

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

IN RE UNISYS SAVINGS PLAN :
LITIGATION :
 :
THIS DOCUMENT RELATES TO: :
No. 91-3772 :
HENRY ZYLLA, ET AL., on behalf : MASTER FILE NO. 91-3067
of himself and all others :
similarly situated :
 :
 :
v. :
 :
UNISYS CORP., ET AL. :

MEMORANDUM AND ORDER

HUTTON, J.

August 9, 2001

Presently before this Court are Plaintiffs' Motion for Partial Summary Judgment and Memorandum in Support of the Local 444 Plaintiffs' Motion for Partial Summary Judgment(Docket No. 198), Defendants' Cross-Motion for Summary Judgment and Motion in Opposition to Local 444 Plaintiffs' Motion for Partial Summary Judgment (Docket No. 205), Memorandum in Reply to Defendant's Opposition to Local 444 Plaintiffs' Motion for Partial Summary Judgment and in Opposition to Defendants' Cross-Motion for Summary Judgment (Docket No. 207), Defendants' Reply Memorandum of Law in Support of Defendants' Cross-Motion for Summary Judgment and Motion in Opposition to Local 444 Plaintiffs' Motion for Partial Summary Judgment (Docket No. 210), Defendants' Motion for Summary Judgment Against Local 445, 450, 470, 165 and 3 Plaintiffs (Docket No. 204),

Memorandum in Opposition to Defendants' Motion for Summary Judgment Against Local 445, 450, 470, 3 and 165 Plaintiffs (Docket No. 208) and Defendants' Reply (Docket No. 209). For the reasons stated below Defendants' Motions are **GRANTED** and Plaintiffs' Motion is **DENIED**.

I. PROCEDURAL BACKGROUND

Almost ten years ago, on November 25, 1991, Plaintiffs filed a second amended consolidated class action complaint. In Counts I and II of the complaint, non-union employees alleged that Unisys breached its fiduciary duties and disclosure requirements under the Employee Retirement and Income Security Act, 29 U.S.C. §§ 1001, et. seq., ("ERISA"), by investing in Guaranteed Investment Contracts ("GICs") issued by Executive Life Insurance Company of California ("Executive Life"). In Count III, union employees sought separate relief under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA") for alleged breaches of collective bargaining agreements.¹ This Court, on January 26, 1995, granted summary judgment in favor of Unisys as to Counts I and II. The Third Circuit subsequently vacated the dismissal of Count I and remanded it for trial.² See *In re Unisys Savings Plan Litig.*, 74 F.3d 420 (3d Cir. 1996) ("Unisys I"). After a ten-day bench trial, during

¹The union Plaintiffs are Locals 444, 445, 450, 470 and 165 of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers ("I.U.E.E.S.M.F.W."), Local 3 of the International Brotherhood of Electrical Workers ("I.B.E.W.").

²The Plaintiffs did not appeal the court's decision to grant summary judgment on Count II.

which Unisys demonstrated that it committed no wrongdoing, this Court entered judgment in favor of Unisys,³ which the Third Circuit affirmed on March 22, 1999. See *In re Unisys Savings Plan Litigation*, 173 F.3d 145 (3d Cir. 1999) ("Unisys III").⁴

Pending the appeals process, this Court stayed further proceedings on the union Plaintiffs' claims under the LMRA. See Order of Sept. 19, 1996, (Hutton, J.). On July 31, 2000, the Court lifted the stay, and the parties subsequently resumed discovery. See Stipulation and Order of July 26, 2000 (Hutton, J.).

II. FACTUAL BACKGROUND

Unisys is the product of the 1986 merger between Sperry Corporation and Burroughs Corporation. *Unisys I*, 74 F.3d at 425. Sperry and Burroughs each had maintained retirement plans for its employees. Sperry's plan was known as the Sperry Retirement Program-Part B ("Sperry Plan") and Burrough's plan was the Burroughs Employees Savings Thrift Plan ("BEST Plan"). *Id.* On April 1, 1988, the Sperry Plan and the BEST Plan were consolidated to form the Unisys Savings Plan ("USP"). *Id.* at 426. Around the same time, Unisys established the Unisys Retirement Investment Plan ("RIP") and the Unisys Retirement Investment Plan II ("RIP II") for

³For the District Court's findings of fact and conclusions of law following the bench trial, see *In re Unisys Savings Plan Litig.*, No. 91-3067, 1997 WL 732473 (E.D. Pa. Nov. 24, 1997).

⁴ The plaintiffs then sought further review in the United States Supreme Court, which denied their writ of certiorari on October 15, 1999. See *Meinhardt v. Unisys Corp.*, 528 U.S. 950 (1999).

its unionized employees.⁵ Id. at 427. The RIP and RIP II were mirror images of the USP, with the exception of the definition of service and the amount of the Company match, id. at 426-27, and all three plans were administered together.⁶ See Deposition of Henry Zylla of Feb. 17, 1994, at 30, attached as Exhibit 7.

The USP, RIP I and RIP II were "individual account plans" or "defined contribution plans," which are given preferential treatment under the Internal Revenue Code, and also known as 401(k) plans. Unisys II, 1997 WL 732473, at *2. Such a plan provides for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, which may be allocated to the participant's account. 29 U.S.C. § 1002(34). Participants in defined contribution plans choose where to direct their contributions. Id. A defined contribution plan is completely different from a "defined benefit plan" where participants are promised, upon retirement, a benefit in the form of a fixed percentage of their pre-retirement salary, in that participants in defined contribution plans bear the risk of their

⁵Local 444 members are former Sperry employees. Unisys RIP's predecessor was the Sperry RIP.

⁶The RIP I mirrored the USP except for Company-matching contributions and the definition of service, while the RIP II mirrored the USP except for Company-matching contributions. See RIP I summary plan description, at 6, and RIP II summary plan description, at 6. The RIP II is not at issue here as it was offered to Locals other than the Local Plaintiffs. The RIP I will be referred to as the "RIP."

investments. See *id.*⁷

III. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Ultimately, the moving party bears the burden of showing that there is an absence of evidence to support the nonmoving party's case. See *id.* at 325. Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See *id.* at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" only if it might affect the outcome of the suit under the applicable rule of law. See *id.*

When deciding a motion for summary judgment, a court must draw

⁷See also *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-41 (1999) (discussing the difference between a defined contribution plan and defined benefits plan); *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 163 (7th Cir. 1988) (same).

all reasonable inferences in the light most favorable to the nonmovant. See *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See *id.* Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See *Trap Rock Indus., Inc. v. Local 825*, 982 F.2d 884, 890 (3d Cir. 1992). The court's inquiry at the summary judgment stage is the threshold inquiry of determining whether there is need for a trial, that is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. See *Anderson*, 477 U.S. at 250-52. If there is sufficient evidence to reasonably expect that a jury could return a verdict in favor of plaintiff, that is enough to thwart imposition of summary judgment. See *id.* at 248-51.

IV. LOCAL 444 PLAINTIFFS' CLAIMS AGAINST DEFENDANTS

The interpretation of a collective bargaining agreement is a legal issue for the court. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., U.A.W. v. Skinner Engine Co.*, 188 F.3d 130, 138 (3d Cir. 1999). Federal law generally governs collective bargaining agreement interpretation, however, traditional rules of contract construction apply when not

inconsistent with federal labor law.⁸ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957); *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., U.A.W. v. Mack Trucks, Inc.*, 917 F.2d 107, 111 (3d Cir. 1990). When contract language is clear and unambiguous, a court must determine its meaning as a matter of law. *Skinner*, 188 F.3d at 138.

A. Do Sections 5 and 7 of the CBA create contractual rights that exist independently of the prospectus and appendix?

Section 7B of the Collective Bargaining Agreement ("CBA")⁹ between Defendant and Plaintiffs incorporated by reference three documents: the Prospectus and Appendix, the Supplement to the Prospectus and a Summary Plan Description ("SPD"). Plaintiffs contend that the Amendment and Termination clause of the Prospectus conflicts with Section 26F8 of the CBA. In particular, Plaintiffs note, that the Amendment and Termination clause of the Prospectus provides that "[E]ffective April 1, 1988, the Administrative Committee may amend, modify, or discontinue the Plan, in whole or

⁸Plaintiffs contend that New York law governs this case because of a choice of law provision in the grievance and arbitration section of the contract. There is no doubt that Pennsylvania law applies to this dispute. The RIP Plan Document effective Apr. 1, 1988 (as amended and restated Apr. 1, 1989), however, states that the RIP "shall be construed, regulated and administered under and in accordance with the laws of the State of Pennsylvania, except as preempted by ERISA." *Id.* at 121. It does not appear that the choice of law in this case matters as it appears neither New York nor Pennsylvania law conflicts with general contract interpretation principles.

⁹ The agreement is titled in full "Agreement between Surveillance and Fire Control System Division and the Systems Management Unit of Shipboard and Ground Systems Group, Unisys Corporation and International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers A.F.L.-C.I.O and Engineers Union, Local 444 I.U.E.E.S.M.F.W, A.F.L.-C.I.O., as amended and extended September 10, 1988 - September 6, 1991.

in part, at any time" but that no amendment could deprive a participant of "benefits accrued before the amendment without that persons consent." See Prospectus, Unisys RIP, dated April 1, 1988, at 7. Plaintiffs then assert that Section 26F8 of the CBA provides that no interpretation of the CBA could "add to, subtract from, delete or modify in any way, the existing provisions of this Agreement." See Local 444 CBA, as amended and extended Sept. 10, 1988 - Sept. 6, 1991, at 87. Plaintiffs then seek to "harmonize" these provisions.

Plaintiffs assert that the in the "Amendment and Termination" clause found in the Prospectus made reference only to the 1988 Prospectus and Appendix and Supplement No. 1. Plaintiffs contend the Administrative Committee's authority granted in this clause was limited to amending and modifying terms set forth in these three documents. Plaintiffs contend that the terms that are stated in the Prospectus and Appendix of April 1, 1988 remain subject to amendment by the Administrative Committee, while the terms that originate in §§ 5 and 7 of Article 28 of the CBA were immunized from amendment by the Administrative Committee by virtue of the language of 26F8.

Upon review of the documents referenced by Plaintiffs, the Court finds no conflict between the provisions. The Amendment and Termination clause of the Prospectus and Appendix states that the Employee Benefits Executive Committee may modify or amend the Unisys Retirement Investment Plan in whole or in part. See

Prospectus, Unisys RIP, dated April 1, 1988, at 7. The clause also provides that while no amendment may deprive any member or beneficiary of benefits or contributions with that person's consent, the Plan, however, may be amended to comply with applicable law, regulation, or the requirements of any government authority. See *id.*

The provision that Plaintiffs contend creates rights beyond those found in the incorporated document, Section 26F8, on the other hand, is located in the CBA within a section covering arbitration. The language Plaintiffs cite is taken out of context. Viewing the clause in the context of the CBA indicates that the provision Plaintiffs rely upon relates to an arbitrator's authority in the grievance and arbitration procedure, which is not at issue here. The Court thus finds that the CBA did not create rights in addition to those found in the incorporated documents.

The Court, additionally finds that, upon reviewing the incorporated documents, the intent of the parties to the CBA was for the RIP to mirror the USP. The express contract language in the CBA between Local 444 and Unisys does not afford Local 444 RIP participants any rights above and beyond those given to non-union USP participants. Rather, language in the CBA and incorporated plan documents makes clear that the RIP and the USP were meant to be identical in all respects except for the definition of service and the rate of contribution. The contract clearly and unambiguously states that the RIP "shall conform with the Unisys

Savings Plan in all respects, except for the definition of Service and the rate of contribution on the part of the Company." See CBA, at 198. Furthermore, any future changes to the "Unisys Savings Plan, exclusive of rate of contribution on the part of the Company and the definition of service, will automatically apply to the Unisys Retirement Investment Plan and all interpretations and administrative practices which apply to the Unisys Savings Plan shall apply to the Unisys Retirement Investment Plan." See *id.*

The clear intent behind this language was to make the plans conform to one another except for the definition of service and Company-contributions - features which were deliberately carved out of the "mirror image" language. Other than these two carve-out provisions, the parties intended the RIP and USP to be administered identically.

The SPD also made clear that the USP and RIP were meant to be "mirror image" plans. The RIP SPD provided the same "mirror image" language as in the contract. The SPD is a plan document that was incorporated into the CBA. The contract provides that both Articles 14 ("Safety and Health") and 28 ("Schedule D-Medical, Dental, Life Insurance, Pension and Retirement Investment Plans") include by reference "Plan Documents," or other documents which "legally govern the provision of benefits under the present and previous Retirement Investment Plan." Additionally, the contract as a whole includes by reference the applicable "Plan Documents," or "other documents which legally govern the provision of benefits

outlined in whole or in part in Article 14."¹⁰

The plain contract language demonstrates that Unisys and Local 444 agreed that the RIP and the USP would be identical subject to only two exceptions - the definition of service and the rate of contribution. No other basis for treating Local 444 members differently from participants in the USP exists. The fact that participants in the RIP plans were meant to be subject to the administrative practices regarding the USP is evident in the contract provision stating that "future changes to the [USP], exclusive of rate of contribution on the part of the Company and the definition of service, will automatically apply to the Unisys [RIP] and all interpretations and administrative practices which apply to the [USP] shall apply to the Unisys [RIP]."

B. Was the Freeze by Unisys prohibited by the CBA?

Having determined that § 26F8 does not conflict with the incorporated documents and that the intent of the parties was to create a mirror image, Plaintiffs' argument that the CBA prohibited the freeze fails. The Amendment and Termination clause of the Prospectus, that the Court finds governs changes to the CBA, provides that "[E]ffective April 1, 1988, the Administrative Committee may amend, modify, or discontinue the Plan, in whole or in part, at any time" but that no amendment could deprive a

¹⁰Furthermore, the contract provides that any "improvements, modifications or changes in those plans shall be automatically applicable to the employees covered by this agreement." See Exhibit 10, at 221.

participant of "benefits accrued before the amendment without that persons consent." See Prospectus, Unisys RIP, dated April 1, 1988, at 7.

On April 11, 1991, the California Commissioner of Insurance seized Executive Life, placing it in conservatorship, and on April 12, 1999, issued a moratorium on all payments from the insurer. As a result, Unisys froze the account balances that included investments in Executive Life. Unisys acted in accordance with its authority as prescribed by language in the CBA and RIP documents, and its action constituted an administrative decision by the benefits committee which applied to all plan participants.

The prospectus permits Unisys to: "amend, modify or discontinue the Plan in whole or in part at any time. . ." See Prospectus, RIP, dated April 1, 1988, at 7. Furthermore, Unisys could make certain changes to the RIP, without first having to obtain approval from the Administrative Committee if doing so was vital to maintaining compliance with applicable law:

[T]he Company. . . reserves the right to amend, modify or discontinue the Plan in whole or in part at any time or times. The Plan may be amended, modified or terminated by action of the Administrative Committee within the limits imposed by the Board of Directors. The Plan shall be deemed automatically amended, without action by the Board of Directors or the Administrative Committee, to the extent the Administrative Committee deems it necessary or appropriate to maintain compliance of the Plan with applicable statutes and regulations.

See Unisys RIP Plan, at 118. The reservation of the right to modify, amend or even terminate a benefits plan is a common feature

in plan administration. *Norrily v. Thomas & Betts Corp.*, 188 F.3d 153, 158 (3d Cir. 1999)(holding that an employer can act according to its business interests in amending or terminating a benefits plan); *Deibler v. United Food and Commercial Workers' Local Union 23*, 973 F.2d 206, 210 (3d Cir. 1996)("ERISA generally allows employers to amend or terminate welfare benefit plans as will."); *Hennessy v. Federal Deposit Ins. Corp.*, 858 F. Supp. 483, 488 (E.D. Pa. 1994)(stating that an employer may generally terminate welfare benefit plans at will).

Local 444 contends that the "amendment and termination" provisions are at odds with contract language based on Article 26, Section F(8), a provision in a portion of the contract reciting the procedure for grievances and arbitrations. Local 444's constant references to Article 26, Section F(8), however, are misplaced. That provision prohibits an arbitrator's ability, in the grievance and arbitration setting, to add to, subtract from, delete or modify provisions in a collective bargaining agreement when interpreting the agreement. Under the Federal Arbitration Act, a court may vacate an arbitration award if arbitrators exceed their powers or venture beyond the bounds of their authority. *Matteson v. Ryder System Inc.*, 99 F.3d 108, 112 (3d Cir. 1996). It follows that arbitrators must base their decisions on the "essence" of the agreement, and not modify a provision in an agreement when interpreting its meaning. *Id.* Contrary to Local 444's contention, this provision has absolutely no bearing on plan administration

decisions.

C. Did § 7F of Article 28 of the CBA Obligate Defendant to Pay For the Cost fo Transfer From the FIF

Plaintiffs contend that Article 28, Section 7(F) of the CBA, which states: "Unless specifically stated otherwise, all costs for the benefits covered herein will be borne by the Company," means that Unisys guaranteed the investments in Local 444 members' retirement accounts. According to Plaintiffs, benefits equals account values. Because Unisys, through an excerpt of testimony from an arbitration hearing, agreed to pay all costs associated with providing the "benefits" to participants, Unisys should have paid the lost value of the frozen Executive Life account balances as a cost of providing the benefits. Local 444 contends that the testimony of John Loughlin, the then Vice-President of Benefits/Financial Administration of Unisys, that "Benefits per se, we're talking about account values, have never been reduced" means that the word "benefits" in the contract provision means account values. This argument essentially claims that Unisys guaranteed the investments in Plaintiff's account balances.

As discussed, Loughlin's testimony equating benefits with account values is completely taken out of context. Loughlin was not talking about "benefits" and "account values" in terms of costs that will be covered by Unisys. Loughlin was referring to the notion that once a participant's money is placed into an account, the money is 100% vested and the company cannot then reduce the

value for its own benefit. See Prospectus, RIP, dated April 1, 1988, at 7 ("no amendment may cause the Company to recapture any contributions previously made to the trust"). Loughlin, however, did not mean that accounts could not be reduced by other forces, such as the performance of the funds in which they were invested. Defined contribution plans obviously involve risk, and are designed to impose that risk on the plan participant.

Loughlin's comment was not responsive on the issue of the meaning of "costs," nor was he ever questioned on this issue. Even assuming that account values are a benefit, the "cost" referred to in the provision, does not mean that Unisys promised to pay the lost value of the frozen Executive Life balances.

The provision "all costs for the benefits covered herein will be borne by the Company" is found in the ERISA portion of the contract at Article 28, Section 7. The term "costs" in this sentence does not mean losses sustained in individual investment accounts. Were it otherwise, Unisys would be the guarantor for all funds in the RIP, including the highly speculative equity funds. "Costs" refers to the expenses incurred as a result of administering the plan under ERISA. Indeed, the term "costs" is defined in the Appendix to the RIP Prospectus which explains:

all costs of administration of the Plan will be paid by the Trustee from the assets of the Plan, except to the extent that the Company elects to pay all or a part of such costs. As of the date of this Appendix [dated March 9, 1988], the Company has elected to pay internal administrative costs, recordkeeping fees for monitoring individual accounts, costs of voting solicitation and furnishing of stockholder

communications and costs of communications, materials and forms. Expenses related to the operation of the trust, such as trustee's fees, investment management fees, brokerage fees, transfer taxes and other expenses incidental to the purchase and sale of trust assets, or which are incurred subsequent to the termination of the Plan, are paid by the Trustee from the assets of the Plan. Except for loan fees, the company will not receive any fees or charge, or be reimbursed for any expenses from the Plan.

See Prospectus, Unisys RIP, dated April 1, 1988, at p. I-3.

The RIP Plan Document also defines "costs." It provides:

All costs of administration of the Plan and expenses related to the operation of the Trust will be paid by the Trustee from the assets of the Trust, except to the extent that the Company elects to pay all or a part of such costs and expenses.

See Unisys Retirement Investment Plan, at 110. In sum, the losses sustained in the individual accounts, a necessary feature of defined contribution plans, cannot be equated with the costs assumed by Unisys in the administration of the RIP.

Based on this Court's analysis of the Motions by both the 444 Plaintiffs and Defendants, the Court finds that there are no genuine issue of material fact and Defendants are entitled to judgment as a matter of law.

V. LOCAL 445, 450, 470, 165 AND 3 PLAINTIFFS' CLAIMS AGAINST DEFENDANTS

The following three documents signed by bargaining representatives from Locals 445, 450 and 470 openly acknowledge that the RIP was intended to be a "mirror image" of the USP in all aspects, with the exception of rate of contribution and definition of service:

- 1) A "Memorandum of Agreement" entered into on

September 12, 1988 between Unisys and Locals 445, 450, and 470 states that the "RIP in all respects [is the] same as Unisys Savings Plan." See Memorandum of Agreement of Sept. 12, 1988, at 3.

2) A document titled "Retirement Investment Plan" which is dated September 13, 1988, represents a settlement agreement between Unisys and the I.U.E. Conference Board in which the parties agreed that:

The Retirement Investment Plan shall continue to conform with the Unisys Savings Plan in all respects, except for the definition of Service and the rate of contribution on the part of the Company. Any future changes to the Unisys Savings Plan (exclusive of rate of contribution on the part of the Employer and the definition of service), will continue to automatically apply to the Retirement Investment Plan and all interpretations and administrative practices which apply to the Unisys Savings Plan shall apply to the Retirement Investment Plan.

See Retirement Investment Plan Document of Sept. 13, 1988, at 1.

3) A "Memorandum of Agreement" entered into on September 10, 1982, prior to the Sperry-Burroughs merger, signed by the I.U.E. Conference Board, acknowledges the creation of the Sperry RIP, which was the predecessor to the Unisys RIP, and that "any future changes to the Part B of the Sperry Retirement Program exclusive of the rate of contribution on the part of the Company will automatically apply to the Sperry Retirement Investment Plan and all interpretations and administrative practices which apply to the Part B of the Sperry Retirement Program shall apply to the Retirement Investment Plan." See Memorandum of Agreement of Sept.

10, 1982, at 4.

The governing collective bargaining agreement between Local 450 and Unisys also contains "mirror image" language similar to that in the above-listed agreements between the I.U.E. Conference Board and Unisys:

The Retirement Investment Plan shall continue to conform with the Unisys Savings Plan in all respects, except for the definition of Service and the rate of contribution on the part of the Employer. Any future changes to the Unisys Savings Plan (exclusive of rate of contribution on the part of the Employer and the definition of service), will continue to automatically apply to the Retirement Investment Plan and all interpretations and administrative practices which apply to the Unisys Savings Plan shall apply to the Retirement Investment Plan.

See Collective Bargaining Agreement between Local 450 and Unisys, dated Sept. 10, 1988-Sept. 6, 1991, at 144.

Local 3's collective bargaining agreement contains clear "mirror image" language demonstrating that Local 3 and Unisys agreed that the RIP was identical to the USP except for the definition of service and rate of contribution:

The Retirement Investment Plan shall continue to conform with the Unisys Savings Plan in all respects, except for the definition of Service and the rate of contribution on the part of the Employer. Any future changes to the Unisys Savings Plan (exclusive of rate of contribution on the part of the Employer and the definition of service), will continue to automatically apply to the Retirement Investment Plan and all interpretations and administrative practices which apply to the Unisys Savings Plan shall apply to the Retirement Investment Plan.

See Collective Bargaining Agreement between Local 3 and Unisys, dated Oct. 23, 1988-Oct. 18, 1991, at 59.

Local 165's collective bargaining agreement does not discuss

the RIP. See Collective Bargaining Agreement between Local 165 and Unisys, 1987-90. A letter of understanding, dated October 3, 1990, from Unisys to the President of Local 165, and signed by the President of Local 165, however, indicates that the parties agreed to "mirror image" plans:

The RIP provisions are patterned after similar provisions in 'Part B' of the salaried employees' retirement savings plan. It is the parties intent that the administration and terms and conditions of RIP will be the same as those applied to the salaried employees' retirement savings plan during the term of the agreement. In exchange, IUE Local 165 covenants and agrees that neither they, nor any employees represented by them, will in any manner challenge the administration of RIP through any legal or administrative proceedings or the grievance and/or arbitration provisions of the labor agreement, provided such administration is consistent with the Administrator's rules and regulations regarding this policy that are applicable to all participants. The Company agrees, however, that it will discuss with the Union, upon the its request, any questions which may arise regarding the RIP or its administration. In any event, the decision of RIP administrators shall be final and binding upon the Union and all bargaining unit employees with respect to any provisions of RIP.

See Letter from M.I. Oglensky to Nicholas Klemenz, President of Local 165, dated Oct. 3, 1990, at 1-2.

Summary judgment is appropriate because Locals 445, 450, 470, 3 and 165 fail to come forward with a genuine issue of material fact to preclude dismissal of their claim that Unisys guaranteed their Executive Life investments. Rather, the agreements and memoranda of understanding between the Locals and Unisys clearly indicate that the Locals agreed that the RIP would take its administrative cue from the USP, except for the definition of service and rate of company contributions. These were the only

contract terms that were not subject to change without the Locals' consent. In the case of Locals 450 and 3, the language that the RIP mirrors the USP actually appears in their collective bargaining agreements. As for the other Locals, while their contracts contain a reference to the RIP, other agreements that they signed expressly acknowledge that the RIP and the USP were meant to be identically administered plans. It is clear from these documents that any changes to the USP automatically applied to the RIP, including the administrative decision to freeze Executive Life investments when Executive Life was seized in April 1991. The Locals cannot now contest that decision, as the language they agreed to, permits Unisys to make universal decisions in administering its retirement plans.

The Locals next attempt to argue that "past practice" required the Company to honor transfer requests after the seizure of Executive Life, and also that Unisys had a "contractual obligation" to give "timely" notice of the August 10, 1990 Executive Life resolution. This Court has already decided, and the Third Circuit affirmed, any misrepresentation and concealment claims in favor of Unisys. See *In re Unisys Savings Plan Litig.*, No. 91-3067, 1997 WL 732473 (E.D. Pa. Nov. 24, 1997), *aff'd*, 173 F.3d 145 (3d Cir. 1999), *cert. denied*, *Meinhardt v. Unisys Corp.*, 528 U.S. 950 (1999). This Court specifically found that union plaintiffs were solely negligent in failing to transfer their own investments as making investment choices was entirely their responsibility. See

id. at *28 (Unisys made no “material misrepresentations’ about Executive Life. . . . [P]laintiffs had all the information they needed to make informed choices about their investments. . . . [and] Unisys had no obligation to disclose to the participants that which they already knew.”).

As for the Locals’ past practice argument there was no past practice of honoring transfer requests amidst a seizure of investment assets by a state regulatory agency. Furthermore, past practice is not applicable when the contract language is clear and unambiguous. *Aetna Casualty & Surety Co. v. Philadelphia Reinsurance Corp.*, No. 94-2683, 1995 WL 217631, at *3 (E.D. Pa. Apr. 13, 1995) (“If the face of the contract is plain and unambiguous, evidence of the parties’ performance is immaterial.”).

The Court thus grants summary judgment in favor of Defendants on the Locals’ claims.

An appropriate Order follows.

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

IN RE UNISYS SAVINGS PLAN :
LITIGATION :
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THIS DOCUMENT RELATES TO: :
No. 91-3772 :
HENRY ZYLLA, ET AL., on behalf : MASTER FILE NO. 91-3067
of himself and all others :
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v. :
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O R D E R

AND NOW, this 9th day of August, 2001, upon consideration of Plaintiffs Motion for Partial Summary Judgment and Memorandum in Support of the Local 444 Plaintiffs' Motion for Partial Summary Judgment(Docket No. 198), Defendants' Cross-Motion for Summary Judgment and Motion in Opposition to Local 444 Plaintiffs' Motion for Partial Summary Judgment (Docket No. 205), Memorandum in Reply to Defendant's Opposition to Local 444 Plaintiffs' Motion for Partial Summary Judgment and in Opposition to Defendant's Cross-Motion for Summary Judgment (Docket No. 207), Defendants' Reply Memorandum of Law in Support of Defendants' Cross-Motion for Summary Judgment and Motion in Opposition to Local 444 Plaintiffs' Motion for Partial Summary Judgment (Docket No. 210) Defendants' Motion for Summary Judgment Against Local 445, 450, 470, 165 and 3 Plaintiffs (Docket No. 204), Memorandum in Opposition to Defendants' Motion for Summary Judgment Against Local 445, 450,

470, 3 and 165 Plaintiffs (Docket No. 208) and Defendants' Reply (Docket No. 209), IT IS HEREBY ORDERED that Defendants Motions are **GRANTED** and Plaintiffs Motion is **DENIED**.

IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment in the above captioned matter in favor of Defendants and against Plaintiffs.

BY THE COURT:

HERBERT J. HUTTON, J.