

# **SAMPLE OPENING BRIEF**

## **FINAL DRAFT**

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OPENING BRIEF OF APPELLANT FERNDALE SMELTING COMPANY

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### **For Internal CLE Use Only**

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## **I. STATEMENT OF JURISDICTION**

Plaintiffs-Appellees United Autoworkers of America (the “Autoworkers”) filed this lawsuit against Defendant-Appellant Ferndale Smelting Company in the United States District Court for the Central District of California pursuant to Section 301 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185. Although Ferndale does not agree that the district court could properly exercise jurisdiction under the LMRA, the jurisdiction issue turns on the arbitrability issue that is addressed in Section VI.C below and therefore need not be separately decided by this Court on appeal.

On November 1, 2001, District Judge Arthur Bransford granted the Autoworkers’ motion for summary judgment and simultaneously denied Ferndale’s motion for summary judgment. On November 27, 2001, Ferndale filed a timely notice of appeal of the district court’s final judgment and order. Subject to and without waiving Ferndale’s assertion that the district court could not properly exercise jurisdiction under the LMRA (as noted above), Ferndale acknowledges that this Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and 1294(1).

## **II. ISSUES PRESENTED FOR REVIEW**

1. Whether the district court erred in finding that the Autoworkers’ action was not time-barred under the six-month limitation period in Section 10(b) of the National Labor Relations Act (“NLRA”), 29 U.S.C. § 160(b), even though the Autoworkers commenced their action more than six months after Ferndale

unequivocally informed them that “it is the Company’s position that this dispute . . . is . . . not subject to” arbitration.

2. Whether the district court erred in granting summary judgment in favor of the Autoworkers and referring the parties’ dispute to arbitration even though (a) the arbitration provision at issue in this appeal is expressly limited to “matters involving the interpretation and application of specific provisions of [the parties’ Collective Bargaining] Agreement,” and (b) the Autoworkers’ grievance does not involve a “specific provision” of the parties’ agreement.

### **III. STATEMENT OF THE CASE**

The Autoworkers filed this suit under the LMRA, alleging that Ferndale breached the parties’ Collective Bargaining Agreement (“CBA”) by (a) failing to pay the appropriate value to employees who received cash distributions based on certain shares of Ferndale stock, and (b) refusing to process the Autoworkers’ dispute through the CBA’s grievance and arbitration provisions. On September 23, 2001, both parties moved for summary judgment on the issue of whether the district court should compel Ferndale to arbitrate the Autoworkers’ grievance.

On November 1, 2001, the district court issued an order granting the Autoworkers’ motion for summary judgment, denying Ferndale’s motion, and agreeing with the Autoworkers that the dispute should be referred to arbitration. In addition to addressing the arbitrability issue, the district court also determined that the Autoworkers’ action was not time-barred by the six-month limitation period in Section 10(b) of the NLRA. This timely appeal followed.

## IV. STATEMENT OF FACTS

### A. Factual Background.

#### 1. The Parties And Their Collective Bargaining Agreement.

Ferndale owns and operates a smelter in Ferndale, Washington. The Autoworkers represent some of Ferndale's employees. The parties' relationship is governed by the above-referenced CBA (ER 42-114), which sets forth the Autoworkers' rates of pay, hours of work, and conditions of employment. ER 46, at § 1.01.<sup>1</sup> The CBA also includes detailed provisions regarding Ferndale's grievance and arbitration procedures (Articles 10 and 11) and certain employee benefit plans (Articles 21 and 25). It is the CBA's provisions concerning arbitration and employee benefits that are at issue in this appeal.

With respect to arbitration, the CBA's provisions are both clear and precise. Article 10 of the CBA expressly limits the CBA's grievance procedures to "matters involving the interpretation and application of specific provisions of this Agreement." ER 72, at § 10.01. Article 11, in turn, states that the "submission to the arbitrator shall be based on the original written grievance submitted in the grievance procedure." ER 75, at § 11.01. The CBA makes clear, in other words, that the only matters that are subject to arbitration under Article 11 are those matters that are subject to grievance under Article 10.

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<sup>1</sup> Although the CBA expired by its terms on May 31, 2000, after the Autoworkers filed their grievance, it is undisputed that both parties continued to operate under the CBA during the relevant time period. ER 39, at ¶ 2; ER 147, at ¶ 2.

The CBA also contains two substantive articles related to employee benefit plans. The first is Article 21, which establishes a “Retirement Plan” that requires Ferndale to contribute cash to employee 401(k) accounts through December 31, 1998 and, thereafter, contribute five percent of the company’s profits to a “pool” for allocation and eventual disbursement to eligible employees upon their retirement. ER 89-90, at §§ 21.01 and 21.02. As will be discussed later, it is important to note that Article 21 does not involve benefits related to employee stock. In fact, it says precisely the opposite:

The Retirement Plan will be established as a *separate feature* of the Company’s ESOP [Employee Stock Ownership Plan] as [a] profit sharing account and will be subject to the Internal Revenue Regulations and other Federal and State regulations regarding qualified profit sharing plans.

ER 90, at § 21.02(E) (emphasis added). By its terms, therefore, the CBA expressly distinguishes Article 21’s “Retirement Plan” from the company’s existing and separate stock ownership plan (the “ESOP”).

The second section of the CBA regarding employee benefit plans is Article 25, which establishes a “Profit Sharing Plan” that, for the relevant time period, requires Ferndale to allocate up to twenty percent of its yearly profits for disbursement to eligible employees. ER 95, at § 25.04. Like Article 21, Article 25 deals with the set-aside of company profits, not stock, for the benefit of employees. *Id.* at 95-97. In fact, as will be discussed further below, the CBA does not include a *single* provision relating to employee stock or the valuation of such stock.

## 2. The Autoworkers' Grievance And Ferndale's Refusal To Arbitrate.

On June 1, 2000, the Autoworkers lodged a written grievance regarding the value of certain shares, dividends, and distributions of Ferndale stock held for the benefit of Ferndale employees and retirees. ER 118. The grievance stated in relevant part:

The language between the Retirement Plan and Certificate of Incorporation is ambiguous and contradicting with regards to value of shares, dividends and distributions. Also, retirees and bargaining unit employees who were able to put their option on their shares at age 59½ should have been paid for their shares at the share price in the year that they exercised their option.

*Id.*<sup>2</sup> Even though, as noted above, the CBA does not include any provisions relating to employee stock benefits, the Autoworkers listed in the “Agreement Violation” portion of the grievance Articles 1, 21, 25, 26, and 27 of the CBA. *Id.*

Ferndale responded to the Autoworkers' grievance in early June 2000. In the Autoworkers' own words, Ferndale's “Human Resources Director Allen Jones unilaterally concluded that the grievance was improper and that the Company would supply the union with a written response to that effect.” ER 133, at ¶ 11; ER 138, at ¶ 9; ER 148, at ¶ 9. In that written response – dated June 19, 2000 – Mr. Jones informed the Autoworkers once again that their dispute was not

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<sup>2</sup> Contrary to the Autoworkers' use of the terms “put” and “option,” none of the employee benefit plans at Ferndale involves such rights with regard to company stock. For simplicity and ease of analysis, this brief attempts to use the same terminology that the Autoworkers use in their grievance. By doing so, however, Ferndale does not accept the Autoworkers' erroneous characterizations of the employee benefits at issue in this appeal. Ferndale reserves the right to challenge the accuracy of those characterizations if and when appropriate.

governed by any provision of the CBA. ER 119. In particular, the Autoworkers' grievance concerned the value of stock held in an employee benefit plan called the "Managed Investment Fund."<sup>3</sup> The Managed Investment Fund, however, is not addressed anywhere in the CBA. As Mr. Jones would later explain, Ferndale's distinct Managed Investment Fund is *not the same* as Article 21's "Retirement Plan" or Article 25's "Profit Sharing Plan." ER 40, at ¶ 4. Accordingly, Ferndale informed the Autoworkers that "this dispute does not involve 'the interpretation and application of specific provisions of this [Collective Bargaining] Agreement . . . .'" ER 119. Noting the distinction that the CBA drew between the retirement plan in Article 21 of the CBA and the company's separate and unrelated stock benefit plan, Mr. Jones added: "Article 21 specifically distinguishes the Company's ESOP from the Retirement Plan which is dealt with in the [Collective Bargaining] Agreement." *Id.*<sup>4</sup>

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<sup>3</sup> The parties agree – and the district court similarly noted – that the Managed Investment Fund is the employee benefit plan that is at issue in the Autoworkers' grievance. *See* ER 12, at ¶ 8 (Ferndale's statement of material facts); ER 175 (Autoworkers' response to Ferndale's statement of material facts); ER 191 (district court order). The Managed Investment Fund began as Ferndale's ESOP in 1987. ER 40, ¶ 3. Then, in 1996, the ESOP exchanged its common stock for Ferndale's preferred stock, thereby converting the ESOP into what is now known as the Managed Investment Fund. *Id.*

<sup>4</sup> The Autoworkers' grievance also cited three provisions of the CBA in addition to Articles 21 and 25. ER 118. However, all of these Articles relate to general terms. ER 46, at Art. 1 ("Purpose"); ER 98, at Art. 26 ("General Provisions"); ER 99, at Art. 27 ("Term of Agreement"). The Autoworkers did not argue to the district court – nor could they – that their grievance involves a specific provision in one of these three articles of the CBA so as to require arbitration under Article 11 of the CBA.

Ferndale's June 19, 2000 letter also addressed whether the Autoworkers' dispute was subject to the grievance and arbitration procedures in the CBA. On that issue, Mr. Jones wrote in unambiguous terms: "[P]lease be advised that *it is the Company's position that this dispute . . . is . . . not subject to the grievance procedure per Article 10.*" *Id.* (emphasis added). As the Autoworkers would later acknowledge in their summary judgment papers, Ferndale's response was to "*flatly refuse to process the grievance.*" ER 122 (emphasis added). That precise language, including the phrase "flatly refuse," can be found in the Autoworkers' supporting memorandum, their statement of material facts, and the affidavits of two union officials that the Autoworkers submitted in support of their motion. *Id.* (supporting memorandum); ER 134, at ¶ 16 (statement of material facts); ER 139, at ¶ 14 (Smith affidavit); ER 149, at ¶ 14 (Burns affidavit).

After Ferndale "flatly refused" to process their grievance, the Autoworkers turned their attention to litigation. On or about February 11, 2001, the Autoworkers' attorneys sent Ferndale a letter enclosing a draft copy of a complaint to compel arbitration. ER 18. The letter indicated that absent an agreement to arbitrate the dispute, the Autoworkers would file the complaint the following Monday. *Id.* Ferndale reviewed the draft complaint with its attorneys and, on March 11, 2001, informed the Autoworkers in writing that Ferndale was "unwilling to change its position" that the Autoworkers' grievance "is not arbitrable." ER 169.

## **B. Procedural Background.**

On or about March 25, 2001, the Autoworkers filed their previously-threatened complaint to compel arbitration. ER 1. In seeking arbitration, the Autoworkers' complaint reasserted the subject matter of their earlier grievance, *i.e.*, the valuation of the preferred stock held in the Managed Investment Fund. Even though that plan is not addressed anywhere in the CBA, the Autoworkers alleged that Ferndale had violated Article 21 of the CBA by "not paying the appropriate share value to the employees at the share price that existed at the time they exercised their options." ER 3, at ¶ VI.

On September 23, 2001, both parties moved for summary judgment on the arbitrability issue. The Autoworkers, for their part, argued that the valuation of the preferred shares "involves the interpretation of both the CBA and the Retirement Plan which it incorporates" and therefore must be submitted to arbitration "unless another provision of the CBA expressly excludes this question from arbitration." ER 125. Although the CBA's grievance and arbitration procedures apply only to matters "involving the interpretation and application of specific provisions" of the CBA (ER 72 and 75), the Autoworkers did not identify any specific provision of the CBA involving the Managed Investment Fund, employee stock benefits, or the valuation thereof. Instead, the Autoworkers continued to refer to the "Retirement Plan" in Article 21 of the CBA as the basis for their grievance. ER 121.

As noted above, the Autoworkers' summary judgment papers included an important concession regarding Ferndale's timeliness argument. Specifically, the Autoworkers unambiguously admitted that Ferndale's June 19, 2000 response to

their grievance “was to flatly refuse to process the grievance after having unilaterally decided it was not covered under the CBA.” ER 122. The Autoworkers repeated this concession four separate times: in their supporting memorandum, in their statement of material facts, and in the affidavits of two union officials who testified – under oath – in support of the Autoworkers’ motion. ER 122; ER 134, at ¶16; ER 139, at ¶ 14; ER 149, at ¶ 14.

Ferndale, in turn, advanced two arguments: (1) that the action was time-barred under Section 10(b) of the NLRA because the Autoworkers commenced the action more than six months after Ferndale’s June 19, 2000 letter, in which Ferndale “flatly refused” to arbitrate the Autoworkers’ grievance (CP 13, at § III.B); and (2) that the Managed Investment Fund was not a “specific provision” of the CBA and therefore was not subject to the CBA’s grievance and arbitration procedures (*id.* at § III.A). Ferndale also stipulated that the operative filing date for purposes of its timeliness argument should be February 11, 2001, the date it received a draft copy of the complaint from the Autoworkers’ counsel, not the actual filing date of March 25, 2001. *Id.* at n.4; ER 16, at ¶ 4.

The district court subsequently ruled in favor of the Autoworkers. On the timeliness issue, the court held that the Autoworkers’ complaint was not time-barred. ER 195. Despite the clarity of Ferndale’s June 19, 2000 letter and the Autoworkers’ own understanding of that letter, the district court concluded that the letter “informs [the Autoworkers] of [Ferndale’s] initial position, but it does not unequivocally foreclose any possibility of arbitration.” ER 193. The court then purported to bolster its finding by reference to events occurring *after* Ferndale’s

letter, including (i) the parties' alleged discussions regarding the dispute in August and September of 2000 (ER 193-94), and (ii) Ferndale's request to evaluate the Autoworkers' draft complaint prior to filing (*id.*). The court noted: "One usually does not bother with meetings and discussions if there is absolutely no chance it will alter the outcome." ER 194.

The district court also rejected Ferndale's argument regarding arbitrability. Relying on this Court's decision in *Westinghouse Hanford Co. v. Hanford Atomic Metal Trades Council*, 940 F.2d 513 (9th Cir. 1991), the district court held:

In sum, this court cannot say with 'positive assurance' that the arbitration clause in the CBA . . . is not susceptible of an interpretation that covers the dispute in question. Under prevailing law, an arbitrator should be the one to determine if there are any provisions in the CBA which entitle [the Autoworkers] to some type of relief regarding the redemption value of shares of preferred stock in the Managed Investment Fund.

ER 191. The district court referred the dispute to arbitration, concluding: "If employers do not want to arbitrate something, they have to be extra careful about making that manifestly clear in the CBA." ER 195.

This appeal followed.

## **V. SUMMARY OF ARGUMENT**

The district court's summary judgment rulings should be reversed for two separate and independent reasons. First, contrary to the district court's ruling regarding Ferndale's timeliness argument, the Autoworkers' complaint is time-barred. The complaint is subject to a six-month limitations period that began to run when Ferndale rejected the Autoworkers' request for arbitration. Ferndale did so no later than June 19, 2000, when it informed the Autoworkers in writing that

“it is the Company’s position that this dispute . . . is . . . not subject to” arbitration. The Autoworkers commenced their action on February 11, 2001 – more than six months after Ferndale’s letter.

Second, the district court similarly erred in rejecting Ferndale’s argument that the Autoworkers’ dispute is not arbitrable. The arbitration provision in the CBA is expressly limited to “matters involving the interpretation and application of specific provisions of this Agreement.” Because the Autoworkers’ grievance involves an employee stock benefit plan that is not addressed anywhere in the CBA, it does not involve a “specific provision” of the CBA and is therefore not arbitrable. The district court’s ruling is contrary to the plain language of the CBA and improperly abdicates the court’s responsibility to decide the arbitrability issue.

## **VI. ARGUMENT**

### **A. Standard Of Review.**

The district court’s summary judgment ruling regarding Ferndale’s timeliness argument is reviewed *de novo*. See *State of California v. Montrose Chem. Corp.*, 104 F.3d 1507, 1512 (9th Cir. 1997) (summary judgment ruling regarding timeliness issue reviewed *de novo* to determine (a) whether genuine issues of material fact exist, and (b) whether district court correctly applied the substantive law); *Capital Tracing, Inc. v. United States*, 63 F.3d 859, 861 (9th Cir. 1995). The court’s ruling regarding arbitrability is similarly reviewed *de novo*. See *Tracer Research Corp. v. National Env’tl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994); *Dennis L. Christensen Gen. Bldg. Contractor, Inc. v. General Bldg. Contractor, Inc.*, 952 F.2d 1073, 1076 (9th Cir. 1991).

**B. The District Court Erred In Ruling That The Autoworkers' Complaint Is Not Time-Barred.**

**1. The Autoworkers' Action Is Untimely Because It Was Commenced More Than Six Months After Ferndale Unequivocally And Expressly Refused To Arbitrate The Autoworkers' Grievance.**

There is no dispute that the six-month limitation period in Section 10(b) of the NLRA applies to the Autoworkers' action to compel arbitration. ER 192; *see also Teamsters Union Local 315 v. Great Western Chem. Co.*, 781 F.2d 764, 769 (9th Cir. 1986).<sup>5</sup> As to the date that this limitations period begins to run, this Court has repeatedly held that an action to compel arbitration accrues when one party “makes it clear” that it will not submit the matter to arbitration. *See Local Joint Exec. Bd. of Las Vegas v. Exber*, 994 F.2d 674, 675 (9th Cir. 1993); *Great Western Chem. Co.*, 781 F.2d at 769. The Court has also held that for an employer to “make it clear” that it will not submit a matter to arbitration “an unequivocal, express rejection of the union’s request for arbitration must be communicated to the union.” *Id.* at 676.

The record in this case shows that Ferndale communicated such an unequivocal, express rejection to the Autoworkers' request to arbitrate no later than June 19, 2000. In a letter sent to the Autoworkers on that date, Ferndale confirmed its earlier statements that it would not recognize the Autoworkers' grievance under the CBA. The letter stated in relevant part:

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<sup>5</sup> Section 10(b) provides, in relevant part, that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge.” 29 U.S.C. § 160(b).

[T]he Company's position is that this dispute does not involve "the interpretation and application of specific provisions of this [Collective Bargaining] Agreement" and is therefore not subject to the grievance procedure per Article 10.

ER 119. By refusing to hear the Autoworkers' grievance, Ferndale unequivocally and expressly rejected any possibility of arbitration under the CBA. *See* ER 75, at § 11.01 ("submission to the arbitrator shall be based on the original written grievance submitted in the grievance procedure").

The court's opinion in *Schott v. Hotel-Motel Service Workers, Drug Store, Sports Events and Industrial Catering*, 587 F. Supp. 1095 (N.D. Ill. 1983), is instructive on this point. There, an employee's union filed a grievance with the employer on the employee's behalf, but subsequently withdrew the grievance. *Id.* at 1099. The union informed the employee of its decision in a letter stating that "the Union is unable to help you further in your effort to regain employment with [the Company]." *Id.* (emphasis omitted). Because the employee's action against the employer was commenced more than six months after he received the letter, the court dismissed the employee's action under Section 10(b) of the NLRA. *Id.* The rejection letter in this lawsuit is even more forceful than the letter in *Schott*. Yet the Autoworkers, like *Schott*, failed to commence their action within the applicable limitations period.

Indeed, the Autoworkers themselves repeatedly acknowledged in their summary judgment papers that they considered the June 19, 2000 letter unequivocal. The Autoworkers admitted that Ferndale's response to their grievance "was to flatly refuse to process the grievance after having unilaterally

decided it was not covered under the CBA.” ER 122. As noted above, the Autoworkers repeated this statement in (a) their supporting memorandum on summary judgment (*id.*), (b) their statement of material facts (ER 134, at ¶ 16), and (c) the affidavits of two Autoworkers officials, Steve Smith (ER 139, at ¶ 14) and Ken Burns (ER 149, at ¶ 14), submitted in support of their motion. These Steelworker affidavits are binding party admissions, and the summary judgment papers are conclusive judicial admissions as well. *See Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226-27 (9th Cir. 1988) (factual statements in a brief may be binding admissions). These admissions confirm – consistent with Ferndale’s express and unequivocal rejection – that the applicable six-month limitations period began to run on June 19, 2000.

The record is equally clear that the Autoworkers commenced their action more than six months after June 19, 2000. Specifically, the Autoworkers provided their draft complaint to Ferndale on February 11, 2001 – more than six months after Ferndale unequivocally informed the Autoworkers of its refusal to arbitrate. ER 18. As a result, the Autoworkers’ suit is untimely under Section 10(b) of the NLRA and should have been dismissed on that basis alone.

## **2. The District Court Erred In Rejecting Ferndale’s Timeliness Argument.**

The district court’s timeliness analysis – rejecting Ferndale’s argument on summary judgment – is wrong in at least two respects. First, the court erroneously concluded that Ferndale’s June 19, 2000 letter was not sufficiently unequivocal to satisfy the “makes it clear” test that applies here. *Exber*, 994 F.2d at 675. The district court noted in that regard that Ferndale’s letter “certainly informs [the

Autoworkers] of [Ferndale's] initial position, but it does not unequivocally foreclose any possibility of arbitration.” ER 193. As discussed in Sections IV.A.2 and VI.B.1 above, the notion that Ferndale's June 19, 2000 letter was anything less than unequivocal is contrary to both the plain language of Ferndale's June 19, 2000 letter, and the Autoworkers' binding admissions regarding their own understanding of that letter. Indeed, it is difficult to imagine how Ferndale could have been more clear in its rejection of the Autoworkers' grievance.

The district court also erred with regard to the timeliness issue by improperly considering events occurring *after* the June 19, 2000 letter in an effort to bolster its conclusion that Ferndale's letter was not an unequivocal refusal to arbitrate. As noted in Section IV.B above, the district court pointed to (i) the parties' alleged discussions regarding the dispute in August and September of 2000 (ER 193-94), and (ii) Ferndale's request to review the Autoworkers' draft complaint prior to filing (*id.*). As discussed immediately below, the district court's consideration of these events is wrong as a matter of law because it is a party's *initial* refusal to arbitrate that triggers the applicable limitations period, and subsequent discussions are therefore irrelevant. If this were not the rule, then a party like the Autoworkers could avoid the running of a statute of limitations by simply asking the other party to reconsider an earlier refusal, thereby defeating the congressional policy of rapid resolution of labor disputes. *See International Union, United Auto., Aerospace and Agr. Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707 (1966) (recognizing congressional policy); *Dozier v. Trans World Airlines, Inc.*, 760 F.2d 849, 852 (7th

Cir. 1985) (same); *see also Great Western*, 781 F.2d at 766 (“[a] long period of controversy and conflict can be a serious burden, both for the grievant and for the management”).

The court’s opinion in *Schott* is instructive on this point as well. As discussed on page 13 above, the employee in *Schott* received an unequivocal rejection of his grievance on April 26, 1982, but did not file suit until more than six months later. 587 F. Supp. at 1099. The employee nevertheless attempted to oppose a motion to dismiss his complaint on timeliness grounds by referring to the following events occurring *after* the April 26 letter:

[B]y written correspondence dated May 12, 1982, he specifically requested arbitration on the grievance and delivered the letter personally to the Union office. Schott’s counsel made a further inquiry of the Union as to the status of the grievance by a letter dated May 25, 1982, and he received a written reply from the Union dated June 1, 1982.

*Id.* (citations omitted). The *Schott* court squarely held that this evidence did not change the original accrual date, noting: “[w]ere the law otherwise, any aggrieved employee could, by a series of letters or calls, effectively extend that statute [of limitations] indefinitely.” *Id.*

The court in *Dozier* rejected a similar argument and – like the *Schott* court – refused to extend the applicable limitations period based on events that occurred after the employee’s grievance had been unequivocally rejected. 760 F.2d at 852 (noting that “Union continued to respond to plaintiff’s requests for a hearing”). And like the *Schott* court, the *Dozier* court explained: “Otherwise, a plaintiff could indefinitely delay resolution of labor disputes merely by bombarding his union

with tiresome requests for needless review.” *Id.* Here too, the district court should not have relied on events that occurred after the Autoworkers received Ferndale’s June 19, 2000 letter because those events – as in *Schott* and *Dozier* – are legally irrelevant with regard to both the date on which the applicable limitations period was triggered and the timeliness of the Autoworkers’ action.

Equally important, the district court’s consideration of subsequent events is also legally flawed because the Autoworkers submitted that evidence (the affidavit of union official James Wilson (ER 170)) to the district court *after* they had already admitted, repeatedly, that Ferndale’s June 19, 2000 response to their grievance “was to flatly refuse to process the grievance after having unilaterally decided it was not covered under the CBA.” ER 122; ER 134, at ¶ 16; ER 139, at ¶ 14; ER 149, at ¶ 14. Under federal law, such evidence lacks credibility and cannot properly contradict the Autoworkers’ prior admissions on this very point. *See, e.g., Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 954 (9th Cir. 1999) (district court may disregard affidavit that contradicts earlier deposition testimony).

In addition, even if it were proper for the district court to consider evidence of events occurring after Ferndale’s June 19, 2000 letter, those events do not in any event support summary judgment in the Autoworkers’ favor. Mr. Wilson’s affidavit – even if taken as true – shows only that Mr. Wilson met with Ferndale employees on August 2, 2000 “to discuss the issue” and had discussions in September “to discuss resolution of this grievance.” ER 171, at ¶ 4. The affidavit does not state, or even infer, that Ferndale reconsidered its refusal to arbitrate. In fact, the affidavit states the contrary: “We were unable to resolve it at that time.”

*Id.* Thus, as in *Service Employees Int’l Union Local 252 v. 1500 Garage Corp.*, 699 F. Supp. 487 (E.D. Pa. 1988), Mr. Wilson’s affidavit suggests only that Ferndale “reaffirm[ed] the position it [had] taken before, namely that the Company was unwilling to submit to the Union’s arbitration request.” *Id.* at 490.

Much the same can be said with regard to Ferndale’s request to review the Autoworkers’ draft complaint on February 11, 2001. ER 15-16, at ¶¶ 3 and 4. The very fact that the Autoworkers had asked their counsel to prepare a complaint to compel arbitration suggests – as the Autoworkers would subsequently acknowledge in their summary judgment papers – that they clearly understood that Ferndale’s refusal to arbitrate was unequivocal. Moreover, if the limitations period was triggered on June 19, 2000, then six months had already expired by February 11, 2001. A party like Ferndale should not lose its right to successfully challenge a complaint as time-barred merely because it was willing to consider another party’s threat to file suit.

Finally, the district court’s analysis of events occurring after Ferndale’s June 19, 2000 letter is also deficient because the court considered *some but not all* of that evidence. In particular, in a November 26, 2000 e-mail memorandum from Mr. Jones to Mr. Wilson, Ferndale specifically reiterated its position that the Autoworkers’ grievance was not subject to arbitration: “The Company maintains its position as indicated in the [letter] dated June 19, 2000.” ER 27. Thus, even if it were proper for the district court to consider events occurring after June 19, 2000, the evidence demonstrates that Ferndale never wavered from its unequivocal

rejection of the Autoworkers' demand.<sup>6</sup> For this reason as well, the district court's analysis of Ferndale's timeliness argument is seriously flawed and should be reversed.

**C. The District Court Also Erred In Ruling That The Parties' Dispute Is Arbitrable Under The CBA.**

**1. The Autoworkers' Grievance Does Not Involve A "Specific Provision" Of The CBA And Therefore Is Not Within The Scope Of The CBA's Arbitration Provision.**

The Autoworkers' action should be dismissed on timeliness grounds, as discussed above. But even if the Autoworkers' complaint is not time-barred, the district court should not have granted the Autoworkers' motion for summary judgment to compel arbitration because the grievance at issue here is not arbitrable under the CBA. Under federal law, the obligation to arbitrate disputes exists only when the parties have so agreed. As this Court specifically noted in *Tracer*: “[A]rbitration is a matter of contract and [a] party cannot be required to submit to arbitration of any dispute which he has not agreed to so submit.” 42 F.3d at 1294 (quoting *United Autoworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). This Court also cautioned that courts cannot – and should not – “expand the parties’ agreement to arbitrate” beyond the specific issues that

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<sup>6</sup> At the very most, however, there is an issue of fact on the timeliness issue that cannot properly be resolved without an evidentiary hearing. *See, e.g., Local 1422, Int'l Longshoremen's Assoc. v. South Carolina Stevedores Assoc.*, 170 F.3d 407, 409 (4th Cir. 1999) (“a court, rather than an arbitrator, has jurisdiction to decide whether the relevant statute of limitation bars an action to compel arbitration under § 301 of the NLRA”); *see also Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 267 (9th Cir. 1991) (district court must hold a hearing on issue of whether contradictory affidavit constitutes a “sham”).

the parties' have agreed to submit to arbitration. *Id.* (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983)).

The arbitration provision at issue here is both clear and precise. As noted in Section IV.A.1 above, that provision applies only to “matters involving the interpretation and application of specific provisions of this Agreement.” ER 72, at § 10.01 (grievance provision), and ER 75, at § 11.01 (“submission to the arbitrator shall be based on the original written grievance submitted in the grievance procedure”). Under *Tracer* and other similar authorities, therefore, arbitration is appropriate with regard to the Autoworkers' grievance only if the dispute “involv[es] the interpretation and application of specific provisions of [the CBA].” ER 72. If, on the other hand, the grievance does not involve such a matter, then the district court's ruling compelling arbitration is erroneous and should be reversed.

The record in this case shows very clearly that the Autoworkers' grievance does not involve any “specific provision” of the CBA. The grievance itself identifies two issues: the first relates to “value of shares, dividends and distributions,” and the second relates to whether “employees who were able to put their option on their shares at age 59½ should have been paid for their shares at the share price in the year that they exercised their option.” ER 118. The Autoworkers' response to Ferndale's summary judgment motion says the same thing: it describes the “central question” presented by the grievance as “the value of shares, dividends, and distributions of retirees and bargaining unit members.” ER 158. These issues – as defined by the Autoworkers themselves – involve

benefits related to Ferndale *stock* (namely, the Managed Investment Fund), not benefits related to company *profits*.

The CBA says nothing about company stock and addresses only employee benefit plans related to company profits. The only substantive provisions in the CBA that address employee benefit plans – Articles 21 and 25 – describe the company’s obligation to allocate and contribute a percentage of company *profits* for the benefit of employees. ER 89-90, at Art. 21, and ER 95-97, at Art. 25. Neither provision says anything about other company benefit plans involving company stock, such as the Managed Investment Fund. Article 21 could not be more clear on this point; it specifically notes that the “Retirement Plan” in that article is wholly “*separate*” from the company’s distinct ESOP. ER 90, at § 21.02(E). Neither the ESOP, its successor the Managed Investment Fund, nor any other “*separate*” employee benefit plan involving stock valuation, dividends, and distributions is described in the CBA.

The distinction that the CBA makes between employee stock benefit plans and profit-sharing plans is intentional. As Ferndale’s Human Resources Director Allen Jones carefully explained in an affidavit submitted in support of Ferndale’s motion for summary judgment, the Managed Investment Fund “is not the same as the Profit Sharing Plan that is set forth in Article 25 of the Collective Bargaining Agreement. Nor is it the same as the Retirement Plan, which is set forth in Article 21.” ER 40, at ¶ 4. There is no credible evidence contradicting Mr. Jones’ testimony that the Managed Investment Fund is *not* the “Retirement Plan” or the “Profit Sharing Plan” described in the CBA. Nor could there be.

This Court addressed a similar situation in *Teamsters Local 315 v. Union Oil Co. of California*, 856 F.2d 1307 (9th Cir. 1988) (“*Unocal*”). The collective bargaining agreement in *Unocal*, much like the CBA here, required arbitration only with regard to “grievances which allege violations of any of the *express terms or provisions* of this Agreement.” *Id.* at 1310 (emphasis in original). Despite that contractual requirement, the union claimed only that Unocal had “violated the employee’s seniority rights under Article III of the contract by not reinstating the disabled employee.” *Id.* at 1311. The Court rejected that assertion as a proper basis for arbitration – and reversed the district court’s ruling compelling arbitration – because the allegation was “merely conclusory” and therefore did not satisfy the “express terms or provisions” requirement in the parties’ agreement. *Id.* As discussed above, the same is true in this case.

In short, the Autoworkers’ conclusory allegation that the dispute at issue is arbitrable under Article 11 of the CBA is both contrary to the plain language of the CBA and unsupported by the evidence. The Managed Investment Fund is intentionally distinct and separate from the employee benefit plans in the CBA, and therefore the Autoworkers’ grievance does not, and cannot, “involv[e] the interpretation and application of specific provisions of [the CBA].” ER 72, at § 10.01. The proper remedy for any alleged violation of the Managed Investment Fund is an enforcement action regarding the specific provisions of that plan, not compelled arbitration under the LMRA.

**2. The District Court Erred In Granting The Autoworkers' Motion To Compel Arbitration By, Among Other Things, Improperly Deferring The Question Of Arbitrability To The Arbitrator.**

As explained in Section IV.B above, the district court rejected Ferndale's argument regarding arbitrability because it concluded that "[u]nder prevailing law, an arbitrator should be the one to determine if there are any provisions in the CBA which entitle [the Autoworkers] to some type of relief regarding the redemption value of shares of preferred stock in the Managed Investment Fund." ER 191. The court also found that it could not "say with 'positive assurance' that the arbitration clause in the CBA . . . is not susceptible of an interpretation that covers the dispute in question." *Id.* As discussed below, the district court erred in both respects.

To begin with, federal law is clear that "the question of arbitrability – whether a collective bargaining agreement creates a duty for the parties to arbitrate that particular grievance – is undeniably an issue for judicial determination." *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986). The Supreme Court has explained the rationale underlying this principle as follows:

The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be "drastically reduced," however, if a labor arbitrator had the "power to determine his own jurisdiction." . . . Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but, instead, would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." . . . This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements, and is antithetical to the function of a collective-bargaining agreement as setting out the rights and duties of the parties.

*Id.* at 651 (internal citations omitted). This Court has repeated and endorsed this fundamental principle in numerous cases. *See, e.g., Carpenters 46 Northern Cal. Counties Conference Bd. v. Zcon Builders*, 96 F.3d 410, 419 (9th Cir. 1996); *Northern California Newspaper Guild Local 52 v. Sacramento Union*, 856 F.2d 1381, 1383 (9th Cir. 1988); *Frederick Meiswinkel, Inc. v. Laborers' Union Local 261*, 744 F.2d 1374, 1376 (9th Cir. 1984).

The district court failed to follow this principle and concluded instead that “an arbitrator should be the one to determine if there are any provisions in the CBA which entitle [the Autoworkers] to some type of relief.” ER 191. Although the district court cited as support for its arbitrability ruling this Court’s opinion in *Westinghouse*, that opinion does not support the district court’s refusal to decide the arbitrability issue. In *Westinghouse*, this Court was confronted with an arbitration provision that required the parties to arbitrate any “grievance involv[ing] interpretation or application of a provision of [the parties’] Agreement.” 940 F.2d at 518. The union there argued that the party’s dispute was arbitrable because it involved the interpretation or application of “Supplement 6” of the Agreement. *Id.* *Westinghouse*, in contrast, argued that “Supplement 6 simply does not apply to” the issues raised in the union’s grievance. *Id.* at 519 (emphasis omitted). The Court refused to decide which parties’ interpretation of Supplement 6 was correct because it could not do so without at the same time deciding the merits of the underlying grievance. *Id.* at 523. In other words, because the merits of the union’s grievance and the proper resolution of the arbitrability issue both turned on the same analysis (the proper interpretation of

Supplement 6), the Court held that it would have been improper for the district court to decide the issue. *Id.*

*Westinghouse* does not support the district court's arbitrability ruling for several reasons. *First*, this Court's subsequent holding in *Tracer* makes clear that district courts, not arbitrators, must determine the arbitrability issue where – as here – the parties' arbitration provision is limited, clear, and precise. The Court held in *Tracer* that an arbitration provision that covers disputes “arising out of” an agreement and omits reference to disputes “relating to” the agreement is “limited” in scope and therefore requires the district court to determine whether a dispute is in fact related to the interpretation or performance of the contract as a precondition to arbitration. 42 F.3d at 1295. The Court also stressed that “[n]otwithstanding the federal policy favoring it . . . a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.” *Id.* at 1294.

The arbitration provision at issue here – which confines arbitrable grievances to “matters involving the interpretation and application of specific provisions of this Agreement” – is analogous to both the “limited” provision in *Tracer* and the “express provision” in *Unocal* (as discussed on page 22 above). Nevertheless, the district court did not properly analyze whether the Autoworkers' grievance involved a “specific provision” of the CBA. Rather, the court skipped over this important threshold inquiry and simply presumed that the dispute was arbitrable. The court then held that Ferndale could avoid arbitration only if it could “identify an express exclusion to arbitration” or “present ‘other forceful evidence’ of the parties' intent to exclude the grievance from the broad coverage of [the

arbitration provision in the CBA].” ER 188-89 (quoting *Westinghouse*, 940 F.2d at 523). Given the plain language of the CBA’s arbitration provision, the district court’s presumption was neither necessary nor appropriate under this Court’s holdings in *Tracer* and *Unocal*.

*Second*, unlike *Westinghouse*, the parties’ dispute in this case regarding the arbitrability issue did not require the district court – and would not require this Court – to address the merits of the Autoworkers’ grievance. As discussed in Sections IV.A.2 and VI.C.1 above, it is undisputed that the grievance here turns on the proper valuation of the preferred stock held in the Managed Investment Fund. That issue does *not* turn on the interpretation of any specific provision in the CBA because nothing in the CBA, including the “Retirement Plan” described in Article 21 and the “Profit Sharing Plan” described in Article 25, involves employee stock benefits let alone the valuation of such stock. As was the case in *Unocal*, the Autoworkers’ contrary allegations are “merely conclusory.” 856 F.2d at 1311. For this reason too, *Westinghouse* does not support the district court’s ruling regarding arbitrability.

*Third*, even if the legal framework set forth in *Westinghouse* were applicable here, the Court in *Westinghouse* expressly recognized that a dispute is not arbitrable under federal law if “it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” 940 F.2d at 518. This standard is satisfied here for all the reasons set forth in Section VI.C.1 above. Indeed, despite the “specific provision” requirement in the CBA, the Autoworkers have *never* identified – in their

grievance, their complaint, their summary judgment papers, or anywhere else – a “specific provision” of the CBA that is at issue here. Nor did the district court identify such a provision. Instead, both the Autoworkers and the district court repeatedly referred only to Articles 21 and 25 generally. ER 121; ER 189. Such conclusory allegations are not a proper basis for arbitration under the plain language of the CBA or under this Court’s opinion in *Unocal*. 856 F.2d at 1311 (as discussed on page 22 above).

*Fourth*, the Court also recognized in *Westinghouse* that a dispute is not arbitrable if the party opposing arbitration presents “forceful evidence of a purpose to exclude the claim from arbitration.” 940 F.2d at 518. The district court in this case erred in concluding that Ferndale had failed to present such evidence. ER 190. In addition to the plain language of the CBA (as discussed above), Ferndale presented sworn testimony establishing *without dispute* that the Managed Investment Fund at issue in the Autoworkers’ grievance “is not the same as the Profit Sharing Plan that is set forth in Article 25 of the Collective Bargaining Agreement. Nor is it the same as the Retirement Plan, which is set forth in Article 21.” ER 40, at ¶ 4. Contrary to the district court’s ruling, Mr. Jones’ undisputed declaration is “forceful evidence of a purpose to exclude the claim from arbitration.”<sup>7</sup>

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<sup>7</sup> If, on the other hand, some doubt remains on that issue, it should not be resolved against Ferndale on summary judgment or on appeal. Rather, the matter should be *properly* resolved at an evidentiary hearing *prior to* deciding whether to compel arbitration. *See, e.g., EOTT Energy Operating Limited Partnership v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 999 (9th Cir. 2001) (concluding that the district court record was incomplete and remanding for further factual inquiry).

*Finally*, the district court’s reliance on *Westinghouse* to support its ruling deferring the arbitrability issue to arbitration is contrary to the Supreme Court’s recognition in *AT&T Technologies* that allowing arbitrators to determine their own jurisdiction “undercuts the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements, and is antithetical to the function of a collective-bargaining agreement as setting out the rights and duties of the parties.” 475 U.S. at 651. For this reason as well, the district court erred in granting the Autoworkers’ motion to compel arbitration without properly deciding the arbitrability issue based on the plain language of the arbitration provision in the CBA and the undisputed facts described in Sections IV.A and VI.C.1 above.

## **VII. CONCLUSION**

For all the above reasons, the district court’s summary judgment rulings should be reversed. The Autoworkers’ complaint is time-barred and should be dismissed on that basis. Even if the complaint were timely, it fails on the merits because the Autoworkers’ grievance is not arbitrable under the CBA.

RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

[SIGNATURE BLOCK.]