IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUPERMEDIA INC., SUPERMEDIA LLC, SUPERMEDIA SERVICES INC., SUPERMEDIA SALES INC., SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE, and IDEARC INCEPTOR LTD., Plaintiffs v. LINTON BELL, DALE BURKS, PAMELA BENNETT, MARTHA BOBO, DENNIS CASSIDY, CAROL FOY, JOSEPH GALLAGHER, BEVERLY GEMMELL, EDWIN HANSON, CHRISTINE HARVEY, MARGARET KETZER, JOANIE KRAFT, THERESA LANE, SHARON LEYNES, PATRICIA LINDOP, ROBERT MENTZER, SANDRA NOE, CARL OHNSTAD, CLAIRE PALMER, STANLEY RUSSO, HOWARD SHAPSES, JOHN SULLIVAN, BERNARD ZENUS, COMMUNICATION WORKERS OF AMERICA, AFL-CIO, LOCAL 1301, COMMUNICATION WORKERS OF AMERICA, AFL-CIO, LOCAL 1302, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 2213, Defendants	Civil Action No. 3:12-cv-2034-G

MOTION TO DISMISS OF LOCAL 1301 AND LOCAL 1302 OF THE COMMUNICATION WORKERS OF AMERICA, AFL-CIO

NOW COME Defendants Local 1301 and Local 1302 of the Communication Workers of America, AFL-CIO (collectively, "the New England Locals"), and hereby move to dismiss the

Complaint against them pursuant to Fed. R. Civ. P. 12(b)(1), (2), (3) and (6) for the following reasons.

First, the case against the New England Locals should be dismissed under Fed. R. Civ. P. 12(b)(2) and (3) for lack of personal jurisdiction and for improper venue under Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185. This Court lacks personal jurisdiction over the New England Locals because they are based in Massachusetts and have not had the requisite minimum contacts with Texas and for this same reason §301 venue is also improper here. To the extent that the SuperMedia Plaintiffs would seek to employ the nationwide service provision under ERISA, 29 U.S.C. § 1132(e)(2), this argument should be rejected because Plaintiffs' cause of action does not arise under ERISA, but rather under the Declaratory Judgment Act, for which the national service provision is not available. In any event, application of nationwide service would fail the requirements of constitutional due process.

Second, the case should be dismissed because it is not ripe for judicial determination. As Plaintiffs have conceded, the collective bargaining agreements ("CBAs") between the parties are the critical element of this dispute. It is because of these agreements that Plaintiffs say they have sued the New England Locals. However, the current CBAs do not expire until December 31, 2013, and the agreements that will be in effect when the plan amendments are implemented on Jan. 1, 2014, have yet to be been negotiated. Until those successor CBAs exist, it is impossible for the parties or this Court to determine the lawfulness of Plaintiffs' actions.

Third, the complaint should be dismissed because it fails to state a claim for declaratory judgment under § 301 of the Labor-Management Relations Act. Plaintiffs' § 301 claim seeks a declaration that no CBAs apply to the present dispute, but that claim is not cognizable under § 301 because it does not seek a declaration concerning a "violation" of a CBA.

Fourth, the case should be dismissed because it presents core questions as to whether the SuperMedia Plaintiffs violated §§ 8(a)(5) and (d) of the National Relations Act, 29 U.S.C. § 158(a)(5) and (d), when they unilaterally changed the future retirement benefits of current employees along with the benefits of those employees who had already retired. Because the National Labor Relations Board has exclusive jurisdiction to determine whether there has been a violation of § 8 the NLRA, dismissal pursuant to Fed. R. Civ. P. 12(b)(1) is warranted. Should the Court nonetheless find reason to decide the questions presented under § 8, dismissal is proper under Fed. R. Civ. P. 12(b)(6) since SuperMedia's violation of the NLRA precludes the declaratory judgment plaintiffs seek.

Finally, the Complaint should be dismissed because it fails to state a claim for a declaratory judgment under ERISA. The New England Locals are neither participants, beneficiaries, nor fiduciaries of an ERISA plan. Because SuperMedia alleges that the New England Locals are not representatives of the retirees, it follows that the locals would not have statutory standing to bring an ERISA claim. Accordingly, the declaratory judgment claims against them should be dismissed for lack of statutory standing.

This Motion to Dismiss is supported by a Memorandum of Law and Affidavit of Patricia Telesco, which are submitted with this Motion.

DATED: August 30, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2012, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means. A copy of the foregoing document has also been served, by first-class mail, on Donald D. Oliver, Esq., Blitman & King LLP, Franklin Center, 443 North Franklin Street, Suite 300, Syracuse, NY 132079.

s/ *Shelley B. Kroll*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUPERMEDIA INC., SUPERMEDIA LLC, SUPERMEDIA SERVICES INC., SUPERMEDIA SALES INC., SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE, and IDEARC INCEPTOR LTD.,

Plaintiffs

v.

LINTON BELL, DALE BURKS, PAMELA BENNETT, MARTHA BOBO, DENNIS CASSIDY, CAROL FOY, JOSEPH GALLAGHER, BEVERLY GEMMELL, EDWIN HANSON, CHRISTINE HARVEY, MARGARET KETZER, JOANIE KRAFT, THERESA LANE, SHARON LEYNES, PATRICIA LINDOP, ROBERT MENTZER, SANDRA NOE, CARL OHNSTAD, CLAIRE PALMER, STANLEY RUSSO, HOWARD SHAPSES, JOHN SULLIVAN, BERNARD ZENUS, COMMUNICATION WORKERS OF AMERICA, AFL-CIO, LOCAL 1301, COMMUNICATION WORKERS OF AMERICA, AFL-CIO, LOCAL 1302, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 2213,

Defendants

Civil Action No.
3:12-cv-2034-G

<u>MEMORANDUM IN SUPPORT OF LOCAL 1301 AND LOCAL 1302'S MOTION TO DISMISS</u>

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I. Introduction

Defendants Local 1301 and Local 1302 of the Communication Workers of America, AFL-CIO, have moved to dismiss the Amended Complaint against them, pursuant to Fed. R. Civ. P. 12(b)(1), (2), (3) and (6), for the following reasons.

First, the case against Locals 1301 and 1302 (collectively, "the New England Locals") should be dismissed pursuant to Fed. R. Civ. P. 12(b)(2) and (3) for lack of personal jurisdiction and improper venue under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, because the New England Locals do not have the requisite minimum contacts with Texas. To the extent that Plaintiffs (collectively referred to as "SuperMedia") would seek to employ the nationwide service provision under ERISA, 29 U.S.C. § 1132(e)(2), they cannot do so because Plaintiffs' cause of action does not arise under subchapter I of ERISA.

Second, the case should be dismissed under Fed. R. Civ. P. 12(b)(1) because it is not ripe for judicial determination. As Plaintiffs have conceded, collective bargaining agreements ("CBAs") between the parties are critical to determining whether the announced changes to retiree medical benefits will be lawful when they are implemented in 2014. However, the lawfulness of the Plaintiffs' actions must be evaluated in light of the CBAs that will be in place on Jan. 1, 2014 (the date the announced changes actually take effect), and those CBAs do not yet exist. Until those CBAs have been negotiated, it is impossible for the parties or this Court to determine the lawfulness of Plaintiffs' actions with respect to any retirees who have been covered by the CBAs of the New England Locals.

Third, the case should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) because: (1) SuperMedia does not allege a cause of action concerning whether an existing collective bargaining agreement has been violated, and therefore it has not stated a claim under §

301 of the LMRA, 29 U.S.C. § 185; and (2) by changing the future retirement benefits of its current employees prior to engaging in collective bargaining negotiations, SuperMedia has violated §§ 8(a)(5) and (d) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (d), an unfair labor practice committed to the exclusive jurisdiction of the National Labor Relations Board. If this Court were to nonetheless decide the questions presented by § 8 of the NLRA, dismissal would be warranted under Fed. R. Civ. P. 12(b)(6) because SuperMedia's violation of the NLRA precludes the declaratory judgment they seek.

Finally, to the extent that SuperMedia's declaratory judgment claim against the New England Locals is based on ERISA rather than § 301, the claim must be dismissed because SuperMedia contends that the New England Locals are not being sued as representatives of the retirees.

II. Factual Overview

The following facts are taken from the Amended Complaint, and are presented as undisputed for the purpose of this motion only. See, e.g., Stripling v. Jordan Prod. Co., LLC, 234 F.3d 863, 869 (5th Cir. 2000).

The Plaintiffs are six entities that have collectively referred to themselves as SuperMedia. Am. Compl., intro. para. SuperMedia is a "media solutions company" that provides print and digital services, such as the yellow pages directories, advertising, mobile applications, and search engine resources. Am. Compl., ¶ 38. SuperMedia provides health and welfare benefits to its eligible retired employees (and eligible retired employees of its predecessors). Am. Compl., ¶ 42.[1] These benefits currently are provided pursuant to various health and welfare benefit plans[2] and various collective bargaining agreements. Am. Compl., ¶¶ 41, 44.

[1] These predecessors include Verizon Communication Inc., GTE Corporation, f/k/a General Telephone & Electronics Corporation, Bell Atlantic, and NYNEX Corporation. Am. Compl., ¶ 39.

Local 1301 is a labor union based in Marblehead, Mass. and Local 1302 is a separate labor union based in Lynn, Mass. Am. Compl., ¶¶ 32-33; see also Orig. Compl., ¶¶ 11-12. The bargaining unit represented by Local 1301 is a unit of sales employees and the bargaining unit represented by Local 1302 is a unit of clerical employees. See Am. Compl., Exs. H and I. Employees in both bargaining units work in New England. See id. Neither Local 1301 nor Local 1302 represents employees who work in Texas. See id. Both locals are parties to separate collective bargaining agreements with SuperMedia. Am. Compl., ¶ 58; Exs. H and I. [3] Both CBAs expire on Dec. 31, 2013. Am. Compl., ¶ 58. Plaintiffs do not contend that either New England Local is "a representative of any individual retiree or the putative class of retirees sued herein." Am. Compl., ¶¶ 32-33, fns. 1-2. The Amended Complaint alleges only that the New England Locals have each been "sued . . . because it is a party to certain collective bargaining agreements that are at issue in this case." Id. Plaintiffs make no allegation that either of the New England Locals has had any other contacts with the state of Texas.

On June 25, 2012, the Employee Benefits Committee of the SuperMedia Board of Directors voted to amend three of its retiree benefits plans to the substantial detriment of the retirees. Am. Compl., ¶ 52. For example, SuperMedia has declared it will reduce or eliminate contributions to retirees' health insurance premiums and that it will increase co-pays and deductibles. Am. Compl., ¶ 62. The plan changes relevant to the New England Locals took effect on September 1, 2012, but the changes to benefits will not become effective until Jan. 1, 2014.

[2] The Plans include: (i) the SuperMedia Management and Non-Union Hourly Plan for Group Insurance, (ii) the SuperMedia Plan for Group Insurance for Mid-Atlantic Associates, (iii) the SuperMedia Plan for Group Insurance for New York and New England Associates, and (iv) the SuperMedia Pension Plan for Collectively-Bargained Employees (providing Medicare Part B reimbursement). Am. Compl., ¶ 42, n. 4.

[3] While the Local 1301 and Local 1302 CBAs are exhibits to the Complaint, SuperMedia has not produced the CBAs that "pertain to most former bargaining employees" despite alleging that these contracts "do not provide for or even reference retiree health and welfare benefits." Am. Compl. ¶ 44, ¶ 47, n. 8. Only a single sample agreement is attached to the Amended Complaint as Ex. K.

Am. Compl., ¶ 62. The contribution rates and benefit levels for retirees of Locals 1301 and 1302 are fixed by the CBAs until Dec. 31, 2013. Am. Compl., ¶ 58.

The day after this vote was taken, SuperMedia sent notice of the Amendments to those retirees who are potentially affected. Am. Compl., ¶ 64. With its notice, SuperMedia included a "Claim Form" that allowed plan beneficiaries to "make a claim for benefits, raise questions, voice concerns, or make objections regarding the Amendments and SuperMedia's legal right to amend, modify, revoke, or terminate the Plans at any time." Am. Compl., ¶ 64. Super Media received replies from more than 900 "Claim Form" recipients. Am. Compl., ¶ 65. Although the "Claim Forms" state that the "purpose ... is to provide you with a procedure to object to SuperMedia's right to amend" the Plans, see, e.g., Am. Compl., Exs. Y-AM, the context of the litigation strongly suggests that SuperMedia desired not to "provide … a procedure" to object, but rather to identify retirees to haul into federal court. See Am. Compl., ¶¶ 65, 71.

Indeed, within hours of receiving the "objections" of Defendant retirees Carol Foy and Stanley Russo, rather than review and respond to the objections made, SuperMedia filed its initial 26-page complaint (supported by hundreds upon hundreds of pages of supporting documentation) in the U.S. District Court for the Northern District of Texas. See Orig. Compl. ¶ 42. Named as Defendants were Foy, Russo, and Locals 1301 and 1302 of the Communication Workers of America, AFL-CIO. On August 2, 2012, SuperMedia filed an amended complaint adding twenty-one (21) additional retirees and Local 2213 of the International Brotherhood of Electrical Workers.

III. Legal Arguments

A. The Amended Complaint against the New England Locals should be dismissed pursuant to Fed. R. Civ. P. (12)(b)(2) and (3) for lack of personal jurisdiction and improper venue

The Amended Complaint against Locals 1301 and 1302 should be dismissed pursuant to Fed. R. Civ. P. 12(b)(2) and (b)(3) because this Texas Court lacks personal jurisdiction over the Massachusetts labor unions.[4]

"When a nonresident defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident." Jobe v. ATR Mktg., Inc., 87 F.3d 751, 753 (5th Cir. 1996). Here, Plaintiffs allege that the Court "has personal jurisdiction over each of the Defendants based on the facts alleged" in the Amended Complaint, but asserts only that the New England Locals are based in Massachusetts, and that each has a collective bargaining agreement with SuperMedia, a Texas company. Am Compl., ¶¶ 2-4, 32-33; Orig. Compl. ¶¶ 11-12. Because the Complaint makes no allegation that either Local 1301 or 1302 has ever had any contacts with the state of Texas other than entering into collective bargaining agreements with SuperMedia, Plaintiffs cannot sustain their burden.

1. A Texas Court does not have jurisdiction over the New England Locals under Section 301 of the Labor-Management Relations Act

"[A] federal court may only exercise personal jurisdiction if it is authorized to do so by law and such exercise does not violate the Constitution." Burstein v. State Bar of California, 693 F.2d 511, 514 (5th Cir. 1982). The venue and jurisdiction provisions of Section 301 of the Labor-Management Relations Act ("§ 301") cited by Plaintiffs do not allow for personal

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[4] As set forth below, the New England Locals also urge dismissal for lack of subject matter jurisdiction. A court faced with challenges to both subject matter jurisdiction and personal jurisdiction should "consider the complexity of subject-matter jurisdiction issues raised by the case, as well as concerns of federalism, and of judicial economy and restraint in determining whether to dismiss claims due to a lack of personal jurisdiction before considering challenges to its subject-matter jurisdiction." Alpine View Co. Ltd. v. Atlas Copco AB, 205 F.3d 208, 213 (5th Cir. 2000).

jurisdiction here. Section 301 establishes federal jurisdiction only "(1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members." 29 U.S.C. § 185(c). Because the New England Locals do not maintain their principal offices in Texas and are not engaged in representing or acting for employee members in Texas but rather in New England, Plaintiffs cannot establish jurisdiction under § 301.[5]

Moreover, even if § 301 authorized the court to exercise jurisdiction, it cannot do so here because such exercise would violate the Constitution. To satisfy the Due Process Clause, the nonresident must "have some minimum contact with the forum that results from an affirmative act on his part such that the nonresident defendant could anticipate being haled into the courts of the forum state" and "it must be fair or reasonable to require the nonresident to defend the suit in the forum state." Isbell v. DM Records, Inc., 2004 WL 1243153 (N.D. Tex. June 4, 2004), citing Burger King Corporation v. Rudzewicz, 471 U.S. 462, 474–77 (1985). The Due Process Clause thus ensures that persons have a "'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" Id., quoting Burger King Corporation, at 472 (quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)). Yet, Plaintiffs do not allege that the New England Locals have engaged in any affirmative acts that would reasonably cause them to anticipate being haled into Texas courts.

Plaintiffs do not claim that the New England Locals have committed any tortuous activity in Texas, or that they have sought to represent employees or retirees in Texas. Instead, in their complaint Plaintiffs focus on various actions that they have taken in Texas, such as amending their plan documents and sending notices of these changes to retirees. A plaintiff's unilateral

[5] In light of the New England Locals' lack of minimum contacts in Texas, venue under Section 301 is improper here as well.

activities, however, cannot establish minimum contacts between the defendant and forum state. Moncrief Oil Int'l Inc. v. OAO Gazprom, 481 F.3d 309, 311 (5th Cir. 2007), citing Hydrokinetics, Inc. v. Alaska Mech., Inc., 700 F.2d 1026, 1028 (5th Cir.1983).

Plaintiffs may attempt to argue that by entering into collective bargaining agreements with SuperMedia, the New England Locals could somehow anticipate being sued here in Texas. This argument is unavailing, as merely contracting with a resident of the forum state does not establish minimum contacts. Moncrief Oil Int'l Inc. v. OAO Gazprom, 481 F.3d 309, 311 (5th Cir. 2007), citing Latshaw v. Johnston, 167 F.3d 208, 211 (5th Cir.1999) and Hydrokinetics, Inc., supra. Indeed, "[a]n exchange of communications in the course of developing and carrying out a contract also does not, by itself, constitute the required purposeful availment of the benefits and protections of Texas law." Moncrief Oil Int'l Inc, 481 F.3d at 312, citing Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773, 778 (5th Cir.1986). This rule is critical, as "[o]therwise, jurisdiction could be exercised based only on the fortuity that one of the parties happens to reside in the forum state." Id. Instead, the court must evaluate multiple factors in determining whether a defendant purposefully established minimum contacts within the forum and may not base jurisdiction on random, fortuitous, or attenuated contacts. Id., citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479 (1985).

Plaintiffs offer no facts to support any claim that the New England Locals purposefully established minimum contacts within Texas. They do not allege that the New England Locals came to Texas to represent employees here, or even that the New England Locals sought out a Texas company operating in Massachusetts to organize. To the contrary, the New England Locals already represented employees in New England when Verizon Communication Inc., and Verizon "spun-off" SuperMedia's predecessor, Idearc, Inc., and consequently their members

became Idearc employees. Am. Compl., ¶ 39. Plaintiffs also do not allege that either the employees covered by the Local 1301 and 1302 collective bargaining agreements or the New England Locals representing them performed any of their contractual obligations in Texas. Nor do they allege that Texas was a hub of the activity covered by the collective bargaining agreement or that the New England Locals engaged in any business activities in Texas. Finally, they point to no choice of law provisions suggesting that the parties would look to Texas law to govern any disputes. In sum, Plaintiffs' unilateral activities in Texas do not give rise to the minimum contacts necessary to establish personal jurisdiction over the New England Locals under Section 301 of the LMRA.

2. Plaintiffs may not avail themselves of ERISA's nationwide service provision because their suit does not arise under Subchapter I of ERISA

In order to circumvent the absence of any minimum contacts with Texas, Plaintiffs seek to apply the nationwide service provision of section 502 of ERISA. Am. Compl., ¶ 37 (citing 29 U.S.C. 1132(e)(2)).[6] However, 29 U.S.C. § 1132(e)(2) does not apply to plaintiffs' declaratory judgment action because they do not assert claims cognizeable under § 1132 of ERISA. Whether the Plaintiffs may avail themselves of ERISA's nationwide service provision "hinges on the court's subject matter jurisdiction under 29 U.S.C. § 1132(a)(3)," not on the Declaratory Judgment Act. Denny's Inc. v. Cake, 364 F.3d 521, 524 (4th Cir. 2004). And contrary to Plaintiffs' allegation in paragraph 37 of their Amended Complaint, there is no cause of action available to Plaintiffs under § 1132 on the facts alleged.

The relevant causes of action established by § 1132 may be brought only by plan participants, beneficiaries, fiduciaries, or the Secretary of Labor. 29 U.S.C. § 1132(a). Plaintiffs

[6] 29 U.S.C. § 1132(e)(2) provides in relevant part that "[w]here an action under this subchapter [Subchapter I – Protection of Employee Benefit Rights] is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found."

obviously are not a participant, beneficiary, or the Secretary. Thus, Plaintiffs' only hope to state a claim under § 1132 is as fiduciaries, but this fails because: (1) Plaintiffs did not act as fiduciaries when they amended the plan, and (2) Subchapter I of ERISA would not allow Plaintiffs to make the claim they are making even if they were fiduciaries.

a. Because SuperMedia did not act as a fiduciary when it altered the Plans, it may not bring a cause of action under § 1132

First, employers and plan sponsors "who alter the terms of a plan do not fall into the category of fiduciaries." Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996); Martinez v. Schlumberger, Ltd., 338 F.3d 407, 429 (5th Cir. 2003) ("a company does not act in a fiduciary capacity by simply amending a plan"). Because SuperMedia did not act as a fiduciary, SuperMedia is not one of the three enumerated persons who have statutory standing under § 1132 to bring a claim. And because SuperMedia is not an appropriate plaintiff under § 1132, there is no subject-matter jurisdiction, meaning that SuperMedia may not access the nationwide service provision. KLLM, Inc. Employee Health Prot. Plan v. Ontario Cmty. Hosp., 947 F. Supp. 262, 269, n. 14 (S.D. Miss. 1996) (Because "subject matter jurisdiction does not exist pursuant to § 1132(e), the court agrees … the Plan may not utilize … nationwide service of process").

b. Even if SuperMedia were a fiduciary, this declaratory judgment action is nonetheless not of the kind that may be brought under § 1132

Second, even if the Plaintiffs implausibly could be viewed as fiduciaries, there still would be no cause of action available to them, as § 1132 explicitly limits the types of claims fiduciaries may bring and a claim for a declaration that amendments to an employee benefit plan do not violate ERISA is not among those available claims for which nationwide service of process applies. Section 1132(a)(3) provides the only cause of action that may be initiated by a fiduciary under ERISA. This section allows "a participant, beneficiary, or fiduciary:

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or
(ii) to enforce any provisions of this subchapter or the terms of the plan."

29 U.S.C. § 1132(a)(3). Because Plaintiffs do not seek to enjoin an act or practice that violates ERISA, § 1132(a)(3)(A) does not apply.

Section 1132(a)(3)(B) also does not apply, as Plaintiffs neither seek to redress a violation of ERISA or a plan, nor to enforce ERISA or a plan. Indeed, they claim there has been no violation. Therefore, regardless of whether the requested declaratory judgment may be considered "appropriate equitable relief," it is clear that this action is not designed to redress a violation of ERISA or an ERISA plan. Plaintiffs do not allege that the New England Locals (or any of the other Defendants, for that matter) have committed any such violations. See § 1132(a)(3)(B)(i).

The Complaint also is not an action to "enforce" ERISA or a plan because "a fiduciary's declaratory suit does not enforce ERISA." NGS Am., Inc. v. Jefferson, 218 F.3d 519, 530 (6th Cir. 2000). An "action 'to enforce' means an action to compel someone to do something or not to do something, such as make contributions, that ERISA or the plan requires be done or not done." Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520, 1523 (11th Cir. 1987) (citing Carpenters Amended & Restated Health Benefit Fund v. Ryan Constr. Co., 767 F.2d 1170 (5th Cir. 1985). Plaintiffs' "action is defensive in nature; the compan[ies] simply wish[] to avoid making payment that [Defendants might later claim] is due. Seeking a declaration of its liability does not 'enforce' the plan." Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520, 1523-24 (11th Cir. 1987); see also Bluecross Blueshield of TN v. Doctors Med. Ctr. of Modesto, Inc., 2008 WL 111980 (E.D. Tenn. 2008)

(unpublished) ("Several different federal courts disagree with BCBST's claim that a fiduciary's request for a court to interpret the terms of an ERISA plan constitutes an 'enforcement' of that plan pursuant to 29 U.S.C. § 1132(a)(3)(B)(ii).") (emphasis in original) (discussing NGS Am., Inc., supra, Gulf Life Ins. Co., supra, Massey Ferguson Division of Varity Corp. v. Gurley, 51 F.3d 102, 103 (7th Cir. 1995), Transamerica Occidental Life Ins. Co. v. DiGregorio, 811 F.2d 1249, 1250-51 (9th Cir. 1987), and several district court cases). Because Plaintiffs' request for declaratory judgment is not an effort at enforcement, they have not stated a claim under § 1132(a)(3)(B)(ii). Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520, 1524 (11th Cir. 1987). And, again, as the above cases establish, without a claim under § 1132, Plaintiffs may not avail themselves of the nationwide provision of § 1132(e)(2). NGS Am., Inc., 218 F.3d at 524.

This result is entirely consistent with the language of § 1132 itself. Section 1132(a)(1)(B) allows "a participant or beneficiary," but not fiduciaries, to bring a civil action "to clarify his rights to future benefits under the terms of the plan." A clarification of legal rights is exactly what Plaintiffs seek by bringing their Declaratory Judgment action. However, unlike other provisions of § 1132, "fiduciaries" are expressly not provided with a special cause of action to clarify their ERISA obligations. This demonstrates that "Congress did not intend ERISA fiduciaries to use declaratory judgment actions to determine the benefit rights of participants/beneficiaries." Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520, 1524 (11th Cir. 1987) (emphasis added) (fiduciary that filed declaratory judgment action to determine its liability under ERISA could not invoke ERISA's national service provisions). "[F]iduciaries are not mentioned in § 1132(a)(1)(B), which authorizes beneficiaries and participants to bring suits to recover benefits due and/or clarify future benefits owed. Under the principle of *expressio unius est exclusio alterius,* it would do violence to the statute to hold that fiduciaries could bring similar

suits." NGS Am., Inc. v. Jefferson, 218 F.3d 519, 528 (6th Cir. 2000); see also Transamerica Occidental Life Ins. Co. v. DiGregorio, 811 F.2d 1249, 1252 (9th Cir. 1987) (same); HSC Hospitality, Inc. v. Sun Life Assur. Co. of Canada, 2001 WL 327831 (N.D. Tex. 2001) (Kaplan, M.J.) (unpublished) ("[O]nly plan participants and beneficiaries may maintain a declaratory judgment action to clarify their rights under an ERISA plan. Sun Life is neither a participant in nor a beneficiary of the plan made the basis of this suit. Its declaratory judgment action to avoid paying benefits under the policy is purely defensive in nature. Therefore, there is no subject matter jurisdiction under ERISA.") (internal citations omitted).

The court in Gulf Life recognized the dramatic problems that could be created if plan fiduciaries were allowed to file claims under the Declaratory Judgment Act against plan participants anywhere in the United States or its territories:

> [U]nder Gulf Life's view of section 1132, if Gulf Life were headquartered in Guam it would be able to force Arnold to litigate his benefit plan rights in that forum. Although this states the case in its most extreme, it is not unusual for a national corporation to be headquartered in New York or in California. We believe that ERISA's legislative history unquestionably demonstrates that Congress did not intend to allow a fiduciary to force a plan participant/beneficiary who worked for a company for 30 years in Maine and who files a claim for benefits with that company, to be required to litigate his claim in Los Angeles.

Gulf Life Ins., 809 F.2d at 1525, n. 7. The same problem is present here, as Plaintiffs seek to haul the Massachusetts-based union defendants into a court that is located some 1,500 miles away. Because Plaintiffs' action against the New England Locals is not an enforcement action under ERISA, § 1132(e)(2)'s nationwide service provision does not apply. Consequently, this Texas court lacks personal jurisdiction over the New England Locals and the suit should be dismissed as to them.

Moreover, an assertion of personal jurisdiction under § 1132(e)(2) under these circumstances would also fail the constitutional requirements of due process. "The Fifth Circuit

has held that these provisions amount to a congressionally legislated 'nationwide service of process' in ERISA actions, such that the relevant personal jurisdiction inquiry becomes whether the defendant has had minimum contacts with the United States." Verizon Emp. Benefits Comm. v. Jaeger, 2006 WL 2880451 (N.D. Tex. 2006) (Lindsay, J.) (citing Bellaire Gen. Hosp. v. Blue Cross Blue Shield, 97 F.3d 822, 825 (5th Cir.1996)). However, "[t]here are circumstances, although rare, in which a defendant may have sufficient contacts with the United States as a whole but still will be unduly burdened by the assertion of jurisdiction in a faraway and inconvenient forum. As the [U.S. Supreme] Court noted in Burger King, 'minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposely engaged in forum activities.'" Rep. of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 947 (11th Cir. 1997) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985)). Forcing Locals 1301 and 1302 to litigate in Texas would not comport with constitutional notions of due process given that the Locals have not been accused of doing anything unlawful under ERISA. Therefore, application of § 1132(e)(2) in this case would be constitutionally improper even if the statute did apply.[7]

B. The Complaint should be dismissed for a lack of ripeness

Even if the Court had personal jurisdiction over the New England Locals, the Court should still dismiss this case pursuant to Fed. R. Civ. P. 12(b)(1) because the Complaint does not present a dispute as to the New England Locals that is ripe for judicial determination.

[7] The concerns regarding personal jurisdiction and the unfairness of hauling parties into a distant forum apply with equal force to other defendants named here who also appear to have no minimum contacts with the state of Texas. According to the Complaint, only four of the named retirees are residents of Texas. Am. Compl., ¶¶ 8-30, 34. The Court may take judicial notice that two other individuals are named Plaintiffs in Murphy v. Verizon Communications, Inc., 09-CV-2262-G. It appears, however, that the other nineteen individuals are residents of 11 different states ranging from California to Florida to Maine for whom no minimum contacts have been alleged.

SuperMedia alleges that the dispute is ripe for determination because "[e]xtrinsic or substantial factual development will prove unnecessary or inappropriate because the pertinent facts of this matter – the terms of the Plan Documents and the Amendments – should be undisputed, resulting in a proceeding comprised chiefly of legal issues." Am. Compl., ¶ 78. SuperMedia's principal error in this statement is that the Complaint asks the Court to validate plan amendments that will affect current employees represented by the New England Locals who will not retire until after the current CBA has expired. The validity of the plan amendments as to these employees depends on the terms of new CBAs that have not yet been negotiated and, indeed, that SuperMedia assures the Court it will negotiate in good faith. Am. Compl., ¶ 63, fn. 17. The questions that Plaintiffs pose regarding the New England Locals thus are not ripe for determination and cannot be answered until the parties reach terms on new collective bargaining agreements.

A court "should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 833 F.2d 583, 586-87 (5th Cir. 1987) (citing Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985)). "The key considerations are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" Id. (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967)). "A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required." Id. "Because ripeness affects justiciability, we believe that unripe claims should ordinarily be disposed of on a motion to dismiss, not summary judgment," pursuant to Fed. R. Civ. P. 12(b)(1). Taylor Inv., Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1290 (3d Cir. 1993).

Plaintiffs are parties to collective bargaining agreements with the New England Locals and they have promised that "[g]ood faith bargaining with the Defendant Unions will occur prior to the expiration of the CBAs and will encompass . . . current employees' retiree benefits." Am. Compl., ¶ 63, fn. 17.[8] Plaintiffs' request for declaratory judgment – as it relates to any plan amendment affecting the New England Locals – will ultimately turn on the content of the new CBAs that Plaintiffs have promised, and are legally required, to bargain regardless of the content of the current CBAs. The fact that the current CBAs will expire before the plan amendments take effect does nothing other than beg the question of what the new contracts will say.[9] Moreover, Plaintiffs allege that because the CBAs will expire on Dec. 31, 2013, "the applicable Plans, which explicitly allow the modifications, govern alone." Am. Compl., ¶ 60. This allegation, however, assumes the existence of a future, entirely hypothetical, CBA that contains no language on retiree benefits.[10] In reality, the parties do not know what their successor CBAs will have to say about retiree medical benefits because these contracts will not be negotiated until over a year from now.

[8] Even absent a promise to bargain, SuperMedia would be under a legal duty to bargain in good faith imposed by the National Labor Relations Act. See 29 U.S.C. 158(a)(5) and (d); Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 180 (1971) ("the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining"). Good faith negotiations require that the parties not come to negotiations with a fixed, predetermined position, but rather with an open mind and a willingness to bargain and compromise. NLRB v. Ins. Agents' Int'l Union, AFL-CIO, 361 U.S. 477, 485 (1960).

[9] There is no guarantee that the parties will reach an agreement on the terms of successor CBAs by Jan. 1, 2014. However, even if an agreement is reached after that date, the parties could agree to make it applicable retroactively. Moreover, if there are no new CBAs in place as of Jan. 1, 2014, the NLRA requires SuperMedia to maintain the status quo of all mandatory subjects such as the future retirement benefits of current employees while the parties continue negotiations and until those negotiations reach either resolution or impasse. Laborers Health & Welf. Trust Fund For N. Calif. v. Adv. Lightweight Concrete Co., Inc., 484 U.S. 539, 543, n. 5 (1988) (employer under duty to maintain status quo during post-contract negotiations until parties reach resolution or impasse). The point is that neither the Parties nor the Court can adequately determine the respective rights of the parties until the legal situation is known in light of the new CBAs.

[10] SuperMedia asserts that "[d]ue to competitive pressures and the impact of increasing healthcare costs on its business and profitability, SuperMedia has amended its health and welfare benefits plans in a manner that modifies and/or eliminates certain benefits that its retirees currently receive." Am. Compl., ¶ 1. If, however, retirees are returned to the Verizon retirement plan under Murphy v. Verizon Communications, and are no longer participants in SuperMedia's plans, SuperMedia's position at the bargaining table regarding the remaining retirees may well change.

Plaintiffs might respond that they have no duty to bargain over the retirement benefits for those employees who had already retired as of June 25, 2012. Indeed, "Pittsburgh Plate Glass"[11] stands for the proposition that the retirement benefits of a company's current retirees are not mandatory bargaining subjects but that future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining." Miss. Power Co. v. NLRB, 284 F.3d 605, 614 (5th Cir. 2002) (quoting Pittsburgh Plate Glass Co., 404 U.S. at 180 (emphasis in original)). Plaintiffs' plan changes, however, will affect not only the benefits of employees who have already retired, but the benefits available to current employees when they retire in the future.

Plaintiffs may argue further that the Unions have waived any right to bargain over retiree benefits for current employees. In Memoranda of Agreement that are included as part of the CBAs, the parties stated as follows with regard to both current and future retirees: "The parties further agree that the New CBAs will not provide or suggest or imply in any way that retiree medical benefits for [Current and Future] Retirees will extend beyond the term of the New CBAs or that they will not extend beyond the term of the New CBAs." Ex. H, pg. 63 (Local 1301); Ex. I., pg. 94 (Local 1302) (same language in both CBAs) (emphasis added). In their Complaint, Plaintiffs bring the first part of this either/or language to the Court's attention, but without explanation they decline to draw the Court's attention to the second part. See Am. Compl., ¶ 59. Viewed in its complete context, it is evident this language does not stand for the proposition claimed by Plaintiffs and instead refutes any claim that the New England Locals have waived their rights to bargain over post-contract retirement benefits.

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[11] Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 180 (1971).

Although Plaintiffs' claim that "extrinsic or substantial factual development will prove unnecessary or inappropriate," Am. Compl. ¶ 78, the critical facts concerning the outcome of the collective bargaining process and the content of the CBAs in effect in January 2014 when the plan changes are implemented, are entirely unknown at this time. Accordingly, the case is appropriate for dismissal as to the New England Locals because it is unripe.[12]

C. Plaintiffs' attempt to address future rights also fails to state a claim against the New England Locals under § 301

Plaintiffs have named Locals 1301 and 1302 as defendants because of their collective bargaining agreements with SuperMedia. Am. Compl., ¶¶ 32-33, fns. 1-2. Insofar as this declaratory judgment action is one based on § 301, it must be dismissed because the suit does not allege a "violation" of an existing collective bargaining agreement.

Section 301 creates a cause of action for "[s]uits for a violation" of a collective bargaining agreement. 29 U.S.C. 185(a) (emphasis added). However, SuperMedia does not seek a declaration that its plan amendments are permitted under the existing CBAs with the New England Locals nor does SuperMedia allege that there is a dispute as to whether it is violating these CBAs. Instead, SuperMedia alleges that "because the CBAs expire before the relevant Amendment sections take effect, the CBAs do not apply to, much less govern, SuperMedia's right to enact the Amendments. Rather the applicable Plans … govern alone." Am. Compl., ¶ 60 (emphasis added).

[12] The Eighth Circuit's recent decision in Maytag Corp. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., --- F.3d. ----, 2012 WL 3168428 (8th Cir. Aug. 7, 2012) is not to the contrary. The Court found that dispute ripe where the change concerned only rights of retirees (not current employees), and where the Union had refused the Employer's request to bargain over this issue. Id., at *4 ("[t]he Union's refusal to bargain the issue made it imperative to seek final and immediate judicial resolution of this significant contract dispute"). Here, in contrast, the Plaintiffs promised to bargain, but have implemented the change in plan language without first engaging in such bargaining. Moreover, as explained infra, good faith bargaining under federal labor law requires that unilateral changes not be made prior to such bargaining, and accordingly, Locals 1301 and 1302 have requested that SuperMedia rescind the plan changes. See Affidavit of Patricia Telesco.

Section 301(a) creates jurisdiction for the federal courts to determine whether a CBA has been violated, not whether a CBA does or does not apply to a dispute. See Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto. Workers, 523 U.S. 653, 661-662 (1998) (Union's claim for relief under the Declaratory Judgment Act does not confer § 301(a) jurisdiction in the federal courts where the "complaint alleges no violation of the collective-bargaining agreement.") Because Plaintiffs insist that the current CBAs do not apply to the dispute, they fail to state a claim concerning any violation of those CBAs. Accordingly, SuperMedia has failed to state a claim for declaratory judgment under § 301 of the LMRA and the claims against the New England Locals should be dismissed.

D. The declaratory judgment action against the New England Locals concerning a future contract is an improper attempt to circumvent the National Labor Relations Board's exclusive jurisdiction

As to the New England Locals, Plaintiffs are asking this Court to validate a decision concerning SuperMedia's bargaining obligation regarding future retirement benefits for current employees. As such, the suit would require a declaratory judgment that Plaintiffs did not commit unfair labor practices in violation of §§ 8(a)(5) and 8(d) of the National Labor Relations Act ("NLRA") by unilaterally amending the Plans. See 29 U.S.C. §§ 158(a)(5) and (d). However, because the National Labor Relations Board has exclusive jurisdiction over such unfair labor practices, this Court lacks subject-matter jurisdiction and the Complaint should be dismissed as to Locals 1301 and 1302 pursuant to Fed. R. Civ. P. 12(b)(1).

An employer's decision to unilaterally change future retirement benefits for current employees violates § 8(a)(5) of the NLRA as an unlawful unilateral change to a mandatory subject of bargaining. See, e.g., Miss. Power Co. v. NLRB, 284 F.3d 605, 615 (5th Cir. 2002) ("retirement benefits, although prospective, are considered part of an employee's compensation

package, and changes in the computation of such benefits do constitute significant changes") (enforcing Miss. Power Co., 332 NLRB 530 (2000)); FirstEnergy Gen. Corp., 358 NLRB No. 96, 9-10 (Aug. 6, 2012) (employer violated NLRA by unilaterally changing future retirement benefits for current employees, even where those changes would not take effect until after employees had retired); Georgia Power Co., 325 NLRB 420 (1998) (prospectively announced changes in retirement benefits that would affect current employees who would not retire until on or after the announced implementation date were mandatory subjects of bargaining that could not be changed unilaterally); Midwest Power Systems, Inc., 323 NLRB 404, 406 (1997) ("The Supreme Court[13] has clearly stated that the future retirement benefits of current active employees are a mandatory subject of collective bargaining under the Act. Unilateral modification of such benefits constitutes an unfair labor practice"); S. Nuclear Operating Co. v. NLRB, 524 F.3d 1350 (D.C. Cir. 2008) (same).[14]

Plaintiffs have alleged facts that demonstrate that they violated the NLRA by amending the Plans in June 2012. Specifically, the Complaint alleges that SuperMedia has already amended the Plans and that SuperMedia intends to deny benefits to retirees starting on Jan. 1, 2014. Although the Complaint describes these changes as ones that "apply to former members of these certain collective bargaining units," Am. Compl., ¶ 62, this description is imprecise and incomplete. In fact, the announced changes to the Plan will affect not only employees who were

[13] See Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 180 (1971) ("Pittsburgh Plate Glass").

[14] In this line of cases, the NLRB and courts of appeals examine the CBA to determine whether the union has waived its right to bargain over the future retirement benefits of current employees. See, e.g., Miss. Power Co., 284 F.3d. at 619 ("the Unions expressly, clearly and unmistakably waived bargaining on the changes in the Medical Benefits Plan that are here at issue"). However, there is plainly no waiver at issue here, particularly given the parties explicit acknowledgement that the CBAs do "not provide or suggest or imply in any way either that retiree medical benefits for Future Retirees will extend beyond the term of the New CBAs or that they will not extend beyond the term of the new CBAs." Ex. H, pg. 63 (Local 1301); Ex. I., pg. 94 (Local 1302) (same language in both CBAs). A waiver argument is unavailing here because the placeholder language clearly demonstrates that the Union has waived nothing. Moreover, because the announced changes will not take effect until after the current CBAs expire, any purported waiver in the CBAs would in any event not survive the expiration of those CBAs. See, e.g., E.I. Dupont De Nemours, 355 NLRB No. 176 (2010), enf. denied on other grounds 682 F.3d 65 (D.C. Cir. 2012).

retired as of the date the changes were made in June 2012, but also those employees still employed on June 25, 2012, who will subsequently hold retiree status on or after Jan. 1, 2014. Am. Compl., ¶ 62. Thus, there are two groups, not one, that will be affected by the plan amendments when they take effect in 2014: (1) employees who were already retired as of June 25, 2012; and (2) current employees who will retire after June 25, 2012. With regard to this second group, SuperMedia's actions represent unilateral changes that are unlawful under the NLRA.

SuperMedia's violation of the NLRA is similar to that of the employer in the recent NLRB case of FirstEnergy Gen. Corp., 358 NLRB No. 96 (Aug. 6, 2012). In FirstEnergy, the Employer made unilateral changes to retiree benefits that were implemented immediately for employees who had already retired. However, as here, the changes for current employees were not scheduled to take effect until after the CBA then in effect had expired. Id. at 9. The Employer defended by claiming there would be sufficient time for the Union and Employer to bargain over the future retirement benefits of current employees before they took effect, just as SuperMedia has pledged in its amended complaint. Id. at 9; Am. Compl., ¶ 63, fn. 17 ("[g]ood faith bargaining with the Defendant Unions will occur prior to the expiration of the CBAs and will encompass these current employees' retiree benefits"). The Board nonetheless found a violation. "When FirstEnergy suggests that future bargaining may result in current employees never being affected by the cap, it is really saying that, absent agreement in subsequent bargaining to rescind the subsidy cap that applies to this retirement plan, the cap will come into effect in 2013 for unit employees retiring any time after February 15, 2008. That is the essence of a unilateral change, which in most every case could be bargained back to the *status quo ante*. However, FirstEnergy has a statutory duty to bargain over this retiree benefit before implementing it, not after

implementing it, leaving the Union to bargain back to the *status quo ante* in order to avoid future adverse effects on unit employees." Id. at 9-10 (emphasis added). What SuperMedia seeks to have this Court sanction is unlawful for the same reason.

In response to SuperMedia's unilateral changes, the New England Locals have requested that Plaintiffs rescind the plan changes and bargain in good faith as promised. See Affidavit of Patricia Telesco.[15] If SuperMedia agrees to do so, the case against the New England Locals becomes moot and should be dismissed. If SuperMedia refuses to do so, it will be continuing to engage in the same unlawful conduct at issue in FirstEnergy, and be subject to an unfair labor practice charge. Such charges would be investigated by the NLRB's General Counsel, through its regional office in Boston, Massachusetts. If the General Counsel finds merit to the charges, then the matter would proceed to trial before an administrative law judge. The standard remedy in such a case is that the wrongdoer restore the *status quo ante*, which here would mean restoring the Plans to the way they were before June 25, 2012, and to order SuperMedia to prospectively bargain in good faith with Locals 1301 and 1302 before making any further changes. See e.g., FirstEnergy Generation Corp., 358 NLRB No. 96, 20 (2012) (rescinding the unilaterally implemented change in the terms and conditions of employment for its unit employees and ordering bargaining).

This lawsuit represents an attempt to evade the NLRB's exclusive jurisdiction, which is contrary to the U.S. Supreme Court's longstanding Garmon preemption doctrine. See San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959). For more than 50 years, it has been the rule that "federal courts do not have jurisdiction over activity which 'is arguably subject to § 7 or § 8 of the [NLRA],' and they 'must defer to the exclusive

[15] On a jurisdictional motion brought pursuant to Fed. R. Civ. P. 12(b)(1), it is appropriate for the Court to consider matters outside the pleadings. Williamson v. Tucker, 645 F.2d 404, 412-13 (5th Cir. 1981); Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980).

competence of the National Labor Relations Board.'" Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83 (1982) (quoting Garmon, 359 U.S. at 245). The activity here – SuperMedia's unilateral change to the future retirement benefits of current employees – is arguably subject to § 8 of the Act, as explained supra. Whether SuperMedia's action was lawful is precisely the question about which SuperMedia seeks declaratory judgment. See Am. Compl., ¶ 71.e ("Plaintiffs seek declarations that … [a]s to defendants who are current or former bargaining unit members of Defendant Unions, SuperMedia has the right to amend, modify, revoke or terminate the Plans or any provisions therein at any time after December 31, 2013, and at SuperMedia's discretion.") (emphasis added). It is the Unions' position that SuperMedia does not have that right, and that its decision to proceed with changes to the future retirement benefits of current employees violates § 8 of the Act. See Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 180 (1971) (unilateral change to the future retirement benefits of current employees violates NLRA); Miss. Power Co. v. NLRB, 284 F.3d 605, 614 (5th Cir. 2002)(same)

This Court cannot enter declaratory judgment against the New England Locals without interpreting the NLRA and deciding whether SuperMedia acted lawfully when it amended the plan to change retirement benefits for current employees. As this matter is within the exclusive jurisdiction of the NLRB, the Court should dismiss the claims against Locals 1301 and 1302 pursuant to Fed. R. Civ. P. 12(b)(1)[16]

[16] Plaintiffs may argue that Kaiser Steel Corp. v. Mullins, supra, lends the Court authority to decide whether the NLRA has been violated, a proposition the New England Locals would vigorously dispute. The Kaiser Steel decision created a narrow exception to the rule of deference to the NLRB when the Court is asked to enforce a contract that includes provisions allegedly unlawful under the NLRA. SuperMedia makes no such claim here that would usurp the Board's exclusive jurisdiction to determine whether its pre-bargaining plan amendment violates the Act. Further, in Kaiser Steel the Court limited its holding to a passive remedy in a § 301 action leaving to the NLRB the exclusive right to "provide affirmative remedies for unfair labor practices." Id. at 86. See American Commercial Barge Lines Company v. Seafarers International Union, 730 F.2d 327 (5th Cir. 1984) (distinguishing Kaiser Steel and declining jurisdiction to enjoin unions' allegedly unlawful collective bargaining demands). For the foregoing

E. Plaintiffs fail to state a claim against the New England Locals for declaratory relief based on ERISA because they are not suing the New England Locals as representatives of the individual retirees

To determine whether an ERISA declaratory judgment action is properly brought, the Court must consider whether ERISA would have granted statutory standing to the declaratory judgment defendant bringing the same claim as an ERISA plaintiff. See NewPage Wisconsin Sys. Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy Allied Indus. & Serv. Workers Int'l Union, AFL-CIO/CLC, 651 F.3d 775, 777-78 (7th Cir. 2011) ("If a well-pleaded complaint by the defendant (the 'natural' plaintiff) would have arisen under federal law, then the court has jurisdiction when the 'natural' defendant brings a declaratory-judgment suit.") Here, the New England Locals are neither participants, beneficiaries, nor fiduciaries. Because SuperMedia has alleged that the Locals are not representatives of the retirees,[17] it cannot simultaneously claim that the Locals could have brought the alleged claim under ERISA as the "natural" plaintiff. Therefore, dismissal for failure to state a claim is appropriate. See Harold H. Huggins Realty, Inc. v. FNC, Inc., 634 F.3d 787, 795, n. 2 (5th Cir. 2011) (dismissal for lack of statutory standing is properly granted under Rule 12(b)(6)).

IV. Conclusion

For all of the above reasons, the New England Locals respectfully request that the Court dismiss the complaint against them.

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reasons, Kaiser Steel is inapplicable. However, even if the Court were to reach the question of the lawfulness of SuperMedia's actions under the NLRA, the clear and longstanding precedents cited above would mandate dismissal of the case for failure to state a claim against the New England Locals under Fed. R. Civ. P. 12(b)(6).

[17] See Am. Compl, ¶¶ 32-33, fns. 1-2. Plaintiffs have also made no showing that the retirees have assented, or would assent, to representation in this lawsuit by the New England Locals. See Boeing Co. v. March, 656 F. Supp. 2d 837, 846 (N.D. Ill. 2009) ("Boeing has not shown, by a preponderance of the evidence, that the retirees would assent to the Union's representation in this matter. Indeed, Boeing has not presented any evidence of such assent. Accordingly, this court lacks jurisdiction over Boeing's declaratory action under ERISA against the Union.")

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Respectfully submitted,

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COUNSEL FOR COMMUNICATION
WORKERS OF AMERICA, AFL-CIO,
LOCAL 1301 AND LOCAL 1302

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2012, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means. A copy of the foregoing document has also been served, by first-class mail, on Donald D. Oliver, Esq., Blitman & King LLP, Franklin Center, 443 North Franklin Street, Suite 300, Syracuse, NY 132079.

/s/ Shelley B. Kroll
Shelley B. Kroll

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUPERMEDIA INC., SUPERMEDIA LLC, SUPERMEDIA SERVICES INC., SUPERMEDIA SALES INC., SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE, and IDEARC INCEPTOR LTD., Plaintiffs v. LINTON BELL, DALE BURKS, PAMELA BENNETT, MARTHA BOBO, DENNIS CASSIDY, CAROL FOY, JOSEPH GALLAGHER, BEVERLY GEMMELL, EDWIN HANSON, CHRISTINE HARVEY, MARGARET KETZER, JOANIE KRAFT, THERESA LANE, SHARON LEYNES, PATRICIA LINDOP, ROBERT MENTZER, SANDRA NOE, CARL OHNSTAD, CLAIRE PALMER, STANLEY RUSSO, HOWARD SHAPSES, JOHN SULLIVAN, BERNARD ZENUS, COMMUNICATION WORKERS OF AMERICA, AFL-CIO, LOCAL 1301, COMMUNICATION WORKERS OF AMERICA, AFL-CIO, LOCAL 1302, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 2213, Defendants	Civil Action No. 3:12-cv-2034-G

AFFIDAVIT OF PATRICIA TELESCO

1. My name is Patricia Telesco and I am employed as staff representative for District 1 of the Communication Workers of America ("CWA"). My business address is 193 State Street, 2nd Floor, North Haven, CT 06473.

2. My duties as a staff representative include providing support in collective bargaining for CWA Locals 1301 and 1302 in Massachusetts.

3. Attached to this affidavit is a true and accurate copy of a letter I sent to SuperMedia by first class mail on August 23, 2012, on behalf of these CWA locals.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY ON AUGUST 23, 2012

Patricia Telesco

Attachment

Communications Workers of America
AFL-CIO, DISTRICT 1

193 State Street, 2nd Floor
North Haven, CT 06473
(203) 288-3440
Fax (203) 288-2420

Lawrence R. Cohen
President

Christopher M. Shelton
Vice President
District 1

COPY

PATRICIA M. TELESCO
Staff Representative

August 23, 2012

Carl Mitchell, Business Partner
SuperMedia - Labor Relations NE
35 Village Rd, Suite 200
Middleton, MA 01949

Dear Mr. Mitchell,

I am writing on behalf of CWA Locals 1301 and 1302. These locals recently learned, by way of complaints served upon them in a lawsuit the Company filed in Texas, that on June 25, 2012, SuperMedia amended its retiree benefit plans to reduce and/or terminate medical, dental, and other "component benefits" provided to retirees of Locals 1301 and 1302. It is my understanding that these changes are scheduled to take effect on January 1, 2014, the day after the expiration of the parties' current agreement. The Union objects to the Company's unilateral changes in retiree benefits and reserves its right to bargain over these matters in the course of the parties' negotiations for a successor agreement. Any plan amendments affecting the retirement benefits available to employees represented by Locals 1301 and 1302 must be rescinded before such bargaining takes place.

Sincerely,

Patricia M. Telesco
CWA Staff Representative
District One

cc: Thomas Bates, President CWA Local 1301
Sean LeBlanc, President CWA Local 1302