NO. 854771

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE 1199NW,

Appellant,

v.

SNOHOMISH COUNTY PUBLIC HOSPITAL DISTRICT NO. 1 d/b/a EVERGREENHEALTH MONROE,

Respondent.

BRIEF OF RESPONDENT - SNOHOMISH COUNTY PUBLIC HOSPITAL DISTRICT NO. 1, d/b/a EVERGREENHEALTH MONROE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Service Employees International Union Healthcare 1199NW (the "Union"), in its representative capacity, filed a complaint in superior court, alleging that from 2018 through present, Snohomish County Public Hospital District No. 1 d/b/a EvergreenHealth Monroe ("EvergreenHealth") deposited matching contributions in September or October of the year following the year of the employee's deferral instead of monthly as required by the Snohomish County Public Hospital District No. 1 401(a) Plan (the "Plan"). CP 1499-590. The trial court agreed with EvergreenHealth that such a dispute, and all derivative state law claims, are subject to mandatory arbitration pursuant to the governing collective bargaining agreements ("CBAs"), CP 4-5, and the Union now appeals.

The sole issue before this Court is whether resolution of the Union's contract claim, including discovery and the interpretation of the underlying agreements and past practices,

may be conducted by the superior court or is subject to mandatory arbitration under the CBAs.

Under Washington law, EvergreenHealth must establish only: (1) an agreement to arbitrate, and (2) the agreement governs the dispute at issue. The CBAs contain the parties' agreement to grieve and arbitrate any alleged breach of a term or condition of the CBAs. CP 1235, 1293. The sole issue is thus whether the allegations of the Union's complaint would constitute a breach of a term or condition of the CBA. The Union's complaint alleges: "Employees have and had **a contractual right to the retirement benefits contained in the 401(a) retirement plan under the terms of the plan.** Defendant has not provided employees with the benefits set forth in the terms of the plan." CP 1507, ¶ 39 (emphasis added).

This contractual right is specifically set forth in the CBAs and any alleged breach of the CBA is subject to the grievance and arbitration provisions:

> **The Hospital will make a matching contribution** equal to two dollars ($2.00) for each one dollar ($1.00) of compensation the employee contributes, up to a Hospital contribution of five percent (5%) of the employee's eligible compensation **in accordance with the terms of the retirement plan**. . . . Beginning November 1, 2018, **the Employer shall make a good faith effort to make its matching contributions to employees' retirement accounts no less than twice a year.**

CP 1289 (Service Support); CP 1231 (Nurses).

The trial court found for EvergreenHealth, holding that the Union's breach of contract claim—**failure to make matching contributions in accordance with the terms of the Plan—**is also a breach of the identical requirement contained in the CBAs—**matching contributions must be made in accordance with the terms of the Plan.** CP 4. The trial court also held that because all the Union's claims are based on the matching contributions not being timely contributed to the Plan, such claims are encompassed by the grievance and arbitration provisions of the CBAs. CP 5.

On appeal, the Union attempts to muddy what is a simple contractual matter by suggesting its members' participation in the Plan and the dollar amount and timing of matching contributions were not the subject of collective bargaining and that the Plan's administrative committee has sole discretion over the interpretation of the Plan and the timing of the matching contributions so that the Union's claim may allegedly be brought under a claims procedure separate from the bargained grievance process. But, tellingly, the Union filed a state law contract claim against EvergreenHealth. The Plan committee was not named in this action, nor does the Plan provide separate claims procedures even were the committee named. The Union's claim is simply a contract claim against EvergreenHealth, as employer and Plan sponsor, governed by state law, and subject to mandatory arbitration.

The Union also attempts to argue the merits of its contract claim—rather than the jurisdictional question before this Court—focusing on a single phrase in a 2021 restatement

of the Plan while ignoring other specific provisions of the same document, the Plan's summary plan description ("SPD"), the CBAs, the language of the prior Plan restatement, and the parties' past practices. All show matching contributions are not required to be contributed monthly, but by the time period established by the Internal Revenue Service ("IRS"), as modified by the CBAs. The Union, through its discovery arguments, apparently concedes that the single phrase in the 2021 plan document is not dispositive and that a review of other documents, practices, and testimony is necessary to resolve the substantive issue. However, the intent of the parties and the amount and timing of the matching contributions is simply not before this Court and the Union's focus on the merits is improper.

The Union also contends the trial court erred by permitting certain documents into evidence. All documents were properly submitted into evidence and offered for contextual background. Further, even if the trial court erred in

admitting the documents, and it did not, any error was harmless as the trial court based its order solely on the language of the CBAs, the Plan, and the complaint.

EvergreenHealth, therefore, respectfully requests this Court uphold the decision of the trial court in its entirety.

II. COUNTERSTATEMENT OF ISSUES RELATING TO ASSIGMENTS OF ERROR

1. The trial court did not err in holding this case is subject to the grievance and arbitration provisions of the CBAs.

2. The trial court did not err in holding all state law claims were also subject to the grievance and arbitration provisions of the CBAs.

3. The trial court did not err in dismissing the case with prejudice.

4. The trial court did not err in denying the Union's motion to strike exhibits.

5. The trial court did not err in granting EvergreenHealth's protective order staying discovery.

6. The trial court did not err in denying the Union's provisional Civil Rule 56(f) motion for a discovery continuance.

III. COUNTERSTATEMENT OF CASE

A. The Union's participation in the Plan and the timing of matching contributions stems from and is controlled by the CBAs.

The Union's argument that the Plan created a benefit outside of the collective bargaining relationship is wholly unsupported. The Plan states that Union members participate in the Plan only if the CBA provides for their participation:

> **Employees shall be excluded** from those eligible to participate if they are included in a unit of employees covered by a collective bargaining agreement between employee representatives and one or more employers, if there is evidence that retirement benefits were the subject of good faith bargaining and **if the collective bargaining agreement does not provide for participation by such Employees**.

CP 153 (emphasis added).

With respect to participation of union members in the Plan, Section 14.5 of the Nurses' CBA provides:

> Retirement Plan. **The Hospital shall provide during the term of this Agreement a retirement plan.** Eligibility and benefits will be determined by the plan's terms. ***The Hospital will make a matching contribution equal to two dollars ($2.00) for each one dollar ($1.00) of compensation the employee contributes, up to a Hospital contribution of five percent (5%) of the employee's eligible compensation in accordance with the terms of the retirement plan.*** The Hospital agrees not to reduce the current level of Hospital contribution (both basic and matching contributions) and eligibility requirements during the term of this Agreement. ***Beginning November 1, 2018, the Employer shall make a good faith effort to make its matching contributions to employees' retirement accounts no less than twice per year.***

CP 1231 (emphasis added).

Article 14 of the CBA for Support Services similarly provides:

> **During the term of this Agreement, the Hospital shall continue in full force and effect its Employee Retirement Plan.** ***The Hospital will make a matching contribution equal to two dollars ($2.00) for each one dollar ($1.00) of compensation the employee contributes, up to a***

> ***Hospital contribution of five percent (5%) of the employee's eligible compensation in accordance with the terms of the retirement plan.*** The Hospital agrees not to reduce the current level of retirement contributions defined in the retirement plan during the term of this Agreement. **This commitment does not apply to administrative (non-benefit) changes that may occur to the plan.** In order to be enrolled in the Retirement Program, an employee must contribute to the Deferred Compensation program, as per the plan design. ***Beginning November 1, 2018, the Employer shall make a good faith effort to make its matching contributions to employees' retirement accounts no less than twice per year.***

CP 1289 (emphasis added).

The Plan and the SPD also indicated the terms of the matching contributions to the Plan were to be interpreted in accordance with negotiated Union agreements. The pre-2021 restated Plan language reads:

> **Special Limits Applicable to Matching Contributions**: The Employer will match $2.00 for every $1.00 a Participant contributes to the Snohomish County Public Hospital District No. 1 Deferred Compensation Plan up to 5% of the Participant's monthly Plan Compensation **as described in negotiated M.O.U. agreements**.

CP 707 (emphasis added) (Adoption Agreement § 6A-4(c)).

The SPD contains similar language:

> **Special Limit on Matching Contributions.** In applying the matching formula described above, the following limit applies: The Employer will match $2.00 for every $1.00 a Participant contributes to the Snohomish County Public Hospital District No. 1 Deferred Compensation Plan up to 5% of the Participant's monthly Plan Compensation **as described in negotiated M.O.U. agreements.**

CP 730 (emphasis added).

The parties' bargaining history indicates that in 2017, the Union proposed an increase in the aggregate compensation percentage on matching contributions from 3% to 5% of pay and also proposed matching contributions be contributed to the Plan monthly. CP 986. On November 8, 2018, the parties reached agreement that EvergreenHealth would not make the matching contributions monthly but, beginning November 1, 2018, would make a good faith effort to make the contributions to the employees' retirement accounts no less than twice per year. CP 991-92.

The Plan and the CBAs are clear the Union and EvergreenHealth bargained for the Union members' participation in the Plan and reached an understanding regarding the dollar amount of the matching contributions, the percentage of pay subject to matching contributions, the timing of the contribution, and that such contribution could not be changed during the duration of the agreement.

B. Matching contributions are determined based on monthly deferrals, but are contributed to the Plan by the time permitted by law and the CBAs.

It is important to understand there is a difference between the mechanical calculation of the matching contribution and the timing of that contribution to the Plan. The pre-2021 restated Plan (the "Mass. Mutual Plan") contained the following options for the matching contribution: payroll period, plan quarter, calendar month or other. *See* CP 707 (Adoption Agreement § 6A-5). The notes therein restate the law that the period

selected does not bind the employer to actually contribute the matching contribution on the frequency selected. Rather, the contribution will be deemed to be retroactively "credited for a particular limitation year" if the amount, for a nonprofit employer, is contributed to the Plan no later than the fifteenth day of the tenth calendar month following the close of the taxable year, i.e., by October 15 of the following calendar year. Treas. Reg. § 1.415(c)-1(b)(6)(B). EvergreenHealth elected to determine the amount of matching contributions monthly. However, the contribution could be made to the Plan on a less frequent basis, in compliance with the CBAs, and would be allocated to the Plan year in which the employee's deferral was made, if the contribution was made by the following October 15th.

In 2021, EvergreenHealth moved the Plan investments from Mass. Mutual to Fidelity. As a result, EvergreenHealth could no longer use the Mass. Mutual Plan and it was necessary to restate the Plan to a new document. CP 578, ¶ 4. The Plan

restated in 2021 (the "2021 Restatement") was not a new plan, but merely a restatement of the Mass. Mutual Plan. CP 138. EvergreenHealth did not make any substantive, design changes to the Plan and no changes to the pre-2021 SPD were required. *See* SPD, CP 724-742. It is undisputed EvergreenHealth calculated and contributed the matching contributions in the same consistent manner under both the Mass. Mutual Plan and the 2021 Restatement. CP 1503-04, ¶¶ 20-25.

Article IV, Section A of the 2021 Restatement (similar to Section 6A-5 of the Mass. Mutual Plan) addresses the *amount* of the matching contribution:

> Within a reasonable time following the end of each calendar month, the Employer will contribute on behalf of each Active Participant two dollars ($2) for every one dollar ($1) of monthly Compensation contributed by the Participant to the Employer's 457 Deferred Compensation Plan to a maximum of five percent (5%) of the Participant's monthly Compensation.

CP 153.

Like the drafting notes to the Mass. Mutual Plan, Article IV, Section C of the 2021 Restatement deals specifically with the reasonable time period for contributing the contribution: "The Employer shall pay its contributions to the Funding Manager, ***within the time provided by law***." CP 154 (emphasis added).

Like Section 6A-4 of the Mass. Mutual Plan, Article III of the 2021 Restatement states the terms of the CBAs will govern the Union's participation in the Plan. CP 152-53. The Union conveniently ignores Article IV, Section C, and Article III of the 2021 Restatement, the Mass. Mutual Plan, the SPD, the CBAs, and past practices.

C. The CBAs do not require monthly contributions.

Again, the Union's proposal for monthly contributions was specifically rejected in 2018. CP 991-92. The CBAs provide, "Beginning November 1, 2018, the Employer shall make a good faith effort to make its matching contributions . . .

no less than twice per year." CP 1289 (Support Services), 1231 (Nurses). Nothing in the CBAs provides for monthly matching contributions to the Plan.

D. The SPD does not require monthly contributions.

The SPD describes the terms of the Plan to employees. At all relevant times, the SPD indicated that matching contributions can be contributed either during or after the plan year at the employer's discretion: "Matching Contributions will be contributed to your Matching Contribution account under the Plan at such time as we deem appropriate. Matching Contributions may be contributed during the Plan Year or after the Plan Year ends." CP 729-30.

The SPD also indicated EvergreenHealth should exercise its discretion in accordance with negotiated agreements with the Union:

> In applying the matching formula described above, the following limit applies: The Employer will match $2.00 for every $1.00 a Participant

> contributes to the Snohomish County Public Hospital District No. 1 Deferred Compensation Plan up to 5% of the Participant's monthly Plan Compensation **as described in negotiated M.O.U. agreements.**

CP 730 (emphasis added).

E. Undisputed past practices and the Union's prior grievance establish the matching contributions were not intended to be made monthly.

It is undisputed that during all relevant time periods, EvergreenHealth contributed matching contributions to the Plan once per year, within the time permitted by federal law. The Union brings this lawsuit in its representational capacity, and therefore its Union members knew that such contributions were not made monthly.

In fact, the Union grieved this very issue and sought as a remedy relief under the Plan. CP 1007. On October 3, 2022, the grievance was denied. CP 1011. The Union did not take any further action and abandoned its grievance. CP 580, ¶ 15. The

Union then filed the complaint, without mention of the CBAs or the grievance.

F. The administrative committee, by the explicit terms of the Plan, has no authority over the timing or the amount of matching contributions.

The Union's argument that the administrative committee has authority over the amount and timing of the matching contributions lacks support in the Plan. Appellant Brief ("Br.") 27. The Plan gives that authority to EvergreenHealth as the settlor and, contrary to the Union's statement, affirmatively states the committee has no authority over the amount or timing of matching contributions:

> The Employer's determination of such [Matching Contribution] shall be binding on all Participants, the Committee, and the Funding Manager.

CP 154.

The Plan does not contain claims procedures and, telling, the Union's claim is not brought against the committee under

any Plan procedure for an alleged abuse of discretion over its handling of the matching contributions. Rather, the Union filed a breach of contract claim against EvergreenHealth, as a settlor and Plan sponsor. Thus, the forum for this claim is determined solely by state law. Under state law, the claim must be arbitrated if it falls within the scope of the arbitration clause.

G. The grievance and arbitration clause of the CBAs governs the current dispute.

A "grievance" is defined broadly as an alleged breach of a "term" or a "condition" of the CBA. CP 1235, 1293. The CBAs thus specifically and unambiguously require the Union to grieve any allegation that EvergreenHealth has violated Article 14 or Section 14.5 of the CBAs. The Union's complaint alleges:

> (1) Employees have and had a contractual right to the retirement benefits contained in the 401(a) retirement plan **under the terms of the Plan**; and
>
> (2) [EvergreenHealth] has not provided employees with the benefits set forth **in the terms of the plan**.

CP 1507, ¶ 39 (emphasis added).

The only issue before the trial court, and on appeal, is whether these allegations also allege a breach of a "term" of the CBA. Both CBAs provide: "The Hospital will make a matching contribution equal to two dollars ($2.00) for each one dollar ($1.00) of compensation the employee contributes, up to a Hospital contribution of five percent (5%) of the employee's eligible compensation ***in accordance with the terms of the retirement plan.***" CP 1289, 1231 (emphasis added).

The CBAs unambiguously reference the very allegations at issue in the complaint—EvergreenHealth must make matching contributions in accordance with the terms of the Plan. If the matching contributions are not made in accordance with the terms of the Plan, a term of the CBA has been violated. As a matter of law, this matter is, therefore, subject to the grievance and arbitration procedures of the CBAs.

IV. RESPONDENT'S ARGUMENTS

A. The trial court did not err in finding the allegations of the complaint are subject to the grievance and arbitration provisions of the CBAs.

It is undisputed the CBAs provide a grievance and arbitration process for all grievances, defined broadly as "an alleged breach of any term or condition of the CBA." CP 1235, 1293. The Court's inquiry is thus limited to whether the Union's allegations that EvergreenHealth "has failed to make timely contributions . . . as required by the 401(a) plan," CP 1503, ¶ 20, and "has not provided employees with the benefits set forth in the terms of the plan," CP 1507, ¶ 39, are an alleged breach of a "term" of the CBAs.

The Union incorrectly contends that because its contract claim is based on the Plan, the dispute is not subject to the CBA arbitration and grievance procedures. The Union relies on distinguishable cases that establish where an employee seeks to

enforce rights created by statute, the employee can separately enforce that statute outside the CBA. That is not the case here, as there is no statutory right to receive matching contributions to the Plan. Instead, the Union members' right to receive matching contributions is a bargained-for right contained in Section 14.5 and Article 14 of the CBAs.

Having failed to find supportive case law, the Union argues, without legal authority, the Plan benefits did not arise as a result of collective bargaining. As detailed below, this argument has no support in the unambiguous provisions of the CBAs, the Plan itself, or the IRS rules governing qualified Section 401(a) plans.

1. The Union's case law is distinguishable and misplaced.

The Union, relying on a single case, argues EvergreenHealth's obligation to make matching contributions to the Plan does not arise from the CBAs. The case of *International Association of Firefighters, Local 1789 v.*

Spokane Airports, 146 Wn.2d 207, 45 P.3d 186, *amended on denial of reconsideration*, 50 P.3d 618 (2002) ("*Firefighters International*"), is distinguishable and provides no support for the Union's position. *Firefighters International* addressed whether the employer was obligated to provide a corresponding benefit when the firefighters opted out of social security. Social security is a special statutory scheme that applies to all employees at the outset of the employment relationship without bargaining with the employer. *Id.* at 220 (quoting *Int'l Ass'n of Firefighters, Local No. 2088 v. City of Tukwila*, 22 Wn. App. 683, 688, 591 P.2d 475 (1979)). While there is no contractual relationship between the individual and the federal government, *Bradford v. Data Processing Joint Board*, 106 Wn.2d 368, 374-75, 722 P.2d 95 (1986), Washington courts have held the contributions to social security that arise at the outset of an employment relationship create an inferred contractual relationship, *id*. The obligation does not flow from a CBA or an express contract, but from the special compensatory nature of

social security that arises at the outset of the employment relationship and cannot be altered to the employees' detriment without providing a corresponding benefit. *Firefighters International*, 146 Wn.2d at 221-22, 45 P.3d 186. Because the right to social security exists independent of any expressed contractual provision or provision in a CBA, it is not subject to arbitration. *Id.* at 223-24. In *Firefighters International*, the source of the right was an inferred contract based on the federal social security statutory scheme and not any express contractual provision.

Firefighters International is consistent with the cases the Union cites regarding its alleged state law claims: where a right is conferred by statute, the Union can sue to enforce the statute without exhausting remedies under the CBAs, unless the CBA clearly indicates that statutory rights were to be arbitrated, as the benefit was created by statute and not through collective bargaining. *See Washington State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 833, 287 P.3d 516 (2012) (CBA

need not be interpreted to enforce a statutory wage claim); *Cox v. Kroger Co.*, 2 Wn. App. 2d 395, 404, 409 P.3d 1191 (2018) (same); *Lee v. Evergreen Hosp. Med. Ctr.*, 7 Wn. App. 2d 566, 578-79, 434 P.3d 1071 (2019) (same).

The Union here is not seeking to recover improperly withheld social security or Medicare taxes or other benefits conferred by statute. Reliance on *Firefighters International* is therefore misplaced. Unlike social security and other statutorily created rights, there is no mandatory statutory right for employees to receive matching contributions to the Plan. Union members are entitled to receive matching contributions solely because this benefit was bargained for by the Union as set forth in Section 14.5 and Article 14 of the CBAs.

2. Section 14.5 and Article 14 specifically set forth the bargained-for language.

The preamble to the CBAs, in clear terms, provides: "The purpose of this Agreement is to set forth ***the understanding reached between the parties*** with respect to

wages, hours of work and conditions of employment . . . ."

CP 1205, 1267. With respect to retirement benefits,

Section 14.5 of the Nurses' CBA provides:

> Retirement Plan. **The Hospital shall provide during the term of this Agreement a retirement plan**. Eligibility and benefits will be determined by the plan's terms. ***The Hospital will make a matching contribution equal to two dollars ($2.00) for each one dollar ($1.00) of compensation the employee contributes, up to a Hospital contribution of five percent (5%) of the employee's eligible compensation in accordance with the terms of the retirement plan***. The Hospital agrees not to reduce the current level of Hospital contribution (both basic and matching contributions) and eligibility requirements during the term of this Agreement. ***Beginning November 1, 2018, the Employer shall make a good faith effort to make its matching contributions to employees' retirement accounts no less than twice per year.***

CP 1231 (emphasis added).

Article 14 of the CBA for Support Services, quoted *supra* Section III.A, provides similarly. CP 1289.

It is clear from the face of the CBAs that the Union and EvergreenHealth bargained for the Union members'

participation in the Plan and reached an understanding regarding both the dollar amount of the matching contribution and that only non-benefit administrative changes could be made to the Plan during the duration of the agreement without bargaining with the Union. The CBAs further show the parties bargained about the ***timing*** of the matching contribution and agreed that EvergreenHealth would make a good faith effort to fund contributions twice per year. Section 14.5 and Article 14 of the CBAs thus demonstrate Plan benefits were the result of collective bargaining and arise from the CBAs. The Union has no argument that can defeat this unambiguous, specific language. The Court's analysis should start and end here as the CBAs specifically and unambiguously show the Plan contributions did not stem from an independent statutory right, but rather from collective bargaining—"during the terms of this Agreement the Hospital will provide a retirement plan."

The Plan also fails to offer any support to the Union's argument. The Plan excludes Union members from the Plan

unless the CBA provides for their participation. Article III of the Plan defines the groups of employees that are eligible to participate in the Plan:

> Employees shall be excluded from those eligible to participate if they are included in a unit of employees covered by a collective bargaining agreement between employee representatives and one or more employers, if there is evidence that retirement benefits were the subject of good faith bargaining and if the collective bargaining agreement does not provide for participation by such Employees.

CP 153.

Put another way, Union members must look to the CBA to determine whether they are eligible for the Plan. Only if the CBA affirmatively provides for Plan benefits may the Union members participate. If the CBA is silent, so long as there is evidence that retirement benefits were the subject of good faith bargaining, the Union members are excluded.

The treasury regulations are also informative. The Plan is a qualified plan under Section 401(a) of the Internal Revenue Code. *See* CP 301. Under Treas. Reg. § 1.410(b)-6(d), if a plan

provides benefits to both union and non-union employees, the portion of the plan governing collectively bargained employees is treated as a separate plan from the plan for non-union employees.

Treas. Reg. § 1.410(b)-6(d)(2) defines a collectively bargained employee as an employee who is covered by a bargaining relationship where "there is evidence that retirement benefits were the subject of good faith bargaining." Thus, the Code treats the Plan as a separate plan for Union employees established through collective bargaining.

In addition, contrary to the Union's allegations, a CBA need not be incorporated by reference in a plan to be part of a plan. A retirement plan consists of one or more contracts under which a retirement plan is established or operated. 29 C.F.R. § 1024(b)(4). A CBA is a contract under which a retirement plan is established or operated. *See Cohen v. Retail, Wholesale & Dep't Store Int'l Union & Indus. Pension Plan*, No. 18-1430, 2019 WL 2357584, at *8 (E.D. Pa. June 4, 2019) (failure to

produce CBAs constituted a violation of Section 1024(b)(4)). Thus, courts consider CBAs when determining a union member's rights under the terms of a plan. *See In re AMR Corp.*, 508 B.R. 296, 307-10 (Bankr. S.D.N.Y. 2014) (examining case law of whether CBA should be considered when determining rights under the plan).

A review of the CBAs, the Plan, and the treasury regulations clearly establish the Union's participation in the Plan was the result of collective bargaining and not an independent statutory right. Section 14.5 and Article 14 of the CBAs are clear and unambiguous in this regard. The only question for the Court is whether this action is within the scope of Section 14.5 and Article 14 of the CBAs and, therefore, subject to mandatory arbitration.

3. EvergreenHealth has not violated any statutory provision governing the timing of matching contributions.

The Union argues its claim is governed by statute. However, there are no deadlines imposed by state law. The only statutory rule governing the timing of matching contributions is set forth in Internal Revenue Code § 404(a)(6), the annual tax return deadline, including extensions, which would be November 15 of the calendar year following the year in which the contribution was withheld. Because Section 415 of the Internal Revenue Code requires the amount contributed by a tax-exempt entity to be allocated by October 15 of the following tax year, October 15 of the following year becomes the practical deadline for making the contribution. 29 C.F.R. § 1.415(c)-1(b)(6)(B). The Plan specifically provides the matching contributions can be made by the time permitted by law. The Union does not allege this deadline was violated.

The Union nevertheless claims it brings statutory claims under RCW 49.52.010, 49.52.050 (prayer for relief, CP 1511) and WAC 296-126-023, but neither these statutes nor the complaint support this position. Br. 45. Significantly, the Union does not allege the employee's own deferrals were not timely contributed to the Plan. RCW 49.52.010 is, therefore, not applicable as it makes it unlawful to divert any portion of employee wages and does not govern employer contributions to the Plan. RCW 49.52.050 similarly makes it unlawful to willfully and with intent deprive the employee of any part of his or her wages, pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract. There are no allegations of an intent to deprive employees of wages relating to the employee's own contributions to the Plan. In addition, Article II, Section G of the Plan, which the Union alleges governs its claim, states that while employee contributions shall be considered wages, employer contributions are not wages: "Compensation shall not

include contributions by the Employer (other than salary reduction [employee] contributions) to any retirement plan . . . .” CP 253.

WAC 296-126-023 likewise governs the payment of wages to employees on established pay days. This regulation does not govern the Union’s claim as the contributions are made to a trust and not to any employee as wages on an established payroll date. Moreover, the complaint does not even allege that any of these statutory provisions govern its claim. The complaint alleges a breach of the Plan, not a statutory provision, gives rise to damages under the above referenced statutes. CP 1510, ¶ 61. Thus, all such claims are derivative claims dependent upon first establishing a breach of a contractual obligation under the Plan. Because a breach of the Plan is also a breach of the CBA, arbitration is required.

4. The parties agreed to arbitrate this matter.

In Washington, the Public Employees’ Collective Bargaining Act (PECBA), RCW Chapter 41.56, not the

National Labor Relations Act (NLRA), governs CBAs with state public employers like EvergreenHealth. The courts apply contract law to the interpretation and construction of CBAs created under the PECBA, and look to interpretations of the NLRA where PECBA is substantially similar. *Barclay v. City of Spokane*, 83 Wn.2d 698, 700, 521 P.2d 937 (1974); *see also Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps.*, 130 Wn.2d 401, 407, 924 P.2d 13 (1996) courts find persuasive interpretations of the NLRA where PECBA is substantially similar to the NLRA).

To answer the question of whether the parties agreed to arbitrate a dispute, the Court thus looks to the face of the CBAs to determine whether the parties agreed to arbitrate certain matters and whether the Union's dispute falls within that scope. *See Meat Cutters Loc. # 494 v. Rosauer's Super Markets, Inc.*, 29 Wn. App. 150, 153-56, 627 P.2d 1330 (1981); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 1353, 4 L. Ed. 2d 1409 (1960); *United*

Steelworkers v. American Mfg. Co., 363 U.S. 564, 568, 80 S. Ct. 1343, 1346, 4 L. Ed. 2d 1403 (1960); *see also Peninsula Sch. Dist. No. 401*, 130 Wn.2d at 414, 924 P.2d 13 ("[W]e look to the face of the collective bargaining agreement to determine whether this dispute is arbitrable.").

Here, the Union's claims clearly fall within the scope of the CBAs' grievance process. The Union's essential allegation is that EvergreenHealth breached its obligation to make matching contributions **in accordance with the terms of the 401(a) retirement plan document**. CP 1507, ¶ 39. The issue before this Court is simply whether this allegation would also be a breach of the CBA and, therefore, subject to the grievance and arbitration provisions of the CBAs. There can be no doubt that the duty to make matching contributions in accordance with the Plan is a duty required by the CBAs as the agreement expressly so states:

> The Hospital will make a matching contribution equal to two dollars ($2.00) for each one dollar ($1.00) of compensation the employee contributes,

> up to a Hospital contribution of five percent (5%) of the employee's eligible compensation **in accordance with the terms of the retirement Plan.**

CP 1289, 1231 (emphasis added).

Any alleged breach of the terms and conditions of the CBAs is subject to the grievance and arbitration provisions of the CBA and this Court would therefore lack jurisdiction to provide relief for any such claims. *See United Steelworkers v. Ret. Income Plan for Hourly-Rated Emps.*, 512 F.3d 555, 561 (9th Cir. 2008) (dispute regarding retirees' entitlement to additional benefits fell within scope of the CBA and was subject to arbitration); *Kop-Flex Emerson Power Transmission Corp. v. International Ass'n of Machinists & Aerospace Workers Loc. Lodge No. 1784*, 840 F. Supp. 2d 885, 891 (D. Md. 2012) (disputes regarding retiree benefits are generally subject to arbitration, so long as CBAs include terms regarding retiree health benefits); *United Steelworkers v. Mead Corp., Fine Paper Div.*, 21 F.3d 128, 132 (6th Cir. 1994) (grievance

regarding employer's retirement incentive program subject to arbitration when arbitration clause at issue provided for arbitration of any controversies regarding interpretation of agreement, and agreement did not contain express provision excluding grievance at issue from arbitration).

The Union's final argument that the Plan was in existence after the effective date of the CBA is simply incorrect as the Plan was effective January 1, 1994, well before the effective date of the CBA, and the Plan document unambiguously so states in its preamble. CP 138.

5. The parties did not exclude this matter from arbitration.

Contrary to the Union's suggestion, the law is not whether the Plan (or other document) incorporates the grievance provisions of the CBAs, but whether the dispute involving the other plan or document is within the scope of the party's arbitration clause. S*ee Inlandboatmens Union v. Dutra Grp.*, 279 F.3d 1075, 1080 (9th Cir. 2002) (holding "disputes

arising under a side agreement must be arbitrated if the dispute relates to a subject that is within the scope of the CBA's arbitration clause"), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) . Where there is an arbitration clause, there is a presumption of arbitration that can only be overcome by a showing of forceful evidence to exclude the matter from arbitration. Thus, a dispute over a Plan benefit is subject to the CBAs and arbitration if the Plan falls within the scope of the CBAs and if nothing excludes the Union's dispute from arbitration. *See Mead Corp.*, 21 F.3d at 132 (holding dispute over retirement plan was subject to arbitration where CBA required company to provide retirement plan and no evidence indicated that grievance was excluded from arbitration); *United Steelworkers v. Cooper Tire & Rubber Co.*, 474 F.3d 271, 279-80 (6th Cir. 2007) (holding dispute over side agreement within the scope of the CBA was subject to arbitration where side agreement did not provide for alternative dispute resolution procedure).

The Union makes two arguments that are intended to be "forceful evidence of a purpose to exclude the claim from arbitration." *Warrior & Gulf Navigation*, 363 U.S. at 585, 80 S. Ct. 1347, 4 L. Ed. 2d 1409. First, the Union points to the fact the Plan was amended in 2021, arguing because the amendment was drafted after the date of the arbitration agreement, the parties could not have intended for the claim to be arbitrated. As a practical matter, most cases that are arbitrated involve changes that occurred after the date of the arbitration agreement, as cases that arose prior to the effective date would not be subject to arbitration as no clause existed. Second, in making such an argument, the Union is making merits arguments and misrepresents the facts of the Plan, the complaint, its bargaining history, past practices and interpretations, and its discovery demands when it now argues the case is about an isolated clause in the 2021 Restatement. As the 2021 Restatement preamble makes clear, there is only one Plan and that Plan was effective in 1994. The Plan was

amended and restated in 1997, 2006, 2016, and 2021. CP 138. The Plan at all relevant times provided that the matching contributions would be made in accordance with applicable law. CP 154; CP 707. The Plan further indicated it should be interpreted in accordance with memorandum of understandings with the Union. CP 707; CP 730.

The Court's analysis could end there. But, the Union also bargained for monthly matching contributions in 2018, not in 2021, and that change was rejected. The Union's alleged claims begin in 2018 (the effective date of the CBA), not 2021. CP 1503, ¶ 21. The complaint also alleges that throughout the claim period, the Plan was administered in the same manner and the Mass. Mutual Plan contained the same or similar provisions. CP 1501, ¶¶ 9, 12. In seeking discovery back to 2016, the Union acknowledges that its claim is not based on a single phrase in the 2021 restatement. The Union stated that circumstances surrounding the making of the contract are relevant to determine intent, even if the Plan provisions are not

found to be ambiguous. It is well-settled law that a trier of fact must consider the past practices of the parties and the language of the CBA when resolving a dispute. *See Meat Cutters Loc. # 494*, 29 Wn. App. at 156, 627 P.2d 1330 (past practices and bargaining history are an implied part of the bargaining agreement involving an interpretation of the CBA and requiring arbitration); *The Council of Cnty. & City Emps. v. Spokane Cnty.*, 32 Wn. App. 422, 424, 647 P.2d 1058 (1982) (interpretation of the agreement in light of past practice is subject to the grievance and arbitration provisions of the CBA). These past practices extend to at least 2018. Therefore the Union has not met its burden to show by "forcible evidence" that the claim is excluded from arbitration merely because the Plan was restated effective January 1, 2021. The claim clearly falls within provisions of Section 14.5 and Article 14 of the CBAs and must be arbitrated. Moreover, the fact that the Union itself filed a grievance over matching contributions indicates that the parties did not exclude disputes over matching

contributions from the grievance and arbitration provisions of the CBA.

The Union's final and equally unpersuasive argument is that the dispute cannot be arbitrated because Plan claims are to be decided by the Plan's administrative committee. The Union raises this argument for the first time on appeal and it should not be considered by this Court. RAP 2.5(a); *Wingert v. Yellow Freight Sys., Inc*., 146 Wn. 2d 841, 853, 50 P.3d 256 (2002). If considered, the Union's reliance on *Local Union No. 4-449, Oil, Chemical and Atomic Workers v. Amoco Chemical Corporation*, 589 F.2d 162 (5th Cir. 1979) is misplaced. In *Amoco Chemical*, the court found that because the plan gave final power to the board of directors to interpret the plan and decide all claims, the plan indicated a forcible intent to exclude such claims from arbitration. *Id.* at 164. Here, the Plan does not give the administrative committee the power to interpret Plan provisions governing matching contributions. In fact, the Plan specifically excludes and reserves to the settlor, outside of the

fiduciary functions of the Plan, the discretion over the timing of the matching contributions:

> The Employer's determination of such [Matching Contribution] shall be binding on all Participants, the Committee, and the Funding Manager.

CP 154.

Even if the Plan did give discretion to the committee, and it does not, the trial court would still lack jurisdiction as the determination must be made by the committee. It is telling that despite the Union's argument, the Union has not filed a claim with or against the committee, but instead filed this contract claim against EvergreenHealth in its capacity as the settlor and sponsor of the Plan. State law governs the claim against the employer and the claim must be arbitrated if it falls within the scope of the arbitration clause.

6. Neither the Plan nor the CBAs exclude the Plan from mandatory arbitration.

The Plan and CBAs simply do not exclude the Plan from the CBA grievance process. Moreover, the Plan contains no

claims procedures, making the grievance procedures applicable by the express language of the CBAs. The Union itself previously grieved this matter, confirming the parties did in fact agree to arbitrate Plan disputes.

7. The substantive issues were not before the trial court.

The sole issue before the trial court was whether the Union's contract claim—and all related state law claims—are subject to arbitration. When making such a determination, the courts are not to decide the merits of the case. *See AT & T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (quoting *American Mfg. Co.*, 363 U.S. at 568, 80 S. Ct. 1343, 4 L. Ed. 2d 1403) (the courts "have no business weighing the merits of the grievance"). Thus, whether EvergreenHealth or the Union will prevail on the merits before the arbitrator is irrelevant to the trial court's threshold determination of arbitrability or this Court's review on appeal. The parties agreed "to submit all grievances to

arbitration, not merely those which the court will deem meritorious." *Id.* (quoting *American Mfg. Co.*, 363 U.S. at 568, 80 S. Ct. 1343, 4 L. Ed. 2d 1403); *Mead Corp.*, 21 F.3d at 133 (quoting same). While EvergreenHealth disputes the various merit contentions set forth by the Union, the merits are simply not before the Court and are irrelevant. The threshold question of arbitrability can be decided as a matter of law based on the unambiguous language of Section 14.5 and Article 14 of the CBAs and all the Union's claims are subject to mandatory arbitration.

B. The trial court did not err in dismissing the derivative state law claims.

Where, as here, the parties agreed to arbitrate matters pursuant to an arbitration clause, "the law's permissive policies in respect to arbitration counsel that any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration." *Columbia Exp. Terminal, LLC v. International Longshore & Warehouse Union*, 23 F.4th 836, 847 (9th Cir.)

(citations omitted), *cert. dismissed sub nom. Columbia Exp. Terminal, LLC v. ILWU*, 142 S. Ct. 2094, 212 L. Ed. 2d 804 (2022). Thus, to the extent there is any doubt regarding whether a Plan dispute should be referred to arbitration, that doubt must be resolved in favor of arbitration. *Id.* In the instant case, there is no doubt the Union's claim that the matching contributions were not made in accordance with the terms of the Plan is encompassed within Section 14.5 and Article 14 of the CBAs, as the CBAs explicitly state that EvergreenHealth will make the matching contributions "in accordance with the terms of the retirement Plan." Therefore, any claim related to violation of such duty is subject to mandatory arbitration.

The Union nevertheless continues to assert that its non-contract state law claims should survive dismissal. However, the central allegation for all the Union's claims is that "for all relevant time periods, Defendant has failed to timely make contributions on behalf of such SEIU 1199NW members as required by the 401(a) Plan." CP 1503, ¶ 20. As previously

discussed with respect to the Union's alleged statutory claims, there is no independent cause of action for this claim under state law. All of the Union's claims are dependent on a finding that EvergreenHealth failed to make the matching contributions in accordance with the terms of the Plan. Therefore, the analysis of the Union's state law claims is the same that governs any arbitration analysis: do the Union's claims fall within the scope of Section 14.5 and Article 14 of the CBAs? As all of non-contract claims are merely derivative, such claims must be dismissed as they fall within the express language of the CBAs: "The Hospital will make a matching contribution . . . in accordance with the terms of the retirement plan."

In a last effort, the Union now argues that breach of fiduciary duties does not necessarily involve breach of contract and that breach of the covenant of good faith and fair dealing does not require breach of a specific provision in a contract. Br. 60-61. To the contrary, the Union specifically pled the fiduciary breach claim as a derivative claim—the terms of the Plan

require the contributions to be made monthly and EvergreenHealth breached its fiduciary duty by not timely making the contribution. CP 1508. In addition, the employer's contribution obligation is a settlor, not a fiduciary, function under Article IV.A of the Plan and under case law. CP 154; *accord In re Popovich*, 359 B.R. 799, 806 (Bankr. D. Colo. 2006) (failure to make employer contributions is a breach of the CBA but not a breach of fiduciary duty); *Cline v. Industrial Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1234 (9th Cir. 2000) (citing *Local Union 2134, United Mine Workers v. Powhatan Fuel, Inc.*, 828 F.2d 710, 714 (11th Cir. 1987); *Professional Helicopter Pilots Ass'n v. Denison*, 804 F. Supp. 1447, 1453-54 (M.D. Ala. 1992)) ("Until the employer pays the employer contributions over to the plan, the contributions do not become plan assets over which fiduciaries of the plan have a fiduciary obligation; this is true even where the employer is also a fiduciary of the plan."); *Petroff v. Retirement Benefit Plan of Am. Airlines, Inc.*, No. LA CV14-02866 JAK (MANx),

2015 WL 13917970, at *14 (C.D. Cal. July 28, 2015) ("Funding a plan is a settlor function.").

Similarly, the Union's complaint alleges the implied contract of good faith and fair dealing was violated by EvergreenHealth's failure to make the contributions within the time period specified by the Plan. CP 1508, ¶ 47. Despite the Union's contentions, Washington courts have clearly held the implied duty of good faith is derivative. *See Johnson v. Yousoofian,* 84 Wn. App. 755, 762, 930 P.2d 921 (1996) ("The implied duty of good faith is derivative, in that it applies to the performance of specific contract obligations. If there is no contractual duty, there is nothing that must be performed in good faith." (citations omitted)). Further, the implied duty of good faith "does not impose a free-floating obligation of good faith on the parties." *Rekhter v. State, Dep't of Soc. & Health Servs.,* 180 Wn.2d 102, 113, 323 P.3d 1036 (2014). There must therefore be a contract term and contractual duty to bring a claim for breach of the implied duty of good faith. Moreover,

the Union's complaint firmly indicates this duty is based on the contractual provision to make contributions within a reasonable time following the end of the month. CP 1508, ¶ 47.

The key here is that the Union's non-contract claims of course stem from the same alleged violation of the Plan and CBAs and are so interrelated that they should not be decided in a different forum. *See Berman v. Tierra Real Est. Grp., LLC*, 23 Wn. App. 2d 387, 397, 515 P.3d 1004 (2022) (derivative claim of fiduciary breach subject to arbitration); *Sterling Fin. Corp. v. Conklin*, No. CV-07-038-FVS, 2007 WL 9717753, at *1-2 (E.D. Wash. Feb. 23, 2007) (breach of fiduciary duty claim arising out of employment duties was subject to arbitration); *Glaude v. Macy's, Inc.*, No. 12-CV-5179-PSG, 2012 WL 6019069, at *4 (N.D. Cal. Dec. 3, 2012) (all state law claims regarding breach of contract, breach of good faith, and emotional distress were merely derivative of the employee's claim that he was fired without cause); *Cybertek Inc. v. Bentley Systems, Inc.*, 182 F. Supp. 2d 864, 869 (D. Neb. 2002) (claims

of bad faith, good faith and fair dealing, negligence stem from the same violation and are subject to arbitration); *David Terry Invs., LLC-PRC v. Headwaters Dev. Grp. Ltd. Liab. Co.,* 13 Wn. App. 2d 159, 168-69, 463 P.3d 117 (2020) (claims of fraud, unjust enrichment, and conversion fell within scope of arbitration clauses, which provided for arbitration of disputes "over this Agreement"); *CixxFive Concepts, LLC v. Getty Images, Inc*., No. C19-386-RSL, 2020 WL 3798926, at *4 (W.D. Wash. July 7, 2020) (claim for unjust enrichment relates to the agreement and falls under the broad language of the arbitration clause); *Manchester v. Ceco Concrete Constr., LLC*, No. C13-832 RAJ, 2014 WL 1805548, at *3 (W.D. Wash. May 7, 2014) ("claims for unjust enrichment and quantum meruit arise out of the same factual circumstances at issue in the arbitration, and therefore are logically related to the breach of contract claim such that they should have been raised in arbitration"). The Union's claims are derivative of its contractual claim and were properly dismissed.

C. The trial court did not err in dismissing the case with prejudice.

The Union cites to five arbitration cases that were dismissed without prejudice and, with no analysis, concludes it is improper to dismiss any arbitration case without prejudice. Br. 58-59. The rule is, of course, that a case can be dismissed with or without prejudice and the standard of review is whether the court's decision was an abuse of discretion. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2001) (dismissal with prejudice reviewed for abuse of discretion). It is proper to dismiss a complaint with prejudice if it suffers from a deficiency that cannot be cured by amendment.

In the instant case, the trial court found that all claims were subject to the grievance and arbitration provisions of the CBAs and that the court lacked jurisdiction over the claims. CP 4-5. The court also found that any state law claims were derivative of the claim that "matching contributions were not made in accordance with the terms of the retirement plan." *Id*.

In denying the Union's motion for a continuance for further discovery, the court found that the deficiency could not be cured by further evidence as all claims were subject to binding arbitration. The trial court's decision to dismiss the claims with prejudice was not an abuse of discretion as all claims were subject to binding arbitration and the court lacked jurisdiction over the claims.

Contrary to the Union's unsupported argument, courts can and do dismiss the case with prejudice in favor of arbitration where all claims are subject to arbitration. *See Sparling v. Hoffman Constr. Co., Inc*., 864 F.2d 635, 638-39 (9th Cir. 1988) (district court acted within its discretion in dismissing claims which were subject to arbitration pursuant to terms of contract; the court was not limited to granting stay pending arbitration, but could dismiss the complaint when all claims were barred by arbitration clause); *Sharma v. Subway Real Est., LLC*, 793 F. App'x 584 (9th Cir. 2020) (recognizing that district courts may dismiss an action when the plaintiff is

required to submit all claims to arbitration); *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1073-74 (9th Cir. 2014) (same); *Pilgrim Home & Hearth, LLC v. Panacea Prods. Corp.*, No. CV 10-6649 PSG (RCX), 2010 WL 11603083, at *4 (C.D. Cal. Nov. 4, 2010) (dismissal with prejudice where all claims barred by the arbitration clause); *Perera v. H & R Block E. Enters., Inc.*, 914 F. Supp. 2d 1284, 1290 (S.D. Fla. 2012) (dismissed with prejudice); *Kivisto v. NFL Players Ass'n*, No. 10-24226-CIV, 2011 WL 335420, at *1 (S.D. Fla. Jan. 31, 2011) (voluntary dismissal with prejudice), *aff'd*, 435 F. App'x 811 (11th Cir. 2011); *Olsher Metals Corp. v. Olsher*, No. 01-3212-CIV, 2003 WL 25600635, at *9 (S.D. Fla. Mar. 26, 2003) (dismissal with prejudice when all claims subject to arbitration); *Athon v. Direct Merchs. Bank*, No. 5:06-CV-l, 2007 WL 1100477, at *6 (M.D. Ga. Apr. 11, 2007), *aff'd*, 251 F. App'x 602 (11th Cir. 2007) (a case in which arbitration has been compelled may be dismissed in the proper circumstances, such as "when all the issues raised in . . . court must be

submitted to arbitration"); *Marciel v. J&S, LLC*, 2013 WL 12131232, at *4 (W.D. Tex. Nov. 5, 2013) (motion to compel arbitration granted and dismissal with prejudice). The trial court did not abuse its discretion in granting dismissal with prejudice as all claims were subject to arbitration and the court lacked jurisdiction to decide the same.[1]

D. The trial court did not err in denying the Union's motion to strike.

Throughout this action, the Union has ignored the documents relevant to this dispute and made false and baseless statements, including that the Plan terms were not subject to bargaining between the parties, CP 1327, the employees were misinformed about the timing of the contributions, CP 1328, and the grievance procedures of the CBAs do not apply to the

[1] The Union spends more than three pages discussing its associational standing. EvergreenHealth has never questioned the Union's ability to bring this action on behalf of its members nor is this an issue on appeal.

contractual breaches of the Plan, CP 1337. In addition to the Plan and CBAs, which are controlling and the admissibility of which the Union does not challenge, EvergreenHealth submitted documents to counter the Union's false, self-serving factual allegations. EvergreenHealth did not submit these challenged documents for purposes of proving the truth of any factual matter at issue in the Motion for Summary Judgment. The Motion for Summary Judgment is based on the unambiguous language in the CBAs and the Plan—there are simply no other facts relevant to the question presented to the trial court on summary judgment other than the contractual language of the CBAs and Plan and submission of other documents for that purpose would be contrary to the summary judgment standard. This is further evident from the trial court's order: "the Union's claim of breach of the retirement Plan would be a breach of express provisions of the CBAs." CP 4. The trial court's decision on summary judgment was based on

the uncontradicted, express language of the contract—the Plan and CBAs—and nothing more.

EvergreenHealth's submission and use of the challenged documents was for the sole purpose of disputing the Union's factual narrative and providing the trial court with the complete picture—that the parties negotiated the timing of the Plan contributions, the Union and its members were all well aware of this timing, and that the Union turned to the trial court only after it was unhappy with the decision in the first round of the CBA grievance process.

The challenged documents, which can be separated into three general categories, were all relevant and admissible for this purpose.

a. Sample Fidelity Participant Statements (Exhibits 7 and 8)

Sample Fidelity Participant Statements for the 401(a) and 457 plans were submitted to the trial court to show only the form of the statements that all Plan participants received on a

monthly basis and not to prove the truth of any manner contained on such statements. EvergreenHealth cited to these exhibits in relation to two factual statements that are not in dispute:

> (1) "EvergreenHealth makes employer matching contributions to the Plan on behalf of eligible employees who make deferrals to EvergreenHealth's Code Section 457(b) plan." CP 1124; CP 1503, ¶ 20.
>
> (2) "The Union does not allege that EvergreenHealth failed to make any matching contributions to the Plan by the annual legal deadline." CP 1125-26.

EvergreenHealth's Human Resources Department has the responsibility to keep as business records employee records with respect to the Plan. Stacey Riden, Director of Human Resources, has custody of these records, can access them from Fidelity at any time, and has personal knowledge of the statements and the informational format of such statements.

b. Bargaining Proposals (Exhibit 11)

EvergreenHealth submitted the Union's own bargaining proposals and EvergreenHealth's counter proposals made in

collective bargaining, and kept as EvergreenHealth's business records, with respect to employer contributions to the Plan. Again, the bargaining proposals are cited in the Motion for Summary Judgment only to provide the contextual fact that the parties' bargaining history indicates the Union's proposal that matching contributions be made monthly to the Plan and that such proposal was rejected by EvergreenHealth. CP 1126. The substantive issue of the timing of the matching contributions, the contractual history, or the parties' intent was not before the trial court.

c. Union Grievance (Exhibits 12-15)

Lastly, EvergreenHealth submitted grievance correspondence between the Union representative and Ms. Riden related to the timing of the Plan's employer matching contributions. EvergreenHealth cited the grievance correspondence in support of its statement that the Union filed a grievance relating to matching contributions prior to filing this case before the trial court. CP 1130. The grievance was not

submitted to prove the truth of any allegation set forth in the grievance. The exact nature of the grievance and any decision relating to the grievance were not before the trial court. Ms. Riden maintains these documents as business records and also has personal knowledge of the grievance as the correspondence was either written by or addressed to Ms. Riden.

1. The documents and declaration are admissible as either business records or non-hearsay.

The challenged documents are admissible as business records regardless of whether they contain hearsay. *See Saben v. Skagit Cnty.*, 136 Wn. App. 869, 876 n.5, 152 P.3d 1034 (2006) (rejecting argument letter was inadmissible hearsay because court did "not rely on it for the truth of the matter asserted, but only to create context"). In fact, a business record is presumptively reliable and therefore admissible even if the evidence would otherwise be hearsay. *State v. Ziegler*, 114 Wn.2d 533, 538, 789 P.2d 79 (1990). Notably, the Union has

never challenged the authenticity of these documents—the Union simply moved to strike and continues to challenge the documents that are its own documents and the records of its members that contradict its narrative. The documents and declaration are admissible either because they are not hearsay or because they are excepted from the hearsay rule as business records.

2. The documents and declaration are relevant.

Relevance is not a high hurdle. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 670, 230 P.3d 583 (2010). Merely "minimal logical relevancy is adequate if there exists a reasonable connection between the evidence and the relevant issues." *State v. Suarez-Bravo*, 72 Wn. App. 359, 364, 864 P.2d 426 (1994) (citation omitted). All of the exhibits and statements in Ms. Riden's Declaration related to the case, are relevant to show the implausibility of the Union's allegations, and meet the relevancy standard. The trial court did not err in finding them relevant.

3. The documents and declaration were properly authenticated.

The party seeking to admit a document is required to make only a "prima facie showing of authenticity," and authentication or identification is established if the party shows sufficient proof "for a reasonable fact finder to find in favor of authenticity." *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 745-46, 87 P.3d 774 (2004). CR 56(e) does not limit what evidence may be used to authenticate a document; it only "requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be." *Id.* at 746. For example, if an affiant states he or she is the "custodian of the records and that the attached documents are true and correct copies of the documents," such documents are authenticated for purposes of ER 901. *Discover Bank v. Gardner*, 173 Wn. App. 1010, at *4 (2013) (unpublished).

The requirement that the affiant have personal knowledge, where applicable, is also minimal on summary judgment. There are no "magic words" that must be contained in a declaration and whether the personal knowledge requirement is met may be inferred from the contents of the affidavit or declaration (e.g., her position and participation in the matters sworn to in the affidavit). *See Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990) (citation omitted) ("requirements of personal knowledge and competence to testify have been met may be inferred from the affidavits themselves"); *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 529-30 (5th Cir. 2005) (collecting cases for the proposition that there are no "magic words" necessary to demonstrate personal knowledge).

The authenticity and foundation of Ms. Riden's Declaration and the exhibits cannot be reasonably challenged. It is not necessary that the Fidelity participant statements be for a member of the Union, nor is Ms. Riden required to provide

anything more than an affirmative statement that she is the custodian of business records kept and maintained as Human Resources Director. Ms. Riden's Declaration, and the exhibits attached thereto, were all properly admitted by the trial court.

4. In the alternative, an error in admitting evidence is not grounds for reversal if the outcome is not materially impacted.

Even assuming arguendo that the trial court erred in denying the Motion to Strike—it did not—the trial court's admission of the challenged documents and declaration does not rise to reversible error. "An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Evidentiary error is not prejudicial unless the outcome of the trial would have been materially affected had the error not occurred. *Id*. The trial court's order shows it based its decision solely on the complaint, the Plan, and the CBAs. As explained above, the challenged documents were used for

contextual statements, which were supported elsewhere in the record, including in the Plan, CBAs, and the complaint itself. Admission of the challenged documents thus had no material impact whatsoever on the trial court order and the order should be upheld.

E. The trial court did not err in granting a protective order.

The trial court properly stayed discovery and denied the Union's motion to compel discovery during the pendency of EvergreenHealth's Motion for Summary Judgment. Although EvergreenHealth, in the spirit of cooperation, did provide limited discovery responses, it was forced to object when discovery requests became burdensome and harassing at such an early stage in the litigation and where it was unlikely the trial court could grant the Union any remedy. For multiple reasons below, the trial court acted properly and within its discretion in barring further discovery while the Motion for Summary Judgment was pending.

First, it is well established law that jurisdictional issues are to be decided at the outset of the litigation to avoid the waste of judicial resources and any discovery should be limited to the jurisdictional matter at issue. *See e.g.*, *Meat Cutters Loc. # 494*, 29 Wn. App. at 153-56, 627 P.2d 1330 (the sole inquiry is whether the parties bound themselves to arbitrate the particular dispute); *Albino v. Baca*, 747 F.3d at 1170 ("If discovery is appropriate, the district court may in its discretion limit discovery to evidence concerning exhaustion, leaving until later—if it becomes necessary—discovery directed to the merits of the suit."); *Warrior & Gulf Navigation*, 363 U.S. at 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (merits of a controversy may not be inquired into under guise of determining arbitrability under bargaining agreement); *American Mfg. Co.*, 363 U.S. at 568, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (same). To decide EvergreenHealth's Motion for Summary Judgment and whether the trial court had jurisdiction over this matter or must compel arbitration, no discovery was necessary or warranted. The Plan

and CBAs were and continue to be controlling over the jurisdictional question before the trial court.

Second, Washington State courts routinely stay discovery pending the resolution of a dispositive motion, including on summary judgment. *See, e.g.*, *Quinn Constr. Co. v. King Cnty. Fire Prot. Dist. No. 26*, 111 Wn. App. 19, 33, 44 P.3d 865 (2002) (citing CR 26(c)(1) for proposition that the "court clearly had the discretion to stay discovery" pending the dispositive motion); *Stewart v. Richards*, No. 08-5275, 2008 WL 4446694, at *2 (W.D. Wash. Sept. 25, 2008) (staying discovery where party did not identify "what relevant, material facts would be discovered that would preclude summary judgment"); *Heckman v. State*, No. C04-5447-RJB, 2005 WL 1532961, at *2 (W.D. Wash. June 24, 2005) (staying served discovery where it did not appear it was "necessary or helpful to resolution of the issues in the pending dispositive motion"); *Hoisington v. Williams*, No. 09-5630-RJB/KLS, 2010 WL 1006565, at *1 (W.D. Wash. Mar. 15, 2010) (holding "[a] court

may relieve a party of the burdens of discovery while a dispositive motion is pending").

Third, no discovery or extrinsic evidence is appropriate where the contract (i.e. the Plan and CBAs) is clear. The courts apply contract law to the interpretation and construction of CBAs that, like here, are created under the PECBA. *Barclay*, 83 Wn.2d at 700, 521 P.2d 937. When deciding whether the parties agreed to arbitrate a certain matter, "courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). The complaint, Plan, and CBAs demonstrate (1) an agreement to grieve and arbitrate, and (2) the agreement encompasses the dispute at issue. *See Granite Rock Co. v. International Bhd. of Teamsters*, 561 U.S. 287, 298-300, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010). The dispute is thus subject to arbitration regardless of what other merit-related discovery the Union wished to pursue

and discovery is contrary to the contractual agreement of the parties to arbitrate disputes over the terms of the CBAs.

Lastly, no outside evidence can establish the arbitration clause is not susceptible of an interpretation that this dispute is covered by the CBAs. *See id.* In fact, the Union failed to point to any admissible evidence that discovery would lead to for purposes of the trial court's decision on summary judgment. The Union further contends it was prejudiced in responding to EvergreenHealth's Motion for Summary Judgment, but still cannot point to how it was prejudiced or what other evidence could possibly have been relevant on summary judgment. EvergreenHealth has never sought to engage in games of "hide and seek" or "blindman's buff," but rather to protect itself from an expensive, harassing, irrelevant, and unnecessary round of discovery that should instead be overseen by an arbitrator in binding arbitration. Contrary to the Union's allusions that EvergreenHealth engaged in any type of deceptive practice, EvergreenHealth provided initial discovery responses and then

properly sought a motion to stay discovery during the pendency of its dispositive, jurisdictional motion once it was clear the parties disagreed on the scope of reasonable discovery. There was clearly good cause to stay discovery, particularly where the requested discovery was wholly unrelated to the dispositive question before the trial court. In addition, the trial court, considering the totality of the circumstances, including the contractual nature of the claim, the pending dispositive motion, and the jurisdictional questions before it, properly concluded discovery was not necessary and would not impact the trial court's decision on summary judgment.

F. The trial court did not err in denying the Union's provisional Rule 56(f) motion for a continuance.

The standard of review on the trial court's ruling on the Union's Rule 56(f) motion is a manifest abuse of discretion. *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 237, n.4, 88 P.3d 375 (2001). The Union's 56(f) motion is

based on the false premise that the substantive merits of the timing of the matching contributions was before the trial court. Br. 73. Again, the sole issue before the trial court was whether the trial court had jurisdiction—was the dispute subject to the grievance and arbitration provisions of the CBAs or did the superior court have jurisdiction to hear the claim.

Rule 56(f) states that where affidavits of the party opposing the motion for summary judgment show reasons why the party cannot present facts justifying its opposition, the court may refuse the motion for summary judgment or order a continuance in order to obtain affidavits or depositions. In *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989), however, the court nevertheless stated that denial of a Rule 56(f) motion is appropriate when:

> (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.

Denial can be based on any one of the above three prongs. *Pelton v. Tri-State Mem'l Hosp., Inc.*, 66 Wn. App. 350, 356, 831 P.2d 1147 (1992). Here, the Union has not established the need for any evidence necessary to interpret the unambiguous language of Section 14.5 and Article 14 of the CBAs and no evidence could change the meaning of the unambiguous language of those provisions of the CBAs.

This is a contract case involving whether the parties contracted to submit disputes over Plan contributions to the CBA grievance procedure. This dispute was resolved by reviewing the allegations of the complaint, the Plan, and Section 14.5 and Article 14 of the CBAs. There are simply no material issues of fact as to the questions before this Court.

The Union did not file a standard motion under Rule 56(f), but rather a *conditional* Rule 56(f) motion to be heard only if the trial court did not deny summary judgment as a matter of law. The Union, in doing so, conceded the fact that summary judgment is appropriate on the record.

The Union alleges only that it is entitled to merits discovery. The Union's desire for merits discovery is not before the Court as EvergreenHealth's motion is based on the specific language of the CBAs to determine the sole issue of whether this matter is subject to mandatory arbitration. For the foregoing reasons, the denial of the conditional 56(f) motion was not an abuse of discretion.

V. CONCLUSION

The sole issue before the Court is whether the Union's claim that "matching contributions were not made in accordance with the terms of the retirement plan," is within the scope of Section 14.5 and Article 14 of the CBAs, which require that the "matching contributions . . . be made in accordance with the terms of the retirement Plan." The Union cannot overcome the clear language of the Plan and CBAs with false narratives and irrelevant merits-based arguments. An alleged breach of the Plan is an alleged breach of Section 14.5 and Article 14 of the CBA, and thus a grievance subject to

bargained-for mandatory arbitration. All other non-contract claims are based on the same set of facts, contingent on a finding of breach, and similarly require dismissal. The inquiry starts and ends here. For the foregoing reasons, EvergreenHealth respectfully requests the Court affirm the trial court's orders.

This document contains 11,927 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 5th day of January, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the document to which this certificate is attached to be filed with the WA State Court of Appeals, Division I, which electronically serves all parties, and sent via email per agreement of the parties to the following as indicated below:

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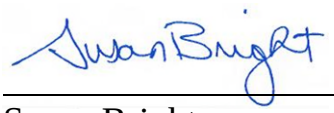
Declared under penalty of perjury under the laws of the State of Washington.

DATED at Redmond, Washington this 5th day of January, 2024.



Susan Bright

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