

1 CALABRESI, *Circuit Judge*, concurring in part and dissenting in part:

2 I concur with Part I of the majority's opinion, in which we affirm dismissal
3 of UMMF's ERISA § 515 claim. I write separately to dissent from Part II of the
4 majority opinion, which concludes that the district court lacked subject matter
5 jurisdiction over UMMF's other claims because the CBAs in question did not
6 constitute an ERISA "plan" under § 502(a)(3)(B).

7 I dissent for the simple reason that the district court expressly found, as a
8 factual matter, that the language and circumstances of *these* particular CBAs
9 made them an ERISA "plan" under § 502, and this factual finding was not
10 appealed. The district court wrote: "Although not every CBA qualifies as a
11 'plan' under ERISA § 502(a)(3)(B), in view of the plain language of the CBAs at
12 issue here and the UMMF indenture, Plaintiffs' action to enforce the CBAs is an
13 action to enforce 'the terms of [a] plan.'" *Miranda II*, 785 F. Supp. 2d at 384
14 (quoting 29 U.S.C. § 1132(a)(3)(B)). However dubious such a finding may be,
15 since the Local 210 Fund did not contest it on appeal, a factual finding it remains,
16 and it gives the district court a proper basis for subject matter jurisdiction under
17 § 502(f).

1 Were I to decide this issue in the first instance, I might well agree with the
2 majority that these CBAs do not meet § 502(a)'s definition of an ERISA "plan."
3 But I am not prepared to say that there are no circumstances in which a CBA
4 *could ever* be an ERISA "plan," and therefore am not prepared to vacate the
5 district court's decision that, in this instance, it was.

6 I join the majority in remanding this case to the district court, which, I
7 hope, will decide the remaining claims under state law. I note that if the district
8 court were to find a state law contract breach for the same reasons that it found a
9 violation of ERISA, then the district court would likely reach the same result as
10 before. That is because the district court denied attorney's fees, which, had they
11 been granted, would have been the principal difference between a victory by
12 UMMF on state law grounds and a victory under ERISA.

13 For these reasons, I concur in Part I of the majority's opinion, respectfully
14 dissent from Part II, and join the majority in remanding the case to the district
15 court for reconsideration of UMMF's remaining claims.