In The

Court of Special Appeals

Of Maryland

September Term, 2008
No. 2127

CATALYST HEALTH SOLUTIONS, Inc., f/k/a HealthExtras, Inc.,

Appellant,

v.

MARTIN A. MAGILL,

Appellee.

Appeal from the Circuit Court for Montgomery County, Maryland
(The Honorable William J. Rowan, III, Judge)

BRIEF OF *AMICI CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE MARYLAND CHAMBER OF COMMERCE, DISCOVERY COMMUNICATIONS, INC., LOCKHEED MARTIN CORPORATION, AND MARRIOTT INTERNATIONAL, INC., IN SUPPORT OF APPELLANT

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INTEREST OF THE *AMICI*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country, including Maryland. The Chamber advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business. Recent *amicus curiae* filings include; *Livingston v. Wyeth, Inc.*, 520 F.3d 344 (4th Cir. 2008) (concerning the requirement that to be protected as a whistleblower under the Sarbanes-Oxley Act, one must have an objectively reasonable belief that his employer has violated or intends to violate securities laws); *Platone v. United States DOL*, 548 F.3d 322 (4th Cir. 2008) (addressing the level of specificity required for employee's allegation of fraud to constitute protected activity under the Sarbanes-Oxley Act); *Haas v. Lockheed Martin Corp.*, 396 Md. 469 (Md. 2007) (addressing the accrual of a cause of action for discriminatory discharge under Title VII); and *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007) (concerning the impact of the Maryland Fair Share Health Care Fund Act upon the goal of ERISA to permit uniform nationwide administration of employee health insurance plans).

[1] Pursuant to Maryland Rule 8-511, the *amici* have moved for leave to participate in this case.

The Maryland Chamber of Commerce is a statewide coalition of 840 businesses devoted to maintaining a favorable business climate in Maryland. Its mission is to maximize opportunities for its members and their employees to grow and prosper. By working with Maryland's executive and legislative branches, the Chamber seeks to make Maryland an even better place to live, work and do business.

Discovery Communications, Inc. ("Discovery") is incorporated under the laws of the State of Delaware, with its principal place of business in Silver Spring, Maryland. Since its launch in 1985, Discovery has become the world's number one nonfiction media company reaching more than 1.5 billion cumulative subscribers in over 170 countries. Discovery employs approximately 3,000 individuals in the United States, more than 1,500 of whom are actively employed in the State of Maryland.

In 2008, Discovery became a public company and since that transaction has made equity awards to certain employees under an equity-based plan ("the Plan"). Awards under the Plan are subject to the Plan document and implementing award agreements that set forth staggered vesting dates. Option grants typically vest and become exercisable in four equal installments of 25% each year over four years. The terms of the Plan provide that upon termination of employment, options that have not yet vested are forfeited except in the case of termination for death, disability, or other specific circumstances. Discovery currently has approximately 15,198,282 million stock options outstanding under the Plan, and, as of June 12, 2009, 100% are unvested.

Lockheed Martin Corporation ("LMC") is incorporated under the laws of the State of Maryland and has its principal place of business in Bethesda, Maryland. LMC began

operations in 1995 following the combination of Lockheed Corporation and Martin Marietta Corporation. LMC employs approximately 146,000 individuals worldwide, 8,160 of whom are employed in the State of Maryland.

Since its inception in 1995, LMC has made equity-based grants to its employees under stockholder-approved plans (collectively, "the Equity Plans"). Awards made under the Equity Plans have staggered vesting dates. Option grants typically vest in equal installments over two or three years or longer periods in some instances. Restricted stock and restricted stock unit grants typically vest in increments over time or vest in their entirety at the end of a specified period of time. The award agreements governing the grants provide that upon termination of employment prior to a vesting date, awards that have not yet vested are forfeited except in certain cases (which vary by grant) involving retirement, death, layoff, disability, divestiture or change in control. At the end of 2008, LMC had approximately 19 million stock option grants outstanding, of which 12 million were vested and seven million were unvested. Lockheed Martin also had 2.4 million other share-based awards outstanding as of the end of 2008, all of which were unvested.

Marriott International, Inc. ("Marriott") is incorporated under the laws of the State of Delaware, with its principal place of business in Bethesda, Maryland. Marriott and its predecessors have been engaged in the hospitality business since 1927. Marriott employs 110,419 individuals nationwide, 8,009 of whom are actively employed in the State of Maryland.

Since 1963, Marriott or its predecessors have maintained an equity-based plan ("the Plan") for its employees. Since its inception, the Plan has set forth staggered

vesting dates that govern all stock option grants issued under the Plan as well as other stock-based awards. Option grants typically vest in equal installments over four years. The terms of the Plan provide that upon termination of employment, options that have not yet vested are forfeited except in certain cases in which the requirements for approved retirement are met. Marriott currently has approximately 34.5 million stock option grants outstanding and 12.8 million other share-based awards outstanding, of which 90 % are unvested.

The present case highlights issues of great importance to the business community on both state and national levels. The Circuit Court's holding that unvested stock options constitute wages under the Maryland Wage Payment Collection Law, if affirmed, would dramatically change the rules governing the use of stock options as a means to motivate and reward employees. Specifically, affirmation of the Circuit Court's holding would: (1) dramatically change the rules governing a significant facet of the compensation of millions of employees within and without the State of Maryland; (2) potentially cause substantial changes in the way employers disclose and account for unvested incentive stock options; and (3) adversely impact employers' flexibility with respect to the use of stock options as a means to motivate and reward their employees. For these reasons, the *amici* hereby file this *amici curiae* brief.

STATEMENT OF FACTS

Amici curiae generally adopt the Statement of Facts set forth in the brief of the Appellant. Nonetheless, the *amici* reiterate the following facts for the Court's ease of reference in reading and considering this brief.

Appellee Martin A. Magill (hereinafter, "Magill") received a written offer of employment from Appellant Catalyst Health Solutions, Inc. (hereinafter, "Catalyst") as a vice president of sales in a letter dated February 11, 2004. (E 83-84). Magill accepted the offer and began his employment on March 1, 2004.

Catalysts' offer of employment included, among other things, the promise that Magill would "be granted 40,000 options to acquire [Catalyst] common stock. The terms of the options are described in the [Catalyst] Stock Option Plan." (E 83).

During the course of Magill's employment, Catalyst and Magill executed three separate Incentive Stock Option Award Agreements ("SOAAs"). The first was effective as of Magill's start date on March 1, 2004. (E 85-89). The second SOAA was dated April 16, 2004. With the exception of the date of the grant, the number of shares and the strike price, the terms of the second SOAA were identical to those of March 1, 2004 SOAA. (E 91-95). The third, dated September 9, 2004, provided for an award under a different Plan from the first two. Except for differences in the date of the grant, the number of options and the strike price, the terms of the second and third SOAAs were virtually identical to those of the first. (E 98-102). The terms of the Plan document governing the third SOAA were substantively identical to those of the Plan document governing Magill's earlier SOAAs. (E 112-20).

The terms of each of the SOAAs set forth the number of options granted, the date of the grant, the term during which the grant remained effective, the price to be paid in order to purchase the underlying stock (the "strike price"), and the schedule under which Magill's right to purchase the stock at the strike price would vest.

Each of the SOAAs included a schedule on which Magill's right to exercise the options would vest. The first essentially provided that Magill's options would vest over four years, with 25% of the award vesting each year, but that "an installment shall not become exercisable on the otherwise applicable vesting date if the Optionee terminates employment or service prior to such vesting date." (E 85).

The terms of the first SOAA further provided that "[t]he Exercise Price may be paid in cash or Common Stock having a Fair Market Value on the exercise date equal to the total Exercise Price." (E 85). The first SOAA further provided that its terms were governed by the terms of the governing Stock Option Plan document. (E 87).

The Plan document governing the first and second SOAAs explicitly provided that upon termination of employment, only options that are immediately exercisable or vested are subject to exercise, and that the employee must pay the exercise price in full in order to receive the number of shares of Stock for which the Option is being exercised. (E 106).

On November 11, 2005, Magill and Catalyst agreed to modify the terms of the three SOAAs to allow accelerated vesting of certain options, which when combined with those options which had then vested, allowed Magill to exercise a total of 55,000 options. Magill exercised the options and sold the shares, using the proceeds to pay off the balance of a relocation loan he owed to Catalyst. (E 121). Magill retained the remaining proceeds of roughly $100,000.00 (net of taxes). (E 333-34). The November 11, 2005, agreement also adjusted the vesting schedule for the remaining 60,000 options. (E 121).

All of the vesting dates for the remaining options were after April 5, 2006 – Magill's last day of employment.

After Magill's employment with Catalyst ended, Counsel for Magill contended that cancellation of Magill's ability to exercise the stock options (which had not vested prior to the end of his employment) would violate the Maryland Wage Payment Collection Law. (E 335-338). Catalyst responded to this contention, however, the issues were not resolved and this litigation subsequently ensued. *Id.*

Catalyst filed a three-count complaint against Magill seeking in part, declaratory relief that it did not owe Magill any further compensation. (E 38-55). Magill responded by filing counterclaims, alleging in part that Catalyst violated the MWPCL by failing to allow him to exercise 60,000 incentive stock options which had not vested prior to the end of his employment with the company. (E 56-68).

Following a hearing, the Circuit Court granted Magill's renewed motion for partial summary judgment concerning his claim under the MWPCL. (E 28 - Dckt #198). In granting partial summary judgment to Magill on this claim, the Circuit Court concluded that Magill's unvested incentive stock options were "wages" and "wages due for work performed" under the MWPCL, and that as a result, Magill was entitled to exercise them "regardless of his termination of employment from Catalyst, and regardless of any contractual requirement that he remained employed for the options to vest . . . ." (E 342).

SUMMARY OF ARGUMENT

The Circuit Court's holding that unvested stock options constitute wages under the Maryland Wage Payment Collection Law should be reversed. In weighing this decision,

this Court should consider that stock options are a critical tool that employers commonly use as an incentive for employees to continue their service with and contribute to the overall profitability of their companies. Uses of stock options for such purposes is fully consistent with the public policy underlying the MWPCL, under which an employee's right to payment of compensation vests only when the employee has done all of the work required to earn wages that were promised in exchange for his service.

Moreover, this Court should consider the damaging impact that affirmation of the Circuit Court's holding will bring for employers within Maryland and well beyond its borders. Because stock options are so frequently used by employers, employers would have to assess making significant changes to the accounting treatment of unvested incentive stock options which will almost certainly harm their profitability and, concomitantly, the compensation that they are able to pay their employees. For these reasons, *amici curiae* urge this Court to reverse the Circuit Court's holding that unvested stock options constitute wages under the Maryland Wage Payment Collection Law.

ARGUMENT

I. Stock options are a vital tool for employers to use in motivating their employees, and are fully consistent with the public policy underlying the Maryland Wage Payment Collection Law.

In reviewing the propriety of the Circuit Court's holding that unvested stock options constitute wages under the Maryland Wage Payment Collection Law, Md. Code Ann., Lab. & Empl. §§ 3-501-509 (the "MWPCL"), this Court must consider the purposes for which stock options are typically granted and the important distinction between the granting and vesting of such options. In so doing, this Court should conclude that

requiring employees to work until a specified period of time in order for stock options to vest does not transform those options into wages. Moreover, this Court should conclude that such practice is fully consistent with the public policy underlying the MWPCL, which provides that an employee's right to payment of compensation only vests once that employee has done everything required to earn the wages that were promised in exchange for the employee's service.

A. Employers commonly grant stock options to motivate employees to continue their service with and contribute to the profitability and increased stock price of the company through the date of vesting.

Stock options generally provide an employee the future opportunity to purchase a number of the company's shares at a fixed price. The purchase (or strike) price is usually fixed by the market value of the stock on the date the option is granted. However, the employee must generally continue his or her employment with the company, often for a period one to five years, before the right to purchase the shares has vested. If vesting does not occur, for example, because an employee did not remain employed with the company for the period of time specified in the grant of the options, then the employee cannot exercise the stock options because the terms required for vesting were not fulfilled. Of course, even after stock options vest, their ultimate benefit is conditional upon the value of the company's stock being higher at the point of sale than the purchase price of the options, as well as the employee's own decision about when to sell the options.

Despite the inherently conditional nature of unvested stock options, stock options are frequently granted as a means to motivate employees to continue their service and

contribute towards the fundamental goal of increasing the company's profitability. This in turn serves to benefit employees who have received stock option grants, as their contributions ideally serve to increase the value of the company's stock over time, so that once the options are vested, the employee will be able to purchase the shares at a discount and, if the employee so chooses, sell them at a higher price. Employee Stock Options and Ownership (ESOP), *Encyclopedia of Business on Enotes.com* (Jane A. Malonis & Gale Cengage eds.), *available at* http://www.enotes.com/biz-encyclopedia/employee-stock-options-and-ownership-esop (hereinafter "Employee Stock Options and Ownership"). Notwithstanding well-documented debacles such as Enron and the various high-profile stock option back-dating scandals, stock options remain one of the best, if not the best, methods of ensuring that the personal economic interests of a company's employees, and especially its managers, are aligned with the interests of the corporation's shareholders. *See* Burton G. Malkiel and William J. Baumol, Stock Options Keep the Economy Afloat, *The Wall Street Journal*, Apr. 4, 2002, at A18.

B. Requiring continued employment for a specified period of time in order for stock options to vest, a typical feature of stock option grants, is wholly consistent with the public policy underlying the Maryland Wage Payment Collection Law.

One of the key reasons that employers grant stock options is to encourage and reward performance by employees by providing strong incentive for employees to continue in the employer's service for a period of years before being eligible to purchase the shares. The Bureau of Labor Statistics' 2001 survey noted that for employees who received "after-hire" stock option grants, the average period required for full vesting was

three years. *See* Beth Levin Crimmel & Jeffrey L. Schildkraut, Stock Option Plans Surveyed by NCS, *in Compensation and Working Conditions Spring 2001,* at 16, http://www.bls.gov/opub/cwc/archive/spring2001art1.pdf (hereinafter "Stock Option Plans Surveyed by NCS"). For employers with 100 or more employees, the average time required to fully vest increased to 3.2 years. Indeed, only 3.5% of the employers imposed a full vesting period of less than two years. The vast majority required three years (42.9%), four years (15.0%), or more than four years (16.1%). *Id.*

This common practice of requiring employees to work for a specified period of time prior to the vesting of stock options is fully consistent with the public policy underlying the Maryland Wage Payment Collection Law, Md. Code Ann., Lab. & Empl. §§ 3-501-509 ("MWPCL"). Indeed, in *Medex v. McCabe*, 372 Md. 28, 41 (2002), the Court of Appeals referred to the critical concept of vesting when explaining the public policy underlying the MWPCL, stating as follows:

> In accordance with the policy underlying the Maryland Act, an employee's right to compensation ***vests*** when the employee does everything required to earn the wages. (Emphasis added.)

In *Varghese v. Honeywell International, Inc.*, 424 F.3d 411, 421 (4th Cir. 2005), the Fourth Circuit Court of Appeals made clear that although stock options may be deemed wages under the MWPCL, the mere granting of stock options to an employee would not transform the options into wages where they were not promised in exchange for the employee's service, stating as follows:

> Finally, we would note that the mere fact that the stock options were granted does not convert them from a form of a gratuity or reward to "wages" that must be paid. Under that logic, any and all forms of

> compensation, once granted, would constitute "wages." Maryland law applies a much narrower brush, defining wages as compensation *promised* to an employee as remuneration for that employee's labor. As such, it is possible for additional compensation to be granted without it being termed a "wage."

The same holds true concerning a bonus, or any other form of remuneration, which may be offered or granted to an employee, where such was not promised in exchange for the employee's labor at the onset of service. In *Whiting-Turner Contracting Co. v. Fitzpatrick*, 366 Md. 295 (2001), the employer promised the employee a weekly salary, and "after two years of employment and depending upon the profitability of the company, profit sharing", *id.* at 299. When the employee indicated that he was considering resigning prior to completing two years of service, the employer offered him a profit sharing check to try and persuade him to remain with the company. *Id.* at 299-300. The Court of Appeals held that the employer's offer was merely a gratuity that did not constitute wages that were enforceable under the MWPCL, because there was no promise that the employee could receive such benefits prior to completing two years of service at the onset of employment. *Id.* at 306.

As the Court of Appeals' decision in *Whiting-Turner* demonstrates, a Maryland employer can require an employee to work until a specified period of time in order to be eligible for a specific form or amount of compensation (so long as the employee has not performed all of the work required to earn such compensation), as the employer's promise of profit sharing in that case was conditioned on the employee's completion of two years of service (along with the company's profitability). Such is identical to the common requirement of stock option grants that employees work until a specified period

of time in order for options to vest, and demonstrates that such longevity requirements within the context of stock option grants are wholly consistent with the policy underlying the MWPCL.[2]

The Circuit Court's holding that unvested stock options constitute wages under the MWPCL is clearly not supported by the statute's underlying public policy. However, if affirmed, its holding would transform into wages all stock options granted to employees with the condition that they work until a specified date in order for the options to vest, and it would destroy the critical distinctions between the granting of stock options and the vesting of those options, as well as the important rationale for granting them in the first place. Such would effectively nullify the longevity provisions contained in existing stock option grants for employers who are subject to the MWPCL by negating the requirement that employees fully earn the benefits of those options by contributing to the profitability of the company through the date of vesting. Maryland law does not support this result and accordingly, the Circuit Court's decision should be reversed.

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[2] The holding of the Court of Appeals in *Medex* does not dictate otherwise. In *Medex*, the Court of Appeals held that the longevity provision of an employer's incentive plan for payment of commissions, which required the sales employee in question to remain with the company until an arbitrary date beyond the point at which he had performed all of the work required to earn the commissions at issue, violated the public policy underlying the MWPCL. In contrast, an employee whose stock options have not vested has not done all of the work required to earn the right to purchase them at the price specified in the stock options grant.

II. Public policy supports reversal of the Circuit Court's holding that unvested stock options constitute "wages" based upon the vast number of employers and employees that will be harmed if the decision is affirmed.

In weighing the propriety of the Circuit Court's ruling, this Court should also consider the damaging impact that affirmation of its decision will have at the state and national level. As explained herein, stock options are used by a vast number of employers to motivate and reward their employees. However, those employers and the employees who currently benefit from grants of stock options will be harmed if the ruling that unvested stock options are wages under the MWPCL is upheld.

A. Affirmation of the Circuit Court's holding will damage employers on both state and national levels because the use of stock options is so widespread and because the term "employer" under the MWPCL has been construed very broadly.

The use of stock options is highly prevalent. The Bureau of Labor Statistics regularly compiles a National Compensation Survey ("NCS"), which for years has included statistics relating to the use and availability of stock options. The Bureau's 2007 NCS revealed that 8% of all workers in private industry in the United States had access to stock options. In raw numbers, the data reveals that by 2006 (the year for which the data underlying the 2007 NCS was obtained), some 10.6 million employees in the United States held stock options.[3]

Not surprisingly, the percentage of employees to whom stock options were made available increased markedly – to 13% – for companies with 100 or more employees. U.S. Department of Labor, Bureau of Labor Statistics, National Compensation Survey:

[3] *See* National Center for Employee Ownership, New Data Show Widespread Employee Ownership in U.S., http://www.nceo.org/library/widespread/html.

Employee Benefits in Private Industry in the United States, at 36 (Aug. 2007), http://www.bls.gov/ncs/ebs/sp/ebsm0006.pdf. These percentages for overall access to stock options and the availability of those options to higher-paid employees have remained relatively stable over the last several years.[4]

Data concerning the availability of stock options in publicly traded companies shows a substantially higher level of participation in stock award programs. A study published in 2001 revealed that while 1.7% of employees nationwide working in private industry actually received stock options (as opposed to simply having them available), the level of participation more than tripled, to 5.3%, for employees who were employed by corporations that were publicly held. *See* Stock Option Plans Surveyed by NCS, *supra* at pp. 7 - 8, at 10. This same data also demonstrates the relationship between compensation and stock option grants. The highest rate of participation (28%) was found in employees who earned $75,000 or more annually. *Id.*

Moreover, the data from the Bureau of Labor Statistics' 2001 study confirmed that companies were using grants of stock options as incentive compensation, and that participation levels in stock option programs also corresponded to the size of publicly held companies. In companies with fewer than 100 employees, 3.7% of employees participated, while employers with 100 or more employees had participation rates of 6.2%. *Id.* The 2001 research data from the Bureau of Labor Statistics showed that 22.1% of all publicly held companies offer stock options. *Id.* at 11. Public firms with 100 or

[4] *See* Table 27. Nonproduction bonuses and stock options: Access, private industry workers, National Compensation Survey March 2008, http://www.bls.gov/ncs/ebs/benefits/2008/ownership/private/table27a.pdf.

more employees were markedly more likely to offer stock options (30.5%) than their smaller counterparts. (21.0%). *Id.*

From 1992 to 2002, the value of stock options granted by the average firm in the S&P 500 rose from $22 million per company to a high of $238 million per company in 2000, then dropping to $141 million in 2002. Brian Hall & Kevin Murphy, National Bureau of Economic Research Working Paper 9784, The Trouble With Stock Options 3-4 (June 2003), http://www.nber.org/digest/mar04/w9784.html. On an individual basis, the "mean dollar value of unvested options" per employee (based on a sampling of 8,390 U.S. companies offering stock options) has been estimated to be $112,882. Douglas Kane, et al., National Bureau of Economic Research, Shared Capitalism in the U.S. Economy: Prevalence, Characteristics, and Employee Views of Financial Participation in Enterprises 40, www.nber.org/chapters/c8086.pdf. Based on the Bureau of Labor Statistics' research suggesting that that there are something in excess of 10 million U.S. employees who own stock options, the value of unvested options nationwide would appear likely to exceed one trillion dollars.

Although for decades, stock options were used to compensate executives and other key employees, widespread use of stock options to compensate rank-and-file employees came into its prime in the 1990s, as high-technology companies used broad-based stock option grants as a tool to attract and retain top talent. Employee Stock Options and Ownership, *supra* at pp. 8 - 9. The use of broad-based grants of stock options spread to other industries, and by 1998, virtually all of the companies included in the Fortune 1000 issued stock options. Many corporations issue stock options through broad-based stock

option plans. *See* Elaine S. Gill, *Cashless exercise: Why few people keep shares*, 7 ACA Journal, Issue: 1, at 31 (Spring 1988). The reasons employers offer stock options vary, but among the most prevalent is the ability to motivate employees to continue to work for the company in a way that ties the employees' personal financial interests with those of the employer. *See id.* Additionally, compensating employees with stock allows the employer to remunerate the employee without interrupting cash flow – a potentially significant consideration for any company, and particularly for start-up and smaller companies with more limited cash on hand.

Given the extremely broad use of stock options as a means to motivate and reward employees in the workplace, if it is affirmed, the Circuit Court's ruling that unvested stock options granted to employees constitute "wages" will have a damaging impact far beyond those who are a party to this case. At a minimum, all employers headquartered or otherwise regularly operating in Maryland will have to adhere to its holding if they grant stock options to their employees in Maryland. Moreover, employers located outside the state of Maryland, who do not maintain offices or even regular operations in Maryland, also will be harmed based upon the expansive meaning of the term "employer" under section 3-501 of the MWPCL.

This Court's decision in *Himes Associates, Ltd. v. Anderson*, 178 Md. App. 504, 535-536 (2008), *cert. denied*, 405 Md. 291 (2008), demonstrates the extremely broad applicability of the Circuit Court's holding in the case *sub judice* to non-Maryland employers. In *Himes*, this Court held that an "employer" under the MWPCL includes non-Maryland employers which merely instruct their employees to be present at a work

site in Maryland, even where those employees do not regularly perform work in Maryland. *Id.*

In that case, Himes, a Virginia corporation with its principal place of business in Fairfax, Virginia, was deemed an "employer" under the MWPCL, even though its former employee (Anderson) was assigned to work from its Fairfax, Virginia office, and even though the work that he performed in Maryland was extremely limited in scope (e.g., participating in an initial presentation to manage a multi-million dollar construction project for a Maryland corporation in Virginia, and attending bi-monthly meetings in Baltimore concerning the Virginia construction project).[5] *Id.* 178 Md. App. at 514-515.

In concluding that Himes was an "employer," this Court relied upon the plain language of section 3-501 of the MWPCL, which defines "employer" to "include any person who *employs* an individual in the State," and reasoned that because section 3-101 defines the term "employs" to include: "(i) allowing an individual to work; and (ii) *instructing an individual to be present at a work site*," that the situation in which a company outside of Maryland directs its employee to go to a work site in Maryland is clearly encompassed therein. *Himes*, 178 Md. App. at 535 (emphasis added). This Court also rejected the argument that because Himes' former employee was not "regularly employed" in Maryland (which is the standard this Court employs when construing the meaning of the term "employer" under the Maryland's Workers' Compensation Act (Md.

[5] Although Anderson was also assigned to manage a project for another Maryland company in Maryland, this Court's opinion does not indicate that Anderson performed work within Maryland in relation to that project. However, this Court's opinion notes Anderson's testimony that he performed work on one additional project at Aberdeen, Maryland. *Himes*, 178 Md. App. at 514-516.

Code Ann., Lab & Empl. §§ 9-101 *et seq.*)), it should not be deemed an employer under the MWPCL. This Court explained that the "regularly employed" test employed a more rigid standard than what the Maryland General Assembly intended the term "employer" to mean under the MWPCL, stating as follows:

> If the legislature had intended the MWPCL to apply only to employers of those individuals who are "regularly employed" in Maryland, it could have said so.

Himes, 178 Md. App. at 536.

B. The damaging impact that affirmation of the Circuit Court's holding would cause strongly supports reversal of its ruling.

Affirmation of the Circuit Court's holding could immediately damage employers headquartered or otherwise regularly operating in Maryland, as well as those employers subject to provisions of the MWPCL even though they are located elsewhere. To be sure, such employers would have to assess substantially changing the way that they account for grants of incentive stock options which have not vested.

In response to well-documented abuses, the Financial Accounting Standards Board issued a revised version of Statement of Financial Accounting Standards No. 123, *Share-Based Payment* (SFAS 123(R)), in December of 2004. SFAS 123(R) addresses the rules for accounting for transactions in which an entity uses its own equity instruments as remuneration for goods or services received, and generally requires that such transactions be disclosed using the fair-value method to value the securities. Grants of incentive stock

options are reported as contingent liabilities until exercised[6] – which can only occur after such options vest – and in that situation, "[n]o compensation cost is recognized for equity instruments for which employees do not render the requisite service" (e.g. unvested options). SFAS 123(R)-3 (December 2004). However, if it is upheld, the Circuit Court's holding could force employers to preclude treating unvested incentive stock options in this manner (i.e., as a contingent liability), as they potentially would have to immediately treat unvested incentive stock options as if they were fully vested from an accounting perspective for their employees who are actively employed in Maryland.[7]

It is axiomatic that such drastic increases in corporate expenses would impact the overall profitability and value of the affected companies which, in turn, would impact the price investors are willing to pay for their stock. Additionally, in an effort to try and make up for these losses, affected companies may increase the prices that they charge consumers for their products and services. In an effort to avoid this scenario, companies may elect to move out of or otherwise cease doing business in Maryland, or they may choose to decrease or even stop granting stock options as a way to motivate and reward

[6] This is not to suggest that, as contingent liabilities, the options have no value. But the nuances of that valuation are beyond the scope of this brief.

[7] It may prove impossible for many companies to reliably track which of their employees are properly subject to the MWPCL if they periodically allow or assign employees located elsewhere to work in the State of Maryland. *See Himes*, 178 Md. App. at 535.

their employees.[8] As a matter of public policy, the damaging impact that affirmation of the Circuit Court's holding would cause should be considered, as it strongly supports reversal in this case.

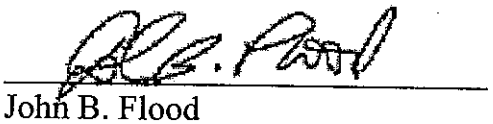
CONCLUSION

For the foregoing reasons, the Circuit Court's holding that unvested stock options constitute wages under the Maryland Wage Payment Collection Law should be reversed. In weighing this decision, this Court should consider that stock options are a critical tool that employers use to provide incentive for employees to continue their service and to contribute to the overall profitability of their companies. The use of stock options for such purposes is fully consistent with the public policy underlying the MWPCL, under which an employee's right to payment of compensation vests only when the employee has done all of the work required to earn wages that were promised in exchange for his service. Moreover, this Court should consider the damage that affirmation of the Circuit Court's holding will bring for employers within Maryland and well beyond its borders, based upon the broad use of stock options and the fact that it could require immediate, significant changes to the accounting treatment of unvested stock options for employers, which will almost certainly will harm their profitability and, concomitantly, their employees and even consumers. For these reasons, *amici curiae* urge this Court to

[8] *See, e.g., Retail Indus. Leaders Association v. Fielder*, 475 F.3d 180, 197 (4th Cir. 2007) (noting that in response to the Maryland Fair Share Act, which required companies with more than 10,000 Maryland employees to spend at least eight % of their total payroll on employees' health insurance costs or pay the amount their spending fell short to the state, employers "could move plants from the State to bring its employee number under 10,000" or may "reduce wages to increase the proportion of its payroll devoted to healthcare spending" or might "leave the State altogether.")

reverse the Circuit Court's holding that unvested stock options constitute wages under the Maryland Wage Payment Collection Law.

Respectfully submitted,



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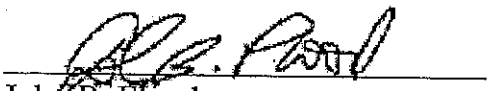

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I hereby certify that on June 15, 2009, the attached document:

BRIEF *AMICI CURIAE* OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE MARYLAND CHAMBER OF COMMERCE, DISCOVERY COMMUNICATIONS, INC., LOCKHEED MARTIN CORPORATION, AND MARRIOTT INTERNATIONAL, INC., IN SUPPORT OF APPELLANT

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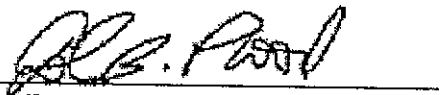

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