No. 17-515

# In the Supreme Court of the United States

CNH INDUSTRIAL N.V. & CNH INDUSTRIAL AMERICA LLC

PETITIONERS,

v.

JACK REESE; FRANCES ELAINE PIDDE; JAMES CICHANOFSKY; ROGER MILLER; GEORGE NOWLIN,

RESPONDENTS.

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

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## REPLY BRIEF

The Petition shows that the Sixth Circuit's decision in this case misinterpreted this Court's unanimous decision in *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), resurrected a conflict among the circuits, and created a conflict within the Sixth Circuit itself. Moreover, as amici show, the decision sows uncertainty among employers and retirees alike about the duration of retiree health benefits, threatens to impose massive financial burdens on employers, and invites a return to forum shopping in the Sixth Circuit.[1]

In opposition, the Retirees urge the Court to look the other way. They contend that the decision, and the conflicts it has spawned, are explained by factual distinctions among retiree benefit cases. But this reading of the various decisions is demonstrably wrong. As the Chamber of Commerce explains, "the plan terms on which the majority relied are likely to recur in nearly every retiree-health-benefits case." Chamber Br. at 15. Even though the contract language in these cases is materially identical, certain panels, like the one here, are improperly divining ambiguities to "permit[]" and "allow[]" consideration of extrinsic evidence. Pet. App. 12. But turning to extrinsic evidence in the face of unambiguous general durational clauses flouts this Court's instruction in *Tackett* that enforcement of

[1] *See* Brief of Amicus Curiae United States Chamber of Commerce, et al., at 5–7 & 12–14 ("Chamber Br."); Brief of Amicus Curiae ERISA Industry Committee, at 10–11 ("ERIC Br."); Brief for Amicus Curiae Whirlpool Corp., at 12 ("Whirlpool Br.").

"contractual 'provisions … as written is *especially appropriate* when enforcing an ERISA [welfare benefits] plan.'" 135 S. Ct. at 933 (emphasis added).

Worse still, Retirees hail the decision below as inviting "a case by case review of facts to determine whether a durational clause cures ambiguity." Opp. at 13. An invitation to disregard the contractual language and consider extrinsic evidence will exacerbate uncertainty and make trials the norm in these disputes. That is not what Congress intended when it rejected mandatory vesting of welfare benefits, and it is not, CNH respectfully submits, what this Court intended in *Tackett*.

## I. THE DECISION BELOW CANNOT BE RECONCILED WITH *TACKETT*.

The Sixth Circuit's decision contravened *Tackett* in several ways. Pet. 14–17. It failed to follow the written agreement, which "is presumed to encompass the whole agreement of the parties." *Tackett*, 135 S. Ct. at 936. As in its pre-*Tackett* decisions based on *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), the lower court "refused to apply [the] general durational clause[] to provisions governing retiree benefits." 135 S. Ct. at 936. It compounded these errors by disregarding "the traditional principle that courts should not construe ambiguous writings to create lifetime promises," *id.*, and the canon that "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life," *id.* at 937. Rather than construing the agreement, the court reached out for extrinsic evidence, which it asserted

"moves us closer to the ultimate goal … [of] discovering the parties' true intentions." Pet. App. 12.

The lower court justified this departure from *Tackett* on the ground that the general durational clause in the CBA here is ambiguous. To find ambiguity, the court relied on both "silence" and the "tying" of eligibility for healthcare to eligibility for a pension, both of which this Court expressly rejected as grounds for vesting. *Tackett*, 135 S. Ct. at 934, 935. The lower court tried to distinguish between reliance on silence and tying to find *vesting*, versus reliance on those same canons to find *ambiguity*, but its reasoning does not withstand analysis. *See* Pet. at 15–16. "A forbidden inference cannot generate a plausible reading." Pet. App. 32 (Sutton, J., dissenting). Absent some provision in the contract addressing the duration of retiree benefits, the general durational clause means what it says and says what it means: the contract, and the benefits it promises, expire on a date certain. *See Tackett*, 135 S. Ct. at 937 ("traditional principle that contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.").

Remarkably, the Retirees make no attempt to reconcile the lower court's reasoning with the instructions in *Tackett*. They repeatedly argue that, under Sixth Circuit precedent, a durational clause does not say "everything" about the vesting of benefits, Opp. at 13, 21, 22; that extrinsic evidence itself can be used to show an ambiguity, *id.* at 18 ("those facts can inform a finding of ambiguity"); and that "[a]mbiguity opens the analysis to extrinsic

evidence of the parties' intent," *id*. at 19. They even claim that "[t]he danger of the *Yard-Man* inference" was its failure to "consider[] intent evidence." *Id*. at 19. Even in the *Yard-Man* era, the Sixth Circuit at least made a pretense, through illogical canons, of following the agreement.

For the Retirees, however, the written agreement is simply beside the point. The Retirees here would move forthwith to the extrinsic evidence both to find an ambiguity and to resolve it. Their approach flouts *Tackett*. 135 S. Ct. at 933 (when contact language is clear, "its meaning is to be ascertained in accordance with its plainly expressed intent.") (citation omitted); *id.* at 938 (Ginsburg, J., concurring) ("When the intent of the parties is unambiguously expressed in the contract, that expression controls, and the court's inquiry should proceed no further.").

## II. THE DECISION BELOW CREATES BOTH AN INTER-CIRCUIT AND AN INTRA-CIRCUIT CONFLICT.

**A.** The Petition explains how the decision creates and furthers an inter-circuit conflict, both with pre-*Tackett* decisions of other Courts of Appeals, *see* Pet. App. 27 (Sutton, J., dissenting), and with post-*Tackett* decisions of the Third and Fourth Circuits, Pet. at 20–24. The Retirees merely assert that the decisions are fully reconcilable on their facts. They are wrong.

The CBA in this case stated that the Group Benefit Plan, which contained the retiree health benefits, "will run concurrently with the [CBA],"

which expired on May 2, 2004. Pet. App. 114–15. The benefits at issue in both the Third Circuit and Fourth Circuit cases were likewise subject to durational clauses with language materially identical to the language here. *See Barton v. Constellium Rolled Products-Ravenwood,* 856 F.3d 348, 352 (4th Cir. 2017) ("Article 15 of the CBA states that the retiree health benefits 'shall remain in effect for the term of this … Labor Agreement."); *Grove v. Johnson Controls, Inc.,* 694 F. App'x 864, 868 (3d Cir. 2017) ("The booklets containing the phrases in question were incorporated into collective bargaining agreements, and those agreements, of course, included durational clauses with exact expiration dates.").

The lower court also deemed it significant that the plan at issue here "carved out certain benefits" that "ceased at a time different than other provisions of the CBA." Pet. App. 11. Again, the Fourth Circuit rejected this same argument based on similar language. *Barton*, 856 F.3d at 355 (no vesting even though dependent coverage "'shall cancel on the dates such person is no longer an eligible dependent as defined *or upon your death*, whichever comes first.'").

Further, the Retirees contend that certain "cap letters"—eliminated in the 1998 CBA at issue here—indicate that their benefits were vested. But the Fourth Circuit ruled that similar "Cap Letters themselves undermine the notion that the retiree health benefits vested, for the Cap Letters indicate that the parties can *change* the benefits" by placing limits on them. *Barton*, 856 F.3d at 353. In short,

the Third and Fourth Circuit decisions are in irreconcilable conflict with the decision below in the interpretation of *Tackett* on substantively identical contract language.

**B.** Likewise for the conflict within the Sixth Circuit. The decisions in this case and *UAW v. Kelsey-Hayes*, 854 F.3d 862 (6th Cir.), *reh'g denied*, 872 F.3d 388 (6th Cir. 2017), on the one hand, and in *Gallo v. Moen Inc.*, 813 F.3d 265 (6th Cir.), *cert. denied*, 137 S. Ct. 375 (2016); *Cole v. Meritor, Inc.*, 855 F.3d 695 (6th Cir.), *cert. denied*, — S. Ct. —, 2017 WL 4168076 (Nov. 27, 2017); and more recently *Watkins v. Honeywell Int'l Inc.*, 875 F.3d 321 (6th Cir. 2017), on the other, are in irreconcilable conflict on the law.[2] As amicus Whirlpool Corp. points out, Whirlpool Br. at 16, "the rule of law applied in *Gallo* and *Cole* does not assign any weight to the 'factual differences'" deemed determinative in this case. Indeed, in *Gallo, Cole*, and *Watkins*,[3] the general durational clauses in the CBAs were materially indistinguishable from the clause here. *See Gallo*, 813 F.3d at 269 ("Present in each CBA, the *general durational clause supplied a concrete date of*

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[2] The *Cole* class of retirees agreed that the Sixth Circuit's law is in irreconcilable conflict. *See Cole v. Meritor, Inc.*, No. 17-413, Petition for Certiorari, (filed Sept. 15, 2017) & Pet'rs' Supp'l Br. (filed Sept. 27, 2017). On 27 November 2017, the Court denied the petition for certiorari in *Cole*, just as it had done in *Gallo*, 137 S. Ct. 375 (2016). CNH submits that *Gallo* and *Cole* were correctly decided.

[3] In *Watkins*, the Sixth Circuit tried to reconcile the inconsistent decisions, but its suggestion that the durational clauses in *Gallo*, *Cole*, and *Watkins* are different from the one here is, as shown in text, not accurate.

*expiration* after which either party could terminate the agreement.") (emphasis added); *Cole,* 855 F.3d at 699 ("This [Insurance] Agreement and [Insurance] Program … shall continue in effect *until the termination of the Collective Bargaining Agreement of which this is a part.*") (emphasis added); *Watkins*, 875 F.3d at 322 ("'*For the duration of this Agreement*, the Insurance Program shall be that which is attached hereto'") (emphasis added). As *Gallo* held, "[w]hen a specific provision of the CBA does not include an end date, we refer to the general durational clause to determine that provision's termination." 813 F.3d at 269.

The court in *Gallo*, *Cole*, and *Watkins* also addressed other benefit provisions with specific end dates, but unlike the lower court here found the retiree health benefits, which had no specific end date, were governed by the general durational clause. *See Gallo*, 813 F.3d at 271 ("The 2005 CBA, for example, says that 'Hospitalization, Surgical and Medical Benefits for terminated employees, including lay-off, will continue in effect for the duration of the month for which premiums have been paid.'"); *Cole*, 855 F.3d at 700 ("the plaintiffs point out that the CBAs 'set specific durational limits on continued healthcare for employees on layoff and leave—up to 24 months—but set no duration limits on retiree healthcare.'"); *Watkins*, 875 F.3d 321, at *6 ("that the agreement contemplates early benefits termination for active employees but not retirees does not make it ambiguous."). These other panels of the Sixth Circuit rejected the very argument accepted by the lower court here, which deemed these specific durational

clauses evidence of an ambiguity in the general durational clause.

In contrast to *Gallo*, *Cole*, and *Watkins*, but in line with this case, *Kelsey-Hayes* deemed ambiguous a general durational clause stating the Agreement "continued through February 2002," on the ground that certain benefits were limited to "periods less than life," other benefits had "specific-duration periods for life," but the CBA did not specify a duration for healthcare benefits. 854 F.3d at 867, 868. Thus, no consistent interpretation of *Tackett* can explain the disparate results in this case and in *Kelsey-Hayes*, compared to results in *Gallo*, *Cole*, and *Watkins*.

Nor does the purported "tying" of healthcare eligibility to pension eligibility distinguish this case from the inconsistent Sixth Circuit decisions. The eligibility language in this case states: "Employees who retire under the [CNH] Pension Plan for Hourly Paid Employees after 7/1/94 … shall be eligible for the Group Benefits." Pet. at 3. *Gallo* and *Watkins* specifically rejected the argument that tying of eligibility for retiree healthcare to eligibility for a pension suggested vesting. *See Gallo*, 813 F.3d at 272 ("the CBAs simply state that those who are *eligible* for pensions are also *eligible* for health benefits."); *Watkins*, 875 F.3d 321 at *6 ("that the agreement tied eligibility for healthcare coverage to pension eligibility *does not*, for this particular contract, *raise an ambiguity about the duration of the healthcare benefits*") (emphasis added).

The Retirees' fallback suggestion that this Court should deny the petition to give the Sixth Circuit

more time to work out its differences is unpersuasive. Opp. at 26–27. First, the Sixth Circuit declined three times to resolve this conflict and appears to lack a cogent majority to do so. *See UAW v. Kelsey-Hayes*, 872 F.3d 388, 390 (6th Cir. 2017) (Sutton, concurring in denial of rehearing) ("real possibility that [the court] would not have nine votes" to resolve the conflict). Moreover, in view of the severe consequences detailed by amici to both businesses and retirees from the continued uncertainty, "[t]he value of additional intra-circuit debate seems … far outweighed by the benefits that flow to litigants and the public from the resolution of legal questions." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27 (1994); *see* Chamber Br. at 7–10 (consequences of uncertainty to employers and employees).

In short, the Retirees' assertion that the Third Circuit's decision in *Grove* and the Fourth Circuit's decision in *Barton* are distinguishable on their facts is inaccurate. Likewise, the contractual provisions in *Gallo*, *Cole*, and *Watkins* are materially identical to the provisions in this case.[4] Judge Griffin was plainly correct in observing that the Sixth Circuit's "post-*Tackett* case law is a mess," and "these decisions are in irreconcilable conflict regarding how courts are to view durational clauses." *UAW v.*

[4] As amicus ERIC forcefully argues, Br. at 21–22, this case may be a candidate for summary reversal with instructions to enter judgment for petitioner CNH. *See Amgen, Inc. v. Harris*, 136 S. Ct. 758, 760 (2016) (per curiam) (summarily vacating Ninth Circuit's second decision because it "did not correctly apply" this Court's decision in the first appeal).

*Kelsey-Hayes*, 872 F.3d at 390, 391 (Griffin, J., dissenting from denial of rehearing). That "mess" calls for this Court's prompt resolution.[5]

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[5] Plaintiffs seek to prove vesting with extrinsic evidence from the record in *Yolton v. El Paso Tennessee Pipeline Co.*, 318 F. Supp. 2d 455, 469 (E.D. Mich. 2003), *aff'd*, 435 F.3d 571 (6th Cir. 2006). *See* Opp. at 1–3. *Yolton*, which follows *Yard-Man*, addressed benefits for a class of persons who retired *before* July 1, 1994, and who derived their benefits under earlier agreements. *See* Pet. App. 34 (Sutton, J., dissenting) (extrinsic evidence "predates the relevant time period").

Unlike the pre-1994 agreements, the 1995 and 1998 agreements "reset" the benefits for *all post-1994 retirees*, explicitly extending and modifying those benefits. Pet. at 3, 17; *see also Reese v. CNH Am. LLC*, 574 F.3d 315, 324 (6th Cir. 2009) ("*Reese I*"). The existing retirees "saw their coverage downgraded in at least one respect" with the move to managed care. *Id*. at 325*; see also Reese v. CNH Am. LLC*, 694 F.3d 681, 684 (6th Cir. 2012) ("*Reese II*") (same). For this reason, the Retirees' reliance on extrinsic evidence prior to 1994 is irrelevant to the interpretation of the agreements at issue here. *See* Pet. App. 34 (Sutton, J., dissenting) ("No amount of parol evidence regarding prior agreements, including promises made to workers who retired in the 1970s and '80s, is probative of the meaning of a set of distinct promises made by a new corporate parent for the first time in 1995, and then in altered form in 1998.").

If, contrary to *Tackett*, extrinsic evidence were relevant, the most compelling evidence is that the parties in fact renegotiated the benefits for all post-1994 retirees in both the 1995 and 1998 collective bargaining cycles. *See also Reese I*, 574 F.3d at 323 (quoting Summary Plan Description allowing CNH to "amend[] or terminat[e]" the plans).

## III. THIS CASE IS THE APPROPRIATE VEHICLE TO RESOLVE THE CONFLICTS.

As the Retirees repeatedly note, this case has been to the Sixth Circuit three times. *See, e.g.*, Opp. at 12, 14, 15. The first two decisions held the benefits vested under *Yard-Man*, and this third decision relies on *Yard-Man* rules to reaffirm those earlier vesting rulings. In any event, Retirees cannot deny that the record is fully developed.

The Retirees assert that "it is premature to conclude that the Courts of Appeal require guidance" on how to interpret and apply *Tackett,* Opp. at 15, and that the conflict has not yet "matured," *id.* at 26–27. But district courts in the Sixth Circuit are already struggling to interpret and follow the inconsistent precedents, Pet. at 24–25, and the business community already confronts the uncertainty of inconsistent decisions as well as the risk of forum shopping. Chamber Br. 5–7 & 12–14; ERIC Br. 10–11; Whirlpool Br. 12. Moreover, if the Retirees are correct that the Sixth Circuit is demanding detailed analysis of extrinsic evidence in every case to determine if an ambiguity exists, and then resorting to such evidence to resolve the inevitable ambiguities discerned, the especial importance of written benefit plans is being completely undermined in the Sixth Circuit.

## CONCLUSION

For the reasons set forth above, and in the Petition and amicus briefs, CNH Industrial N.V. and CNH Industrial America LLC urge the Court to grant the petition and summarily reverse the decision below, or in the alternative, to grant the petition and schedule this case for full briefing and argument.

Respectfully submitted,

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