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

REPLY BRIEF OF PETITIONERS

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I. Tyco's Argument Concerning the Unilateral Contracts Is Based on a Misstatement of the Evidence.

Tyco does not dispute any of the legal points made by the Gimpel Employees. In particular Tyco does not dispute that the 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), are applicable to this case. Likewise, Tyco does not dispute that the Court of Appeals failed to address *Vanegas* and *Williams*.

Instead, Tyco argues that there is no evidence to support the trial court's finding that unilateral contracts were formed. In fact, the trial court's findings are well supported by the evidence. 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.

Remarkably, Tyco now claims that it never told Mr. Kahrig to inform the other employees of the severance schedule. Brief of Respondents at 15-16. Tyco

did not make this argument in the trial court, in the Court of Appeals, or even in its response to the Petition for Review. This is an entirely new argument that has been concocted for the first time in Tyco's latest brief.

In any event, the argument is wholly without merit. Tyco claims that "Kahrig admitted he was told ***not*** to share information about the potential of severance pay with other employees." Brief of Respondents at 16. This is false. In the testimony quoted by Tyco, Mr. Kahrig states that he was told not to discuss his own personal Retention Incentive Agreement with other employees. The six Gimpel Employees who are asserting unilateral contract claims did not receive Retention Incentive Agreements. Mr. Kahrig never claimed that he discussed his own personal contract with other employees who did not receive such contracts.

Mr. Kahrig absolutely did testify that Ms. Warman enlisted him to communicate with the other employees in the shop. Tr. 145-46. Mr. Kahrig absolutely did testify that the severance schedule was posted on the bulletin board at the Gimpel Unit. Tr. 146. Mr. Kahrig absolutely did testify that he discussed the severance schedule with the other employees in the unit. Tr. 146-47. The other employees knew about the severance schedule and were relying on it:

> Q. Okay. Did you talk to other employees in the unit about the severance package?
>
> A. Yes.
>
> . . . .

Q. All right. And they were aware of what they were supposed to be getting under this schedule?

A. Yes.

Q. Were they relying on that?

A. Right.

Tr. at 146-47.

In fact, Holly Kreindler of Tyco admitted that all of the employees had been told about the severance arrangement. In an e-mail dated January 26, 2007, Ms. Kreinder stated:

> The employees only signed retention if they were offered it. **We communicated verbally regarding the severance at town hall meetings and one on one conversations.** We have to give a 60 day notice so as the 60 day notice period arrives we then give the waiver agreements to the employees to review and sign. By law, they have 45 days to sign. **Therefore not all employees have it in writing but they all know it.**

PX 15 (emphasis added).[1] Accordingly, there are no grounds for disputing that all of the employees knew about the severance arrangement, and in fact that they were told about the severance arrangement by Tyco.

[1] The 60-day notice discussed by Ms. Kreindler is required by the Worker Adjustment and Retraining Notification Act, a federal statute that applies to plant closings. 29 U.S.C. § 2102. The 45-day review period mentioned by Ms. Kreindler is required by the Older Workers Benefit Protection Act, a federal statute that applies to waivers and releases by employees who are covered by the age discrimination statutes. 29 U.S.C. § 626(f)(1)(F)(ii).

Tyco argues that "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 [severance schedule]." Brief of Respondents at 17. In fact, the evidence shows that (1) Ms. Kreindler put the terms of the severance arrangement into the severance schedule (PX 12); (2) Tyco posted the severance schedule on the bulletin board at the Gimpel Unit; (3) Mr. Kahrig discussed the severance schedule with the employees who did not have Retention Incentive Agreements; (4) Tyco discussed the severance arrangement with the employees in town hall meetings and in one on one conversations; and (5) the employees were relying on the severance schedule.

Tyco notes that several of the employees did not testify at trial. There was no need for such testimony. In a unilateral contract case, the offeree accepts through performance, not through words. The evidence shows that the six employees were aware of the severance schedule, and it is undisputed that they performed the terms of the deal by remaining employed at Tyco. That is all of the evidence that is required.

The six employees had binding unilateral contracts under *Vanegas* and *Williams*. The Court should reverse the judgment of the Court of Appeals and affirm the judgment of the trial court.

II. The Severance Schedule Was Not a "Reference Sheet."

Tyco makes one additional argument relating to the severance schedule, but that argument is not contained in the Argument section of its brief. Instead, the argument is contained in its Statement of Facts. Tyco claims that PX 12 was not a severance schedule, but instead was "a one-page reference sheet for [Ms. Kreindler's] 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." Brief of Respondents at 4. Tyco claims that Ms. Kreindler circulated the document to only two people and that "she made it clear that the document was not for distribution, but was her own personal working document." Brief of Respondents at 4-5.

Tyco does not mention that the district court rejected this argument, finding that Ms. Kreindler's story was not credible. R. 586. In fact, the Gimpel Employees briefed this issue in connection with the ERISA defense. Brief of Petitioner at 41-42. Tyco does not respond to, or even acknowledge, that briefing.

The absurdity of Tyco's argument can be seen from the face of the document. For the Court's convenience, a copy of PX12 is attached as Appendix 1. This is not a "worksheet." It begins with this preamble: "Effective August 1, 2006, Tyco Valves and Controls West Gulf Bank location will follow the following Severance schedule." It then sets forth all of the terms of the severance

arrangement. This is the document that was posted on the bulletin board at the Gimpel Unit. There is nothing on PX 12 which suggests that it was anything other than a "Severance schedule," which is exactly what the document says it is.

Furthermore, Ms. Kreindler's own contemporaneous statements to other Tyco officials show that her story is a complete fiction. For the Court's convenience, a copy of PX 14 is attached as Appendix 2. This is an e-mail from Ms. Kreindler dated January 25, 2007:

> **Attached is the policy I used for severance during our restructuring (not separation related).** I need you to sign off on this and send it back to John.
>
> A little background information in case you don't remember…. **When we were planning for the restructuring at WGB I worked with you and Rober Chiaravalloti to develop the severance plan.** The final plan was to offer 2 weeks per year of continuous service for salaried and 1 week per year for hourly with a minimum of 6 and a maximum of 26 weeks. . . .
>
> We have used this for Miami, Bridgeport and West Gulf Bank. . . . **At West Gulf Bank we have communicated the policy** and approximately 20 people have been let go and are beginning to receive the benefit.

PX 14 (emphasis added).

While Tyco clings to the story told by its witness, the story is not credible and is contradicted by the contemporaneous evidence. The district court correctly rejected Ms. Kreindler's story.

III. Dresser-Rand Was Not a "Successor" to Tyco Under Texas Law.

Tyco virtually concedes this issue. Tyco makes no attempt to defend Justice Keye's ruling that Dresser-Rand was a successor to Tyco under corporate law. Tyco makes no attempt to rebut Justice Sharp's dissent. In fact, Tyco does not even respond to any of the arguments set forth by the Gimpel Employees. Tyco appears to recognize that Justice Keyes' position is untenable.

Instead, Tyco claims that Dresser-Rand is a successor because it was contractually bound to offer employment to the Gimpel Employees. Tyco states that Dresser-Rand completely fulfilled its contractual obligations **to Tyco**. Brief of Respondents at 18-19. Tyco claims that the Gimpel employees "disregard the plain meaning of severance pay." Brief of Respondents at 19-20.

For starters, it must be remembered that the parties actually intended that the Gimpel Employees would receive severances even if they were hired by the purchaser of the Gimpel Unit. The Gimpel Employees testified that they were told this repeatedly by Paddy Warman, the Tyco Human Resources employee who was responsible for the Gimpel Unit. After the situation became explosive in March 2007, a senior executive at Tyco asked Ms. Kreindler whether there had been a miscommunication with the employees in January 2007. In an e-mail (attached as Appendix 3 for the Court's convenience), Ms. Kreindler admitted (1) that Ms. Warman believed that the employees would receive a severance even if the unit

was sold, and (2) that Tyco always included the Gimpel Employees in the severance arrangement even though Tyco expected that the buyer of the Gimpel Unit would hire them:

> There was confusion on what paddy had communicated. However, this scenario had not been discussed up front. **It was a natural assumption to her that they 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.

This is significant because it is Tyco, not the Gimpel Employees, that is trying to defeat the intention of the contracts. Tyco refers to "the plain meaning of severance pay," but what matters is the plain meaning of the contract and the intent of the parties. The Gimpel Employees were supposed to receive severance pay regardless of whether they were hired by the purchaser of the unit. This is what the parties contemplated.

Tyco claims that it "required" Dresser-Rand to hire the Gimpel Employees, but this is just an attempt at spin doctoring. The Gimpel Unit requires skilled, specialized workers. It would have been difficult to sell the unit without the employees. Tr. 78-79. In fact, Tyco was eager to discourage any of the employees from leaving before the sale was complete. Tr. 145-46.

In any event, the Gimpel Employees anticipated this argument in their opening brief and presented three counter-arguments:

(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.

Brief of Petitioners at 26. Tyco does not respond to, or even acknowledge, any of those arguments. Once again, Tyco virtually concedes the issue.

Justice Keyes erred in finding that Dresser-Rand was a successor to Tyco. In fact, Tyco continued to exist as an independent company until its parent company was acquired by a Swiss company (Pentair) in 2012. Pentair may be a

successor to Tyco, but Dresser-Rand is not. The Court should reverse the judgment of the Court of Appeals and affirm the judgment of the trial court.

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

Even though Tyco lost on the ERISA preemption issue in the Court of Appeals by a 2-1 vote, Tyco relies almost exclusively on that defense in this Court. Tyco wishes the Court to believe that ERISA preemption is complex. In fact, the ERISA preemption issue in this case is easy. Every court to consider the issue has held that ERISA does not preempt independent severance agreements.

In this connection, the Gimpel Employees wish to emphasize two critical points:

(1) The standard for preemption is dependent on the source of the legal duty to pay severance. If the legal duty to pay severance arises from the Plan, then of course the contract claims are preempted. But if the legal duty to pay severance arises from independent contracts (as is the case here), preemption is inapplicable. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 210 (2004) (holding that ERISA preemption applies "where the individual is entitled to such coverage only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty (state or federal) independent of ERISA or

the plan terms is violated" (emphasis added)); *Lone Star OB/GYN Associates v. Aetna Health Inc.*, 579 F.3d 525, 530-31 (5th Cir. 2009).

(2) In every case involving an independent severance contract that was not dependent on a separate ERISA plan, the courts have rejected preemption. Brief of Petitioners at 30-34 (discussing the cases).

The controlling question is thus whether the Gimpel Employees' contracts were independent of the Plan. The district court entered a finding of fact in favor of the Gimpel Employees on this issue, and it was well supported by the evidence.

As usual, Tyco does not respond to, or even acknowledge, any of the Gimpel Employees' arguments. The Gimpel Employees will simply address Tyco's arguments in order.

A. The Gimpel Employees Had No Knowledge of the Plan.

The first argument is not contained in the Argument section, but rather in the Statement of Facts. Tyco makes the following claim:

> 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).

Brief of Respondents at 4. In fact, both of those witnesses testified exactly the opposite. Mr. Heinrich testified:

> Q. . . . [F]irst of all, had you ever heard of anything called the Tyco severance plan?
>
> A. No, sir.
>
> Q. Have you ever heard [of] an ERISA plan that governed your right to severance?
>
> A. No, sir.

Tr. 107. Mr. Hill testified:

> Q. Had you ever heard of something called the Tyco severance plan?
>
> A. No. Huh-uh. No, nothing like that.
>
> Q. Have you ever heard of a – or at least until recently in this lawsuit, had you ever heard of an ERISA plan that provided severance benefits?
>
> A. No, I didn't know what that was. I had to look that up in Wikipedia about four weeks ago just to figure out what that was what they're talking about.

Tr. 66-67.

So what testimony is Tyco citing in support of its argument? Mr. Heinrich testified that he understood that Tyco had "a general severance policy." Tr. 116. The cited page of Mr. Hill's testimony (Tr. 97) does not even discuss the matter.

While this issue is not dispositive, and in fact not even particularly important, these facts do show that Tyco is being less than candid concerning the facts of the case.

B. At the Time of the Formation of the Contracts, the Plan Offered Benefits That Were Significantly Different From the Contracts.

Tyco's first formal argument is that the Court must view the preemption argument from the perspective of the entire West Gulf Bank facility and not just the Gimpel Unit. It is not clear how this argument relates to ERISA, but the gist of the argument seems to be the following:

> 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.

Brief of Respondents at 21.

While it is literally true that all of the West Gulf Bank employees were theoretically covered by the Plan, as of the time of the contracts the Plan offered significantly different benefits from the contracts. First, the 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 Plan did not provide for severance for employees who obtained employment with a purchaser.

After Tyco had entered into its separate 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.

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.

In light of these facts, not only is there evidence that the contracts were intended to be separate from the Plan, but in fact the evidence is incontrovertible. The Plan simply did not provide the sorts of benefits that are provided by the contracts. In fact, Ms. Kreindler's e-mail (PX 14) and her severance schedule (PX12) shows that Tyco knowingly created a separate severance system for the

West Gulf Bank facility almost six months before the Plan was amended to provide similar benefits. If the Plan had covered the Gimpel Employees, there would have been no need for separate contracts (except with respect to the Retention Bonuses).

In sum, Tyco's argument is once again unsupported by the evidence.

C. The Capitalization of the Word "Severance" Is Not a Reference to the Plan, Especially Given That the Plan Does Not Use the Term "Severance."

After several pages of generalities about how ERISA is "broad," Tyco's next substantive argument is that the Retention Incentive Agreements must be referring to the Plan because the word "Severance" is capitalized:

> 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. 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.

Brief of Respondents at 24. While Tyco did make this argument in the trial court, Tyco did not raise this issue in the Court of Appeals.

If the Court chooses to consider this argument, then the answer to the argument is supplied by Finding of Fact 20 from the trial court:

> Tyco Valves also notes that the word "Severance" is capitalized in the Retention Incentive Agreements. Tyco Valves argues that the capitalization of "Severance" shows that the agreements are referring to the Tyco Severance Plan. However, the plan does not use the term "Severance," but instead uses the term "Severance Benefits." The word "Severance" is not a reference to the Plan.

R. 587. Tyco does not address, or even acknowledge, that finding of fact.

Given that the Plan uses the term "Severance Benefits," there is no logical reason why the term "Severance" should be construed as a reference to the Plan. It should also be noted that, in the first paragraph of PX 12, Ms. Kreindler capitalized the word "Severance." Apparently, Ms. Kreindler makes a habit of capitalizing this word. In any event, Tyco's argument is both waived and without merit.[2]

D. Tyco Did Not Promise to Provide Indefinite Benefits.

Next, Tyco argues that "The proper reading of the RIAs, is simply that Tyco agreed to provide 'standard Severance benefits,' whatever those benefits might be [under the Plan]." Brief of Respondents at 25. Tyco thus asks the Court to adopt an unnatural construction of the agreements simply because that construction would cause the agreements to be preempted by ERISA.

Aside from the sketchy logic of the argument, the argument is contrary to all of the evidence and to the trial court's findings of fact. The Gimpel Employees testified that they already knew what their severance benefits were going to be. Ms. Kreindler's January 25, 2007 e-mail (PX 14) shows that she developed the severance schedule (PX 12) the preceding summer and made it effective as of August 1, 2006. Ms. Kreindler's January 26, 2007 e-mail (PX 15) shows that the

[2] Tyco also claims that "The wording of the RIA clearly distinguishes between the 'Retention Bonus,' the subject of the RIA, and severance payments, which are dealt with by the ERISA Severance Plan." Brief of Respondents at 24-25. In fact, the Retention Incentive Agreements make no reference to the Plan. Instead, they refer to "the severance schedule associated with the closure of the facility." *E.g.*, PX 1 at 2. That schedule is PX 12, not the Plan.

terms were conveyed to all of the employees at town hall meetings or one-on-one conversations. Mr. Kahrig's testimony shows that the terms were posted on the bulletin board at the Gimpel Unit. Neither Tyco nor the Gimpel Employees contemplated that the severance payments would be based on some formula to be determined in the future.

Again, Tyco's argument is contrary to the evidence and would defeat the intent of the parties.

E. Tyco's Cases Are Not on Point.

Next, Tyco provides a string cite of cases that are not on point. All of those cases involve situations in which an employee had some sort of severance agreement or employment contract that either adopted the company's ERISA plan by reference or that required the use of the ERISA plan in some way. In those cases, regardless of the legal theory asserted by the plaintiff, the legal duty to pay the benefits flowed from the ERISA plan.

The first case cited by Tyco is *Greathouse v. Glidden Co.*, 40 S.W.3d 560 (Tex. App. – Houston [14th Dist.] 2001, no pet.). This case is discussed and distinguished in Brief of Petitioners at 36-37. As usual, Tyco does not address or acknowledge that discussion.

Tyco also cites *Epps v. NCNB Texas*, 7 F.3d 44 (5th Cir. 1993). In that case, the plaintiff made a claim for loss of pension and retirement benefits arising from

the breach of his employment agreement. However, those pension and retirement benefits arose under an ERISA plan, not under the employment agreement. The ERISA plan was the source of the legal duty to pay benefits. Accordingly, the Fifth Circuit correctly found preemption:

> As the district court correctly concluded, this claim is preempted because the letter agreement does not specify the amount or other terms of Epps's retirement benefits, and the court would have to refer to the NCNB Retirement Plan to determine Epps's retirement benefits and calculate the damages claimed.

Id. at 45. By contrast, the present case does not involve a claim for benefits under an ERISA plan.

Similarly, Tyco relies heavily on *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989). In that case, the plaintiff sued his employer for breach of an oral employment agreement. However, the damages sought by the plaintiff were pension benefits under an ERISA plan. The Fifth Circuit correctly found preemption:

> 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 the Court to speculate on the amount of damages.

Id. at 1294. Once again, the present case does not involve a claim for benefits under an ERISA plan, nor is it necessary to refer to the Plan to calculate damages.

Tyco cites several additional cases along these lines, all of which are essentially the same as *Greathouse*, *Epps*, and *Cefalu*. Those cases are simply not on point. Significantly, however, Tyco does not address, or even acknowledge, the cases that have held that ERISA does not apply to an independent severance agreement. It is those cases that are controlling.

F. The Gimpel Employees Did Not Stipulate That Their Claims Were Governed by the Plan.

Next, Tyco argues that the Gimpel Employees stipulated that their claims were calculated under the Tyco Severance Plan. Brief of Respondents at 28-34. With all due respect, this argument is absurd. The stipulation (R. 131-33) relates to the calculation of damages and to other specific facts relating to the Gimpel Employees, such as dates of employment and the like. The Gimpel Employees never stipulated that the calculation of damages was being made under the ERISA Plan. In fact, Tyco never made this argument in the trial court.

The sequence of events before, during, and after the trial refutes Tyco's new-found claim that the stipulation had some larger significance. Shortly before trial, Tyco moved for summary judgment on the basis of ERISA preemption. In response, the Gimpel Employees made the same arguments as in this Brief. Specifically, they argued that "these contracts make no reference to the Tyco Severance Plan and are enforceable without reference to that Plan," and that "[t]he

severance schedule can be proven without any reference to the plan." R. 91, 102. The trial court denied the motion for summary judgment. R. 119.

Several days later, the parties filed the stipulation. R. 131-33. While the preamble of the stipulation has a passing reference to Tyco's "severance plan," there is no stipulation that the Gimpel Employees' claims arise under an ERISA plan. The actual body of the stipulation lists the damage amounts simply as "Severance Calculation," which is what those numbers represented. The other stipulated facts relate to hire dates, years of service, and the like.

At the beginning of the trial, the parties offered the stipulation, which contains stipulated facts for each of the 17 plaintiffs. The colloquy between the trial court and counsel for Tyco made the purpose of the stipulation clear:

> THE COURT: I took a look at that stipulation yesterday and correct me if I'm wrong about the stipulation as to the various amounts claimed by the various parties in the case.
>
> MR. FOX: And it has a couple of other factual details in there that we'll make sure in case we forget it about 1 of the 17 we'll have the factual basis.

Tr. 9. Tyco did not argue that the stipulation had any greater significance.

During opening argument, counsel for the Gimpel Employees made it clear that the breach of contract claims had nothing to do with the Tyco Severance Plan:

> Nothing here relates to anything that's in the plan. You could enforce every bit of it, oral breach of contract claim without any reference to the plan or any of the plans terms.

Tr. 33. Tyco did not object on the ground that this argument was contrary to the stipulation. Instead, counsel for Tyco acknowledged that there was a contested issue as to whether the severance payments were tied to the Plan. Tr. 45-46. Counsel did not argue that the stipulation settled the issue.

During trial, both parties presented evidence with respect to whether the breach of contract claims arose under the ERISA plan. Again, Tyco did not argue that the Gimpel Employees had stipulated to that fact. Nor did Tyco make such an argument in its closing argument.

Tyco then filed a lengthy post-trial brief. R. 483. Tyco did not argue that the Gimpel Employees had stipulated that their damages were calculated under the Plan. Instead, Tyco argued that the damages could only be calculated under the Plan because the severance schedule did not contain a definition of "years of service."[3] R. 498.

In sum, the record refutes Tyco's interpretation of the stipulation. Furthermore, Tyco waived this argument by failing to raise it in the trial court. If Tyco had raised the argument, the Gimpel Employees would have moved to modify the stipulation to clarify the parties' intention. The trial court entered findings of fact contrary to Tyco's new-found interpretation of the stipulation, and

[3] This argument is discussed in the next section of this Reply Brief.

Tyco never made any objection based on the stipulation. The stipulation was never intended to address the ERISA issues in the case, and Tyco knows that.

G. The Plan Is Not Needed to Determine Years of Service.

Finally, Tyco argues that "years of service" can only be determined with reference to the Plan because there are three employees who had breaks in service. Brief of Respondents at 34-38. The Gimpel Employees addressed this argument in Brief of Petitioners at 37-39. As usual, Tyco does not address, or even acknowledge, that briefing.

The key points in response to this argument are the following:

(1) Even if it was necessary to refer to the Plan to resolve the years of service issue, this would not give rise to ERISA preemption because Tyco's legal obligation to pay severance does not arise under the Plan. Instead, the obligation to pay under the agreements is an independent legal duty. *Lone Star OB/GYN Associates*, 579 F.3d at 530-31 ("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."); *see Davila*, 542 U.S. at 210.

(2) It is undisputed that Ms. Kreindler did not use the Plan to resolve the years of service issue. Brief of Petitioners at 38.

(3) The trial court entered a finding of fact that the Plan is not needed to resolve a years of service issue, and the testimony of Ms. Kreindler supports that finding. Brief of Petitioners at 38.

In sum, the ERISA preemption issue in this case is actually quite simple. All of Tyco's arguments are without merit and, in fact, are foreclosed by the case law.

CONCLUSION AND PRAYER

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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CERTIFICATE OF COMPLIANCE

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 5,454 words as shown by my word processing software.

/s/ David C. Holmes
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