In The

Supreme Court of Virginia

RECORD NO. 130681

RICHARD ANTHONY, *et al.*,

Appellants,

v.

VERIZON VIRGINIA INC., *et al.*,

Appellees.

BRIEF OF APPELLEE VERIZON VIRGINIA INC.

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SUMMARY OF THE ARGUMENT

This case is, and from its inception has been, a federal labor law case that Appellants Richard Anthony and nine other employees ("Employees") seek to masquerade as a state law fraud case. The trial court properly concluded – *twice* – that Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("Section 301"), preempts the Employees' state law claims against their former employer, Verizon Virginia Inc. ("Verizon"), and union, the Communications Workers of America AFL-CIO, District 2 ("CWA"), because those claims require interpretation of the parties' collective bargaining agreements ("CBA"). This Court should affirm the trial court's decision and clarify for the courts of Virginia that, by virtue of Section 301, federal law governs misrepresentation claims, like those raised here, that arise out of and involve interpretation of labor contracts.

For over 50 years, the United States Supreme Court has held that Section 301 displaces *any* state claim that is "inextricably intertwined" with a CBA. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209–13 (1985); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405–06 (1988); *Local 174, Teamsters, Chauffers, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). As one of only three statutes that the Supreme Court has declared to be "complete preemption" statutes,

Section 301 carries "extraordinary pre-emptive power" (*Metro. Life Ins. Co v. Taylor*, 481 U.S. 58, 65 (1987)): it mandates that federal law *must* govern any case that may affect the meaning or application of a CBA, regardless of *how* the plaintiff pled the claim, in contract or in tort, or *where* the plaintiff filed the claim, in state or federal court. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987).

This rule exists for a simple but vitally important reason: Section 301 preemption is essential to federal labor policy. *Lucas Flour Co*., 369 U.S. at 103–04. Collective bargaining agreements govern labor relationships, and if the same CBA could have different meanings in different states, it would be impossible for multi-state bargaining parties, like Verizon and the CWA, to develop consistent labor practices that apply uniformly across state lines. *Lueck*, 471 U.S. at 209–10. For that reason, the Supreme Court held, over 50 years ago, that "substantive principles of federal labor law must be paramount" and must "uniformly . . . prevail over inconsistent local rules." *Lucas Flour Co.*, 369 U.S. 95 at 103–04. And, to that end, Section 301 authorizes the federal courts to establish a "body of federal law for the enforcement of" CBAs to ensure uniformity in interpretation. *Textile Workers Union of Am. v. Lincoln Mills of Ala*., 353 U.S. 448, 450–51 (1957).

This federal common law governing labor relations, not state law, controls here. Though the Employees label their claims as state fraud claims, they substantively assert claims that are "inextricably intertwined" with the CBA. They allege that Verizon and the CWA fraudulently misrepresented their risk of layoff based on their seniority (*which the CBA controls*) after Verizon declared a 12,000-employee "surplus" (*which the CBA defines*) that encompassed their job titles (*which the CBA covers*) so as to induce them to resign in a short period of time (*which the CBA defines*) in exchange for Enhanced Income Security Plan ("EISP") benefits (*which the CBA creates*) that Verizon and the CWA codified in the 2010 EISP Memorandum of Agreement ("MOA") (*which expressly incorporates the CBA and specifically addresses the subject of layoffs*). Joint Appendix ("App.") pp. 2–4. None of these claims would exist *but for* the CBA and MOA that governed every aspect of the Employees' separation from employment, including the "surplus" and the "EISP" itself – express CBA terms that the Employees repeatedly cite in their Complaints.

To decide these claims, a reviewing court will have to interpret the express and implied terms of the CBA and MOA under federal common law. Indeed, the Supreme Court's decision in *Lueck* – where it held that federal common law required consideration of both express and implied duties

under a CBA in evaluating allegedly tortious handling of a benefit claim – is dispositive here. 471 U.S. at 213–19. A court cannot determine whether Verizon and the CWA tortiously handled the Employees' separation under the EISP – in terms of describing the comparative value of the EISP, making alleged misrepresentations about the Employees' layoff risk, and/or providing inadequate time to consider the EISP – without evaluating their actions under the standard of good faith and fair dealing that *Lueck* deemed implicit in all CBAs under Section 301's federal common law. *Id*. at 217–19. Further, a court cannot evaluate whether Verizon and the CWA made false representations about the Employees' layoff risk during the surplus without interpreting the extensive CBA provisions governing surpluses and layoffs. Nor can a court determine whether the Employees reasonably relied on alleged representations about job security without interpreting the CBA and MOA, since the Employees' could not have justifiably relied on such representations if the CBAs contradicted them.

The Employees seek to evade this outcome by arguing that, as the "masters" of their Complaints, they chose not to mention the CBA by name in their Complaints, making their state law claims "independent" of the CBA. Not only do the Complaints themselves belie this argument – as they rely on and repeatedly reference the CBA-created EISP numerous times – but

the argument amounts to form over substance. Long-settled Supreme Court precedent holds that plaintiffs cannot "evade the requirements of Section 301" through artful pleading. *Lueck*, 471 U.S. at 211. Because Section 301's preemptive reach is so "extraordinary," it does not matter how the Employees crafted their Complaints: Section 301 "'converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, *Inc.*, 482 U.S. at 393 (quoting *Metro Life Ins. Co.*, 481 U.S. at 65).

Artful pleading aside, this case is and always has been a federal law case under Section 301. Because the Employees' claims cannot be resolved without interpreting the CBAs, their claims are federal claims that must be resolved under Section 301's federal common law. Any other conclusion would embroil state courts in labor disputes best left to labor arbitrators, and would destabilize labor relationships by creating inconsistent enforcement of multi-state labor contracts, like the CBA here, which applies to Verizon employees in Virginia, Maryland, West Virginia, and the District of Columbia. This Court should affirm the ruling below.

STATEMENT OF THE CASE

The ten Employees – all former Verizon employees and former CWA members – filed separate but largely identical Complaints against Verizon

and the CWA in the Portsmouth Circuit Court in October 2011.[1] App. pp. 1–82. They claimed that Verizon and the CWA made misrepresentations to induce them to resign in exchange for EISP benefits, including that their jobs were "in serious jeopardy" when they were not. App. pp. 2–3.[2]

Verizon and the CWA removed the cases to the United States District Court for the Eastern District of Virginia and moved to dismiss based on Section 301 preemption. App. pp. 83–84. The district court instead remanded the cases back to state court on July 2, 2012. App. pp. 105–10. Neither Verizon nor the CWA was entitled to appeal that order because the district court relinquished its jurisdiction in remanding. However, the decision was not dispositive, such that Verizon and the CWA were entitled to raise the issue again in state court. *See Nutter v. Monongahela Power Co.*, 4 F.3d 319, 322 (4th Cir. 1993) (holding that remand decisions in Section 301 cases have "no preclusive effect" in state court).

Following remand, Verizon and the CWA filed demurrers based on Section 301 preemption, among other things. App. pp. 111–16. Verizon

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[1] Appellant Ricky Rosser also asserted a claim for negligent infliction of emotional distress in his Complaint. Appendix ("App.") p. 78. That claim, though, was not addressed in the Appellants' Brief or the Petition for Appeal, and thus Rosser has waived any challenge to its dismissal.

[2] In their brief, the Employees only cited to the Complaint filed by Appellant Richard Anthony. Because the ten Complaints are largely similar, Verizon will follow the same practice except where they state different facts.

also moved craving oyer (without opposition) to include in the record certain documents referenced in or integral to the Complaints, including (1) the CBA between Verizon and the CWA; (2) the 2010 MOA between Verizon and the CWA concerning the "surplus" and EISP benefits; and (3) the correspondence that Verizon sent to the Employees in May 2010 concerning the surplus and their EISP benefits. App. pp. 117–20.

Thereafter, following briefing and oral argument, Judge James Cales consolidated the ten cases, granted the motion craving oyer, partially overruled the demurrers (on the non-Section 301 issues), and took the Section 301 issue under advisement. App. pp. 155–58. On December 27, 2012, Judge Cales issued a letter ruling granting the demurrers based on Section 301 preemption. App. pp. 153–54. The court did not, as the Employees erroneously assert (Appellants' Brief ("Br.") p. 2), take these issues under *further* advisement; to the contrary, the court dismissed the Complaints based on Judge Cales' letter ruling. App. pp. 159–60.

The Employees moved for reconsideration, which the court granted on February 13, 2013. App. p. 161. The court reaffirmed its decision following a second oral argument. App. p. 167. The Employees thereafter filed a Petition for Appeal, which this Court granted on December 12, 2013.

STATEMENT OF FACTS

Because the trial court decided this case on demurrers, the Court must accept the facts as pleaded, but may also consider the documents incorporated into the record on Verizon's unopposed motion craving oyer. *See Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 557, 708 S.E.2d 867, 869 (Va. 2011); *Ward's Equip., Inc. v. New Holland North America, Inc.*, 254 Va. 379, 382, 493 S.E.2d 516, 518 (Va. 1997).

1. The "Surplus." The Employees worked for Verizon as technicians from 2005 until 2010, and were members of the CWA. App. p. 2; *see also* App. p. 75 (noting that Appellant Rosser worked for Verizon from 2003 to 2010). At that time, Verizon and the CWA were parties to a CBA that covered employees, including the Employees, in the Potomac Region, a multi-state area that includes Virginia, Maryland, the District of Columbia, and West Virginia. App. pp. 122–24 (CBA, Art. 1, § 2).

The Employees allege that, in 2010, Verizon announced a "surplus of 12,000 employees," and notified employees in the covered titles (including the Employees) that it "would be terminating that many positions." App. p. 2. Even though the Employees were admittedly included in this surplus, they claim that unidentified Verizon and CWA representatives informed them that their jobs "would not be in jeopardy" given their seniority. *Id*.

The CBA contains several specific provisions detailing Verizon's responsibilities and employee rights when a "surplus" is declared and a force adjustment occurs. Under the CBA, before Verizon can lay off employees, it must determine the extent of the surplus, identify the surplus employees, and afford such individuals 30 days to volunteer to resign in return for negotiated severance benefits. Supplemental Joint Appendix ("Supp. App.") pp. 175–81 (CBA, Arts. 35, 36A). The CBA permits Verizon to offer severance benefits through the CBA's Income Security Plan ("ISP"), or to negotiate an EISP with the CWA, which entails even greater benefits for employees. Supp. App. pp. 175–82 (CBA, Art. 35; Art. 36A, Exhibit XIV). In addition, the CBA requires that, before laying off regular employees, Verizon must take steps to mitigate the impact of this process, including identifying job vacancies and offering them to affected employees as appropriate; laying off temporary, occasional, and term employees; eliminating or reducing the use of contractors; and allowing certain employees to claim the jobs of less senior employees. Supp. App. pp. 175–79 (CBA, Art. 35); App. pp 132–35 (CBA Exhibit IV).

2. The EISP. Pursuant to the CBA, Verizon and the CWA negotiated a MOA to provide EISP benefits to the "surplus of 12,000 employees" here. App. pp. 2, 136–39 (MOA). This collectively bargained

MOA offered surplus employees who elected to resign from Verizon a lump-sum payment in excess of $50,000 each, with the exact amount depending on factors such as years of service. App. pp. 136–39. These EISP benefits – which are referenced seven times in the Anthony Complaint alone, App. pp. 2–4 – were significantly more generous than the standard ISP benefits that the CBA otherwise provided. *Compare* Supp. App. pp. 180–81 (CBA, Art. 36A) *with* App. pp. 136–39 (MOA).

The MOA expressly incorporated the CBA "language associated with surplus reductions and layoffs" detailed above. App. p. 139 (MOA § IX). The MOA also contained two no-layoff pledges related to the 2010 surplus. First, it stated that, "[i]f a minimum of 12,000 associates . . . accept the [EISP] . . . and leave the service of the Company or terminate their employment . . ., no post August 2, 2003 hires will be laid off prior to May 1, 2011." App. p. 138 (MOA § VI). Second, it prohibited Verizon from laying off employees between July 3, 2010 (the first termination date for surplus employees resigning under the EISP) and the second, later termination date for EISP participants. App. p. 137 (MOA § II). These sections applied to the Employees, who were hired after August 2, 2003. App. pp. 2–3.

Verizon and the CWA executed the MOA on April 22, 2010. App. p. 139. On May 18, 2010, Verizon sent notices of the EISP benefits to the

employees in the surplus, including the Employees. App. pp. 2, 140–47. These letters detailed the EISP benefits for employees who elected to resign under the EISP and gave them one month (until June 16, 2010) to decide whether to resign. App. pp. 140–47.[3] Each of the Employees offered to resign prior to the June 16, 2010 deadline and signed the "Employee Volunteer Form" attached to the EISP correspondence, in which they expressly acknowledged that "[t]he terms and conditions of the Collective Bargaining Agreement apply." App. pp. 2–3, 141. Thereafter, each was terminated on July 3, 2010 and received their EISP benefits. App. pp. 2–3. The Employees never filed a grievance under the CBA over their inclusion in the surplus, the EISP, or any aspect of its implementation.

3. The Complaints. Approximately 15 months after they resigned, and again without ever filing a CBA grievance, the Employees filed their Complaints in state court. App. pp. 1–5. They alleged that unnamed Verizon and CWA representatives initially stated that they were not at risk of layoff from the surplus (even though they admittedly were included in the 12,000-employee surplus), and then, on June 15, 2010, informed them that

[3]The Employees state in their brief that Verizon and the CWA told them that they would be fired "if they did not accept the EISP within 24 hours after it was presented them." Br. 5. The record proves the falsity of that statement: the May 18, 2010 EISP documentation and Employees' own actions make clear that they had 30 days, not 24 hours, to make their decision after receiving the EISP documents. App. p. 140.

their "employment was in serious jeopardy." App. p. 2. The Employees claim that they only resigned because Verizon and the CWA told them that they would be terminated and "receive significantly fewer or no benefits" if they did not resign under the EISP. App. pp. 2–3. They never identify the individuals who allegedly made these representations.[4]

STANDARD OF REVIEW

Because the trial court granted the demurrers as a matter of law, this Court's review is *de novo*. *See Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 404, 732 S.E.2d 676, 688 (Va. 2012).

ARGUMENT AND AUTHORITIES

I. Well-settled United States Supreme Court Precedent Requires Dismissal of the Employees' Claims Based on Section 301's Complete Preemptive Reach.

The Employees' claims would not exist *but for* the CBA and MOA between Verizon and the CWA, and they cannot be resolved without

[4] While the Employees must prove that these statements were fraudulent when made in June 2010, *see Evaluation Research Corp. v. Alequin*, 247 Va. 143, 148, 439 S.E.2d 387, 390 (Va. 1994), they try to color their case by referencing events occurring months after their separation. For example, they claim that, after they resigned, Verizon took the position in unemployment compensation proceedings that their jobs were not in danger and their termination was voluntary. App. p. 3. Even assuming *arguendo* that these statements are accurate, the fact remains that the CBA governed their separation of employment and established their and Verizon's rights and responsibilities before and after a surplus reduction. Thus, as discussed below, their claims are preempted, regardless of the events that occurred after the Employees resigned.

interpreting those labor agreements. For that reason, the trial court properly concluded that Section 301 completely preempts the Employees' claims – following over 50 years of United States Supreme Court precedent holding that Section 301's "extraordinary" preemptive reach extends to any claims that are "inextricably intertwined" with a CBA. In treating the Employees' claims as federal claims subject to the federal common law of labor relations, the trial court reached the only conclusion that effectuates Section 301's purpose: to ensure that labor matters are resolved under the consistent banner of federal law, not a multiplicity of state and local laws, and to promote uniformity and stability in labor relationships. This Court should follow this clear line of precedent and affirm the trial court's decision.

A. Section 301's preemptive reach is "extraordinary" and completely preempts claims that require interpretation of or are inextricably intertwined with a CBA.

On its face, Section 301 establishes federal jurisdiction over labor contracts between employers and unions in industries affecting commerce. *See* 29 U.S.C. § 185(a). It is undisputed that Section 301 covers Verizon and the CWA, and that their labor contracts are subject to it – including the CBA and the MOA that apply to union-covered Verizon employees in a multi-state area that includes Virginia, Maryland, West Virginia, and the District of Columbia.

The plain text of the statute, however, tells only half the story. As the United States Supreme Court held over 50 years ago in *Lincoln Mills*, by creating federal jurisdiction for disputes over labor contracts, Congress also "authorize[d] federal courts to fashion a body of federal law for the enforcement of" such contracts to ensure that uniform standards apply to them. *Lincoln Mills of Ala.*, 353 U.S. at 450–51. Thus, Section 301 not only empowers federal courts to hear disputes over labor contracts; it *mandates* that federal law *must* govern the enforcement of those agreements. *See Lueck*, 471 U.S. at 209–10. Consistent with Congress' authority to preempt state law under the Supremacy Clause in Article VI of the Constitution (*see id*. at 208), the scope of federal preemption under Section 301 is "complete": any state law claim arising within Section 301's domain "is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar, Inc.*, 482 U.S. at 393.[5]

Complete preemption under Section 301 exists to ensure that collectively bargained contracts are interpreted and applied uniformly

[5] Complete preemption is not the same thing as ordinary preemption, in that the latter operates as an affirmative defense to a state law claim on the basis that federal law takes precedence. Absent a complete preemption statute like Section 301, a plaintiff is normally free to file in state court, and a defendant cannot remove the case to federal court based on an ordinary preemption defense. Complete preemption operates differently, in that it converts a state law claim, from its inception, into a federal claim that arises under federal law. *See Caterpillar*, 482 U.S. at 392–93.

across jurisdictions, which is critical to maintaining stability in labor relationships. As the Supreme Court has long recognized, even the mere "*possibility* that individual contract terms *might* have different meanings under state and federal law" would have deleterious effects on labor relationships. *Lucas Flour Co.*, 369 U.S. at 103 (emphasis added). As the Court further explained:

> Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract.

Id. This concern is heightened when, as here (App. pp. 122–24), the CBA covers employees in multiple states. *See McCormick v. AT&T Techs., Inc.*, 934 F.2d 531, 538 (4th Cir. 1991).

It is unassailable that Section 301 preempts cases concerning CBAs that sound in contract, where a party challenges compliance with a particular CBA provision. *See Foy v. Giant Food, Inc.*, 298 F.3d 284, 287 (4th Cir. 2002) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983)). But it is equally unassailable that CBA provisions can come into play in tort cases too. *See Lueck*, 471 U.S. at 210–11. As the Supreme Court made clear in *Lueck*, Section 301 would be toothless if it did not preempt those actions as well:

> If the policies that animate § 301 are to be given their proper range, however, the pre-emptive effect of § 301 *must extend beyond suits alleging contract violations*. . . . [Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, *whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort*. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.

Id. (emphasis added); *see also id.* at 220 ("The requirements of [Section] 301 . . . cannot vary with the name appended to a particular cause of action.").

To protect these interests, Section 301 completely preempts *any and all* causes of action that would require a court "to define the meaning or scope of a term in a contract" (*Lueck*, 471 U.S. at 210), or engage in an analysis that is "substantially dependent" on a CBA (*Caterpillar, Inc.*, 482 U.S. at 394 (internal quotation marks omitted)). In other words, Section 301 preempts any state claim that "'requires the interpretation of a collective-bargaining agreement' . . . or is 'inextricably intertwined with consideration of the terms of the labor contract.'" *Foy*, 298 F.3d at 287 (quoting *Lingle*, 486 U.S. at 405–06; *Lueck*, 471 U.S. at 213); *see also McCormick*, 934 F.2d at 534–35. It does not matter where or how the plaintiff pleads his or her case; if a reviewing court will have to interpret a

CBA or decide issues that are bound up in the terms of a labor contract, Section 301 complete preemption applies.

To be sure, plaintiffs normally are the masters of their own complaints. But Section 301 operates as an "independent corollary" to the well-pleaded complaint rule as a "complete preemption" statute – one of only three such federal statutes that the United States Supreme Court has singled out, based on Congressional intent, to displace state law completely. *See Lontz v. Tharp*, 413 F.3d 435, 441 (4th Cir. 2005); *see also Metro Life Ins. Co.*, 481 U.S. at 64 ("For 20 years, this Court has singled out claims pre-empted by Section 301 of the LMRA for such special treatment.") (citing *Avco Corp. v. Machinists*, 390 U.S. 557 (1968)). That means that where, as here, a state law claim is "inextricably intertwined" with a CBA, that claim is, from its inception, a federal claim arising under federal law, and Section 301 precludes a plaintiff from avoiding federal jurisdiction by pleading his claims as state law claims. As the Supreme Court explained in *Caterpillar*:

> There does exist . . . an "independent corollary" to the well-pleaded complaint rule . . . known as the "'complete preemption"' doctrine. On occasion, the Court has concluded that the pre-emptive force of a statute is so "extraordinary" that it "'converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." . . . Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law. . . .

> The complete preemption corollary to the well-pleaded complaint rule is applied primarily in cases raising claims pre-empted by § 301 of the LMRA.

482 U.S. at 393 (citations omitted). In short, "when complete preemption exists, there is 'no such thing' as the state action." *Lontz*, 413 F.3d at 441 (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11 (2003)).[6]

The Supreme Court's decision in *Lueck* demonstrates the breadth of Section 301 preemption in cases, like the present one, where union-represented plaintiffs attempt to couch their claims as state torts to evade federal preemption. There, a union-covered employee brought state tort claims against his employer and an insurer, alleging that they failed to pay his disability claims in a timely manner and failed to handle his disability claims fairly under a plan incorporated into the CBA. *Lueck*, 471 U.S. at 206. Much like the Employees' argument here, the Wisconsin Supreme Court held that Section 301 did not preempt the tort claims because it considered them "independent" of the CBA and, in the court's view, they could be adjudicated without reaching questions of contract interpretation. *Id*. at 207.

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[6] Because complete preemption is an exception to the well-pleaded complaint rule, the Employees' citation to *Harless v. CSX Hotels, Inc.*, 389 F.3d 444, 450 (4th Cir. 2004), for the idea that a defendant cannot create federal jurisdiction by raising a preemption defense is irrelevant. (Br. pp. 13–14). *See* note 5, *supra*.

The United States Supreme Court reversed. In holding that Section 301 preempted the state tort claims, the Court rejected the state court's views that Section 301 preempts only violations of express CBA obligations and that tort actions based on bad faith handling of claims for CBA-provided benefits could be adjudicated without interpreting the CBA. *Id.* at 214–15. The Supreme Court disagreed with the state court's assumption that the "only obligations the parties assumed by contract are those expressly recited in the agreement" (like the obligation to pay benefits), and pointed out that CBAs also include an "implied duty to act in good faith." *Id*. at 214–16. Further, it stated that "[t]he assumption that the labor contract creates no implied rights is not one that state law may make," but rather "is a question of federal contract interpretation" under Section 301. *Id*. at 215.

Thus, in *Lueck*, the Supreme Court made clear that even state tort law claims are subject to Section 301 preemption, since the CBA, as a matter of federal law, included both an "explicit contractual duty" and an "implied duty to act in good faith," both of which are "tightly bound with questions of contract interpretation that must be left to federal law." *Id.* at 216. As the Court concluded:

> *Because the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation*. The parties' agreement as to the manner in

> which a benefit claim would be handled will necessarily be relevant to any allegation that the claim was handled in a dilatory manner. . . . *These questions of contract interpretation, therefore, underlie any finding of tort liability, regardless of the fact that the state court may choose to define the tort as "independent" of any contract question*.

Id. at 218 (emphasis added).

The same is true here. As discussed in Section I.B. below, the trial court properly concluded that the Employees' claims derive from the CBA and MOA, which define not just the explicit rights and duties that arise in the context of a "surplus" and "EISP" under the CBA, but also the implied duties that Verizon and the CWA owed the Employees in treating them as part of the "surplus," describing their risk of layoff under the CBA, and offering them EISP benefits. As in *Lueck*, these matters are "tightly bound with questions of contract interpretation that must be left to federal law."[7] *Id*. at 216.

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[7] Importantly, when a claim is preempted under Section 301, it must either be dismissed or treated as a Section 301 claim. *Lueck*, 471 U.S. at 220. In the latter case, though, the plaintiff must have filed within Section 301's strict, six-month statute of limitations or the claim will be time-barred. *See DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 169–70 (1983). Because the Employees admittedly filed their Complaints at least ten months after they had notice of the alleged misrepresentations (App. p. 3), their claims, if preempted, are time-barred. *See DelCostello*, 462 U.S. at 172; *Foy*, 298 F.3d at 291. Further, because the Employees failed to grieve this matter, their claims would be barred for failure to exhaust CBA remedies. *See Clayton v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 451 U.S. 679, 692 (1981).

B. Section 301 completely preempts the Employees' fraud claims, which are inextricably intertwined with both the explicit obligations and implied duties in the CBA.

Against the weight of dispositive Supreme Court precedent and a well-reasoned trial court decision, the Employees argue that Section 301 preemption does not apply because their claims are grounded in state tort law and "independent" of the CBA. But, as the Supreme Court made clear in *Lueck* when faced with essentially the same arguments, the mere fact that the case sounds in tort is not enough to avoid preemption; the inquiry is whether the claims, however presented, will require a court to interpret the CBA's explicit obligations and implied duties. 471 U.S. at 211, 220.

The elements of the Employees' fraud claims show that it is impossible to resolve this case without interpreting the CBA. It is telling that the Employees *never* discuss the elements of their claims in their brief, but in all events actual fraud requires a plaintiff to prove, through clear and convincing evidence: "(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled." *Evaluation Research Corp. v. Alequin*, 247 Va. 143, 148, 439 S.E.2d 387, 390 (Va. 1994). Constructive fraud has the same elements, except that it requires an innocent or negligent misrepresentation. *See id*. Two specific elements

are important to the preemption analysis here – the alleged false representations and the reasonableness of the Employees' reliance. If either element would require a reviewing court to interpret the CBA, the entire claim is preempted. *See McCormick*, 934 F.2d at 535.

Interpreting the CBA and MOA is inescapable in this case.

1. Determining whether Verizon and the CWA made misrepresentations requires interpretation of the CBA's explicit rights and obligations.

In the first place, the Employees' claims are "inextricably intertwined" with and plainly "require interpretation" of any number of express terms in the CBA. No matter how the Employees couch their claims, they fundamentally allege that Verizon and the CWA fraudulently misrepresented the Employees' relative risk of layoff (*which the CBA dictates*) after Verizon declared a 12,000-employee "surplus" (*which the CBA defines*) so as to induce them to resign in a short period of time (*which the CBA and MOA define*) in exchange for EISP benefits (*which the CBA creates*) that Verizon and the CWA codified in the MOA (*which expressly incorporates the CBA*). App. pp. 2–4.

It is simply impossible to decide these claims without interpreting the explicit terms and duties in the CBA and MOA under Section 301's federal

common law. *Foy*, 298 F.3d at 287. The following claims in the Complaints particularly prove the point:

- *The Complaints allege that Verizon offered the Employees "EISP" benefits after it "declared a surplus of 12,000 employees," and that Verizon and the CWA conveyed the "understanding" that the declaration of a 12,000-employee surplus meant that Verizon "would be terminating that many positions."* App. p. 2.

Suffice it to say, the Employees' invocation of CBA terminology in their Complaints – both in referencing the declared "surplus" and the resultant "EISP" – plainly shows that these claims are "inextricably intertwined" with the CBA and MOA, and would require a court "to define the meaning or scope of a term in a [labor] contract." *Lueck*, 471 U.S. at 210, 213; *Smith v. Logan*, 363 F. Supp. 2d 804, 813 (E.D. Va. 2004) (finding preemption in a Verizon case involving negotiated severance benefits because, among other things, "the ISP was offered pursuant to the provisions of the CBA"). Understanding the meaning of a 12,000 employee "surplus," moreover, requires interpreting the CBA. For example, only by interpreting the CBA and the parties' practices under the CBA can a reviewing court assess the Employees' alleged "understanding" that declaring a 12,000-employee surplus unequivocally meant that Verizon "would be terminating that many positions" (App. p. 2) – an "understanding" that is essential to assessing both the alleged misrepresentations about the

Employees' layoff risks and the reasonableness of their claimed reliance on those statements.

- *The Complaints allege that, notwithstanding the declaration of 12,000 surplus jobs, Verizon and the CWA advised the Employees that their jobs "would not be in jeopardy" given their "seniority," since "only persons employed after 2008 were being considered surplus employees."* App. p. 2.

Resolving the Employees' claims that Verizon and the CWA assured them that their jobs were "not in jeopardy" – even though the Employees incongruously claim to have "understood" that Verizon planned to lay off 12,000 surplus employees – likewise requires defining the "meaning or scope" of express provisions of the CBA and MOA in two primary ways. *Lueck*, 471 U.S. at 210.

First, the Employees claim that Verizon and the CWA cited "seniority" as the reason their jobs were not in jeopardy. App. p. 2. Needless to say, "seniority" rights are fundamental to labor relations under federal common law – and a fundamental part of the CBA here – and a court would have to interpret seniority rights under the CBA to assess the alleged misrepresentations about the Employees' risk of layoff given their seniority.

Second, the Employees' claim that Verizon and the CWA represented that only post-2008 hires were at risk of layoff as "surplus" employees requires analysis of both (1) the meaning and scope of the "surplus" based

on the CBA, the MOA, and the parties' practices and seniority rules, and (2) the express no-layoff pledges that Verizon and the CWA negotiated into the MOA – including that, "[i]f a minimum of 12,000 associates . . . accept the [EISP] . . . and leave the service of the Company or terminate their employment . . ., *no post August 2, 2003 hires will be laid off prior to May 1, 2011*." App. p. 138 (MOA § VI (emphasis added)). That a court would have to interpret the CBA and MOA's surplus, layoff and seniority provisions to determine whether Verizon and the CWA properly represented their scope and application to the Employees, and whether the Employees were entitled to rely upon those representations given the express terms of the CBA and MOA, is inescapable.

- *The Complaints allege that, on June 15, 2010, Verizon and the CWA advised the Employees that their jobs were "in serious jeopardy" and they had 24 hours to decide whether to participate in the EISP "or be terminated in August 2010."* App. p. 2.

Resolving the Employees' claims that Verizon and the CWA changed course, represented on June 15, 2010 that their jobs were "in serious jeopardy," and gave them 24 hours to decide whether to participate in the EISP would also require interpretation of the CBA and MOA. This allegation not only requires interpretation of the meaning and impact of declaring a "surplus" under the CBA and the parties' practices, including whether the surplus meant that all 12,000 surplus employees' positions

would eliminated; it also requires interpretation of Verizon's obligations and the Employees' rights under the CBA and MOA, including whether Verizon had the right under the CBA and MOA to lay the Employees off in August 2010, whether the MOA's no-layoff pledges prevented layoffs in August 2010, and whether their jobs were actually "in serious jeopardy" at the time.

The Employees never explain how a court can decide this false representation element without interpreting the CBA and MOA. This issue is the crux of the case; if the as-of-yet-unidentified representatives of Verizon and the CWA were correct and the Employees' jobs *actually were in serious jeopardy* at that time, no liability will exist, since a true statement cannot be fraudulent. And the only way to determine whether the individual Employees' jobs were or were not actually in jeopardy is to examine the CBA's extensive provisions on force reductions and seniority, as well as the procedures that Verizon must follow before laying off employees, including identifying job vacancies and offering them to affected employees; laying off temporary, occasional, and term employees; eliminating or reducing the use of contractors; and allowing certain employees to claim the jobs of less senior employees. Supp. App. pp. 175–79; App. pp. 132–35. Further, whether or not the Employees' jobs were in jeopardy likewise requires interpretation of the MOA – which expressly incorporates the CBA's

"contract language associated with surplus reductions and layoffs" and further includes two additional layoff protections. App. pp. 137–38 (MOA § II, VI).

- *The Complaints allege that the Employees accepted the EISP package because Verizon and the CWA represented that, if they did not do so, they "would receive significantly fewer or no benefits after" termination.* App. p. 2.

The Employees also claim that Verizon and the CWA represented that they would receive "significantly fewer or no benefits" upon termination if they did not accept the EISP, so as to induce them to resign (App. p. 2), but this allegation is indisputably a matter of labor contract interpretation. Whether this statement was wrongful requires a comparative analysis of the CBA's numerous provisions relating to severance and benefits for laid-off employees, Supp. App. pp. 175–81, including the ISP provisions and the more generous EISP that Verizon and the CWA negotiated to provide lump-sum payments in excess of $50,000 to surplus employees resigning under the EISP. Supp. App. pp. 175–82; App. pp. 136–39.

In sum, to evaluate all of these Complaint allegations, a reviewing court will be forced to review the extensive CBA and MOA provisions covering surpluses, layoffs, and seniority, as well as those providing for ISP and EISP benefits, and measure the parties' actions based on the rights and responsibilities in those agreements. The fact that the Employees

never mentioned the CBA by name in their Complaints (Br. p. 4) is irrelevant, since their claims depend upon and arise out of concepts created in the CBA and MOA. Indeed, they themselves reference the "surplus" and the CBA-created EISP program multiple times in their Complaints – demonstrating that their claims are inextricably intertwined with consideration of the CBA and that, notwithstanding their failure to cite the CBA, Section 301 preempts them. *See Smith*, 363 F. Supp. 2d at 813 (finding preemption in a Verizon severance benefit case because, among other things, "the ISP was offered pursuant to the provisions of the CBA").

This conclusion finds ample support in federal and state court cases that have applied Section 301 complete preemption to state law misrepresentation claims "[w]here, as here, the alleged misrepresentations and concealments are inextricably intertwined with an analysis of the terms contained in the CBA." *Augustin v. Sectek, Inc.*, 807 F. Supp. 2d 519, 525 (E.D. Va. 2011); *see also Moon v. Goodyear Tire & Rubber Co.*, 519 Fed. App'x 620, 623 (11th Cir. 2013) (unpublished) (fraud claim over alleged failure to honor buyout agreement preempted because "[w]hether Goodyear's failure to pay the buyout was fraudulent . . . depends entirely on the terms of the [CBA], which serve as the terms of the" buyout); *Dougherty v. AT&T Co.*, 902 F.2d 201, 204 (2d Cir. 1990) (finding claims

that defendant fraudulently induced transfers preempted because the obligation to provide accurate information was inextricably intertwined with CBA provisions on job assignments and transfers); *Martin v. Assoc. Truck Lines, Inc*., 801 F.2d 246, 249 (6th Cir. 1986) (misrepresentation of job status preempted where court would have to examine CBA to understand job status); *Gibson v. AT&T Techs, Inc.*, 782 F.2d 686, 687–88 (7th Cir. 1986) (fraud claims related to failure to provide information about a plant closing and related severance benefits preempted); *Miller v. Coca Cola Bottling Co.*, Civ. Action No. 12-862(MAS)(TJB), 2013 U.S. Dist. Lexis 90884, *18–19 (D.N.J. June 28, 2013) (intentional interference with economic advantage claim preempted where "the Court would necessarily have to look to the CBA to determine what positions, income, and benefits Plaintiffs are entitled"); *Alley v. Quebecor World Kingsport, Inc*., 182 S.W.3d 300, 305 (Tenn. Ct. App. 2005) (fraudulent inducement claims based on recall rights preempted, since court had "to examine the CBA to determine if such recall rights existed and what they were").

2. Determining whether the Employees could have reasonably relied on alleged misrepresentations requires interpretation of the CBA's explicit rights and obligations.

The reliance element of the Employees' fraud claims likewise requires interpretation of the CBA. To prove fraud, it is not enough merely

to rely on an alleged misrepresentation; that reliance must also be reasonable under the circumstances. *See Metrocall of Delaware, Inc. v. Continental Cellular Corp.*, 246 Va. 365, 374, 437 S.E.2d 189, 193–94 (Va. 1993). Thus, even if the Employees could show that Verizon and the CWA informed them that their jobs were in serious jeopardy when they were not, they would then need to prove that it was reasonable for them to believe those representations. If the CBA shows, though, that the Employees would not have been terminated under the surplus, or that it is highly improbable that that would ever happen regardless of what the unidentified Verizon and CWA representatives said, they cannot prove reasonable reliance.

The Eighth Circuit addressed this reliance issue in *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009). In finding state fraud claims related to alleged misrepresentations about banned substances for NFL players to be preempted, the court noted that, to determine whether the plaintiffs reasonably relied on representations about matters addressed in the CBA, it would necessarily need to interpret the CBA to see if it conflicted with the representations, since an individual cannot reasonably rely on a representation that conflicts with a written agreement absent some ambiguity. *Id*. at 881–82.

Other courts have likewise held that it is impossible to avoid a CBA when evaluating reasonable reliance about job status:

> In determining whether the plaintiffs' reliance was reasonable, the jury would have to put themselves in the position of an "ordinary" employee covered by the [CBA] and told of these representations. At a minimum, the jury would be forced to read and interpret the provisions of the [CBA] to determine whether a reasonable person could have relied on the representations of permanent employment knowing [the terms of the CBA]. It also appears that the jury would have to interpret these agreements to determine whether it is possible to reconcile the conflict between the oral representations of job security commensurate with company seniority and the terms of the [CBA]. Therefore, at a minimum, a referencing of the [CBA] would be required in proving plaintiffs' cause of action and that "referencing" might entail an interpretation of those provisions.

Smith v. Colgate-Palmolive Co., 752 F. Supp. 273, 279 (S.D. Ind. 1990); *see also Perez v. Roadway Express, Inc.*, 281 F. Supp. 2d 936, 939 (N.D. Ohio 2003) ("[O]ne can determine the reasonable reliance prong of the fraudulent inducement claim only by reference to the terms of the collective bargaining agreement, and the rights asserted by Plaintiff in reference to this claim arise only by virtue of the terms of that agreement.").

The same is true here. A court cannot determine whether the Employees reasonably relied on representations about their job security without interpreting the CBA and MOA to determine whether they conflicted with those alleged representations. Because the CBA and MOA are dispositive of the Employees' rights and Verizon's responsibilities during

the surplus, their interpretation – and Section 301's complete preemption – are unavoidable.

3. The Employees' fraud claims require interpretation of the CBA's implied duties under federal common law.

The Employees seek to evade Section 301 preemption in this case by arguing that that *only* state common law – not any CBA or federal law – prohibits the alleged misconduct in this case. (Br. p. 11.) That argument patently ignores the United States Supreme Court's decision in *Lueck*, where the Court made clear that CBAs are subject to an *implied* duty of good faith and fair dealing as a matter of *federal common law*. *See Lueck*, 471 U.S. at 216–19; *see also Davis v. Bell Atlantic-West Virginia, Inc.*, 110 F.3d 245, 249 (4th Cir. 1997) (finding that the duties of "good faith" and "fair dealing" are implied in a CBA and that a claim for breach of those duties necessarily requires interpretation of a CBA).

Lueck is dispositive on this point. There, as here, the employee was union-represented with rights under a CBA and a benefit plan that was expressly incorporated into the CBA. *Lueck*, 471 U.S. at 203–04. There, as here, the employee did not assert that the employer had breached the CBA by not providing benefits, only that it had mistreated him in connection with the benefit plan. *Id*. at 205–06. And there, as here, the employee attempted to argue that his tort claims were thus "independent" of the CBA.

Id. at 207. While the Wisconsin Supreme Court concluded that Section 301 did not apply in these circumstances, the United States Supreme Court soundly rejected the state court's analysis, holding that the state court was wrong to conclude that the CBA contained no implied duties to interpret. *Id*. at 215. As the Supreme Court held, the implied duties under a labor contract are a matter of federal contract interpretation, and any discussion of whether the parties to a labor contract acted improperly or in bad faith is "tightly bound with questions of contract interpretation that must be left to federal law." *Id*. at 216.

Simply put, Section 301 preempts the Employees' claims because, at bottom, the Employees complain about how Verizon and the CWA treated them in connection with their inclusion in the 2010 "surplus" under the CBA and the EISP negotiated pursuant to the CBA. The Employees' Complaints do not just implicate the CBA's express provisions – they require interpretation of the implied duties under the CBA that would prohibit Verizon and the CWA from taking the exact sort of actions alleged here, *e.g*., misconstruing facts to induce acceptance of the EISP, not giving the Employees time to consider their options, and acting to undermine their seniority rights. The idea that, but for state common law, Verizon and the CWA would be free to mistreat union-covered employees and make

material misrepresentations utterly ignores the federal common law duty to act in good faith under a labor contract.

In short, it is impossible to resolve the Employees' claims about how Verizon and the CWA treated them without interpreting the explicit and implied terms of the CBA. *Lueck*, 471 U.S. at 218 (Where "the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here will inevitably involve contractual interpretation."). Holding that Section 301 completely preempts these claims is the only outcome *Lueck* permits.[8]

II. The Cases That The Employees Cite To Avoid Section 301 Preemption Are Neither Controlling Nor Apposite To The Claims In This Case.

Unable to explain how a court could decide their claims without interpreting the CBA and MOA, the Employees resort to string citing a number Section 301 cases, suggesting that because some lower courts have occasionally declined to find preemption, this Court should do so as well. But each of those decisions is distinguishable, and none is controlling

[8] The Employees' effort to evade preemption on the theory that their Complaints do not allege that they lost benefits under the CBA or MOA fails. (Br. p. 20). That is, of course, the same argument that the Supreme Court in *Lueck* rejected on the basis that CBAs, as a matter of federal contract interpretation, include both express contractual duties (*e.g.*, to pay benefits) and implied duties of good faith. 471 U.S. at 216. Both duties are implicated for preemption purposes.

on this Court. For the most part, they involve claims based on individual, not collective, employment agreements and promises; discrimination or retaliation against union-covered employees; or the exercise of management discretion unrestricted in any CBA. Those cases, which involve claims "independent" of any CBA, do nothing to undermine the inescapable conclusion here: that the Employees' claims are "inextricably intertwined" with the CBA and MOA and that Section 301 preempts them.

First, the Employees rely heavily on cases holding that Section 301 does not preempt claims arising from *individual* contracts or promises about employment status that are separate and apart from the CBA. But those cases are irrelevant. As the United States Supreme Court made clear in *Caterpillar*, "Section 301 says nothing about the content or validity of *individual* employment contracts" – only contracts between unions and employers – and thus does not preempt claims based on the former. 482 U.S. at 394 (emphasis added).

Here, the Employees were bargaining unit members subject to a CBA, and they allege that their employer and union misrepresented facts about their job security under the CBA so as to induce them to accept the collectively bargained EISP benefits. App. pp. 2–3. The Employees were not working under individual employment agreements at any time; nor did

the alleged misrepresentations concern promises about job status outside the CBA. As such, the cases that the Employees cite pertaining to such individual agreements or extra-contractual job status are completely inapposite. *See Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 221, 231 (3d Cir. 1995) (written "guarantees" of employment separate and apart from the CBA); *White v. Nat'l Steel Corp.*, 938 F.2d 474, 482–84 (4th Cir. 1991) (promises in individual contracts for management employees separate from CBA); *Wells v. Gen. Motors Corp.*, 881 F.2d 166, 173–74 (5th Cir. 1989) (promises about future employment eligibility not discussed in the CBA); *DeSanzo v. Titanium Metals Corp.*, 351 F. Supp. 2d 769, 777 (S.D. Ohio 2005) (representations to induce plaintiff to remain as a member of management); *Kittle v. Prudential Ins. Co. of Am.*, 102 F. Supp. 2d 1029, 1034–36 (S.D. Ind. 2000) (individual representations about job status made before the plaintiff began working); *Borek v. Weinreb Mgmt.*, 933 F. Supp. 357, 359, 361–62 (S.D.N.Y. 1996) (independent waiver of liability against employer); *Walton v. UTV of San Francisco, Inc.*, 776 F. Supp. 1399, 1402–03 (N.D. Cal. 1991) (independent agreement to terminate employees only for good cause); *Paradis v. United Techs., Pratt & Whitney Div.*, 672 F. Supp. 67, 71 (D. Conn. 1987) (individual agreement not to terminate an employee for violating drug policy contingent on cooperation with employer);

Aldridge v. DaimlerChrysler Corp., 809 So.2d 785, 789, 791 (Ala. 2001) (individual promises concerning extra-contractual rehire rights).

Second, the Employees cite several cases holding that Section 301 does not preempt claims relating to severance or other similar benefits where, unlike here, those claims turn on facts external to the CBA. For example, in *Felix v. Lucent Techs., Inc.*, 387 F.3d 1146, 1152, 1165 (10th Cir. 2004), the plaintiffs claimed that the defendants falsely represented a severance package as being a one-time offer. There, though, management had the discretion to determine whether and when such offers would be made, and thus the court could decide whether the defendants concealed the truth without interpreting the CBA. *Id*. at 1165. Similarly, in *Voilas v. GM Corp.*, 170 F.3d 367, 371, 376 (3d Cir. 1999), the misrepresentation concerned whether the plant where the plaintiffs worked would close – an issue dictated by outside facts, not the CBA. Again, that is not the case here, since the alleged misrepresentations pertain directly to job status under the CBA, not some external fact.

Appellants also cite a few non-severance benefit cases where the courts found no Section 301 preemption because the claims did not involve any CBA, unlike the Employees' claims here. *See Romero v. San Pedro Forklift, Inc.*, 266 Fed. App'x 552, 556 (9th Cir. 2008) (unpublished)

(individual representations regarding a pension plan that predated the CBA); *Foy v. Pratt & Whitney Group*, 127 F.3d 229, 234 (2d Cir. 1997) (alleged misrepresentation concerned pre-layoff transfer rights, which the parties agreed was not covered by the CBA); *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1409 (9th Cir. 1991) (alleged fraud that "ar[o]se from alleged promises that the company would not close, and not from promises regarding rights or procedures entitled to them if the company closed"); *Dollear v. G. F. Connelly Mech. Contractors, Inc.*, 355 F. Supp. 2d 937, 939–40 (N.D. Ill. 2005) (independent bonus agreement); *Miller v. Fairchild Indus., Inc.*, 668 F. Supp. 461, 466 (D. Md. 1987) (misrepresentation related to plans to close plant). Again, the claims here relate directly to express and implied rights and obligations grounded in the CBA and MOA, including the Employees' inclusion in a "surplus" and "EISP" and their risk of layoff under the CBA and MOA in light of their CBA "seniority," the CBA's layoff protections, and the MOA's no-layoff pledges.

Third, the Employees cite several cases holding that Section 301 does not preempt claims of discrimination or retaliation against union-covered employees – claims that turn on the employer's allegedly unlawful motivation and thus do not require interpretation of any CBA. For example, in *Martin Marietta Corp. v. Md. Comm'n on Human Relations*, 38 F.3d 1392,

1402 (4th Cir. 1994), the plaintiff claimed that his employer discharged him in retaliation for filing a discrimination charge. In such cases, the CBA provides no relevant information about the employer's allegedly retaliatory motivations, even if the employer claims that it laid off the employee pursuant to the CBA, since the layoff decision could be pretextual. *Id*. at 1403; *see also Lingle*, 486 U.S. at 412–13 (no Section 301 preemption of workers' compensation retaliation claim)

The Employees do not allege this type of discrimination or retaliation. Instead, a reviewing court would need to consider issues such as whether the alleged representations about job status were truthful and whether it was reasonable to rely upon them given the CBA, which will require careful examination of the CBA language. Thus, *Martin* and the cases like it that the Employees cite are inapposite. *See*, *e.g.*, *Harless v. CSX Hotels, Inc.*, 389 F.3d 444, 446, 449–50 (4th Cir. 2004) (finding no preemption because plaintiff raised age and disability discrimination claims that are necessarily independent from CBAs, because no CBA can permit discrimination); *Jackson v. Kimel*, 992 F.2d 1318, 1326 (4th Cir. 1993) (finding that intentional infliction of emotional distress related to requests for sexual acts were not preempted because "[n]othing in the [CBA] could authorize [the defendant] to coerce sexual favors in exchange for employment benefits");

Hayden v. Reickerd, 957 F.2d 1506, 1509–10 (9th Cir. 1991) (finding claims of battery and retaliation related to the battery not to be preempted because "[w]hatever the parties' rights and duties under their collective bargaining agreement, they could not possibly have negotiated infringement of [plaintiff's] state law right to be free from battery.").[9]

In short, the litany of cases that the Employees cite offers no basis for avoiding Section 301 preemption. Unlike all of those cases, where the claims were "independent" of the CBA, the Employees' claims here fundamentally depend on and are inextricably intertwined with the express provisions of the CBA and MOA, as well as the implicit duty of good faith and fair dealing arising from those collectively bargained documents. Because it is impossible to avoid interpreting the CBA and MOA here, Section 301's extraordinary reach, and the weight of relevant authority

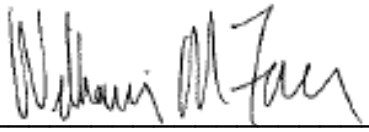
[9] The Employees offer a hodgepodge of additional citations, none of which control here. In *Wynn v. AC Rochester*, 273 F.3d 153, 158 (2d Cir. 2001) and *Beals v. Kiewit Pacific Co., Inc.*, 114 F.3d 892, 895 (9th Cir. 1997), the parties did not dispute the meaning of any CBA provisions, so the courts did not have to interpret those documents at all. *Muenchow v. Parker Pen Co.*, 615 F. Supp. 1405, 1414–16 (W.D. Wis. 1985), addressed Section 301 preemption in dicta without considering whether interpretation of the CBA was required. And *Barbour v. Int'l Union*, 594 F.3d 315, 327–28, 332 n. 11 (4th Cir. 2010), *superseded by statute on other grounds*, primarily dealt with preemption under the National Labor Relations Act; the case did not concern claims against an employer or CBA terms, and the court dismissed the union defendant's "alternative" Section 301 preemption argument in a footnote.

finding preemption of precisely such claims, compel preemption. *See*, *e.g.*, *Moon*, 519 Fed. App'x at 623; *Williams*, 582 F.3d at 881–82; *Dougherty*, 902 F.2d at 204; *Martin*, 801 F.2d at 249; *Gibson*, 782 F.2d at 687–88; *Augustin*, 807 F. Supp. 2d at 525; *Smith*, 363 F. Supp. 2d at 813; *Miller*, 2013 U.S. Dist. Lexis 90884, at *18–19; *Alley*, 182 S.W.3d at 305.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's judgment finding the Employees' claims to be preempted under Section 301 and dismissing the case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, the undersigned certifies that on this 18th day of February, 2014, fifteen bound copies with one electronic copy on CD of the foregoing Brief of Appellee Verizon Virginia, Inc. were hand-filed with the Clerk of this Court, and a true and correct copy of the same, was served on the following counsel of record by UPS Ground Transportation:

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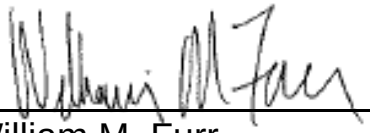

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