IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ART SHY, et al., Plaintiffs, v. NAVISTAR INTERNATIONAL CORPORATION, et al., Defendants.	Civil Action No. 3:92-CV-00333-WHR Judge Walter Herbert Rice
SUPPLEMENTAL BENEFIT COMMITTEE OF THE NAVISTAR, INC. RETIREE SUPPLEMENTAL BENEFIT PROGRAM, Intervenor-Plaintiff, v. NAVISTAR INTERNATIONAL CORPORATION; NAVISTAR, INC.; NAVISTAR FINANCIAL CORPORATION; and INDIANAPOLIS CASTING CORPORATION, Defendants.	

COMPLAINT FOR ENFORCEMENT OF SETTLEMENT AGREEMENT

Introduction and Nature of Action

1. The Supplemental Benefit Committee of the Navistar, Inc. Retiree Supplemental Benefit Program (the "Committee" of the "Supplemental Benefit Program") brings this action to enforce the terms of the Amended and Restated Settlement Agreement ("Settlement Agreement") by and among each of the following and each's successors thereto: the Navistar

International Transportation Corp. (the "Company"); Navistar International Corporation ("Parent"); Navistar Financial Corporation ("NFC"); Harco National Insurance; and Indianapolis Casting Corporation (together, including their successors, "Navistar" or "Defendants") and the Class Representative (as defined on page 2 of Exhibit D to the Settlement Agreement) resolving the original complaint in *Shy v. Navistar International Corp*., No. C-3-02-933 (S.D. Ohio) (the "*Shy* Action"), and for damages arising out of breaches thereof.

2. The Settlement Agreement created and incorporates the Navistar, Inc. Retiree Health Benefit and Life Insurance Plan (the "Plan") to provide, among other benefits, medical and prescription drug benefits for eligible retirees.

3. As explained more fully below, this case concerns certain subsidies paid by the Centers for Medicare and Medicaid Services ("CMS") and rebates by pharmaceutical manufacturers, including any amounts representing such payments paid by a pharmacy benefit manager or others (together, "Subsidies") under the Medicare Part D prescription drug benefit program provided on account of the Medicare-eligible retirees in the Plan. Specifically, and in violation of the Settlement Agreement, Defendants have appropriated and refused to share the Subsidies with the Plan's retirees even though the retirees paid a portion of the cost of the drugs that generated the Subsidies through their contributions to the (currently or formerly named) Navistar, Inc. Retiree Health Benefit and Life Insurance Trust (the "VEBA Trust") which paid for all of the cost of the drugs that generated the Subsidies.

4. In addition, Defendants have breached the Settlement Agreement by disregarding their receipt of the Subsidies and interpreting the Settlement Agreement's terms in a manner that increased the retirees' required contributions to the Plan ("Retiree Contributions") and decreased

their own and other Employers'[1] required contributions ("Employer Contributions" including as set forth in section 3.3 of Exhibit A to the Settlement Agreement), and by failing to implement the Plan through the VEBA Trust.

Jurisdiction and Venue

5. This Court retained "exclusive jurisdiction to resolve any disputes relating to or arising out of or in connection with the enforcement, interpretation or implementation of [the] Settlement Agreement, except for disputes relating solely to eligibility or entitlement to benefits [t]hereunder." Settlement Agreement § 15.4. Similarly, Paragraph 6 of the Court's Supplemental Opinion and Order entered June 8, 1993 (Doc. 326) provides in pertinent part that "this Court hereby retains continuing jurisdiction over all parties hereto for the purposes of implementing, enforcing and administering the Settlement Agreement and Exhibits thereto."

6. Declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202 and Rules 58 and 65 of the Federal Rules of Civil Procedure.

7. This Court "has already recognized that the Committee has the standing necessary to enforce the Settlement Agreement[.]" Doc. 426, at 22. In addition, the Supplemental Benefit Program (consisting of the "Supplemental Benefit Plan" and the "Supplemental Benefit Trust" (as defined on page 18 of Exhibit D to the Settlement Agreement)), which the Committee represents, has been directly affected by Defendants' failure to abide by the terms of the Settlement Agreement because the Supplemental Benefit Program has been subsidizing contributions paid by the retirees that have been inflated by the illegal acts of Defendants.

[1] Pursuant to Exhibit D of the Settlement Agreement, the term "Employers" includes, but is not limited to: Defendants, Navistar Global Operations Company (f/k/a Navistar International Export Corporation), International Truck and Engine Overseas Corporation (f/k/a Navistar International Overseas Corporation), and Pure Power Technologies, LLC).

8. Defendant Navistar International Corporation is a Delaware corporation with a corporate headquarters in Illinois. Parent is a party to the Settlement Agreement and is among the "Employers" as that term is defined therein.

9. Defendant Navistar, Inc. (together with Navistar International Transportation Corp. or each individually, the "Company") is a Delaware corporation with a corporate headquarters in Illinois. The Company is a party (or the successor to a party, Navistar International Transportation Corp.) to the Settlement Agreement and is among the "Employers" as that term is defined therein.

10. Defendant Navistar Financial Corporation is a Delaware corporation with a corporate headquarters in Illinois. NFC is a party to the Settlement Agreement and is among the "Employers" as that term is defined therein.

11. Defendant Indianapolis Casting Corporation is a Delaware corporation with a corporate headquarters in Indiana. ICC is a party to the Settlement Agreement and is among the "Employers" as that term is defined therein.

12. This Court has continuing jurisdiction over the Defendants with respect to enforcement of the Settlement Agreement. Settlement Agreement § 15.4 ("Each of the parties hereto expressly and irrevocably submits to the jurisdiction of the Court in connection with any proceedings in connection with the enforcement, interpretation or implementation of this Settlement Agreement[.]").

13. Venue is proper in this Court pursuant to 28 U.S.C. section 1391 because Defendants reside in this District and the Court has personal jurisdiction over them. In addition, the parties to the Settlement Agreement "expressly waive[d] any argument [they] may have with respect to venue or forum non conveniens." Settlement Agreement § 15.4.

The Settlement Agreement

14. The *Shy* Action arose out of an effort by Navistar to slash life and medical benefits for their retirees. On May 27, 1993, this Court entered a Consent Decree embodying the class-action Settlement Agreement made among the parties to the *Shy* Action.

15. The class defined in the Settlement Agreement includes:

(i) Present Retirees, Present Surviving Spouses and Eligible Dependents of Class Members;
(ii) Present Eligible Former Employees and Present Non-Represented Employees who will be eligible for Health and Life Insurance Benefits after the Effective Date; and
(iii) All labor organizations which presently are or were in the past parties to collective bargaining agreements pursuant to which Navistar maintains an Existing Plan.

16. The Settlement Agreement requires the Company to establish and to maintain the Plan (formerly known as the Navistar International Transportation Corp. Retiree Health Benefit and Life Insurance Plan), ERISA Plan number 584, EIN 36-1264810.

17. The Plan consists of three components: the Navistar Inc. Retiree Health Benefit Program (the "Base Plan"), the Navistar International Transportation Corp. Retiree Life Insurance Program (the "Life Insurance Program"), and the Supplemental Benefit Program.

18. The Base Plan is set forth in Exhibit A to the Settlement Agreement. It provides a plan of health, medical, and prescription drug benefits for eligible Plan retirees and their beneficiaries. The Settlement Agreement requires that the Plan be implemented through the VEBA Trust.

19. Section 3.9 of the Base Plan provides in relevant part that Parent and the Company "jointly and severally, unconditionally and irrevocably guarantee the provision of benefits under and in accordance with the terms of the [Base Plan]."

20. Article III of the Base Plan provides for both the Plan's "Contributing Participants" and the "Employers" defined in the Agreement to make periodic contributions to

the Plan. In this way, "[t]he Employers and the Contributing Participants shall share the total cost of the Health Benefit Program [the Base Plan]." Base Plan § 3.2 (first sentence).

21. Section 9.1 of the Base Plan provides:

> Exclusive Benefit. No part of the corpus or income of the Health Benefit Trust shall be used for, or diverted to, any purposes other than for the exclusive benefit of persons who are or may become entitled to benefits under the Health Benefit Program or the Life Insurance Program and for defraying reasonable expenses of administering such programs.

22. Section 9.2 of the Base Plan provides:

> Prohibited Inurement. No part of the corpus or income of the Health Benefit Trust shall inure to the benefit of Parent, the Company or any other Employer [as defined on page 5 of Exhibit D to the Settlement Agreement]. All fiduciaries hereunder shall discharge their duties solely in the interests of Participants for the exclusive purpose of providing benefits and defraying reasonable expenses of plan administration.

23. The Base Plan includes two plans covering different categories of retirees:

- "Plan 1" refers to the Base Plan's benefit program for retirees who are not eligible for Medicare.
- "Plan 2" refers to the Base Plan's benefit program for Medicare-eligible retirees.

Prescription Drug Benefits and Medicare Part D

24. At the time the parties to the *Shy* Action entered into the Settlement Agreement, the federal Medicare programs did not include a prescription drug benefit. Instead, covered retirees' drug benefits were provided directly from the VEBA Trust without government assistance.

25. The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 ("MMA") established Medicare Part D to provide prescription drug benefits through Medicare. Part D is administered by CMS, an entity of the federal government.

26. Effective July 1, 2010, the Company unilaterally eliminated the Base Plan's prescription drug benefit for the Plan's Medicare-eligible retirees covered by Plan 2 and forced them to participate in Medicare Part D. This required the retirees to pay new premiums to the federal government of $420 per year for single coverage and $840 per year for two-person coverage on top of the contributions retirees were required to make under the Settlement Agreement.

27. *Shy* Action plaintiffs sought an injunction to compel the Company to comply with the Settlement Agreement and to bar it from eliminating the Base Plan's prescription drug benefit and replacing it with Medicare Part D.

28. In a decision dated February 24, 2011 (Doc. 373), the Court held that the Company was without authority to substitute unilaterally Medicare Part D for the prescription drug benefit adopted by the parties in accordance with the Settlement Agreement. By Order dated September 30, 2011 (Doc. 383), the Court ordered the Company "to reinstate the drug benefit plan which existed prior to its unilateral action and to make whole the Plaintiffs' class for their losses (the Medicare Part D premiums they have been required to pay as a result of Navistar's unilateral activity and any extra cost for the prescriptions themselves)."

29. The Company appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed this Court's rulings in all respects on December 14, 2012.

30. Despite the Court's 2011 order, the Company has not reestablished the private drug program required by the Settlement Agreement, and the Company still requires the Plan 2 participants to be enrolled in Medicare Part D.

31. For the period from July 2010 through December 2011, the Company caused the VEBA Trust to pay fixed monthly premiums for a fully-insured Series 800 Medicare Part D Plan

operating under an Employee Group Waiver Program (the "Fully-Insured PDP", generally a "PDP"), which was underwritten and administered by SilverScript Insurance Company.[2] CMS and the pharmaceutical manufacturers who participated in the Fully-Insured PDP paid certain Subsidies back to CVS/Caremark. As relevant here, those Subsidies are:

(i) A Medicare Part D base subsidy paid by CMS;
(ii) Low-income subsidies paid by CMS;
(iii) Federal reinsurance paid by CMS;
(iv) Coverage-gap discounts by the pharmaceutical manufacturers.

32. The Medicare Part D base subsidy is one way in which the federal government subsidizes the cost of prescription drug benefits for Medicare-eligible participants. The base subsidy is paid by CMS to every PDP, based on such factors as the number of plan participants, the risk level of the participants, and individual plan costs.

33. Low-income subsidies are subsidies paid monthly by CMS to the PDP for the purpose of reducing premiums for low-income plan participants.

34. Federal reinsurance subsidies operate as a sort of stop-loss coverage provided by the federal government. They are amounts paid by CMS to reimburse the PDP or for costs above a certain threshold.

35. Coverage-gap discounts provided by the drug manufacturers are amounts provided by the drug manufacturers to the PDP to reduce the amounts paid by Medicare recipients for portions of their costs that are not covered by Medicare. The coverage-gap discount was created by the Patient Protection and Affordable Care Act of 2010 when it amended MMA.

[2] Upon information and belief, SilverScript was subsequently acquired by CVS/Caremark.

36. While the Fully-Insured PDP was in place, these Subsidies were paid to, and retained by, CVS/Caremark. However, they were then used by CVS/Caremark to reduce the cost of the insurance premiums it charged the VEBA Trust to provide the drug benefit.

37. Effective January 2012, the Company violated the Settlement Agreement by switching from the Fully-Insured PDP to a self-funded PDP, and by failing to implement the Plan through the VEBA Trust by failing to cause the Trust to contract with the pharmacy benefit manager. CVS/Caremark continued to provide claims administration services, but the VEBA Trust assumed the liability for paying the underlying prescription drug claims (the "Self-Funded PDP"). This Self-Funded PDP has remained in effect for all periods from and after January 2012, subject to minor amendments not material to this action.

38. As under the prior, fully-insured arrangement, CMS and the pharmaceutical manufacturers have continued under the Self-Funded PDP contract to provide the Subsidies described above. Unlike under the prior, fully-insured arrangement, however, those Subsidies have no longer been paid to and retained by CVS/Caremark, and then used to lower the premiums the VEBA Trust pays for the insurance.

39. Instead—despite the fact that the Subsidies were generated by payments from the VEBA Trust, not by payments from the Employers' corporate assets, and that contributions to the VEBA Trust were made not only by the Employers but also by the Plan participants and the Supplemental Benefit Trust—Employers have received approximately $105,000,000 in Subsidies from January 2012 through April 2015 from CVS/Caremark and have used them exclusively for their own corporate benefit rather than for the benefit of Plan participants and beneficiaries.

40. To the extent the Subsides have been returned to the VEBA Trust, the Company has failed to allocate those funds in a manner that returns to the participants their fair share of the Subsidies. Instead, on information and belief, Employers, including the Defendants, have used and are using the Participants' share of the Subsidies to reduce their own obligation to make contributions to the VEBA Trust.

41. Based on information provided by the Company for the years since the Self-Funded PDP began in 2012 through the most recent month for which data is available (April 2015), Plaintiffs have determined that the retirees' fair share of the Subsidies that was misappropriated by the Employers is approximately $26 million.

42. Because the participants' fair share of the Subsidies was not returned to the VEBA Trust for their benefit, Plan participants have had to pay approximately $26 million in increased premiums to the VEBA Trust.

43. To the extent that the Supplemental Benefit Trust has offset for Plan participants some portion of the increased Retiree Contributions, Plan participants have been damaged to the extent that (i) the Supplemental Benefit Trust contributions did not fully offset the increased premiums; (ii) the Supplemental Benefit Trust as a result holds decreased assets from which to offset required participant contributions in the future; and (iii) the Supplemental Benefit Trust would have provided participants with more robust ancillary benefits (such as vision or hearing coverage), or provided them at a lower cost, if the Supplemental Benefit Trust had not spent so much money offsetting the Retiree Contributions that were inflated as a result of Defendants' failure to comply with the Settlement Agreement.

How Defendants' Actions Affect the Participants' Contribution Obligations

44. The Base Plan calls for the Contributing Participants' share of the total cost of the benefits to be computed on a calendar year basis. The formula is complex, largely because of the difficulty of projecting the cost of health care. To account for this difficulty, the parties to the Settlement Agreement included in the Plan two elements: first, a formula projecting what the cost of providing benefits under the Base Plan was anticipated to be in the years after 1993, and second, a mechanism for increasing or decreasing that estimated amount to reflect the actual experience of the Base Plan.

45. The parties to the Settlement Agreement agreed on a number of assumptions about the future costs and utilization of the benefits, as well as the expected population that would participate in the Base Plan. Based on these assumptions, the benefit levels and initial retiree costs were established so that—if all of those assumptions proved to be exactly right—the Retiree Contributions would increase at a certain set rate (e.g., 6%) each year. This assumed increase in the monthly contribution therefore formed the "base line" for the calculation of Retiree Contributions. This "base line" is called the "Monthly Base Contribution." These Monthly Base Contributions are set forth in Appendix A-6 of the Base Plan.

46. These Monthly Base Contributions are the starting point of the Retiree Contribution calculation. This figure is then converted into an aggregate annual figure simply by increasing the previous year's Monthly Base Contribution by 6%, multiplying by 12 months, and then multiplying by the number of expected participants under each plan. This aggregate projected annual figure is called the "Scheduled Contributions."

47. The Scheduled Contributions are then adjusted up or down to reflect two ways in which the Plan's actual experience has differed from the assumptions: differences in actual vs. expected health care costs, and changes in the retiree population.

48. Although the Plan provides for a number of adjustments to the Scheduled Contributions, the primary adjustment at issue here is the adjustment meant to account for any difference between the Plan's actual experience with respect to drug costs and the Plan's assumptions regarding drug costs. The Settlement Agreement recognizes that it is impossible to predict the actual drug costs in any year because future drug prices are not known, and the usage rates under the Plan vary year by year. The Settlement Agreement deals with this by comparing actual versus projected costs in a particular year (called the "Measurement Year"), and then adjusting a subsequent year's participant contribution rate to include a true up (or down) to account for the discrepancy between those actual and projected costs in the Measurement Year. This adjustment factor is described in subsection 3.2(c) of the Base Plan and is called "Adjustment 3 (T3)" (here, "Adjustment 3" or "T3").

49. The objective of the Adjustment 3 calculation is to measure whether drug claims have turned out to be less than or greater than expected. Adjustment 3 begins with a number representing the amount that the Plan is expected to pay in the aggregate for drug claims for a given year. The Plan calls this number the "Total Expected Drug Dollars." Adjustment 3 then compares the Total Expected Drug Dollars to the Plan's actual experience with drug expenses, the "Total Actual Drug Cost."

50. The Settlement Agreement reflects a belief that, when an unanticipated cost (such as this difference between the expected drug costs and the actual drug costs) arises, part of that increase should be borne by the Employers and part should be borne by the retirees. The

"Retiree Cost-Sharing Ratio" is the figure that determines the portion of the benefits that the retirees are paying for through their contributions. The Retiree Cost-Sharing Ratio compares the Scheduled Contributions to the total amount paid for Plan benefits. This ratio is determined on a calendar year basis. Historically, the retirees have funded about 25% of their benefits. The Retiree Cost-Sharing Ratio is adjusted to account for the fact that the Measurement Year differs from the calendar year. This adjusted ratio is referred to as the "Retiree Adjustment Ratio."

51. The final step in determining the T3 adjustment is to multiply the difference between the Total Actual Drug Cost and the Total Expected Drug Dollars by the Retiree Adjustment Ratio.

52. This dispute centers on whether the Defendants have properly interpreted the term "Total Actual Drug Cost" for use in Adjustment T3 as set forth in the Settlement Agreement. Total Actual Drug Cost for a Measurement Year should reflect the cost of the drugs after the Subsidies attributable to them have been received, but the Company simply ignores the fact that considerable amounts of Subsidies reduced the amounts the Plan actually paid for the drugs.

53. The Company maintains that the retirees are not entitled to benefit from the fact that the net cost of the drugs the VEBA Trust purchased ended up to be lower as a result of the Subsidies. In furtherance of this view, the Company has provided to the Plan Actuary responsible for carrying out these calculations information that does not reflect the actual cost of the drug benefits.

54. By misinterpreting the term Total Actual Drug Cost, the Company failed to offset the actual cost of the drugs to the VEBA Trust, thereby failing to provide accurate information to the actuary which resulted in a T3 adjustment which was too high, thereby increasing the required contribution from the participants.

55. The Company inflated the Retiree Contribution, thereby requiring Plan participants to pay increased premiums to the VEBA Trust for their benefits. Each year, the Committee has expended Supplemental Trust assets to alleviate a portion of this burden on the retirees.

56. In their efforts to resolve this matter without litigation, Plaintiffs have requested that the Company provide them with the information and instructions they provided to the Actuary and Plan Accountants with respect to Total Actual Drug Costs and the Company's treatment of the Subsidies. The Company has refused to provide this information or has provided it in an unusable format. Based on the limited information Plaintiffs have received, however, they believe that the participants' contributions have been inflated an average of $8,250,000 per year.

The Impact of Defendants' Actions on the Employers' Contribution Obligations

57. The Settlement Agreement imposed a series of Plan funding obligations on the Employers. The Settlement Agreement required certain initial contributions at the time of settlement, as well as ongoing annual contributions. The Company's failure to determine properly the Total Actual Drug Cost has affected the Defendants' ongoing annual contribution requirements.

58. Specifically, Defendants' failures to comply with the Settlement Agreement have caused them and the other Employers to underpay the Employer Contribution counterpart to the participant contributions discussed above ("Employers' Annual Contribution"). The Settlement Agreement provides generally that the Employers must make an annual contribution which is dependent upon the amount of the participant contribution: "The Employers' annual contribution shall equal the Total Estimated Annual Cost less the Contributing Participants' share of the Total Estimated Annual Cost. The Contributing Participants' share of the Total

Estimated Annual Cost shall equal the sum of the Plan 1 and Plan 2 Contributing Participants' Annual Contributions (detailed in section 3.2) times the respective number of Plan 1 and Plan 2 Contributing Participants." Base Plan § 3.3.

59. Because the Company inflated the amount of the Contributing Participants' Annual Contributions by failing to credit the participants' VEBA Trust sub-account with their share of the Subsidies and by failing to appropriately reduce the Total Actual Drug Cost by the Subsidies, they necessarily decreased the Employers' Annual Contribution obligation by a like amount.

Pre-Litigation Conciliation Efforts

60. The Committee has tried letters, emails, phone calls, and face-to-face discussions to convince the Company that its practice of not sharing Subsidies and using them exclusively for the Employers' own benefit violates the Settlement Agreement. The Committee has also made repeated requests for information about the VEBA Trust and contribution accounting. The Company has refused to change its position on the Subsidies and has declined to provide all of the information Plaintiffs need to determine whether the Employers met their obligations under the Shy Agreement.

COUNT I – BREACH OF SETTLEMENT AGREEMENT

61. Paragraphs 1 through 60 are incorporated herein by reference.

62. By: (1) failing to implement the Plan through the VEBA Trust; (2) keeping the full amount of the Subsidies for themselves; (3) misinterpreting the term "Total Actual Drug Cost"; (4) inflating the Retiree Contributions to the Plan; and (5) decreasing the Employer Contributions to the Plan, Defendants have, among other things, diverted VEBA Trust assets and income to their own use; have not acted solely in the interest of Plan participants, or for the exclusive benefit of Plan participants, or for the exclusive purpose of providing benefits; and

have otherwise breached the terms of the Settlement Agreement and this Court's Consent Order, causing damages to Plaintiffs and the Plan participants.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff prays that judgment be entered against Defendants, jointly and severally, on all claims and respectfully request that the Court award the following relief:

(A) Declare that the failure to cause the VEBA Trust to contract with the pharmacy benefit manager violates the terms of the Settlement Agreement;

(B) Declare that the failure to credit Plan participants and/or the Supplemental Benefit Trust with an appropriate share of the Subsidies violates the terms of the Settlement Agreement;

(C) Declare that the Company has misinterpreted the term "Total Actual Drug Cost," in violation of the Settlement Agreement, and thereby have increased the Retiree Contributions and decreased the Employer Contributions, in violation of the Settlement Agreement;

(D) Order the Company to determine the Retiree Contributions and Employer Contributions in the future consistent with the terms of the Settlement Agreement;

(E) Order Defendants to repay all damages resulting from their violations of the Settlement Agreement;

(F) Order Defendants to make all contributions for all prior calendar years, including pre-judgment interest, that they have failed to make in violation of the Settlement Agreement;

(G) Plaintiffs' costs and attorneys' fees; and

(H) Such other relief as the Court shall deem necessary to redress any violation of the Settlement Agreement.

Dated: October 21, 2016

Respectfully submitted,

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