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

v.

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

On Petition for Review from the
First Court of Appeals
Houston, Texas

No. 01-10-00113-CV

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Nature of the Case:	Suit for breach of contract for severance pay by former employees of Tyco who were hired by Dresser Rand after it purchased the product line on which they worked. Eleven of the former employees claimed breach of a written contract. Six of the former employees claimed breach of an oral contract.
Trial Court:	Hon. Kyle Carter, 125th District Court, Harris County
Disposition of Trial Court:	After a non-jury trial, the trial court ruled that Respondents breached written and oral agreements, and it entered judgment in favor of all employees.
Court of Appeals:	First Court of Appeals in Houston, Texas. Opinion by Keyes, J., Sharp, J. dissenting in part, and Massengale, J. concurring in the judgment only. *Citation*: 365 S.W.3d 750 (January 19, 2012).
Parties in the Court of Appeals:	Appellants: Tyco Valves & Controls, L.P. and TV&C GP Holdings, Inc. Petitioners: Arsenio Colorado, Steven Craig, Umit Davulcu, Richard Gonzales, Lanny Heinrich, Leonard Hill, Andy Huynh, Chris Kahrig, Lay Keonakhone, Greg Lambousy, Tung Le, Chris Luckey, Fernando Macias, Jorge Martinez, Raul Martinez, Kenneth Nash, Jimmy Phoumlavanh.
Disposition of Court of Appeals:	The Court reversed and rendered judgment that all employees take nothing on their breach of contract claims. Justice Keyes and Justice Sharp held that the alleged oral agreements were unenforceable. Justice Keyes and Justice Sharp held that the written agreements were enforceable and not preempted by ERISA. Justice Keyes held that there was no breach of contract because Dresser Rand was a successor as defined by the written agreement. Justice Sharp dissented, holding that Dresser Rand was not a successor under the written agreement and that there was a breach. Justice Massengale held that the claims of all the employees were preempted by ERISA and thus concurred only in the judgment.

ISSUES PRESENTED FOR REVIEW

1. The Court Of Appeals Correctly Held There Was No Evidence Of An Enforceable Oral Agreement.

2. Justice Keyes Correctly Ruled That Tyco Complied With The RIAs By Providing Comparable Employment Through A Successor or Assign.

3. Justice Massengale Correctly Ruled That Petitioners' Breach of Contract Claims Are Preempted by ERISA.

STATEMENT OF FACTS

I. Summary Overview Of The Dispute.

Petitioners are 17 former employees of Tyco Valves & Controls, L.P.[1] who worked on a particular production unit, the Gimpel line, both before and after Tyco sold the Gimpel line to Dresser Rand Company. Even though no Petitioner ever missed a day's work or suffered any other loss, they sued claiming entitlement to severance pay.

Tyco had a company wide ERISA Severance Plan that covered all its employees. The general plan was modified by schedules which provided the amounts that individuals who were being laid off at certain facilities would receive. The ERISA Severance Plan had a "no windfall provision" so that if a covered employee was not out of a job because of the closure, they would receive no severance. [2]

Tyco made a decision to close its West Gulf Bank facility where the Petitioners were employed. Tyco offered Retention Incentive Agreements ("RIAs")

[1] Unless otherwise indicated, all Tyco entities are hereinafter referred to collectively as "Tyco."

[2] An eligible employee will not be eligible to receive severance benefits under any of the following circumstances:

…. (ix) The Eligible Employee's employment with the Employer terminates as a result of a sale of … assets of the Employer … and the Eligible Employee accepts employment … with the purchaser …. The payment of Severance Benefits in the circumstances described in this subsection (ix) would result in a windfall to the Eligible Employee, which is not the intention of the Plan.

to numerous employees including 11 of the Petitioners in this case.[3] The RIAs were with employees in all departments, not just with those working on the Gimpel line. Not all employees of the facility, including not all employees on the Gimpel line, were offered RIAs.

The RIAs contemplated that the employees would be paid "standard Severance" if the employees continued their employment with Tyco until the plant closed and were left without a job. As explained below, the only "standard" severance plan at Tyco was its ERISA governed Severance Plan. Ultimately, Tyco was able to sell the Gimpel line to Dresser Rand. As a condition of the sale Tyco required Dresser Rand to offer employment to all of the Tyco employees on the Gimpel line, in the same jobs, and at their full Tyco seniority, wages, and benefits. In other words, Tyco made sure that none of the Gimpel line employees (including the Petitioners) were left without a job.

Petitioners now contend that the RIAs were unrelated to Tyco's ERISA Severance plan, and that Tyco should pay them severance pay even though Tyco ensured that they were not left without a job (the entire purpose of severance pay).

[3] The 11 Petitioners who had RIAs were: Steven Craig, Umit Davulcu, Richard Gonzales, Larry Heinrich, Leonard Hill, Chris Kahrig, Lay Keonakhone, Tung Le, Raul Martinez, Kenneth Nash, and Jimmy Phoumlavanh. (R. 583 at ¶ 5). Six other Petitioners (Arsenio Colorado, Andy Huynh, Chris Luckey, Fernando Macias, Jorge Martinez, and Souk Vongsamphanh) did not have written RIAs (R. 584), but claim that Tyco breached *oral* contracts. Tyco refers to them in this Brief as the "Oral Contract" Petitioners.

II. Background Facts Regarding The Tyco Severance Plan.

Tyco International first adopted a Severance Plan for U.S. Employees with an effective date of January 1, 2004. (R. 352 at ¶ 3; Tr. Vol. 3 at Defendant's Exhibit 27, ¶ 3). Effective January 1, 2005, the Tyco Engineered Products and Services ("TEPS") business segment of Tyco International adopted the Severance Plan pursuant to its provisions. (R. 236, 352; Tr. Vol. 3, at Defendant's Exhibit 2, Confidential Tyco 1977-1978; Tr. Vo. 3, at Defendant's Exhibit 27, ¶ 4; Tr. Vol. 2, at 175-176, 185-186). The Tyco Severance Plan was amended and restated as of December 1, 2006. (R. 238; Tr. Vol. 3, at Defendant's Exhibit 3). On February 27, 2007, a revised Benefits Schedule for the employees of Tyco Valves and Controls West Gulf Bank facility (i.e., the facility where Tyco employed the Petitioners) was adopted with an effective date of December 1, 2006 (hereafter referred to as the "West Gulf Bank schedule"). (R. 265-266; Tr. Vol. 2, at 212-213; Tr. Vol. 3 at Defendant's Exhibit 4). At all times relevant to this case, Tyco Valves was part of the TEPS business segment of Tyco International. (Tr. Vol. 2, at 176-177, 186).[4]

The Tyco Severance Plan is generally applicable to all TEPS employees and covered all the Petitioners in this case. (R. 353; Tr. Vol. 3, at Defendant's Exhibit

[4] There is only one Tyco Severance Plan, although, as discussed, it has been adopted and restated on several occasions.

27, ¶ 8). It was the only severance plan available for employees who worked at the West Gulf Bank facility, including the Petitioners. (Tr. Vol. 2, at 185-186, 198-199). The existence of the Tyco Severance Plan was not secret, and Petitioner Lanny Heinrich specifically testified that he was aware of the Tyco Severance Plan before the decision to close the West Gulf Bank facility was announced to employees in December 2006. (Tr. Vol. 2, at 116). Likewise, Petitioner Leonard Hill acknowledged that he was aware of the Tyco Severance Plan. (Tr. Vol. 2, at 97).

III. The Kriendler Reference Sheet.

Ms. Holly Kriendler was hired as Director of Human Resources for Tyco's Americas region in April 2006.[5] In the "early summer of 2006,"[6] Ms. Kriendler drafted a one-page reference sheet for her own use to help her learn the key provisions of the Tyco Severance Plan without having to refer to the entire 25-30 page Severance Plan document. (Tr. Vol. 2, at 213-218; Tr. Vol. 3, at Plaintiffs' Exhibit 12). The only people to whom Ms. Kriendler circulated a copy of Plaintiffs' Exhibit 12 were Mr. Gary Haire, the CFO of her group, and Ms. Paddy Warman, a clerical Human Resources employee. (Tr. Vol. 2, at 196, 205, 214). Moreover, when Ms. Kriendler circulated Plaintiffs' Exhibit 12, she made it clear that the

[5](Tr. Vol. 2, at 174, 176).

[6](Tr. Vol. 2, at 214).

document was not for distribution, but was her own personal working document. (Tr. Vol. 2, at 214). Ms. Kriendler also testified that Plaintiffs' Exhibit 12 was never posted at the facility. (Tr. Vol. 2 at 214).

Ms. Kriendler copied most of Plaintiffs' Exhibit 12 (*i.e.*, the bottom 2/3rds) verbatim from parts of the Tyco Severance Plan. (Tr. Vol. 2, at 214-216). She also created a slightly different schedule of benefits because she erroneously thought that she had the flexibility to do so. (Tr. Vol. 2, at 188).[7] As Ms. Kriendler testified, most of Plaintiffs' Exhibit 12 came directly from parts of the Tyco Severance Plan,[8] including numerous specific capitalized terms that are *defined by the Tyco Severance Plan*, such as, "Severance Benefit," "Severance Period," "Participant," "Effective Date," "Employee," "Involuntary Termination," "Release," "Company," "Committee," "Eligible Employee," "Cause," and "Permanent Disability." (*Compare* R. 391 and Tr. Vol. 3, at Plaintiffs' Exhibit 12 with R. 214, 218-220; R. 239, 243-245; Tr. Vol. 3, at Defendant's Exhibit 2, pages i and 2-4; and

[7] These slight modifications relating to (a) the amount of severance benefits and (b) whether only "continuous years of service" would be counted are the only differences between Ms. Kriendler's reference sheet and the Tyco Severance Plan. Ms. Kriendler did not have any authority to modify the Tyco Severance Plan. (Tr. Vol. 2, at 188). The only person with authority to modify Tyco's Severance Plan was the plan administrator, Ms. Laurie Siegel, Tyco's Senior Vice President of Human Resources. (Tr. Vol. 2, at 188). Ms. Kriendler learned that she had no authority to modify the benefit schedule after she created Plaintiffs' Exhibit 12. (*See* R. 398; Tr. Vol. 3, at Plaintiffs' Exhibit 15) ("I was always under the impression that Bands 4 and below were subject to local policies, but Nawrath corrected me that since 2/2005 we were supposed to operate under a uniform schedule.").

[8] (Tr. Vol. 2, at 215-216).

Tr. Vol. 3, at Defendant's Exhibit 3, pages i and 2-4). In other words, Plaintiffs' Exhibit 12 is a partial summary of the Tyco Severance Plan, with a slightly different severance formula that Kriendler created.

IV. The Potential Facility Closure And The Retention Incentive Agreements.

In August, 2006, Tyco decided to close the West Gulf Bank facility. (Tr. Vol. 2, at 178-180). The initial intent was to relocate the product lines to other Tyco facilities. (Tr. Vol. 2, at 180-182). The Gimpel product line (the workplace of all the Petitioners) was to be moved to Tyco's Stafford facility. (Tr. Vol. 2, at 182; Tr. Vol. 4, at Defendant's Exhibit 22).

In August 2006, seven West Gulf Bank employees (none of whom were employed on the Gimpel line) signed RIAs. (Tr. Vol. 2, at 194). Except for the amount of the retention bonus, these RIAs were identical to those signed by the 11 Petitioners in this case who had an RIA. (Tr. Vol. 2, at 195).

In the fall of 2006, it was learned that the cost of moving the Gimpel line to Stafford was much greater than anticipated. (Tr. Vol. 2, at 182-183). After determining that there was no other Tyco facility to which the Gimpel line could be moved, Tyco decided to attempt to sell the Gimpel line. (Tr. Vol. 2, at 183-184).

On December 11, 2006, the employees at the West Gulf Bank facility were informed that the facility would be closing and that every product line would either

be relocated to other Tyco plants, sold, or abandoned. (Tr. Vol. 2, at 184). Between January 5 and January 15, 2007, 11 of the Petitioners entered into an RIA, identical to those signed by all other facility employees including those who did not work on the Gimpel line. (R. 358-390; Tr. Vol. 3, at Plaintiffs' Exhibits 1-11).

Each RIA stated that if the employee remained an active employee during the entire "Retention Period," the employee would receive a specific, stated sum of money as a retention bonus, *which would be payable whether or not the employee was offered comparable employment at the end of the Retention Period.* (R. 357-390; Tr. Vol. 3, at Plaintiffs' Exhibits 1-11). Paragraph 2.1(a)(i) of each RIA also stated that if the employee remained an active employee during the entire "Retention Period," and if the employee was not offered "Comparable Employment with Tyco," the employee would receive not only the specified "Retention Bonus," but also "the standard Severance in accordance to the severance schedule associated with the closure of this facility." (R. 357-390; Tr. Vol. 3, at Plaintiffs' Exhibits 1-11, ¶ 2(a)(i)).

None of the RIAs stated the dollar amount of the severance benefit that could be payable under Section 2(a)(i) or contained a severance schedule. (R. 357-390; Tr. Vol. 3, at Plaintiffs' Exhibits 1-11). Except for identifying the "Company" and the "Employee," none of the RIAs defined any term spelled with an initial

capital letter (such as "Severance," "Involuntary Termination," etc.) if that term already was defined in the Tyco Severance Plan. (R. 357-390; Tr. Vol. 3, at Plaintiffs' Exhibits 1-11). Each RIA defined the word "Company" and the word "Tyco" to mean "Tyco Valves and Controls, its successors and assigns"). (Id).

Each RIA stated that it "sets forth the entire understanding of Tyco and the employee, and supercedes all prior agreements and communications, whether oral or written, pertaining to eligibility for stay incentives of the type described herein." The RIA said nothing about superceding any prior agreement with respect to severance. (R. 360, 363, 366, 369, 372, 375, 378, 381, 384, 387, and 390, at ¶ 9; Tr. Vol. 2, at Plaintiffs' Exhibits 1-11, at ¶ 9).

On March, 15, 2007, the President of Tyco Valves & Controls held a meeting with employees of the Gimpel line to explain/clarify issues surrounding the closure of the West Bank Facility and the potential sale of the Gimpel line. (Tr. Vol. 2, at 171, 219-222). He explained that those employees who signed RIAs, and worked through the transition of the sale but received a job from a successor/purchaser, would get the Retention Bonus but would not be entitled to severance payments, consistent with the Tyco Severance Plan. (Tr. Vol. 2, at 171, 219-222).

V. The Sale Of The Gimpel Line To Dresser Rand And Tyco's Procurement Of Continued Employment For Petitioners With Dresser Rand.

On April 5, 2007, Dresser Rand agreed to purchase the Gimpel line from Tyco. (R. 172-212; Tr. Vol. 3, at Defendant's Exhibit 2). Shortly thereafter, the employees who worked on the Gimpel line were informed that it had been bought by Dresser Rand. (Tr. Vol. 2, at 163). The sale and transfer of the Gimpel product line was completed in September 2007. (Tr. Vol. 2, at 163). As part of the sale, Tyco contractually bound Dresser Rand to ensure continuity of employment for all of the Gimpel line employees (which included all Petitioners). (R. 186-187 at Article 4.1(a), (b), and (c); Tr. Vol. 3, at Defendant's Exhibit 1, Article 4.1(a), (b), and (c)). Specifically, Tyco contractually required Dresser Rand to:

- offer the Gimpel line employees (including all the Petitioners) jobs, at their present or higher salary;
- allow the Gimpel line employees (including all Petitioners) to be eligible for benefits with no lapse in coverage, no exclusions or limitations with respect to pre-existing conditions, and no requirement that they present evidence of insurability; and
- allow Gimpel line employees (including all Petitioners) to keep their full seniority for purposes of 401k plans, vacation and paid time off plans, short term disability plans, and severance plans.

(*Id*; Tr. Vol. 2, at 222-225).

Dresser Rand completely fulfilled its contractual obligations. All of the Petitioners received job offers from Dresser Rand performing the same job they did

at Tyco. (R. 131-33; Tr. Vol. 4, at Exhibit 1). Indeed, the Petitioners went to work for Dresser Rand the very next work day after they stopped working at the West Gulf Bank facility (*i.e.*, never lost a day's work), performed the same jobs, had the same supervisors, experienced no loss in seniority, were given an increase in their salary, were immediately eligible for benefits, and had reasonably comparable benefits. (Tr. Vol. 2, at 101-102, 123-125, 136-137, 160-163, 172). With the exception of Leonard Hill, all of the Petitioners who testified at trial still worked for Dresser Rand. (Tr. Vol. 2, at 101-102, 123-125, 136-137, 160-163, 172).[9] The Gimpel line was physically moved to the Dresser Rand facility less than eight miles from the West Gulf Bank facility and Petitioners' positions with Dresser Rand did not require relocation. (Tr. Vol. 2, at 101-102, 123-125, 136-137, 160-163, 172).

SUMMARY OF THE ARGUMENT

The result reached by the Court of Appeals was correct: none of the Petitioners missed a day of work and are not entitled to receive severance pay. Neither of the breach of contract claims, oral or written, are properly before the Court as they are preempted by ERISA.

[9] Only five of the Petitioners (Leonard Hill, Larry Heinrich, Umit Davulcu, Chris Kahrig, and Christopher Luckey) testified at trial. Of those, only one (i.e., Chris Luckey) was an Oral Contract Petitioner. (Tr. Vol. 1, at 3).

Even if not preempted, there was no enforceable oral contract because of the most basic principle of contract law — there was no evidence that an offer of the contract alleged to be breached was ever made.

Those Petitioners who sued based on a written agreement fare no better, as they did not show that the contract was breached. Instead, Tyco, acting through its successor and assign, Dresser Rand, fulfilled the terms of the contract by providing comparable employment.

ARGUMENT

I. This Is Not An Appropriate Case For Review.

This is not a case that merits review by the Court. Although the underlying lawsuit is for severance pay, not one of the Petitioners ever lost their job. All Petitioners asserted claims for breach of contract, 11 employees bringing suit on a written agreement and six employees asserting claims for breach of an alleged oral agreement. This is a case where the single largest claim belongs not to any Petitioner, but to their attorney for his fees.

Nor would deciding this case be a wise use of the Court's resources as no error was committed, nor are any of the issues important to the jurisprudence of the state. Before reaching the breach of contract claims, the Court must first decide a narrow issue of federal preemption law to determine whether, as Justice

Massengale found, the Plaintiffs' claims were preempted. ERISA preemption is a narrow and rarely raised issue in Texas courts, which alone argues against the use of the Court's resources. But even if ERISA preemption was an area in need of broader explication, this case is a particularly inappropriate vehicle. The Court's determination of the ERISA issue would turn not only on interpretation of language specific to the RIAs, but also on the specific terms in Tyco's ERISA Severance Plan, all viewed in light and effect of a separate document prepared by the company's Director of Human Resources. It would be difficult to intentionally create a set of circumstances resulting in an outcome more limited to the parties than those present here.

Moreover, the breach of contract claims are neither novel nor complicated and were decided correctly by the appeals court. The two Justices who ruled on the merits on the breach of the oral contract claim (Justices Keyes and Sharp) rejected this claim based on simple hornbook contract law: there was no evidence that Tyco made an offer to the six employees alleging an oral contract. The court's decision is not surprising given that only one of the six employees alleging an oral agreement testified, and even he failed to testify that an offer of severance, the most basic element required for an enforceable agreement, had been made. Petitioners principal argument, that the contracts were unilateral, does not overcome that there

is no evidence of an offer, fundamental for even a unilateral contract.

The Petitioners asserting claims for breach of a written agreement fare no better. The RIAs provided that severance payments would be due only if the employees did not receive comparable employment. The difference between the two justices who considered this issue was whether, in the unique context of this case, Dresser Rand was a "successor or assign." Given that the ultimate issue was whether employees who did not lose their job should receive severance pay, notwithstanding that their continuity of employment with all seniority benefits was guaranteed based on contractual obligations created in the sale of the product line on which they worked, the determination that no severance pay was due was not only correct, but not surprising.

In short, granting review of this case would require the Court to first resolve a complex, non-precedential ERISA issue that would not alter the outcome of the case. If the Court agrees that the claims are preempted, Plaintiffs would recover nothing. If the Court were to hold that the claims are not preempted, the Court would be left with two different breach of contract claims, one where there is no evidence of an offer, and the other where the court correctly found that Tyco complied with its obligation to offer comparable employment through Dresser Rand, its successor or assign. The result is the same: Petitioners are entitled to

recover nothing.

II. The Court Of Appeals Correctly Held There Was No Evidence Of An Enforceable Oral Agreement.[10]

All contracts require evidence of an offer, an acceptance, and consideration. *Hathaway v. General Mills, Inc.*, 711 S.W.3d 227, 228 (Tex. 1986) ("the elements of a contract" are "a meeting of the minds supported by consideration"); *Vanegas v. American Energy Services*, 302 S.W.3d 299 (Tex. 2009) ("A unilateral contract occurs when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance."); *City of Houston v. Williams,* 353 S.W.3d 128, 136 (Tex. 2011) (noting that in unilateral contracts performance is the "valuable consideration" for a promise). As explained below, the Court of Appeals correctly held there was no evidence of a binding oral contract because the Oral Contract Petitioners never presented evidence that Tyco promised them anything.

Five of the Oral Contract Petitioners did not testify at trial, and thus, they did not offer any evidence that Tyco ever communicated any offer of severance pay to them. The sixth Petitioner (Luckey) admitted he was never promised severance pay. (Tr. Vol. 2, 167-168, 170). Specifically, Luckey testified that in the only conversation he had with Tyco about the possibility of severance pay, he told Ms.

[10] The only two Justices of the Court of Appeals to address the substance of the oral contract found no evidence of an enforceable agreement. Justice Massengale, who found both breach of contract claims preempted, did not consider this issue.

Paddy Warman, a Tyco Human Resources assistant,[11] that he "was looking for another job" and that he didn't feel like any possibility of severance pay "was sufficient for [him] to stay." (Tr. Vol. 2, 167). Luckey testified that Warman responded that he definitely would not receive severance pay if he resigned. (Tr. Vol. 2, 167-168, 170). Luckey did not testify regarding what, if any, severance Warman was referring to, and he did not testify that he ever saw or relied upon the Kreindler memo. Luckey did testify that he did not rely upon any expectation of severance pay in making his decision to keep working for Tyco. (Tr. Vol. 2, 168). The Court of Appeals correctly held there was no evidence of an oral contract and no evidence of any terms of such contract.

Petitioners contend that the oral contract claims do not depend on either Luckey or their own testimony and that it was not necessary for them to present *evidence* that Tyco actually promised *them* anything, because a different employee (Chris Kahrig, who received an RIA) asserted *he* was told *he* would get severance pay. Petitioners assert that Warman "enlisted" Kahrig to "spread the word" about the severance schedule to employees who did not receive RIA's. (Petitioners' Brief, 16).

Petitioners' assertion is directly contradicted by the record. Kahrig never

[11] (Tr. Vol. 2, 205).

testified that Warman (or anyone else) asked him to tell other employees that they would receive severance pay, nor did he testify that Warman asked him to tell other employees that they would receive severance pay in accordance with the Kriendler memo. Instead, Kahrig admitted he was told ***not*** to share information about the potential of severance pay with other employees:

> Q. … look at the retention agreement that you signed.
>
> A. Yes.
>
> Q. Tell us how you came about to be signing this.
>
> A. … my supervisor … took me to … Warman's office and they presented me with this document to pretty much keep me at Tyco for the rest of the time period.
>
> Q. … What do you recall being discussed during that meeting?
>
> A. **What was discussed was that *we were not to really share this information, just to keep it between us*, but to also let us know that** our jobs were secure up to that point of release as well as **we would have a severance package afterwards.**

(Tr. Vol. 2, 142-143). Kahrig also testified that in a subsequent meeting concerning the severance plan, Warman told him she would have to get back with him later "[b]ecause we were around people." (Tr. Vol. 2, 156). Accordingly, the Court of Appeals correctly held that there was no evidence that valid contracts existed between Tyco and the Oral Contract Petitioners.

Citing this Court's decision in *Vanegas*, Petitioners make much of the fact

that "unilateral" contracts do not require an *exchange* of promises; only an initial promise, along with acceptance through performance. However, nothing in *Vanegas* suggests that a breach of contract claimant can establish the existence of a contract without offering evidence that a contractual promise was made to *him*. Indeed, the evidence in *Vanegas* showed that each of the plaintiffs attended a company meeting wherein the company president made the promise at issue. *Vanegas*, 302 S.W.3d at 300. Thus, in *Vanegas*, the defendant actually made a promise *to the plaintiffs*. Here, there is no such evidence. Specifically, there is no evidence that any Tyco employee promised the Oral Contract Petitioners severance pay, and there is no evidence that any of those Petitioners ever saw or relied upon the Kreindler memo.[12] Therefore, the Court of Appeals correctly held that there is no evidence to support the breach of contract claims concerning the Oral Contract Petitioners.

III. Justice Keyes Correctly Ruled That Tyco Complied With The RIAs By Providing Comparable Employment Through A Successor or Assign.

Tyco did not breach any contracts to pay severance benefits. Under the terms of the RIAs, "standard Severance" was payable to an employee under Section

[12] Petitioners' contrary assertion that "[t]here is no dispute that the six Gimpel Employees were aware of the promise and were relying on it" (Petitioners' Brief, 19), is patently false. As the Court of Appeals noted, Tyco specifically challenged the trial court's conclusion that Tyco entered binding oral contracts, on grounds that the oral contract Petitioners offered no evidence of an offer, an acceptance, or any knowledge of or reliance upon the Kreindler memo. (Opinion, 38-40; Appellant's Brief, 39).

2(a) only if the employee was not offered "Comparable Employment" by "Tyco." (*See* R. 358, 361, 364, 367, 370, 373, 376, 379, 382, 385 and 388, at ¶1(c); Tr. Vol. 3, at Plaintiffs' Exhibits 1-11, at ¶1(c)). The term "Tyco" was defined to include not only Tyco Valves but also its "successors or assigns." (*Id.* at ¶ 1). Both parties recognize that Texas courts have long accepted that "the exact meaning of the word 'successor' as applied to a contract must depend largely on the kind and character of the contract, its purposes and circumstances, and the context." *Thompson v. North Texas Nat'l Bank,* 37 S.W.2d 735, 739 (Tex. Comm'n App. 1931, holding approved); *Enchanted Estates v. Timberlake*, 832 S.W.2d 800, 802 (Tex. App.—Houston [1st Dist.] 1992, no writ).

Although giving lip service to the principle that "successor" is contextual, Petitioners then proceed to ignore the most basic context, that the RIAs arise out of an employer/employee relationship, and instead rely on a decision deciding who is a successor in a corporate context, involving the sale of banks. In this case, particularly given Petitioners' characterization of the RIA as an employment contract, Dresser Rand was a "successor or assign" of Tyco with respect to the Gimpel line—the product line on which Petitioners worked. Simply stated, Tyco contractually bound Dresser Rand to ensure continuity of employment for all of the Gimpel line employees (which included all Petitioners). (R. 186-187 at Article

4.1(a), (b), and (c); Tr. Vol. 3, at Defendant's Exhibit 1, Article 4.1(a), (b), and (c)).

According to all testimony and evidence offered at trial, Dresser Rand completely fulfilled its contractual obligations to Tyco. It is stipulated that all Petitioners received job offers from Dresser Rand performing the same job they did at Tyco. (R. 131-33; Tr. Vol. 4, at Exhibit 1). At trial, all the testifying Petitioners stated they went to work for Dresser Rand the very next work day after they stopped working at the West Gulf Bank facility (*i.e.*, never lost a day's work), performed the same jobs, had the same supervisors, experienced no loss in seniority, were given an increase in salary, and were immediately eligible for benefits, and had reasonably comparable benefits. (Tr. 101-102, 123-125, 136-137, 160-163, 172). The Gimpel line was physically moved to the Dresser Rand facility less than eight miles from the West Gulf Bank facility and Petitioners' comparable positions with Dresser Rand did not require relocation. (Tr. 101-102, 123-125, 136-137, 160-163, 172).

Given these facts and circumstances, and the employment-related nature of the RIAs, Dresser Rand was a "successor or assign" to Tyco Valves' Gimpel line. Accordingly, Petitioners were not eligible for "standard Severance" under the RIAs because they were offered "Comparable Employment" by a "successor or assign" of Tyco. To hold otherwise would elevate form over substance, disregard the plain

meaning of severance pay, strip the RIAs from their relevant purpose and character, and make the "successor or assign" determination depend solely on whether the sale involves a subsidiary or a division.

For these reasons, Justice Keyes' conclusions that Dresser Rand was a successor or assign of Tyco, and that Petitioners' employment with Dresser Rand was comparable employment by Tyco, as defined by the RIAs was correct.

IV. Justice Massengale Correctly Ruled That Petitioners' Breach Of Contract Claims Are Preempted By ERISA.

A. The ERISA Claim Must Be Viewed From The Perspective Of All Employees, Not Just Those Who Worked On The Gimpel Line.

Petitioners view and argue this case from a flawed perspective. By seeing themselves as a select group of employees for which Tyco created a special retention and severance program, designed to preserve the value of the Gimpel line for a possible sale, they assume the answer to the ultimate question, that the RIAs are the sole means of providing severance. The appropriate view is that rather than a select group of employees who were treated differently, Petitioners were just a small sliver of the employees who worked at the West Gulf Bank facility, some of whom received RIA's and some of whom did not. All employees at the West Gulf Bank facility, including Petitioners, were covered by the ERISA Severance Plan. The RIA agreements used for all employees, those who worked on the Gimpel line and those who worked elsewhere, were identical except for the amount of the retention

bonus. Significantly, the RIA agreements were prepared when the intent was to move the Gimpel line to another Tyco plant. The possibility of selling the Gimpel line, the raison d'etre which underlies Petitioners' claim, came long after the form of the RIA's were prepared and put in use.

Petitioners view this case as if the RIAs were independent documents and that there is insufficient evidence to relate them back to the ERISA Severance plan. Viewed correctly, before the RIAs were created, Petitioners like all other West Gulf Bank facility employees were covered by Tyco's ERISA Severance plan, and there is no evidence that would support the trial court's finding (or the Court of Appeals affirmation) that the RIAs did or were intended to break the tie with the ERISA Severance Plan.[13]

In short, the goal of the RIAs was to have employees stay until plant closing, a purpose totally distinct from providing severance if employees were left jobless after the closing. That need was already addressed by the ERISA Severance Plan. Rather than a new, independent severance agreement, the RIA, as its name implies, is merely an incentive agreement. An incentive agreement that refers and is related to Tyco's already existing ERISA Severance Plan.

[13] More than 200 Gulf Bank employees received payments under Tyco's ERISA Severance Plan between Ms. Kreindler's arrival and the date of her trial testimony.

B. This Court Has Repeatedly Recognized That ERISA Preemption Is Broad.

There is no dispute that Tyco's Severance Plan is an ERISA plan. (R. 585, at ¶13). Texas courts have repeatedly observed that "ERISA includes *expansive* preemption provisions, which are intended to ensure that employee benefit plan regulation be 'exclusively a federal concern.'" *Ambulatory Infusion Therapy Specialists, Inc. v. North American Administrators, Inc.*, 262 S.W.2d 107, 113 (Tex. App.–Houston [1st Dist.] 2008, no pet.) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)); *Stiles v. Memorial Hermann Healthcare Sys.*, 213 S.W.3d 521, 526 (Tex. App.—Houston [1st. Dist.] 2007, pet. denied) (same). "To this end, Congress has statutorily provided that ERISA 'shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.'" *Ambulatory Infusion*, 262 S.W.3d at 113 (quoting 29 U.S.C. § 1144(a)). Thus, ERISA preempts all state laws that "relate to" employee benefit plans under ERISA. 29 U.S.C. 1144(a); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 92 (1983). A state law "relates to" an employee benefit plan if it has either (1) a reference to such a plan, or (2) a connection with such a plan. *Shaw*, 463 U.S. at 96-97.

"ERISA preemption applies not only to state laws but to all forms of state action dealing with the subject matters covered by the statute." *Ambulatory Infusion*, 262 S.W.2d at 113 (citing 29 U.S.C. § 1144(c)(1) and *Shaw*, 463 U.S. at 98).

"Accordingly, when a state court suit, alleged in terms of a state common-law or statutory cause of action, relates to an employee welfare benefit plan, ERISA preempts the state law in favor of federal law." *Id.* (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-67 (1987) and *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 545 (Tex.1991)); *accord Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1293 n. 5 (5th Cir. 1989) ("ERISA preempts state law causes of action as they relate to employee benefit plans.").

"The ERISA preemption provision is to be broadly construed." *Ambulatory Infusion*, 262 S.W.2d at 113 (citing *Aetna Health Inc. v. Davila*, 542 U.S. 200, 216-17 (2004)). "Because the scheme is deemed to be comprehensive with regard to the remedies provided and excluded, any state law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the Congressional intent to make the ERISA remedy exclusive and is preempted." *Id.* (citing *Davila*, 542 U.S. at 209).

C. Plaintiffs' Breach Of Contract Claims "Relate To" Tyco's Severance Plan And Are Preempted.

1. Tyco's ERISA Severance Plan Is The Only Agreement That Governs Severance Benefits for Petitioners and Tyco Employees.

Petitioners' state law breach of contract claims "relate to" the terms and conditions created in the Tyco Severance Plan, and as such, are preempted by

ERISA. The individual Plaintiffs with signed RIAs base their contract claim on the following provision of the Agreements that references the Tyco Plan:

> (i) In the event that the Employee is not offered Comparable Employment with Tyco, an amount equal to [$X AMOUNT] (Retention Bonus) plus the standard Severance in accordance to the severance schedule associated with the closure of this facility.. .. OR
>
> (ii) in the event that the Employee is offered Comparable Employment with Tyco, an amount equal to [$X AMOUNT] ... [14]

The Retention Severance Agreement's expressly references Tyco's "standard Severance" and the Tyco Severance Plan is the only severance plan or vehicle that Tyco has.[15] The term "Severance" is capitalized for an obvious reason: it refers to Tyco's Severance Plan. Otherwise, there is no plausible reason for it to be capitalized. "Under general principles of contract construction, [Texas courts] must strive to give meaning to every sentence, clause, and word to avoid rendering any portion inoperative."[16] Accordingly, the RIA's capitalization of the term "Severance" to refer to Tyco's Severance Plan must be given full force and affect.

The reference to "standard Severance" is not the only contextual indication of the connection between the RIAs and the Tyco ERISA Severance Plan. The wording of the RIA clearly distinguishes between the "Retention Bonus," the

[14] Tr. Vol. 3, at Plaintiffs' Exhibits 1-11.

[15] Tr. Vol 2, at 185-186, 198-199.

[16] *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998).

subject of the RIA, and severance payments, which are dealt with by the ERISA Severance Plan. For example, while the RIA gives the Director of Human Resources the power to deny payment of the "Retention Bonus" if the Employee's performance is not deemed acceptable, there is no similar power to deny the severance payment.[17]

Petitioners' principal argument, and the rationale for the Justices who held that the claims were not preempted lay in the timing of the amendment to the schedule of benefits. Because the RIAs were entered into before the formal amendment to the Tyco Severance plan that adopted the West Gulf Bank schedule, Justice Keyes and Petitioners argue that the schedule referred to in the RIA could not "possibly be the severance schedule associated with the closure of this facility."

This conclusion is false. As Justice Massengale points out, Tyco's ERISA Severance Plan was properly amended, and the fact that such amendment was made after the RIAs does not affect its validity as an amendment to the ERISA Severance Plan. The proper reading of the RIAs, is simply that Tyco agreed to provide "standard Severance benefits", whatever those benefits might be. [18]

Moreover, in addition to the RIA's specific usage and capitalization of the

[17] Tr. Vol. 3, at Plaintiffs' Exhibits 1-11.

[18] The timing argument potentially could support a claim that the amendment violated ERISA's anti-cutback provision, see 29 U.S.C. § 1054(g). However, besides being factually unsupportable, such an argument obviously does not defeat, but in fact makes more clear, that the breach of contract causes of action are preempted by ERISA.

term "standard Severance," it is clear that Plaintiffs' breach of contract claims are entirely dependent upon the terms of Tyco Severance Plan and its appended schedule. Simply stated, the RIA does not specify any amount of severance benefits allegedly owed. The calculation of severance benefits that Plaintiffs contend they are owed is derived entirely from the severance formula, definitions, provisions, and schedules contained in the Tyco Severance Plan.[19] Most basically, Plaintiffs' severance damage calculation relies on the Plan's definitions of "Severance Benefit" and "Base Salary" among others, as well as Article IV of the Plan ("Determination of Severance Benefits") and the Plan's appended schedule, all of which together provide the formula and calculation of severance benefits.[20] Without these Tyco Severance Plan provisions, Plaintiffs have no severance benefit calculation for their breach of contract claim.

Texas and federal courts have repeatedly applied the very same reasoning in holding that state law breach of contract claims for failure to pay severance pay were preempted by ERISA. *See Greathouse v. Glidden Co.*, 40 S.W.3d 560, 569 (Tex. App.—Houston [14th Dist.] 2001, no pet.).; *Epps,* 7 F.3d at 45-46; *Cantrell v. Curry*, 407 F.Supp.2d 1280, 1290 (M.D. Ala. 2005) (holding that plaintiff's breach of contract and fraud claims related to an ERISA plan and were preempted because

[19] *See*, Sections 2.02,2.22, and Article IV of the Tyco Plan. Tr. Vol. 3, at Defendant's Exhibit 3.

[20] *See*, Sections 2.02,2.22, and Article IV of the Tyco Plan. Tr. Vol. 3, at Defendant's Exhibit 3.

"the alleged contracts for severance pay would have provided the plaintiffs with benefits equivalent to those found in the Severance Agreement … [and] the calculation of the payment amounts would have been derived directly from the formula provided in [the] severance plan."); *Kirkland v. SSL Americas, Inc.*, 263 F.Supp.2d 1326, 1347 (M.D. Ala. 2003) (holding that plaintiff's state law breach of contract claim for severance "relates to" an ERISA plan and is preempted because the contract did "not define 'severance' within the four corners of the written instrument," and "cannot be understood" without reference to the ERISA plan.); *Abramowicz v. Rohm and Haas Co.*, No. CIV. A. 00-4645, 2001 WL 1346404, *4 (E.D.Pa. Oct. 30, 2001) (holding that "Plaintiff's breach of contract claim … would clearly be preempted by ERISA, because Plaintiff himself has calculated the amount of recovery under this claim by reference to the Severance Benefit Plan … and is therefore 'related to' ERISA."); *Switzer v. Hayes Wheel International, Inc.*, 976 F.Supp. 692, 695-96 (E.D.Mich. 1997) (holding that Plaintiff's breach of contract claims seeking severance and employee benefits were preempted by ERISA because the "determination of [these claims] involves referring to ERISA health and welfare plans" for calculating damages and other issues).

Petitioners and the two Justices who found the claims were not preempted err because they start with the conclusion that the RIAs were stand alone

documents providing for severance. Viewed properly, the RIAs were incentive, not severance agreements, given to employees who were already covered by severance agreements. When viewed from this correct perspective, it is easy to see as Justice Massengale did, the clear connection between the ERISA Severance Plan and the RIA, a connection is so close that there can be no doubt that the breach of contract claim is preempted.

2. Petitioners' Claims "Related To" ERISA Because Petitioners Sought And The Trial Court Awarded Them Severance Pay Damages In Amounts Identical To The Severance Pay That Would Have Been Due Under Tyco's ERISA-Governed Severance Plan, And Petitioners Stipulated That The Amounts Were Calculated In Accordance With the Terms of Tyco's Severance Plan.

   a. The Oral Contract Petitioners Were Awarded Severance Pay In Amounts That They Stipulated Were Owed Under Tyco's Severance Plan. Their Alleged Oral Contracts Were Not Valid Because ERISA Does Not Permit Oral Amendments To ERISA Plans.

The Oral Contract Petitioners alleged (and the trial court found) that Tyco promised them severance pay orally and by posting the Kriendler Memo on a bulleting board "in early 2007." (R. 16, at ¶ 8; R. 584, at ¶ 9). However, as explained above, the undisputed evidence at trial showed that the Tyco Severance Plan was adopted and applied to all Tyco Valves employees (including all of the Petitioners), effective January 1, 2005. (R. 236, 352; Tr. Vol. 3, at Defendant's Exhibit 2, Confidential Tyco 1977-1978; Tr. Vo. 3, at Defendant's Exhibit 27, ¶ 4;

Tr. Vol. 2, at 175-176, 185-186). Thus, each of the alleged Oral Contract Petitioners was subject to the terms of Tyco's ERISA-governed Severance Plan.

The trial court found that the alleged contracts of all of the Petitioners (including the Oral Contract Petitioners) were "not connected to, dependent on, or related to the Tyco Severance Plan," but were instead "independent contracts." (R. 585, at ¶ 15). However, these Petitioners ***stipulated*** to the amounts of damages they would be entitled to "under the Tyco Valves & Controls, L.P.'s severance plan." (R. 131-33; Tr. Vol. 4, at Exhibit 1). Further, the judgment awarded them severance pay amounts that were identical to the amounts they stipulated they were due under the Tyco's Severance Plan. (R. 567-569).

Petitioners' stipulation that the amount of severance pay to which they allegedly were entitled was equal to "the calculated amount of severance under [Tyco's] plan"[21] conclusively shows that Petitioners' breach of contract claims "related to" Tyco's Severance Plan. *See Greathouse,* 40 S.W.3d at 569; *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1294 (5th Cir.1989); *Epps*, 7 F.3d at 45-46; *Cantrell*, 407 F.Supp.2d at 1290; *Kirkland*, 263 F.Supp.2d at 1347; *Abramowicz*, 2001 WL 1346404 at *4; *Switzer*, 976 F.Supp. at 695-96.

Greathouse is directly on point. In *Greathouse*, the plaintiff asserted a breach

[21] (R. 131).

of contract claim against his former employer for severance pay allegedly owed under an oral contract. *Id.* at 562-63. The plaintiff alleged that under a severance pay agreement with Grow Group, Inc., where he had begun his employment, it would have paid him severance pay if he left his employment voluntarily. *Id.* The Glidden Company purchased Grow Group, and the plaintiff alleged that Glidden promised that if he accepted employment with Glidden, he would receive a severance package similar to what he had at Grow Group. *Id.*

The plaintiff later resigned and submitted a claim for severance pay in the amount of $141,000. *Id.* At trial, it was undisputed that the amount of severance pay the plaintiff sought was the same amount as would have been calculated under Glidden's severance pay plan. *Id.* Glidden denied the severance pay claim under its ERISA-governed severance pay plan, which did not provide for severance pay to employees who voluntarily resigned. *Id.*

After a bench trial, the trial court ruled that the plaintiff's breach of contract claim was preempted by ERISA. *Id.* The appeals court affirmed the trial court's ruling, reasoning as follows:

> **The amount Greathouse sought ($141,000) is the same amount that would be calculated for severance pay under Glidden's plan**, a fact amply demonstrated at trial upon Greathouse's questioning of Cahoon. 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 so holding, the court also rejected the plaintiff's argument that his situation was "unique" because he had an oral severance agreement that was separate from Glidden's ERISA plan. The court reasoned that the plaintiff's arguments "necessarily require a finding that Glidden's employee welfare benefit plan was somehow modified or amended with respect to [plaintiff]." *Id.* at 567. The court found that a finding of that sort would be improper because "ERISA precludes all oral modifications and written modifications which do not purport to be formal amendments of a plan." *Id.*

Cefalu is also on point. In *Cefalu*, the plaintiff (Cefalu) sought to recover additional pension benefits from his former employer (B.F. Goodrich) under a purported oral agreement. During his employment, Cefalu had participated in Goodrich's ERISA-governed retirement program. *Cefalu*, 871 F.2d at 1291. Goodrich sold all of its assets in the division that employed Cefalu to Tire Center, Inc. (TCI). *Id.* As a result of the asset sale, Cefalu had three options under Goodrich's retirement program: (1) he could accept employment with TCI and remain in the program;[22] (2) he could retire and receive either a deferred vested

[22] Employees who accepted employment with TCI were entitled to continued benefits under the ERISA plan because TCI was a "Successor Company" under the plan. *Id.*

pension benefit or a lump sum payment; or (3) he could purchase a franchise to operate a Goodrich retail center. *Id.* Cefalu accepted the third option. *Id.* The franchise agreement provided that, as a franchise owner, Cefalu would not be an employee of Goodrich. *Id.* However, Cefalu alleged that Goodrich orally assured him that his retirement benefits as a franchisee would be identical to those of employees who accepted jobs with TCI. *Id.* at 1292.

The federal district court found that Cefalu's claims were preempted by ERISA and granted summary judgment in favor of Goodrich. Cefalu appealed, claiming that "he is merely seeking recovery from Goodrich pursuant to a valid oral contract unrelated to the ERISA plan." *Id.* The Fifth Circuit affirmed the district court's ruling that Cefalu's claim was preempted by ERISA, reasoning as follows:

> Appellant's claim has a definite connection to an employee benefit plan. Plaintiff concedes that if he is successful in this suit his damages would consist of the pension benefits he would have received had he been employed by TCI. To compute these damages, the Court must refer to the pension plan under which appellant was covered when he worked for Goodrich. Thus, the precise damages and benefits which appellant seeks are created by the Goodrich employee benefit plan. To use any other source as a measure of damages would force this Court to speculate on the amount of damages.

Id. at 1294. Further, the Fifth Circuit ruled that ERISA did not permit oral modifications to ERISA plans. *Id.* at 1295-97.

Epps also is on point. In *Epps*, the court held that a plaintiff's breach of

contract claim for retirement benefits premised on a "letter agreement" was preempted by ERISA because the "letter agreement did not specify the amount or other terms of Epp's retirement benefits, and the court would have to refer to the NCNB Retirement Plan to determine Epp's benefits and calculate the damages claimed." *Epps,* 7 F.3d at 45-46. Likewise, the other numerous federal courts that have found breach of contract claims for failure to pay severance pay preempted by ERISA are on point. *See e.g., Cantrell*, 407 F.Supp.2d at 1290; *Kirkland*, 263 F.Supp.2d at 1347; *Abramowicz*, 2001 WL 1346404 at *4; *Switzer*, 976 F.Supp. at 695-96.

Greathouse, Cefalu, Epps, and the other cases cited herein are fatal to the Petitioners' claims. Like the plaintiffs in those cases, the Oral Contract Petitioners in this case sought severance pay in the precise amounts as they stipulated would have been due under Tyco's Severance Plan. Therefore, the Petitioners' claims in this case clearly "related to" Tyco's Severance Plan. Moreover, Petitioners' assertions that they had unique, separate oral contracts fails for the same reason those assertions failed in *Greathouse* and *Cefalu*; namely, "ERISA precludes all oral modifications and written modifications which do not purport to be formal amendments of a plan." *Greathouse*, 40 S.W.3d at 567; *accord Cefalu*, 871 F.2d at 1295-97.

b. The RIA Petitioners Also Were Awarded Severance Pay In Amounts That They Stipulated Were Owed Under Tyco's Severance Plan.

The RIA Petitioners also stipulated to the amounts of damages they would be entitled to "*under the Tyco Valves & Controls, L.P.'s severance plan*." (R. 131-33).

Petitioners' stipulation that the amount of severance pay to which they allegedly were entitled was equal to "the calculated amount of severance under [Tyco's] plan"[23] conclusively shows that these Petitioners' breach of contract claims were "related to" Tyco's Severance Plan. *See Greathouse*, 40 S.W.3d at 569; *Cefalu*, 871 F.2d at 1294; *Epps*, 7 F.3d at 45-46; *Cantrell*, 407 F.Supp.2d at 1290; *Kirkland*, 263 F.Supp.2d at 1347; *Abramowicz*, 2001 WL 1346404 at *4; *Switzer*, 976 F.Supp. at 695-96.

3. Petitioners' Claims Depend On And "Relate To" The Tyco Severance Plan And Are Preempted By ERISA Because The Severance Pay Amounts Petitioners Stipulated They Were Owed Under Tyco's Severance Plan (And Which They Were Awarded By The District Court) Can Only Be Accurately Calculated Under Tyco's Severance Plan; The Stipulated Amounts Are Not Calculable Under Plaintiffs' Exhibit 12.

At trial, the Tyco Severance Plan and its West Gulf Bank schedule were the only exhibits in evidence that contained the precise severance formula that was stipulated by the parties to be the correct calculation for determining the severance

[23] (R. 131).

amounts that Plaintiffs' seek on their breach of contract claims. (R. 238-266; Tr. Vol. 3-4, at Defendant's Exhibits 3-4). The parties stipulated that the correct severance formula for Petitioners' breach of contract claims (1) counts "full years" of service; (2) accounts for breaks in service by subtracting from an Petitioner's years of service any time during which that Petitioner was not in the employment of Tyco Valves; and (3) counts an Petitioner's prior term of employment with Tyco Valves (*i.e.*, before a break in service), unless that Petitioner previously received a severance payment from Tyco Valves for the prior term of employment. (R. 132; Tr. Vol. 4, at Exhibit 1, Page 2). This stipulated severance formula is derived from the Tyco Severance Plan and its West Gulf Bank schedule. (R. 238-266; Tr. Vol. 3-4, at Defendant's Exhibits 3-4). It is not compatible with the only formula submitted by Petitioners at trial (i.e., Plaintiffs' Exhibit 12). (R. 391; Tr. Vol. 3, at Plaintiffs' Exhibit 12).

There are no provisions in either the RIAs or Plaintiffs' Exhibit 12 that states "full year[s]" of service with the Company are to be counted, that provides that breaks in service are not counted, or that provides that prior terms of employment are to be counted unless the employee previously received a severance payment for the prior term of employment. (*See* R. 358-390; Tr. Vol. 3, at Plaintiff's Exhibits 1-11). The RIAs also contain no severance formula whatsoever. *Id.* Moreover,

Plaintiffs' Exhibit 12 expressly provides for counting only "each full year of *continuous* service" and does not provide for counting a prior period of employment depending on whether a previous severance was paid. (R. 391; Tr. Vol. 3, at Plaintiffs' Exhibit 12).

The stipulated severance calculations and amounts for Petitioners Leonard Hill, Fernando Macias, and Raul Martinez (all of whom had breaks in service and one of whom had a prior severance payment for his prior term of employment) together demonstrate the stipulated severance formula (1) is incompatible with Plaintiffs' Exhibit 12, and (2) is dependent upon and relates to the Tyco Severance Plan and its schedule for West Gulf Bank. (R. 132; Tr. Vol. 4, at Exhibit 1, Page 2; R. 238-266; Tr. Vol. 3, at Defendant's Exhibits 3-4). The following summary highlights a few operative facts about these stipulation calculations which reveal they depend on and relate to the Tyco Severance Plan:

Petitioner Leonard Hill:

- The parties stipulated that Appellant Hill had 12 "full years" of service for determining his severance amount (1989-1997 and 2003-2007), which excludes his 6 year break in service, and results in a severance calculation of $34,718.59. This stipulated term of service and severance amount cannot be derived from Petitioner Hill's RIA or Plaintiffs' Exhibit 12, and is only accurately calculated by the severance formula and provisions in the Tyco Severance Plan and its West Gulf Bank schedule. (R. 238-266; Tr. Vol. 3-4, at Defendants' Exhibit 3-4). Applying the formula in Plaintiffs' Exhibit 12 results in a severance amount for Petitioner Hill that is one-third of the stipulated

amount.

Petitioner Fernando Macias:

- The parties stipulated that Petitioner Macias's term of service should not include the time during his break in service that occurred from 1999-2000 and also should not include his prior 10 year term of employment with Tyco Valves because Macias received a severance payment for that prior term. (R. 132; Tr. Vol. 4, at Exhibit 1, Page 2). Only the provisions of the Tyco Severance Plan (not Plaintiffs' Exhibit 12) specifically require that a prior term of employment is not counted towards length of service if the employee previously received a severance for the prior term of employment. (R. 245; Tr. Vol. 3, at Defendants' Exhibit 3, page 4, Section 2.21).

Petitioner Raul Martinez:

- The parties stipulated that Petitioner Martinez had 9 full years of service (including his 5 years of service before a break in employment), instead of the 4 years of "continuous" service since his May 12, 2003 rehire date, resulting in a severance calculation of $8,895.49. (R. 132; Tr. Vol. 4, at Exhibit 1, Page 2). If Plaintiffs' Exhibit 12 applied, Petitioner Martinez' applicable severance amount would have been substantially less than the amount he stipulated he was seeking and which he was awarded (*i.e.*, based on 4 years instead of 9 years and based on the May 12, 2003 start date under the "continuous service" formula contained in Plaintiffs' Exhibit 12). The stipulated severance calculation is not calculable under the RIA or Plaintiffs' Exhibit 12, but is instead only accurately calculated by the severance formula and provisions in the Tyco Severance Plan and its West Gulf Bank schedule (R. 238-266; Tr. Vol. 3-4, at Defendants' Exhibit 3-4).

Stated simply, the ONLY way to apply one severance formula to all Petitioners (including Petitioners with breaks in service) and arrive at their stipulated severance amounts is to apply the formula in the Tyco Severance Plan and its West Gulf Bank schedule. Plaintiffs' Exhibit 12 is not enough.

The Tyco Severance Plan clearly is an employee benefit plan governed by ERISA. Therefore, Plaintiffs' state law claims are preempted by ERISA § 514(a) because they depend on the Tyco Severance Plan and its West Gulf Bank schedule to compute the amount of Plaintiffs' alleged damages. *See Greathouse*, 40 S.W.3d at 569; *Cefalu*, 871 F.2d at 1294; *Epps*, 7 F.3d at 45-46; *Cantrell*, 407 F.Supp.2d at 1290; *Kirkland*, 263 F.Supp.2d at 1347; *Abramowicz*, 2001 WL 1346404 at *4; *Switzer*, 976 F.Supp. at 695-96. For these reasons, the Court lacks jurisdiction to rule on Plaintiffs' state law breach of contract claims.

CONCLUSION

This case was properly decided by the Court of Appeals. Petitioners breach of contract claims are clearly related to an ERISA severance plan, and thus preempted. Even if that is not the case, the oral breach of contract claim fails because as the Court of Appeals properly held there was no evidence of an offer, and the RIA agreements were not breached as Tyco met its contractual obligation by contractually binding Dresser Rand to provide comparable employment to the Gimpel line employees, which it did.

PRAYER

Respondents request that the holding of the Court of Appeals be affirmed, that they be awarded their costs, and for such other and further relief to which they

may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Appellant certifies that this brief contains 8,697 words, is proportionally spaced, and has a typeface of 14 point.

/s/ Michael W. Fox
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Brief has been electronically transmitted to counsel for Petitioners on this 11th day of January, 2013.

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