No. 15-2382

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACK REESE; FRANCES ELAINE PIDDE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN, ON BEHALF OF THEMSELVES AND A SIMILARLY SITUATED CLASS,
Plaintiffs-Appellees,

v.

CNH INDUSTRIAL N.V., AND CNH INDUSTRIAL AMERICA LLC,
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Michigan, No. 2:04-cv-70592

AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN BENEFITS COUNCIL IN SUPPORT OF PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, disclosure is hereby made by amici curiae Chamber of Commerce of the United States of America and American Benefits Counsel of the following corporate interests:

a. Parent companies of the corporation/association:

None.

b. Any publicly held company that owns ten percent (10%) or more of the corporation/association:

None.

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The American Benefits Council (the "Council") is a national nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large multistate U.S. employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to

retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

The businesses represented by the Chamber and the Council sponsor or service hundreds of thousands of employee benefit plans, many of which provide for retiree health benefits. It is vital to the continued operation of those plans that the governing law is clear and that plan terms are applied as written. The panel majority's decision creates untenable confusion regarding the status and required duration of retiree healthcare benefits and makes it difficult for employers to rely on express plan terms in planning for their businesses and providing benefits to their retired employees. For these reasons, the Chamber respectfully submits that the Court should review the panel's decision en banc.[1]

INTRODUCTION

[1] This brief is submitted pursuant to Rule 29(b), accompanied by a motion for leave to file. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amici curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

In *M&G Polymers USA LLC v. Tackett*, 135 S.Ct. 926 (2015), the Supreme Court attempted to restore clarity and uniformity to the interpretation of collective bargaining agreements and plans providing retiree health benefits by unanimously rejecting this Court's outlier rule established by *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), which, as the Supreme Court stated, improperly "plac[ed] a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements," *Tackett*, 135 S. Ct. at 935. Just over two years later, the panel majority's decision in *Reese v. CNH Industrial America LLC*, No. 15-2382 (April 20, 2017), has effectively undone what *Tackett* accomplished, once again creating uncertainty and unpredictability within this circuit and a split across circuits. Employers and employees cannot meaningfully bargain or reliably plan for the future in the chaotic legal environment this Court has created. The Court should rehear this case en banc to restore the stability that *Tackett* established.

ARGUMENT

I. *REESE* HAS CREATED CONFUSION AND CONFLICT WITHIN THE SIXTH CIRCUIT AND WITH OTHER CIRCUITS

In *Tackett*, the Supreme Court announced that ordinary principles of contract interpretation, to which other circuits have long adhered, are to be applied to discern whether collective bargaining agreements and associated benefit plans provide for vested, lifetime benefits. *See, e.g.,* 135 S. Ct. at 930 ("[C]ourts should not construe ambiguous writings to create lifetime promises."). The Court further held that "a contract [that] is silent as to the duration of retiree benefits" cannot be construed as promising vested benefits for life. *Tackett*, 135 S. Ct. at 937. It squarely rejected the notion "that the tying of eligibility for health care benefits to receipt of pension benefits suggested an intent to vest health care benefits." *Id.* And the Court made clear "that the use of the future tense without more . . . does not guarantee lifetime benefits." *Gallo v. Moen Inc.*, 813 F.3d 265, 271 (6th Cir. 2016) (citing *Tackett*, 135 S. Ct. at 937).

As Judge Sutton's dissent explains, *Reese* is irreconcilable with *Tackett*—as well as with this Court's decisions in *Moen* and *Cole v. Meritor, Inc.*, No. 06-2224 (Apr. 20, 2017)—on each of these teachings from the Supreme Court. And, because other circuits have abided by *Tackett*'s commands, *Reese* has now taken this Court back out of step with other jurisdictions. *See Reese*, Slip Op. at 18-19 (Sutton, J., dissenting). Indeed, *Reese* effectively signals a return to *Yard-Man* in all but name. The Court should grant en banc review to redress the intra- and inter-circuit conflict and confusion created by *Reese*, as well as by *International Union, UAW v. Kelsey-Hayes Co.*, No. 15-2285 (6th Cir., April 20, 2017).

II. THIS CONFUSION AND CONFLICT WILL HURT EMPLOYERS AND RETIREES ALIKE

Healthcare benefits are often a core aspect of the employer-employee relationship, with a substantial economic impact on employers and, indeed, on the economy as a whole. As healthcare and health insurance becomes increasingly complex, employers and employees more frequently choose a flexible, rather than fixed, system

of retiree healthcare benefits. That arrangement can maximize utility for both sides. Indeed, as the prior *Reese* panel recognized, the demand for increasing flexibility in healthcare benefit packages is in large part due to consistent and "remarkable growth in modern life-saving and comfort-improving medical procedures, devices and drugs." *Reese v. CNH Am. LLC* ("*Reese II*"), 694 F.3d 681, 683 (6th Cir. 2012). In addition, the need for flexibility results from ever-changing regulatory regimes—including, not least, the Affordable Care Act. The combination of these factors—technological and scientific advancement, plus complex regulatory change—means that decades-old benefits packages may be ill-suited to employers' or retirees' needs. "Companies want the freedom to change health-insurance plans," and retirees "want coverage to account for new and better, yet likely more expensive, procedures and medications than the ones in existence at retirement." *Id.* at 684.

Regardless of whether parties to a collective bargaining agreement and associated benefits plan agree to flexibility regarding

retiree healthcare benefits—or whether they prefer to fix those benefits over a retiree's lifetime—actual, reliable implementation of that agreement is workable only when courts consistently enforce the terms of governing contracts. *See Tackett*, 135 S. Ct. at 933 (holding that courts have an obligation to respect the terms of contracts that provide for retiree healthcare benefits). And consistent enforcement is effectively impossible when the legal standards applicable to interpreting collective bargaining agreements and benefit plans are contradictory and unclear. The only certain result under an uncertain legal regime is that both sides to the agreement ultimately suffer.

Most obviously, interpreting a CBA or benefits plan to provide for vested, lifetime benefits when the parties did not enter an agreement to that effect imposes a massive financial burden on employers—a burden for which they neither bargained nor would rationally have prepared. These costs can easily exceed hundreds of millions of dollars—more, even, for companies with large retiree populations—and those numbers will only continue to rise as the population of retirees expands and

healthcare and health insurance becomes more expensive.[2] Indeed, unforeseen, expanding expenditure for retiree health benefits can put companies out of business altogether. *See, e.g., Wood v. Detroit Diesel Corp.*, 607 F.3d 427, 429 (6th Cir. 2010) (CEO testified that vested retiree healthcare liabilities "could have bankrupted the company by rendering it unable to obtain capital").

Retirees and current employees also suffer from an unpredictable legal regime governing the interpretation of CBAs and benefit agreements. Retirees, for their part, stand to lose all of their benefits if unanticipated healthcare costs end up driving their former employer into insolvency. In the short term, current employees may face lowered wages, a move to part-time status, or even potential termination, as

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[2] The U.S. Census Bureau found after the 2010 census that "more people were 65 years and over in 2010 than in any previous census" and that "the population 65 years and over [has] increased at a faster rate (15.1 percent) than the total U.S population (9.7 percent)" since the 2000 census. 2010 Census Briefs, The Older Population: 2010, https://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf. "This age group represents the leading edge of the Baby Boom and is expected to grow more rapidly over the next decade as the first Baby Boomers start turning 65 in 2011." *Id.*

companies are forced to cut costs elsewhere to pay for unanticipated retiree healthcare benefits.[3] And, in the long term, employers will be less willing to provide retiree benefits in the first place if they cannot accurately predict their potential liabilities for those benefits in light of uncertain or inconsistent enforcement of plan terms. *Cf. Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (noting "ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities"); *Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) ("Predictability as to the extent of future obligations would be lost, and, consequently, substantial disincentives for even offering such plans would be created."). So whereas this generation of retirees may find themselves with different healthcare benefits than they previously had been provided, the next generation of

[3] *See, e.g.,* U.S. Social Security Administration, Social Security Advisory Board, *The Unsustainable Cost of Health Care,* p. 9 (September 2009), http://purl.access.gpo.gov/GPO/LPS118647 ("In the long run, most of the impact of rising health care costs on employers can be shifted to their workers by reducing wage growth, hiring fewer workers, or hiring more part-time workers who are typically not eligible for health insurance coverage.").

retirees may not have any healthcare benefits at all if contractual provisions for healthcare benefits are not interpreted reliably and consistently by the courts.

The uncertain status quo ushered in by *Reese* is particularly untenable for companies that operate throughout the nation (and employees of those companies). The Sixth Circuit's divergence from other circuits, *see Reese*, Slip Op. at 18-19 (Sutton, J., dissenting), has created the possibility of "a patchwork of different interpretations of a [single] plan . . .—a result that would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010). In addition, parties will be encouraged to forum shop, seeking out or avoiding the Sixth Circuit depending on whether they want to evade or enforce the bargain they struck. This is as unseemly for the legal system as it is untenable for the business community.

Critically, and contrary to *Reese*'s suggestion, consideration of extrinsic evidence is no solution to these problems. As a practical matter, turning to extrinsic evidence—which, of course, demands discovery—exponentially increases the costs of litigation, which is particularly unfair for parties who clearly reserved their rights to amend retiree benefit plans. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559–60 (2007) (highlighting "the potentially enormous expense of discovery" and noting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases"). It also increases the burden on courts. More substantively, "allowing parties to substitute oral testimony for contractual language . . . depriv[es] parties of the protection of a written contract." *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607 (7th Cir. 1993). If "all communications between an employer and plan beneficiaries" are relevant to "establishing the terms of a welfare plan, the plan documents . . . would establish merely a floor for an employer's future obligations." *Moore*, 856 F.2d at 492. That is not how benefit plans (or any other contracts)

are supposed to work. *See Tackett*, 135 S. Ct. at 934 ("[T]he written agreement is presumed to encompass the whole agreement of the parties."). The approach in the *Reese* panel majority decision—and the sort of routine resort to extrinsic evidence that this approach will foster—would introduce an intolerable level of uncertainty into the provision of retiree benefits.

III. *REESE* IS A GOOD VEHICLE FOR EN BANC REVIEW

Reese is a good candidate for this Court to review en banc for at least two reasons. First, the panel majority made sweeping pronouncements of law that are inconsistent with *Tackett*, *Moen*, and *Meritor*. It gave no weight at all to the contract's general durational clause. It then held that "silence" as to the duration of retiree benefits elsewhere in the contract is sufficient to create ambiguity as to vesting. Slip Op. at 7. The panel majority did the same with respect to so-called "pension tying," that is, inferring ambiguity as to whether retiree healthcare benefits have been vested for life when provisions for healthcare benefits and pension benefits share certain eligibility

criteria. *Id.* at 8. Further still, the panel majority in *Reese* held that the mere continuation of healthcare coverage "past the date of retirement"—a factor present in literally every *retiree* healthcare benefit plan—furthered ambiguity as to vesting. Then, having found the agreement ambiguous, it proceeded to construe this purportedly "ambiguous writing[ ] to create lifetime promises." *Tackett*, 135 S. Ct. at 930. Each of these interpretive principles is directly at odds with *Tackett* and its progeny, including *Moen* in this Circuit.

Second, the panel majority's decision turned on relatively generic plan terms, rather than idiosyncratic ones. Particularly in light of the Court's broad pronouncements, this means that *Reese*, if left in place, could have widespread consequences in many pending and future cases within this Circuit. And it means that any superseding ruling by the en banc Court—even if narrower than the panel opinion—would be similarly wide-reaching.

In that vein, the Court should not wait to take up this issue. As already explained, the uncertainty created by *Reese*—and the Sixth

Circuit's publication on the same day of decisions in *Meritor* and *Kelsey-Hayes* addressing whether and when retiree healthcare benefits may be deemed vested for life—has created confusion in the law and will continue to adversely affect employers and employees until the en banc Court (or the Supreme Court) intervenes. In the even shorter term, district courts in this Circuit are poised to decide multiple cases now pending that present the question whether retiree healthcare benefits are vested for life. *See, e.g., ICE-CWA v. General Electric Co.*, No. 4:15-cv-02301 (N.D. Ohio); *Kerns v. Caterpillar Inc.*, No. 3:06-cv-1113 (M.D. Tenn.); *Reynolds v. Resolute Forest Products, Inc.*, No. 1:16-cv-00048 (E.D. Tenn.); *Tackett v. M&G Polymers USA, LLC*, No. 2:07-cv-00126 (S.D. Ohio); *Zino v. Whirlpool Corp.*, No. 5:11-cv-01676, (N.D. Ohio). In the absence of guidance from the en banc Court, these district courts will have no choice but to attempt to reconcile this Court's recent decisions (which present inconsistencies with each other) with other post-*Tackett* Sixth Circuit precedent and *Tackett* itself. Not only would that be unfair to district courts, it would also be massively wasteful.

After all, if this Court stays its hand now but acts (or forces the Supreme Court to act) later, district courts will have to do it all over again—an especially unfortunate result given that many of them are still working through "do overs" after *Tackett* abrogated this Court's *Yard-Man* rule.

CONCLUSION

The Chamber of Commerce of the United States of America and the American Benefits Council therefore respectfully submit that the Court should grant the Petition and rehear this case en banc.

Dated: May 11, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations contained in Federal Rule of Appellate Procedure 29(b)(4) because, excluding the portions exempted by Rule 32(f), the brief contains 2,585 words.

Dated: May 11, 2017

/s/ Stanley Weiner
Stanley Weiner

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on May 11, 2017, I electronically filed the foregoing brief with the United States Court of Appeals for the Eleventh Circuit using the ECF system. All parties have consented to receive electronic service and will be served by the ECF system.

Dated: May 11, 2017

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