

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 Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit*

BRIEF IN OPPOSITION

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**COUNTERSTATEMENT OF QUESTIONS
PRESENTED**

In this LMRA/ERISA CBA-breach and enforcement action brought by retirees, spouses, and the retirees' labor union against the successor, M&G, to the retirees' former employer,

where the Sixth Circuit and the District Court held that contractually promised benefits were vested following a trial on the merits,

WHETHER this Court should decline review of the Sixth Circuit decision enforcing those contractual promises because:

1. The Sixth Circuit applied traditional contract interpretation rules to a fact-specific CBA dispute which is of interest only to the litigants and is grounded on a trial record that contained no error, and
2. with minor variations in approach, all circuits hold that LMRA/ERISA cases are governed by traditional contract interpretation rules applied to particular circumstances, and
3. the Sixth Circuit decision does not address any "important federal question" or depart from the "accepted and usual course of judicial proceedings;" is not in conflict with any legal question decided by this Court or any other circuits; does not call for the exercise of this Court's supervisory power; and otherwise does not present any question warranting this Court's review.

PARTIES TO THE PROCEEDING

Respondents are retirees Hobert Freel Tackett, Woodrow W. Pyles, and Harlan B. Conley, on behalf of themselves and all other similarly situated persons in the Class (consisting of nearly 500 people who retired from M&G or one of its predecessors, Goodyear or Shell Chemical, and the retirees' eligible family members), and Plaintiff United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("USW").

Except where distinctions are necessary, we refer to all respondents as "**plaintiffs**" and to the retirees and spouses collectively as "**retirees.**" We refer to USW and its predecessors as the "**union.**"

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner M&G seeks certiorari to resolve a fact-based trial decision in a case where the employer's effective elimination of health benefits for hundreds of retirees and their dependents was determined following a bench-trial to violate the collective bargaining agreements (CBAs) which governed. Resp. App. 1.¹ Plaintiffs prevailed following the six-day bench trial, where they proved the retiree health benefits are vested for life. Defendants appealed a judgment and permanent injunction ordering M&G to provide the retiree benefits to Class Members. Pet. App. 25.² The Sixth Circuit affirmed the trial decision. Pet. App. 23.

Now, M&G in effect fabricates a circuit split to convince this Court to intervene in this quotidian matter of contract enforcement. M&G's argument failed to convince the trial court. M&G's argument failed to convince the appellate court. M&G is a party to contracts that obligate M&G to provide lifetime benefits to retirees and their eligible dependents. This is ordinary contract enforcement, and while M&G veils its request as resolution of a circuit split, what M&G actually seeks is release from a contract. This case presents no "erroneous factual findings or . . . misapplication of a properly stated rule of law," and thus is not worthy of review according to Sup. Ct. R. 10.

¹ "Resp. App." refers to the appendix to the brief in opposition in No. 13-1010.

² "Pet. App." refers to the appendix to the petition for certiorari in No. 13-1010.

Here, even if M&G were able to identify any “erroneous factual findings” or “misapplication” of any “rule of law”—which M&G does not and cannot do—any such “errors” and “misapplications” are fact-specific, solely of consequence to the parties’ unique dispute, and “outside the mainstream of the court’s functions.” See E. Gressman, *et al. Supreme Court Practice* (9th ed. 2007) § 5.12(c)(3) at 351.

At trial, two M&G witnesses provided “dubious testimony” that “wholly lacked veracity” in an attempt to persuade the court. Resp. App. 32-34, 40. The District Court determined that no side letters capping M&G’s liability applied and that benefits were vested for life, a finding that stands as an issue of fact, reviewable only for clear error. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). The District Court did not err in its determination in this matter, nor did the Sixth Circuit in affirming that holding. In sum, there is no inconsistency between the Sixth Circuit decision and standing precedent, nor anything in the Sixth Circuit’s application of traditional contract interpretation rules that warrants this Court’s review of this garden-variety, fact-specific, contract dispute.

M&G’s petition for certiorari should be denied. This case presents no important or recurring issues of federal law and is not worthy of review under Sup. Ct. R. 10. This is a fact-specific dispute, resolved at trial and affirmed on appeal, and the decisions of the trial court and the Sixth Circuit should remain.

COUNTERSTATEMENT OF THE CASE

M&G purchased a polyester resin facility in Point Pleasant, West Virginia in 2000. Pet. App. 34. Workers at Point Pleasant have historically been represented by Local 644, now part of the USW. *Id.*, 32-34. At the heart of this case are collectively bargained promises of retirement healthcare that M&G asserted it had the right to unilaterally limit, with cost-sharing assigned to Retirees. Following trial, the Court found the healthcare benefits had vested for life and were not subject to cost-sharing. Resp. App. 32-42.

Benefits vested according to the terms of a contractually bargained Pension & Insurance (P&I) Agreement. The 1991 P&I booklet that controlled benefits in Point Pleasant had clear vesting language for retiree health benefits. In 1994, the P&I booklet adopted in Point Pleasant contained new vesting language regarding retiree health benefits, which promised a “full company contribution” for healthcare to persons receiving a monthly pension. Resp. App. 4. The 1997 and 2000 P&I Agreements contained identical vesting language. Resp. App. 4.

Several years later, in 2005, M&G and the USW reached an agreement that established caps on M&G’s contribution toward the costs of **future** retirees’ healthcare premiums. Resp. App. 36-38. The benefits for retirees who retired after August 9, 2005 are no longer at issue. In 2007, M&G began to implement caps on retiree benefits for **all** hourly retirees, shifting substantial monthly costs for healthcare to Class Members. Resp. App. 12-14. M&G terminated healthcare coverage for those Class Members unable to

pay the substantial added costs; other retirees dropped coverage due to the substantial costs.

District Court Decisions At Issue.

A. The Liability Decision.

Following a six-day bench trial, the District Court determined the retiree health benefits to be lifetime, vested benefits, without retiree contribution. Resp. App. 26-33. The Court found the contractual “linking of eligibility for healthcare benefits to pension benefits indicates the parties’ intent that healthcare benefits vested upon retirement.” *Id.* at 30-31.

The District Court next analyzed the evidence presented by each witness, *determined their credibility* (Resp. App. 11-25), and concluded that prior to 2005, cap letters limiting M&G’s liability for healthcare **never** formed a part of the M&G — USW contracts:

On one side, **Defendants have presented largely dubious testimony** On the other side, **Plaintiffs have presented notably more compelling evidence** that Defendants have engaged in after-the-fact company scrambling to find a way to impose unilaterally application of cap letters as a cost-savings measure that defies the agreements the caps puncture.

[T]he intent and effect of the applicable operative documents governing Subclasses One through Four present a lifetime benefits scheme for qualifying retirees and beneficiaries without the cost-sharing Defendants wrongly imposed.

Id. at 32-33 (emphasis added).

The District Court rejected key M&G testimony as “simply not credible” *Id.* at 38-39. In contrast, the Court found credible the testimony of Plaintiffs’ key witnesses. Resp. App. 39. Importantly, the Court’s final conclusion rejected M&G’s position, and found:

Plaintiffs have presented ample evidence involving M&G’s counsel, actuaries, and human resources personnel that no one thought that there was a cost-sharing plan in place for Apple Grove retirees for years until it became advantageous to the company Those who testified supporting cap letter applicability wholly lacked veracity.

Id. at 40 (emphasis added).

B. The Injunction Decision.

Following the trial determination, the District Court granted a permanent injunction, restoring the Class Members to their respective Plans, and requiring a cessation of contributions. Pet. App. 25. The injunction decision incorporated the liability decision, and emphasized key factual findings, including credibility determinations.

ARGUMENT

I. M&G's Arguments For Certiorari Lack Merit.

M&G attempts to obscure the clear factual record in this matter under the guise of a non-existent circuit conflict. This is an ordinary matter of contract enforcement.

A. The Sixth Circuit Does Not Apply Presumptions In LMRA/ERISA Retirement Healthcare Cases.

M&G's argument rests on the premise that the Sixth Circuit is unable to distinguish between an "inference" and a "presumption." M&G suggests that the multiple Sixth Circuit panels making this distinction—applying an inference when factually warranted and *never* applying a presumption—are not to be taken at their word.

1. An Inference And A Presumption Are Not Equivalent.

To foster its false premise, M&G repeatedly confuses the existence of a presumption with that of an inference, and apparently believes that repetition of the word "presumption" in its petition somehow will change the Sixth Circuit standard. M&G asserts that plaintiffs "who would lose in most jurisdictions can prevail if they are fortuitous enough to have at least one retiree member of their putative class living in Michigan, Ohio, or Kentucky." Petition at 7. This is hyperbole, and it ignores the Sixth Circuit cases holding that specific contractual terms demonstrate the

parties' intent to vest retiree healthcare.³ It also

³ Many cases listed decided by the Sixth Circuit find vested benefits based on specific CBA terms. See, e.g., (1) *Bender v. Newell Window Furnishings, Inc.*, 681 F.3d 253, 262 (6th Cir. 2012), cert. denied 133 S.Ct. 436 (2012) (the CBAs “specifically stated that ‘[t]he Company agree[d] to pay the cost of such insurance for the retiree and his dependents’”); (2) *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064, 1070 (6th Cir. 2008) (healthcare at the “time of retirement...shall be continued thereafter”); (3) *McCoy v. Meridian Automotive Systems, Inc.*, 390 F.3d 417, 419 (6th Cir. 2004) (“coverages an employee has...at the time of retirement...shall be continued thereafter”); (4) *Maurer v. Joy Technologies, Inc.*, 212 F.3d 907, 912 (6th Cir. 2000) (“For pensioners and spouses under age 65, the retiree Group Insurance Program...will remain in effect”); (5) *Golden v. Kelsey-Hayes Co.*, 845 F.Supp. 410 (E.D. Mich. 1994), aff’d. 73 F.3d 648 (6th Cir. 1996), cert. denied 519 U.S. 807 (1996), and 954 F.Supp. 1173, 1178 (E.D. Mich. 1997) (the company “shall contribute the full premium” for the “health care coverages” an employee has “at the time of retirement” and those coverages “shall be continued thereafter”); (6) *Smith v. ABS Industries, Inc.*, 890 F.2d 841, 843 (6th Cir. 1989), reh. denied (6th Cir. 1990) (healthcare “[b]enefits will continue for retirees”); (7) *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 611, 615 (6th Cir. 1985), cert denied 475 U.S. 1017 (1986) (“hospitalization and surgical benefits for the pensioner and his spouse...during the life of the pensioner at no cost to the pensioner”); (8) *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 674-675 (6th Cir. 1985) (“the four corners of the” CBA provide that retiree benefits “shall continue” “so long as such Employees are, in fact, retired and remain unemployed”).

Other cases find vesting promises in contractual context. See, e.g., (1) *Noe v. PolyOne Corp.*, 520 F.3d 548, 558-560 (6th Cir. 2008) (benefits from age 65 “until the individual’s death,” lifetime “special” Medicare payments, and CBA terms which “tie eligibility for retiree health benefits directly to eligibility for pension benefits”); (2) *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 584-585 (6th Cir. 2006), cert. denied 549 U.S. 1019 (2006) (“the district court correctly interpreted the plain language of the CBAs

ignores the reality that *in this case*, following a six-day trial, the fact-finder (1) found that M&G's witnesses lacked any credibility and (2) concluded that Plaintiffs had proven that lifetime, vested benefits were promised. Resp. App. 32-34, 40.

2. The Vesting Language Present Here Has Long Been Acknowledged To Solidify Lifetime, Vested Healthcare Benefits.

Additionally, in the face of strikingly similar language to that seen here and in contracts throughout the rubber industry, the Sixth Circuit long ago affirmed that such language created vested, lifetime benefits. In *UAW v. Loral*, nearly identical language was examined by the Sixth Circuit and found to provide lifetime, vested benefits. The *Loral* language stated that “Employees who retire . . . eligible . . . for a pension . . . shall receive the . . . benefits described in this Section B” *UAW v. Loral*, 873 F.Supp. 57, 63-64 (N.D. Ohio 1994), later decision, 873 F.Supp. 66 (N.D. Ohio 1995), *aff'd*, 1997 U.S. App. LEXIS 2118 (6th Cir. 1997). This language is nearly identical to the vesting language of the P&I Agreements, was found to create

and Group Insurance Plans as well as the agreement as a whole. The language tying health care benefits to pension benefits and the context of the bargaining demonstrate an intent to provide lifetime benefits”); (3) *UAW v. Cadillac Malleable Iron Co., Inc.*, 728 F.2d 807, 809 (6th Cir. 1984) (“On the basis of the entire record the district court concluded that the plaintiffs had established that it was the intent of the parties that these rights not be affected by the expiration of the collective bargaining agreements which created them, confirmed them and often improved the benefits of already retired employees.”).

vested benefits, and supports the conclusion of the District Court in this action. See *Id.*, see also *Noe v. PolyOne Corp.*, 520 F.3d 548, 562 (6th Cir. 2008). Indeed, *Loral* was decided at summary judgment, and had strikingly similar vesting language. Even had a trial on the merits not been conducted in this matter, the contract language supports a finding in favor of retirees.

3. The Enforcement Of Contractual Promises Results In No Detriment.

M&G argues that there is a “presumption” creating a “tilted” playing field in the Sixth Circuit, to “the detriment of workers and the economy, too.” Petition at 12, 25. In fact, the Sixth Circuit decisions demonstrate that retiree successes are not guaranteed, and no presumption plays a role in their outcome. Nowhere, in the Sixth Circuit or elsewhere, does a LMRA Section 301 case alter traditional evidentiary standards or otherwise shift the burden to a defendant. M&G does not identify a single case in which a court imposed any such requirement. LMRA/ERISA cases are hard-fought, vigorously defended, and decided on the evidence; typically in detailed, reasoned, well-documented, fact-specific, presumption-free decisions, informed by traditional contract-interpretation rules, refined by 30-plus years of nuanced, Sixth Circuit jurisprudence, and *proof*. Here, the proof was presented during a lengthy trial in which the fact-finder was convinced that benefits were vested for life—no presumption was applied to reach that result.

4. The Sixth Circuit Has Repeatedly Rejected A Presumption In Favor Of Vesting.

M&G cites to Judge Sutton, dissenting in *Noe v. Polyone Corp.*, 520 F.3d 548, 568, for the premise that a presumption in favor of vesting exists. Petition at 10-11. But even Judge Sutton, in an opinion that followed *Noe*, wrote for a majority that LMRA/ERISA retiree healthcare cases are decided on “ordinary principles of contract interpretation.” He explained: “to the extent we put a thumb on the scale in this setting it favors vesting,” but this “nudge” comes *only* in “close cases” *and only* if “we can find either explicit contractual language or extrinsic evidence indicating an intent to vest benefits.” *Reese v. CNH America, LLC*, 574 F.3d 315, 321 (6th Cir. 2009)(citations and internal quotations omitted). He wrote that the “precise weight” of the *Yard-Man* inference is “elusive,” but it is not alone sufficient to find “an intent to create interminable benefits” and it is *not* a “legal presumption that benefits vest.”

The Sixth Circuit has regularly refuted the “presumption” arguments now repeated by M&G. See *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 579 (6th Cir. 2006):

Shortly after [*UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied* 465 U.S. 1007 (1984)], this Court stated that “there is no legal presumption based on the status of retired employees.” *Int’l Union, United Auto. Workers v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 808 (6th Cir. 1984). Moreover, “*Yard-Man* does not shift the burden of proof to the employer, nor

does it require specific anti-vesting language before a court can find that the parties did not intend benefits to vest. Rather, the *Yard-Man* inference, and the other teachings of the opinion regarding contract interpretation and the consideration of extrinsic evidence, simply guide courts faced with the task of discerning the intent of the parties from vague or ambiguous CBAs.” *Golden [v. Kelsey-Hayes Co.]*, 73 F.3d [648,] at 656 [(6th Cir. 1996), *cert. denied* 519 U.S. 807 (1996)].

Yolton observed that the employers “misinterpret the term ‘inference’ and confuse it with a legal presumption” and explained: “Under *Yard-Man* we may *infer* an intent to vest from the context and already sufficient evidence of such intent. Absent such other evidence, we do not start our analysis presuming anything.” *Yolton*, 435 F.3d at 579 (emphasis in original). *Yolton* also quoted *Maurer v. Joy Technologies, Inc.*, 212 F.3d 907, 917 (6th Cir. 2000): “under *Yard-Man*, [t]here is no legal presumption that benefits vest and that the burden of proof rests on plaintiffs.” *Yolton*, 435 F.3d at 580. *Yolton* explains that the inference merely provides “a contextual understanding about the nature of labor-management negotiations over retirement benefits” and states that “[t]his Court has never inferred an intent to vest benefits in the absence of either explicit contractual language or extrinsic evidence indicating such an intent. *Yolton*, 435 F.3d at 580.⁴

⁴ See also: (1) *Bender v. Newell Window Furnishings, Inc.*, 681 F.3d 253, 261 (6th Cir. 2012), *cert. denied* 133 S.Ct. 436 (2012) (“With regard to the ‘*Yard-Man* inference,’ later decisions of this

In sum, the Sixth Circuit has debunked the “presumption” arguments—now repeated by M&G—in *Cadillac Malleable* in 1984, in *Golden* in 1996, in *Maurer* in 2000, in *McCoy* in 2004, in *Yolton* in 2006, in *Noe* and *Cole* in 2008, in *Reese* in 2009, in *Bender* in 2012, and this Court denied *cert* in *Yard-Man*, *Golden*, *Yolton*, and *Bender*. And again, the decision below similarly debunks the “presumption” arguments by applying traditional presumption-free contract interpretation rules. The Sixth Circuit’s record of “never” applying presumptions in LMRA/ERISA retirement healthcare cases is unmarred.

court have clarified that *Yard-Man* does not create a legal presumption that retiree benefits are interminable”); (2) *Reese v. CNH America LLC*, 574 F.3d 315, 321 (6th Cir. 2009)(“we do not apply a ‘legal presumption that benefits vest”); (3) *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064, 1069 (6th Cir. 2008)(“*Yard-Man* does not create a legal presumption that retiree benefits are vested for life”); (4) *Noe v. PolyOne Corp.*, 520 F.3d 548, 552 (6th Cir. 2008) (“*Yard-Man* does not create a legal presumption that retiree benefits are interminable”); (5) *McCoy v. Meridian Automotive Systems, Inc.*, 390 F.3d 417, 422 (6th Cir. 2004)(“While *Yard-Man* recognized an inference that ‘status’ benefits, including retiree benefits, continue as long as the status is maintained, it also noted that such benefits are not necessarily interminable and no federal labor policy establishes a presumption of vesting.”); (6) *Maurer v. Joy Technologies, Inc.*, 212 F.3d 907, 917 (6th Cir. 2000)(“there is no legal presumption that benefits vest”; the “burden of proof rests on plaintiffs”); (7) *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir. 1996), *cert. denied* 519 U.S. 807 (1996)(“shortly after *Yard-Man* this Court stated: ‘there is no legal presumption based on the status of retired employees,’” quoting *Cadillac Malleable*, 728 F.2d at 808); and (8) *Yard-Man*, 716 F.2d at 1482.

B. The Case Is Determined By “Traditional Rules Of Contract Interpretation” And The “Overwhelming” Evidence.

The Sixth Circuit below applied the traditional rules of contract interpretation. The Sixth Circuit noted that welfare benefit plans do “not vest automatically, but only ‘if the parties so intended when they executed the applicable labor agreements.’” *Tackett v. M&G Polymers*, 733 F.3d 589 (6th Cir. 2013), quoting *Noe v. PolyOne Corp.*, 520 F.3d 548, 552 (6th Cir. 2008). Pet. App. 10. The Court noted that it applied “general principles of contract interpretation.” Pet. App. 12.

Any “nudge” that might have been provided by the *Yard-Man* inference is superfluous here. This is not a “close case.” The Sixth Circuit decision is overwhelmingly justified by the evidence presented at trial. Of particular import were the credibility determinations. M&G’s witnesses presented testimony found by the trial court to be “self-serving” and “dubious,” and which “wholly lacked veracity.” Resp. App. 39, 32, 40. In contrast, the evidence presented by Plaintiffs that the parties had intended the healthcare benefits to vest for life was “compelling.” Resp. App. 32.

C. There Is No “Irreconcilable” Conflict Or Legal Inconsistency Between The Sixth Circuit And Other Circuits, All Of Which Apply Traditional Contract Interpretation Rules To Fact-Specific Circumstances To Resolve Retirement Healthcare Disputes.

M&G posits a supposed “irreconcilable” conflict between the Sixth and other circuits in LMRA/ERISA retirement healthcare cases. No such conflict exists. Defendants repeatedly cite to Judge Posner’s *Rossetto* statement that the circuits are “all over the lot.” See *Rossetto v. Pabst Brewing Company*, 217 F.3d 539, 543 (7th Cir. 2000). But Judge Posner got it wrong. *Id.* *Rossetto* cites to *Maurer*, 212 F.3d 907 (6th Cir. 2000), suggesting that the Sixth Circuit applied a presumption of vesting, but *Maurer* states the opposite. In *Maurer*, the employer argued that there was a presumption against vesting. The court plainly stated that while “ERISA does not require vesting of such benefits parties may agree to create and vest them.” *Maurer v. Joy Technologies, Inc.*, 212 F.3d 907, 917 (6th Cir. 2000). *Maurer* did not apply any presumption in favor of vesting, and so Judge Posner missed the mark.

1. This Court Has Repeatedly Rejected Certiorari In These Garden-Variety Contract Interpretation Cases.

This same “conflict” argument was made in the recent *certiorari* petitions in *Bender v. Newell Window Furnishings, Inc.*, 681 F.3d 253 (6th Cir. 2012) and *Moore v. Menasha Corp.*, 690 F.3d 444 (6th Cir. 2012). This Court denied the petitions *sub nom Newell*

Window Furnishings, Inc. v. Bender, 133 S. Ct. 436 (2012) and *Menasha Corp. v. Moore*, 133 S. Ct. 1643 (2013). The “conflict” argument was made in numerous earlier *certiorari* petitions and also rejected.⁵

2. All Circuits Employ Similar Methods When Determining LMRA/ERISA Matters.

Analytical approaches among the circuits vary, but every circuit resolves LMRA/ERISA retirement healthcare cases by applying traditional contract interpretation rules. The circuits all hold that retirement healthcare promises are enforceable under the LMRA, or ERISA, or both. All apply the same core rules: (1) healthcare benefits do not automatically vest⁶; (2) parties to CBAs may nevertheless agree to

⁵ See, e.g., *Rose v. Volvo Const. Equip. N.A., Inc.*, 331 Fed.Appx. 388 (6th Cir. 2009), *cert. denied* 130 S.Ct. 1731 (2010); *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006), *cert. denied* 549 U.S. 1019 (2006); *UAW v. BVR Liquidating, Inc.*, 190 F.3d 768 (6th Cir. 1999), *cert. denied* 529 U.S. 1067 (2000); and *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir.1985), *cert. denied* 475 U.S. 1017 (1986).

⁶ See *Helwig v. Kelsey Hayes, Co.*, 93 F.3d 243, 248 (6th Cir. 1996); *Grain Millers v. International Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997); *Senior v. NSTAR Electric and Gas Corp.*, 449 F.3d 206, 207 (1st Cir. 2006); *UAW v. Skinner Engine Co.*, 188 F.3d 130, 137-138 (3d Cir. 1999); *Machinists v. Masonite Corp.*, 122 F.3d 228, 231 (5th Cir. 1997); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 604-605 (7th Cir. 1993), *cert. denied* 510 U.S. 909 (1993); *Cherry v. Auburn Gear, Inc.*, 441 F.3d 476, 481 (7th Cir. 2006); *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988), *cert. denied* 489 U.S. 1051 (8th Cir. 1989).

vest retirement healthcare⁷; **(3)** basic rules of contractual interpretation apply; **(4)** extrinsic evidence may be used to interpret ambiguous CBAs⁸; **(5)** and plaintiffs have the burden of proof.⁹

The outcomes of these cases invariably depend on the CBA language and, as necessary to resolve contractual ambiguity, on the case-specific extrinsic evidence and admissions showing the intent of the contracting parties. Each circuit applies the traditional interpretation rules to the particular CBA terms and the parties' particular circumstances; no circuit applies

⁷ See *Yard-Man*, 716 F.2d at 1479; *UAW v. Skinner Engine Co.*, 188 F.3d 130, 138 (3d Cir. 1999); *Machinists v. Masonite Corp.*, 122 F.3d 228, 231 (5th Cir. 1997); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607 (7th Cir. 1993), *cert. denied* 510 U.S. 909 (1993); *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988), *cert. denied* 489 U.S. 1051 (8th Cir. 1989).

⁸ See *UAW v. BVR Liquidating, Inc.*, 190 F.3d 768, 772 (6th Cir. 1999), *cert. denied* 529 U.S. 1067 (2000); *UAW v. Skinner Engine Co.*, 188 F.3d 130, 138, 142 (3d Cir. 1999); *Machinists v. Masonite Corp.*, 122 F.3d 228, 233 (5th Cir. 1997); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 608-609 (7th Cir. 1993), *cert. denied* 510 U.S. 909 (1993); *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988), *cert. denied* 489 U.S. 1051 (8th Cir. 1989).

⁹ See *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988), *cert. denied* 489 U.S. 1051 (8th Cir. 1989); *Machinists v. Masonite Corp.*, 122 F.3d 228, 231 (5th Cir. 1997); *Reese v. CNH America, LLC*, 574 F.3d 315, 321 (6th Cir. 2009), *reh'g denied* 583 F.3d 955 (6th Cir. 2009); *In re Unisys Corp. Retiree Medical Ben. ERISA Litigation*, 58 F.3d 896, 902 (3d Cir. 1995); *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 855 (4th Cir. 1994).

an overarching legal rule to resolve fact-specific cases such as this one.

3. Decisions Cited By M&G Point Out That Traditional Rules Of Contract Interpretation Apply.

Indeed, M&G's account of other circuits' decisions reveals that all circuits, like the Sixth, recognize the core task as applying traditional interpretation rules to disputed CBA terms. While some circuits use, and some decline to use, "inferences" and similar analytical devices to interpret CBAs, all require plaintiffs to present CBA terms and, as necessary to resolve ambiguity, extrinsic evidence, to *prove* the contractual intent to vest retiree healthcare. For example, the Seventh Circuit may apply a "presumption against vesting" but "only if all the court has to go on is silence." *Rossetto v. Pabst Brewing Co., Inc.*, 217 F.3d 539, 544 (7th Cir. 2000). This does not materially differ from the Sixth Circuit approach. The Sixth Circuit declines to infer lifetime retirement healthcare where there is CBA silence—*i.e.*, where no "reasonably interpreted" CBA language may promise vesting—and the Sixth Circuit declines to consider extrinsic evidence absent CBA ambiguity. See *Winnett v. Caterpillar, Inc.*, 553 F.3d 1000, 1008-1110 (6th Cir. 2009).

Fourteen years ago, the Third Circuit in *UAW v. Skinner Engine Co.*, 188 F.3d 130, 139-141 (3d Cir. 1999) disagreed with *Yard-Man* in dicta, but there is no substantive conflict between *Skinner* and any Sixth Circuit case. The disagreement is based on the Third Circuit's *mistaken* belief that *Yard-Man* applies a presumption in favor of vesting. 188 F.3d at 140. As noted, before and since *Skinner*, the Sixth Circuit has

made clear that no presumption applies. See *Yolton*, 435 F.3d at 579-580, and the cases cited in Argument Section A.

M&G asserts that the “Eleventh Circuit has also cited *Yard-Man* with approval and expressly adopted its presumption.” Petition at 14 (citing *United Steelworkers of Am v. Connors Steel Co.*, 855 F.2d 1499, 1505). On the contrary, the Eleventh Circuit neither mentioned a presumption, which is non-existent in *Yard-Man*, nor adopted one. And, as with cases from the Sixth Circuit, we search in vain for any evidence that the Eleventh Circuit has altered traditional burdens or applied a legal presumption in retiree healthcare cases. The Eleventh Circuit applied standard rules of interpretation to conclude that a “general termination clause does not support a finding that retiree benefits ended when the agreements expired.” *Connors Steel Co.*, 855 F.2d at 1505.

Dewhurst v. Century Aluminum Co., 649 F.3d 287, 291-292 (4th Cir. 2011), illustrates that the *Yard-Man* inference commonly has no practical impact. *Dewhurst* points out that *Keffer v. H.K. Porter Co.*, 872 F.2d 60 (4th Cir. 1989) was decided on the “specific [CBA] language” and on the “alternative finding that extrinsic evidence supported our conclusion,” making *Keffer*’s favorable reference to *Yard-Man* superfluous, *i.e.*, “not necessary to our holding,” finding vested retirement healthcare. Every case turns on CBA terms, and as necessary to resolve ambiguity, situation-specific extrinsic evidence. Contrary to what M&G suggests, these cases are garden-variety contract cases, not worthy of certiorari.

4. Minor Differences In Approach Between Circuits Are Not Conflicts.

The Sixth and other circuits may display minor differences in approach to the traditional contract interpretation rules. Minor differences, however, are also reflected within circuits from one three-judge panel to another, and even among panel members reaching consensus on results. Various judges use various approaches, but the facts resolve these cases. And all the circuits, and panels and judges in all circuits, apply in substance the rules set out in *Yard-Man* in 1983, repeated in substance in the decision below and in most if not every LMRA/ERISA decision in every circuit. Again, the “court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent” and “may look to other words and phrases in the collective bargaining agreement for guidance,” consider the contractual “context,” “interpret each provision in question as part of the integrated whole” and construe the terms “so as to render none nugatory and avoid illusory promises.” See *Yard-Man*, 716 F.2d at 1479-1480; *Cole*, 549 F.3d at 1069-1070; *Yolton*, 435 F.3d at 579; *Golden*, 73 F.3d at 654-655.

Where CBA terms are ambiguous, the courts ascertain intent from “extrinsic” evidence, like bargaining history, “course of conduct,” and statements, *i.e.*, the parties’ “words and deeds.” Courts

also use “extrinsic” evidence to confirm unambiguous intent.¹⁰

Indeed, M&G’s assertion that the overwhelming evidence in this case would have resulted in a different outcome in another circuit is purely conclusory. No basis exists to conclude the trial court could have reached differing conclusions — the facts compelled the decision. We search in vain for a case, from any circuit, which contains anything near the wealth of evidence supporting the court’s conclusion in this matter and yet reaches a different result. In the end, retirees must prove their cases. Retirees cannot prevail in the Sixth Circuit or anywhere else absent “explicit contractual language or extrinsic evidence” *proving* “an intent to vest.” *Moore v. Menasha Corp.*, 690 F.3d 444, 450 (6th Cir. 2012) (citations and internal quotations omitted). The language in the contracts at issue in this matter demonstrates an intent to vest. If any question of that intent existed, it was resolved at trial where the Plaintiffs presented “compelling” evidence of the intent to vest lifetime healthcare benefits.

¹⁰ See *Cole v. ArvinMeritor, Inc.*, 516 F.Supp.2d 850, 861-864, 871-876 (E.D. Mich. 2005), and 515 F.Supp.2d at 805, *aff’d* 549 F.3d at 1070, 1074-1075 (6th Cir. 2008) (the “shall be continued thereafter” language “creates an unambiguous promise for lifetime healthcare benefits” and alone warrants judgment for the retirees, but also noting that the “extrinsic” evidence “weighs heavily” to confirm that promise); *Golden v. Kelsey-Hayes Co.*, 954 F.Supp. 1173, 1188 (E.D. Mich. 1997) (judgment for retirees based on “express contract language,” confirmed by “extrinsic” evidence); *Moore v. Menasha*, 724 F.Supp.2d 795, 807 (W.D. Mich. 2010) (on “its face” the 1997 CBA “clearly obligates” Menasha to “provide lifetime health insurance benefits to employees who retire” and “the *Yard-Man* inference and extrinsic evidence only strengthen this conclusion”).

In sum, there is no “irreconcilable conflict” among the circuits. Indeed, the outcome in this case would have been the same in any circuit based on the undisputed and overwhelming evidence *proving* that M&G’s predecessors *promised* lifetime company-paid retirement healthcare for their retirees. There is no legal inconsistency among the circuits that merits this Court’s review.

II. Both Contractually Bargained Benefits And Standard ERISA Plans Are Determined According To Standard Rules Of Contractual Interpretation, But The Context For Interpretation Is Markedly Different.

Both standard ERISA plans and contractually bargained plans are interpreted in accordance with traditional rules of contract interpretation. But with standard ERISA plans, a plan is created according to a company’s wishes, and is subject to unilateral changes by that company. In that setting, logic demands that a plan would favor a company rather than plan participants in regard to vesting, for the employees and plan participants had no input in the creation of the benefit plan: the employer had all the control.

The same is not true in the context of collectively bargained benefits. M&G suggests that collective bargaining and the provision of benefits in accordance with CBAs is “simple,” when it is anything but. When benefits have been collectively bargained, parties bargain for benefits that will be fixed, rather than malleable. See *Int’l Union v. Yard-Man*, 716 F.2d 1476, 1482 (6th Cir. 1983). Union negotiators, knowing they themselves would become retirees, would not be willing

to allow their benefits, as included in a CBA, to be subject to the contingencies of future negotiations. *Id.*

In contrast, non-unionized, employees-at-will are subject to an even more unpredictable reality: the contingencies of employers' generosity. At-will employees are without the same ability to bargain their own retiree health benefit package. M&G's argument in this context does not outline a conflict in vesting interpretation. Because a package of ERISA benefits that was not collectively bargained is declared according to the wishes of the employer and that employer alone, the task of interpretation is simple in comparison to interpretation of vesting clauses within CBAs. In neither case does the Sixth Circuit apply a presumption. See *Maurer v. Joy Technologies, Inc.*, 212 F.3d 907, 917 (6th Cir. 2000) ("ERISA does not require vesting of such benefits, parties may agree to create and vest them.").

III. Regardless Of The Legal Standards Applied, M&G Cannot Overcome The Substantial Findings Of Fact Which Undermine Its Case, And Therefore M&G's Petition For Certiorari Is Futile.

The trial court decided this case based on facts and evidence, and the Sixth Circuit affirmed. No presumptions of law formed any basis for the decisions, nor does this case present a circuit split or an important matter of federal law. The trial court in this matter assessed all evidence, and applying no presumptions, found that Plaintiffs presented "compelling evidence that Defendants have engaged in after-the-fact company scrambling to find a way to

impose unilaterally application of cap letters as a cost-savings measure that defies the agreements.” Resp. App. 32-33. The intent of the parties established that there was “a lifetime benefits scheme for qualifying retirees and beneficiaries.” *Id.*

While the courts below applied no presumption in this case, M&G’s focus on non-existent circuit splits in their petition is to the exclusion of facts which favor the Plaintiffs. Regardless of the manner in which the contracts at issue were to be interpreted, Plaintiffs have proven their case. The case presented at trial by M&G was “dubious,” “self-serving,” and “wholly lacked veracity.” Resp. App. 32, 39, 40. In these circumstances, M&G is left without recourse or remedy. A return to the trial court in this matter would render no different result than that which has already been reached. No error has occurred in this matter, no actual issue worthy of review by this Court has been raised, and M&G’s petition for certiorari should be denied.

CONCLUSION

For the reasons summarized above, M&G’s petition for writ of certiorari should be denied. This case presents no “erroneous factual findings or . . . application of a properly stated rule of law,” and thus is not worthy of review pursuant to Sup. Ct. R. 10.

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APPENDIX

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APPENDIX 1

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**Case No. 2:07-cv-126
JUDGE GREGORY L. FROST
Magistrate Judge Norah McCann King**

[Filed August 5, 2011]

HOBERT FREEL TACKETT, et al.,)
Plaintiffs,)
)
v.)
)
M&G POLYMERS USA, LLC, et al.,)
Defendants.)
)

OPINION AND ORDER

This is a class action case in which Plaintiffs assert that Defendants have violated their right to lifetime contribution-free health care benefits. The matter came on for a bench trial in May 2011 on the issue of liability. For the reasons that follow, the Court finds in favor of those plaintiffs in Subclasses One through Four and against Defendants, but in favor of Defendants and against those plaintiffs in Subclass Five.

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I.

A. Background

The class (retirees, their spouses, and surviving spouses or other dependents of individuals who worked for the named defendant company) assert that although they have a right to lifetime retiree health care benefits, the company is requiring them to pay for those benefits in violation of various collective bargaining agreement (“CBA”) provisions.¹ Plaintiffs

¹ The parties have agreed on the class and subclasses involved, which are as follows:

Class:

All retired employees of M&G PolymersUSA, LLC (“M&G”) and/or its predecessor company, the Shell Chemical Company (“Shell”), who worked at the Point Pleasant Polyester Plant (“Plant”) in Apple Grove, West Virginia and were represented by the USW or its predecessor unions (“Union”) in collective bargaining, and who retired or left service from the Plant having met the eligibility requirements for retiree health care benefits specified in the applicable collective bargaining agreements (“CBAs”) and P&I Agreements, as well as the spouses and surviving spouses and other dependents of those retired former employees who also claim a right to such benefits, and the surviving spouses of Union-represented Plant employees who died while employed at the Plant who also claim a right to such benefits (the “Class”).

Subclass 1: Members of the Class who retired, left service or died while employed at the Plant having met the eligibility requirements for retiree health care benefits specified in the P&I Agreement dated May 15, 1991 through May 15, 1994, as adopted by the CBA between Goodyear Tire & Rubber Company (“Goodyear”) and the Union for the Plant effective November 6, 1991 through November 6, 1994, and as adopted by Shell, and their eligible surviving spouses and dependents.

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Hobert Freel Tackett, Woodrow K. Pyles, and Harland B. Conley are all Ohio residents and retirees from the Point Pleasant Polyester Plant in Apple Grove, West Virginia. They and similarly situated retirees belong to a labor union, Plaintiff United Steel, Paper and

Subclass 2: Members of the Class who retired, left service or died while employed at the Plant having met the eligibility requirements for retiree health care benefits specified in the P&I Agreement dated July 20, 1994 through July 20, 1997, as adopted by the CBA between Shell and the Union for the Plant effective November 6, 1994 through November 6, 1997, and their eligible spouses and dependents.

Subclass 3: Members of the Class who retired, left service or died while employed at the Plant having met the eligibility requirements for retiree health care benefits specified in the P&I Agreement dated May 9, 1997 through May 9, 2003, as adopted by the CBA between Shell and the Union for the Plant effective November 6, 1997 through November 6, 2000, and their eligible spouses and dependents.

Subclass 4: Members of the Class who retired, left service or died while employed at the Plant having met the eligibility requirements for retiree health care benefits specified in the P&I Agreement dated November 6, 2000 through November 6, 2003, as adopted by the CBA between M&G and the Union for the Plant effective November 6, 2000 through November 6, 2003 and applicable until August 8, 2005, and their eligible spouses and dependents.

Subclass 5: Members of the Class who retired, left service or died while employed at the Plant having met the eligibility requirements for retiree health care benefits specified in the CBA between M&G and the Union for the Plant effective August 9, 2005 through November 6, 2008 or any subsequent CBA between M&G and the Union for the Plant, and their eligible spouses and dependents.

(ECF No. 103, at 2-7.)

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Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (“USW”), which represented (or at least one of its predecessor unions represented) them as employees of Defendant M&G Polymers USA, LLC (“M&G”) (which bought the plant in 2000), or one of its predecessor companies, such as the Shell Chemical Company (which owned the plant from 1992 to 2000) and The Goodyear Tire & Rubber Company (which owned the plant until 1992). Plaintiffs’ theory of the case is that the CBA provides vested retiree health care benefits as a result of the following language, which appears in various agreements:

Employees who retire on or after January 1, 1996 and who are eligible for and receiving a monthly pension under the 1993 Pension Plan . . . whose full years of attained age and full years of attained continuous service . . . at the time of retirement equals 95 or more points will receive a full Company contribution towards the cost of [health-care] benefits Employees who have less than 95 points at the time of retirement will receive a reduced Company contribution. The Company contribution will be reduced by 2% for every point less than 95. Employees will be required to pay the balance of the health care contribution, as estimated by the Company annually in advance, for the [health care] benefits Failure to pay the required medical contribution will result in cancellation of coverage.

In addition to a series of main agreements, a number of side letters are involved in this litigation.

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The Sixth Circuit previously explained these documents as follows, before remanding the action to this Court for additional factual development:

A series of collective bargaining agreements has been in force at the Plant, with each typically lasting around three years before renegotiation. The first letter agreement, signed contemporaneously with the 1991-1994 collective bargaining agreement, was adopted “for purposes of conforming with the new Financial Accounting Standard Board (FASB) accounting requirement” that required accrual accounting of healthcare benefits. This new requirement hurt a company’s balance sheet performance if the company had no cap on its health-care costs. While signed in 1991, the caps were not to take effect until July 1, 1997. Concurrent with the 1994-1997 collective bargaining agreement, another cap letter postponed the effective date of the caps to 2004.

Tackett v. M&G Polymers, USA, LLC, 561 F.3d 478, 483 n.1 (6th Cir. 2009).

Plaintiffs claim that on or about January 1, 2007, Defendant M&G acted contrary to the agreements by unilaterally modifying the health care benefits by shifting a large part of the health care costs onto the class members. The other named defendants are M&G-sponsored health plans through which the class members receive health care benefits: the M&G Comprehensive Medical Benefits Program for Employees and Their Dependents, the M&G Catastrophic Medical Plan, the M&G Medical Necessity Benefits Program of Hospital, Surgical,

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Medical, and Prescription Drug Benefits for Employees and Their Dependents, and the M&G Major Medical Benefits Plan.

Plaintiffs filed the instant action on behalf of the named retirees and their surviving spouses or dependents, as well as other similarly situated retirees and their surviving spouses or dependents, on February 9, 2007. (ECF No. 1.) Via their amended complaint, Plaintiffs originally asserted three claims: violation of labor agreements, actionable under Section 301 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185(a) (Count I); violation of employee welfare benefit plan, actionable under Sections 502(a)(1)(B) and (a)(3) of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1132(a)(1)(B) and (a)(3) (Count II); and breach of fiduciary duty under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) (Count III). (ECF No. 14 ¶¶ 26-31.)

Defendants previously filed a motion to dismiss the amended complaint (ECF No. 19), and this Court granted that motion (ECF No. 63). On appeal, the Sixth Circuit Court of Appeals affirmed the dismissal of the § 502(a)(3) claim constituting Count III, but reversed and remanded the remaining Count I § 301 claim and Count II §§ 502(a)(1)(B) and (a)(3) claim (ECF No. 68). Defendants unsuccessfully sought summary judgment on Counts I and II, and the matter progressed to a bench trial held from May 9, 2011, to May 16, 2011.

B. Agreed Facts

The Final Pretrial Order sets forth the parties’ agreed facts, providing:

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The following facts are established by admissions in the pleadings or by stipulation of counsel:

1. M&G Polymers USA, LLC (“M&G”) is a producer of polymer and related chemical products with a facility located in Apple Grove, West Virginia (“the Apple Grove facility,” also known as the “Point Pleasant Plant”).
2. The Goodyear Tire & Rubber Company (“Goodyear”) owned the Apple Grove facility until November 20, 1992, when Shell Chemical Company, an affiliate of Shell Oil Company (“Shell”), purchased it.
3. Production, laboratory, and maintenance employees at the Apple Grove facility are represented by the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO (“USW”) and its Local 644L.
4. Prior to 1995, production, laboratory, and maintenance employees at the Apple Grove facility were represented by the United Rubber Workers (“URW”). The URW merged with the USW in 1995.
5. Retiree Plaintiff Class Representatives H. Freel Tackett, Woodrow Pyles, and Harlan Conley (together with the Class members, the “Retiree Plaintiffs”) were employed at the Apple Grove facility and

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were members of the collective bargaining unit represented by the Union.

6. Mr. Tackett retired on or about March 1, 1996. Mr. Pyles retired on or about January 1, 1996. Mr. Conley retired on or about August 1, 1998.
7. On November 6, 1991, Goodyear and Local 644 of the URW entered into a collective bargaining agreement (“CBA”) effective November 6, 1991 to November 6, 1994.
8. On May 15, 1991, Goodyear and the URW and certain URW locals entered into a collectively bargained Pension, Insurance and Service Award Agreement effective May 15, 1991 to May 15, 1994 (“1991 Master P&I Agreement”).
9. The 1991 Master P&I Agreement between Goodyear and the URW and certain URW locals included a side letter, “Letter G,” dated May 15, 1991, dealing with retiree medical benefits (“1991 Letter G”).
10. Goodyear created a Summary Plan Description (“SPD”) that described the employee benefit programs applicable to hourly rated employees at the Apple Grove facility as of May 15, 1991.
11. Goodyear and Shell entered into an agreement dated December 18, 1992, pertaining to the employment by Shell of certain employees of Goodyear at the

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Apple Grove Facility (the “Employee Agreement”).

12. On December 29, 1993, Shell formally adopted those Goodyear benefit plans that were previously in effect at Apple Grove for represented employees at the Apple Grove facility.
13. On July 20, 1994, Goodyear and the URW and certain URW locals entered into a collectively bargained Pension, Insurance and Service Award Agreement effective July 20, 1994 to July 20, 1997 (“1994 Master P&I Agreement”).”
14. The 1994 Master P&I Agreement between Goodyear and the URW and certain URW locals contained a side letter, Letter G, dated July 20, 1994 (“1994 Letter G”) dealing with retiree medical benefits.
15. On November 6, 1994, Shell and Local 644 of the URW entered into a CBA effective November 6, 1994 to November 6, 1997.
16. On May 9, 1997, Goodyear and the USW and certain USW locals entered into a collectively bargained Pension, Insurance and Service Award Agreement effective May 9, 1997 to May 9, 2003 (“1997 Goodyear Master P&I Agreement”).
17. The 1997 Goodyear Master P&I Agreement between Goodyear and the USW and certain USW locals included a

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side letter, Letter H, dated May 9, 1997, dealing with retiree medical benefits (“1997 Letter H”).

18. On November 6, 1997, Shell and the USW and Local Union 644 entered into a CBA effective November 6, 1997 to November 6, 2000 (“1997 CBA”).
19. M&G purchased the Apple Grove facility from Shell effective June 1, 2000.
20. In connection with the purchase, M&G and Shell entered into a Human Resources Agreement dated June 1, 2000 (“HR Agreement”).
21. In September 2000, M&G and the USW on behalf of Local 644L began bargaining for a potential extension of the 1997 CBA, which by its terms expired on November 6, 2000, and subsequently engaged in bargaining for a successor to the 1997 CBA.
22. On November 6, 2000, M&G and the USW and Local Union 644L entered into a CBA effective November 6, 2000 through November 6, 2003 (“2000-2003 CBA”).
23. In September 2003, M&G and the USW on behalf of Local 644L commenced bargaining for a successor to the 2000-2003 CBA which was due to expire November 6, 2003. This bargaining encompassed more than 60 days of

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negotiations from September 2003 through August 2005 (the “2003-2005 Bargaining”).

24. On August 9, 2005, M&G and the USW on behalf of Local Union 644L reached agreement on a new CBA effective August 9, 2005 to November 5, 2008 (“2005 CBA”).
25. The 2005 CBA included LOU 2003-6, dealing with retiree medical benefits, which was signed by Union chief spokesperson Karen Shipley and Company representative Kimm A. Korber.

(ECF No. 165, at 4-6.)

C. Trial Testimony

In addition to introducing testimony via deposition transcripts, the parties presented live testimony by select witnesses. The Court briefly summarizes the key points of each such witness’ testimony below.

1. Woodrow Pyles

Retiree Woodrow Pyles was the first witness to testify. Pyles testified that he had begun working at the Apple Grove facility on May 1, 1959. In December 1992, Shell bought the plant from Goodyear, which Shell later sold to M&G. He retired on January 1, 1996. A union member, Pyles testified that he held a number of positions in the union, including that of union steward and that of liaison. He stated that he would attend P&I conferences and would study the P&I

booklet. After a new pension and insurance agreement (“P&I agreement”) had been reached, Pyles testified, the union would hold a conference to explain the changes. He also testified that the local CBA governs working conditions and would be negotiated locally by the union.

Notably, Pyles testified several times that it is the local’s position and unwritten policy that letters that are not printed in the booklet distributed to the local union members do not apply to the local union. He stated that no cap letter applied to the Apple Grove agreements. Although he had obtained a copy of Letter G at a conference regarding the 1991 agreement, Pyles testified, he did not distribute the letter to the local members because it was not part of the booklet. Pyles explained that the summary plan description described the plan as non-contributory, with the company paying the entire cost of the plan. He testified that he has not paid union dues since his retirement and that he never gave the union permission to represent him now. Pyles also testified how he has paid the premium for himself and his spouse since its implementation, which he protested in a series of letters to M&G’s Kimm Korber that he discussed.

2. Hobert Freel Tackett

Retiree Hobert Freel Tackett testified that he began working at the Apple Grove facility on February 7, 1966, and retired from that facility on March 1, 1996. He stated that he had held a number of local union positions, including president and vice-president, and was a member of the local bargaining unit. Similar to Pyles, Tackett identified various agreements and testified that the CBA covers working conditions while

the P&I agreement governs benefits. He testified that he was never aware of any employer contribution limit or cap under the agreement and that he first saw a cap letter only after this litigation had commenced. Tackett testified that he understood the applicable plans to provide retirees who had 95 points with contribution-free medical care for life; they had to pay only if they had less than 95 points. He also testified that he did not believe that letters not printed in the booklet controlled retiree benefits. Tackett stated that he relied on the booklet for medical and pension benefits information. Similar to Pyles, Tackett testified that he had never granted anyone the right to bargain on his behalf since retired.

3. Ron Hoover

Ron Hoover testified next on behalf of Plaintiffs. Hoover explained that prior to his retirement—he is now a union consultant—he worked for the international union with the primary responsibility of working with the master bargaining agreement. He explained that a master bargaining agreement would be negotiated typically every three years, and after that agreement was secured, another agreement would be negotiated in an approach termed “pattern bargaining.” Locals would ratify the master agreement and then would negotiate supplemental agreements focused on their specific issues. Not all locals were part of the Goodyear master bargaining, Hoover testified, and Local 644 was not. Some locals not under the master agreement had “me too” agreements in which their own CBA language incorporated some or all of the master agreement provisions. Hoover testified that he believed that the Apple Grove plant stood on its own.

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Hoover stated that he was never the lead spokesman at the Apple Grove plant, that the plant was not part of the master agreement, that he was not certain how they even got the pattern agreement, and that he did not know for certain whether Apple Grove adopted the P&I insurance agreement. He also testified that he had never negotiated Local 644 agreements with Shell or M&G. He indicated that he had attended bargaining sessions where benefits had been discussed.

Hoover explained the 1991 cap letter as a union compromise to help Goodyear control or minimize its liabilities; he explained that the letter was a way to avoid showing the extent of projected liability for retiree medical benefits due to FASB considerations. In other words, Hoover explained, the cap letter was a mechanism by which a company could minimize numbers to attract investors. He explained how the letter worked and the importance of what he called the “bite date,” or the date on which retirees would have to actually begin contributions toward their medical insurance. Hoover emphasized the importance of always moving the bite date out so that it could always be subject to further movement by negotiation.

According to Hoover, he has no knowledge that the Letter G cap letter was ever adopted at the Apple Grove plant. He explained that the letter was not part of the 1994 agreement between Shell and Local 644. Although he may have participated in 1997 negotiations, Hoover testified, his role was to explain how the Goodyear master agreement worked. Hoover stated that he lacked the authority to bind Local 644 to anything and that only the head negotiator had such

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authority. He testified that he did not know whether the cap letter labeled as Letter H automatically applied to M&G. Thus, Hoover testified, when he spoke with Randy Moore, he told Moore that if the cap letter applied, Moore should be certain to move the bite date out so that it did not impact retirees. Hoover also testified that he told Karen Shipley the same thing in 2003. Hoover disagreed with the contention that there was a link between the 95-point rule and the cap letter.

Hoover stated on cross-examination that by agreement not all letters were printed in the booklets. As an example, he explained that the 1991 Letter G was part of the master agreement even though it was not in the printed booklet. Hoover stated that a general understanding existed between the union and company representatives that the bite date would always be moved. He stated that the union never intended to have retirees pay a premium and that he understood that the company representatives could not say publically that there would never be retiree contributions because the accountants would then not certify the FASB statements.

Hoover explained that the Apple Grove plant appeared to be some sort of “me too.” He stated that he could not identify well a marked-up copy of the 2000 agreement, and Hoover indicated that he could not say for a fact whether cap letters were part of the adopted agreement. Such letters were not printed in booklets, Hoover again explained. He testified that if the letter information was not presented to the local members, then the local representatives were not doing their jobs. Hoover also testified that a “me too” local could adopt the P&I agreement but not letters and again stated

that he did not know what Local 644 had done. He stated that he did not know whether the letters were ever presented to the local members. Hoover did state that if the cap letters were not renewed, then they were gone. Hoover testified that he had been careful to never interpret the Apple Grove agreement for Local 644.

4. Randall Moore

Randall Moore is currently the Sub-District Director of the international union and was previously a staff representative. He was assigned to Apple Grove negotiations in late summer 2000. Moore testified that he relied on the local committee in these negotiations and explained that after he was unsuccessful at negotiating a two-year extension of the existing agreement, negotiations for a new P&I agreement continued.

Moore testified that based on his experience, the issue of retiree benefits is typically a subject of forward-looking negotiations in which future retirees' benefits are discussed, but existing retiree benefits remain fixed. He stated several times that it was his understanding that Local 644 is a "me too" that accepted only parts of the "Big Rubber" master agreement. Moore stated that, to his knowledge, Shell was not a part of the "Big Rubber" negotiations.

He also testified that the 1997 P&I agreement for the Apple Grove plant did not reference Letter H. Moore stated that when local individuals such as Sam Stewart brought the cap letter to Moore's attention, Moore spoke to Hoover. Hoover provided Moore with a copy of Letter H because the local committee did not

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have a copy, Moore testified, and Hoover explained that the cap letter is a FASB accounting letter. Moore testified that Hoover never told him that Letter H applied and only suggested that Moore push back the contribution date if the letter were applicable to Apple Grove. Moore also testified that he looked for and never found any document indicating that Letter H applied.

Moore stated that it was less than clear whether the cap letter applied. He testified that the local committee proposed pushing the effective contribution date out, but that the company denied the proposal. The company was also bewildered by Letter H, Moore explained, and on October 17, 2000, the company's chief negotiator, David Dick, responded to Moore's request for written clarification by providing a document stating the company's position that Letter H did not apply.

Moore also testified that the Apple Grove booklet needed cleaned up because it contained provisions that did not apply to the local plant. He explained that the parties agreed to remove these provisions while abiding by the agreement they had reached. Thus, Moore testified, Letter H was removed, and the 2000 P&I agreement that resulted does not contain Letter H.

He stated that for a period of time, Karen Shipley had been assigned to Local 644 until he was reassigned back to the local. Shipley had asked Moore about Letter H during the subsequent negotiations between the local and M&G, he testified, and Moore explained that Letter H did not apply. Moore testified that he was confused when presented with Letter of Understanding 2003-6 because the union had not

agreed to its contents or that Letter H applied. M&G's new chief negotiator, Robert Long, was given a copy of Dick's October 2000 disavowal of the cap letter's application, Moore testified, but this did not change M&G's position. Moore testified that he stated to M&G in negotiations that he lacked the authority to bargain away benefits for existing retirees.

Moore testified that negotiations over Letter of Understanding 2003-6 went nowhere. He enlisted the aid of the international union's attorney, but the result was still the same. Moore testified that the union saw the handwriting on the wall as to what M&G was going to do, and that when Shipley signed Letter of Understanding 2003-6 on August 9, 2005, it was a simple formality because her name was already on the company-provided signature line. Moore explained that the union knew that future retirees would be covered differently than existing retirees. Although the union contested the lawfulness of M&G's actions, Moore stated, the company went ahead and implemented retiree contributions.

5. Karen Shipley

Karen Shipley is a staff representative for the international. She testified that she was part of the 2003 Apple Grove negotiations and acted as the union's chief negotiator. She therefore had the authority to bind the union, she explained, and that the local committee assists the chief negotiator. After M&G's Long and Korber approached her with Letter H, Shipley spoke with Hoover. The parties disagreed over whether the letter applied, she explained, and she states that she informed the company that the union could not bargain over existing retiree benefits, which

was a permissive subject of bargaining. The union disagreed that Letter H applied, Shipley testified, and took the position that given the company's disagreement, the letter should then be deleted.

Shipley testified that after offering to withdraw Letter of Understanding 2003-6, M&G reversed course and refused such withdrawal. M&G then implemented its last, best, and final offer, she testified, which included Letter of Understanding 2003-6. Shipley testified that the union never agreed to Letter of Understanding 2003-6 while she was negotiating.

6. Brian Wedge

Brian Wedge is currently on leave from the Apple Grove plant while he serves as a staff representative for the international. He testified as to his involvement in numerous Local 644 negotiations in numerous union positions. Throughout the ratification of these agreements, Wedge explained, no cap letters had ever been presented as part of the agreements to be ratified by local members. He discussed the 1997 agreement negotiations specifically and testified that M&G had taken the position that it had separated from the master agreement. M&G's Dick stated that Shell had separated from the master agreement, Wedge testified, because Shell did not belong to the larger negotiating group responsible for that agreement.

In preparing for the 2000 negotiations, Wedge explained, he had heard of Letter H. Because he did not know whether the letter applied or what it was, Wedge testified, he spoke with Hoover and obtained a copy of the letter. Wedge testified that Letter H was not part of the agreement with which they had started.

Since the time he began working at the Apple Grove plant in 1987, Wedge testified, such a cap letter had never been included in the booklets local members received.

Wedge testified that M&G took the position that the cap letter did not apply to M&G or Shell. He also testified that the union regarded the October 2000 Dick document as conclusive. The parties proceeded to adopt the 1997 booklet with some changes, Wedge explained, and produced the actual P&I agreement at a later date. Wedge testified that the parties knew they would have to remove content from the booklet that did not apply to Apple Grove. He stated that this was why he had made a handwritten notation on a union copy of Letter H indicating that the letter was to be removed. Wedge testified that the final copy of the P&I agreement distributed to union members did not contain Letter H.

When he was next part of the negotiating team in 2005, Wedge testified, the cap letter issue arose in conjunction with Letter of Understanding 2003-6. He indicated that Moore had questioned the applicability of a cap letter, and Wedge testified that no retirees had agreed that the union could negotiate benefits on their behalf. Wedge testified that the union attorney had informed the negotiators that the union had no right to bargain for the existing retirees. He repeated that the union was not legally permitted to bargain on behalf of the retirees. Wedge testified that the company nonetheless implemented its plan and that retirees have suffered as a result. Some people, he explained, won't speak to him as a result.

On cross-examination, Wedge testified that the union proposed in 2000 negotiations to move the cap letter effective date of retiree contributions because there was uncertainty over whether the letter applied. He stated that the Dick letter on behalf of M&G resolved the issue and that by the end of negotiations, it was settled that Letter H did not apply.

Wedge also explained the inapplicability of the master agreement. He provided the example of when Moore asserted during negotiations that the master agreement's pension multipliers automatically applied and M&G responded by adopting the position that the master agreement did not control. Wedge also testified that the union was responsible for distributing for local ratification the agreement information. He indicated that there was never an agreement between the company and the union as to what would go into the booklet.

7. Kimm Korber

Defendants' first witness was Kimm Korber, M&G's Human Resources Director. Korber testified that he had been hired in 2001 as Human Resources Manager for the Apple Grove plant and that his duties had included general human resources work as well as labor responsibilities. He stated that he had first become aware of issues with the P&I Agreement in the 2000 negotiations. Korber testified that because the Letter H effective date for contributions was after the next negotiations, he assessed that the letter would be discussed in the 2003 negotiations.

During those negotiations, Korber testified, Shipley had told him that the retiree benefits was a permissive

subject of bargaining, that the parties could not reach an impasse over this issue, and that she was not interested in discussing the issue. He indicated that Shipley had proposed deleting Letter H. He also summarized the history of negotiations, stating that the union changed its position after it learned of Dick's October 2000 document.

Korber testified that he was not trained in benefits administration and that he has only a basic understanding of ERISA requirements. He stated that M&G is the plan sponsor and the named fiduciary, the plan had never sent an ERISA notice to retirees of their being subject to the cap or of the possible termination of benefits.

Korber also testified regarding meeting with Rex Rousch. He denied that Rousch told him that Letter H was a Goodyear document and not a Shell document, but stated that he obtained the letter from Rousch. When presented with various exhibits, Korber indicated that Letter H had not been part of local booklets and could not point to where the 2000 CBA or P&I agreements adopted the Goodyear Letter H.

When questioned regarding the October 2000 Dick response that disavowed cap letter application, Korber testified that he had not discussed the document with Dick. Korber stated that a chief negotiator has the authority to bind a company. When asked whether the union could rely on Dick's response, Korber responded by discussing proposals.

Korber reviewed exhibits related to M&G's acquisition of the Apple Grove facility from Shell and various emails regarding Letter H. He denied that it

was left to counsel to determine the effective date of Letter H, but confirmed that he was part of the decision to apply a cap to all retirees. Korber stated that this was not an actuary decision. He disagreed with the position of Moore and Shipley that they did not have the authority to bargain for retirees, but stated that without Letter H, bargaining for retirees would be a permissive subject of bargaining.

Korber also testified regarding M&G's due diligence in the plant purchase. He further stated that he was aware of Letter H in 2001, although he did not mention the application of caps in a strategy memorandum he wrote on M&G's benefits program. This failure to mention Letter H continued throughout other documents and communications Korber sent involving benefits. In a July 12, 2004 email from Korber to Duane Lee, Korber testified, he did address Letter H, but he denied that this was the first time he sent Lee the letter. Korber testified regarding subsequent emails that noted that Letter H may not be deemed enforceable to Apple Grove and that discussed the possible impact of Letter H. He acknowledged his December 2005 email to Lee that concerned the topic of how much M&G would save if Letter H were applied to all retirees. Korber also acknowledged subsequent emails that tracked the effect of the cap letters, which was that retirees were being dropped from the benefits plan. In subsequent testimony, Korber did not disagree that over half of all retirees had died or been dropped from the benefits plan. In another email that Korber acknowledged, he stated that most retirees look to the booklet for a guide to retirement health plans.

8. *Robert Long*

The final witness to testify was attorney Robert Long. He explained that he routinely represents management in labor negotiations and that he has participated in between 200 and 300 negotiations. One such negotiation was the Apple Grove bargaining that began in the fall of 2003. He testified that during these negotiations, Shipley stated that the union was not willing to discuss retiree medical benefits and that it was a permissive subject of bargaining. Long testified that generally speaking, retiree bargaining is a permissive, or non-mandatory, subject of bargaining and that a company and union can by mutual agreement enter into agreements on this topic. He later stated that the parties cannot modify vested benefits, but can modify non-vested benefits.

Long testified that following two union caucuses, the union returned to the table and mentioned Letter H, a cap letter, and that Sam Stewart had indicated that it was part of the binding agreement. He stated that no union representative suggested that Letter of Understanding 2003-6 applied only to future retirees. Long testified as to the circumstances surrounding his negotiation offer that, if the union took the position that Letter of Understanding 2003-6 implicated a permissive subject, then the company would withdraw it from the last, best, final offer. He testified that the company ultimately rejected the union's proposal to delete Letter H.

Long also testified that he never did any research as to whether Letter C or Letter H applied, but instead simply accepted the propositions that Shell had adopted Goodyear letters and that M&G had assumed

Shell's contractual obligations. He had been told that M&G had a P&I book with Letters C and H in it. Long testified that he may have seen the Dick response disavowing cap letter applicability, but he stated that he could not recall when. He testified that he relied upon Korber to be the primary architect for P&I proposals and stated that he had never read the 2000 P&I agreement cover to cover and that he did not know whether Letter H was part of that agreement. In subsequent testimony, Long stated that Stewart did not have the authority to bind the union, as opposed to Shipley, who held such authority.

II.

The central issue in this litigation is whether Plaintiffs—the qualifying retirees, their spouses, and their dependants—have a vested right to lifetime, uncapped (or contribution-free) medical benefits. Those plaintiffs in the first four subclasses do. Those plaintiffs in the fifth subclass do not.

This Court begins its discussion with the threshold issue of vesting. The Sixth Circuit has held that “[r]etiree health benefit plans . . . are welfare benefit plans; thus, vesting only occurs if the parties so intended when they executed the applicable labor agreements.” *Noe v. PolyOne Corp.*, 520 F.3d 548, 552 (6th Cir. 2008). See also *Tackett*, 561 F.3d at 489. The presence or absence of such intent is critical here because, as the court of appeals has explained, “[i]f the parties do not intend to vest the benefits, the former employer can modify the retiree benefits without breaching a collective bargaining agreement.” *Tackett*, 561 F.3d at 489. The appellate court has also explained that “[a] court may find vested rights ‘under

a CBA even if the intent to vest has not been explicitly set out in the agreement.” *Id.* (quoting *Maurer v. Joy Technologies, Inc.*, 212 F.3d 907, 915 (6th Cir. 2000).

The Sixth Circuit has described the “broad analytical framework” that this Court must apply to the vesting issue as follows:

The seminal case for determining whether the parties to a CBA intended benefits to vest is *UAW v. Yard-Man*, 716 F.2d 1476, 1479 (6th Cir. 1983). Under *Yard-Man*, basic rules of contract interpretation apply, meaning that courts must first examine the CBA language for clear manifestations of an intent to vest. *Id.* Furthermore, each provision of the CBA is to be construed consistently with the entire CBA and “the relative positions and purposes of the parties.” *Id.* The terms of the CBA should be interpreted so as to avoid illusory promises and superfluous provisions. *Id.* at 1480. Our decision in *Yard-Man* also explained that “retiree benefits are in a sense ‘status’ benefits which, as such, carry with them an inference . . . that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree.” *Id.* at 1482. With regard to the “*Yard-Man* inference,” later decisions of this court have clarified that *Yard-Man* does not create a legal presumption that retiree benefits are interminable. *Yolton*, 435 F.3d at 579. Rather, *Yard-Man* is properly understood as creating an inference only if the context and other available evidence indicate an intent to vest. *Id.*

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When an ambiguity exists in the provisions of the CBA, then resort to extrinsic evidence may be had to ascertain whether the parties intended for the benefits to vest. *Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am. v. BVR Liquidating, Inc.*, 190 F.3d 768, 774 (6th Cir. 1999). If an examination of the available extrinsic evidence fails to conclusively resolve the issue and a question of intent remains, then summary judgment is improper. *Int'l Union, United Mine Workers of Am. v. Apogee Coal Co.*, 330 F.3d 740, 744 (6th Cir. 2003).

Noe, 520 F.3d at 552. The court of appeals has further clarified:

Courts reviewing a collective bargaining agreement must also keep in mind the context of labor-management negotiations on retiree health-care benefits: “because retirement health care benefits are not mandatory or required to be included in an agreement, and because they are ‘typically understood as a form of delayed compensation or reward for past services’ it is unlikely that they would be ‘left to the contingencies of future negotiations.’” *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 580 (6th Cir. 2006) (quoting *Yard-Man*, 716 F.2d at 1481-82).

Tackett, 561 F.3d at 489. Application of these directions to this case has led this Court to the conclusion that Plaintiffs obtained vested medical benefits.

This conclusions does not conflict with the Sixth Circuit's prior discussion of the issue of vesting. Citing the November 6, 2000 CBA language set forth above, the court of appeals previously made several critical points:

First, the "full Company contribution" language suggests that the parties intended the employer to cover the full cost of health-care benefits for those employees meeting the age and term-of-service requirements. Keeping in mind the context of the labor-management negotiations identified in *Yard-Man*, we find it unlikely that Plaintiff USW would agree to language that ensures its members a "full Company contribution," if the company could unilaterally change the level of contribution. The CBA has no limitation on the amount of a company contribution and if the Defendants' argument were accepted, the company presumably could lower the contribution to zero without violating this language. Such a promise would be illusory.

Second, the limiting language, "[e]mployees will be required to pay the balance of the health care contribution," follows the provision requiring contributions by those retirees who had not attained the requisite seniority points. From the placement of this language, we can reasonably infer that it did not apply to all retirees, but only to those retirees who had not attained the requisite seniority points.

Third, the collective bargaining agreement tied eligibility for health-care benefits to pension

benefits. This is another factor indicating that the parties intended the health care benefits to vest upon retirement.

Tackett, 561 F.3d at 490. This Court previously noted that, on its face, the court of appeals' language appears to present a controlling interpretation of the CBA that proves dispositive of at least the vesting issue, if not the issue of capped versus uncapped benefits.

This Court has recognized, however, that the next sentence of the court of appeals' opinion suggests that perhaps the Sixth Circuit was not handing down an opinion that proves dispositive outside the Rule 12 context. Following the third point, the *Tackett* panel stated that “[w]e hold that the Plaintiffs’ Complaint presented a plausible claim that the parties intended to vest health-care benefits. Accordingly, we hold that the district court erred in granting the Defendants’ Rule 12(b)(6) motion on the § 301 claim.” *Id.* This language might cast the otherwise essentially conclusory language of the three points (noting that the appeals court did use some qualified language such as “suggests”) into a qualified light and presents the issue of whether the Sixth Circuit was interpreting the language as a matter of law or simply saying that it presented a plausible claim for Rule 12(b)(6) purposes and that the vesting issue was left open upon remand.

This Court continues to find the answer to the vesting issue in the next portion of the appellate decision. There, the *Tackett* panel moved from Count I, the § 301 claim, to Count II, the § 502(a)(1)(B) claim. After outlining the considerations relevant to deciding the vesting issue, the Sixth Circuit stated that “[t]he determination above that *the parties intended health-*

care benefits to vest carries over to the ERISA § 502(a)(1)(B) claim. The Plaintiffs have therefore presented a plausible claim under ERISA § 501(a)(1)(B).” *Tackett*, 561 F.3d at 490 (emphasis added). Notably, the court of appeals phrased its summary of its prior discussion as an unqualified declaration—“the parties intended health-care benefits to vest”—without linking that summary statement to a mere finding of a plausible claim. By presenting the intended vesting as a fact leading to the result that Plaintiffs had presented a plausible claim, the appellate court pointedly issued a conclusion instead of merely recognizing a credible possibility.

In other words, had the Sixth Circuit said that based on the factual allegations that it must accept as true, it concludes that Plaintiffs have stated a plausible claim for Rule 12(b)(6) purposes, this Court would perhaps consider the vesting issue open on remand. But what the court of appeals did was conclude that the parties intended vesting, which meant that Plaintiffs had of course stated a plausible claim, which meant that they should have survived the Rule 12(b)(6) attack. The distinction is important; it is the difference between saying that the facts *likely* present a viable claim and saying that the facts *do* present a viable claim. This Court therefore stands by its prior conclusion that the Sixth Circuit answered the threshold vesting issue.

Even if this Court is incorrect in its interpretation of the appellate precedent and the court of appeals did not intend to be dispositive on the issue and reasonably only intended to reach the issue of plausibility of the claim presented, the Court again recognizes that there

are no facts that would defeat the same conclusions. The linking of eligibility for health care benefits to pension benefits indicates the parties' intent that health care benefits vested upon retirement. *See Reese v. CNH America LLC*, 574 F.3d 315, 322 (6th Cir. 2009) (noting cases in which the tying of eligibility for pension benefits to eligibility for health-care benefits "played a 'key' role in a vesting-of-health-benefits determination").

Regardless of the analytic path, the end result is still the same because, in light of the meaning of the CBA language, this Court must conclude that vesting occurred. Whether the appellate path or this Court's own analysis leads to this conclusion is ultimately irrelevant. What is significant is that the Sixth Circuit did not conclusively state the precise nature of the right to health care benefits that vested in light of the fact that the appellate panel left the door open for further related factual development and analysis on remand. After summarizing the cap letters and the postponement of the effect date of the caps, the Sixth Circuit stated that "[t]he import of this perpetual postponement and the applicability of these cap letters to the current parties are fact issues that must be resolved by the district court outside of the Rule 12(b)(1) determination." *Tackett*, 561 F.3d at 482 n.1. Thus, as in *Reese*, the core issue in this case is ultimately not "did the benefits 'vest,' " but rather "what does vesting mean in this context." *Reese*, 574 F.3d at 321. The bench trial answered *what* vested.

What vested for those plaintiffs in Subclasses One through Four was a right to contribution-free lifetime health benefits. What vested for those plaintiffs in

Subclass Five was a right to capped lifetime health benefits, contingent on the qualifying plaintiffs paying the above-cap premiums.

While disagreeing with the Court's vesting analysis, Defendants have taken the position that the health care benefits agreements condition exercise of any vested right to benefits on satisfaction of the cost-sharing precondition. Defendants' theory of the case is that there has been continuity in the wholesale assumption of contractual obligations by each owner of the Apple Grove plant, an unbroken line of side agreements that provide contextual meaning to the language of the main agreements. They posit that the side agreements apply to the plant and its retirees either expressly or under a "me too" arrangement. Thus, Defendants reason, the right to the contingent benefits is clear provided a retiree satisfies the condition of making his or her contribution. This is a permissible scheme; a plan may contemplate fully funded, lifetime health care benefits *or* defined-contribution health care benefits. *Wood v. Detroit Diesel Corp.*, 607 F.3d 427, 432 (6th Cir. 2010). The scheme Defendants assert is not, however, the scheme that exists here.

The factual history that the parties present could not be more different. On one side, Defendants have presented largely dubious testimony to support the theory that an unbroken chain of cap letters informs agreements resulting in at most lifetime health care benefits that are contingent on satisfaction of a cost-sharing arrangement. On the other side, Plaintiffs have presented notably more compelling evidence that Defendants have engaged in after-the-fact company

scrambling to find a way to impose unilaterally application of cap letters as a costsavings measure that defies the agreements the caps puncture.

This Court has untangled which agreements do in fact apply to the Apple Grove plant and concludes that Defendants have conflated companies and agreements. The pre-August 5, 2005 side agreements to the master agreements do not apply to Apple Grove. Rather, the intent and effect of the applicable operative documents governing Subclasses One through Four present a lifetime benefits scheme for qualifying retirees and beneficiaries without the cost-sharing Defendants wrongly imposed. The cap letters were not part of these agreements, and even if they were, they were wholly abandoned.

Thus, contrary to Defendants' assertions, there is no unbroken chain of cap letter applicability. The evidence indicates that Apple Grove is a partial "me too" plant, or a "me too, with exceptions" plant, with the ability to accept or reject such side agreements. The evidence also indicates that Local 644 rejected application of these unpublished agreements. Additionally, chief company negotiator Dick expressly rejected cap letter applicability, and when union negotiator Moore attempted to pull a master agreement's pension multipliers into the negotiation, M&G took the position that the master agreement did not control—a position that undercuts reliance on side agreements that the evidence indicates ultimately applied only to the master agreements.

The first cap letter at issue was in 1991. The evidence does not support that this letter was part of the P&I booklet adopted by Local 644. Testimony

indicated that the booklets are prepared after the local's vote. There is no testimony that the agreement terms ratified by the local included cap letters, regardless of the subsequent booklet content. The testimony of Wedge, Moore, Hoover, Pyles, and Tackett indicates that the booklet as published set forth the total benefits agreement and that it was both permissible and the unwritten policy and practice of Local 644 to adhere to only that which was published in the booklet. Pyles did not testify to knowledge of a cap obtained from a summary plan description; rather, he testified that he did not know of the cap letter and consequently did not ratify it as part of the local agreement. Hoover made clear that a "me too" local could indeed decline to adopt the side agreement letters, and the testimony of Pyles and Tackett indicate that this was the unwritten policy and practice of Local 644. Even James Kruse, whose deposition testimony generally weighed against Plaintiffs in many respects, recognized the divergent nature of the Apple Grove plant. Absent cap letter incorporation into the local P&I agreement, Shell (and consequently, M&G) could not have assumed the cap letter agreement as a successor as part of its purchase of the plant. There is no basis to conclude that the 1991 summary plan description was presented to local members; in any event, a summary cannot itself constitute the terms of the agreement for § 502(a)(1)(B) purposes. Additionally, as Joint Exhibit No. 2 reflects, the express incorporation of specified Goodyear agreements did not include all Goodyear side agreements, pointing to the conclusion that Shell never initially adopted a cap letter.

Neither the 1994 nor 1997 dealings implemented cap letter applicability to the Apple Grove facility. Although deposition testimony by Dale Wunder supports adoption of Letter H in 1997, this conflicts with the Shell documentary evidence and the more credible testimony of Local 644 members as to what they saw, what they ratified, and how the local approached the incorporation issue. The cap letters at issue were Goodyear cap letters that were not negotiated into the local P&I agreements.

The Court also notes expressly that the evidence concerning the 1997 agreement working copy is not the smoking guns Defendants contend. Instead, as Plaintiffs accurately targeted during trial, this was a Goodyear agreement signed by Goodyear officials who were unable to sign for Shell. The working copy cannot provide a logical basis for cap letter incorporation because when placed in context it is apparent that it was simply that: a copy of an agreement from which the parties could begin their work, with not all parts applicable to the relevant negotiating parties.

In 2000, when Shell sold the Apple Grove plant to M&G, M&G assumed CBA and P&I agreement obligations from Shell. The company's own accountants recognized the retiree benefits as involving no retiree contribution, and there was no booklet incorporation of the cap letter.

It is significant that even if there were at one point cap letter applicability for pre-August 5, 2005 retirees, the parties' dealings extinguished invocation of such retiree contributions. At one point, the union took the position in negotiations that the cap issue was at least potentially relevant, and the union's negotiator

recognized the potential applicability of the cap letter. Testimony explained the prophylactic context of Moore's actions and points to strategic maneuvering that removed any possibility of cap letter applicability. M&G disavowed cap letter applications, the effective contribution date of the relevant hypothetically applicable cap letter expired, and the parties proceeded without the possibility retiree contributions for existing retirees. Even assuming *arguendo* earlier cap letter applicability, the 2000 P&I agreement cut off any chain of cap letters.

Letter of Understanding 2003-6, dated August 9, 2005, and made part of the 2005-2008 agreement that applies to those plaintiffs in Subclass Five, permits implementation of above-cap retiree contributions. The issue is whether that document looks only forward from August 9, 2005, or indeed presents a permissible, memorialized understanding of existing if previously unimplemented side agreements. Defendants would have this Court accept the proposition that the parties continually kicked the can of retiree contributions down the road until it was no longer economically feasible for the company. The evidence is to the contrary.

Letter of Understanding 2003-6 contemplates caps on employer contributions to retiree health benefits and provides that "premium cost sharing charged to retirees will be based on the amount by which total cost for all retiree insurances (medical, life, etc.) exceed the caps set forth in Letter H dated January 1, 2001." The unilaterally implemented letter also states that retirees would not be required to contribute to their premiums until January 1, 2006, and that the retiree

premium contribution rates would become effective on that date. Defendants argue that Letter of Understanding 2003-6 and the union's history of attempting to negotiate the effective date of caps and to eliminate the application of Letter H point to the application of the caps to M&G. Defendants posit that Letter of Understanding 2003-6 unambiguously supports the unbroken application of caps to retirees (including preexisting retirees). That document explicitly references the prior 2001 cap letter and provides that "[r]etiree benefits" means "benefits for the Company's preexisting retirees." The trial testimony undercuts deeming Letter of Understanding 2003-6 dispositive in Defendants' favor for pre-August 9, 2005 retirees, spouses, and dependents.

This Court concludes that Letter of Understanding 2003-6 does not rehabilitate broken or reaffirm longstanding cap letter applicability in regard to those plaintiffs in Subclasses One through Four. Despite Defendants' best efforts at rewriting history, the trial evidence places the previously ambiguous Letter of Understanding 2003-6 into its proper context as a going-forward document applicable to individuals in Subclass Five and not a document that also speaks to and clarifies the meaning of the prior agreements governing Subclasses One through Four. The actual context of Letter of Understanding 2003-6 does not include a shared intent to vest only partially funded (*i.e.*, capped employer contributions for) lifetime health care benefits to retirees in the first four subclasses. Rather, the document's context teaches this Court that application of Letter of Understanding 2003-6 to the plaintiffs in the first four subclasses was a unilateral move by M&G to unlawfully circumvent binding

agreements to obtain economic advantages. The addition of Letter of Understanding 2003-6 to the 2005-2008 agreement changes the meaning of what constitutes a “full company contribution” from prior agreements so that the clause no longer means the full cost of health-care benefits for qualifying employees, but rather a capped company contribution to the health-care benefits.

To be certain, the parties’ decade-plus history of dealing with the cap letters and contributions does not present a model of negotiating clarity, much less competence. On one side, the union’s own negotiator once questioned cap letter application, and at least one if not more Local 644 individuals who lacked binding authority appeared not to understand what was involved in the negotiations and the agreements reached. The companies fare no better. During the 2000 CBA negotiations, attorney David Dick was the lead or chief negotiator for M&G and stated clearly and unequivocally that the cap letter did not apply. The testimony Defendants intend to explain away Dick’s purported “confusion” is simply not credible.

Nor is the testimony of Long helpful in regard to applicability. The curiously under-informed Long expressly relied on Korber, whose testimony this Court found to be incredible time and again, in accepting cap letter applicability. Having had ample opportunity to observe the witness and to consider his testimony, this Court expressly rejects as simply not credible the testimony of Korber, M&G’s Human Resources Director, which indicated that M&G had assumed cap letters as part of the preexisting obligations as a successor to Shell. Korber’s actions, particularly his

communications with the consultant actuaries for M&G, are not consistent with an individual or a company that knew or believed that any cap letter applied. It does not appear to this Court that Korber knew of Letter H until at least 2003, despite his contention that he knew of the cap letter years earlier. Additionally, M&G's own reporting of contribution-free retiree health care benefits (tracking Shell) contradicts the company's post-hoc position that the cap letters always applied and undercuts Korber's self-serving testimony.

In contrast to Korber's testimony, the Court found credible the testimony of Hoover and Moore, who together explained that confusion existed because various locals had different approaches. Potential cap letter application does not equal actual application, and the Court finds that Local 644 never adopted cap letters prior to August 9, 2005, even if union leadership was uncertain about that position at times and had to check in with the home office for assistance during negotiations.

It is also notable that the union lacked the ability to negotiate the vested retiree benefits. Pyles and Tackett, for example, did not consent to the parties addressing this permissive subject of bargaining. There is no evidence any retiree did. But there is evidence that union negotiators such as Shipley routinely adopted the position that retiree contributions were not on the table. Only individual union members not in the know apparently believed that the cap letters applied, and they lacked authority to bind the union and the retirees.

As the Court has previously noted, the significant confusion by the parties is odd. It appears that various individuals' efforts to circumvent clarity and full disclosure to the public of self-serving arrangements got a bit too clever for nearly all involved until even key actors were confused by what essentially hidden agreements applied in what context. Goodyear master agreement shenanigans did not necessarily filter down to the me too with exceptions plant involved here, but the various actors in the history of the Apple Grove plant appear to have been rarely well informed. This is no way to run a business or a union. Companies should know what they are buying (obligations and all), investors should know what company liabilities exist, unions at all levels should be clear on what they are negotiating, and retirees should know what agreements they are ratifying.

Plaintiffs have presented ample evidence involving M&G's counsel, actuaries, and human resources personnel that no one thought that there was a cost-sharing plan in place for Apple Grove retirees for years until it became advantageous to the company. Multiple M&G actors appear at best uncertain of what benefits liabilities they assumed when they purchased the plant and another expressed a position wholly adverse to cap letter applicability. Those who testified supporting cap letter applicability wholly lacked veracity. Ultimately, this litigation presents a scenario in which a company faced with ballooning benefits costs uncovered a longshot means by which it could attempt to retroactively rewrite agreements to reduce costs—and then the company turned to actuaries to inform the purported scope of the cap letter, apparently basing the claimed scope on the amount of money that

could be saved if the company prevailed. This is unlawful.

The issue of liability that once appeared complicated during summary judgment proceedings became far more clear as a result of the trial. And despite real conflicts in evidence, including each party's own at times contradictory evidence, the greater weight of the evidence favors Plaintiffs. For example, the evidence indicates that Dick, the company's chief negotiator and someone with the clear authority to bind the company, rejected cap letter applicability. The company attempts to insulate itself by dubiously disowning his comments and authority, while concurrently pointing to Long's testimony as supporting applicability. Defendants cannot reject one of their negotiators as misinformed and turn to another uninformed negotiator to achieve the continuity of applicability that they seek to prove.

In contrast, the evidence indicates that those with the authority to bind the union disputed cap letter applicability. The company insists that the Court should credit instead those local members who lacked such binding authority. The evidence indicates that there were no ERISA notices given here, that the retiree benefits issue was not a subject of bargaining, and that the retirees did not consent to negotiations on the issue. The company asks this Court to ignore these facts. The evidence indicates, however, that Defendants developed the contribution scheme as a self-serving response to economic realities and in contravention of the negotiations conducted and applicable agreement reached. This is impermissible under the controlling law.

The plan participants' understanding of what they ratified reflects the benefits agreements reached. This Court concludes: (1) the relevant agreements set forth a scheme in which the employer is responsible for covering the full cost of health-care benefits for those employees meeting the age and term-of-service requirements in Subclasses One through Four; (2) qualifying individuals in Subclasses One through Four are entitled for the company to cover the full cost of the health benefits, without these plaintiffs being required to pay premium contributions; (3) the contribution-free health benefits for individuals in Subclasses One through Four exist despite the fact that various inapplicable side agreements between other parties deferred the eventual collection of retiree contributions; (4) for the plaintiffs in Subclasses One through Four, Defendants have had no right to collect the premiums charged and have impermissibly terminated benefits for the failure to make such a contribution; and (5) the cap letter applied to Subclass Five, the members of which Defendants could permissibly require to make above-cap contributions.

Having determined both that vesting occurred and what vested, this Court is left with the issue of whether the scheme of permissible contributions governing Subclass Five is nonetheless unlawful in its execution. The Subclass Five Plaintiffs claim that Defendants cannot charge the monthly contributions because they have the effect of forcing retirees out of the benefits plan. Defendants argue in turn that the monthly premiums are acceptable under the negotiated 2005-2008 agreement. Defendants are correct.

The evidence supports that the 95-point agreement language does not preclude retiree contributions for those individuals qualifying for health benefits post-August 9, 2005. The 95-point language itself would not preclude retiree contributions for pre-August 9, 2005 retirees; it is only the inapplicability of the cap letters prior to August 9, 2005 that defeats such a scheme here.

Korber testified that the contribution plan that M&G presented to the union involved monthly premiums, derived from the average above-cap cost, and he did not recall any objection to the monthly basis calculations other than counter-proposals. The Court credits this testimony. Although Korber's testimony regarding the application of cap letters to all retirees was largely not credible, his essentially uncontradicted testimony regarding monthly premiums was more persuasive. Korber explained how application of the methodology set forth in Letter H in conjunction with Letter of Understanding 2003-6 to the actual claims data produced the monthly-premium information provided to the retirees prior to the effective date of retiree contributions. (Defs. Ex. 152.)

The Court understands Plaintiffs' frustration with the monthly costs, which will likely only increase as time passes and no doubt can impose a substantial burden on the affected retirees. Such monthly premiums are not a surprise. Letter H speaks in terms of annual costs and averages, but the evidence indicates the understanding that the annual costs would be broken into monthly payments. Hoover testified that monthly premiums were contemplated by Kruse under the Goodyear cap letters, the model for

the cap letter governing Subclass Five. Hoover also testified that he did not know how a health benefits premium would be paid otherwise and that such an approach made sense. Such a monthly premium approach was incorporated into the union-M&G discussions over retiree contributions, with *both* sides making 2006 proposals involving monthly contributions. The resulting approach is what became part of the 2005-2008 agreement, and the effects of that agreement are the results of the parties' negotiations. Defendants are thus within their contractual rights in imposing the monthly premiums imposed, however harsh the result may be. Because the calculations and monthly premiums are in accord with the negotiated agreement for those plaintiffs in Subclass Five, Defendants are entitled to judgment on this subclass' claims.

III.

In light of the foregoing findings of fact and conclusions of law, the Court finds in favor of Plaintiffs in Subclasses One through Four and against Defendants on the issue of liability as described herein on Plaintiffs' Count I and II claims. The Court finds in favor of Defendants and against Plaintiffs in Subclass Five on these claims. This leaves the issue of damages, which the Court previously bifurcated from the liability issue. (ECF No. 166.) The Court shall schedule a telephone status conference to set a case schedule on the remaining issues in this litigation.

There being no just cause for delay, the Clerk shall enter judgment in accordance with this Opinion and Order.

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IT IS SO ORDERED.

 /s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE