contract limited arbitration to disputes arising under certain contractual provisions).

ARWI's grievance raises a dispute concerning eligibility for benefits under DuPont's various ERISA plans. Disputes over eligibility for benefits under the ERISA plans are excluded from the grievance and arbitration provision of the ARWI-DuPont collective bargaining agreement. *See PDG Chem., Inc, v. Oil, Chem. & Atomic Workers Int'l Union*, 164 F. Supp. 2d 856, 864 (E.D. Tex. 2001) (where "the parties intended to have disputes concerning the plan and

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4 The USW implicitly acknowledges that appropriate nature of a request of this type for declaratory relief, as its conditional counterclaim seeks the exact same type of declaratory relief. *See* Answer and Conditional Counterclaim at 23.

benefits received under the plan to be decided by the Benefits Administrative Committee," grievance pertaining to the plan was not arbitrable); ARWI Complaint ¶ 40. It is perfectly appropriate for an employer to seek a declaratory judgment as to its rights and obligations under a collective bargaining agreement, including whether a particular dispute is excluded from the parties' grievance and arbitration procedure. *See, e.g., PDG Chem.*, 164 F. Supp. 2d at 864; *Hunter Douglas Inc. v. Sheet Metal Workers Int'l*, 714 F.2d 342, 345-46 (4th Cir. 1983); *East Coast Hockey League, Inc. v. Prof'l Hockey Players Ass'n*, 322 F.3d 311, 314-16 (4th Cir. 2003).

After the ARWI action was initiated, DuPont came to realize that the USW was proceeding to raise precisely the same issues with respect to the August 28 announcement. Because both unions were seeking to resolve the identical legal issues through what DuPont believes is an improper mechanism (arbitration), it became apparent to DuPont that the "prudent" way to proceed was to bring this action against the USW, and seek to have it consolidated with the ARWI action. In furtherance of this objective, DuPont moved to amend the ARWI complaint simultaneously with filing this action, so that both complaints now also seek a declaration regarding whether DuPont violated the underlying collective bargaining agreements in making the changes. *See* Complaint, Count II; ARWI Complaint, Count II.

This is exactly the type of situation in which a declaratory judgment action is appropriate. The Fourth Circuit has held that it is appropriate for a court to exercise jurisdiction over a declaratory judgment action in circumstances such as these

> when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and. . . when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. . . It should not be used to try a controversy by piecemeal, or to try particular issues without settling the entire controversy, or to interfere with an action which has already been instituted.

Centennial Life Ins. Co. v. Poston, 88 F.3d 255, 256 (4th Cir. 1996) (internal citations and quotations omitted). Resolution of this action, in conjunction with the ARWI action, will clarify DuPont's rights and responsibilities with respect to all the benefit plans at issue. It will also determine the underlying question of whether DuPont acted within its rights under the various collective bargaining agreements in making the changes described in the August 28 announcement, and in administering the plans according to their amended terms.[5]

The USW's contrary arguments are unavailing.[6] DuPont made a perfectly legitimate decision to select this forum as the natural plaintiff to seek resolution of this dispute. DuPont is trying to avoid piecemeal litigation of the dispute; it is the USW, not DuPont, that is engaging in improper "procedural fencing." *See* USW Brief at 7 (quoting *Centennial Life Ins.*, 88 F.3d at 257). And, as demonstrated above, the USW is demonstrably incorrect in suggesting that the issues raised in this dispute can be "better resolved" in the later-filed actions. USW Brief at 7 n.3 (citing *New Wellington Fin. Corp. v. Flagship Resort Dev. Corp.*, 416 F.3d 290 (4th Cir. 2005)).

The USW's reliance on *Crown Cork & Seal Co., Inc. v. USW*, No. 03-CV-1381, 2004 U.S. Dist. LEXIS 760 (W.D. Pa. 2004) is misplaced. In that case, both the union and the company sought to resolve the underlying employee benefits dispute in class action proceedings

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5 The question of whether DuPont violated its statutory obligation to bargain in good faith with the various labor unions is separately presented in the unfair labor practice charge proceedings pending before the National Labor Relations Board. DuPont believes that this Court's resolution of the contractual interpretation issue will facilitate resolution of that issue as well.

6 While the USW baldly states that "DuPont raced to this Court in order to deprive the unions of their right to select the forum(s) for litigation of their claims" and thereby engaged in procedural fencing, it makes no argument that DuPont will have some tactical advantage by proceeding in this Court. USW Brief at 9.

in one forum – the two sides simply picked different jurisdictions. That case did not involve a multi-party, multi-jurisdictional dispute, like this one, where the natural plaintiff filed the first action to seek a resolution of the dispute. For the same reason, cases cited by the USW, *see* USW Brief at 6-8, involving single or related parties on different sides of actions in competing jurisdictions do not inform the Court's decision on this issue. *See, e.g.*, *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746 (7th Cir. 1987); *Anheuser-Busch Inc. v. Supreme Int'l Corp.*, 167 F.3d 417 (8th Cir. 1999); *Remington Arms Co. v. Alliant Techsystems, Inc.*, No. 1:03CV1051 (M.D.N.C. Feb. 25, 2004), 2004 WL 444574; *Ven-Fuel, Inc. v. Dep't of the Treasury*, 673 F.2d 1194 (11th Cir. 1982).[7]

Finally, this case is materially different from *UAW v. Dana Corp.*, No. 3:99CV7603, 2000 U.S. Dist. LEXIS 12041 (N.D. Ohio March 22, 2000), on which the USW relies. USW Brief at 8. In *Dana Corp.*, the union had obtained a favorable decision from an arbitrator holding that the company violated the terms of the parties' collective bargaining agreement. The employer filed suit in another jurisdiction, in anticipation of the union's suit to enforce the award. The court concluded that the employer was not seeking vindication of any affirmative rights and instead filed its declaratory judgment action solely to thwart the union's impending effort to bring suit elsewhere. *Id.* at *3-4. Here, by contrast, in both this case and the ARWI

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7 Other authority cited by the USW is similarly inapposite. There is no evidence that DuPont filed suit "as a tactical maneuver designed to sidestep. . . [a] forum selection clause," as in *Yoder v. Heinold Commodities, Inc.*, 630 F. Supp. 756, 761 (E.D. Va. 1986). Nor is this a matter that implicates federalism concerns because of a parallel state law proceeding, as in *Centennial Life Insurance Co. v. Poston*, 88 F.3d 255, 257 (4th Cir. 1996). And DuPont did not file a preemptive action as a means to obtain federal jurisdiction over an action that might be non-diverse. *See Cas. Indem. Exch. v. High Croft Enters., Inc.*, 714 F. Supp. 1190, 1193 (S.D. Fla. 1989). Finally, this is not a case where DuPont is chiefly raising an affirmative defense, as was the situation in *BASF Corp. v. Symington*, 50 F.3d 555 (8th Cir. 1995).

action, DuPont seeks to vindicate important affirmative rights through injunctive and declaratory relief. As a fiduciary of the ERISA plans, DuPont seeks to enforce the terms of these plans within the meaning of Section 502(a)(3)(B) of ERISA by obtaining needed clarification of its rights and obligations under the plans. As an employer signatory to various collective bargaining agreements, DuPont likewise seeks a declaration of its rights and obligations under those agreements. By filing this action and seeking to consolidate it with the ARWI action, DuPont is simply attempting to ensure that the entirety of the dispute relating to the August 2006 announcement is resolved in one forum, to conserve resources and avoid the risk of possible inconsistent outcomes.

In short, the USW has failed to show that good cause exists to decline jurisdiction in this case. *Aetna Cas. & Surety Co.*, 92 F.2d at 324. Accordingly, its motion on this basis should be denied.

II. The Local Unions Are Not Indispensable Parties Because The Interests of The Defendant And The Local Unions Are Identical.

The USW claims that the Complaint should be dismissed under Rule 12(b)(7) because DuPont did not name certain of the USW's affiliated local unions as defendants. The USW alleges the local unions are necessary parties. USW Brief at 10-13. The USW's position lacks merit.[8]

The facts establish that the USW has coordinated the union's response to DuPont's August 28 announcement, including the activity undertaken by various of its local union affiliates. The USW injected itself into this dispute four days after DuPont's announcement,

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[8] The USW's position is incorrect with respect to the action filed in Delaware, arising from a grievance filed at DuPont's Edgemoor facility. The USW is a party to that collective bargaining agreement. Brean Decl. at ¶ 5 & Exh. 3. Accordingly, there is no serious basis to contend, under Rule 19 or otherwise, that a "necessary party" is absent from this action.

when, on September 1, 2006, its "DuPont Council" sent a letter to DuPont requesting a meeting with DuPont. This letter, authored by USW employee Kenneth Test, the President of the DuPont Council, was written on behalf of USW-represented employees at all five DuPont locations, and sought a meeting to be attended both by the International and representatives of the various local USW affiliates. *See* Huggett Decl., ¶ 2 & Exh. 2. Thereafter, in late September, the DuPont Council distributed a flier at the Niagara Falls facility criticizing the pension plan amendments and encouraging employees to "[l]et DuPont hear your disgust and outrage." *See id.*, ¶ 2 & Exh. 1. In addition, the USW has also been a party to certain of the unfair labor practice charges that have been filed with the NLRB regarding the August announcement. *See id.*, Exhs. 3-5.

Formal proceedings initiated by the USW in response to the August 28 announcement also reflect the leadership role of the USW. For example, the grievances filed at the Edgemoor (Delaware), Chambersworks (New Jersey) and Niagara Fall (New York) facilities are all but identical. Notably, they all request that the processing of the particular grievance be held in abeyance, referring to Mr. Test's letter of September 1. *See* Brean Decl., Exhs. 4-6. And it was the USW's General Counsel, on behalf of itself and the local union affiliates, who threatened to sue DuPont to sue to compel arbitration. *See* Brean Decl., Exhs. 10-11; *see also* USW Brief at 4. These facts indicate that the USW has already been acting as a representative for the local unions with respect to these grievances.

Where parties share identical interests, and where one party is fully capable of representing the interests of both parties, the litigation can proceed even in the absence of the second party. *Ohio Valley Envtl. Coal. v. Bulen*, 429 F.3d 493, 504 (4th Cir. 2005) ("A litigant may serve as a proxy for an absent party if the interests of the two are identical"); *Codest Eng'g v. Hyatt Int'l Corp.*, No. 94 C 7335 1995 U.S. Dist. LEXIS 17276, at *12 (N.D. Ill. Nov. 6,

1995) ("if absentee's interest are fully represented by parties, prejudice test does not weigh in favor of joinder"); *see also Prof'l Hockey Club Cent. Sports Club of the Army v. Detroit Red Wings, Inc.*, 787 F. Supp. 706, 713 (E.D. Mich. 1992) (hockey player not an indispensable party to dispute between NHL and foreign league over player's affiliation where NHL and player shared identical interest); *Coal. on Sensible Transp. v. Dole*, 631 F. Supp. 1382 (D.D.C. 1986) (state transportation department was not an indispensable party in action challenging planned highway construction where interests of federal defendants were substantially identical to those of state).

The Fourth Circuit's holding in *Ohio Valley* is highly instructive here. In that case, a coalition of environmental groups brought suit against the US Army Corps of Engineers ("the Corps") and a number of coal companies and associations challenging the Corps' promulgation of a permit under the Clean Water Act for the discharge of materials into U.S. waters. The Corps argued that the individual permit holders should be joined as indispensable parties because they had an important interest in preventing their permits from being invalidated. The Fourth Circuit affirmed the district court's finding that joinder was not required because the litigants already involved in the suit would adequately represent the interests of the absent permit holders. Specifically, the Court found that the interests of the coal associations and the permit holders were identical because the coal associations "are arguing on behalf of their members, including members with existing operations dependent on [the permit]." *Id.* at 505. Thus, the Court held, the coal associations would adequately represent the interests of the absent parties, "because both seek to protect . . . interests that would be upset by invalidation of [the permit]." *Id.* at 505.

Those same reasons demonstrate that joinder of the local union affiliates of the USW is not required here. The facts in this case demonstrate that the USW and its local union affiliates have identical interests in this dispute; both seek to ensure enforcement of the relevant provisions of the collective bargaining agreements at the various facilities represented by the USW. Indeed, the USW does not suggest that its interests are not identical to those of its local union affiliates. The facts likewise demonstrate that the USW has already taken the lead in challenging the benefit plan changes implemented by DuPont following the August 28 announcement. There is nothing to suggest, and the USW does not argue, that the USW, represented by able counsel, will be unable to protect those interests; the USW does not even make such a suggestion.[9]

Teamsters Local Union No. 171 v. Keal Driveaway Co., 173 F.3d 915 (4th Cir. 1999), on which the USW primarily relies, is inapposite. *Keal Driveaway* arose out of a dispute related to the seniority status of employees transferring from one union to another. The union from which employees were transferring (which was not named as a party to the suit) took that position that the transferring employees should be dovetailed into the seniority list, while the union into which the employees were transferring (which brought the suit) took the position that the transferring employees should be end-tailed. *Id.* at 917. Because these two entities had interests that were diametrically opposed, one could not protect the interests of the other in the litigation.

Courts recognize that interests of judicial economy and prejudice are relevant considerations in deciding whether litigation can proceed in the absence of a party alleged to be necessary. *See S.C. Dep't of Health and Envtl. Control v. Commerce and Indus. Ins. Co.*, 372 F.3d 245 (4th Cir. 2004) (district courts should consider judicial economy in assessing

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9 Such a suggestion would be erroneous in any event. The common law of agency govern the relationship between and international union and its locals. *See Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 216 (1979). In these circumstances, the USW could not claim that it has no responsibility for advancing the union's interest in this dispute, including those of its local affiliates.

jurisdictional issues in declaratory judgment proceedings, *citing White v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 913 F.2d 165, 168 (4th Cir. 1990)); *see also Nat'l Union Fire Ins. Co. of Pittsburgh v. Rite Aid of S.C.*, 210 F.3d 246, 252 (4th Cir. 2000) (prejudice is a factor under Fed. R. Civ. P. 19(b)). Dismissal of this case based on the unavailability of the local union affiliates of the USW would contradict basic principals of judicial economy. The issues presented in this case plainly encompass those presented in the ARWI action. That case is well underway, with a schedule set to resolve the matter through cross-motions for summary judgment. The USW offers no justification for requiring the parties to litigate the underlying issues in various jurisdictions around the country. Such piecemeal litigation would also risk potentially inconsistent rulings to the potential prejudice of the parties.

III. DuPont Has Standing To Bring This Action.

The USW concedes, as it must, that DuPont has standing to bring this action under the Declaratory Judgment Act, 28 U.S.C. § 2201, and under Section 301 of the LMRA. USW Brief at 13. The USW raises standing only with respect to the ERISA claims asserted by DuPont. The USW is incorrect. DuPont plainly satisfies the standing requirements of ERISA, and the relief sought by DuPont here is explicitly recognized in Section 502(a)(3)(B) of ERISA. Accordingly, the USW's motion to dismiss under Rule 12(b)(1) is not well-founded.

The Complaint identifies DuPont in its status as fiduciary with respect to the plans in question, either because DuPont is the appointed Plan Administrator (Complaint, ¶¶ 16, 29, 33, 37 and 41), or because DuPont appoints a committee of its employees to administer the plan

(Complaint ¶ 23). Section 3(21)(A)(iii) of ERISA, 29 U.S.C. § 1002(21)(A)(iii), explicitly states that this type of discretionary authority over plan administration results in fiduciary status.[10]

The USW argues DuPont is deprived of this ability to sue in a fiduciary capacity because it is also the employer of the employees covered by the plans. USW Brief at 13-15.[11] This argument is misguided. Employers that sponsor benefit plans regulated by ERISA can also sue as fiduciaries with respect to disputes in which the plaintiff is exercising discretionary authority over the plan and is thus covered by ERISA's fiduciary duty rules. *Coyne & Delany v. Selman*, 98 F.3d 1457 (4th Cir. 1996) (power of employer to appoint a plan administrator was sufficient to make employer a fiduciary with standing to sue under ERISA); *U.S. Steel Mining Co., Inc. v. Dist. 17, UMWA*, 897 F.2d 149 (4th Cir. 1990) (both employer and fund held fiduciaries with respect to matter in dispute); *Aetna Life Ins. Co. v. Bayona,* 223 F.3d 1030 (9th Cir. 2000) (plan administrator has standing as fiduciary to ensure proper distribution of funds under ERISA plan); *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732 (7th Cir. 1986), *cert. denied,* 482 U.S. 915 (1987) (employer had standing as a fiduciary to bring action under ERISA); *Great Lakes Steel, Div. of Nat'l Steel Corp. v. Deggendorf,* 716 F.2d 1101 (6th Cir. 1983) (inseparability of an employer's dual roles as employer and fiduciary does not deprive the employer of standing under ERISA); *U.S. Steel Corp. v. Commonwealth of Pa. Human Relations*

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10 USW's arguments regarding DuPont's standing are not confined to jurisdictional questions but instead raise issues that involve the merits of the present case. This Circuit has determined that where a defendant, in opposing subject matter jurisdiction, instead raises issues concerning the merits of the dispute, and where the plaintiff has otherwise adequately demonstrated jurisdiction, the court should find that jurisdiction exists and reserve resolution of the issues on the merits until later stages of the proceeding. *Denny's Inc. v. Cake*, 364 F.3d 521, 525 n.4 (4th Cir. 2004).

11 The USW readily concedes that Section 502(a)(3) allows plan fiduciaries to bring suit under ERISA. USW Brief at 14.

Comm'n, 669 F.2d 124 (3d Cir. 1982) (employer acting in a fiduciary capacity has standing to sue as a fiduciary notwithstanding that it is also an employer); *see also MEBA/NMU Licensed Div. Dist. No. 1 v. Defries*, 943 F.2d 474 (4th Cir. 1991) (union with power to appoint plan trustees is a fiduciary and has standing to sue in its fiduciary capacity).

The USW asserts that DuPont cannot pursue an action under Section 502(a)(3)(B) of ERISA because the conduct at issue involves the actions of DuPont as plan sponsor carrying out so-called "settlor functions." USW Brief at 14. This argument misapprehends the nature of the relief sought by DuPont. DuPont seeks declaratory and injunctive relief with respect to its actions in administering the ERISA benefit plans at issue as a result of the plan amendments made following the August 28 announcement. These plans reserve to DuPont final discretionary authority to interpret and apply plan provisions. Complaint, ¶¶ 16, 23, 29, 33, 41. The Complaint explicitly addresses this authority and the methods by which this authority must be invoked by DuPont under the terms of the plans. For example, Paragraph 56 of the Complaint avers specifically that the grievances at issue "inevitably involve questions of benefit eligibility and denials of claims for benefits," the very types of issues which are reserved to DuPont's fiduciary discretion under the plans. Likewise, the first and third Prayers for Relief in the Complaint focus on the process by which these plans can properly be interpreted and administered, and are intended to vindicate DuPont's ability to exercise this discretion in accordance with the terms of these plans. *See id.*, Counts I & III.

Questions of plan interpretation and administration do not involve "settlor functions." *See, e.g., Sonoco Prods. Co. v. Physicians Health Plan Inc.*, 338 F.3d 366 (4th Cir. 2003) (employer acting with discretion over plan administration would not be acting in a settlor capacity); *Hunter v. Caliber Sys. Inc.*, 200 F.3d 702, 719-20 (6th Cir. 2000) (when an employer acts with discretion over the management and administration of a plan, it acts as a fiduciary, not as plan settlor); *Wachtel v. Guardian Life Ins. Co.*, 38 Emp. Ben. Cases [BNA] 1867, 1873 (D.N.J. 2006) (communications in connection with plan management and claims administration are activities involving fiduciary, not settlor, authority) *vacated and remanded on other grounds sub. nom. by Wachtel v. Health Net, Inc.*, ___ F.3d ___, 2007 WL 958572 (3rd Cir. 2007).[12] It is well settled that such disputes raise questions of possible breach of fiduciary duty. *See e.g., Varity Corp. v. Howe,* 516 U.S. 489 (1996). For example, misleading communications regarding an employee's status as a participant in a plan, and/or plan eligibility issues are frequently challenged as a breach of ERISA's fiduciary rules. *See, e.g., Estate of Becker v. Eastman Kodak Co.,* 120 F.3d 5 (2d Cir. 1997); *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226 (3d Cir. 1994); *Berlin v. Mich. Bell Tel. Co.,* 858 F.2d 1154 (6th Cir. 1988). The relief sought by DuPont here is intended, among other things, to address precisely this concern. As indicated above, DuPont seeks clarification, in the wake of the pending legal challenges, to insure that the company continues to follow the terms of the plan. Almost every step taken by DuPont as part of plan administration, including employee communications about their status under the plans as revised, involves the exercise of discretion in the administration of the plan, thus implicating ERISA's fiduciary duty rules. *Peralta v. Hispanic Bus. Inc.*, 419 F.3d 1064, 1071-72 (9th Cir. 2005) (ERISA's fiduciary duty rules apply to the communication of operative plan terms to plan participants); *Martinez v. Schlumberger, Ltd*, 338 F.3d 407, 424-25 (5th Cir. 2003) (when an employer chooses to communicate with plan participants regarding future plan benefits, it does so as a fiduciary); *In re Reliant Energy ERISA Litig.*, 36 Emp. Ben Cases [BNA]

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[12] Indeed, the three grievances all raises questions about the "application" of the announced amendments, which is clearly a function of the plan fiduciaries. See Brean Decl., Exhs. 4-6.

2648, 2651 (S.D. Tex. 2006) (communications made in connection with plan administration and management are fiduciary in nature); *Wachtel*, 38 Emp. Ben. Cases [BNA] at 1873 (determination of cost basis for plan claims administration, and communication of that basis to plan participants, is subject to ERISA's fiduciary duty rules); *Weiss v. CIGNA Healthcare Inc.*, 972 F. Supp. 748, 751-52 (S.D.N.Y. 1997) (control over communication of medical information in connection with participant claims is sufficient to result in fiduciary status).

Finally, in seeking injunctive relief and a declaration of its fiduciary interpretive and procedural rights with respect to these benefit plans, DuPont requests appropriate equitable relief available under Section 502(a)(3)(B) of ERISA. Courts have recognized that Section 502(a)(3) of ERISA provides a basis for a declaratory judgment action where a fiduciary brings the lawsuit to clarify benefits rights or eligibility, or otherwise to interpret or enforce the terms of the plan in question. *See Coyne & Delany*, 98 F.3d at 1465-66; *Defries*, 943 F.2d at 478; *see also Denny's Inc. v. Cake*, 364 F.3d 521 (4th Cir. 2004) (fiduciary may bring a declaratory judgment action under ERISA § 502 to prevent application of state law to the plan where the action was viewed as one to enforce the terms of the plan); *Prudential Ins. Co. of Am. v. Doe*, 140 F.3d 785 (8th Cir. 1998) (ERISA Section 502 permits declaratory judgment action to determine benefit eligibility); *Drinkwater v. Metro. Life Ins. Co.*, 846 F.2d 821 (1st Cir. 1988) (same); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986) (same) *overruled on other grounds by Firestone & Rubber Co. v. Bruch,* 489 U.S. 101 (1989); *Rexam*, 2003 WL 22477858, at *3 (permitting declaratory judgment action by employer to determine whether amending a plan to eliminate retiree medical benefits violated ERISA and the LMRA) . *Accord Aetna Life Ins.*, 223 F.3d 1030. DuPont has demonstrated its standing to maintain this action and the USW's motion to dismiss for lack of subject matter jurisdiction should be rejected.

IV. This Court Has Jurisdiction To Grant DuPont the Declaratory Relief Requested In Count II Of the Complaint.

The USW argues that this Court does not have jurisdiction to declare that DuPont's actions in amending the ERISA benefit plans at issue are consistent with, and do not violate, DuPont's rights under the parties collective bargaining agreements, such that DuPont's complaint should be dismissed under Rules 12(b)(1) and 12(b)(6). USW Brief at 16. This argument is without merit as the USW reads DuPont's complaint too narrowly.

The duty to arbitrate a dispute is entirely a matter of contract. A explained *supra*, an employer that has not agreed to arbitrate a particular dispute arising under a collective bargaining agreement cannot be forced to do so. *AT&T Techs.*, 475 U.S. at 648; *IAM Progressive Lodge No. 100,* 865 F.2d at 904-06. Whether a particular dispute is within the scope of a contractual arbitration clause "is undeniably an issue for judicial determination." *AT&T Techs.*, 475 U.S. at 649. DuPont properly invoked its right to seek a declaratory judgment regarding the arbitrability of those grievances. *See* Complaint at ¶ 69. It is well settled that a federal court has jurisdiction under Section 301 to hear and decide such a case. *See, e.g., Hunter Douglas Inc.*, 714 F.2d at 345-46. Declaratory relief regarding arbitrability and contract breach is particularly appropriate with respect to the Niagara Falls and Edgemoor grievances, to the extent that these grievances pertain to the Dental Assistance Plan and the Medical Care Assistance Plan. Neither of those plans are incorporated into the applicable collective bargaining agreements, and DuPont thus has no obligation to arbitrate any questions relating to those plans. See generally Brean Decl., Exhs. 2 & 3.

The USW's argument misstates the nature of the relief sought by DuPont. DuPont does not suggest that the Court issue a ruling on the merits of this dispute in determining whether any of these grievance is arbitrable in the first instance. *AT&T,* 475 U.S. at 649. If this Court decides that none of the USW's grievances are arbitrable, no arbitrator has authority to decide the merits of any grievance.[13] In that event, the bar against a judicial determination of the merits of the underlying breach of contract claim falls away as a matter of law. The Court is then free to take up the relief sought in Count II of the Complaint to determine whether DuPont violated the underlying collective bargaining agreements. In this sense, the USW misapprehends the position of DuPont on this issue; DuPont readily concedes that the unions would be able, as a matter of federal court jurisdiction, to file an action for breach of contract under Section 301 of the LMRA. The fact that the grievances filed by the unions are not arbitrable does not negate the ability of a union to file a breach of contract claim alleging that DuPont violated the collective bargaining agreements in the wake of the August 28 announcement. DuPont believes any such claim is without merit. In any case, the relief sought by DuPont in Count II of the Complaint, as well as in the ARWI matter, explicitly addresses this issue by seeking a declaration that no such violations occurred.

For the same reasons, the USW is incorrect in suggesting that a determination as to arbitrability is inconsistent with the relief DuPont seeks under ERISA. If the Court determines, as we believe it must, that these grievances are not arbitrable, the logical result of that conclusion will be that the merits of disputes regarding plan participants' eligibility for benefits "must be resolved exclusively through the procedures set forth in th[e] plans and/or in a civil enforcement action under Section 502 of ERISA." Complaint ¶ 66. The USW is wrong in asserting that the requested relief cannot be provided through this lawsuit. *See* USW Brief at 16-17. This issue is

[13] To the extent that USW claims that it is challenging only DuPont's authority to implement the amendments, rather than benefit decisions made under these amendments, that decision to implement the amendment is inextricably intertwined with the question of benefit eligibility determinations. Accordingly, no arbitrator has authority to decide that aspect of this dispute.

analytically separate from the issue of whether DuPont acted within its rights under the various collective bargaining agreements in making the benefit plan changes announced in August, 2006. And, as demonstrated above, the declaratory relief sought in Count II of the Complaint is fully consistent with ERISA § 502(a)(3).

Conclusion

For all of these reasons, the USW's Motion to Dismiss DuPont's Complaint should be denied.

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April 16, 2007

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to Defendant's Motion to Dismiss were mailed, first-class postage prepaid, this 16th day of April 2007 to the following:

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