No. 13-1010

IN THE

Supreme Court of the United States

M&G POLYMERS USA, LLC, *ET AL.*,

Petitioners,

v.

HOBERT FREEL TACKETT, *ET AL.*,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* WHIRLPOOL CORPORATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

This Amicus Brief is submitted with the consent of the parties in support of Petitioner M&G Polymers USA, LLC.[1] Amicus Whirlpool Corporation ("Whirlpool") seeks reversal of the Sixth Circuit's decision below. Similar to the Petitioner, Whirlpool is a defendant in a case in which four subclasses of formerly union-represented retiree-plaintiffs claim they were promised a specified level of benefits for their lifetimes and the lifetimes of their surviving spouses, if any. *See Zino v. Whirlpool Corp.*, 2013 U.S. Dist. LEXIS 121750, at *8-10 (N.D. Ohio, Aug. 27, 2013).

In 2006, Whirlpool acquired one of its U.S.-based competitors, Maytag Corporation ("Maytag"). As a consequence of acquiring Maytag and its subsidiary, the Hoover Company ("Hoover"), Whirlpool became the sponsor for over 100 separate health plans. Following the purchase, Whirlpool began to harmonize and consolidate the various active and retiree health insurance plans into Whirlpool's existing plans in an effort to ease the administrative burden of overseeing hundreds of disparate benefit plans and to equalize benefits received by participants. These changes enhanced Whirlpool's ability to provide competitive, contemporary, and sustainable healthcare benefits to its employees and retirees.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all amicus briefs.

Whirlpool focused its initial consolidation efforts on a Maytag plant in Newton, Iowa. In 2008, Whirlpool sought to negotiate with the United Auto Workers ("UAW") changes to the Newton retirees' health benefits (i.e. to transfer the Newton retirees into the Whirlpool plans). The UAW refused to bargain over Whirlpool's proposed changes, whereupon Whirlpool brought suit in the Southern District of Iowa. *See Maytag Corp. v. UAW*, 687 F.3d 1076 (8th Cir. 2012). Ultimately, the Eighth Circuit concluded the Newton retirees did not have a contractual right to vested benefits (*id.*), and Whirlpool proceeded to transfer the Newton retirees to its retiree plan, which currently provides healthcare benefits to over 19,000 Whirlpool retirees.

Also in 2008, Whirlpool terminated an expiring collective bargaining agreement, along with all its constituent parts, between Hoover and IBEW Local 1985 that covered employees at a plant in Canton, Ohio. Unlike at Newton, no collective bargaining relationship existed there due to the sale of Hoover to Techtronic Industries ("TTI") in 2007. In 2011, Whirlpool unilaterally announced its plan to harmonize the Hoover retiree benefits with Whirlpool's retiree benefits. Soon thereafter, the Hoover retirees filed suit in the Northern District of Ohio, claiming that various labor agreements had promised them vested benefits at specified levels for their lifetimes. *See Zino*, 2013 U.S. Dist. LEXIS 121750, at *8. By sheer happenstance of living in the Sixth Circuit, the Hoover retirees benefit from a substantial body of retiree-friendly (but, as discussed below, ultimately incorrect and unsustainable) case law based solely on their geographic location.

Whirlpool is uniquely positioned to share with the Court its experience of confronting two lawsuits of the same type, albeit with the potential for widely disparate results based simply on the geographical location of the affected retiree population. Whirlpool thus respectfully submits the following brief as an amicus of the Court. *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) ("An amicus brief should normally be allowed . . . when the amicus has an interest in some other case that may be affected by the decision in the present case . . . or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.").

SUMMARY OF ARGUMENT

The Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., is a comprehensive and detailed statutory scheme. It exempts welfare benefits both from its vesting regime and from its anti-cutback rules, thus granting plan sponsors the ***right*** to amend, modify, or discontinue welfare benefit plans. *See Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 78 (1995); *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 515 (1997). ERISA also requires plans to be in writing. 29 U.S.C. § 1102(a)(1).

In both *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) and *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80 (1998), the Court held, as a matter of federal common law, that waiver of a federal, statutory ***right*** via the collective bargaining process must be "clear and unmistakable." Consequently, the federal common law

of collective bargaining agreements requires that waiver of an employer's ERISA-conferred rights to modify or terminate welfare benefits be expressed in clear and unmistakable language.

To the extent that waiver of this statutory right is characterized as an "agreement to vest retiree benefits" (the flip side of the same coin), the "clear and express" standard, as articulated by the Third Circuit in *UAW v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999), should be adopted. In other words, both the employer's promises (i) to vest retiree healthcare benefits for the life of a retiree and (ii) at specified levels must be expressed in clear and unmistakable terms. The Court should adopt the clear and unmistakable language standard because it is consistent with the Court's prior decisions addressing waiver of statutory rights through collective bargaining and because it is consistent with both the text and intent of ERISA, which expressly and intentionally exempts welfare benefits both from its vesting regime and from its prohibitions against reductions (i.e. the anti-cutback rules).

The Court, moreover, should reject the "reasonable suggestion" or "reasonably susceptible" standard applied by the Second and Seventh Circuits. This standard is vague and does not provide any genuine clarity to the inconsistent vesting standards and competing contract interpretation rules adopted by the various circuits. In any event, the Court should reject the Sixth Circuit's body of precedent based on *UAW v. Yard-Man* and its progeny, as *Yard-Man*'s classification of retiree health benefits as "status" benefits and its characterization of retiree benefits as "delayed compensation" all run contrary to

ERISA's express language and contravene national labor policy.

ARGUMENT

I. A CLEAR, EXPRESS, AND UNMISTAKABLE WAIVER STANDARD IS REQUIRED BY NATIONAL LABOR POLICY[2]

A. ERISA Confers A Federal, Statutory Right To Amend Or Terminate Welfare Benefit Plans

It is axiomatic that while ERISA makes employee ***pension*** benefits inviolate through its vesting rules and anti-cutback prohibitions, the statute expressly and deliberately excludes ***health and welfare*** benefits from these two strictures. *See* 29 U.S.C. § 1051(1) (ERISA's vesting, participant, and anti-cutback provisions do not apply to "employee welfare benefit plans"); *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 78 (1995); *In re Lucent Death Benefits ERISA Litig.*, 541 F.3d 250, 253-54 (3d Cir. 2008) (discussing distinction between pension and welfare benefits for ERISA accrual and vesting purposes). *See also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (citations omitted)

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2. As used herein, the words "clear", "express", and "unmistakable" are considered synonymous and carry the same meaning. *See* BLACK'S LAW DICTIONARY 620 (8th ed. 2004) (defining term "express" as "Clearly and unmistakably communicated").

By exempting health and welfare plans from its vesting and anti-cutback rules, ERISA grants plan sponsors the unfettered, statutory right to terminate or modify such plans and to discontinue or decrease any benefits provided thereunder. Indeed, both the Court and several federal appellate courts have recognized an employer's ability to terminate or modify welfare benefits plans as a "right" granted under ERISA. *See, e.g.*, *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 515 (1997) ("The right that an employer or plan sponsor may enjoy in some circumstances to unilaterally amend or eliminate its welfare benefit plan . . . ."); *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 133 (2d Cir. 1999) (under ERISA, "an employer has the right to terminate or unilaterally amend [a welfare] plan at any time"); *UAW v. Skinner Engine Co.*, 188 F.3d 130, 138 (3d Cir. 1999) (employers may "relinquish their right to unilaterally terminate [welfare] benefits and provide for lifetime vesting"); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994) ("[E]mployers have a statutory right to 'amend the terms of the plan or terminate it entirely.'") (citation omitted); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993) (employer can waive "its statutory right to modify or terminate benefits" if such waiver is "stated in clear and express language"); *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 637 n.8 (7th Cir. 2004) (recognizing an employer's "right" to terminate or modify plan); *Ross v. Rail Car Am. Group Disability Income Plan*, 285 F.3d 735, 741 (8th Cir. 2002) (under ERISA, company has "the unilateral right to amend" disability insurance plan); *Loskill v. Barnett Banks, Inc.*, 289 F.3d 734, 737 (11th Cir. 2002) (employers are generally free to adopt, modify, or terminate welfare plans unless the employer "contractually cedes any of those rights"). *See*

also Curtiss-Wright Corp., 514 U.S. at 78 (employers are "generally free . . . for any reason and at any time to adopt, modify, or terminate welfare plans").[3]

ERISA's plain language and legislative history make clear that Congress intentionally omitted welfare benefit plans from ERISA's automatic vesting and anti-cutback provisions and purposefully granted employers the right to change such plans. As the Court has observed:

> The flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident; Congress recognized that "requiring the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans." Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, "They would err initially on the side of omission."

3. The Tenth Circuit holds an employer may change or modify benefits only if the plan reserves that right. *See Deboard v. Sunshine Mining & Ref. Co.*, 208 F.3d 1228, 1239 (10th Cir. 2000). This is clearly a minority view and undoubtedly an incorrect one. An employer's right to offer, modify, or discontinue welfare benefit plans is a right independent of contract; it is one expressly conferred by statute, and thus there is no need to memorialize it in writing. *See, e.g.*, *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6th Cir. 1963) (union entitlement to wage information was a "right" under the NLRA, and rejecting contention that such a right could only be obtained through contract).

520 U.S. at 515 (internal citation omitted) (quoting S. Rep. No. 93-383, at 51 (1973)). *See also Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) ("With regard to an employer's *right to change medical plans*, Congress evidenced its recognition of the need for flexibility in rejecting the automatic vesting of welfare plans.") (emphasis added).[4]

The right to terminate or modify welfare benefit plans, however, is not absolute. An employer may waive that right via contract. *See* 520 U.S. at 515 ("[U]nless an employer contractually cedes its freedom . . ., it is generally free under ERISA, for any reason at any time, to adopt, modify, or terminate [its] welfare plan.") (internal citations and quotations omitted). As discussed below, both national labor policy and the federal common law of collective bargaining compel the conclusion that an employer's waiver of its ERISA rights to amend or terminate welfare benefits must occur through clear, express, and unmistakable language.

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4. The policy reasons underlying Congress' decision to exempt welfare benefits from ERISA's vesting provision were extraordinarily prescient. The cost of prescription drugs for retirees has skyrocketed. This is no surprise, given the explosion in the types of prescription drugs available on the market and covered by prescription drug plans. A comparison of the formulary for the Hoover retirees' drug plan in 1992 and the formulary for the Hoover Medicare retirees' drug plan in 2014 is telling. The former lists both covered and non-covered drugs in two pages. The latter list of covered drugs is over 100 pages long. *Compare* Exhibit 1 *to* Express Scripts Medicare 2014 Formulary, *available at* http://www.carehealthplan.com/formulary/2014/2014ESIFormulary.pdf (last visited July 23, 2014).

B. Waiver Of A Statutory Right Through Collective Bargaining Must Be Clear And Unmistakable

The Third Circuit's clear and express vesting standard echoes a deeply embedded and well-established national labor policy: namely, that waiver of a statutory right through the collective bargaining process must be clear and unmistakable. The genesis of this policy is found in the Court's decision in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). There, the issue was whether the labor agreement allowed the employer to more severely discipline union officials than rank and file employees for the same misconduct. The Court found the labor agreement did not permit disparate treatment because it did not contain a *clear and unmistakable* waiver of the statutory prohibition against discrimination in the National Labor Relations Act ("NLRA"). Specifically, the Court held:

> We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated." More succinctly, the waiver must be clear and unmistakable.

460 U.S. at 708.[5] *See also Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994) (noting in dictum that if a union purported

5. Appearing as an affiliate of the IBEW in *Metropolitan Edison*, the AFL-CIO urged the Court to adopt the clear and unmistakable waiver standard. *See* Resp't Br., No. 81-1664, 1982 U.S. S. Ct. Briefs LEXIS 45, at *10-11, *39-41 (Oct. 30, 1982). Having prevailed in *Metropolitan Edison*, the AFL-CIO cannot now object to the adoption of that same standard in this matter.

to bargain away a member's rights under California wage and hour laws, such a waiver "would . . . have to be clear and unmistakable"); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409 n.9 (1988) (noting in dictum that waiver of state-law rights must be shown through "clear and unmistakable evidence") (internal citations and quotations omitted); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 656 (1986) (parties must "clearly and unmistakably" agree to submit question of arbitrability to arbitrator). *Cf. Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 471 (1959) (holding that parties to a collective bargaining agreement must express undertakings in "unequivocal words"). [6]

Demonstrating that *Metropolitan Edison* was not an anomaly, the Court applied the same clear and unmistakable standard to the waiver of a federal statutory right through collective bargaining in a different context. In *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), the Court addressed whether a general arbitration clause in a collective bargaining agreement operated to waive an employee's statutory right to bring federal employment discrimination claims in a judicial forum. The Court held that the clear and unmistakable waiver standard applied, even though the right at issue was a procedural, as opposed to a substantive, one. *See*

6. A similar standard has been adopted by the Court elsewhere. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys [under its spending power], it must do so unambiguously"); *Leiter Minerals, Inc. v. United States,* 352 U.S. 220, 224 (1957) (a statute that divests pre-existing rights or privileges will not be applied to a sovereign in absence of "express words to that effect").

id. at 80 (the statutory right to a federal judicial forum was "of sufficient importance to be protected against less-than-explicit union waiver in the CBA").

In keeping with both *Metropolitan Edison* and *Wright*, the federal appellate courts have applied a clear and unmistakable standard to the waiver of federal statutory rights through the collective bargaining process.[7] *See, e.g.*, *Cent. Penn. Teamsters Pension Fund v. McCormick Dray Line, Inc.*, 85 F.3d 1098, 1109 (3d Cir. 1996) (applying clear and unmistakable waiver standard to pension fund's ERISA right to collect delinquent monies); *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 216 (4th Cir. 2007) (labor agreement clearly and unmistakably waived right to judicial forum for Title VII and Section 1981 claims); *East Tenn. Baptist Hosp. v. NLRB*, 6 F.3d 1139, 1144 (6th Cir. 1992) (employer did not clearly and unmistakably waive confidentiality defense to union request for information under NLRA); *Local 65-B, Graphic Commc'ns Conference v. NLRB*, 572 F.3d 342, 351 (7th Cir. 2009) (union clearly and unmistakably waived right to bargain over rules of conduct and performance standards); *Marine Eng'gs Beneficial Ass'n v. GFC Crane Consultants, Inc.*, 331 F.3d 1287, 1293 (11th Cir. 2003) (employer did not clearly and unmistakably waive right to terminate labor agreement); *Local Union 1395 v. NLRB*, 797 F.2d 1027, 1032 (D.C. Cir. 1986) (applying clear and unmistakable standard to waiver of right to sympathy strike).

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7. As the DC Circuit observed, this standard applies regardless of whether the case arises out of Section 301 of the Labor Management Relations Act or out of an unfair labor practice under Section 8 of the NLRA. *See Local Union 1395 v. NLRB*, 797 F.2d 1027, 1032 (D.C. Cir. 1986). *See also Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 203 (1991).

It is thus well-settled under the federal common law of collective bargaining agreements that waiver of a federal statutory right via the collective bargaining process must be clear and unmistakable. Plainly then, in order for an employer to relinquish its substantive ERISA rights to change or terminate welfare benefit plans through collective bargaining and commit to providing lifetime retiree benefits at fixed, unalterable levels, the parties must adopt clear and unmistakable language conveying the intention to do so. This standard, which has been adopted elsewhere by the Court and by the Third Circuit in the context of retiree benefits, is aligned with national labor policy and comports with the intent of ERISA. Accordingly, it should be adopted by this Court. [8]

C. *Yard-Man* Is Inconsistent With ERISA, National Labor Policy And The Clear & Unmistakable Waiver Standard

In *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1984), the Sixth Circuit held that contractual silence as to the duration of retiree healthcare benefits may nonetheless give rise to an intent to vest. *Id.* at 1481 n.2 (noting that while an expression of intent to offer retiree benefits must be clear, no clear expression of intent is necessary regarding the duration of those benefits). As originally framed, the *Yard-Man* inference, as it has come to be known, rests partly upon the notion that retiree benefits are "status" benefits and partly upon the notion

8. The clear and unmistakable waiver standard should apply to all waivers, just as the *Twombly* pleading standard applies to all pleadings. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009) (explaining pleading standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) applied generally).

that retiree benefits are a form of "delayed compensation." 716 F.2d at 1482. The *Yard-Man* inference is completely at odds with ERISA, with federal labor policy and with the clear and unmistakable waiver standard. Accordingly, the Court should explicitly repudiate both the *Yard-Man* inference and its underpinnings.

1. *Yard-Man* Is Incompatible With ERISA

The two notions underlying the *Yard-Man* inference– (1) that retiree benefits are "status" benefits and (2) that retiree benefits are a form of "delayed compensation"–are merely vesting principles in disguise. The argument that healthcare benefits presumptively vest by virtue of being conferred upon a retiree is flatly contrary to the plain language and intent of ERISA, which explicitly exempts health and welfare benefits from its vesting provisions. *See* 29 U.S.C. § 1051(1). Likewise, by characterizing retiree healthcare benefits as a form of "delayed compensation," *Yard-Man* improperly conflates those benefits with pension benefits. Again, this is entirely inconsistent with ERISA, which expressly distinguishes pension benefits and welfare benefits for purposes of vesting.[9] There is an

9. In the early twentieth century, the common law considered employer-funded pensions "gratuities" or "inchoate" gifts. *See, e.g.*, *McNevin v. Solvay Process Co.*, 52 N.Y. Supp. 98 (App. Div. 1898); *Dolge v. Dolge*, 75 N.Y. Supp. 386 (App. Div. 1902). As such, employers enjoyed the right to revoke plans and recover pension plan assets. *Id.* Later, the courts began to afford pension benefits more protection by treating benefits as "deferred wages" to which an employee was contractually entitled in exchange for his years of service. *See, e.g.*, *Sigman v. Rudolph Wurlitzer Co.*, 11 N.E.2d 878 (Ct. App. Ohio 1937); *Texas & New Orleans Ry. Co. v. Jones*, 103 S.W.2d 1043 (Tex. Ct. Civ. App. 1937). Eventually, Congress

element of a "Catch-22" to the Sixth Circuit's logic. As a practical matter, a benefit must be offered before it can be amended or terminated. *Yard-Man* holds, however, that the mere act of offering retiree health benefits results in the automatic erosion of the right to amend or terminate them, a consequence incompatible with ERISA and with *Metropolitan Edison*'s holding that waivers of statutory rights will not be inferred from general contract language. 716 F.2d at 1481 n.2; 460 U.S. at 708.

Yard-Man, moreover, premised its "delayed compensation" theory on the fact that retiree benefits are a permissive, as opposed to mandatory, subject of bargaining. 716 F.2d at 1482. The Sixth Circuit reasoned that because unions are not obligated to bargain on behalf of retirees, "it is unlikely that such benefits . . . would be left to the contingencies of future negotiations." *Id.* [10] The court, however, drew this inference despite unambiguous contract language providing that retirees would receive "benefits equal to active group benefits." *Id.* at 1480. Thus, even though the plain language of the agreement in *Yard-Man* exposed retirees' benefits to future exigencies by virtue of equating them to active employee benefits, the Sixth Circuit disregarded this language and created

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passed ERISA, which codified–to a certain extent–the "contract theory" of pensions and imposed vesting requirements and other minimum standards on employers who chose to offer pension plans. Congress, however, did not impose these same requirements on unfunded, health and welfare plans.

10. But as Maytag's experience at its Newton facility demonstrated, unions in fact engage in bargaining on behalf of retirees. *See Maytag* 687 F.3d at 1084 n.7; *see also John Morrell & Co. v. UFCW*, 37 F.3d 1302, 1307 (8th Cir. 1994).

a rule inconsistent with the parties' express intent. As both the Third and Seventh Circuits have concluded, the more compelling and rationale argument is that if active employees nearing retirement do not want their retirement benefits subject to future uncertainties, they can insist on specific contractual language vesting their retiree benefits. *See Skinner*, 188 F.3d at 141; *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 609 (7th Cir. 1993).

Finally, the genesis of the theory that retiree welfare benefits are "status" benefits or "delayed compensation" appears in the Sixth Circuit's *pre-ERISA* decision, *Upholsterers' International Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967). There, the Sixth Circuit held that a promise to provide retiree life insurance benefits (a welfare benefit) survived the expiration of a labor agreement because "the employee service called for [under the contract] is fully performed." *Id.* at 428. Thus, the court held retirees received vested life insurance benefits if they completed the requisite years of service and reached the age limits prescribed by the labor agreement.

Subsequently, in 1974, ERISA was enacted and, as discussed in Part I.A above, both its plain text and legislative history confirm that Congress exempted welfare benefits from its vesting regime and anti-cutback prohibitions. The Sixth Circuit, however, simply ignored this legislative mandate and created the *Yard-Man* inference, even though it was premised upon a flawed foundation (i.e. *American Pad & Textile Co.*). Indeed, when pressed to revisit *Yard-Man* in light of Supreme Court precedent (including the *Curtiss-Wright* decision), the Sixth Circuit brushed aside those arguments, dismissively

noting that *Curtiss-Wright* bore "no relation to the issues in *Yard-Man*." *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 655 (6th Cir. 1996).

2. *Yard-Man* Conflicts With National Labor Policy

Yard-Man, moreover, conflicts with national labor policy, which calls for the creation of a uniform set of interpretative rules applicable to collective bargaining agreements. *See Lingle*, 486 U.S. at 404 ("[Section] 301 mandates resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes."). As discussed in Part I.B above, federal common law has long held that waiver of a federal statutory right via bargaining must clear and unmistakable and that waiver will not be inferred from contractual silence or from general provisions. *Metropolitan Edison*, 460 U.S. at 708.

Under *Yard-Man*, however, an employer may forfeit the statutory right to change or terminate retiree healthcare benefits through mere silence or through a general reference to retiree benefits. *Yard-Man*, in other words, creates a double standard. Unlike other statutorily conferred rights, the ERISA rights to modify or discontinue welfare benefits can be sacrificed by silence or ambiguity in the labor agreement. There thus exist differing interpretative standards depending on the nature of the federal right at issue–a result that frustrates national labor policy's goals of consistency and uniformity in the interpretation of collective bargaining agreements. *Yard-Man*, therefore, should be overruled and replaced by the clear and unmistakable waiver standard adopted by

this Court or, alternatively, the clear and express vesting standard adopted by the Third Circuit.

3. *Yard-Man* Conflicts With Section 7's Neutrality Requirement

Although the *Yard-Man* court acknowledged that its decision had to be consistent with federal labor policy, it never tested its inference against that policy. 716 F.2d at 1480. Had such testing occurred, the Sixth Circuit would have recognized its inference fails that test. Section 7 of the National Labor Relations Act grants employees the right to "form, join, or assist" labor unions while simultaneously conferring the right "to refrain from any or all such activities." 29 U.S.C. § 157. Entrenched in this statutory provision is the principle of neutrality, meaning that Section 7 protects the free choice of an employee to join–or not to join–a labor union. *See NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973). As the Court has held, rules of law that penalize an employee for union membership (or lack thereof) or that otherwise have detrimental effects on employees' Section 7 rights are impermissible. *See, e.g.*, *Livadas*, 512 U.S. at 117 (voiding a California policy refusing to enforce wage claims brought by unionized employees because the state's policy forced employees to choose between having their state law rights enforced or exercising their Section 7 rights to enter into collective bargaining agreements).

The Sixth Circuit's retiree healthcare precedent runs contrary to Section 7's guarantee of neutrality. Under current Sixth Circuit law, unrepresented retirees do not enjoy the advantage of the *Yard-Man* inference. Rather, in the non-union context, an employer's intent to vest retiree healthcare benefits "must be found in the

plan documents and must be stated in clear and express language." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998). Unionized retirees, however, do not bear the more onerous burden of proving a clear and express intent to vest. *See Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 915 (6th Cir. 2000) ("Courts can find that rights have vested under a CBA even if the intent to vest has not been explicitly set out in the agreement."). In fact, union-represented employees receive a "nudge" or "thumb on the scale" in favor of vesting based solely on their union membership. *Reese v. CNH Am., LLC*, 574 F.3d 315, 321 (6th Cir. 2009); *Yardman*, 716 F.2d at 1482. The Sixth Circuit's disparate vesting standards as applied to union and non-union retirees cannot be reconciled with Section 7's mandate of neutrality and, therefore, must fail. *Cf. Livadas*, 512 U.S. at 117.

Ultimately, the *Yard-Man* inference is built upon an untenable foundation. It is incompatible with the text and intent of ERISA, with national labor policy's core principles of uniformity and neutrality, and with the Court's clear and unmistakable waiver precedent. *Yard-Man* was wrongly decided and should be rejected in favor of the Court's clear and unmistakable waiver standard (or as restated by the Third Circuit: a clear and express vesting standard).

D. Uniform National Labor Policy Precludes Outcomes Dictated By Geography

Because the federal district and appellate courts have wandered into the thicket of "vesting" rather than hewing to the open road of "waiver," the body of federal common law governing the vesting of retiree healthcare benefits, as it currently exists in the federal courts, is anything but

homogenous. This jumble of competing formulae is often inconsistently applied by different panels of the same court and flies in the face of both ERISA's and national labor policy's twin goals of uniformity and consistency.

As set forth in the question presented to the Court, three predominant, yet entirely different, vesting standards have emerged: specifically, the Sixth Circuit's *Yard-Man* "nudge," the Third Circuit's "clear and express" standard, and the Second and Seventh Circuits' "reasonably supported" standard. Moreover, regardless of the standard applied, the federal appellate courts have developed distinct–and at times contradictory–interpretative tools to evaluate collective bargaining agreements and the extent to which contract language gives rise to an intent to vest retiree benefits. *Compare Witmer v. Acument Global Techs., Inc.*, 694 F.3d 774, 776 (6th Cir. 2012) ("Language tying health care benefits to retirement-income benefits, we have held, demonstrates the parties' intent to create vested healthcare benefits") *with Joyce*, 171 F.3d at 134 (tying benefits eligibility to pension eligibility could not "reasonably be read as binding [the employer] to vest the benefits at issue"). *Compare Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 581 (6th Cir. 2006) ("[a]bsent specific durational language referring to retiree benefits themselves, courts have held that the general durational language says nothing about those retiree benefits") *with Senn v. United Dominion Indus.*, 951 F.2d 806, 816 (7th Cir. 1992) ("The default rule in this Circuit is that entitlements established by [CBAs] do not survive their expiration or modification . . . the logical interpretation under our rule is that benefits 'will continue' for the duration of the contract.") *and Skinner*, 188 F.3d at 141 (interpreting contract as providing retiree

benefits through its expiration date "appears to be the more reasonable [interpretation] in light of the durational provisions in all of the CBAs"). [11]

As a result of the divergent standards and interpretive rules adopted by the federal circuits, the outcome of a vesting lawsuit is largely dictated by geography. This, in turn, has led to rampant forum shopping, with plaintiffs racing to the Sixth Circuit to take advantage of the *Yard-Man* inference and of its retiree-friendly jurisprudence. *See, e.g.*, *Lewis v. Allegheny Ludlum Corp.*, 2011 U.S. Dist. LEXIS 148584, at *3-4 (N.D. Ohio Dec. 21, 2011) ("[p]laintiffs have engaged in forum shopping simply in order to capitalize on a unique precedent in the Sixth Circuit"); *see also Dewhurst v. Century Aluminum Co.*, 2009 U.S. Dist. LEXIS 120014 (S.D. Ohio Dec. 23, 2009). Whirlpool has experienced such gamesmanship firsthand. In the *Maytag* litigation, Whirlpool filed a declaratory judgment action in the Southern District of Iowa, seeking a declaration that it had the right to change the Newton retiree benefits under the terms of the collective bargaining agreement. 687 F.3d at 1080. In response, the Newton retirees paired with retirees from a plant in Kentucky and filed a "mirror-image" lawsuit in the Western District of Michigan in a blatant attempt to hale

11. This "default rule" would appear to be required by the Court's decision in *Litton*. *See* 501 U.S. at 207 ("contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement . . ." and agreement must "provide[] in explicit terms" that "certain benefits continue after the agreement's expiration"). In contrast to *Yard-Man* and its progeny, see *Oddie v. Ross Gear & Tool Co.*, 305 F.2d 143, 149 (6th Cir. 1962); *Fraser v. Magic Chef-Food Giant Markets*, 324 F.2d 853, 856-57 (6th Cir. 1963).

the dispute into a Sixth Circuit jurisdiction. 687 F.3d at 1080. This tactic proved unsuccessful, as the district court in Michigan ultimately transferred the later-filed case to Iowa, whereupon, after an unsuccessful mandamus action against the Michigan judge, it was promptly dismissed. *Id. See also Ginter v. Whirlpool Corp.*, 2009 U.S. Dist. LEXIS 56579 (W.D. Mich. July 1, 2009).

These geography-driven outcomes also contravene a primary purpose of ERISA: to minimize administrative and financial burdens on employers by allowing them to offer and administer nationwide benefits plans in a standardized manner. *See, e.g.*, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987) (noting that "the most efficient way" an employer can meet his ERISA responsibilities "is to establish a uniform administrative scheme"); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 105 (1983) (purpose of ERISA preemption was to "minimize . . . interference with the administration of employee benefit plans," to avoid employers "administer[ing] their plans differently in each State in which they have employees"). Simply put, employers with operations in multiple federal jurisdictions cannot, with any degree of predictability or consistency, consolidate and administer retiree benefits plans given the disparate state of the law.

The problems discussed above are exemplified by Whirlpool's experience with retiree benefits litigation. As a result of its purchase of Maytag Corporation in 2006 and its subsequent efforts to harmonize retiree benefits plans, Whirlpool has faced the threat of two lawsuits: *Maytag Corp. v. UAW*, 687 F.3d 1076 (8th Cir. 2012); *Zino v. Whirlpool Corp.*, 2013 U.S. Dist. LEXIS 121750 (N.D. Ohio Aug. 27, 2013). Although both of these cases addressed an

identical issue (i.e. whether a labor agreement promised retirees lifetime, unalterable benefits), the outcome of each case has been–and will be–largely dependent on the law of the jurisdiction in which it was filed.[12]

In *Maytag*, the Eighth Circuit held that retiree benefits had not vested, reasoning, in part that a history of bargained changes to existing retiree benefits and an unambiguous reservations of rights clause in a plan SPD trumped negotiated plan language stating that a pensioner's healthcare benefits "shall continue . . . during his life." 687 F.3d at 1085. In *Zino*, however, the Northern District of Ohio (applying Sixth Circuit law) concluded that a virtually identical reservation-of-rights clause in an SPD carried no such force, even where the negotiated plans at issue contained no durational language, much less any "lifetime" language. *Zino*, 2013 U.S. Dist. LEXIS 121750, at *67-74. In *Maytag*, the Eighth Circuit did not consider relevant the fact that eligibility for retiree healthcare benefits was linked to pension benefits. 687 F.3d at 1085. In *Zino*, the district court judge, based on her reading of Sixth Circuit precedent, determined tying benefits eligibility to pension eligibility served as evidence of vesting. *Zino*, 2013 U.S. Dist. LEXIS 121750, at *39-41.

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12. In November 2013, the parties held Phase I of a bifurcated trial in the *Zino* case, which addressed whether the retirees' benefits had vested for life (i.e. durational vesting). To date, the district court has yet to issue its ruling on Phase I, and the parties have not yet tried Phase II, which will address (to the extent a Phase II trial is necessary) whether the retirees' benefits vested at specific levels. *See also Sloan v. BorgWarner, Inc.*, 2014 U.S. Dist. LEXIS 24856, at *2 (W.D. Mich. Feb. 27, 2014) (adopting the bifurcated trial approach).

As a comparison of the *Maytag* and *Zino* cases illustrates, there exists virtually no uniformity among the federal appellate courts as to what vesting standard and what interpretative tools to apply when evaluating whether a collective bargaining agreement waives the employer's ERISA rights to modify or terminate healthcare benefits or, in other words, vests such benefits for retirees. This state of affairs undermines national labor policy, which directs the courts to fashion a uniform and consistent body of law to apply to labor-related disputes. *See Lingle*, 486 U.S. at 404. As such, it is crucial the Court apply its prior precedent and adopt the clear and unmistakable waiver standard for ERISA retiree benefit claims (or, in the alternative, adopt a clear and express vesting standard). Not only does this standard comport with federal labor policy, it also establishes a bright-line test that will curb inconsistent outcomes and lead to predictability in the arena of retiree benefits litigation.

II. A "REASONABLE SUGGESTION" OR "REASONABLY SUSCEPTIBLE" STANDARD IS NOT CONSISTENT WITH NATIONAL LABOR POLICY

Both the Second and Seventh Circuits have adopted standards that require the contract language at issue to "reasonably support" an intent to vest retiree benefits. *See Joyce*, 171 F.3d at 135 ("[We] will not infer a binding obligation to vest benefits absent some language that itself reasonably supports that interpretation."); *Rosetto v. Pabst Brewing Co.*, 217 F.3d 539, 547 (7th Cir. 2000) ("If there is language in the agreement to suggest a grant of lifetime benefits, and the suggestion is not negated by the agreement read as a whole, the plaintiff is entitled to a

trial."). This "reasonable suggestion" standard, however, is simply another way of stating ambiguity is sufficient for vesting and, for the reasons discussed below, this standard would likely result in a continuation of *Yard-Man*. Since this standard is a deviation from the clear and unmistakable waiver standard adopted as a matter of federal common law by the Court, it should be rejected.

A. The "Reasonable Suggestion" Standard Allows For Further Variation & Disarray Among The Courts of Appeal

As noted in part I.D above, not only does the evidentiary standard necessary to show an intent to vest vary across jurisdictions, the contract interpretation methods utilized by the appellate courts to discern an intent to vest also differ, regardless of the standard applied. This lack of uniformity has allowed the appellate courts (primarily the Sixth Circuit) to employ a hodgepodge of interpretative tools and create forced, results-driven rules of contract construction. The adoption of a clear and express waiver standard, however, would eliminate the need for courts to engage in such "interpretive gymnastics" *see Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 307 (7th Cir. 1996), as it would require the labor agreement to contain clear language indicating an employer's intent to waive its ERISA rights and to vest retiree health benefits.

1. The Sixth Circuit's Pension Tying Rule Is Not Indicative Of Vesting

The Sixth Circuit has attempted to bolster its *Yard-Man* inference by holding that "tying" eligibility for retiree health insurance to eligibility for pension benefits

suggests an intent to vest benefits. *See Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir. 1996). This rule is unique to the Sixth Circuit, as other appellate courts have either expressly rejected the concept of tying welfare benefits to the receipt of a pension as indicative of vesting or simply ignored this factor in their vesting analysis. *See, e.g., Joyce*, 171 F.3d at 134 (tying benefits eligibility to pension eligibility could not "reasonably be read as binding [the employer] to vest the benefits at issue"); *John Morrell & Co. v. UFCW*, 37 F.3d 1302, 1307-08 (8th Cir. 1994) (fact that retiree spousal insurance was contingent on selecting a particular type of pension did not indicate an intent to vest).

This rule of construction–concocted out of whole cloth by the Sixth Circuit–in no way reveals a clear and express intent to vest retiree healthcare benefits. As discussed above in Part I.C.1, the tying rule is tantamount to automatic vesting; left unchecked, "tying" could arguably satisfy the "reasonably supports" standard. ERISA, however, intentionally differentiates between welfare benefits and pension benefits for vesting purposes and grants employers the freedom to offer, modify, or terminate welfare benefits for any reason and at any time. *See Curtiss-Wright Corp.*, 514 U.S. at 78. The fact that an employer offers pension-eligible employees the opportunity to continue health insurance benefits into retirement does not override the statutory rights in ERISA, nor does it give rise to a "reasonable suggestion" that an employer relinquished that right. Regardless of the standard adopted, the Court should make clear that the Sixth Circuit's tying analysis does not survive, as it is in plain contravention of the text and purpose of ERISA. *See United Steel, Paper & Forestry, Rubber, Mfg. Energy,*

Allied Indus. & Service Workers Int'l Union, AFL-CIO-CLC v. Kelsey Hayes Co., 750 F.3d 546, 563 (6th Cir. 2014) (Sutton, J., dissenting) (questioning whether Sixth Circuit's tying analysis and analogy between pensions and retiree healthcare benefits was "a good idea in the first place").

2. The Sixth Circuit's "Specific v. General" Durational Clause Rule Should Be Rejected

The Sixth Circuit also draws a distinction between specific and general durational clauses, giving effect only to those clauses that expressly extinguish retiree healthcare benefits. *See, e.g.*, *Noe v. PolyOne Corp.*, 520 F.3d 548, 554 (6th Cir. 2008) ("Absent specific durational language referring to retiree benefits themselves, courts have held that the general durational language says nothing about those retiree benefits."); *Maurer*, 212 F.3d at 917-18 (durational clause that explicitly terminated insurance agreement conferring retiree benefits was a "general durational provision [] for the entire agreement" and was not "meant to include retiree benefits"). Applying the Sixth Circuit's rule, a court practically must find anti-vesting language in the agreement, elsewise the language reasonably suggests retiree healthcare benefits are vested. This rule, moreover, in no way aims at discerning the intent of the parties. Rather, it blatantly and one-sidedly rejects a perfectly reasonable interpretation of the impact of durational clauses on retiree benefits.

In stark contrast, both the Court and several Circuits have acknowledged–if not embraced–the default rule that all benefits under a negotiated agreement expire along with the agreement pursuant to its general durational

clause. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991) ("contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement . . ." and an agreement must "provide[] in explicit terms" that "certain benefits continue after the agreement's expiration"); *Joyce*, 171 F.3d at 135 (fact that contract's retiree benefit provisions did not contain specific durational limitations of no import where plaintiff failed to identify language implying vesting); *Baldwin v. Motor Components*, 155 F. App'x 16, 18 (2d Cir. 2005) (agreeing "with the district court's conclusion that the effective dates of the agreements were clear and that, since the [CBAs] had expired, appellee . . . was free to alter the benefits plans at will") (unpublished); *Skinner*, 188 F.3d at 141 (interpreting contract as providing retiree benefits through its expiration date "appears to be the more reasonable [interpretation] in light of the durational provisions in all of the CBAs"); *Int'l Chem. Workers v. PPG Indus.*, 236 F. App'x 789, 793 (3d Cir. 2012) (benefits did not vest where the "CBAs all included termination provisions which provided that the terms of the CBA remained in effect until the expiration of the CBA") (unpublished); *Senn*, 951 F.2d at 816 ("The default rule in this Circuit is that entitlements established by [CBAs] do not survive their expiration or modification . . . the logical interpretation under our rule is that benefits 'will continue' for the duration of the contract."); *Anderson v. Alpha Portland Indus.*, 836 F.2d 1512, 1519 (8th Cir. 1988) ("It would render the durational clauses nugatory to hold that benefits continue for life even though the agreement which provides the benefits expires on a certain date.").

In fact, the Sixth Circuit has adopted the default rule that contractual obligations expire upon the termination of the underlying agreement, but has recognized that

certain obligations may survive termination when a labor agreement expressly and unambiguously provides a lifetime guarantee. *See Heheman v. E.W. Scripps Co.*, 661 F.2d 1115, 1121 (6th Cir. 1981) (provision that explicitly guaranteed employment "for the remainder of [employees'] working lives" survived expired CBAs); *see also Int'l Bhd. of Teamsters, Local 1199 v. Pepsi-Cola Gen. Bottlers, Inc.*, 958 F.2d 1331, 1334 (6th Cir. 1992) ("Generally, an employer's contractual obligations under a [CBA] cease upon termination of the agreement . . . *rights may survive the expiration of the collective bargaining agreement if the agreement provides in explicit terms that certain benefits continue after the agreement's expiration.*") (emphasis added). The Sixth Circuit, however, inexplicably and unjustifiably failed to apply this default rule to retiree benefits.

The Sixth Circuit's rule differentiating between specific versus general durational clauses should be rejected. Once again, the Sixth Circuit has devised a minority rule of construction specific to retiree benefits vesting that is at odds with its own precedent and with the common law of labor agreements developed by the Court.

3. Various Sixth Circuit Panels Have Inconsistently Applied *Yard-Man*

In applying its contract interpretation principles, the Sixth Circuit has been anything but consistent. The Sixth Circuit was forced, several years after issuing *Yard-Man*, to clarify that it did not create a presumption, but merely an inference. *Compare UAW v. BVR Liquidating, Inc.*, 190 F.3d 768, 772-73 (6th Cir. 1999) (*Yard-Man* principles are a "presumption" in favor of vesting) *with Maurer*, 212

F.3d at 917 (*Yard-Man* is not a legal presumption) *and Reese*, 574 F.3d at 321 (*Yard-Man* is a "nudge" or "thumb on the scales"). In application, this is pure semantics. Notwithstanding the Sixth Circuit's assurances to the contrary, *Yard-Man* effectively shifts the burden of proof to the employer. If vesting can be inferred despite contractual silence as to duration, the employer must essentially prove a negative–namely, its intent *not* to vest benefits for life and at unalterable levels. *See Noe*, 520 F.3d at 568 (Sutton, J., dissenting) (*Yard-Man* has "become a clear-statement rule. Unless a company can point to explicit language in the relevant agreement stating that 'retiree benefits' terminate at a particular date or do not vest, the benefits seem to vest as a matter of law. What we continually disclaim presuming we continually seem to presume.").

Furthermore, although *Yard-Man* cautioned against interpreting contracts so as to render any promise to provide retiree benefits "illusory," the Sixth Circuit has since held that express reservations-of-rights clauses allowing the termination or modification of retiree benefits in collectively-bargained health plans have no such "illusory" effect. *Compare Yard-Man*, 716 F.2d at 1480 (interpretation that retiree benefits expired with agreement rendered benefit for certain employees "illusory") *with Witmer*, 694 F.3d at 775-76 (no vesting where plan contained both reservation of rights language and a promise to provide retiree benefits) *and Maurer*, 212 F.3d at 919 (promise to provide retiree benefits circumscribed by reservation of rights clause in plan SPD).

B. The Clear & Express Standard Lends Clarity To Vesting Law & Should Be Adopted

As the above cases demonstrate, adoption of a "reasonably susceptible" or "reasonable suggestion" standard would not remedy the confusion and inconsistency surrounding vesting law. This standard is simply too vague to provide adequate guidance to the parties (either union or employer) as to the contract language sufficient to waive ERISA rights and convey an intent to vest retiree benefits. Ultimately, such a standard would allow the Sixth Circuit to continue to apply results-driven contract interpretation methods under the guise that the labor agreement contained language "reasonably suggestive" of vesting. It is thus critical to the national policy embodied in ERISA and to the development of a consistent federal common law that this Court apply the clear and unmistakable waiver standard to retiree welfare benefits, or alternatively adopt the Third Circuit's clear and express vesting standard.[13]

C. Analysis of Extrinsic Evidence Should Be Subject To A Clear, Express, & Unmistakable Standard

Amici recognize the (rare) possibility that contract language may contain a latent ambiguity as to whether an employer has clearly, expressly, and unmistakably agreed to waive its ERISA termination and modification rights and thereby vest retiree benefits, thus necessitating

13. As noted above, an explicit reservation of these ERISA rights is unnecessary, as rights created by statute need not be embodied in an agreement. *See Timken,* 325 F.2d at 751.

resort to extrinsic evidence. *See, e.g.*, *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 784-85 (7th Cir. 2005) (finding ambiguity as to vesting in light of "lifetime" language present in three separate plan documents); *Diehl*, 102 F.3d at 306 (agreement stated retirees "entitled [to health benefits] for the lifetime of the pensioner"); *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 98 (2d Cir. 2001) (references to "lifetime" life insurance benefits in early retirement plans were "ambiguous and susceptible to interpretation as a promise of vested benefits"). *Cf. Skinner*, 188 F.3d at 142 (providing, in dicta, examples of contract language that could clearly and expressly indicate vesting, including statements such as "retiree benefits 'will continue for the life of the retiree' or that they 'shall remain unalterable for the life of the retiree'").

This Court should instruct that when a court looks outside the collective bargaining agreement, the clear and express standard remains applicable. Thus, like the contract language, the extrinsic evidence also must establish that the employer clearly and unmistakably relinquished its right to terminate or modify such benefits and intended to vest retiree benefits. *Cf. Local Union 36, IBEW v. NLRB*, 706 F.3d 73, 84 (2d Cir. 2013) (extrinsic evidence must establish clear and unmistakable waiver of statutory right); *OCAW, Local 1-547 v. NLRB*, 842 F.2d 1141, 1143 (9th Cir. 1988) (same). Thus, when the extrinsic evidence points in both directions, the clear and unmistakable waiver standard has not been met.

Under the current state of the law, once a written agreement has been deemed ambiguous as to vesting, the federal courts have turned to a host of factors to determine whether the parties intended that retiree

benefits would survive termination of the applicable labor agreement. Extrinsic evidence of intent to vest includes, for example, evidence of past changes to retiree benefits; representations in summary plan descriptions and other participant notices and communications; contract proposals and offers; negotiations minutes; and testimony from company and union bargaining representatives. [14] *See generally Zino*, 2013 U.S. Dist. LEXIS 121750; *Bender v. Newell Window Furnishings, Inc.*, 681 F.3d 253, 267-68 (6th Cir. 2012) (summarizing extrinsic evidence considered). Such evidence, taken together, must reveal a clear and unmistakable waiver of the employer's right to change or discontinue benefits.

Adoption of a clear and unmistakable waiver or clear and express vesting standard will greatly reduce the need for extrinsic evidence. This, in practice, makes sense. The reality in the Midwest is that plants, and for that matter, entire corporations have ceased to exist. On the other

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14. This last category of extrinsic evidence–oral testimony–warrants further discussion. ERISA requires "every employee benefit plan . . . be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). Oftentimes in retiree vesting cases, witness testimony aims to interpret or otherwise explain the terms of a written benefit plan, based on the parties' contemporaneous oral representations and negotiations. Such testimony should be accorded little weight, as oral assurances and other extra-plan promises carry little weight in ERISA cases and cannot alter the written terms of a plan. *See, e.g., Mello v. Sara Lee Corp.*, 431 F.3d 440, 447 n.6 (5th Cir. 2005); *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 58 F.3d 896, 902 (3d Cir. 1995) (right to vested retiree benefits must be stated in clear and express language and "[t]he written terms of the plan documents control and cannot be modified or superseded by . . . oral undertakings").

side of the ledger, local unions and international unions have ceased to exist. The task of finding negotiations minutes, contract proposals, plans, SPDs, participant communications, enrollment forms (all dating back decades) and then locating witnesses with knowledge is Herculean, but more frequently akin to Sisyphean. *See, e.g.*, *Bender*, 681 F.3d at 257 (former UAW Local 797 plant owned by Kirsh Company, then by a division of Cooper Industries, then by Newell); *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064, 1069 (6th Cir. 2008).(plants spun-off by Rockwell as Meritor Auto; Meritor merged with Arvin Industries); *Yolton*, 435 F.3d at 574 (JI Case, which became subsidiary of Tenneco, then spun-off as Case Equipment now known as CNH America; remainder of Tenneco merged with El Paso Natural Gas); *McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417, 419 (6th Cir. 2004) (plant owned by Rockwell International, Cambridge Industries, and Meridian).

The record at Hoover is similarly tortured. Hoover was purchased by Chicago Pacific Railroad in 1985 and then by Maytag in 1989. In 2006, Whirlpool purchased Maytag and then sold Hoover to TTI in 2007. In 2011, after Whirlpool announced its intention to harmonize the Hoover retirees' benefits with its own existing benefit plans, litigation commenced. Whirlpool thus had to locate documents covering a bargaining relationship of nearly 30 years, during which time three separate companies owned and operated Hoover. It goes without saying that the retention of documentary evidence over such an extended period of time in light of corporate reorganizations was of paramount concern. Adoption of a clear and unmistakable waiver standard will decrease–if not eliminate–the need to locate and review years upon years of documentary evidence or to tap into faded witness memories.

CONCLUSION

For all the above reasons, Whirlpool respectfully requests the Court reverse the Sixth Circuit's decision in *Tackett v. M&G Polymers USA, LLC* and find that a clear, express, and unmistakable standard applies to an employer's agreement via collective bargaining to waive its ERISA-conferred rights to modify and terminate welfare benefit plans and to vest retiree healthcare benefits for a retiree's lifetime at fixed, unalterable levels.

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EXHIBIT

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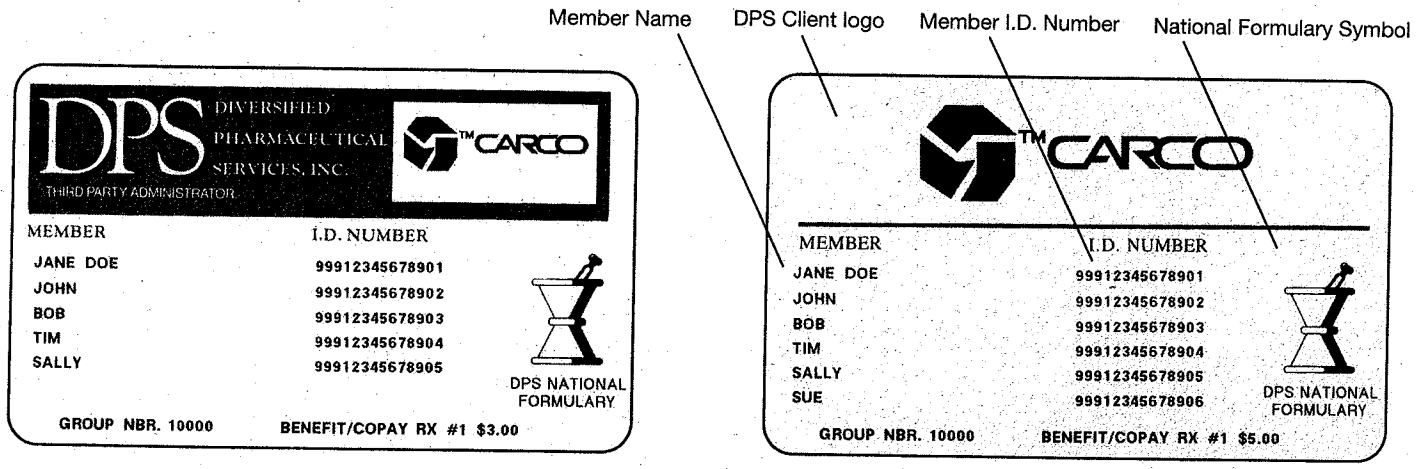

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Doryx	**doxycycline**
Duricef	**cephalexin HCl**
E-Mycin 333	**EryTab 333**
Epo	**Procrit**
Fioricet	**Esgic**
Hismanal	**Seldane**
Imodium	**Imodium A/D (otc)**
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Keftab	**cephalexin HCl**
Kerlone	**atenolol**
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Micronase	**Diabeta**
Minitran	**Nitro-Dur**
Minitran	**Transderm-Nitro**
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Nitrodisc	**Transderm-Nitro**
Norinyl	**Ortho-Novum**
Normodyne	**Trandate**
Noroxin	**Cipro, Floxin**
Pepcid	**Zantac, Tagamet**
Prenate-90	**Zenate, Materna**
Proventil	**Ventolin**
Questran bars	**Questran bulk**
Questran packets	**Questran bulk**
Stuartnatal 1+1	**Zenate, Materna**
Sumycin tablets	**tetracycline caps**
Tenex	**Wytensin**
Tofranil PM	**imipramine HCl**
Trilevlen	**Triphasil**
Trinalin	**Tavist-D**
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$	*Eryc	$$$	Ceftin
$	*Erytab	$$$	Furadantin
$	*Erythrocin	$$$	Macrodantin
$	Gantrisin	$$$	PCE
$	*Keflex	$$$	Suprax
$	*penicillin VK	$$$$	Ceclor susp.
$	*Septra	$$$$	Cipro
$	*tetracycline	$$$$	Floxin
$	*trimethoprim	$$$$	Minocin
$	*Vibramycin		

ANTIULCER DRUGS

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$$$$	Tagamet	$$$$$	Prilosec

ANTIHISTAMINES

$	*Atarax	$$	Polaramine
$	*Benadryl	$$$	*PBZ, SR
$	*Periactin	$$$$	Seldane
$	*Phenergan	$$$$	Tavist
$	*Vistaril		

ANTIHISTAMINE/DECONGESTANTS

$$	Bromfed, PD	$$$	Rondec, TR
$$	Nolamine	$$$$	Tavist-D
$$$	Kronofed-A Jr	$$$$	Seldane-D

DECONGESTANTS

$$	*Entex LA	$$	Entex

ORAL ANTIFUNGALS

$	*nystatin	$$$$	Nizoral
$$	Grifulvin	$$$$$	Diflucan
$$	Mycelex troche		

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$$$	Lotensin	$$$$$	Capoten
$$$	Monopril	$$$$$	Vasotec

BETA BLOCKERS

$	Blocadren	$$	Trandate
$	*Inderal	$$$	Visken
$$	Inderal LA	$$$$	*Tenormin
$$	Lopressor	$$$$$	Corgard
$$	Sectral		

CALCIUM BLOCKERS

$	*Calan, Isoptin	$$$	Cardene
$$	Calan SR	$$$	Cardizem, SR, CD
$$	Dynacirc	$$$	*Procardia, Adalat
$$	Verelan	$$$$	Procardia XL

ANTILIPEMICS

$	*Atromid-S	$$$$	Pravachol
$	Nicobid (otc)	$$$$	Questran
$$$	Colestid	$$$$	Questran Light
$$$	Lorelco	$$$$$	Mevacor
$$$$	Lopid		

BETA-AGONISTS

$	*Alupent tabs, syrup	$$$	Maxair
$	*Metaprel tabs, syrup	$$$	Metaprel inhalers
$$	*Proventil tabs	$$$	Proventil repetabs
$$	*Ventolin tabs	$$$	Ventolin inhalers
$$$	Brethaire	$$$	Ventolin soln, syrup
$$$	Brethine		

ORAL HYPOGLYCEMICS

$	*Diabinese	$$$	Diabeta
$	*Orinase	$$$	Tolinase
$$	Dymelor	$$$$	Glucotrol

NSAIDS

$	*ibuprofen	$$	Voltaren
$	*Indocin, SR	$$$	Anaprox, DS
$$	*Clinoril	$$$	Ansaid
$$	Children's Advil	$$$	Naprosyn
$$	*Meclomen	$$$	Orudis
$$	Pediaprofen	$$$	Tolectin, DS
$$	Relafen	$$$$	Lodine

ORAL CONTRACEPTIVES

For patients with OC coverage, the following are included in the formulary:

$	Lo/Ovral	$$$$	Loestrin
$	Modicon	$$$$	Norlestrin
$	Nordette	$$$$	Ovcon
$	Ortho Novum (All)	$$$$	Ovulen
$	Trinorinyl	$$$$$	Enovid
$	Triphasil	$$$$$	Ovral
$$	Demulen		

ESTROGENS

$$	Premarin	$$$	Ogen
$$$	Estrace	$$$$	Estraderm

VAGINAL ANTIFUNGALS

$	*nystatin	$$$	Monistat-3, Dual
$$	Gyne-Lotrimin (otc)	$$$	Mycelex-G
$$	Monistat-7 (otc)	$$$	Terazol
$$$	Femstat		

NASAL CORTICOSTEROIDS

$$	Nasacort	$$$	Beconase, AQ
$$	Nasalide	$$$$	Decadron Turbinaire

KEY:
$ = Relative cost index
* = Generic available
otc = Available without a prescription

Date: 4-01-92