NO. 12-0360

IN THE SUPREME COURT OF TEXAS

ARSENIO COLORADO, STEVEN CRAIG, UMIT DAVULCU, RICHARD GONZALES, LANNY HEINRICH, LEONARD HILL, ANDY HUYNH, CHRIS KAHRIG, LAY KEONAKHONE, TUNG LE, CHRIS LUCKEY, FERNANDO MACIAS, JORGE MARTINEZ, RAUL MARTINEZ, KENNETH NASH, JIMMY PHOUMLAVANH, and SOUK VONGSAMPHANH,

Petitioners,

VS.

TYCO VALVES & CONTROLS, L.P. and TV&C GP HOLDINGS, INC.,

Respondents.

On Petition for Review from the Court of Appeals for the First District of Texas

BRIEF OF PETITIONERS

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IN THE SUPREME COURT OF TEXAS

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TO THE SUPREME COURT OF TEXAS:

Petitioners Arsenio Colorado, Steven Craig, Umit Davulcu, Richard Gonzales, Lanny Heinrich, Leonard Hill, Andy Huynh, Chris Kahrig, Lay Keonakhone, Tung Le, Chris Luckey, Fernando Macias, Jorge Martinez, Raul Martinez, Kenneith Nash, Jimmy Phoumlavanh, and Souk Vongsamphanh (collectively "the Gimpel Employees") file this Brief of Petitioners and would show the following:

STATEMENT OF THE CASE

This is a suit for breach of contract based on written and oral agreements between the Gimpel Employees and their former employer, Tyco. The Gimpel

Employees – who worked in Tyco's Gimpel unit – contend that Tyco agreed to make severance payments to the Gimpel Employees in connection with the closing of the facility at which the Tyco Employees worked. The parties tried the case to the bench before Judge Kyle Carter of the 125th District Court of Harris County, Texas. The trial court entered judgment in favor of the Gimpel Employees.

Tyco appealed the judgment to the First Court of Appeals, which reversed the judgment of the trial court. Justice Evelyn Keyes delivered an opinion and the judgment of the Court of Appeals, concluding that (1) the claims were not preempted by ERISA, (2) the employees without written contracts did not form valid contracts with Tyco, and (3) the employees with written contracts were not entitled to severance payments because the company that purchased the Gimpel unit was a "successor" to Tyco. Justice Michael Massengale delivered an opinion concurring in the judgment, concluding that all of the claims were preempted by ERISA. Justice Jim Sharp delivered a dissenting opinion, concluding that (1) the claims were not preempted by ERISA, and (2) the company that bought the Gimpel unit was not a "successor" to Tyco. The case is reported as *Tyco Valves & Controls, L.P. v. Colorado*, 365 S.W.2d 750 (Tex. App. – Houston [1st Dist.] 2012).

STATEMENT OF JURISDICTION

The Court has jurisdiction because (1) the justices of the Court of Appeals disagreed on questions of law material to the decision, and (2) an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that it requires correction. Tex. Gov. Code § 22.001(a)(1) and (6).

ISSUES PRESENTED

1. Whether the Court of Appeals erred in holding that the six Gimpel Employees without written agreements did not form valid unilateral contracts with Tyco, which is contrary to this Court's holdings in *Vanegas v. American Energy Services*, 302 S.W.2d 299 (Tex. 2009), and *City of Houston v. Williams*, 353 S.W.3d 128 (Tex. 2011).

2. Whether the company that purchased the Gimpel unit and hired the Tyco Employees was a "successor" to Tyco, so that the eleven Gimpel Employees with written agreements were not entitled to severance payments, even though (1) they were promised that they would receive their severance payments if the Gimpel unit was sold to a third party, (2) the purchaser did not assume any of Tyco's contractual obligations to the Gimpel Employees, and (3) the Gimpel Employees were actually terminated by Tyco before going to work for the purchaser.

3. Whether the Gimpel Employees' claims are preempted by ERISA, given that the contractual obligations contained in separate and independent agreements that have no connection with Tyco's ERISA plan.

STATEMENT OF FACTS

I. Overview

The Gimpel Employees worked in Tyco's Gimpel unit. In late 2006, Tyco decided to close the Gimpel unit and sell it to a third party. Tyco wanted the Gimpel Employees to stay with the company until the sale was complete.

To induce the Gimpel Employees to stay with the company, Tyco entered into contracts for the payment of severances to the Gimpel Employees if they stayed through the sale and were not offered "Comparable Employment with Tyco." Tyco assured the Gimpel Employees that they would receive the severances even if they went to work for the purchaser of the Gimpel unit.

Tyco sold the Gimpel unit to Dresser Rand. All of the Gimpel employees remained with Tyco through the sale and then went to work for Dresser Rand. Tyco did not offer any of the Gimpel Employees "Comparable Employment with Tyco." However, Tyco reneged on its contractual obligation to pay the severances, claiming that it was Tyco's "policy" not to pay severances when an employee gets a job with the new company. None of the Gimpel Employees received the contractual severance.

The Gimpel Employees sued for breach of contract. Over two years after reneging on its agreements, Tyco argued for the first time that the Gimpel Employees' claims are preempted by ERISA. Tyco argued that the Gimpel

Employees are subject to its company-wide severance plan, which excludes employees who obtain employment with the purchaser of a Tyco unit. None of the Gimpel Employees had ever even heard of the severance plan, but instead had received separate contracts. In fact, the severance plan expressly carves out any employees who have separate agreements providing for severance.

After a bench trial, the district court found that Tyco breached its contracts with the Gimpel Employees. The district court rejected Tyco's ERISA preemption defense, correctly finding that the contracts were separate and independent from the ERISA plan. In a divided opinion, the Court of Appeals reversed.

II. The Gimpel Employees Worked in the Gimpel Unit at Tyco's West Gulf Bank Facility.

The Gimpel Employees worked in the Gimpel unit at Tyco. The Gimpel unit makes valves and controls that are used in steam applications for the military and for private companies. For example, some of the valves and controls are used on aircraft carriers and nuclear submarines. Tr. 56-57.

The Gimpel Employees held a variety of different positions in the Gimpel unit. For example, Len Hill was a computer programmer, Tr. 56, while Chris Kahrig was a machine shop leadman, Tr. 139, and Lanny Heinrich was a machinist, Tr. 105.

` The Gimpel unit operated out of Tyco's West Gulf Bank facility in Houston. Tr. 57. Tyco also operated a number of other business lines out of the West Gulf Bank facility. Tr. 57-58.

III. Tyco Decides to Close the West Gulf Bank Facility and Adopts a Severance Schedule for the Employees.

In mid-2006, Tyco decided to close the West Gulf Bank facility. Tyco relocated several of the units at the West Gulf Bank facility to Mexico. PX 13; Tr. 64. However, the Gimpel unit could not be moved overseas because it supplied products to the United States Navy. Tr. 64. Tyco eventually decided to sell the Gimpel unit. Tr. 184.

When an employer announces that a facility is closing, there is a likelihood that the employees will immediately begin to seek new employment. The Gimpel Employees were highly skilled, and it would have been difficult for Tyco to sell the Gimpel unit if they left before the sale was complete. Tr. 78-79, 145-46.

Holly Kreindler, the HR director of Tyco, had previously drafted a standard severance schedule to be used at the West Gulf Bank facility, effective August 1, 2006.[1] PX12. The standard severance schedule stated that salaried employees would receive two weeks of severance per year of service and that hourly

[1] At trial, Ms. Kreindler claimed that the standard severance schedule was just a "reference sheet" that she prepared for her own use, that she never used it, and that it was never circulated. As discussed in detail below, the evidence thoroughly contradicted Ms. Kreindler's story. The trial court rejected Ms. Kreindler's story and specifically found that her testimony was not credible. R. 586.

employees would receive one week of severance per year of service. For both types of employees, the minimum severance payment was six weeks and the maximum was twenty-six weeks. This is referred to as a "6 and 26" program.

Ms. Kreindler used this severance schedule in connection with some of the earlier unit closings at the West Gulf Bank facility. PX 14. The terms spread around the employees in the remaining units by word of mouth. Tr. 79, 141-42.

IV. Tyco Enters into Agreements with the Employees.

In December 2006, Tyco finally announced that the Gimpel unit was going to be sold. Tr. 62-64. Tyco needed to retain its skilled laborers in order to sell the unit. Accordingly, Tyco made promises to the employees in the Gimpel unit to induce them to remain at Tyco until the unit could be sold.

A. The Retention Incentive Agreements

Eleven of the Gimpel Employees received written Retention Incentive Agreements in January 2007. PX 1-11. The agreements include promises by the employees, such as a confidentiality agreement with respect to Tyco's proprietary information. In exchange, Tyco promised that, if the employee remained at Tyco through the Retention Period (in other words, until the closing of the facility or such other date designated by Tyco under the terms of the agreements), the employee would receive a Retention Bonus. The amount of the Retention Bonus varied from employee to employee. In addition, Tyco promised to provide the

"standard Severance" if the employee was not offered "Comparable Employment with Tyco." The agreements stated:

> If the Employee has remained an Active Employee of Tyco for the entire Retention Period . . . , Tyco will pay the employee a retention incentive bonus ("a Retention Bonus") consisting of either:
>
> > (i) in the event that the Employee is not offered Comparable Employment with Tyco, an amount equal to [specified amount] (Retention Bonus) plus the standard Severance in accordance to the severance schedule associated with the closure of the facility. . . .
>
> OR
>
> > (ii) in the event that the Employee is offered Comparable Employment with Tyco, a cash payment of [specified amount] . . .

PX 1, at 2 (emphasis added). At the time of the contracts, the amount of the "standard severance" was already known to the employees: two weeks of pay per year of service for salaried employees, and one week of pay per year of service for hourly employees, with a minimum of six weeks and a maximum of twenty six weeks. Tr. 79.

Tyco made it clear that the Gimpel Employees would get both the Retention Bonus and the standard severance if the unit was sold to a third party. Len Hill recounted his meeting with Sal Vaccaro, the plant manager:

> So I went ahead and read [the Retention Incentive Agreement] over and I was looking through it and I was taking my time. And I said, Man, a severance too. And I don't know if he said yes or nodded or

> what but he, you know, was in agreement with that and I was looking at it.
>
> And so because we knew that the company was being marketed I said to Sal I said, You mean we get all this even if the company is sold? And Sal said, Yes.

Tr. 69. In the case of Lanny Heinrich, Tyco told him that he was getting a smaller Retention Bonus than other employees because he was a long time employee and would be getting the full 26 weeks of severance:

> They said, Lanny, I know it's low – my supervisor [Joe Cagle] said that, Paddy [Warman] said also. I know that that number is low but you're going to get 26 weeks, you know, so I went ahead and went with it. I mean, I know some guys got 5,000, 10,000 and for somebody being there 30 years, to me, $3,000 was a slap in the face but I was going to get the 26 weeks.
>
> . . . .
>
> . . . [Joe Cagle] said that Tyco knows that you're not going anywhere because they were dangling that 26 weeks in my face so I stayed.

Tr. 108-09; Tr. at 143 (similar testimony from Chris Kahrig). Umit Davalcu was considering taking early retirement, but Paddy Warman, Tyco's HR representative, guaranteed that he would receive his severance if he stayed to the end:

> [We discussed] [e]verything about my pension, severance package and like I said, I wanted to take an early retirement and she guaranteed me that I will get my severance and my retention but I have to stay to the end to get both of them and that's what I was told many, many times over.

Tr. 133.

Later, Ms. Warman reassured several of the Gimpel Employees that they would get their severance payments even if the Gimpel unit was sold. Heinrich recalled that discussion:

> She said no matter where we went a mile, 5 miles, 10 miles, however far, you know, I still would have a job. I would still get a severance package.

Tr. 110. Chris Kahrig recalled similar comments by Ms. Warman:

> At the time when they discussed about the company was sold severance packages were still supposed to be adhered and it didn't matter if it was 1 mile, 20 miles at the time.
>
> . . . .
>
> . . . If we were sold, it didn't matter where – where we went, it didn't matter. We'd get the severance package.

Tr. 144. Sal Vaccaro, the plant manager, later acknowledged in an internal e-mail that Ms. Warman had made these representations to the Gimpel Employees:

> It was a natural assumption to [Ms. Warman] that [the employees] would receive severance because as retention was considered and discussed severance was always thrown out there as a key fact for the amount of retention an employee should receive. Never was [it] discussed with her that there was a potential for no severance. In the case of the Gimpel Service Center in Houston, we always figured that the new owner would keep the center in Houston and keep the current employees on. They were always figured in the severance plan.

PX 16 (emphasis added).

B. The Unilateral Contracts

Six of the Gimpel Employees did not receive Retention Incentive Agreements and did not receive Retention Bonuses. However, Tyco promised each of those Gimpel Employees the standard severance through other means. Tyco posted the severance schedule on the Gimpel unit's bulletin board and enlisted Chris Kahrig, who was a leadman, to spread the word about the severance schedule to the employees who did not receive Retention Incentive Agreements. Tr. 145-47. Mr. Kahrig communicated "whatever [Ms. Warman] told me to with everyone in the shop." Tr. 146. This included explaining the severance package to employees who did not receive Retention Incentive Agreements, such as Andy Huynh, Fernando Macias, and Souk Vongsamphanh. Tr. 147. The employees who did not receive Retention Incentive Agreements were aware of the severance schedule and were relying on it. Tr. 147.

The severance schedule used slightly different language than the Retention Incentive Agreements, but the essential terms were the same. The schedule did not use the phrase "Comparable Employment with Tyco," but instead provided that every employee who stayed until the closing of the unit was entitled to a severance unless the employee had an opportunity to remain with Tyco or a subsidiary. An employee was excluded if:

> The Eligible Employee continues in employment with the Company or a Subsidiary or has the opportunity to continue in employment in

> the same or in an Alternative Position with the Company or a Subsidiary.

PX 12. One employee, Chris Luckey, spoke directly to Paddy Warman, who told him "not to leave or I wouldn't get severance pay." Tr. 167.

V. Tyco Valves Reneges on Its Promises.

In March 2007, the Gimpel Employees heard rumors that Dresser Rand might purchase the Gimpel unit. Tr. 72-73. Around this time, Tyco began to retreat from its promises that severance would be paid even if the Gimpel unit was sold. Tr. 73-74. Several of the Gimpel Employees became upset, and one of them sent an e-mail to the president of the company. Tr. 74-75. Tyco then called a meeting at which it announced for the first time that it would not pay severances if the unit was sold and the employees went to work for Dresser Rand. Tyco claimed that it had a "policy" not to pay severances in that situation. Tr. 76-77.

In private internal e-mails, however, Tyco's management acknowledged the truth: that Tyco had promised the precise opposite to the employees. PX 16.

In fact, all of the Employees remained with Tyco Valves until the Gimpel unit was closed and sold to Dresser Rand in November 2007. R. 131-33. Tyco Valves paid the Retention Bonuses to the Employees who had Retention Incentive Agreements, but it did not pay severances to anyone.

The Gimpel Employees accepted jobs with Dresser Rand. The employment contracts with Dresser Rand provided for sign-on and retention bonuses, if the

employee stayed at Dresser Rand for specified periods of time. *E.g.*, DX 5. In many cases, these bonuses were considerably smaller than the severance payments promised by Tyco. Tr. 84, 113. In any event, the Dresser Rand contracts were different contracts with different consideration. Tr. 81. Not all of the Gimpel employees chose to remain at Dresser Rand long enough to receive the full bonuses. Tr. 81-83.

VI. Two Years Later, Tyco Claims That the Gimpel Employees Were Subject to an ERISA Plan All Along.

After Tyco reneged on its promises, several of the Gimpel Employees protested. In its responses, Tyco never mentioned anything about ERISA. R. 112-13. In fact, the Gimpel Employees had never even heard of an ERISA plan. Tr. 67, 113, 148.

When the Gimpel Employees hired counsel and sent a demand letter, Tyco's counsel responded with an extensive legal analysis. R. 114-16. That legal analysis made no reference to an ERISA plan.

The Gimpel Employees filed this lawsuit on March 31, 2008. R. 2. Tyco filed an Answer, but did not assert any defense based on ERISA. R. 8. Tyco listed its defenses in response to a request for disclosure, but those defenses did not include ERISA preemption. R. 117-18.

In April 2009 – over two years after reneging on its promises and over a year after the filing of the lawsuit – Tyco finally asserted an ERISA preemption

defense. R. 21. Tyco pointed to the Tyco International (US) Inc. Severance Plan for U.S. Employees ("the Tyco Severance Plan"). DX 3. The Tyco Severance Plan excludes the payment of severance when:

> The Eligible Employee's employment with the Employer terminates as a result of a sale of stock or assets of the Employer . . . and the Eligible Employee accepts employment . . . with the purchaser.

DX 3 at 6. The Gimpel Employees have never made any claim for severance under the Plan, and in fact they had never even heard of it. Tr. 67, 113, 148.

As it existed at the time of the contracts between Tyco and the Gimpel Employees, the Tyco Severance Plan provided for significantly different benefits. First, the Tyco Severance Plan provided for one week of severance pay for each year of service, subject to a minimum of two weeks and a maximum of 52 weeks. DX 3 (page marked TYCO 2007). This "2 and 52" system is different from the "6 and 26" system in the Gimpel Employees' contracts. The Plan also gave salaried employees one week of severance for each year of service, rather than two weeks as provided in the contracts. Second, as noted above, the Tyco Severance Plan did not provide for severance for employees who obtain employment with a purchaser.

Over a month after Tyco had entered into its agreements with the Gimpel Employees, Tyco modified the Tyco Severance Plan to provide a "6 and 26" system and to provide two weeks of severance per year of service for hourly employees. DX 4. Tyco never told the Gimpel Employees about this, nor did

Tyco ask the Gimpel Employees to waive their contractual rights. Tyco never told the Gimpel Employees that it believed that their separate contracts had somehow been supplanted by the Plan.

The Tyco Severance Plan expressly excludes from its coverage any employee who has a separate severance agreement, unless the employee agrees to waive that agreement:

> [T]he Severance Benefits under this Plan are not additive or cumulative to severance or termination benefits that a Participant might also be entitled to receive under the terms of a written employment agreement, a severance agreement or any other arrangement with the Employer. As a condition of participating in the Plan, the Eligible Employee must expressly agree that this Plan supersedes all prior agreements and set forth the entire Severance Benefit the Eligible Employee is entitled to while an Eligible Employee in the Plan.

DX 3 at 10 (emphasis added). The Gimpel Employees never waived their preexisting rights and instead are proceeding under their contracts.

After a bench trial in August 2009, the trial court rejected Tyco's ERISA defense. The trial court entered judgment in favor of the Gimpel Employees for breach of contract. In a divided opinion, the Court of Appeals reversed.

SUMMARY OF ARGUMENT

Two of the Justices on the Court of Appeals ruled against the six Gimpel Employees who did not have Retention Incentive Agreements, on the ground that they did not have valid oral contracts with Tyco. In fact, the evidence conclusively

establishes that they had binding unilateral contracts with Tyco under this Court's holdings in *Vanegas v. American Energy Services*, 302 S.W.2d 299 (Tex. 2009), and *City of Houston v. Williams*, 353 S.W.3d 128 (Tex. 2011). Specifically, Tyco posted the terms of the agreement on the bulletin board at the Gimpel Unit and enlisted a supervisor to ensure that all of the employees knew the terms of Tyco's offer. The six employees knew about offer, relied on it, and performed the terms of the contract by remaining at Tyco. Under *Vanegas* and *Williams*, the parties formed a binding unilateral contract, which Tyco breached.

One Justice on the Court of Appeals noted that the Retention Incentive Agreements defined "Tyco" to include Tyco's successors and assigns. She ruled against the eleven Gimpel Employees with written agreements on the ground that Dresser Rand was a "successor" to Tyco, so that employment with Dresser Rand was "Comparable Employment with Tyco." That ruling is contrary to the long established rule that the term "successor" must be interpreted in light of the purposes, circumstances, and context of the contract. The evidence shows that none of the parties anticipated that a third party purchaser would be a "successor," and in fact everyone anticipated that the Gimpel Employees would get their severances even if the unit was sold. The term "successor" should not be applied in a manner that defeats the intent of the parties.

Furthermore, as pointed out by the dissenting Justice, Dresser Rand did not assume any of the liabilities of Tyco and did not assume the employment obligations of Tyco. On the contrary, Tyco terminated the employees, who were then hired by Dresser Rand. Dresser Rand did not "succeed" to anything.

The third Justice on the Court of Appeals ruled that all of the claims are preempted by ERISA, because Tyco has an ERISA plan that covers severance. However, the contracts at issue in this case are separate from the ERISA plan. Every court to address the issue has rejected ERISA preemption in the context of a severance agreement that is separate from the company's ERISA plan.

ARGUMENT

I. Standard of Review

After a bench trial, the trial court entered findings in fact in favor of the Gimpel Employees. Other than a sweeping global statement in a footnote in its brief before the Court of Appeals, Tyco has not challenged the legal or factual sufficiency of the evidence to support those findings. Instead, Tyco has approached this case as if the underlying facts are subject to *de novo* review on appeal. This of course is incorrect. Instead, a no-evidence challenge may be sustained only if there is no more than a "scintilla" of evidence to support the fact finding. *City of Keller v. Williams*, 168 S.W.3d 802, 810 (2005).

The trial court also entered conclusions of law in favor of the Gimpel Employees. Those conclusions are subject to *de novo* review by this Court. *American Type Culture Collection, Inc. v. Coleman,* 83 S.W.3d 801, 805-06 (Tex. 2002), *cert. denied*, 537 U.S. 1191 (2003).

II. Tyco Breached the Unilateral Contracts.

Six of the Gimpel Employees (Arsenio Colorado, Andy Huynh, Chris Luckey, Fernando Macias, Jorge Martinez, and Souk Vongsamphanh) did not have written contracts, but nonetheless were promised severance if they stayed to the end. This Court has held that unilateral contracts between a company and its employees relating to bonuses upon the sale or closing of a facility are enforceable. *Vanegas v. American Energy Services*, 302 S.W.2d 299, 303-04 (Tex. 2009). Specifically, when an employer promises a bonus to an employee for remaining with the company until the company is sold, that promise becomes an enforceable unilateral contract when the employee performs. *Id.* at 304. "The fact that the employees were at-will and were already being compensated in the form of their salaries in exchange for remaining employed also does not make the promise to pay the bonus any less enforceable." *Id.*

Justice Keyes' opinion in the Court of Appeals, joined by Justice Sharp, concludes that there was no evidence of valid contracts. Justice Keyes focuses on the testimony of one of the six employees, Chris Luckey, concluding that

"Luckey's testimony is insufficient to support the existence of any of the elements of a contract between Luckey and Tyco." Keyes Opinion at 39. This was error, because the unilateral contract claim was never dependent on the testimony of Mr. Luckey. Instead, the claim was based on undisputed evidence that showed the creation and performance of unilateral contracts between Tyco and the six employees.

A. Tyco Entered into Binding Unilateral Contracts.

Tyco promised these six employees that they would receive severance pay if they remained at the company until the unit was sold. Tyco posted the severance schedule on the Gimpel unit's bulletin board and enlisted Chris Kahrig, who was a leadman, to spread the word about the severance schedule to the employees who did not receive Retention Incentive Agreements. Tr. 145-47. Mr. Kahrig communicated "whatever [Ms. Warman] told me to with everyone in the shop." Tr. 146. This included explaining the severance package to employees who did not receive Retention Incentive Agreements, such as Andy Huynh, Fernando Macias, and Souk Vongsamphanh. Tr. 147. The employees who did not receive Retention Incentive Agreements were aware of the severance schedule and were relying on it. Tr. 147.

The trial court made the following findings of fact on this issue, all of which are supported by evidence:

9. The remaining six Plaintiffs – Arsenio Colorado, Andy Huynh, Chris Luckey, Fernando Macias, Jorge Martinez, and Souk Vongsamphanh – did not receive Retention Incentive Agreements and thus did not receive Retention Bonuses. However, Tyco Valves promised a standard severance to all employees of the West Gulf Bank facility and in fact posted the terms of the severance on a bulletin board in early 2007. In deciding to remain employed with Tyco Valves, these employees relied on Tyco Valves' promises and assurances that they would receive a severance if they remained with the company.

10. Holly Kreindler of Tyco Valves had created the severance schedule in connection with a prior restructuring. The terms of the severance schedule (Plaintiff's Exhibit 12), which applied to the West Gulf Bank facility and were effective as of August 1, 2006, were as follows:

(a) For hourly employees, one week of pay for each year of service.

(b) For salaried employees, two weeks of pay for each year of service.

(c) For both hourly and salaried employees, a minimum of six weeks of pay and a maximum of 26 weeks of pay.

11. Tyco Valves communicated those terms to all of the Plaintiffs through direct communications between HR personnel and the employees, through communications by supervisory personnel, through bulletin board postings, or through a combination of those means.

R. 584 (emphasis added).

This Court recently confirmed that these sorts of promises by an employer form a binding unilateral contract between the employer and the employee. *Vanegas*, 302 S.W.2d at 303-04. Specifically, when an employer promises a bonus

to an employee for remaining with the company until the company is sold, that promise becomes an enforceable unilateral contract when the employee performs. *Id.* at 304.

It is not necessary that a unilateral contract be formed through a specific exchange of oral promises. On the contrary, a unilateral contract may be formed through an invitation published by the promisor to the promisee. This principle is often associated with the classic English case of *Carlill v, Carbolic Smoke Ball Co.,* 1 Q.B. 256 (1893), which is a staple of contract law textbooks. In *Carlill,* the defendant published an advertisement to the public, which the court deemed to be an offer for a unilateral contract that was accepted through performance.[2]

While *Carlill* is not binding authority in Texas, this Court has reached similar results in other cases involving unilateral contracts. *City of Houston v. Williams,* 353 S.W.3d 128 (Tex. 2011) (holding that a city ordinance can form a valid unilateral contract); *Broadnax v. Ledbetter*, 99 S.W. 1111, 1111-12 (Tex. 1907) (holding that a promise to pay a reward for the capture of a criminal is enforceable if the person who earned the reward is aware of the promise). In this case, Tyco promised to pay specific sums of money (based on the posted severance schedule) to employees who performed the terms of the bargain (remaining at Tyco until the facility closed). Under *Williams* and general principles of contract

[2] A copy of the decision in *Carlill v. Carbolic Smoke Ball* is reprinted at http://www.west.net/~smith/Carlill_v_Carbolic.htm.

law, this was an offer of a unilateral contract. There is no dispute that the six Gimpel Employees were aware of the promise and were relying on it, nor is there any dispute that they performed as required.

The Court of Appeals noted that, other than Mr. Luckey, none of the six employees testified at trial. However, Mr. Luckey's testimony was not the primary evidence of the existence of unilateral contracts. On the contrary, the Gimpel Employees presented the following evidence:

(1) Tyco posted the severance schedule on the bulletin board at the Gimpel Unit. Tr. 146. Even standing alone, this constitutes an offer to form a unilateral contract.

(2) Tyco enlisted Chris Kahrig, who was a leadman, to spread the word about the severance schedule to the employees who did not receive Retention Incentive Agreements. Tr. 145-47. Mr. Kahrig communicated "whatever [Ms. Warman] told me to with everyone in the shop." Tr. 146. This included explaining the severance package to employees who did not receive Retention Incentive Agreements, such as Andy Huynh, Fernando Macias, and Souk Vongsamphanh. Tr. 147. The employees who did not receive Retention Incentive Agreements were aware of the severance schedule and were relying on it. Tr. 147.

(3) There is no dispute that the employees accepted the unilateral contract through performance (*i.e.*, by remaining employed at Tyco).

In sum, Tyco's offer was communicated to the six employees both through the posting and through Mr. Kahrig. The six employees performed as requested. Under *Vanegas*, Tyco and the employees formed an enforceable unilateral contract.

The trial court correctly found that Tyco and the six Gimpel Employees formed valid, binding unilateral contracts that were performed by the Gimpel Employees. Tyco breached those contracts by failing to pay severance as promised. The Court of Appeals' ruling to the contrary was erroneous.

B. The Unilateral Contracts Were Not Revocable by Tyco.

In the Court of Appeals, Tyco argued that an employer has the absolute right to change the terms of employment for an at-will employee. Tyco claims that it changed the terms of the six Gimpel Employees' employment when it told them that they would not be receiving severances. The Court of Appeals did not address this argument, but nonetheless the argument fails for two reasons.

First, under *Vanegas*, the six Gimpel Employees had binding unilateral contracts that were independent of their at-will employment relationship. *Vanegas*, 302 S.W.2d at 304 ("The fact that the employees were at-will and were already being compensated in the form of their salaries in exchange for remaining

employed also does not make the promise to pay the bonus any less enforceable."). Once the six Gimpel Employees had partially performed, the contracts ceased to be revocable. *Hutchings v. Slemons*, 174 S.W.2d 487, 489 (Tex. 1943); *Sunshine v. Manos*, 496 S.W.2d 195, 198 (Tex. App. – Tyler 1973, writ ref'd n.r.e.). Tyco could still have changed the terms of the six Gimpel Employees' employment relationship (for example, changing their rates of pay or hours of work), but Tyco could not revoke the independent unilateral contracts that provided for severance.

Second, the trial court found that Tyco was estopped from asserting that the agreements were modified or revoked. R. 591. This is based on the trial court's finding that the employees relied on Tyco's promises to their detriment. R. 584. Tyco did not challenge those findings on appeal.

In sum, the undisputed evidence establishes the existence of unilateral contracts and the breach of those contracts by Tyco. The Court of Appeals ruling was contrary to *Vanegas*, *Williams*, and to the law of unilateral contracts in general. The Court should reverse the judgment of the Court of Appeals and affirm the judgment of the trial court.

III. Tyco Breached the Retention Incentive Agreements.

Justice Keyes, over a dissent by Justice Sharp, found that the eleven Gimpel Employees with written contracts received "Comparable Employment with Tyco" even though they were terminated by Tyco. This argument is based on the

definition of "Tyco" in the Retention Incentive Agreements, which includes "successors." Justice Keyes concluded that Dresser Rand was a "successor" to Tyco and that employment with Dresser Rand was therefore employment with "Tyco." This argument is refuted by the evidence and is rejected in the trial court's findings (which are not challenged by Tyco).

"The exact meaning of the word 'successor,' when used in a contract depends largely on the kind and character of the contract, its purposes and circumstance, and context." *Augusta Court Co-Owners' Association v. Levin, Roth & Kasner, P.C.*, 971 S.W.2d 119, 125 (Tex. App. – Houston [14th Dist.] 1998, no pet.). In this case, the evidence shows that the parties contemplated that the Gimpel Employees would receive the severances even if the unit was sold. In fact, Tyco repeatedly represented to the Gimpel Employees that they would receive severances even if they went to work for a purchaser of the unit. Construing Dresser Rand as a "successor" would thus be contrary to the purpose, circumstance, and context of the contracts.

Furthermore, as Justice Sharp points out in his dissent, the evidence shows that Dresser Rand did not succeed to any of the relevant assets or liabilities of Tyco. Dresser Rand did not acquire Tyco, but instead merely purchased certain assets. PX 17. Tyco continues to exist as an operating company, without the Gimpel Unit. The agreement specifically excluded (1) Tyco's benefit plans, (2)

Tyco's personnel records, and (3) any assets relating to "Excluded Liabilities." PX 17, at 3. The Excluded Liabilities, in turn, included any of Tyco's obligations to the Gimpel Employees. PX 17, at 5.

In practical terms, these provisions meant that the Gimpel Employees were terminated by Tyco and then hired by Dresser Rand. If Dresser Rand had been a "successor" to Tyco, the employment relationship would never have ceased.

This distinction is illustrated by *Thompson v. North Texas National Bank*, 37 S.W.2d 735, 736 (Tex. Comm'n App. 1931, holding approved). The Commission of Appeals held that the purchaser of a bank was a "successor" when it purchased everything other than the corporate charter and the name:

> It is shown that the first bank to which it was given decided to cease business, and to liquidate its assets. To consummate this purpose the first bank entered into a contract with the second bank by the terms of which the first bank conveyed to the second bank all of its assets, "of every kind, character and description," except its name and charter. The second bank assumed all of the liabilities of the first bank of every kind and description, except to its stockholders. In consummating the contract between the two banks an actual physical delivery of all of its properties, papers, books and records, and all other property of every character and description took place. The second bank took over all of the deposit accounts of the first bank, and continued the business at the same place just as though there had been no change in ownership. The checks drawn on the first bank were honored by the second bank, and in fact as far as the transaction of the business was concerned the change in ownership had no effect on the customers of the bank. The $ 4000.00 note of the mortgage company guaranteed by the contract here sued on was actually delivered to the second bank. Also the contract of guaranty was actually delivered to the second bank. The fact that the second bank had taken over the first

> bank was open and notorious as also was the fact that the first bank had ceased business.

Id. at 739-40 (emphasis added). Those are the sorts of facts that are necessary for one corporation to be the "successor" to another corporation.

In the present case, by contrast, Dresser Rand did not purchase all (or even most) of the assets of Tyco, did not assume all (or even most) of the liabilities of Tyco, and did not seamlessly continue the business of Tyco. Instead, Dresser Rand bought some of Tyco's assets, hired some of Tyco's employees, and continued the general business operation at a different location under a different name. Tyco continues to exist as an ongoing company. That is not successorship under Texas law.

Justice Keyes interprets the term "successor" in light of the corporate statutes, which are not controlling in this situation. The question is not whether Dresser Rand is a successor to Tyco for liability purposes under corporate law, but instead is whether Dresser Rand is properly viewed as a successor under contract law, which looks at "the kind and character of the contract, its purposes and circumstance, and context." *Augusta Court*, 971 S.W.2d at 125.

In this case, the evidence of "purposes," "circumstance," and "context" runs contrary to Justice Keyes' conclusion. It is undisputed that Tyco told the employees that they would receive their severance if the Gimpel unit was sold. In fact, Tyco's plant manager acknowledged in a subsequent email that "the potential

of no severance" was never discussed with the employees. PX 16. Treating Dresser Rand as a "successor" thus defeats the purposes of the contracts and disregards the circumstances and context of the contracts. It makes no sense for an entity like Dresser Rand to be a "successor" of Tyco for purposes of providing "comparable employment with Tyco." Dresser Rand is not Tyco.

Furthermore, Justice Keyes' interpretation of "successor" allows Tyco to unilaterally substitute one performance for another. The Tyco Employees did not bargain for an arrangement under which Tyco would find them new jobs with a different company. They bargained for comparable employment with Tyco, or otherwise for the payment of a severance. Tyco did not ask the Tyco Employees to agree that employment with Dresser Rand was good enough or to waive their right to a severance. In effect, this interpretation of "successor" undermines the contractual process by allowing Tyco to impose its own terms without bargaining over the modification to the contract. Justice Keyes' analysis is an unwarranted expansion of "successorship" under Texas contract law.

Tyco suggests that Dresser Rand should be treated as a successor because Dresser Rand paid the Gimpel Employees bonuses for agreeing to work for that company. This argument fails for several reasons:

(1) The fact that Dresser Rand paid bonuses has nothing to do with whether Dresser Rand "succeeded" Tyco. Dresser Rand was not paying bonuses on behalf of Tyco.

(2) The bonus arrangements with Dresser Rand had different terms and different consideration. The contracts required the Gimpel Employees to go to work for Dresser Rand (which not all of them wished to do) and to remain with Dresser Rand for various periods of time (which not all of them did). Those contracts were for the benefit of Dresser Rand, not Tyco or the Gimpel Employees.

(3) As a party to a contract, Tyco has no right to unilaterally substitute a different performance for what is required by the contract. Tyco could have asked the Gimpel Employees to accept jobs with Dresser Rand in lieu of severance payments, but it did not do so.

The contracts between the Gimpel Employees and Dresser Rand have no bearing on the contracts between the Gimpel Employees and Tyco.

Tyco also claims that the Gimpel Employees' position disregards the plain meaning of "severance pay," because the Gimpel Employees never became unemployed. However, Tyco repeatedly and emphatically promised the Gimpel Employees that they would receive severance payments even if they went to work for a purchaser such as Dresser Rand. Tyco's internal e-mails admitted that these

promises had been made. PX 16. In interpreting the agreements, the intent of the parties is more important than Tyco's view of the "plain meaning of severance pay." Tyco made a specific promise and chose not to honor it.

In any event, the trial court entered findings of fact that Dresser Rand was not a "successor" to Tyco. R. 588-89. Tyco does not challenge the sufficiency of the evidence to support that finding. Accordingly, the trial court's finding of fact forecloses Tyco's argument.

IV. The Gimpel Employees' Claims Are Not Preempted by ERISA.

Justice Massengale concluded that the contract claims are preempted by ERISA because they "relate to" an ERISA plan. Although Justice Keyes and Justice Sharp rejected that argument, nonetheless Justice Massengale's concurrence in the judgment is a basis for the Court of Appeals' reversal. Accordingly, the Tyco Employees will address the issue.

A. The Gimpel Employees' Contracts Are Independent from the Plan.

The Gimpel Employees are not making any claim under the Tyco Severance Plan. In fact, the Gimpel Employees testified that they had never even heard of the Plan. Tr. 67, 113, 148. Instead, they are suing under independent contracts that have no relationship to the Plan and that are expressly carved out of the Plan. They are suing for benefits (*i.e.*, the "6 and 26" severance structure) that did not even exist under the Plan at the time and are seeking to enforce terms (*i.e.*, that

severance was payable unless they were offered "Comparable Employment with Tyco") that are not contained in the Plan.

ERISA preempts a state law claim if the claim "relates to" an ERISA plan. 29 U.S.C. § 1144(a). The United States Supreme Court held that "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 96 (1983). For a period of time, some courts interpreted that standard broadly, reaching some surprising results. However, the Supreme Court later clarified its holding, cautioning that these terms are not to be applied with an "uncritical literalism," but instead are to be applied in light of "the objectives of the ERISA statute." *Egelhoff v. Egelhoff,* 532 U.S. 141, 147 (2001).

Applying that standard, it is abundantly apparent that the breach of contract claims do not "relate to" the Plan. Specifically:

(1) The Retention Incentive Agreements make no reference to the Plan and are independently enforceable. It is unnecessary to refer to any portion of the Plan in order to enforce the contracts.

(2) The Retention Incentive Agreements have no connection to the Plan. In fact, separate severance agreements are expressly carved out of the Plan. DX 3 at 1 (section 5.02(a)). Even if the Gimpel Employees had been offered benefits under the Plan (which they were not), they

would not have been covered under the Plan unless they expressly waived their separate contractual rights. That never happened.

(3) Tyco did not offer the Gimpel Employees the standard severance arrangement that existed under the Plan at the time (specifically, the "2 and 52" severance structure that excluded employees who were offered a job with a purchaser). Instead, Tyco was offering the employees special inducements to keep working at Tyco while the Gimpel unit was sold. Under the express terms of the Retention Incentive Agreements, severance was payable even if the employees went to work for the purchaser, as long as they were not offered "Comparable Employment with Tyco." If the severance was payable under the Tyco Severance Plan, Tyco could not have offered this inducement, because the Plan would deny severance to an employee who took a job with the purchaser. In order to offer this inducement, Tyco could only enter into contracts that were separate from the plan, which is precisely what it did.

(4) While the "6 and 26" structure was later adopted by the Plan Administrator, there is no dispute that the "6 and 26" structure was not part of the Plan until over a month after Tyco made its contracts with Plaintiffs. DX 4. Tyco never asked the Gimpel Employees to

waive their contracts and to accept benefits under the Plan. In fact, Tyco never even mentioned the Plan.

Accordingly, the breach of contract claims do not "relate to" an ERISA plan.

After hearing the evidence, the trial court entered findings of fact with respect to this issue. For example, the trial court found:

> 15. The agreements between Tyco Valves and Plaintiffs are not connected to, dependent on, or related to the Tyco Severance Plan. Instead, those agreements are independent contracts with terms and conditions that are different from the Tyco Severance Agreement.
>
> . . . .
>
> 21. The agreements between Tyco Valves and Plaintiffs, when read in connection with the standard severance schedule, provide a means of calculating the payments due to Plaintiffs. It is not necessary to refer to the terms of the plan in order to enforce the agreements. In fact, at the time of the agreements, the Plan provided a method of calculating severance payments ("2 and 52") that was different from the agreements ("6 and 26").

R. 585, 587. Tyco does not dispute that those findings have evidentiary support. Accordingly, the trial court's factual findings foreclose Tyco's ERISA preemption defense.

B. The Courts Have Unanimously Held That Independent Severance Agreements Are Not Preempted by ERISA.

Under strikingly similar circumstances, the courts have unanimously rejected preemption. The facts of *Gresham v. Lumbermen's Mutual Casualty Co.,* 404 F.3d 253 (4th Cir. 2005), are remarkably similar to the facts of this case. In

Gresham, the plaintiff had an employment agreement that provided for severance pay. The employer had a Severance Plan that provided for a lesser amount of severance, and also provided that there would be no severance pay if the company was sold and the employee was offered employment by the purchaser. The employer did in fact sell the business, and the plaintiff did in fact go to work for the purchaser. When the employer refused to pay severance, the plaintiff sued for breach of contract. The employer asserted ERISA preemption.

The Fourth Circuit rejected the employer's preemption argument because the employment agreement was independent of the ERISA plan:

> [W]e conclude that there is no preemption here. First, the substantial differences between the severance provision of Gresham's employment agreement and the terms of the Severance Plan--most notably the significantly greater amount of the benefit promised to Gresham and the absence of any conditions other than termination without cause--make clear that Kemper's promise to pay Gresham severance operated independently of the Severance Plan. Second, there is no indication in the record that severance pay awarded to Gresham pursuant to his employment agreement would be paid out of funds allocated to the Severance Plan. In light of these facts, it is evident that Gresham's breach of contract claim does not relate to the Severance Plan. We therefore hold that the claim is not preempted.

Id. at 259 (citation omitted) (emphasis added). The Fourth Circuit noted "that a holding that a breach of contract claim is preempted by ERISA whenever the plaintiff claims an independent promise to pay benefits of the same type as benefits also provided by an ERISA-governed plan would limit employers' ability to lure

desirable employees by offering benefits better than those available to the rank-and-file." *Id.* at 259 n.5.

The same analysis applies to this case. The Retention Incentive Agreements were independent contracts that were intended to offer superior benefits as an inducement for the Gimpel Employees to keep working for Tyco even though the company was being sold. The Retention Incentive Agreements contained different benefits (the Retention Bonus and the "6 and 26" structure) and did not contain a restriction on the payment of severance if the employee went to work for the purchaser. Furthermore, as Ms. Kreindler admitted at trial, the severance benefits are paid by Tyco itself, as opposed to some fund allocated to the Plan. Tr. 246-47. Thus, the employees' severance payments would not come from "funds allocated to the Severance Plan." Under the analysis in *Gresham,* the Gimpel Employees' claims do not "relate to" an ERISA plan and thus are not preempted.

The Eighth Circuit reached the same result in *Crews v. American General Life Insurance Co.,* 274 F.3d 502 (8th Cir. 2001). In that case, the employer had offered a "stay on" bonus to employees who remained with the company through a specified date. The employer later argued that a breach of contract claim based on nonpayment of the "stay on" bonus was preempted, because the employer had a severance plan. The Eighth Circuit rejected that argument because there were significant differences between the "stay on" bonus and the severance plan:

> We believe, however, that there are significant differences between the benefits allegedly promised to the employees here and the undertakings in General American's established severance pay plan. To begin with, the company's established plan provides for one week of severance pay for each completed year of service for employees who have worked for more than two years; Ms. Crews, in contrast, alleges that she and other employees were promised eight weeks of severance pay in addition to one week of severance for each completed year of service. General American's severance pay policy, moreover, is completely discretionary, whereas the benefits allegedly promised here were not subject to any discretion on the company's part. Finally, the company's severance policy is for employees who have been terminated, but Ms. Crews contends that benefits were promised to her and other employees as a "stay-on bonus" if they remained with the company through a fixed date.

Id. at 505. The Eighth Circuit also noted that "Ms. Crews alleges that General American did not even mention the severance pay plan when promising the 'stay-on bonus.'" *Id.* The Eighth Circuit rejected the ERISA preemption argument because "the significant differences between the company's existing plan and the promised benefits, as well as the lack of any evidence linking them to each other, lead us to conclude that the promised benefits were free-standing and were not premised in any way on the existing plan." *Id*.

Likewise, the Retention Incentive Agreements were free standing and not premised on the Tyco Severance Plan. The agreements provided greater benefits and were not subject to discretion on Tyco's part. Tyco did not even mention its plan when offering the agreements and did nothing to link the agreements to the Tyco Severance Plan. Under *Crews*, the Gimpel Employees' claims are not

"related to" an ERISA plan and thus are not preempted. *See also Evans v. Infirmary Health Services,* 634 F. Supp. 2d 1276, 1291 (S.D. Ala. 2009) (following *Gresham* and *Crews* because "The six months of severance benefits promised Evans in her Agreement were substantially different from the mere four months of benefits which she apparently would have received under the Policy.").

A federal district court in Alabama reached the same result under facts that are virtually identical to this case. *Santini v. Cytec Industries, Inc.,* 537 F. Supp. 2d 1230 (S.D. Ala. 2008). The plaintiff had a written employment agreement that provided for severance. The employer had a severance plan that denied benefits to employees who were offered jobs by a successor employer. The company was sold, and the employer refused to pay the contractual severance. The district court rejected the employer's ERISA preemption argument:

> In the instant action, the agreement at issue does not promise to provide benefits under the Plan or refer to the Plan in any way. Plaintiff's employment contract agrees to provide a notice period and/or payments upon termination, calculated according to the terms stated in the employment contract. Thus, plaintiff's breach of contract claim does not seek payment of benefits under the Plan. As such, Cytec has not shown that plaintiff's breach of contract claim is preempted.

Id. at 1245.

In sum, the courts have reached the common sense conclusion that ERISA does not prohibit an employer from entering into a contract for severance payments that is independent of the employer's usual severance plan. If an employer

chooses to offer a separate contract, the employer cannot escape its contractual obligations by claiming ERISA preemption.

C. Tyco's Preemption Arguments Are Without Merit.

1. The Gimpel Employees' Contracts Do Not Require Application of a Formula from the Tyco Severance Plan.

Tyco's first argument is that ERISA preempts the breach of contract claim because the claim requires the application of a formula from an ERISA plan. Assuming for sake of argument that Tyco is correct on the law, this argument is foreclosed by the trial court's findings of fact. The trial court found that the determination of damages under the contracts did not require application of a formula from the Plan:

> The agreements between Tyco Valves and Plaintiffs, when read in conjunction with the standard severance schedule, provide a means of calculating the payments due to Plaintiffs. It is not necessary to refer to the terms of the plan in order to enforce the agreements.

R. 587. Tyco does not challenge the sufficiency of the evidence to support that finding.

In any event, the finding is well supported by evidence. The "6 and 26" formula was not even part of the Plan when Tyco made its contracts with the Gimpel Employees. Instead, the Plan used a "2 and 52" formula. DX 3 (page marked TYCO 2007). The "6 and 26" formula originated from the schedule created by Ms. Kreindler in mid-2006. PX 12. That formula was known to the

Gimpel Employees at the time of the contracts. Tr. 79, 141-42. In fact, Tyco told the employees the exact number of weeks of severance that they would be receiving and posted the severance schedule on the Gimpel unit bulletin board. Tr. 108-09, 143, 145-47. Over a month later, Tyco adopted the same formula as part of the Plan. DX 4. It is not necessary to look to the Plan to find a formula that already existed and had been discussed among the parties.

Tyco cites several cases in which courts have applied ERISA preemption to claims for severance or other benefits, but those cases involve claims to benefits under the plan, as opposed to independent contracts. For example, in *Greathouse v. Glidden Co.*, 40 S.W.3d 560 (Tex. App. – Houston [14th Dist.] 2001, no pet.), the plaintiff brought a fraudulent inducement claim against his employer, claiming that he had been defrauded into relinquishing certain severance benefits under an ERISA plan. The court found preemption, concluding that the damages sought by the plaintiff were the benefits that would have been due under the ERISA plan:

> The guaranteed benefits Greathouse is claiming are nothing more than the severance benefits which he claims Glidden owes him under its plan. . . .
>
> . . . Thus, the amount of damages or benefits Greathouse sought can be measured only by reference to Glidden's severance plan. The inescapable conclusion is that Greathouse's state law claims "relate to" Glidden's employee welfare benefit plan.

Id. at 569. In this case, by contrast, the Gimpel Employees are not claiming damages under the Plan, and it is not necessary to refer to the Plan to calculate those damages.

In sum, Tyco's argument is foreclosed by the trial court's findings of fact and is unsupported by the law. The Gimpel Employees' claims do not require the application of a formula from the Tyco Severance Plan, but instead are based on independent contracts.

2. The Calculation of "Years of Service" Is Not Dependent on the Plan.

Next, Tyco argues that it is necessary to refer to the Plan in order to determine the "years of service" for various employees who had breaks in service (*i.e.*, employees who had left the company and then come back). Even if that was true (which it is not), that fact would not give rise to ERISA preemption. This is because the obligation to pay under the agreements is an independent legal duty. *Lone Star OB/GYN Associates v. Aetna Health Inc.*, 579 F.3d 525, 530-31 (5th Cir. 2009) ("The ERISA preemption question thus turns on whether the Provider Agreement creates a legal duty 'independent' of the ERISA plan—in this case, a duty to pay a specific contractual rate for services rendered under the ERISA plan."). In this case, the legal duty to pay the severance flows from the agreements, not from the Plan.

In any event, this argument is thoroughly refuted by the evidence. Tyco did not refer to the Plan in determining the employees' "years of service" or in determining their "adjusted hire date," which is the date used to determine seniority and benefits for an employee with a break in service. One of the employees with a break in service, Len Hill, described his communications with Tyco on the issue:

> Q. When the issue about your service date came up did Paddy or anybody else pull out a copy of the Tyco severance plan?
>
> A. Oh, no. She never mentioned that. No, never did.
>
> Q. When you got your original adjusted service date when you came back to the company, did anyone pull out a copy of your Tyco severance plan to determine what your service date should be?
>
> A. Oh, no. No.

Tr. 71-72. Ms. Kreindler admitted that Tyco uses "years of service" for many different purposes, such as seniority. Tr. 231. She admitted that she did not need to refer to the Plan to determine an adjusted hire date:

> Q. Okay. And in order to figure that out [an adjusted hire date], did you have to go pull out the severance plan to figure out what the adjusted hire date should be?
>
> A. No.

Tr. 231. She admitted that she did not need to look at the definition of "years of service" under the Plan unless she was determining benefits under the Plan itself:

> Q. Right. So if you needed – you were trying to calculate years of service for purposes of the plan you certainly would have to look at the definition in the plan, correct?
>
> A. Correct.
>
> Q. But if you're doing it for a purpose that is not within the plan you wouldn't have to look at the definition [in] the plan, fair enough?
>
> A. Correct.

Tr. 232. In this case, of course, the employees are not seeking benefits under the Plan, and thus the definition of "years of service" in the Plan is irrelevant.

The trial court entered a finding of fact rejecting Tyco's argument concerning "years of service":

> Likewise, it is not necessary to refer to the Tyco Severance Plan in order to determine years of service. As Ms. Kreindler acknowledged, "years of service" is relevant to many employee benefit issues and there are many sources for a definition. In fact, Tyco Valves did not refer to the plan to resolve the actual "years of service" issues with Plaintiffs.

R. 587. Tyco does not challenge the sufficiency of the evidence to support that finding. Accordingly, the trial court's finding of fact forecloses Tyco's argument.[3]

[3] Tyco also argues that the stipulated "years of service" for Len Hill, Fernando Macias, and Raul Martinez are inconsistent with Ms. Kreindler's schedule, because that schedule refers to "continuous service." If Tyco stipulated to incorrect damages figures, the blame lies with Tyco. Tyco did not seek to modify the stipulation in the trial court and has thus waived any complaint. A stipulation with respect to damages does not change the terms of the underlying contract.

3. "Standard Severance" Is Not a Reference to the Plan.

The Retention Incentive Agreements provide for the payment of "the standard Severance in accordance to the severance schedule associated with the closure of the facility." PX 1, at 2. Tyco argues that the severance schedule created by Ms. Kreindler (PX 12) could not possibly have been the severance schedule referenced in the agreements because Ms. Kreindler's schedule did not provide for a "non-standard" severance. Tyco also argues that Ms. Kreindler's schedule does not expressly refer to the closure of the West Gulf Bank facility. Tyco therefore argues that the agreements must have been referring to the Plan (DX3) and its amendment (DX 4), rather than to Ms. Kreindler's schedule.

As a threshold matter, Tyco presented no evidence to support this theory, nor does it cite any evidence on appeal. Because ERISA preemption is an affirmative defense, Tyco bore the burden of proof. Tyco wholly failed to discharge that burden.

By contrast, the Gimpel Employees presented evidence showing that (1) Ms. Kriendler's schedule was posted on the Gimpel bulletin board, Tr. 146; (2) the terms of the schedule were orally communicated to the employees even before the agreements, Tr. 79, 141-42; (3) the Gimpel Employees were told the terms of the schedule at the time of the agreements and afterwards, Tr. 108-09, 143, 145-47; and (4) the Plan was not modified to adopt those terms until a month later, DX 4.

The evidence thus supports the conclusion that Ms. Kreindler's schedule was the severance schedule referenced in the agreements.

The opposite conclusion would be illogical. If the Plan amendment (DX 4) is the "standard schedule," then the agreements were referring to a schedule that would not exist until over a month in the future. It is much more logical to conclude that the agreements referred to a schedule that already existed.

In any event, the trial court entered a finding of fact that Ms. Kreindler's schedule (PX 12) was the schedule referenced in the agreements. Tr. 584. Tyco does not challenge the sufficiency of the evidence to support that finding. Accordingly, the trial court's finding of fact forecloses Tyco's argument.

4. Ms. Kreindler's Schedule Was Not a Summary of the Plan.

Tyco claims that Ms. Kreindler created her schedule (PX 12) "as a reference for her own use" to help her learn the Plan and that it was never distributed or posted at the facility. Tyco argues that the schedule is thus a mere summary of the Plan, so that the reference to the "standard schedule" in the agreements was a reference to the Plan.

Ms. Kreindler's story was contradicted by the evidence, crushed on cross-examination, and rejected as non-credible by the trial court. For starters, the record includes an e-mail by Ms. Kreindler in which she states that the schedule "is the policy I used for severance during our restructuring." She also stated that, "[w]hen

we were planning for the restructuring at [West Gulf Bank]," she worked with other Tyco employees "to develop the severance plan." PX 14. Ms. Kreindler's own words in a contemporaneous e-mail thus refute her story at trial.

On cross-examination, Ms. Kreindler could not come up with a credible explanation for why her schedule omits key terms from the Plan, when it was supposed to be a summary of the Plan. In particular, she listed all of the exclusions from coverage under the Plan, except for the critical exclusion for employees who went to work for the purchaser of a unit. Tr. 235-38. She also admitted that she gave the document to Paddy Warman, but claimed that she "believed" that Ms. Warman never gave it to anybody. Tr. 238. She insisted that the schedule was never posted on the bulletin board, but admitted that she never actually looked and did not really know whether it had been posted. Tr. 238-39.

The trial court considered Ms. Kreindler's testimony in light of all the evidence and found that "This testimony is not credible." R. 586. The trial court found that "The evidence shows that Plaintiff's Exhibit 12 is something that Ms. Kreindler actually used, and not just a learning tool." R. 586. Tyco does not challenge the sufficiency of the evidence to support that finding.

In sum, Tyco's ERISA preemption defense is contrary to the evidence, the trial court's findings of fact, and the law. The Court should reverse the judgment

of the Court of Appeals and affirm the trial court's rejection of the ERISA preemption defense.

CONCLUSION AND PRAYER

Tyco needed the Gimpel Employees to stay at the company so that the Gimpel unit could be sold. To keep the Gimpel Employees, the company offered special benefits that were not provided by its company-wide severance plan. This was primarily for the benefit of Tyco, not the Gimpel Employees.

Once the sale to Dresser Rand was close to completion, Tyco broke its promises and reneged on its deal. When the employees stood up to Tyco and filed this lawsuit, Tyco began desperately grasping for straws to avoid liability. Eventually, Tyco settled on a flawed, factually unsupported ERISA preemption defense. The trial court correctly rejected that defense.

Tyco needs to honor its promises. The trial court entered a judgment enforcing the promises. This Court should reverse the judgment of the Court of Appeals and affirm the judgment of the trial court.

Respectfully submitted,

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I certify that the sections of this brief that are subject to the word limitations under the Texas Rules of Appellate Procedure contain a total of 10,289 words as shown by my word processing software.

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