PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOSEPH ZINO JR., *et al.*,	)	
	)	CASE NO. 5:11CV1676
Plaintiffs,	)	
	)	
	)	JUDGE BENITA Y. PEARSON
v.	)	
	)	
	)	
WHIRLPOOL CORPORATION, *et al.*,	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
	)	
Defendants.	)	[Resolving ECF No. 429]

Plaintiffs Joseph Zino, Ruth Wade, Donald Hiner, Roger Knop, and George Watts represent a class of retirees, spouses and surviving spouses (collectively "Retirees" or "Plaintiffs") who have filed suit against Defendants Whirlpool Corporation and the Whirlpool Corporation Group Benefit Plan for Retirees.

Following the first phase of the trial, held in November 2013, and again upon reconsideration after the Supreme Court's decision in *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 826 (2015), the Court concluded that the retiree medical benefits at issue are vested for the lifetime of all subclass members except for Groups 5 and 6 of Subclass D, and until age 65 for Groups 3 and 4 of Subclass D.

The Court presided over a three-day bench trial for the second phase of this class action on February 22, 2016, February 24, 2016 and February 25, 2016. This phase concerned the

principles addressed *Reese v. CNH America, LLC*, 574 F.3d 315 (6th Cir. 2009) ("*Reese I*") and *Reese v. CNH Am. LLC*, 694 F.3d 681 (6th Cir. 2012) ("*Reese II*").

The Court has considered the testimony of the witnesses, exhibits admitted into evidence, arguments of counsel, including the Post-trial briefs and Amended Post-trial briefs (ECF Nos. 435, 438, 439, 483, 486), as well as the entire record in this matter.[1] Duly informed, the Court, herein, enters its findings of fact and conclusions of law in support of the Judgment Entry.

FINDINGS OF FACT

I. Procedural History and the Court's Trial Ruling from First Phase of Trial

1. As recited in the Court's Amended Memorandum of Opinion and Order entered September 19, 2014 (ECF No. 310) ("Trial Ruling"), beginning November 4, 2013, the Court presided over a five-day bench trial concerning the retiree medical benefits of four certified subclasses. ECF No. 310 at PageID #: 10176. The first phase of trial addressed the vesting of benefits for more than two thousand hourly workers, and their spouses, who retired from the Hoover Company and its successor entities, Maytag Corporation and Whirlpool. *Id.*

2. The retiree subclass members retired between 1980 and 2007. *Id.* During their years of employment, Retirees built Hoover-brand floor care products at manufacturing plants in the Canton, Ohio area, and were unionized and represented by the International Brotherhood of Electrical Workers Local No. 1985 ("Union" or "IBEW"). *Id.*

3. In their Third Amended Complaint, Retirees assert that the collective bargaining

[1] This includes submissions of supplemental legal authority through June 27, 2017.

agreements ("CBAs") negotiated between the Company and the Union over the years entitle them to specified retiree health benefits that are not subject to unilateral reduction or termination during retirement. ECF No. 146 at PageID #: 4645. Retirees allege that Whirlpool's actual reduction of their prescription drug benefit in 2011 and the announced reduction of their healthcare benefits, originally set to occur January 1, 2013, violates the CBAs and welfare benefit plans. *Id.* at PageID #: 4631.

4. Retirees proceed under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), and Section 502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B).

5. The Court granted Plaintiffs' unopposed Motion for Class Certification on December 12, 2011. ECF No. 24.

6. Thereafter, on January 8, 2013, in accordance with a compromise reached by the parties (ECF No. 136), the Court ordered the creation of four subclasses. Each subclass shares the same core characteristic and are comprised of former employees of Hoover, Maytag, or Whirlpool who were represented by the Union in collective bargaining and who, after retirement, received health care benefits, as well as their spouses and surviving spouses. ECF No. 145 at PageID #: 4628–49. The subclasses are distinguished by the following time periods under which the former employees retired: After April 18, 1980, but before April 19, 1983 (Subclass A); after April 18, 1983, but before January 1, 1993 (Subclass B); after December 31, 1992, but before December 8, 2003 (Subclass C); and after December 7, 2003, but before January 31, 2007 (Subclass D). *Id.*

7. In a ruling on the parties' cross-motions for summary judgment issued August 27, 2013 ("Summary Judgment Ruling") (ECF No. 191), the Court entered summary judgment in favor of Whirlpool as to Subclass B and denied the cross-motions as to all other Subclasses. The Court did not resolve the *Reese* issues in its Summary Judgment Ruling.

8. On September 16, 2013, Retirees filed a motion to bifurcate trial of the vesting issue from trial of the issues implicated by *Reese*. *See* ECF No. 194. On October 7, 2013, the Court granted Retirees' motion to bifurcate. ECF No. 207.

9. Beginning November 4, 2013, the Court presided over the first phase of trial and decided the following question: "Have Retirees proven by a preponderance of the evidence that the governing CBAs entitle them to receive retiree health benefits for life?" ECF No. 310 at PageID #: 10177 (citing ECF No. 226 at PageID #: 7726). With respect to the *Reese* issues, the Court explained:

> The Court ruled that it would first decide this threshold question (whether the retiree health benefits are "vested" for life) before turning to the remaining issues, if necessary: whether Whirlpool may unilaterally reduce the retiree health benefits if indeed they are vested for life, and, if so, whether the scope and magnitude of Whirlpool's actual and planned reductions are contractually permitted under the CBAs.

Id. Retirees shouldered the burden of proof with respect to all three issues. ECF No. 226 at PageID #: 7727.

10. At the first phase of trial, Retirees' witnesses included Thomas Cook, President of IBEW Local 1985 from 1978 until April 1, 1981, and thereafter an IBEW International representative (ECF No. 251 at PageID #: 8117–220); James Gensley, Chief Steward of Local 1985 from 1978 to 1981, and then President of Local 1985 from 1981 through

1990 (ECF No. 251 at PageID #: 8221–88; ECF No. 252 at PageID #: 8300–79); and James Repace, Local 1985 Chief Steward from 1983 through 1990, and then President from 1993 to 2008 (ECF No. 252 at PageID #: 8380–530; ECF No. 253 at PageID #: 8548–619).

11. Whirlpool called two witnesses who worked for the Company in non-Union positions during the first phase of trial. Whirlpool's first Company witness, Timothy Schiltz, was employed by Hoover from February 26, 1979 until its acquisition by Maytag on August 2, 2004, working as the Pensions and Benefits Administrator until 1982, as Manager of Pensions and Employee Benefits until 1989, and then as Director of Human Resources. ECF No. 255 at PageID #: 8828–937; ECF No. 259 at PageID #: 8952–9040. Upon Maytag's acquisition of Hoover on August 2, 2004, Mr. Schiltz became Maytag's Corporate Vice President of Human Resources. ECF No. 255 at PageID #: 8835. When Maytag and Whirlpool merged in 2006, Mr. Schiltz became Whirlpool's Director of Global Benefits, and he retired on December 31, 2008. *Id.* at 8831–32, 8835. During discovery, Mr. Schiltz also testified for Whirlpool as its Federal Rule of Civil Procedure 30(b)(6) witness with respect to negotiations of collectively bargained agreements regarding Retirees' retiree health benefits. *See* ECF No. 205 at PageID #: 6545, 6547 (Deposition Testimony of Edward Mohr adopting Mr. Schiltz's testimony as the company's official version of the facts).

12. Whirlpool's second Company witness, Edward Mohr, served as Whirlpool's Vice President for Total Rewards and Human Resources Operations at the time of trial. ECF No. 259 at PageID #: 9041–95. Mr. Mohr is responsible for developing and implementing Whirlpool's compensation and benefit programs. *Id.* at PageID #: 9044.

13. Following the first phase of trial, the Court concluded in its September 19, 2014 Trial Ruling (ECF No. 310) that retiree medical benefits are vested for all members of Subclasses A and C, and, at varying levels, for members of Groups 1, 2, 3 and 4 of Subclass D. The Court also granted Retirees' Motion for Reconsideration and/or Relief from Entry of Summary Judgment (ECF No. 261), finding that retiree medical benefits are vested for all members of Subclass B as well. ECF No. 310 at PageID #: 10184, n.7.

14. On September 30, 2014, the Court issued a Civil Trial Order, scheduling the second phase of trial for December 15, 2014. ECF No. 311 at PageID #: 10215.

15. By Order entered October 21, 2014, the Court adopted the parties' recommendation to hear and resolve both the first *Reese* issue (whether the benefits are vested at unchangeable levels) (hereinafter "Issue 1"), and the second *Reese* issue (whether the planned modifications are unreasonable) (hereinafter "Issue 2") at the then-upcoming bench trial. ECF No. 313.

16. By Order entered November 25, 2014 (ECF No. 321), the Court granted the parties' joint request to extend the trial date, continuing the *Reese* trial to April 13, 2015. The Court also ordered that the first trial was adjourned *sine die*, and that the parties could use the admitted exhibits and testimony from that trial in connection with the second trial. ECF No. 321 at PageID #: 10251. The Court later elaborated on this point as follows: "Exhibits, deposition designations, and trial testimony from the first trial need not be resubmitted but will be considered in evidence for purposes of the upcoming trial." ECF No. 375 at PageID #: 10873 (January 15, 2016 Order Granting Joint Motion for Pre-Trial Schedule).

17. On January 26, 2015, the Supreme Court issued its decision in *M&G Polymers USA, LLC v Tackett*, 135 S.Ct. 926 (2015), abrogating *UAW v. Yard-Man*, 716 F.2d 1476 (6th Cir. 1983), and holding that courts must apply ordinary contract principles in determining whether collectively bargained contracts create vested retiree healthcare benefits.

18. On February 16, 2015, Whirlpool filed a second Motion to continue the second phase of trial, asking the Court to postpone the trial until after the Court issued a decision on Whirlpool's to-be-filed Motion to Reconsider. ECF No. 327. The Court granted the Motion on March 3, 2015. ECF No. 333.

19. On March 3, 2015, Whirlpool filed its Motion to Reconsider, asking the Court to reverse its finding of liability as to all four subclasses on the basis of *Tackett*. ECF No. 332. Plaintiffs opposed this Motion. ECF No. 339.

20. On October 30, 2015, the Court denied Whirlpool's Motion to Reconsider as to Subclasses A, C and D, but granted reconsideration as to Subclass B. ECF No. 360. In addressing the governing standards under *Tackett*, the Court rejected Whirlpool's argument that intent to vest benefits must be stated in clear and express language. *Id.* at PageID #: 10742–43 ("Despite Defendants' proffers of case law from other jurisdictions issued before and after the *Tackett* decision in which courts have employed the 'clear and express' standard, the Supreme Court simply did not adopt this standard for CBAs." (citing, *inter alia*, *Tackett*, 135 S. Ct. at 938 (Ginsburg, J., concurring)).

21. Retirees moved to reconsider the Court's October 30, 2015 ruling as to Subclass B. ECF No. 362.

22. The Court granted Retirees' Motion to Reconsider on December 31, 2015, holding that benefits for Subclass B, like benefits for other subclass members, are vested. ECF No. 373. The Court scheduled the case for consolidated bench trial to commence on February 22, 2016. *Id.* at PageID #: 10865.

23. Before trial, the parties entered certain evidence into the trial record through joint stipulations. ECF Nos. 416, 421.

24. The second phase of trial was held February 22, February 24, and February 25, 2016. Plaintiffs submitted no live witnesses at trial. Plaintiffs rested their case after successfully moving into evidence new exhibits (Plaintiffs' Exhibits 42–52 and 54–57; Joint Exhibits 120–125), deposition designations (ECF Nos. 397, 397-3), and deposition counter-designations (ECF Nos. 413 to 413-6).

25. Whirlpool moved to reconsider the Court's admission of Plaintiffs' Exhibit 42 (ECF No. 424), which the Court denied. ECF No. 433.

26. After Plaintiffs rested their case, Whirlpool proffered testimony from two witnesses, David Osterndorf and Mr. Mohr.

27. Mr. Osterndorf is an actuary and healthcare strategy consultant who provides consulting services to Whirlpool regarding its use of health exchanges. Mr. Osterndorf has performed worked for Whirlpool since 2001, previously at the consulting firm Towers Watson. ECF No. 426 at PageID #: 12640, 12642.

28. Whirlpool successfully moved into evidence Defendants' Exhibit 94, 95, 101,

102, 104, 105, 107, 108, 110, 111, 112, 113, 114, 116, 118, 120, 121, 126, 127, 128, 129, 131, 132, 133, 135, 139, 140, 142, 143, 144, 146, 147, 148, 149, 150, 151, 162, 166, 167, 168 (deposition testimony from James Cook, Hoover and Maytag's Labor Relations Manager from the mid-seventies until his retirement in 2003), 169 (deposition testimony for Thomas Cook), 170 (deposition testimony excerpts for James Gensley), 171 (deposition testimony for Kirk Goodwin, formerly counsel at Maytag and now Senior Counsel at Whirlpool), 172 (deposition testimony for Chris Koehler, former Chief Steward of the Union and former member of the joint Cost Containment Committee), 173 (deposition testimony for Harry Paul, Union Insurance Representative between 1990 and 1993, and member of the Union's Executive Committee), 174 (deposition testimony for Mary Jane Phillips, former Union President, Cost Containment Committee member, and Insurance Representative for Local 1985), 175 (deposition testimony for Frank Provo, former Industrial Relations Manager for Hoover and lead negotiator during several negotiations), 176 (deposition testimony for James Repace), 177 (deposition testimony for Tim Schiltz), 179 (deposition testimony for Joseph Zino, Subclass C Representative), 180, 181, and 182. ECF No. 428 at PageID #: 13091–92. Joint Exhibit 126, a compilation of expert reports, was also moved into evidence. *Id.* at PageID #: 13091.

29. After the conclusion of trial, Whirlpool filed a Motion for Judgment on Partial Findings, arguing that Plaintiffs had failed to meet their burden of proof. ECF No. 429. Plaintiffs opposed (ECF No. 434).

II. The Underlying Documents and Whirlpool's Continuation of Benefits

30. The retiree health benefits at issue in this case are governed by a series of CBAs

negotiated between the Company and the Union. ECF No. 310 at PageID #: 10178 (citation omitted).

31. The CBAs include, *inter alia*, Basic Labor Agreements ("BLAs") that set forth the parties' essential rights and obligations with respect to the employment relationship; Exhibit A-1 Welfare Plans for Hourly-Rated Employees ("Welfare Plans") that describe health insurance coverage; and other supplemental contracts known as Contract Settlements. *Id.* (citation omitted).

32. As the Court emphasized in its Summary Judgment Ruling, "every Retiree in this lawsuit has continued to receive company-sponsored healthcare benefits." ECF No. 191 at PageID #: 6285; *see also id.* at PageID #: 6312. The only break in Whirlpool's continuation of benefits occurred effective January 1, 2016 as to Subclass B, when Whirlpool eliminated company-provided benefits as to these individuals, replacing this coverage with a small monthly stipend. *Compare* ECF No. 353 (representing that Whirlpool intended to eliminate company-provided benefits for all Medicare-eligible subclass members effective January 1, 2016, replacing these benefits with an $85 monthly stipend) *with* ECF No. 361 (representing that Whirlpool would not implement benefit changes for members of Subclass A, C, or Groups 1 and 2 of Subclass D, and, as to pre-65 benefits, as to Groups 3 and 4 of Subclass D).

III. The Governing Contractual Provisions and Other Evidence of the Parties' Intent with Respect to Whether Whirlpool May Unilaterally Reduce Benefits of Current Retirees

A. Mutual Consent Provisions in the Governing CBAs

33. The parties' BLAs all include a provision stating (with some immaterial variation)

as follows:

> (E) AGREEMENT CHANGES
>
> Changes in, or amendments to, the terms of this Agreement may be made at any time by mutual consent of the Company and the Union. When amendments or revisions are made, they shall be reduced to writing and be executed in the same manner as this Agreement.

Joint Exhibit 12 at 57 (1980 BLA); Joint Exhibit 16 at 58 (1983 BLA); Joint Exhibit 22 at 65 (1986 BLA); Joint Exhibit 26 at 67 (1988 BLA); Joint Exhibit 29 at 66 (1992 BLA); Joint Exhibit 35 at 66 (1995 BLA); Joint Exhibit41 at 83 (2000 BLA); Joint Exhibit49 at 84 (2003 BLA).

34. The BLAs each state (with some immaterial variation): "This Agreement as written expresses the entire contract between the parties." Joint Exhibit 12 at 58 (1980 BLA); Joint Exhibit 16 at 59 (1983 BLA); Joint Exhibit 22 at 66 (1986 BLA); Joint Exhibit 26 at 68 (1988 BLA); Joint Exhibit 29 at 67 (1992 BLA); Joint Exhibit 35 at 67 (1995 BLA); Joint Exhibit 41 at 84 (2000 BLA); Joint Exhibit 49 at 85 (2003 BLA).

B. 1980 to 1988 Contracts, Negotiations, and Other Evidence

35. Before 1980, the parties' Welfare Plans specified that health insurance coverage terminated when a person retired, and that retiring employees could continue coverage by self-paying the premium during retirement. Joint Exhibit 10 at 25 (1977 Welfare Plan).

36. In 1980 negotiations, the Company's position was that it would not bargain for current retirees. ECF No. 413-1 at PageID #: 12351–52 (Plaintiffs' Counter-Designations of James H. Cook). This remained the Company's position throughout all negotiations that Company official James Cook attended on behalf of the Company. *Id.* at PageID #: 12352.

37. In 1980, the Company and the Union executed a Contract Settlement amending the 1977 CBA, specifying under a "Pension" subsection called "Future Retirees" that "The Hoover Company assumes responsibility for paying premiums to the insurance carrier for future retiree's medical insurance in accordance with the terms and conditions of the Plan." Joint Exhibit 14 at 4 (1980 Contract Settlement).

38. Tom Cook, President of Union Local 1985 beginning in 1978 and chief negotiator for the Union in 1980 negotiations, learned the following in 1980 based on discussions with Company officials James Provo and James Cook (Tom Cook's brother):

> Q. All right. Now, did Mr. Provo or James Cook have any discussions with you back in 1980 regarding The Hoover Company's ability to change the level of healthcare benefits after an employee retired?
>
> A. Yes.
>
> Q. And what did you learn from those discussions?
>
> A. I learned from those discussions that they not only didn't have a right, but neither did we. *They were locked in—they kept using the term "They were locked in when they go out."*
>
> Q. That the level of benefits would be locked in?
>
> A. Their money *and the insurance*, yes.

ECF No. 251 at PageID #: 8124 (emphasis added); *see also id.* at PageID #: 8121 ("Q. Now, during your various discussions with Mr. Provo and/or your brother, Jim Cook, back in these 1980 negotiations, did you have any discussions concerning—did they have any discussions with you concerning bargaining for past or current retirees, people who were already retired? A. They

would not—they would refuse to bargain for employees that were already retired, with sayings like, '*Once you go out, you're locked in.*'") (emphasis added)).

39. A collaborative cost-containment committee including members from the Union and the Company met in the 1980s (and thereafter) and worked to keep healthcare costs in line while keeping the level of healthcare benefits "the same or higher." *Id.* at PageID #: 8231; *see also* ECF No. 253 at PageID #: 8585 (stating that the purpose of cost-containment committee was to look for ways to save costs without changing the level of benefits).

40. In 1988 bargaining talks, the parties agreed that employees hired after July 7, 1988 would receive a lower level of medical benefits, through the "Comprehensive Plan," than those provided to employees hired before that date, who received the "Basic" and "Major Medical" Plan. Whirlpool Proposed Findings of Fact for first phase of trial. Joint Exhibit 28 at 15, 51.

C. 1992 to 2000 Contracts, Negotiations, and Other Evidence

41. During negotiations on May 13, 1992, Mr. Schiltz stated: "We are not proposing any change to current retiree's [benefits]. We don't negotiate for current retiree's, and nothing in this proposal changes that." Plaintiffs' Exhibit 35 at 35-17 (1992 Negotiation Minutes). Mr. Schlitz testified in his deposition that this transcription from the negotiation minutes fairly characterized what he said at the time. ECF No. 206 at PageID #: 6752.

42. In 1992, the Company and Union formally amended the Exhibit A-1, negotiating a Welfare Plan that specifically stated that qualified retiring employees "*shall* have the opportunity to continue" Company-paid healthcare after retirement. Joint Exhibit 30 § 3.01(c)(iii) (emphasis added) (1992 Welfare Plan).

43. Section 3.01(c)(iii) of the 1992, 1995, and 2000 Welfare Plans provided in relevant part:

> In the case of an employee who retires on or after January 1, 1993, under the terms of the Pension Plan for Hourly-Rated Employees and who has at least ten years of pension credit accumulated after attaining the age of 45 (or was born prior to December 31, 1937), and who had active employee coverage in effect on the day immediately preceding retirement, such *employee shall have the opportunity to continue elements of the medical insurance* in accordance with the following principles:
>
> (A) A monthly contribution shall be required as follows for coverage prior to the covered person's attainment of age 65:
>
> | Years of Pension Credit | Per Person Contribution | Family Maximum Contribution |
> |---|---|---|
> | More than 30 | $0 | $0 |
> | 20–30 | $10 | $20 |
> | 10–20 | $15 | $30 |
>
> (B) Eligible retired employees who were hired prior to July 8, 1988, will be eligible to retain Basic and Major Medical coverage, provided that the Major Medical lifetime maximum benefit shall be $50,000. . . .[2]
>
> (C) Eligible retired employees who were hired after July 8, 1988, will be eligible to retain the Comprehensive Plan.

Joint Exhibit 30 § 3.01(c)(iii) (1992 Welfare Plan) (emphasis added); *see also* Joint Exhibit 36 § 3.01(c)(iii) (1995 Welfare Plan); Joint Exhibit 42 § 3.01(c)(iii) (2000 Welfare Plan); and Joint Exhibit 50 § 3.01(c)(iii) (2003 Welfare Plan).

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[2] The $50,000 maximum was set forth in the 1992 Welfare Plan. That amount was increased to $60,000 in the 1995 Welfare Plan, and increased again to $70,000 in the 2000 Welfare Plan. *See* § 3.01(c)(iii) in Joint Exhibit36 (1995 Welfare Plan); Joint Exhibit 43 (2000 Welfare Plan).

44. Therefore, prior to age 65, depending on their years of pension eligibility, subclass members who retire or after January 1, 1993 are required to pay a monthly premium of $0 to $15 for individual coverage and $0 to $30 for family coverage. There are no monthly premiums for subclass members over age 65.

45. Section 2.06 of the Welfare Plan describes in detail the benefits provided under the Basic Medical Expense Plan and Major Medical Plan available to pre-1988 hires and the Comprehensive Plan available to post-1988 hires. *See* Joint Exhibit 30 § 2.06 (1992 Welfare Plan); Joint Exhibit 36 § 2.06 (1995 Welfare Plan); Joint Exhibit 42 § 2.06 (2000 Welfare Plan); and Joint Exhibit 50 § 2.06 (2003 Welfare Plan).

46. Under the Basic Medical Expense Plan, subclass members who were hired prior to July 8, 1988 are to receive, among other specified services, "365-day hospitalization insurance at the hospital's daily rate in semi-private accommodation" with private accommodations when "confinement in a private room is medically necessary due to severe burns or a contagious disease requiring isolations"; "outpatient diagnostic coverage"; "hospital expense benefits"; and "surgical expense benefits insurance on a reasonable and customary fee basis." *Id.*; *see also* ECF No. 426 at PageID #: 12709.

47. There are no charges associated with any of these services. *See* Joint Exhibit 30 § 2.06 (1992 Welfare Plan); Joint Exhibit 36 § 2.06 (1995 Welfare Plan); Joint Exhibit 42 § 2.06 (2000 Welfare Plan); and Joint Exhibit 50 § 2.06 (2003 Welfare Plan); *see also* ECF No. 393 at PageID #: 11448 (Defendants' Proposed Pre-Trial Findings of Fact for Second Trial, explaining that Basic Plan covers "100% of medically-necessary hospital and surgical-related expenses").

48. The Major Medical Plan available to subclass members hired before July 8, 1988 provides coverage for, among other things, licensed practical nurses, professional ambulance service, home health care, hospice care, and convalescent care. *See* Joint Exhibit 30 § 2.06(b) (1992 Welfare Plan); Joint Exhibit 36 § 2.06(b) (1995 Welfare Plan); Joint Exhibit 42 § 2.06(b) (2000 Welfare Plan); and Joint Exhibit 50 § 2.06(b) (2003 Welfare Plan); *see also* ECF No. 426 at PageID #: 12709.

49. With respect to Major Medical coverage, subclass members have annual deductibles of $100 per person, with a $200 family maximum; co-insurance payments of 15%; and co-insurance maximums of $500 per person and $1,000 per family. *See* Joint Exhibit 30 § 2.06(b)(1) (1992 Welfare Plan); Joint Exhibit 36 § 2.06(b)(1) (1995 Welfare Plan); Joint Exhibit 42 § 2.06(b)(1) (2000 Welfare Plan); and Joint Exhibit 50 § 2.06(b)(1) (2003 Welfare Plan).

50. As to subclass members hired after July 8, 1988, who are eligible for the Comprehensive Plan, the Welfare Plans provide that they "shall be provided with the same medical coverage as provided to employees hired prior to July 8, 1988, with the following exceptions which apply to employees hired after July 8, 1988." *See* Joint Exhibit 30 § 2.06(d) (1992 Welfare Plan); Joint Exhibit 36 § 2.06(d) (1995 Welfare Plan); Joint Exhibit 42 § 2.06(d) (2000 Welfare Plan); and Joint Exhibit 50 § 2.06(d) (2003 Welfare Plan). Those exceptions do not include anything pertaining to prescription drug benefits. *See id.*

51. Under the Comprehensive Plan, all benefits (not just Major Medical benefits) are subject to an annual deductible of $200 per person, with a $400 family maximum. Retirees also are responsible for 15% co-insurance payments. Annual out-of-pocket maximums (including

deductibles and co-insurance) are $800 per person and $1,600 per family. *See* Joint Exhibit 30 § 2.06(d)(ii), (d)(iv) (1992 Welfare Plan); Joint Exhibit 36 § 2.06(d)(ii), (d)(iv) (1995 Welfare Plan); Joint Exhibit 42 § 2.06(d)(ii), (d)(iv) (2000 Welfare Plan); and Joint Exhibit 50 § 2.06(d)(ii), (d)(iv) (2003 Welfare Plan). The agreements specify that "[f]ollowing the attainment of these maximums during a calendar year, the Plan shall pay 100% of eligible expenses for the balance of the year." *Id.*

52. As to prescription drug coverage, before Whirlpool unilaterally implemented the co-payment increases that Retirees challenge in this litigation (*see* ECF No. 146 at PageID #: 4641–42 (Third Amended Complaint), the Welfare Plans mandated the following coverage as to retired employees hired prior to July 8, 1988:

> [Such retired employees] shall be eligible for a mail order prescription drug program with a $3.00 per prescription deductible ($1.00 for generic prescriptions) in addition to [the prescription coverage of the Major Medical Plan.]

See Joint Exhibit 36 § 3.01(c)(iii) (1995 Welfare Plan); Joint Exhibit 42 § 3.01(c)(iii) (2000 Welfare Plan); and Joint Exhibit 50 § 3.01(c)(iii) (2003 Welfare Plan).

53. Retirees hired after July 8, 1988 "will be eligible to retain the Comprehensive Plan," *see* Joint Exhibit 36 § 3.01(c)(iii)(C) (1995 Welfare Plan); Joint Exhibit 42 § 3.01(c)(iii)(C) (2000 Welfare Plan); and Joint Exhibit 50 § 3.01(c)(iii)(C) (2003 Welfare Plan) and "eligible prescription drug coverage shall be available through [the Comprehensive Plan.]" *Id.*; Joint Exhibit 23 at 28 (1985 Welfare Plan); Joint Exhibit 30 § 2.09(c) (1992 Welfare Plan).

54. Contractual retiree benefits agreed to in the Welfare Plans, applicable to be both pre-Medicare and Medicare-eligible Retirees, are summarized as follows:

Retiree Hired Prior to July 8, 1988	
Basic Medical Expense Plan:	365 day hospitalization Outpatient Diagnostic Coverage Hospital/Surgical Expenses All 100% covered with no deductible or co-insurance or life time maximum
Major Medical:	Licensed practical nurses, ambulance service, home health care, hospice care and comparable services
Deductible: Coinsurance: Out of Pocket Maximum: Lifetime Maximum:	$100 per person; $200 Family 15% $500 per person; $1,000 Family $70,000 per person (for Major Medical only)
Retiree Hired After July 8, 1988	
Comprehensive Plan Deductible: Coinsurance: Out of Pocket Maximum: Lifetime Maximum:	 $200 per person; $400 Family 15% $800 per person; $1,600 Family $500,000 per person
Prescription Drug	
Mail Order $1 for generic/$3 for brand name	Retail 15% co-insurance $50 deductible per person

See Plaintiffs' Exhibit 41 at 3 (Supplemental Report of Thomas S. Tomczyk Report).

D. 2003 and 2005 Changes to Benefits for Active Employees and Future Retirees

55. During 2003 contract negotiations, the Company sought to limit how long it would have to pay retiree healthcare benefits for future retirees, while continuing to assert that it would not bargain for current retirees. ECF No. 259 at PageID #: 9009–10. Through these negotiations, the parties made changes to benefits for certain categories of future retirees only.

56. The parties ultimately agreed, as follows, in Section 3.01(c)(iv) of the 2003–2008 Welfare Plan (applicable to Subclass D): "With regard to qualifying employees who retire subsequent to December 9, 2003, the available medical benefits shall be those summarized in

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Exhibit 5." Joint Exhibit 50 at 22.

57. The referenced Exhibit 5 provides:

EXHIBIT 5
RETIREMENT HEALTH CARE

	Eligibility	Benefit	Comments
Group #1	Age 55 or more with at least 10 years of pension credit as of 12/31/03	• Retiree health. No change if retired by 12/31/04	Window Closes 1/31/04
Group #2	Age 55 or more and 10 or more years of pension credit by 6/5/05, but not in Group #1, or in Group 1 and not retired by 1/31/04	• Retiree health: No change	• Regular Retirement • Grandfathered to 6/29/08
Group #3	85 points and 30 or more years of pension credit by 6/29/05, but not in Group #1 or #2	• Access only to retiree health care. $10,000 lump sum payment. • Or, if qualified by 6/5/05, may retire after 6/5/05 upon reaching eligibility requirements (e.g., 55 with 10 years) with the following health care: -Cost share of 20% (of 80/20 plan) -No change in current coverage -Pre-65 coverage only	• Window until 6/29/05, pension only (no retiree health care) - or - • If qualified by 6/5/05 and retiring after 6/5/05, 20% cost share for medical to age 65.
Group #4	Pension credit as described to the right as of 12/31/03	Pension Credit (Years) 30 or more 29 28 27 26 25 24 23 22 21 20	Retiree Health Cost Share 20% 23% 26% 29% 32% 35% 38% 41% 44% 47% 50% • No window • Retiree health care is $200 80/20, pre-65 only • Retiree Rx drug is Maytag Model
Group #5	Not eligible under Group #1, #2, #3 or Group #4 above as of 12/31/03	• Access only to pre-65 retiree healthcare	
Group #6	Employees hired after 1/1/04	• Access only to pre-65 retiree healthcare	

- Medicare shall always be primary payer for post 65 benefits.
- Medicare supplement plan will be available at full cost to retirees who do not qualify for post-65 medical coverage.
- Employees on LTD are eligible for the window if they meet the criteria of Group #1. Otherwise, the pension benefit in effect on the date of original LTD will apply.
- Annual Open Enrollment for Health Care Plan Selection.
- Refer to February 19, 2004, letter of understanding.

Joint Exhibit 50 at 22.

58. In 2003, the Company and the Union negotiated substantial cost-sharing and elimination of plan participation for Medicare-eligible retirees but only as to future retirees.

59. Mr. Schiltz's testified as Whirlpool's Rule 30(b)(6) witness that provisions

governing Groups 1 and 2 were inserted at the "impetus" of the Union, which "wanted to make sure that people who were on the verge of retirement had the opportunity to essentially get out under the old rules." ECF No. 206 at PageID #: 6704. Mr. Schiltz further testified that "we gave them that opportunity." *Id.*

60. According to Mr. Schiltz, if Group 1 and 2 Retirees retired within the appropriate windows, they "would basically get the entire pre-December 9, 2003 program available to them . . . ." *Id.* at PageID #: 6704–05 (agreeing that employees retiring before January 1, 2004 would get basically the entire pre-December 9, 2003 program); *id.* at PageID #: 6705–06 (agreeing that employees retiring before the window closed (on January 1, 2004) were "locked in" to the same package of health insurance benefits); *see also* ECF No. 252 at PageID #: 8527.

61. In addition to substantially altering healthcare benefits for future retirees who were not grandfathered, the 2003 Welfare Plan substantially altered healthcare benefits for current employees, effective January 1, 2005.

62. In particular, as of that date, employees were eligible to participate **only** in a PPO plan, and were subject to increased premiums, deductibles, co-insurance payments, and out-of-pocket maximums. *See* Joint Exhibit 50 at 15, 24. Prescription drug co-payments also increased substantially for current employees as of January 1, 2005. *Id.* at 17–18.

63. Mr. Schiltz testified that it remained the Company's position until 2005 that it would not negotiate for current retirees. ECF No. 259 at PageID #: 9028.

64. Mr. Repace's testimony was to the same effect:

> Q. Before 2005, had the Company ever suggested that you could go back and renegotiate past or current retirees?
>
> A. No, they never suggested we could.

ECF No. 252 at PageID #: 8448.

65. When the Company for the first time attempted to negotiate for current retirees in 2005, the Union refused to do so. ECF No. 259 at PageID #: 9028; *see also* ECF No. 252 at PageID #: 8448.

66. In particular, the Company approached the Union in 2005 concerning an "Eagle Steam Vac" line in connection with proposed reductions to retiree health benefits. ECF No. 255 at PageID #: 8927–28; *see also* Plaintiffs' Exhibit 13; Plaintiffs' Exhibit 15.

67. As set forth in a "Special Update Notice" to Union members, the Company proposed replacing current and future retiree medical benefits with the so-called "Maytag Model." *See* Plaintiffs' Exhibit 15.

68. Under this model, current and future retirees would be required to pay contributions for up to 40% of the actuarial value of medical benefits for dependents. *Id.* This was the first time that the Company proposed changing benefits for existing retirees. ECF No. 255 at PageID #: 8928.

69. Part of the Company's 2005 proposal was included in a document regarding proposed "Rx savings" dated March 29, 2005. Plaintiffs' Exhibit 11.

70. Therein, the Company described a "Proposed plan" that would increase retiree co-

payments from 15% for retail and $1 to $3 for mail order to $10/$20/$30 for retail and $20/$30/$40 for mail order. *See id.* The proposal identified total savings to the Company of $634,700 for the year 2006 if the plan was implemented. *Id.*

71. Mr. Schiltz testified as follows with regard to the Company's 2005 proposal to reduce benefits for existing retirees:

> Q. Okay. Now, would you agree with me that if Maytag/Hoover Company, back in 2005, thought that it had the unilateral right to change current or past retirees' healthcare benefits, like which was proposed in Option Number 1 from Exhibit 121, the Maytag Company would not need to negotiate those changes with the Union?
>
> A. I think you're correct.
>
> Q. And isn't the reason that the Maytag Company made this proposal to the Union was because they were concerned about their future liability for retiree healthcare benefits?
>
> A. Maytag was very concerned about future retiree medical –
>
> Q. And that certainly was shared with you, correct?
>
> A. Yes. That one was.
>
> Q. It's that staggering number thing again, right?
>
> A. It had only become more staggering.

ECF No. 255 at PageID #: 8329–30.

72. Mr. Repace similarly testified:

> Q. Okay. Now, when Maytag made this proposal to you, based upon your past dealings with the Maytag officials and The Hoover Company officials, if they believed they had the right to unilaterally change past or current retirees' retiree healthcare benefits, would they have needed to negotiate those changes with the Union?

A. Absolutely not; they would have just done it.

ECF No. 252 at PageID #: 8450; *see also* *id.* at PageID #: 8452 ("Q. Okay. And, again, asking the same question, based upon your dealings with Whirlpool, if Whirlpool believed it had the right to unilaterally change current or past retiree healthcare benefits, would they need to negotiate those changes with the Union? A. The way Whirlpool has treated our people, they would have done it in a heartbeat").

73. Mr. Repace explained the Union's refusal to negotiate benefit reductions for current retirees, even in exchange for the promise of additional Union jobs, as follows:

> [T]here was no way that I would ever, ever touch past or current retirees' healthcare benefits. That is so important to these folks. I mean, I would have opened up a lawsuit against the Union. It wouldn't have been morally right. And I just would not do that. I wouldn't even consider—it wasn't even a consideration, to change their benefits, not even a consideration.

ECF No. 253 at PageID #: 8570; *see also* ECF No. 413-5 at PageID #: 12377 (Repace Counter Dep.) ("Q. If you had chosen to agree to the company's proposal, would that proposal have been binding on the retirees? A. Probably not. I think that would open up a major lawsuit. It's probably one of the reasons why I wouldn't even consider such a document.").

74. Mr. Repace testified that he understood that he could not negotiate changes to benefits of past retirees even if he wanted to:

> Q. Well, based upon your position with the Union, did you believe you had the legal right to go in and change the past retirees' benefits or premium payments?
>
> A. Absolutely not, I didn't have no legal right to do that.

ECF No. 252 at PageID #: 8452.

75. In addition to the above negotiated changes for current employees and future

retirees, on March 30, 2005, the Company in 2005 unilaterally imposed retiree medical benefit reductions on salaried retirees but not on hourly retirees. *See* Plaintiffs' Exhibit 12 (letter to "Maytag retirees" dated March 30, 2005); ECF No. 259 at PageID #: 9034–35. (explaining that benefit reductions described in Plaintiffs' Exhibit 12 applied to salaried retirees and certain non-Hoover Union retirees but not to Hoover hourly retirees); ECF No. 265 at PageID #: 9421 (Whirlpool's First Factual Findings) ("On March 30, 2005, the Company notified salaried retirees and active employees that their healthcare benefits were changing").

E. 2008/2009 Changes to PPO Plan and Absence of Changes to Traditional Plan

76. An April 24, 2008 draft of a document prepared by Towers Perrin, a human resources consulting firm, titled "Whirlpool Corporation Retiree Medical Plan Consolidation and Future Direction" states that "Hoover opportunities may be more limited," observing that this was "[c]urrently under legal review" and stating: "[w]ill make changes to optional PPO plan and Base plan (which is allowed under current contract."). Defendants' Exhibit 126 at 5; *see also* ECF No. 426 at PageID #: 12670–71.

77. This reflects Whirlpool's understanding that the controlling contracts allowed changes to PPO benefits. ECF No. 426 at PageID #: 12852–53.

78. The Towers document also states "[o]ptions to consolidate some plans limited due to prior commitments/contracts." Defendants' Exhibit 126 at 7.

79. It further states:

> Hoover is steady state for 2009
>
> — Move special salaried ("Class of 90") to Pre-65 PPO by 2010

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— Wait and see for hourly (but redesign PPO, as practical)

Defendants' Exhibit 126 at 10.

80. Finally, the document states that "consolidation" is "Dependent upon favorable legal outcomes with regards to the ability to make changes for Hoover retirees." Defendants' Exhibit 126 at 12.

81. Mr. Osterndorf explained that opportunities to cut Hoover benefits were "more limited" because "there was an open question" as to whether the Company was legally permitted to "update the Hoover benefits" as it was with plan benefits for other Whirlpool facilities. . ECF No. 426 at PageID #: 12670–81.

82. Mr. Osterndorf has no memory of anyone saying to him in the 2008 time period that changes had been routinely made to the Traditional Plan and that Whirlpool accordingly had a right to make further changes to that plan. ECF No. 426 at PageID #: 12853–54. He further testified:

> Q. Did you ever hear anybody say, "Well, we've been negatively reducing those benefits for years, since we bought it back in 2006, so we have every right to continue to make negative changes with respect to the retiree comprehensive plan"?
>
> A. The only thing I remember along those lines is Tim Schiltz indicating they had an open-ended ability to change the PPO.

Id. at PageID #: 12854. Because Mr. Schiltz told Mr. Osterndorf that Whirlpool had the right to change the PPO, Mr. Osterndorf inferred that Mr. Schiltz may have meant that the Traditional Plan could not be changed. *Id.* at PageID #: 12855.

83. In a 2008 email, Mr. Schiltz stated that Whirlpool was interested in securing

information from Aultcare regarding the possibility of moving Hoover hourly retirees to an AultCare Medicare Advantage Plan in 2009. Mr. Schiltz stated that "[t]he plan of benefits for the existing 'McKinley' indemnity plan must be duplicated[.]" Plaintiffs' Exhibit 45 (August 27, 2008 email from Tim Schiltz to Lorraine Kalkreuth).

84. Consistent with all these documents, Whirlpool made numerous material changes to the PPO plan while not making comparable changes to the Traditional Plan.

85. Notably, a 2009 SPD reflects that Whirlpool imposed a new $100 co-payment for each of the first three days of inpatient hospital stays, which could amount to hundreds of dollars a year if a retiree has multiple hospitalizations; these co-payments were not a feature of the earlier PPO plan. *Compare* Joint Exhibit 100 at 5 (1994 PPO SPD) *with* Joint Exhibit 108 at 16 (2009 SPD) (showing that Whirlpool implemented a $100 copay for hospital stays in a semi-private room under the PPO plan, but that the McKinley or non-PPO Traditional Plan remained the same); *see also* Plaintiffs' Exhibit 45 (email chain including August 27, 2008 email from Tim Schiltz to Lorraine Kalkreuth, citing various changes Whirlpool wanted to make to PPO plan, and explaining that "The plan of benefits for the existing 'McKinley' indemnity plan must be duplicated[.]").

86. Similarly, although the 1994 SPD reflects that Retirees in the PPO plan originally paid $0 or $10 co-payments for various physician office visits (*see* Joint Exhibit 100 at 7 (1994 SPD)), Whirlpool reduced this benefit by 2009 such that PPO Retirees were required to pay a $25 co-payment for all visits to a physician's office. *See* Joint Exhibit 108 at 20 (2009 SPD).

87. In another example, Whirlpool imposed new co-payments for certain injections

within the PPO plan but not within the Traditional Plan. *Compare* Joint Exhibit 100 at 7 (1994 SPD) and Joint Exhibit 108 at 17 (2009 SPD showing that change was made as to PPO plan but not the Traditional or McKinley Plan).

88. Whirlpool also introduced a co-payment when there had been none, or increased the co-payment to $15, for various preventative care procedures under the PPO. *Compare* Joint Exhibit 100 at 6–7 (1994 SPD) *with* Joint Exhibit 108 at 22 (2009 SPD).

89. Whirlpool also increased Chiropractor co-payments for the PPO plan from $10 to $25. *Compare* Joint Exhibit 100 at 7 (1994 SPD) *with* Joint Exhibit 108 at 28 (2009 SPD).

90. Mr. Mohr admitted that a January 1, 2009 co-payment increase applied only to the PPO and Alternative plans. ECF No. 205 at PageID #: 6563.

91. It was only "sometime in the 2008–2009 time frame" that Mr. Mohr came to the conclusion that Whirlpool had a right to unilaterally reduce the retiree health benefits at issue in this litigation. ECF No. 428 at PageID #: 13031, 13036–37.

92. Mr. Mohr had been a member of Whirlpool's benefits restructuring team since before Whirlpool's 2006 purchase of Maytag. *Id.* at PageID #: 12909, 12981.

93. This team was charged with studying and making proposals as to retiree medical benefits. *Id.* at PageID #: 12910. Mr. Mohr was assigned to lead the retiree medical team and help develop the proposal and get it implemented. *Id.* at PageID #: 12912.

F. Other Post-2005 Evidence

94. Before Whirlpool purchased the Hoover facility from Maytag effective April 18, 2006, Whirlpool was advised by its Tower actuaries that its total accumulated postretirement

benefit obligation ("APBO") for Union retirees as of March 31, 2006 was $282.6 million. *See* Defendants' Exhibit 120 at 1.

95. An APBO is an obligation that is held on an employer's balance sheet and reflects the present value of the future benefits that are expected to be paid to a retiree population over time, brought back to a current day present value. ECF No. 423 at PageID #: 12658.

96. The APBO includes no obligation on the part of retirees; it solely represents the employer's obligation. *Id.* at PageID #: 12815.

97. On September 7, 2006, Towers advised Whirlpool that Towers had significantly overstated the APBO. Towers revised the APBO based on more complete information, calculating that, as of March 31, 2006, the APBO for Union retirees was $229.30 million as of March 31, 2006. Defendants' Exhibit 120 at 2.

98. Because Whirlpool had purchased Maytag while under the impression that it was assuming $282.6 million in Hoover Union retiree healthcare liability, this $53.3 million difference was "found money" for Whirlpool.

99. An April 24, 2008 draft of a document prepared by Towers titled "Whirlpool Corporation Retiree Medical Plan Consolidation and Future Direction" states that, with respect to Heritage Maytag retirees, "most retirees" have a "frozen company contribution" with "limited" post-65 coverage. The document also notes that "some groups," including the Hoover retirees, "maintain generous coverage." Defendants' Exhibit 126 at 3.

100. "Generous" in this context means that the plans "provided benefits that had more

coverage in parts of the plan, more first dollar coverage for various kinds of expenses" and "coverage that was very comprehensive in nature." ECF No. 426 at PageID #: 12667, 12848.

101. A 2009 cover email from Judy Locatis, Whirlpool "Benefits Manager" to "Chris" states: "I've asked Tim [Schiltz] for his opinion on Hoover changes for 2010 and his response is below [redacted by Whirlpool]." Plaintiffs' Exhibit 46.

102. In his referenced email to Ms. Locatis, dated April 21, 2009, Mr. Schiltz states as follows:

> Judy –
>
> I think you've pretty well got it. I think that 2010 is a "lying in the weeds" year for Hoover hourly retirees. The change in Medicare rules requiring a network in 2011 may serve as "air cover" for making some changes in 2011. [Redacted by Whirlpool].
>
> The current economic realities may drive the Corporation to want to take additional risk, so you may get some pressure to make big changes at Hoover. [Redacted by Whirlpool].
>
> Whirlpool has two possible overall approaches toward Hoover hourly retirees' medical insurance:
>
> > (1) Make the commitment to sweeping change recognizing that, at best [Redacted by Whirlpool].
> >
> > (2) Strategically seek to make modest changes when the opportunity is presented—taking small savings here and there and *establishing more of a tradition of change*. [Redacted by Whirlpool].
>
> Although it should be clear that I favor option 2, make no mistake that even that option will not be easy. *Former union executives are on the lookout for ANY negative changes to the health insurance plan because they understand the importance of that precedent, and you could in for a fight even over modest changes.* [Redacted by Whirlpool].

Plaintiffs' Exhibit 46 (email chain including April 21, 2009 email from Tim Schiltz to Judy Locatis) (italicized emphasis added; all caps emphasis in the original).

103. Mr. Schiltz's email reflects Whirlpool's recognition that at the time Mr. Schiltz emailed Ms. Locatis in April 2009, there had been no "precedent" of "ANY negative changes," including "modest changes," to the healthcare benefits of Hoover Retirees, and that the Union would fight any attempt by Whirlpool to establish such a precedent.

104. This proved to be the case in 2010, when Whirlpool announced its intent to unilaterally reduce the mail order prescription drug benefit contracted for in the parties' Welfare Plans, and the Union immediately protested.

105. The parties' contracts had mandated that retired employees who were hired prior to July 8, 1988 "shall be eligible for a mail order prescription drug program with a $3.00 per prescription deductible ($1.00 for generic prescriptions)[.]" *See* Joint Exhibit 36 § 3.01(c)(iii) (1995 Welfare Plan); Joint Exhibit 42 § 3.01(c)(iii) (2000 Welfare Plan); and Joint Exhibit 50 § 3.01(c)(iii) (2003 Welfare Plan).

106. In 2011, Whirlpool replaced this benefit with a mail order benefit requiring co-payments of $10, $20, or $30. ECF No. 435-2 at PageID #: 13286–87. A December 16, 2010 email from Chris Koehler to Judy Locatis confirms that Whirlpool raised the mail order co-payment to $10, $20, and $30. Defendants' Exhibit 37 at 3.

107. These figures show that Whirlpool unilaterally increased the mail order prescription co-payment tenfold.

108. The Union protested this reduction in prescription drug benefits. *See* Defendants'

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Exhibit 37.

109. Frank E. Vaughn, former President, Vice President of Administration, and Human Resources Officer for Hoover Company, ECF No. 259 at PageID #: 9027–28, stated that it was his understanding that Whirlpool's hourly retiree medical benefits are unchangeable. *See* Plaintiffs' Exhibit 42 (March 13, 2013 letter from Mr. Vaughn to Whirlpool's counsel, stating "since this guarantee does not expire for any reason short of bankruptcy, it was considered best to include me in the hourly plan which was expected to last").

110. Mr. Schiltz similarly testified that salaried workers sometimes sought to retire with hourly retiree health benefits because they probably viewed the hourly benefits as superior to salaried benefits. ECF No. 259 at PageID #: 9038; *see also* ECF No. 265 at PageID #: 9429–30 (Whirlpool's First Factual Findings) ("Under certain circumstances, Hoover salaried employees were eligible to retire with the health insurance benefits otherwise available only to hourly retirees").

111. Mr. Shiltz testified that although its welfare benefits do not enjoy the same protection as pension benefits do—for example, the documents were unclear as to whether welfare benefits would survive bankruptcy—he never told the union that the Company could terminate the benefits completely. *See* ECF No. 206 at PageID #: 6799–801 (discussing 2003 contract negotiations).

112. Mr. Repace similarly testified that the only discussion he ever heard concerning the Company having the ability to discontinue benefits was in the event of bankruptcy. ECF No. 252 at PageID #: 8438.

113. In the spring or summer of 2011, Mr. Repace called Mr. Schiltz to discuss changes to the Plan that Whirlpool had announced would be implemented in 2013. ECF No. 206 at PageID #: 6660–61. They had several such discussions. *Id.* at PageID #: 6664.

114. In the course of one of these conversations concerning the announced chages, Mr. Repace and Mr. Schiltz discussed the fact that a court in Iowa had ruled that Whirlpool could alter retiree medical benefits with respect to the retirees of a Whirlpool plant in Newton, Iowa. ECF No. 255 at PageID #: 8897. Mr. Repace indicated that he thought that this was a bad sign for the North Canton retirees. *Id.* Mr. Schiltz testified:

> I advised him that it wasn't a good thing for his case, but it was not necessarily as bad as he might think, because *the two cases would be distinguishable, because in Newton, there was a lengthy tradition of bargaining for current retirees.*
>
> And, in fact, in the contract in 2004—yeah, 2004, they had collectively bargained what any fair person would call a reduction in the medical benefits for retirees. So they had that clear precedent there that they did negotiate for current retirees, and therefore, it would be very difficult to contend that—in fact, impossible to contend that the benefits were vested, because both sides agreed they could be changed.

Id. at PageID #: 8898 (emphasis added); *see also* ECF No. 206 at PageID #: 6663–64.

IV. There Were No Benefit Reductions in this Case for Existing Retirees That Would Support a Ruling for Whirlpool on *Reese* Issue 1

A. Evidence of the Parties' Intent with Respect to Benefit Reductions for Current Retirees: Benefits Were "Locked In" at the Time of Retirement, and the Company Did Not Even Attempt to Negotiate for Current Retirees Before 2005

115. Frank Provo was the Company's chief negotiator in the 1980, 1983, 1986, 1992,

and 1995 negotiations. ECF No. 405-8 at PageID #: 12240. (Whirlpool's Designations of Deposition Testimony of Frank Provo). Mr. Provo testified as follows at his deposition:

> Q. Do you recall saying at least the first part, that you're only negotiating for future retirees, you're not going to negotiate for those already out the door?
>
> A. That was a standard at the table. And this will show that the Union on almost each occasion said we want to talk, and I said—it almost became a joke, and go sit down and say boys, you don't represent the retirees, and they said okay and we went on with negotiations, so –
>
> Q. So the retirees that already retired, they have what they have?
>
> A. Correct.
>
> Q. And we're not going to negotiate about them?
>
> A. That's correct.

ECF No. 413-4 at PageID #: 12370 (Plaintiffs' Counter Designations of Deposition Testimony of Frank Provo).

116. Mr. Schiltz's deposition testimony confirms Mr. Provo's deposition testimony: He testified that the Company's chief negotiator (Mr. Provo) presented to the Union that employees have what they have when they went out. ECF No. 120-17 at PageID #: 2262.

117. James Cook also testified that beginning with the 1980 negotiations, it was the Company's position was that it did not bargain for current retirees. ECF No. 413-1 at PageID #: 12351 (Plaintiffs' Counter-Designations of James Cook). This remained the Company's position throughout all negotiations that Mr. Cook attended on behalf of the Company. *Id.* at PageID #: 12352.

118. Mr. Gensley emphasized that it was important for the Union to obtain good and

stable benefits for persons who were retiring during the term of the upcoming contract because, after they were retired, they were "locked in," and if retirees were obligated to pay an escalating share, the Union would be powerless to do anything:

> [W]e can't negotiate for past retiree's . . . . We can't control the cost that you pass on to retiree's and *they're set as whatever they retire at. They're locked in there* that their medical could escalate to a point where they don't have anything, where we don't have any control over it.

Plaintiffs' Exhibit 35 at 21 (1992 Negotiation Minutes) (emphasis added); *see also* ECF No. 251 at PageID #: 8280 ("The Company was always very adamant about not negotiating [for] past retirees."). Mr. Schiltz testified that although he did not remember Mr. Gensley stating this, "I would not be surprised if he did." ECF No. 259 at PageID #: 9006.

119. Mr. Schiltz has no memory of any Company official ever telling Union negotiators that the Company could cut retiree healthcare benefits. *Id.* at PageID #: 8988.

120. Mr. Schiltz testified that the Company never negotiated for current retirees *id.* at PageID #: 8986–87, with the exception of its failed attempt to get the Union to agree to reductions in 2005, *id.* at PageID #: 9003–04. *See also id.* at PageID #: 9003 ("The Company did not negotiate for current retirees, current retirees being defined as those who were currently retired at the time of that negotiation").

121. Mr. Gensley's testimony was to the same effect:

> Q. Okay. And past practice would say if the Company had been changing the retirees' benefits, then those benefits were subject to change, correct?
>
> A. No.
>
> Q. Okay. What would the past practice be?

A. Past practice is that they never changed them except in an upward manner. ECF No. 413-2 at PageID #: 12357 (Gensley Counter Dep.). After being questioned about the 1986, 1989, 1992, and 1995 negotiations, Mr. Gensley testified that the Company did not negotiate for current retirees in any of these negotiations. *Id.*; *see also* ECF No. 413-5 at PageID #: 12375 (Repace Counter Dep.) ("The company made that very, very clear from forever that they will not negotiate for past retirees, just future retirees.")

122. Mr. Schiltz also testified that throughout his discussions with the Union, it was always the Union's position that the Company could not cut retiree healthcare benefits. ECF No. 259 at PageID #: 8987–88.

123. Mr. Schiltz testified at his deposition that he thought that union negotiators believed that the Company was locked in and there could not be cuts to benefits. ECF No. 206 at PageID #: 6706–07 (Schlitz Dep.).

124. Mr. Schiltz testified in his role as Whirlpool's Rule 30(b)(6) witness that he agreed that the Company's consistent position was that negotiators would not discuss people who already were retired. *Id.* at PageID #: 6712.

125. Mr. Schiltz confirmed in his trial testimony that this was the Company's position through 2005. ECF No. 259 at PageID #: 9028.

126. At his deposition, Mr. Schiltz did not recall ever conveying to the Union that benefits for current retirees could later be cut. ECF No. 206 at PageID # 6707. He similarly testified at trial:

> Q. And you would agree with me that the Company, Hoover Company representatives or officials, never told Union negotiators that the Company could

cut retiree healthcare benefits?

A. I don't recall ever having that discussion, no.

ECF No. 259 at PageID #: 8988.

127. Mr. Schiltz testified at his deposition concerning a discussion he had with Union representative Chris Koehler regarding a statement in a "Conditional Waiver of Hoover Hourly Retire/Dependent Medical Insurance" form (Plaintiffs' Exhibit 30). Mr. Schiltz stated that retiree who waives coverage would be eligible only for whatever coverage was available at the time of reinstatement. ECF No. 206 at PageID #: 6821–22. He stated that Mr. Koehler's concern was that the form stated that someone could waive coverage and then be put back into whatever plan the Company elected. *Id.* at PageID #: 6822.

128. Mr. Schiltz testified that "that's not how we administered things at Hoover. *We would have put them in the plan that was in effect at the time that they retired when they came back.*" *Id.* at PageID #: 6822 (emphasis added). This "was consistent with the philosophy" that the retiree gets what they went out with, which the Company implemented. *Id.*; *see also* ECF No. 413-5 at PageID #: 12375 (Repace Counter Dep.) ("What you went—here is what they would always say: What you went out with is what you have for life.").

129. A 2002 email message from Mr. Schiltz to Jewell Gullett of Maytag confirms that Retirees were to receive what was in effect when they retired. The message concerned conditional waiver forms, which a spouse with alternative coverage could sign to waive current Whirlpool coverage, with the ability to later regain that coverage:

> Union Representative Chris Koehler has approached me with a concern about the Conditional Waiver form (Form 223A) sent to Hoover hourly retirees. Specifically,

> the bold paragraph in the middle states that a retiree who waives coverage will be eligible only for whatever coverage is available at the time of reinstatement. This is not accurate with regard to hourly employees. *The coverage which would be available upon reinstatement would have to be that which was defined as retiree coverage in the contract which was in effect at the time of retirement.*"

Plaintiffs' Exhibit 31 (emphasis added).

130. Whirlpool argues that "[i]f the Company wanted to modify past retirees' benefits, it could do so and in fact did so." ECF No. 265 at PageID #: 9397 (citing ECF No. 251 at PageID #: 8226). Whirlpool cited Mr. Gensley's testimony, in which he stated:

> I mean, once you receive them, they're for life. Now, that's what you got. You won't get anything in the next negotiations. *Now, if the Company wants to give you something, we let them. Who cares? If it's better, they couldn't cut them, but if they want to give them something else and it happened, that's okay.*

ECF No. 251 at PageID #: 8226 (emphasis added). Mr. Gensley testified that although Whirlpool was free to give retirees *additional benefits*, it "couldn't *cut* them." *Id.* (emphasis added).

131. Whirlpool also claimed that the trial transcript establishes that "It was the Company's decision whether to provide past retirees with additional medical coverage and services or to reduce the benefits." ECF No. 265 at PageID #: 9397 (Whirlpool's First Factual Findings). To the contrary, the cited testimony only states that Whirlpool could offer additional benefits, not that it could impose benefit reductions. He explained that if a new medical breakthrough such as a cure for cancer were developed, Whirlpool could decide whether to offer that additional benefit, and:

> Q. So the Company got to decide what level of healthcare retirees got, is that it?

> A. As we said over and over, yes, it would be, because *if it was a better benefit, so be it.*

ECF No. 252 at PageID #: 8356 (emphasis added).

132. Mr. Repace testified that Company officials shared with him their position that the level of retiree benefits could be changed after an employee retired only to make benefits better. *Id.* at PageID #: 8393.

133. Class Representative Joseph Zino testified in his deposition that he was led to believe by both the Union and the Company that he would be able to keep the benefits he had when he retired. ECF No. 397-3 at PageID #: 11937.

134. Mr. Repace testified that it was the position of Company officials that retiree medical benefits could be left the same or improved but could not be decreased. ECF No. 252 at PageID #: 8396.

B. Supposed Benefit Changes Identified by Whirlpool

135. In a chart filed February 25, 2016 labeled "History of Changes to Retiree Healthcare Benefits," ECF No. 430-1 at PageID #: 13123 ("Benefit Change Chart") Whirlpool identifies certain benefit changes. Whirlpool argues that the Company made a "host" of benefit reductions, and that these changes demonstrate that the parties intended to give Whirlpool the power to make unilateral benefit reductions. ECF No. 430 at PageID #: 13114–15.

136. Whirlpool admits that three of the items identified on its Chart carry no "penalty or limitation": the Company's offering of an alternative PPO; its offering of an alternative HMO; and its movement of post-65 retirees into an "Employer Group Waiver Plan." *See* ECF No. 430-1.

137. A fourth item on Whirlpool's chart, increased prescription drug payments unilaterally imposed in 2011, also cannot advance Whirlpool's cause because the Union protested this step at the time (*see* Defendants' Exhibit 37 (email chain between Chis Koehler and Judy Locatis discussing the changes) and Plaintiffs have sought relief for this change in this litigation. *See* ECF No. 146 at PageID #: 4641.

138. This leaves the following purported changes to Traditional Plan benefits, which Whirlpool contends carry some "penalty or limitation" for retirees:

1986 and 1995 precertification requirements

1986 second surgical opinion requirement

1986 subrogation

1992 mandatory generic substitution

1995 $50 retail prescription deductible

1995 mail order for prescription drugs

2004 deductible carry-over removed

2009 and 2010 pharmacy edits

2009 change in plan provider

2011 pharmacy administrator changed

Each item is addressed in turn.

139. **1986/1995 Precertification Requirement** Precertification is a notification process through which an individual going into the hospital for a nonemergency situation, into hospice or convalescent care, or who needs home healthcare, contacts the precertification

agency, lets them know they are going into the hospital, and allows that organization to preapprove the hospital stay. ECF No. 426 at PageID #: 12717–18, 12720.

140. Whirlpool Rule 30(b)(6) witness Edward Mohr testified that implementation of the precertification requirement could be viewed "by any number of folks" as either positive or negative. ECF No. 205 at PageID #: 6553–55.

141. Mr. Schiltz agreed that the precertification requirement could be characterized as valuable to participants. ECF No. 206 at PageID #: 6714.

142. Mr. Osterndorf also testified that "[p]recertification can be a good thing . . . it works well for people who comply, and poorly for people who don't." ECF No. 426 at PageID #: 12827. Precertification is beneficial because it can prevent unnecessary treatment.

143. The testimony of Union witnesses as to the precertification requirement was consistent with the cited testimony of the three Company witnesses. ECF No. 253 at PageID #: 8552 ("Precertification was viewed as a good thing for the membership").

144. Mr. Gensley testified that there was nothing wrong with having a precertification requirement:

> Q. Do you think an 80/20 plan is a bad benefit plan?
>
> A. I think so, for me, yes.
>
> Q. It would be, all right. And isn't it true that in the 1986 negotiations, the parties agreed that one of the consequences of not getting precertification would be that you shifted from the traditional plan to an 80/20 plan as a penalty for not complying with the precertification requirements?
>
> A. We—yeah, there's nothing wrong with having a penalty for not doing what you're supposed to do.

ECF No. 251 at PageID #: 8264.

145. **1986 Second Opinion Requirement** Mr. Schiltz testified that a second surgical opinion requirement imposed in 1986 was a good thing for employees because it allowed avoidance of unnecessary surgery. ECF No. 259 at PageID #: 9016. He further testified that this requirement was valuable for retirees. ECF No. 206 at PageID #: 6714.

146. Mr. Osterndorf agreed that although the second opinion requirement "may be a pain," if it allows someone to avoid an unnecessary surgery, it's a pretty good thing, and he has made this case in the past. ECF No. 426 at PageID #: 12827–28.

147. Mr. Cook's trial testimony as to the second opinion requirement was consistent with Mr. Schiltz's and Mr. Osterndorf's:

> Q. Based upon your experience in negotiating and representing numerous employees in different unions, did you consider [a second opinion requirement] a good thing or a bad thing for employees?
>
> A. Absolutely good thing. In fact, we would usually propose to have that.

ECF No. 251 at PageID #: 8137.

148. Mr. Gensley testified that Company representatives on the Cost Containment Committee also thought that second opinions were a good thing for retirees. *Id.* at PageID #: 8243 ("Oh, the Company, along with us, thought it was a positive . . . they even said, 'Your people will be better off for it.' You know, 'Your people will feel more at ease,'[.]").

149. **1986 Addition of Home Healthcare, Hospice, and Convalescent Facilities** In 1986, the parties negotiated coverage for home health care, hospice care, and convalescent care. Joint Exhibit 23 at 16.

150. Mr. Schiltz testified that home healthcare was an improvement for Retirees. ECF No. 259 at PageID #: 9017 (Q. So [home healthcare] would have been an improvement? A. I think it was, yes."); *see also* ECF No. 413-6 at PageID #: 12381 (Schiltz Counter Dep.) (Q. Home health care is an improvement? A. Yes.").

151. The Union viewed home healthcare the same way as Whirlpool. Mr. Gensley testified:

> Q. Yeah. So from the Union's point of view, did this seem to be a positive or a negative in terms of the overall package of coverage?
>
> A. Oh, it was absolutely win/win. It was great for us, and it was great for the Company. I mean, they were saving the money having people at home. We were getting our people out of the hospital and home to convalesce.
>
> Q. Did the Company have a position whether this was a win for the employees or a negative for the employees?
>
> A. They thought it was—they thought it was a positive for the employees. They always did. We did and they did.

ECF No. 251 at PageID #: 8239.

152. Hospice care was also seen as an improvement. As Mr. Gensley testified, "This was the compassionate thing to do. It was a positive for the families. It was a positive, and the Company said, 'Yeah, it's a positive for us, too,' because they were compassionate at that time." *Id.* at PageID #: 8239–40.

153. Mr. Schiltz testified that convalescent care was a benefit for retirees. ECF No. 413-6 at PageID #: 12382 (Shiltz Dep); *see also* ECF No. 259 at PageID #: 9017–18 (Schiltz Trial Testimony).

154. Mr. Gensley agreed with Mr. Schiltz that convalescent care was a benefit:

> This was another positive/positive thing for us . . . . This is the kind of stuff you could do and get out of the hospital and rehab and get back to work, or get—you know, get your quality of life back, without burdening the hospital system.

ECF No. 251 at PageID #: 8241.

155. **1986 Subrogation** Under the concept of subrogation, an insured cannot collect twice for the same injury. *See* ECF No. 253 at PageID #: 8552. Otherwise put, if someone receives full reimbursement from an insurance company for a particular cost, they cannot receive the reimbursement from another insurance company for the same cost. Insurance companies typically require subrogation clauses in their policies. *Id.* at PageID #: 8552–53. ERISA regulations also require that SPDs reference certain subrogation rights. *See* 29 C.F.R. § 2520.102-3.

156. Subrogation did not "affect the people's ability to get their benefits." ECF No. 251 at PageID #: 8245–46.

157. **1992 Mandatory Generic Substitution** Mr. Mohr testified that automatic generic substitution could be a positive or a negative. ECF No. 205 at PageID #: 6569.

158. Mr. Repace testified that a mandatory generic drug substitution requirement was not a detriment to retirees because physicians were always free to note "dispense as written" on a prescription, and the patient would receive the prescribed medication regardless of its generic status. ECF No. 253 at PageID #: 8550. Furthermore, generic substitution saved everybody money. *Id.*

159. **1995 $50 Deductible for Retail Prescriptions Only/Mail Order** In 1995, the parties agreed to add a new mail order prescription drug program that provided a 90-day supply

of drugs for either $1 for generic or $3 for name brand, and at the same time, agreed that retail prescription drug coverage would be subject to a 15% co-payment and a $50 deductible. *See* Joint Exhibit 36 at 23, 33 (1995 Welfare Plan); Joint Exhibit 30 at 22 (1992 Welfare Plan). As part of this change, prescription drug benefits were no longer part of the Major Medical portion of the Traditional Plan. Plaintiffs' Exhibit 29 at 4.

160. Mr. Schiltz testified at his deposition that the 1995 mail order prescription drug program was an improvement for retirees. ECF No. 206 at PageID #: 6713. He likewise testified at trial:

> Q. All right. Either way, you would agree with me, mail-order is a very beneficial thing for retirees, if they can get their pharmaceuticals by just mail-order –
>
> A. Especially with the copayments that were in that contract, yes.

ECF No. 259 at PageID #: 9019. Mr. Schiltz explained that with the mail order program, retirees would pay as little as $1 for their prescription medication. *Id.* at PageID #: 8901. Indeed, he testified that he would want the mail order program as part of his own coverage. *Id.* at PageID #: 9020.

161. Mr. Mohr testified that it was a good thing for retirees that they could purchase mail order prescriptions for a lower cost than retail prescriptions. ECF No. 428 at PageID #: 13046. He also testified that incentivizing retirees to use less expensive mail order prescriptions rather than more expensive retail prescriptions was a good thing for retirees. *Id.* at PageID #: 13050.

162. Mr. Osterndorf testified that the mail order option was cheaper for retirees, and

more efficient for them because they could get their prescriptions at home, assuming they were comfortable with that. ECF No. 426 at PageID #: 12831–32; *see also id.* at PageID #: 12833–34.

163. The Union also viewed the mail order prescription drug requirement as an improvement for retirees. ECF No. 253 at PageID #: 8551. Mr. Repace explained that mail order was a good thing because it allowed people to get a 90-day supply of their medication for the price of a 30-day supply. *Id.*

164. The Welfare Plan provided that the increase in the retail co-payment and deductible applied only to "retired employees *who retired on or after June 5, 1995.*" *See* Joint Exhibit 36 at 29 (emphasis added) (1995 Welfare Plan). The parties' contract reflects that the parties agreed that the deductible would apply to future retirees, not current retirees. Subsequent Welfare Plans repeated that the co-payment and deductible applied to those retiring on or after June 5, 1995. *See* Joint Exhibit 42 at 33 (2000 Welfare Plan); Joint Exhibit 50 at 21 (2003 Welfare Plan).

165. A document produced by Whirlpool on February 10, 2016 similarly states that the $50 deductible applies only to those who retire after June 5, 1995. *See* Joint Exhibit 123 at 4 ("RX – retire on or after 6/5/1995. Same plan $1/$3 – with $50 deductible, but must go through plan").

166. Assuming that, contrary to the terms of the parties' Welfare Plans, the $50 deductible for retail prescriptions was applied retroactively to current retirees, it must be considered in the context of the undisputed benefit improvements that went into effect in 1995,

which included a raise in the major medical lifetime maximum benefits to $60,000. Joint Exhibit 36 at 33; *see* ECF No. 206 at PageID #: 6761. Schlitz testified that this increase in the lifetime maximum was an improvement. *Id.* at PageID #: 6714. In another 1995 benefit improvement, benefits paid toward prescription drug costs no longer counted toward the lifetime major medical maximum for Major Medical benefits, a good thing for retirees. ECF No. 428 at PageID #: 13049–50.

167. Hoover's Vice President of Human Resources Frank Provo characterized 1995 changes to retiree medical insurance as follows: "*Very little change took place in retiree medical insurance.* A separate $50 annual deductible will apply for retail prescriptions instead of the current coverage as a Major Medical expense." Plaintiffs' Exhibit 29 at 4 (emphasis added) (June 6, 1995 Memorandum). Mr. Provo also characterized the "mail order prescription plan for maintenance drugs" as a "Plan improvement." *Id.*

168. **2004 Elimination of Deductible Carryover** For the first time in its Proposed Findings of Fact filed February 12, 2016, Whirlpool cited the following supposed benefit reduction: "Between 2003 and 2004, the Company eliminated that deductible carry-over option enjoyed by Hoover Retirees enrolled in the Traditional Plan." ECF No. 393 at PageID #: 11468, ¶ 156; *see also* ECF No. 430-1 at PageID #: 13124 (Whirlpool's Benefit Change Chart, relying on elimination of deductible carryover in 2004).

169. Mr. Mohr, who testified concerning the carryover deductible supposedly eliminated in 2003 or 2004, admitted that it may still have existed in 2009—he did not know. ECF No. 428 at PageID #: 13052.

170. Defendants' Exhibit 109 includes a series of Aultcare checklists for various years between 1996 and 2009, which identify benefits provided by the "Group 160T" plan, or the "Traditional Plan." *See* Defendants' Exhibit 109; ECF No. 428 at PageID #: 12979–80. As Whirlpool has explained:

> Aultcare maintained and periodically updated coverage "checklists" for each of the Hoover plans it administered, including the Traditional Plan for Hoover Retirees. The Aultcare checklists tracked the terms and conditions of the Hoover plans, including, for example, deductible and co-pay amounts, coverage levels, what services were covered by the Basic Plan, what services were covered by the Major Medical Plan and what services were excluded from coverage.

ECF No. 393 at PageID #: 11469, ¶¶ 159–60.

171. The Aultcare check sheet dated February 2, 2009 reflects that the carryover deductible remained in place as of that date, defeating Whirlpool's claim that the carryover deductible was eliminated in 2003 or 2004. *See* Defendants' Exhibit 109 at 76 (reflecting deductible carryover was still in place as of February 18, 2009 for the 160T or Traditional Plan); *see also* ECF No. 428 at PageID #: 13056 ("Q. So at least in 2009, deductible carryover is still in existence in these documents, correct? A. That's what this document says, yes.").

172. The same checklist also reflects that an "out-of-pocket carryover" also remained in effect in 2009. Defendants' Exhibit 109 at 78; *see also* ECF No. 428 at PageID #: 13065 ("Q. So it appears that at least as of 2009, the carryover out-of-pocket still existed? A. Yes.").

173. Moreover, none of the Welfare Plans indicate that either the deductible or out-of pocket carry-over was a negotiated term of the parties' agreement in the first place. *See* Joint Exhibit 10; Joint Exhibit 17; Joint Exhibit 23; Joint Exhibit 30; Joint Exhibit 36; Joint Exhibit

42, Joint Exhibit 50. Therefore, even if this feature was eliminated at some point, this did nothing to reduce the parties' negotiated benefits.

174. **2009/2010 Drug Safety Edits** Per Mr. Mohr, the January 1, 2009 implementation of "Pharmacy Safety Edits" could theoretically help retirees by preventing overdoses or drug abuse. ECF No. 205 at PageID #: 6564–65. Furthermore, the January 1, 2009 implementation of "Pharmacy Edits" requiring generic drugs absent certain circumstances could result in lower copayments for retirees. *Id.* at PageID #: 6565–66.

175. Mr. Osterndorf similarly testified that drug safety edits are a good thing for retirees' health because they protect participants from harmful drug interactions. ECF No. 426 at PageID #: 12830–31.

176. **2009 Change In Plan Provider** In an email dated October 15, 2008, Tim Schiltz noted that effective January 1, 2009, Medicare-eligible retirees would have their benefits administered by PrimeTime Health Plan" and elaborated: "*There is no change* in the net benefits compared to the traditional indemnity plan other than some additional benefits associated with a Medicare Advantage Plan, and there are modest revisions compared to the existing AultCare and United Health Care PPO's." Defendants' Exhibit 128 (emphasis added).

177. Whirlpool has produced two versions of an October 2008 "Important Notice for Medicare-Eligible Hoover Hourly" Retirees." *See* Joint Exhibit 124; Defendants' Exhibit 129; *see also* Defendants' Exhibit 166. They both state, albeit in different language, that Medicare-eligible coverage would be provided through a Medicare Advantage Plan affiliated with

AultCare, that PPO benefits would change in 2009, and that Traditional Plan benefits would not change in 2009.

178. The Defendants' Exhibit 129 version identifies three benefit changes to the PPO plan and states that the Traditional Plan "will offer the same benefits as the combination of Medicare and the existing McKinley Health Plan. It will also include some additional benefits such as dental, vision and routine physical examination coverage."

179. As to prescription drug coverage, the Defendants' Exhibit 129 Notice states "The pharmacy benefits will include additional features to support patient safety, help improve the quality of your healthcare and encourage you to work with your doctor to make smart healthcare decisions." *Id.*

180. The 2008 Notice at Joint Exhibit 124 states that in 2009, "Whirlpool will introduce a new claims administrator and implement changes to some of the Whirlpool retiree medical plans." Joint Exhibit 124 at 1 (emphasis added). After specifying changes to the PPO plan, the Notice states: "If you are enrolled in the McKinley Plan: Your plan will continue to be administered by AultCare as the McKinley Plan, *with no changes* to the plan design." *Id.* at 2 (emphasis added).

181. Whirlpool has, therefore, admitted that the 2009 change in plan providers entailed "no change in net benefits" and "no changes to the plan design." This is contrary to Whirlpool's claim in its chart that the change in providers "limited/altered the provider network." ECF No. 430-1 at PageID #: 13124. Whirlpool's chart is also contradicted by Mr. Osterndorf's following testimony:

> Q. So can you describe in broad terms how the Hoover Canton traditional hourly retiree plan works?
>
> A. Yes. It's an indemnity plan, which means it doesn't have a network of doctors that you can go to, instead it provides benefits through an open-ended definition of doctors and hospitals . . . .

ECF No. 426 at PageID #: 12709.

182. **2011 Prescription Drug Premium Increases** Retirees specifically challenge in this litigation Whirlpool's 2011 unilateral increase in prescription drug co-payments. *See* ECF No. 146 at PageID #: 4641–42, ¶ 31 (Third Amended Complaint) ("Despite the promises in the successive Welfare Plan Agreements to provide certain levels of Basic and Major Medical coverage and coverage under the Comprehensive Plan throughout retirement, Whirlpool reduced retiree medical benefits from levels in place at the time Class Members retired by, *inter alia*, increasing co-payments for prescription medicine . . . ."). Furthermore, the Union objected to this increase. *See* Defendants' Exhibit 37; ECF No. 254 at PageID #: 8718–19. Because neither Retirees nor the Union have treated these changes as allowable, they provide no support for Whirlpool's *Reese* position.

183. **Plan Design Features Generally** Mr. Osterndorf testified that various plan design features that he addressed in his trial testimony (which included coordination of benefits, subrogation, precertification, and the second opinion requirement) amounted to trying to get people appropriate medical care, and that appropriate care was a good thing for retirees. ECF No. 426 at PageID #: 12829.

184. **Whirlpool's Abandoned Changes** Whirlpool has abandoned earlier arguments

that the following purported changes support its *Reese* theories. The Court nonetheless cites some pertinent facts.

185. **Coordination of Benefits** Mr. Osterndorf agreed that overall, coordination of benefits was a good thing for retirees. ECF No. 426 at PageID#: 12829.

186. **Step Therapy** Mr. Osterndorf testified that step therapy can "definitely" be a good thing for the health of participants. *Id.* at PageID #: 12829–30.

187. **Alternative PPO Plan** As to alternative coverage, the 2000 Welfare Plan provides that "[r]etired employees shall have available to them any Alternative Medical Plans which are available to active employees at any given time . . . ." Joint Exhibit 42 at 34 (2000 Welfare Plan). Under the parties' contracts, Alternative Medical Coverage provides coverage through Health Maintenance Organizations ("HMOs") and/or ("PPOs"). *See, e.g.*, *id.* at 26 (2000 Welfare Plan).

188. As negotiated by the parties in 2000, "[e]mployees shall have the opportunity to enroll in or drop out of the alternative . . . coverage at least annually . . . ." *Id.* (2000 Welfare Plan). Whirlpool also attested in its Final Proposed Findings of Fact that the PPO option was described as an "opportunity" in the operative A-1. ECF No. 265 at PageID #: 9407, ¶ 132 (citing Joint Exhibit 23). Whirlpool further stated that this same "opportunity" language is contained in each of the subsequent Exhibit A-1s. *See id.* (citing Joint Exhibits 30, 36, 42, 50). This provision applies to retirees. ECF No. 206 at PageID #: 6698–99.

189. The Court also already has found that Alternative Medical Coverage was

provided to Retirees as an option, not as a mandate. *See* ECF No. 191 at PageID #: 6305 (Summary Judgment Ruling).

190. As testified to by Mr. Osterndorf, under the parties' contracts, retirees who selected the PPO plan retained the option of returning to the Traditional Plan. ECF No. 426 at PageID #: 12822. Mr. Repace and Mr. Gensley testified to the same effect. ECF No. 253 at PageID #: 8563 (Repace testimony); ECF No. 251 at PageID #: 8235 (Gensley testimony).

191. As the Court previously determined, any changes imposed on Retirees by the 2000 Welfare Plan did not reduce healthcare benefits. ECF No. 191 at PageID #: 6310. In particular, and as the Court reasoned, the 2000 Welfare Plan (1) raised the Major Medical lifetime benefit from $60,000 to $70,000; (2) gave retirees the option of selecting an Alternative Medical Plan as an alternative to the Basic and Major Medical and Comprehensive Plans; and (3) granted Medicare-eligible retirees the option to enroll in Medicare HMOs in place of coverages offered by the Basic and Major Medical, Comprehensive, and Alternative Medical Plans. *Id.* (discussing 2000 Welfare Plan (Joint Exhibit 42 at 29–30)); *compare* Joint Exhibit 36 at 33–334 (1995 Welfare Plan); Joint Exhibit 30 at 31–32 (1992 Welfare Plan).

192. The Court ruled that "even if the 2000–2003 Welfare Plan did impose changes to past retirees, those changes did not reduce healthcare benefits." ECF No. 191 at PageID #: 6310 The Court reasoned that the cited changes:

> improved healthcare benefits by providing a higher lifetime benefit amount and greater coverage options. As recognized by the Sixth Circuit, "the resetting of health-care benefits for previously retired employees might not concern anyone if each change upgraded the existing package of benefits . . . ."

Id. (citing *Reese I*, 574 F.3d at 325).

193. Mr. Schiltz testified that the availability of PPOs was a benefit to Retirees, and that indeed "the huge majority" or Retirees chose to enroll in them. ECF No. 259 at PageID #: 9013. According to Mr. Schiltz, PPOs were a "win-win" for the Company as well as for employees and retirees. *Id.* at PageID #: 9014.

C. Summary Conclusion as to Benefit Changes Cited by Whirlpool

194. The Court finds that the sundry benefit changes for existing retirees cited by Whirlpool were improvements**,** or, at most, neutral or *de minimis*, particularly when considered as part of a package of over-all benefit improvements. The Court also finds that the cited changes to the Traditional Plan applicable to current retirees should be viewed in the context of the changes Whirlpool unilaterally imposed on the PPO plan and that the parties negotiated for active employees and future retirees. Cuts to these latter benefits were substantial, and show that Whirlpool did not hesitate to unilaterally impose genuine benefit cuts when it believed that it could do so, and that the parties also did not hesitate to negotiate benefit reductions for groups whose benefits they believed they could reduce.

D. Whirlpool's Announced Benefit Reductions

195. Whirlpool's objective in reducing the benefits of subclass members is to "transition" these retirees into the "Whirlpool Plans" in which "[t]he majority of Whirlpool's retirees (salaried and hourly) and the majority of Maytag's retirees (salaried and hourly), numbering approximately 12,000 covered lives, are currently enrolled." ECF No. 265 at PageID #: 9381, ¶ 14. In other words, Whirlpool did not analyze the benefits promised in the parties' Welfare Plans and attempt to reasonably adjust them in accordance with *Reese* or the parties'

intentions in this case but rather seeks to shoehorn Retirees into its existing benefit plans, regardless of the terms of the parties' agreements.

196. In May 2011, Whirlpool delivered notices to Retirees announcing its plan to greatly reduce their health benefits ("May 2011 Notice"). The Notice advised Medicare-eligible Retirees that Company-paid supplemental health benefits would no longer be provided and that any supplemental health coverage would have to be individually purchased from private insurance companies. Plaintiffs' Exhibit 27 at 3 (May 2011 Whirlpool Notice to Retirees and Spouses). The notice stated that, as of January 1, 2013, "you must choose and pay for your own individual supplemental medical and supplemental pharmacy coverage, instead of receiving coverage through a Whirlpool-sponsored plan"; Whirlpool would provide reimbursement of up to $85 per month for both supplemental medical and supplemental pharmacy coverage, $50 for medical coverage and $35 for prescription drugs. *Id.* at 2.

197. Whirlpool informed Retirees who were not Medicare-eligible that their health coverages would "transition" to the same plan as that provided to the majority of Whirlpool retirees (*i.e.*, those who never worked at the Hoover facility) who are not eligible for Medicare. *Id.* Although the 2011 Notice advised pre-Medicare Retirees as to new deductibles, co-insurance, and out-of-pocket limits, there was no mention of any new premium. A similar 2013 Notice also failed to identify any new premiums. *See* Plaintiffs' Exhibit 33.

198. Whirlpool did not impose the benefit changes announced in 2011, and left benefits in place for all subclass members through 2015.

199. By letter dated October 1, 2015 ("2015 Notice"), Whirlpool informed subclass

members that they would lose their then-current benefits effective January 1, 2016. *See* Plaintiffs' Exhibit 47 (October 1, 2015 Letter to "Hoover Retiree/Spouse/Surviving Spouse").

200. Whirlpool advised that Medicare-eligible subclass members would lose their Whirlpool-provided coverage and would be eligible for a monthly Health Reimbursement Arrangement ("HRA") stipend of up to $85 "to offset some or all of the cost of purchasing coverage through a Medicare supplemental medical plan and/or Medicare Part D supplemental pharmacy plan." *Id.*

201. Whirlpool generally ignored the pre-Medicare retirees in its presentation of trial evidence, and claimed in its Proposed Findings of Fact filed before trial that by January 31, 2017, there will not be any remaining pre-Medicare subclass members. *See* ECF No. 393 at PageID #: 11448, ¶ 45. To the contrary, the list of subclass members shows that 144 of them were born after January 31, 1952, meaning that there would still be pre-Medicare subclass members in 2017. *See* Joint Exhibit 122.

202. Per the 2015 Notice, effective January 1, 2016, non-Medicare-eligible Retirees could participate in one of two plans, the "Rewards Plan" or the "Savings Plan." Plaintiffs' Exhibit 47. Although the 2015 Notice notified Pre-Medicare Retirees precisely what their deductibles, out-of-pocket limits, and co-insurance payments would be under the various plans, the 2015 Notice did not disclose that Pre-Medicare Retirees would be charged any premium, much less identify that premium.

203. Benefits for pre-Medicare subclass members are described in Exhibit B to the

Affidavit of Judy Locatis (Joint Exhibit 121). ECF No. 225-2. As described therein, the Rewards Plan, which is PPO-based, consists of three levels: Level1, Level 2, and out-of-network. Rewards Plan participants who do not complete quarterly "wellness activities" would face a per-person deductible of $1,500; an out-of-pocket limit of $8.500; and 40% co-payments for PCP and specialist office visits, all hospitalizations, and surgery. *Id.* Rewards Plan participants who complete "wellness activities" four times a year would face a per-person deductible of $500; an out-of-pocket limit of $2,000; a $15 copayment for primary care office visits, and 20% co-payments for specialist office visits, hospitalization, and surgery. Participants using out-of-network providers pay far more. *See id.*

204. Participants using In-network Savings Plan providers face a per-person deductible of $2,000; an out-of-pocket limit of $2,000; and 15% co-payments for office visits, hospital care, surgery, and emergency room visits. Participants using Out-of-network providers would be obliged to pay a per-person deductible of $4,000; an out-of-pocket limit exclusive of the deductible of $12,500; and 50% co-payments for specialist office visits, hospital care, and surgery. *Id.*

205. Both the Rewards Plan and the Savings Plan also include substantial price increases in prescription drugs, which are categorized into five "tiers." *See* Plaintiffs' Exhibit 33 at 12 (2013 Notice). Co-insurance after the deductible ranges from 0% to 100%, and the price for each prescribed drug ranges from $0 to $625, or, as to Tier 4 drugs, 100% of the total price. *Id.* Prices vary depending on whether drugs are purchased in-network or out-of-network, and retail or mail order. *Id.*

206. Although Whirlpool's 2011, 2013, and 2015 notices of upcoming changes to retiree healthcare benefits disclosed changes to deductibles, co-insurance, out-of-pocket limits, and prescription drug coverage, each failed to disclose the premiums that pre-Medicare Retirees would be charged under Whirlpool's proposed benefit changes, even though premiums increases are the most significant component in Whirlpool's proposed changes. *See* Plaintiffs' Exhibits 27,32, 33, 47. Furthermore, Whirlpool proffered to the Court the October 25, 2013 Affidavit of Whirlpool Benefits Manager Judy Locatis (ECF No. 225-2; Joint Exhibit 121), wherein Ms. Locatis avers that "In my position as Benefits Manager, I am familiar with the healthcare benefits provided to Whirlpool retirees and their surviving spouses, including the 'Hoover' retirees and their surviving spouses, as well as the past and impending modifications made to Whirlpool retirees' healthcare benefits." ECF No. 225-2 at PageID #: 7635, ¶ 3.

207. Ms. Locatis attached as Exhibit B to her Affidavit what she described as "a detailed summary of the benefits offered under the healthcare plans Whirlpool seeks to implement for the Hoover Retirees effective April 1, 2014." *Id.* at PageID #: 7636, ¶ 7. This "detailed summary" is indeed highly detailed in some respects; for example, Ms. Locatis identified co-insurance amounts for such specific items as mammograms and pap smears. Despite this level of detail, Ms. Locatis failed to include any mention of any premium for pre-Medicare Retirees.

208. Ms. Locatis also attached as Exhibit A to her Affidavit what she identifies as a "Tackett/Whirlpool Comparison Table," wherein she purports to compare the benefits

modifications at issue in *Tackett v. M&G Polymers, USA, LLC*, 733 F.3d 589 (6th Cir. 2013), *vacated*, 135 S.Ct. 826 (2015), and the benefit modification at issue in this case. She attests that in her table, she:

> identifies the benefits provided to the Tackett Retirees before and after the Court approved modifications. Next to those modifications, I have included the current benefits provided to the Hoover hourly retirees as well as the comparable benefits provided under the healthcare plan Whirlpool seeks to implement for the Hoover Retirees effective April 1, 2014.

Id. at PageID #: 7636, ¶ 6. Ms. Locatis' table specifies deductibles, varying co-insurance requirements, and out-of-pocket maximums, but includes no mention of any premiums.

209. In their First Request for Production of Documents to Defendant Whirlpool Corporation, Plaintiffs asked Whirlpool at Request No. 19 to "produce all documents concerning the potential cost of retiree health benefits for Class Members. Such documents include, but are not limited to documents that actuaries and other professionals used in preparing such projections." *See* Plaintiffs' Exhibit 48. Despite this request, before February 10, 2016, Whirlpool did not produce any documents concerning the potential cost of retiree health benefits for subclass members as those costs relate to the new premiums that Whirlpool seeks to impose on pre- Medicare Retirees.

210. It was only after counsel for Retirees specifically asked counsel for Whirlpool on February 3, 2016 whether the proposed new plans for pre-Medicare Retirees included any premium requirements that Whirlpool advised Plaintiffs for the first time on February 5, 2016—the date that the parties' supplemental expert reports were due—that they did. ECF No. 391 at PageID #: 11265, ¶ 3 (Declaration of Pamina Ewing dated February 12, 2016).

211. According to a document produced by Whirlpool for the first time on February 10, 2016 entitled "Important Information – Retiree Medical Insurance" (Plaintiffs' Exhibit 49), monthly per-person premiums for the proposed 2016 pre-Medicare plans are $321.06 for the Rewards Plan and $305.20 for the Savings Plan, for a total annual cost to Retirees of either $3,852.75 or $3,662.40.

212. Additional documents produced by Whirlpool on February 10, 2016 show that 2015 pre-Medicare monthly premiums would have been $277.53 ($3,330.40 for the year) and $265.83 ($3,189.99 for the year). Plaintiffs' Exhibit 50 (Document entitled "2015 Retiree Medical Enrollment Form"). For 2014, pre-Medicare Retirees would have paid $241.33 a month ($2,896.00 annually) or $231.16 a month ($2,773.90 annually). Plaintiffs' Exhibit 51 (Document entitled "2014 Whirlpool Retiree Healthcare Pricing: Pre-Medicare"). These numbers show that in just two years, Whirlpool has increased its annual premium for pre-Medicare retirees by almost $1,000.

213. FAS 106 is a statement written by the Financial Accounting Standards Board setting forth proscribed rules for accounting for and valuing retiree healthcare plans. ECF No. 426 at PageID #: 12667, 12668–69. According to a statement in a 2015 FAS-106 Report produced by Whirlpool on February 10, 2016, "Savings/Rewards participants pay for half of cost increase due to trend." Plaintiffs' Exhibit 52 at 19. In other words, Whirlpool calculated its retiree healthcare obligation assuming that pre-Medicare Retirees' premiums would continue to increase each year in order to cover one-half of all future increases in healthcare costs.

214. As addressed above, current per-person premiums for persons under 65 range

from $0 a month to $15 a month. Assuming the highest current monthly premium of $15 and the lowest proposed monthly premium of $305.20, if Whirlpool's announced changes are imposed on pre-Medicare Retirees, a pre-Medicare Retiree would see their annual cost of premiums rise from $180 to $3,662.40, an increase of 1,935%.

215. In summary form, a comparison of contractual benefits and Whirlpool's proposed benefits for pre-Medicare Retirees are as follows; this omits the even higher costs associated visits to out-of-network practitioners

	Pre-2011 Program		New Program		
			Rewards Plan		Savings Plan
	Pre-1988 Hires	Post-1988 Hires	Level 1	Level 2	
Premium	$0 to $15, depending on years of pension credit	0 to $15, depending on years of pension credit	$321.06	$321.06	$305.20
Deductible	$0 for Basic $100 for Major Medical	$200	$1,500	$500	$2,000
Coinsurance	0% for Basic 15% for Major Medical	15%	40%	$15 PCP 20% specialist, in-patient, surgery	15%
OOP Maximum	$500 (for Major Medical only)	$800	$8,500	$2,000	$2,000
Lifetime Maximum	$70,000 for Major Medical only	$500,000	$1,000,000	$1,000,000	$1,000,000

See Joint Exhibit 50; Exhibit B to ECF No. 225-2 (Joint Exhibit 121); Plaintiffs' Exhibit 49.

V. Pertinent Medicare.gov Background Material Regarding Post-65 Retirees

216. To understand the impact of Whirlpool's announced changes for Medicare

eligible subclass members, it is necessary to understand the benefits available under Medicare. This is explained on the federal government's website Medicare.gov, which the parties jointly identified as a trial exhibit, Joint Exhibit 125. *See* ECF No. 408.

217. Medicare consists of four parts—Parts A through D. Part A covers hospital services, skilled nursing facility services, home health visits, and hospice services. Defendants' Exhibit 143 at 5.

218. Medicare Part B covers a broad range of medical services and supplies, including physician services, laboratory services, durable medical equipment, and outpatient hospital services. *Id.* In addition to standard monthly premiums, which in 2015 were $104.90, Part B beneficiaries must also pay other out-of-pocket costs when they use services, as well as an annual deductible, which was $147 in 2015. Defendants' Exhibit 143 at 3, 6. In 2016, the standard monthly premium is $121.80, and the annual deductible is $166. ECF No. 435-2. After the annual deductible is met, beneficiaries are responsible for coinsurance costs, which are generally 20% of Medicare-approved Part B expenses. *Id.*; *see also* ECF No. 426 at PageID #: 12710.

219. Medicare Part C provides private plan options, such as managed care (*e.g.*, HMOs and PPOs), for beneficiaries who are enrolled in both Parts A and B. Defendants' Exhibit 143 at 6. Part C, which is also termed Medicare Advantage, essentially wraps all of the Part A, Part B and Part D benefits together into a more comprehensive insurance plan structure. ECF No. 426 at PageID #: 12692.

220. Medicare Part D provides optional outpatient prescription drug coverage.

Defendants' Exhibit 143 at 5. If a retiree purchases a Medicare Prescription Drug Plan, she typically pays a monthly premium, a yearly deductible, copayments, and costs in the coverage gap, sometimes referred to as the "doughnut hole." ECF No. 435-4; ECF No. 426 at PageID #: 12693–94.

221. The coverage gap begins after the retiree and his or her drug plan has spent a certain amount for covered drugs; in 2016, that amount is $3,310. ECF No. 435-5; ECF No. 426 at PageID #: 12693–94. After an individual is in the coverage gap in 2016, she must pay 45% of the plan's cost for covered brand-name prescription drugs and 58% for generic drugs. ECF No. 435-4; ECF No. 435-5. After the individual has spent $4,850 in 2016, she is out of the coverage gap and becomes eligible for "catastrophic coverage," which means she must pay 5% in co-insurance. ECF No. 435-7; ECF No. 426 at PageID #: 12693. By 2020, individuals with Part D coverage will pay 25% co-insurance both before and during the coverage gap. ECF No. 425-6. If the Affordable Care Act were repealed, the provisions filling in coverage during the coverage gap would not be closed and the retirees would again be subject to increased out of pocket costs in the coverage gap. ECF No. 426 at PageID #: 12808.

222. Retirees' expert, Thomas Tomczyk, utilized the Medicare.gov website tool to find Medicare Advantage Plans available for purchase by an individual in the 44641, 44646, 44705, 44709, 44720, and 44721 ZIP code areas (which represent approximately 50% of the retiree and survivor population). Joint Exhibit 126 at 2 (Supplemental Tomczyk Report). As shown on Medicare.gov, for 2016, there are 41 Medicare Advantage plans offering medical and prescription drug coverage, ranging from $0 per month to $188 per month per person. *Id.* None

of these plans, however, provide a level of benefits comparable to the pre-2011 program in this case, and each would cost the retiree significantly more in total out-of-pocket costs. *Id.* Even the most expensive and comprehensive plan, Aetna Medicare Connect Plus PPO, at $188 (using plan data for 2016 from the Medicare.gov website) is inferior to the Pre-2011 Program, Mr. Tomczyk concluded. *Id.* at 3.

223. Under the new program announced by Whirlpool for Medicare-eligible Retirees, Retirees would experience changes in the following areas if they selected the most comprehensive available Advantage plan:

	Whirlpool Pre-2011 Program	**2016 Medicare Advantage Program (Aetna Medicare Connect Plus PPO)***
Premium	$0	$188
Medical Deductible	Pre-1988 hires: $100 Major Medical deductible; no deductible for Basic program Post-1988 Hires: $200 deductible	$500
Inpatient Hospital Co-insurance	Pre-1988 hires: 100% coverage Post-1988 hires: 15% co-payment	$200 per day copay for days 1-4

(5:11CV1676)

Medical Out-of-Pocket Maximum	Pre-1988 hires: $500 for Major Medical Post-1988 hires: $800			$4,500 per individual		
Prescription Drug Plan				Rx coverage included as part of Medicare Advantage plan by same vendor as Medical.		
Prescription Drug Deductible	None for mail order $50 for retail			None		
Prescription Drug – Brand Rx Copays		Mail	Retail		Mail	Retail
	Generic	$1	15%	Preferred Generic	$15	$6
				Generic	$30	$12
	Formulary Brand	$3	15%	Preferred Brand	$117.50	$47
	Non-Formulary Brand	$3	15%	Non-Preferred Brand	50%	50%
Prescription Drug – Coverage Gap	Coverage for generic and brand drugs remains through 'donut hole'			Through the 'donut hole', when Rx costs are between $3,310 and $4,850, participant will pay 58% of the cost of Generic drugs, and 45% of the cost for Brand drugs.		
Total Monthly Premium (65 Year Old)	$0			$188.00 MA Premium ($85.00) Allowance $103.00 Total		

Id. at 3-4. Note that although Mr. Tomczyk has compiled this information for ease of comparison, it is also available in the parties' Welfare Plans and at the Medicare.gov website.

224. Under current prescription drug coverage enjoyed by Medicare-eligible Retirees, there is no coverage gap, or so-called "doughnut hole." ECF No. 259 at PageID #: 9092. Any Medicare Advantage Plans and any Medicare Part D prescription drug plans available to Retirees through an exchange would not include coverage for the doughnut hole. *Id.*; *see also* Joint Exhibit 126 at 9 (showing that doughnut hole applies even under the most comprehensive Medicare Advantage Plan available in Canton).

225. Mr. Osterndorf testified that "we actually looked at the likely increase in total cost to the retirees, the combination of their out-of-pocket costs and their premium costs, and looked at modeling it out for this entire group." ECF No. 426 at PageID#: 1254. He stated that approximately a third of the Medicare-eligible subclass members had a lower net total cost under the proposed changes, that approximately a third had between a zero and $2,000 increase in costs, and approximately a third had between a $2,000 and $4,000 increase in costs. *Id.* The average price increase was a little more than $1,000 of additional annual costs per retiree. *Id.*

226. Medicare-eligible subclass members receiving the Whirlpool stipend could select either a Medicare Advantage Plan or a Medigap plan combined with a prescription drug plan. *Id.* at PageID #: 12740–41, 12748–49.

227. The plan finder function on Medicare.gov is a tool that retirees can use to learn what medical and prescription drug plans are available in their local area, which they identify by entering their zip code. *Id.* at PageID #: 12777.

228. Medigap plans are classified as Medigap A through Medigap Plan N, with some of those plans now defunct. *Id.* at PageID #: 12762. Mr. Osterndorf testified as to three

specific Medigap plans, Medigap Plan C, Medigap Plan F, and Medigap Plan K. *Id.* at PageID #: 12763–65.

229. Specific information regarding Medigap plans is found at Medicare.gov. The information on Medicare.gov for the North Canton area reflects that a person in the North Canton area purchasing Medigap Plan C should expect to pay a monthly premium of $126-$253. If that person purchases a Medigap Plan F, they would pay a monthly premium of $116 to $247. For Medigap Plan K, they would pay a monthly premium of $49 to $91. *See* ECF No. 435-8.

230. Mr. Osterndorf testified that for $50 a month a retiree in the Canton area could purchase a Medigap Plan "in the lower range of the benefits levels . . . something like a Plan K." ECF No. 426 at PageID #: 12764. Plan K would require substantial cost-sharing from Retirees. *See* ECF No. 435-9. For example, because Plan K "pays about half of what Medicare doesn't pay for," a retiree with Medigap Plan K would be obliged to pay 50% of the Part A deductible for hospital stays, all Part B services and supplies, skilled nursing facility co-insurance, and Part A hospice care coinsurance or copayments. *See id.*; ECF No. 435-10; *see also* ECF No. 426 at PageID #: 12763–64. Moreover, Plan K pays nothing toward the Part B deductible, and the retiree would also have to pay $644 for a hospital stay and would be responsible for an out-of-pocket limit of $4,960. ECF No. 435-9; ECF No. 435-10.

231. Medigap plan prices increase for Ohio residents as they grow older. ECF No. 428 at PageID #: 12892, 12794–95. In addition, Medigap plan premiums also increase based on the projected costs of the plans (*i.e.*, to account for healthcare inflation). *Id.* at PageID #: 12895.

232. Mr. Osterndorf also discussed purchase of prescription drug plans under Medicare Part D. *See, e.g.*, ECF No. 426 at PageID #: 12683, 12692, 12748–89. He asserted that the average monthly premium for a prescription drug plan nationwide is approximately $35. *Id.* at PageID #: 12684. Review of these plans on Medicare.gov shows that monthly premiums range from $18.40 to $125.90. ECF No. 435-11. Mr. Osterndorf failed, however, to address the costsharing in these plans.

233. Even among the relatively cheaper plans, the cost-sharing is more burdensome to the retiree. For example, the Symphonix PrimeSaver Rx plan has a monthly premium of $39.70, an annual deductible of $200, co-pays ranging from $1–$6 and co-insurance ranging from 20% – 40%. *Id.* The SilverScript Choice plan, which has a $19.60 premium, does not have a deductible, but requires co-pays of between $3 and $41 and co-insurance of 33% to 44%. *Id.* Furthermore, these plans are subject to the doughnut-hole. ECF No. 259 at PageID #: 9092 (Mohr Phase I testimony).

234. Plaintiffs' Exhibit 57, a printout from Medicare.gov titled "Your Plan Results," shows the 41 Medicare Advantage Plans available in the North Canton area, found using the zip code 44641. *See* Plaintiffs' Exhibit 57; ECF No. 426 at PageID#: 12778, 12779. The first column identified "Estimated Annual Drug Costs" for each of the 41 plans; Mr. Osterndorf explained that "this is the cost out of pocket for the individual for the full year if they had spending exactly like the average Medicare individual." Plaintiffs' Exhibit 57; ECF No. 426 at PageID #: 12780–81.

235. Mr. Osterndorf admitted that under their existing program of benefits,

Medicare-eligible retirees bear little risk with respect to future inflation in healthcare costs. ECF No. 426 at PageID #: 12845. With respect to the proposed stipend program, he testified as follows:

> Q. All right. Whirlpool would no longer shoulder the risk of rising healthcare costs under this stipend program, correct?
>
> A. That's correct.
>
> Q. That would be shifted onto the retirees, correct?
>
> A. That's correct.

Id. at PageID #: 12890.

236. The proposed plan would give Whirlpool control over its future costs. *Id.* at PageID #: 12845–46. Unless Whirlpool chooses to increase the stipend or take some other action (which Whirlpool has never done to date), retirees and not Whirlpool will bear ongoing increases in healthcare costs. *Id.* at PageID #: 12846.

237. The average per capita claims cost refers to "essentially the average cost per [retiree] life" "for the plan." This cost to the plan includes "the combination of what Whirlpool pays and what retirees pay in contributions." *Id.* at PageID #: 12659. Of the $4,342 for each post-65 retiree, Whirlpool was responsible for "somewhere in the range of $4,250," and the retirees' contributions and out of pocket costs made up the remainder. *Id.* at PageID #: 12690. In 2015, Osterndorf testified that the per capita cost for Medicare-eligible retirees was approximately $5,000 per person, for which "Whirlpool is largely responsible." *Id.* at 12690, 12741. In fact, according to the 2015 Valuation Report, the per capita cost was $5,760. Plaintiffs' Exhibit 52 at 24. In contrast, under Whirlpool's proposed plan, "Whirlpool's costs are

going to be fixed at the $85 a month stipend amount, or $1,020 a year." ECF No. 426 at PageID #: 12741.

238. Whirlpool's December 31, 2011 FAS 106 Report showed that medical costs are expected to rise each year, assuming costs would rise by 8 % in 2012, by 7 % in 2013, by 6 % in 2014, and by 5 % each year thereafter. Defendants' Exhibit 132 at 7. Mr. Osterndorf confirmed that these numbers reflect assumed inflation in medical costs. ECF No. 426 at PageID #: 12835. He also agreed that there was nothing showing that retiree stipends would increase in conjunction with the inflation of healthcare costs. *Id.* He has not known Whirlpool to increase its stipend since "the end of the last decade," and has not heard of any plans to do so in 2017. *Id.* at PageID #: 12835–36.

239. As the Court observed in its Summary Judgment Ruling, it is undisputed that Whirlpool's actual and planned reductions as announced in 2011 would decrease the estimated present value of Retirees' current health benefits (as of January 1, 2012) from $169 million to $43 million, resulting in an approximately 75% decrease in estimated present value. ECF No. 191 at PageID #: 6286; *see also* Plaintiffs' Exhibit 23 at 24 (documents from Whirlpool's actuary projecting liability under new and old plan); ECF No. 259 at PageID #: 9090; ECF No. 310 at PageID #: 10179 ("Whirlpool's actual and planned reductions are estimated to decrease the present value of Retirees' current health benefits from $169 million to $43 million-an approximately 75% decrease in the present value of the retiree health benefits in question"); ECF No. 426 at PageID #: 12816–17 (explaining that under the calculations of Whirlpool's actuaries

(including Osterndorf himself), Whirlpool's liability as of 2012 would be reduced by approximately $120 million if their proposed plans were instituted).

240. A 2012 FAS 106 report assumes that Whirlpool would implement its announced changes effective January 1, 2013. *See* Defendants' Exhibit 132. This report concluded that before these changes were implemented, the average per capita claims cost per year for each pre-65 retiree was $10,297 and the cost for each post-65 retiree was $4,342. Defendants' Exhibit 132 at 8.

241. Whirlpool's actuaries recalculated these numbers as of January 1, 2015, including Subclass B in its calculations. *See* Joint Exhibit 123 (analysis of Retiree Welfare Obligations prepared by Towers Watson and dated October 29, 2014); Plaintiffs' Exhibit 54 (letter dated October 31, 2014 from Douglas Darch to William T. Payne. Using these numbers, the present value of the retiree medical benefits for all Subclass Members would decline from $198.4 million under the current benefit scheme to $44.6 million under the benefit scheme that Whirlpool has proposed. As to Medicare-eligible subclass members, the present value of retiree benefits would decline from $176.8 million to $26.9 million. *See* Plaintiffs' Exhibit 54 (October 31, 2014 letter from Douglas Darch to William T. Payne); *see also* Joint Exhibit 126 at 7; ECF No. 426 at PageID #: 12702.

VI. Whirlpool Purports to Reserve its Right to Terminate Even the Proposed Benefits

242. Whirlpool specifically stated in its 2015 Notice that it reserved the right to terminate even the lesser benefits it has announced it intends to impose on pre-Medicare and Medicare-eligible Retirees: "The Company . . . reserves the right, at its discretion, to change or

terminate all or any part of the benefits offered at any time and in any manner." Plaintiffs' Exhibit 47 at 3.

243. Mr. Mohr testified to the same effect at trial:

> Q. You have no—there's no contractual obligation for Whirlpool to continue providing this $85 subsidy to their other retirees in the United States?
>
> A. No, sir.

ECF No. 259 at PageID #: 9095; *see also* ECF No. 426 at PageID #: 12836.

CONCLUSIONS OF LAW

I. Case Law Pertinent to *Reese* Issues

1. Having adjudicated Issue 1, determining that, with the exception of some Subclass D groups, Retirees are entitled to lifetime retiree healthcare benefits (ECF No. 310; ECF No. 373), the Court will now determine Issues Two and Three. *See* ECF No. 207 (Court's order bifurcating trial). Issue Two asks: if the retirement health benefits are vested for life, are they vested at fixed, unchangeable levels—that is, are they vested such that Whirlpool may not unilaterally modify them, however reasonably? ECF No. 226 at PageID #: 7726. Issue Three asks: if the benefits are vested for life, but not at fixed, unchangeable levels (meaning that Whirlpool may reasonably alter them), are the planned modifications in this case unreasonable? *Id.* These questions are referred to as the "*Reese* issues." Retirees carry the burden of proof for both of these issues. *Id.* at PageID #: 7727.

2. Resolution of the *Reese* issues requires application of the Sixth Circuit's decisions in *Reese v. CNH Am. LLC*, 574 F.3d 515 (6th Cir. 2009) ("*Reese I*"), *Reese v. CNH Am.* LLC, 694 F.3d 681 (6th Cir. 2012) ("*Reese II*"), and *Reese v. CNH Industrial N.V.*, 854 F.3d 877 (6th

Cir. Apr. 20, 2017) ("*Reese III*"), as well as consideration of the Supreme Court's 2015 decision in *Tackett v. M & G Polymers USA, LLC*, 135 S. Ct. 926 (2015), and the Sixth Circuit's 2014 decision, *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO-CLC v. Kelsey-Hayes Co.*, 750 F.3d 546 (6th Cir. 2014) ("*USW v. Kelsey-Hayes*"), *vacated on other grounds* 795 F.3d 525 (6th Cir. 2015).

3. In *Reese I*, the Sixth Circuit drew a distinction between the vesting of retirement benefits and "the *scope* of those benefits." *Reese I*, 574 F.3d at 318. As summarized in *Reese II*, *Reese I* addressed two questions: "Did [Defendant] in the 1998 CBA agree to provide health-care benefits to retirees and their spouses for life? And, if so, does the scope of this promise permit [Defendant] to alter these benefits in the future?" *Reese II*, 694 F.3d at 682 (quoting *Reese I*, 574 F.3d at 326).

4. Consistent with *Tackett*, the *Reese I* court applied ordinary contract principles of contract interpretation to determine whether benefits had vested at unchangeable levels. *Reese I*, 574 F.3d at 321. The *Reese I* court concluded that although eligibility for lifetime healthcare benefits had vested, in light of the parties' practice of altering healthcare benefits for past retirees in a later CBA, the benefits were not vested at fixed, unchangeable levels. *Id.* at 325–27; *see also Reese II*, 694 F.3d at 684 (discussing *Reese I*'s holding). In other words, the court found that "the parties' actions and a common understanding of welfare benefits" confirmed that defendant-employer CNH could make "reasonable" changes to retiree healthcare benefits. *Reese I*, 574 F.3d at 325–27. The Sixth Circuit emphasized that the 1998 *Reese* CBA "reset the rules" by imposing managed care on existing retirees. *Id.* at 325. Accordingly, the court reasoned:

> no party to this case—the union, the employer, the retirees—viewed the benefits [as unalterable]. The 1998 CBA not only set the rules for employees who retired during the next six years of that CBA; it also *reset* the rules for employees who retired after July 1, 1994, which is inconsistent with the notion that the 1990 and 1995 CBAs . . . created unalterable, irreducible health benefits.

Id. at 324.

5. Based on its conclusion that reasonable changes were permitted, the Sixth Circuit remanded to the district court with instructions to determine whether the specific changes proposed by CNH were reasonable. The Sixth Circuit listed three considerations: whether the modified plan provided benefits "reasonably commensurate" with the old plan; whether the proposed changes were "reasonable in light of changes in health care"; and whether the benefits were "roughly consistent with the kinds of benefits provided to current employees." *Reese II*, 694 F.3d at 684 (discussing *Reese I*, 574 F.3d at 326).

6. Following the remand order, the *Reese* plaintiffs filed a petition for rehearing with the Sixth Circuit, which the court denied. *Reese v. CNH America LLC*, 583 F.3d 955 (6th Cir. 2009). Judge Sutton, who authored both *Reese I* and *Reese II*, wrote a concurrence, elaborating on the *Reese* analysis. Judge Sutton explained that "there was something different about this case—something that implicated the distinct question of what 'vesting' means in this context." *Id.* at 956 (Sutton, J., concurring); *see also* ECF No. 191 at PageID #: 6333 (quoting Judge Sutton and emphasizing that "*Reese* is . . . wedded to the facts of that case."). Judge Sutton also stated that the parties were free to develop evidence on remand, and that "[t]hat evidence may show that plaintiffs should win as a matter of law because the prior retirees either approved the

changes or they did not diminish the nature of the benefits package that existed upon retirement." 583 F.3d at 955.

7. On remand from *Reese I*, the district court concluded that CNH could not impose the proposed benefit reductions absent union agreement, and found that the union had not agreed. *Reese v. CNH Global, N.V.*, 2011 WL 824585 (E.D. Mich. March 3, 2011). On appeal in *Reese II*, the Sixth Circuit reversed, explaining that in holding that CNH could reasonably alter retiree benefits, "we recognized that CNH could alter them *on its own,* not as part of a new collective-bargaining process." *Reese II*, 694 F.3d at 685. The court emphasized that "[p]ast changes to retiree healthcare benefits had not been collectively bargained." *Id.* Because the district court had failed to answer the second question in the *Reese I* analysis ("what does vesting mean in this context?"), the Sixth Circuit remanded again.

8. In *Reese II*, the Sixth Circuit cited a number of factors to guide the district court in its determination as to what would constitute "reasonable" alteration in health care benefits:

> The case turns in part on facts not in the record: How much did retirees pay for their health care under the old plan? How much did CNH pay? How much will the retirees and CNH each pay under the new plan, and how quickly are each side's costs likely to grow? How does the quality of care provided under the old plan compare to the quality of care under the new plan? Do the retirees' benefits differ in material respects from those offered to current employees and people retiring today? How do the benefits compare to benefits offered by other companies in similar industries?

Id. at 685.

9. This Court addressed *Reese I* and *Reese II* in its Summary Judgment Ruling, first observing that "Whirlpool reads *Reese* more liberally than is warranted." ECF No. 191 at PageID #: 6332. The Court summarized the Sixth Circuit's *Reese* holding as follows: "the Sixth

Circuit concluded that even though our vesting jurisprudence required the conclusion that the CBA promised healthcare benefits to retirees for life, neither the CBA nor the extrinsic evidence supported the finding, under the particular facts of *Reese*, that those benefits were irreducible." *Id.* at PageID #: 6333 (citations omitted).

10. On remand from *Reese II*, the *Reese* district court concluded that although CNH was permitted to make reasonable modifications to retiree healthcare benefits, CNH's proposed modifications were not reasonable under the principles set forth in *Reese I* and *Reese II*. *Reese v. CNH Industrial N.V.*, 143 F. Supp. 3d 609 (E.D. Mich. 2015).

11. In *Reese III*, the Sixth Circuit affirmed the *Reese* district court's conclusion that benefits were vested, but concluded that the district court had erred in its reasonable modification analysis, and remanded the case again.[3] *Reese III*, 854 F.3d at 887.

12. In *Reese III*, Judge Gibbons, delivering the opinion of the court, criticized the

[3] The Court observes that the "reasonable modification" portion of *Reese III* (as opposed to its vesting analysis) may have no controlling weight, as only one of the judges on the *Reese III* panel expressly endorsed that ruling. Judge Gibbons delivered the opinion of the court in her own name only. Judge Sutton dissented, without endorsing Judge Gibbons' reasonable modification discussion. Judge Donald concurred in the judgment because she agreed with Judge Gibbons that the district court's vesting determination should be affirmed, but specifically reasserted her "disagreement with this Court's previous determination that despite a lifetime vesting, CNH may unilaterally modify the scope of the retirees' healthcare benefits." *Reese III*, 854 F.3d at 887 (Donald, J., concurring). Judge Donald cited the law-of-the-case doctrine, and "recognize[d] the limitations—although not the impossibility—in reaching a result that is inconsistent with that reached at this Court's first review of this case." Therefore, although Judge Donald accepted the "result" in *Reese I* and perhaps *Reese II*, she did not clearly join in the additional reasonable modification discussion contained in *Reese III*. Nonetheless, in an abundance of caution, this Court will apply *Reese III* in addition to *Reese I* and *Reese II*.

district court's decision on several grounds. First, the district court failed to consider the retirees' access to new and better medical procedures—increased benefits enjoyed by the plaintiff retirees under the new proposed plan. *Id.* at 884–85. Second, the district court erred because in assuming that the retirees would bear the burden of all the costs shifted away from their former employer, when, in fact, a substantial portion of the costs would be covered by the federal government. *Id.* at 885. Additionally, the district court erred by placing undue weight on a subset of thirteen class members who would be subject to drastic cost increases under the new plan, although *Reese III* concluded that the district court was right to acknowledge the effect on this group. *Id.*

13. The Sixth Circuit noted that the district court further erred in its reasonableness analysis, stating that the district court should have found that "the mere fact that the proposed plan was equal in substance to the plan offered to current employees and retirees weighs in favor of reasonableness." *Id.* The appellate court also emphasized that the proposed plan placed the plaintiff retirees in "substantially the same position in terms of healthcare benefits as current employees and retirees," while the plaintiff retirees paid less for these same benefits. *Id.* The Sixth Circuit also found that the district court erred by discounting the utility of comparators in determinating whether that the proposed plan was reasonable in light of changes to healthcare. *Id.* Finally, the district court mistakenly held that it could not consider the reasonableness of the proposed plan in piecemeal fashion, a holding challenged by the defendant employer.

14. The Sixth Circuit also discussed the *Reese* analysis at length in *USW v. Kelsey-Hayes*. Like Whirlpool's treatment of Medicare-eligible subclass members, the employer in *USW v. Kelsey-Hayes* sought to terminate group health coverage and instead provide retirees with a HRA contribution. *USW v. Kelsey-Hayes*, 750 F.3d at 550. The Sixth Circuit explained that "the HRAs differed from the prior group coverages in that they shifted risk—and potentially costs—off of defendants and on to plaintiffs." *Id.* The court did not reach the *Reese* issues, instead concluding that the employer's implementation of HRAs breached the controlling CBAs, "not because HRAs are 'unreasonable' under the *Reese* cases, but because the HRAs are simply not what the parties bargained for in the first instance." *Id.* at 555.

15. The Sixth Circuit explained:

> Again, upon the commencement of their retirement, plaintiffs were entitled to the continuation of the same coverages they had as employees. Upon retirement, they all had company-provided group health insurance coverage, with Kelsey-Hayes paying the full premium for that insurance. The HRAs are not company-provided group insurance; they are health care vouchers—essentially cash. According to Kelsey-Hayes' own representatives, far from the company paying the full premium, the HRAs shift significant risks, including the potential costs of medical care, from the company to plaintiffs. Moreover, not only did defendants refuse to fund the HRAs past 2013, they failed to even acknowledge that the right to health care was vested in the first place; the pamphlet sent to plaintiffs about the HRAs indicated that, so far as TRW was concerned, the HRAs were not vested and could be terminated at any time. For these reasons, we conclude that the implementation of the HRAs violated the CBAs.

Id.

16. As noted, *USW v. Kelsey-Hayes* was vacated on other grounds—the Sixth Circuit remanded for reconsideration in light of the Supreme Court's decision in *Tackett*, noting that

Tackett had overruled *Yard-Man*. *See* *United Steel, Paper & Forestry, Rubber Mfg. Energy, Allied Indus. & Service Workers Intern. Union v. Kelsey-Hayes Co.*, 795 F.3d 525, 526 (6th Cir. 2015). On remand from the Sixth Circuit, the *USW v. Kelsey-Hayes* district court again concluded that benefits were vested, finding that application of *Tackett* did not change this result. *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Induc. & Service Workers Intern. Union v. Kelsey-Hayes Co.*, No. 4:11CV15497, 2016 WL 337467 (E.D. Mich. Jan. 28, 2016). The district court made no mention of the *Reese* issues. Because benefits were vested, if the court had doubted whether the Sixth Circuit's *Reese* analysis continued to hold, it would have been obligated to conduct its own *Reese* analysis. Instead, the district court concluded that, consistent with the Sixth Circuit's *Reese* analysis in *USW v. Kelsey-Hayes*, replacing a vested right to retiree healthcare benefits with a HRA arrangement was contrary to the parties' contracts.

17. Other courts have also embraced the *USW v. Kelsey-Hayes* analysis. In *Int'l Union, United Mine Workers of Am. v. Consol Energy, Inc.*, No. 1:16-12506, 2017 WL 1044696 (S.D. W.Va. Mar. 17, 2017), the employer, like Whirlpool and like the employer in *USW v. Kelsey-Hayes*, sought to terminate employer plan group insurance benefits and replace them with an HRA scheme, which it reserved the right the terminate at any time. In granting the retirees' motion for preliminary injunction, the Southern District of West Virginia reasoned, in part, that by replacing the employer plan with an HRA:

> the retirees would be encumbered with novel administrative burdens and risk. Courts addressing employers' similar attempts to unilaterally terminate group health insurance and substitute an HRA scheme have recognized the considerable burdens shifted from employer to retired beneficiary. In *United Steel Workers v. Kelsey-Hayes Co.*, 2016 WL 337467, at *2 (E.D.Mich. Jan. 28, 2016), the court upheld its prior injunction in a case where the employer terminated group health

> insurance for retirees and substituted an HRA scheme. This action led Plaintiffs to allege: "the change to HRAs meant that retirees bore the administrative and financial risks and responsibilities formerly borne by Defendants [and] . . . the HRA program subjected them to time-consuming and frustrating administrative burdens, anxiety, and uncertainty." *Id.* at *2; *see also United Steel Workers v. Resolute Forest Products, Inc.*, 1:16-CV-00048, Doc.42 (E.D. Tenn. Mar. 1, 2017) (denying motion to dismiss Plaintiffs' complaint that the employer "replaced these [group insurance] health care benefits with 'limited funds' provided through a Health Reimbursement Account.").
>
> The same administrative burdens and risk shifting threaten harm to Employer Plan beneficiaries in this case. Starting April 1, 2017, the retiree beneficiaries would be encumbered with new administrative burdens and risks that Defendant CONSOL Energy had agreed in the NBCWA and Employer Plan to carry for their lifetimes. Even if the HRAs do ultimately end up paying, Defendant CONSOL Energy has yet to implement a scheme to protect retirees from having to first pay out-of-pocket, and then wait for reimbursement. Consequently, Plaintiffs will be irreparably harmed were this court to refuse to preserve the status quo with a preliminary injunction.

2017 WL 1044696, at *8 (some citations omitted).

18. The *USW v. Kelsey-Hayes* court's *Reese* analysis is entirely consistent with *Tackett*. As this Court explained in its October 30, 2015 decision granting in part and denying in part Whirlpool's Motion for Reconsideration (ECF No. 332), the Supreme Court, in *Tackett*, "ordered courts to use ordinary principles of contract law and first look to the language of CBAs to ascertain the intention of the parties . . . ." *Zino v. Whirlpool Corp.*, 141 F. Supp. 3d 762, 766 (N.D. Ohio Oct. 30, 2015) (citing *Tackett*, 135 S.Ct. at 935). The *Tackett* Court rejected the Sixth Circuit's use of the inference in favor of retirees, first adopted in *Yard-Man*, because the inference "violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements." *Tackett*, 135 S.Ct. at 935. The Supreme Court reasoned that this inference "has no basis in ordinary principles of contract law and it

distorts the attempt 'to ascertain the intention of *the parties.*'" *Id.* (quoting 11 R. Lord, Williston on Contracts § 30:2, p. 18 (4th ed. 2012)).

19. The Supreme Court in *Tackett* also criticized the Sixth Circuit for relying on speculation rather than on evidence. The Sixth Circuit had inferred in *Yard-Man* that benefits due to those achieving the "status" of retiree would likely be intended to continue as long as the individual was a retiree. The Supreme Court concluded that this "assessment" was "too speculative and too far removed from the context of any particular contract to be useful in discerning the parties' intention" and was not derived "from record evidence." *Id.*

20. *Tackett* therefore fully supports the Sixth Circuit's application of *Reese* in *USW v. Kelsey-Hayes*. As explained in *USW v. Kelsey-Hayes*, the scope of vested benefits could be unilaterally altered in *Reese* because "that is what the evidence indicated the parties intended in that case, not because all vested health care rights in all CBAs are subject to unilateral alteration as a matter of law." *Tackett* is likewise founded on the parties' intent, and requires application of ordinary contract principles and record evidence, not inferences and speculation. *See also* *UAW v. Loral Corp.*, 107 F.3d 11, 1997 WL 49077, at *3 (6th Cir. 1997) ("It might well be sensible for the parties to agree to allow the employer to retain some flexibility to deal with future vicissitudes, but such an arrangement must be agreed to in the contract. It cannot be imposed unilaterally by the employer or the courts.")

II. Whether *Gallo* Advances Whirlpool's *Reese* Arguments

21. Whirlpool has argued that the Sixth Circuit's divided panel ruling in *Gallo v. Moen*, 813 F.3d 265 (6th Cir. 2016), is dispositive. *See* ECF No. 430 at PageID #: 13109–12 (Defendants' Memorandum in Support of Motion for Judgment on Partial Findings (ECF No. 429)); *see also Cole v. Meritor*, 855 F.3d 695 (6th Cir. 2017). Whirlpool contends that under *Gallo*, "[f]or the Court to find that retiree healthcare benefits are vested at fixed, unchangeable levels, Plaintiffs had to prove that there is language within the agreements promising to provide unalterable healthcare benefits to retirees for life." ECF No. 430 at PageID #: 13109. The Court rejects Whirlpool's reading of *Gallo*, and concludes that this case has little bearing on the *Reese* analysis in this case.

22. First, Whirlpool misreads *Gallo*. The case does not hold that retirees can prevail only by pointing to contract language "promising to provide unalterable healthcare benefits to retirees for life." In fact, the *Gallo* court expressly noted that a clear statement is not required:

> *Tackett* does not create [a clear-statement rule]. It tells courts to apply "ordinary principles of contract law"—identifying relevant principles in this setting along the way—and tells courts to follow those principles where they lead. . . . In overruling *Yard-Man*, in short, *Tackett* does not create a clear-statement rule in the other direction. It instead eliminates the use of inferences and implications not grounded in "ordinary principles of contract law" and explains the kinds of tools properly deployed in this setting.

Gallo, 813 F.3d at 274 (citing *Tackett*, 135 S.Ct. at 933).

23. The *Gallo* panel's rejection of a clear-statement requirement is entirely consistent with the unanimous Sixth Circuit panel ruling in *Tackett III*, 811 F.3d 204, issued just

weeks prior to the divided *Gallo* case. As in *Gallo*, the Sixth Circuit in *Tackett III* recognized that the Supreme Court "declined to adopt an 'explicit language' requirement in favor of companies":

> [T]he Supreme Court's decision prevents us from presuming that "absent specific durational language referring to retiree benefits themselves, a general durational clause *says nothing* about the vesting of retiree benefits," we also cannot presume that the *absence* of such specific language, by itself, evidences an intent *not* to vest benefits or that a general durational clause says *everything* about the intent to vest.

811 F.3d at 209.

24. The *Tackett III* court also relied on Justice Ginsburg's *Tackett* concurrence and its identification of the following four "ordinary principles of contract law":

- Under the cardinal principle of contract interpretation, the intention of the parties, to be gathered from the whole instrument, must prevail.
- [W]hen the contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties. . . . [F]or example, the parties' bargaining history.
- No rule requires "clear and express" language in order to show that parties intended health-care benefits to vest.
- Constraints upon the employer after the expiration date of a collective bargaining agreement . . . may be derived from the agreement's "explicit terms," but they may arise as well from implied terms of the expired agreement.

Id. (citing *Tackett,* 135 S. Ct. at 937–38 (Ginsburg, J., concurring) (citations omitted)).

25. In its final remand directions, the *Tackett III* Court instructed the district court to apply ordinary contract principles, "without a 'thumb on the scale' in favor of *either* party." *Id.* at 210.

26. In *Reese III*, the Sixth Circuit reiterated *Tackett III*'s holding and refuted Whirlpool's interpretation of *Gallo*. Notably, *Reese III* confirmed *Tackett III*'s recitation of the above-quoted ordinary contract principles. *Reese III*, 854 F.3d at 881 (quoting *Tackett III*, 811 F.3d at 208–09 and *Tackett*, 135 S.Ct. at 937–38 (Ginsburg, J., concurring)).

27. The *Reese III* court continued, explaining the controlling *Tackett III* analysis:

> The *Tackett III* court then proceeded to discuss what effect the absence of any durational language has on the vesting of rights. It held that:
>
> > [W]hile the Supreme Court's decision [in *Tackett*] prevents us from presuming that "absent specific durational language referring to retiree benefits themselves, a general durational clause says nothing about the vesting of retiree benefits," we also cannot presume that the absence of such specific language, by itself, evidences an intent not to vest benefits or that a general durational clause says everything about the intent to vest.
>
> *Tackett III*, 811 F.3d at 209. The *Tackett III* court highlighted that the retirees in that case acknowledged that the agreements at issue lacked clear and express language vesting benefits, but still remanded the case to the district court so that it could determine whether certain documents were part of the agreements or "may otherwise serve as extrinsic evidence."at 210 & n.3.

Reese III, 854 F.3d at 882.

28. The Sixth Circuit's discussion of *Tackett* and *Tackett III* in *UAW v. Kelsey-Hayes Company*, 854 F.3d 862 (6th Cir. April 20, 2017) is entirely consistent with the *Tackett* analysis in *Reese III*. The *UAW v. Kelsey-Hayes* court concluded:

> overruling the *Yard-Man* inference did "not preclude the conclusion that the parties intended to vest lifetime benefits for retirees." The Court's language repeatedly emphasized that a court should look to ordinary contract interpretation, remove any thumb on the scale in either direction, and look to the intent of the parties in the instant case.

> On remand [in *Tackett III*], we noted a non-exhaustive list of contract principles to apply when interpreting the duration of healthcare benefits in a CBA. First and foremost, *Tackett III* emphasized that "[a]s with any other contract, the parties' intentions control." This was highlighted in particular by citing Justice Ginsburg's concurrence: "Under the cardinal principle of contract interpretation, the intention of the parties, to be gathered from the whole instrument, must prevail."

Id. (citations omitted).

29. Once again in *UAW v. Kelsey-Hayes*, the Sixth Circuit reiterated the following from *Tackett III*:

> [W]hile the Supreme Court's decision [in Tackett] prevents us from presuming that "absent specific durational language referring to retiree benefits themselves, a general durational clause says nothing about the vesting of retiree benefits," we also cannot presume that the absence of such specific language, by itself, evidences an intent not to vest benefits or that a general durational clause says everything about the intent to vest.

Id. at 867 (quoting *Tackett III*, at 811 F.3d at 209).

30. Presaging *Tackett III*, *Reese III*, *UAW v. Kelsey-Hayes*, and *Gallo* on the clear statement point, this Court rejected Whirlpool's argument that retirees must point to specific vesting language to prove their case:

> Almost as if to prevent the error made by Defendants, the *concurring opinion* clearly articulates that "no rule requires 'clear and express' language in order to show that parties intended healthcare benefits to vest." *Tackett*, 135 S.Ct. at 938 (Ginsburg, J., concurring). Both the *Tackett* majority and concurring opinions cite to an earlier Supreme Court decision in which the Supreme Court stated "'[c]onstraints upon the employer after the expiration date of a collective bargaining agreement,' we have observed, may be derived from the agreement's 'explicit terms,' but they 'may arise as well from . . . implied terms of the expired agreement.'" *Id.* (citing *Litton Financial Printing Div., Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190, 203, 2017 (1991)). Accordingly, despite Defendants' urging and reliance on case law from other circuits, the Court will not adopt the clear and express language standard.

ECF No. 360 at PageID #: 10742–43.

31. Even if *Tackett III* and *Gallo* are seen to be in conflict, *Reese III* confirms that *Tackett III* must control:

> To the extent that *Tackett III* and *Gallo* are in conflict—a dispute about which reasonable minds may differ—*Tackett III*, being first in time, must govern. To so hold is not an endorsement of *Tackett III*'s reasoning nor is it an indictment of Gallo's; rather, it simply demonstrates adherence to this court's precedent. *Darrah v. City of Oak Park*, 255 F.3d 301, 309–10 (6th Cir. 2001) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)); *see also* 6th Cir. R. 32.1(b) ("Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc.").

854 F.3d at 883 n.2. *See also UAW v. Kelsey Hayes*, 854 F.3d at 872 ("The dissent's reading of *Gallo* creates an unnecessary conflict between *Gallo* and our decision in *Tackett III*, which as a preceding published opinion controls.").

32. Furthermore, Whirlpool's reading of *Gallo*, with respect to general durational clauses, is incorrect. Although *Gallo* found the absence of contract language reflecting a commitment to "provide unalterable healthcare benefits to retirees and their spouses for life" to be a critical starting point, it did not hold that the absence of such specific language or the presence of a general durational clause was dispositive—such a holding would have been plainly at odds with *Tackett* and *Tackett III*. Rather, *Gallo* relied upon a number of other factors present in *Gallo* but absent in this case, and, moreover, made clear that its holding was specific to "this set of contracts." *Gallo*, 813 F.3d at 274. None of the *Gallo* factors are present in this case.

33. Finally and in any event, even if (1) Whirlpool's reading of *Gallo* to require clear language were correct; (2) *Tackett III*, *Reese III*, and *UAW v. Kelsey-Hayes* had never been decided; and (3) this Court has misread *Tackett*, none of this would alter the *Reese* analysis. *Gallo* simply does not address the *Reese* standards. Even assuming that *Gallo* overruled *Tackett*

III and requires a clear statement to establish vesting, it does not follow that an additional clear statement would be required to preclude unilateral benefit reductions.

III. Issue 1: Retirees Prevail on the First *Reese* Question Because the Governing Contracts as Well as the Extrinsic Evidence Demonstrate That the Bargaining Parties Did Not Intend to Give Whirlpool a Right to Reduce Retiree Healthcare Benefits

34. The Court finds and concludes that Retirees' healthcare benefits are vested at the level in place before Whirlpool unilaterally reduced prescription drug benefits in 2011, and that the scope of these benefits is not subject to reduction under the principles applied in *Reese I*, *Reese II*, and *Reese III*. The evidence unequivocally demonstrates that the bargaining parties intended that the vested retiree medical benefits of all class members not be subject to reduction (whether "reasonable" or otherwise). This ruling applies to pre-Medicare Retirees, Medicare-eligible Retirees, Whirlpool's 2011 prescription drug co-payment increase, and any undisclosed material alterations to retiree medical benefits that Whirlpool may have already made or may attempt to make in the future.

35. Furthermore, because the parties expressly agreed that retirees would receive Company-provided benefits (with no mention of anything akin to a HRA stipend), it is clear that they did not intend to give Whirlpool a right to terminate Company provided benefits and replace them with a monthly HRA contribution, which Whirlpool maintains it is free to eliminate entirely at any time. As in *USW v. Kelsey-Hayes*, the Court rejects Whirlpool's proposed changes for Medicare-eligible Retirees "not because HRAs are 'unreasonable' under the *Reese* cases, but because the HRAs are simply not what the parties bargained for in the first instance." *USW v. Kelsey-Hayes*, 750 F.3d at 555.

36. It is also clear that the parties did not intend to give Whirlpool a right to impose a massive premium increase on pre-Medicare Retirees. Under the governing Welfare Plans, pre-Medicare retirees pay monthly individual premiums of $0, $10, or $15, depending on years of pension credit. Under Whirlpool's proposed pre-Medicare plan for 2016, retirees would be responsible for monthly individual premiums of either $305.20 or $321.06. Assuming the highest Welfare Plan monthly premium of $15 and the lowest proposed plan monthly premium of $305.20, a pre-Medicare Retiree would see the annual cost of premiums rise from $180 to $3,662.40, an increase of almost 2,000%. As with Whirlpool's changes for Medicare-eligible retirees, this does not remotely satisfy the *Reese* requirement that any changes, assuming they are permitted, be "reasonably commensurate" with bargained-for benefits.

37. The parties repeatedly specified in their contracts that premiums would range between $0 and $15. Accordingly, it does not matter whether the massive premium increases proposed by Whirlpool are "unreasonable"—because the parties bargained for and agreed to specific premiums, *Reese* is not implicated.

A. The Court Need Not Reach *Reese* Issue I as to Medicare-eligible Retirees Because the Parties Did Not Intend to Allow Whirlpool to Eliminate Company-provided Retiree Medical Benefits and Replace Them with a Monthly HRA Stipend

38. As shown in the Findings of Fact, *supra*, the governing Welfare Plans specify the healthcare benefits that are to be provided to retirees, and are absolutely clear that retiree healthcare is to the take the form of Company-provided coverage. The contracts include no hint that the parties intended to allow replacement of this benefit with a HRA stipend like the one Whirlpool now seeks to impose on Medicare-eligible class members.

39. Starting with the 1980 Contract Settlement, the parties agreed that "the Hoover Company assumes responsibility for paying premiums to the insurance carrier for future retiree's medical insurance in accordance with the terms and conditions of the Plan." Joint Exhibit 14 at 3 (1980 Contract Settlement). Applicable Sub-Agreement provisions in later agreements carried this provision through in subsequent bargaining. *See* Joint Exhibit 16 at 58 (1983 Agreement); Joint Exhibit 22 at 65 (1986 Agreement); Joint Exhibit 26 at 66 (1988 Agreement).

40. The parties similarly agreed in the 1992, 1995, 2000, and 2003 Welfare Plans that retiring employees "shall have the opportunity to continue elements of the medical insurance in accordance with the following principles," with those principles including specific monthly premiums before the age of 65, and no premiums upon reaching 65. *See* Joint Exhibit 30 § 3.01(c)(iii) (1992 Welfare Plan); Joint Exhibit 36 § 3.01(c)(iii) (1995 Welfare Plan); Joint Exhibit 42 § 3.01(c)(iii) (2000 Welfare Plan); and Joint Exhibit 50 § 3.01(c)(iii) (2003 Welfare Plan). These Welfare Plans further specify that "eligible retired employees who were hired prior to July 8, 1988, will be eligible to retain Basic and Major Medical coverage," and "shall also be eligible for a mail order prescription drug program with a $3.00 per prescription deductible ($1.00 for generic prescriptions) in addition to the prescription coverage of the Major Medical Plan." *Id.* Retirees hired after July 8, 1988 "will be eligible to retain the Comprehensive Plan," and "eligible prescription drug coverage shall be available through the Comprehensive Plan." *Id.*; Joint Exhibit 30 § 2.09(c) (1992 Welfare Plan); Joint Exhibit 36 § 2.09(c) (1995 Welfare Plan); Joint Exhibit 42 § 2.09(c) (2000 Welfare Plan); and Joint Exhibit 50 § 2.09(c) (2003 Welfare Plan).

41. Therefore, under the plain language of the parties' agreements, the parties intended that Whirlpool provide "medical insurance," Basic and Major Medical coverage or the Comprehensive Plan, as well as prescription drug coverage, with no premiums for retirees age 65 and older.

42. The Court concludes that the parties' contractual undertakings cannot reasonably be read to permit elimination of contracted-for healthcare coverage and the substitution of a discrete and apparently frozen monthly HRA contribution that immediately shifts costs, as well as all risk of future cost increases, to Retirees—a HRA contribution that Whirlpool maintains it may terminate entirely at any time. Whirlpool's announced changes as to Medicare-eligible retirees are contrary to the parties' intent as expressed in the plain language of their contracts.

43. The extrinsic evidence further shows the parties' intent that Whirlpool provide Retirees with healthcare benefits, not a limited stipend terminable at any time. For example, Mr. Schiltz testified that the 1980 Contract Settlement created an obligation on the part of the Company to fund retiree health benefits, and also stated during 1992 negotiations: "Everybody in this room, we made a promise that when you retire, you're going to have retiree medical insurance. So we have to estimate what the value of that is.'" ECF No. 206 at PageID #: 6734 (Schiltz Dep.); Joint Exhibit 34 at 4426–29 (1992 Minutes).

44. The Sixth Circuit's analysis in *USW v. Kelsey-Hayes*, vacated on other grounds, is on point and highly persuasive. The Sixth Circuit explained that the HRA contribution model that the employer had proposed differed from the prior group coverages in that they "shifted

risk— and potentially costs—off of defendants and on to plaintiffs." *USW v. Kelsey-Hayes*, 750 F.3d at 550. The *USW v. Kelsey-Hayes* retirees bore the risk of loss because the company's HRA contribution was fixed, at $15,000 for 2012 and $4,800 for 2013.

45. In this case, Whirlpool has also announced a fixed HRA contribution, but it is far smaller than the contributions at issue in *USW v. Kelsey-Hayes*—just $1,020 per year ($85 x 12 months). Whirlpool, therefore, sought to provide Retirees with a 2016 HRA contribution that is worth just 6.8% of what the *USW v. Kelsey-Hayes* employer proposed to provide in 2012, and just 42% of what that employer proposed to provide in the 2013.

46. Moreover, and as the Sixth Circuit concluded in *USW v. Kelsey-Hayes*, medical costs continue to rise over time, meaning that Whirlpool's proposed 2016 contribution of $1,020 is worth even less in comparison to the 2012 and 2013 *USW v. Kelsey-Hayes* contributions. *See USW v. Kelsey-Hayes*, 750 F.3d at 557 ("The cost of health insurance premiums increases every year, and this growth shows no signs of slowing"). The Sixth Circuit continued, quoting from a law review article:

> A new study by the Kaiser Family Foundation that tracks employer-sponsored health insurance shows the average annual premium for family coverage in 2011 reached $15,073, an increase of nine percent over the previous year. The study indicates that the cost of family coverage has almost doubled in just one decade. As private insurers raise premium rates to meet the projected costs of health care, the burden of rising premiums falls on employers who often shift the rise in costs to employees. It is projected that rising private health insurance premiums will have an adverse effect on wage growth as well as the standard of living that individuals will be able to afford."

Id. (quoting Susan Adler Channick, *Health Care Cost Containment: No Longer an Option But a*

Mandate, 13 Nev. L.J. 792, 794–95 (2013)); *see also* Joint Exhibit 126 at 7 (Supplemental Tomczyk Report showing that medical costs have been on the increase for the past 50 years, with charts illustrating how the Medicare Part A deductible, an indication of cost increases for Medicare retirees, has increased since Medicare's inception, as well as the increase in the cost of Medicare Supplement and Prescription Drug plans since 1999).

47. Furthermore, although the Sixth Circuit assumed that the *USW v. Kelsey-Hayes* employer would continue its contributions for two years, Whirlpool has said nothing concerning continuing contributions for a second year, and has expressly reserved its right to terminate its HRA contributions at any time. *See* Plaintiffs' Exhibit 47 (2015 Notice advising Retirees that Whirlpool "reserves the right, at its discretion, to change or terminate any part of the benefits offered at any time and in any manner").

48. The *USW v. Kelsey-Hayes* panel also discussed the language of the governing CBA. Therein, the employer promised retirees "continuance" of "[t]he healthcare coverages [that she] ha[d]…at the time of retirement," and also promised to pay the full premium. *USW v. Kelsey-Hayes*, 750 F.3d at 554. In this case, the governing Welfare Plans similarly promise that retiring employees "shall have the opportunity to continue elements of the medical insurance." *See* Fact No. 43, *supra*. That medical insurance is specifically identified as Whirlpool's Basic and Major Medical coverage or Whirlpool's Comprehensive Plan (depending on date of hire), as well as prescription drug coverage with co-payments varying between $1 and $3. *See id.*

49. The Sixth Circuit concluded in *USW v. Kelsey-Hayes* that the employer's

implementation of HRAs breached the controlling CBAs, "not because HRAs are 'unreasonable' under the *Reese* cases, but because the HRAs are simply not what the parties bargained for in the first instance." *USW v. Kelsey-Hayes*, 750 F.3d at 554. The court explained:

> Again, upon the commencement of their retirement, plaintiffs were entitled to the continuation of the same coverages they had as employees. Upon retirement, they all had company-provided group health insurance coverage, with *Kelsey-Hayes* paying the full premium for that insurance. The HRAs are not company-provided group insurance; they are health care vouchers—essentially cash. According to *Kelsey-Hayes*' own representatives, far from the company paying the full premium, the HRAs shift significant risks, including the potential costs of medical care, from the company to plaintiffs.

Id.

50. The Sixth Circuit found further support for its rejection of Kelsey-Hayes' HRA proposal in the fact that, like Whirlpool, Kelsey-Hayes reserved its right to terminate its HRA contributions. *See id.* ("Moreover, not only did defendants refuse to fund the HRAs past 2013, they failed to even acknowledge that the right to health care was vested in the first place; the pamphlet sent to plaintiffs about the HRAs indicated that, so far as TRW was concerned, the HRAs were not vested and could be terminated at any time").

51. Significantly, the evidence in *USW v. Kelsey-Hayes* showed that the average amount a retiree would spend per year on health care under the proposed plan was $3,000, but the employer funded the HRAs well in excess of that amount—$15,000 in the first year, and $4,800 in the second. *Id.* at 557. After noting that Kelsey-Hayes had not committed to fund the HRAs for more than two years, the Sixth Circuit concluded: "it does not follow that no retirees will in the future exceed the level of HRA funding simply because no retiree has done so in the

past. The cost of health insurance premiums increases every year, and this growth shows no signs of slowing." *Id.* (citation omitted).

52. In this case, unlike in *USW v. Kelsey-Hayes*, Retirees' costs will not be fully funded in the first year, or in any year. Rather, contrary to what the parties intended and what the parties contracted for, under Whirlpool's announced changes, most Medicare-eligible Retirees would pay far more for their healthcare coverage, and all such Retirees would bear all risk of future price increases.

53. Whirlpool attempts to distinguish *USW v. Kelsey-Hayes* on the following ground: "Unlike *Kelsey-Hayes* . . . the Company has implemented numerous unchallenged changes to Plaintiffs' healthcare benefits throughout the years that 'reset the rules' for those individuals. The *USW v. Kelsey-Hayes* Court found this distinction 'critical' in discussing *Reese*." ECF No. 430 at PageID #: 13118. Whirlpool has taken this reference out of context. Before making this observation, the *USW v. Kelsey-Hayes* court had already held that it would not reach the *Reese* analysis because the parties had not bargained for a HRA contribution. Responding at the end of its ruling to the defendants' argument that *Reese* controlled, the court stated: "we note that this case is factually different from the *Reese* cases *as well*." *USW v. Kelsey-Hayes*, 750 F.3d at 556 (emphasis added). The court then cited various distinctions between the facts before it and the facts in *Reese*, including the presence in *Reese* of changes that "reset the rules." *Id.* This alternate basis for ruling for retirees at the end of the *USW v. Kelsey-Hayes* decision does not detract from the Sixth Circuit's primary ruling and its application to this case.

54. For these reasons, the facts in this case provide an even stronger case for rejecting

Whirlpool's proposed Medicare-eligible healthcare changes than was present in *USW v. Kelsey-Hayes*. And, as explained in the preceding section, the Sixth Circuit's reasoning in *USW v. Kelsey-Hayes* is entirely consistent with *Tackett*, as it is based on discerning the intent of the parties through application of ordinary contract principles. Applying the persuasive reasoning in *USW v. Kelsey-Hayes* and the principles mandated by *Tackett*, this Court concludes that the parties never intended to give Whirlpool a right to eliminate Company-provided benefits and replace them with a limited HRA stipend.

55. This ends the *Reese* analysis as to Medicare-eligible Retirees; as in *USW v. Kelsey-Hayes*, *Reese* simply is not implicated. *USW v. Kelsey-Hayes*, 750 F.3d at 555 (ruling that the company's proposed changes violated the operative contract "not because HRAs are 'unreasonable' under the *Reese* cases, but because the HRAs are simply not what the parties bargained for in the first instance").

B. The Parties Cannot Have Intended to Give Whirlpool the Right to Raise Premiums, Deductibles and Out-of-pocket Maximums for Pre-Medicare Subclass Members Because Their Contracts Expressly Establish Specific Premiums, Deductibles and Out-of-pocket Maximums and Make No Provision for Raising Them

56. As shown in the Court's Findings of Fact, the governing Welfare Plans establish monthly premiums ranging from $0 to $15 for Retirees under age 65. *See* Fact No. 44, *supra*. As to subclass members hired before July 8, 1988, the Welfare Plans establish annual deductibles of $100 per person, with a $200 family maximum, and out-of-pocket maximums of $500 per person and $1,000 per family. *See* Fact No. 55, *supra*. As to subclass members hired after July 8, 1988, the Welfare Plans establish annual deductibles of $200 per person, with a $400 family

maximum, and annual out-of-pocket maximums (including deductibles and co-insurance) of $800 per person and $1,600 per family. *Id.* The agreements also specify that "[f]ollowing the attainment of these maximums during a calendar year, the Plan shall pay 100% of eligible expenses for the balance of the year." *Id.*

57. Given that the parties specified precisely how much Retirees are to pay in premiums, deductibles, and out-of-pocket maximums, and made no provision for allowing Whirlpool to increase these amounts, the contracts themselves show that the parties intended that Retirees pay the specified premiums, deductibles and maximums, not whatever amounts Whirlpool might elect to impose Company-wide, such as its proposed almost 2,000% premium increase.[4] Accordingly, Retirees prevail on Issue 1 as to pre-Medicare subclass members.

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[4] Whirlpool cites a $50 deductible and 15% co-insurance applicable only to retail (and not to mail order) prescription drugs that the parties adopted in 1995. As Retirees have noted, the 1995 Welfare Plan provides that this change (and other prescription drug changes) apply only to "retired employees who retired on or after June 5, 1995, Joint Exhibit 36 at 29 (1995 Welfare Plan), *i.e.,* only to future retirees. *See also* Joint Exhibit 123 (stating in a document produced by Whirlpool on February 10, 2016 that $50 deductible applies to those who retire after June 5, 1995). Even assuming that the deductible was applied retroactively, this would be of little moment because, unlike Whirlpool's recent unilateral reductions, this change was made consistent with the mutual consent provision in the parties' BLAs, and at the same time, the Union achieved numerous improvements for Retirees, most notably a mail-order prescription drug plan to which the deductible did not apply and which carried co-insurance of $1 to $3, as well as a $10,000 increase in the Major Medical lifetime maximum. Indeed, Hoover Vice President Frank Provo characterized 1995 changes to retiree medical insurance as follows: "Very little change took place in retiree medical insurance. A separate $50 annual deductible will apply for retail prescriptions instead of the current coverage as a Major Medical expense. The lifetime Major Medical maximum was increased to $50,000." Plaintiffs' Exhibit 29 at 4648 (June 6, 1995 Memorandum). Mr. Provo also characterized the "mail order prescription plan for maintenance drugs" as a "Plan improvement." *Id.* Mr. Schiltz similarly admitted that the 1995 mail order prescription

(continued...)

C. The Parties Cannot Have Intended to Give Whirlpool the Right to Raise Prescription Drug Co-payments Because Their Contracts Expressly Establish Those Co-payments and Make No Provision for Raising Them

58. As established above, the collectively bargained Welfare Plans provide:

> [Such retired employees] shall also be eligible for a mail order prescription drug program with a $3.00 per prescription deductible ($1.00 for generic prescriptions) in addition to [the prescription coverage of the Major Medical Plan.]

See Fact No. 52, *supra*.

59. Because the parties specified the exact price of prescription drug payments, and included no language giving Whirlpool a right to raise that price, the parties' contracts demonstrate the parties' intent that Retirees pay the specified co-payments—not whatever co-payment Whirlpool might impose. Retirees prevail on Issue 1 with respect to Whirlpool's unilateral prescription drug price increases.

D. The Parties' Approach in Altering Retiree Medical Benefits over the Years Further Confirms That They Never Intended to Give Whirlpool the Right to Impose Unilateral Benefit Reductions on Existing Retirees, Whether Pre-Medicare or Medicare-eligible

60. As shown, the *Reese* inquiry is over as to Medicare-eligible Retirees because the evidence demonstrates that the parties never intended to allow Whirlpool to replace Company provided benefits with a monthly stipend. The inquiry is over as to pre-Medicare Retirees and the prescription drug issue because by establishing specific premiums, deductibles, out-of-pocket limits, and prescription drug co-payments, the parties demonstrated their intent that Retirees pay

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[4](...continued)
drug benefit was an improvement for retirees. ECF No. 206 at PageID #: 6713 (Schiltz Dep). Plan improvements and changes characterized as "very little" do not reflect any intent to allow the massive benefit reductions proposed by Whirlpool in this case.

those specified amounts, not whatever amounts a subsequent purchaser of the Hoover facility such as Whirlpool might choose to impose, including a 1,935% increase in premium costs.

61. Separate and apart from this analysis, Retirees also prevail on Issue 1 as to all subclass members and all claims for the independent reason that, unlike in *Reese*, the parties' approach to altering benefits over time demonstrates that the parties did not intend to allow Whirlpool to impose unilateral benefits reductions on existing retirees.

62. In *Reese I*, the Sixth Circuit emphasized that a 1998 CBA "reset the rules" not only for employees retiring under the term of that CBA but for those who had already retired between 1994 and 1998. *Reese I*, 574 F.3d at 324. In particular, the 1998 CBA imposed managed care on those already retired, which "represented a reduction in the effective choices of coverage available for all retirees and the coverage actually provided to many, if not most, of them."

63. In this case, unlike in *Reese*, in which the parties negotiated benefits reductions for future retirees, the parties did not apply these reductions to existing retirees. As discussed above, the 1988 Welfare Plan reflects that when benefit reductions were addressed in 1988, the parties agreed that employees hired after July 7, 1988 would pay more for their retiree medical benefits through the "Comprehensive Plan" than employees hired before that date, who received the "Basic" and "Major Medical" Plan. *See* Fact No. 40, *supra*. In other words, the parties negotiated benefits reductions for a subset of future retirees (those hired after 1988), but not for existing retirees.

64. When benefit reductions were again addressed in 2003, the parties agreed to

substantial benefit reductions and ultimately to benefit elimination, but, again, only as to certain future retirees. *See* Fact No. 58, *supra*. None of the negotiated benefit reductions applied to existing retirees.

65. The next time that the parties addressed benefit reductions, in 2005, Whirlpool for the first time sought to negotiate reductions for current retirees. *See* Facts No. 62–65, *supra*. In particular, Whirlpool sought the Union's agreement to impose almost the same prescription drug co-payment increases that it unilaterally imposed six years later in 2011. *See* Fact Nos. 69–70, *supra*. The Union refused to discuss the matter, and Whirlpool did not at that time unilaterally impose the reductions it had failed to achieve in bargaining. *See* Fact No. 73, *supra*.

66. Mr. Schiltz testified as follows with regard to the Company's 2005 proposal to reduce benefits for existing retirees:

> Q. Okay. Now, would you agree with me that if Maytag/Hoover Company, back in 2005, thought that it had the unilateral right to change current or past retirees' healthcare benefits . . . the Maytag Company would not need to negotiate those changes with the Union?
>
> A. I think you're correct.

See Fact No. 71, *supra*; ECF No. 255 at PageID #: 8929–30.

67. These facts demonstrate that the parties did not intend to give Whirlpool a unilateral right to impose material benefit reductions on existing retirees.

68. Furthermore, Whirlpool indisputably recognized and acknowledged that the Union would fight "ANY negative changes" to Retirees' healthcare benefits. *See* Fact No. 102, *supra*. As described above, Tim Schiltz advised a Whirlpool "Benefits Manager" in 2009 that the Company could "[s]trategically seek to make modest changes when the opportunity is

presented—taking small savings here and there and establishing more of a tradition of change," but that this option "will not be easy." *Id.*; Plaintiffs' Exhibit 46 at 2 (email from Timothy Schiltz to Judy Locatis). He explained: "Former union executives are on the lookout for ANY negative changes to the health insurance plan because they understand the importance of that precedent, and you could in for a fight even over modest changes." *Id.* Whirlpool therefore fully understood in 2009 that there had been no "precedent" of "ANY negative changes," including "modest changes," to the healthcare benefits of Hoover Retirees, and that the Union would fight any attempt by Whirlpool to establish such precedent.

69. Consistent with Mr. Schiltz's 2009 observations, and as found above, past changes to medical benefits for existing retirees were benefit improvements. As such, these alterations provide no basis for concluding that benefits may be reduced. The Sixth Circuit explained in *Reese I*:

> No doubt, the resetting of health-care benefits for previously retired employees might not concern anyone if each change *upgraded the existing package of benefits*. That sort of change would not break any promises to provide irreducible benefits for life.

574 F.3d at 325 (emphasis added); *see also* ECF No. 191 at PageID #: 6310. At the very most, certain administrative-type changes may have been neutral, or *de minimis*, in effect. *See Cole v. ArvinMeritor, Inc.*, 516 F. Supp. 2d 850, 873 (E.D. Mich. 2005) (finding "no history of unilateral material changes" when defendants argued that changes to benefits put plaintiffs on notice benefits could be eliminated; court noted that a change that altered the mechanism for buying prescription drugs "resulted in savings for retirees, and in any event was *de minimis*," and that another benefit change was agreed to by the union).

70. The fact that Whirlpool imposed various reductions in the optional Alternative PPO benefits while making no such changes to the vested "Traditional" Basic and Major Medical and Comprehensive plans is particularly strong evidence that Whirlpool understood that the vested benefits at issue in this case could not be reduced. If Whirlpool believed it could reduce Traditional Plan benefits, and if it believed that the Union would accept those reductions (which, as shown by Mr. Schiltz's email, it did not), Whirlpool would have had no reason to limit its price-saving efforts to PPO benefits, particularly given that it was grappling with a "staggering" liability for retiree healthcare benefits, as Mr. Schiltz testified. *See* ECF No. 255 at PageID #: 8930.

71. In sum, and in the alternative to the analysis in the preceding Subsections, because the evidence regarding changes to retiree benefits shows that the bargaining parties did not intend to give Whirlpool a right to reduce Traditional Plan benefits for existing retirees, both pre-Medicare and Medicare-eligible Retirees prevail under the first *Reese* question.

E. Mutual Consent Language in the Parties' BLAs Provides Another Basis for Ruling Against Whirlpool on Issue 1

72. "Mutual consent" provisions in the parties' collectively bargained BLAs further demonstrate the parties' intent that Whirlpool be foreclosed from unilaterally reducing benefits, a point the Court recognized in its Summary Judgment Ruling.

73. The Court observed as follows in its Summary Judgment Ruling: "*Reese* also did not mention the existence of any CBA provision, such as the one in the present case, requiring changes to be made with the mutual assent of both parties." ECF No. 191 at PageID #: 6333.

74. In this case, unlike in *Reese* and as found above, the parties expressly agreed as

follows in all of their pertinent CBAs—the Basic Labor Agreements, or BLAs:

> (E) AGREEMENT CHANGES
>
> Changes in, or amendments to, the terms of this Agreement may be made at any time by mutual consent of the Company and the Union. When amendments or revisions are made, they shall be reduced to writing and be executed in the same manner as this Agreement.

See Fact No. 33, *supra*. The BLAs also state: "This Agreement as written expresses the entire contract between the parties." *See* Fact No. 34, *supra*.

75. In *Moore v. Menasha Corp.*, 690 F.3d 444 (6th Cir. 2012), the Sixth Circuit relied on a similar mutual consent provision, stating "[t]his Agreement may be amended at any time by mutual agreement of the parties hereto." *Moore*, 690 F.3d at 458. Rejecting the defendant's reliance on a reservation-of-rights clause, the court reasoned: "[b]ecause the parties agreed on the procedure to be used in amending their agreement, it would read that provision out of the contract to allow Defendant to unilaterally modify the terms by an alternate avenue." *Id.* at 459; *see also Prater v. Ohio Educ. Ass'n*, 505 F.3d 437, 445 (6th Cir. 2007) (citation omitted) (when "a contract contains formal procedures requiring mutual, written assent to amend, that language preempts future unilateral termination of rights").

76. The Court has already rejected Whirlpool's contention that the mutual consent provision applies only to the parties' BLAs, and not their Welfare Plans, and reiterates this conclusion in its Findings of Fact and Conclusions of Law. *See* ECF No. 191 at PageID #: 6326 ("The BLAs clearly recognize that Welfare Plans are part of the "Agreement" referenced in the mutual consent provision").

77. Furthermore, although the Sixth Circuit did not need to rely on a mutual consent

provision in *USW v. Kelsey-Hayes* because it had already ruled in favor of retirees on other grounds, the court observed that a mutual agreement clause in that case provided an alternate basis for concluding that the employer there could not unilaterally modify benefits. The court began its analysis on this point with the following "basic principle of contract interpretation":

> As a general rule, an existing contract cannot be unilaterally modified. Were it otherwise, the option of either party to modify a contract unilaterally would defeat the essential purpose of reaching an agreement in the first place—to bind the parties prospectively . . . . This principle applies with equal force to collective-bargaining agreements, where employers are statutorily barred from effectuating unilateral modifications of existing collective bargaining agreements.

750 F.3d at 555–56 (citation omitted). Referencing the rule it had just cited, the court continued:

> Here, the mutual agreement clause simply reiterates this basic principle of contract interpretation. Accordingly, although the mutual agreement clause provides an additional piece of evidence that defendants could not unilaterally modify the CBAs by implementing the HRAs, we need not rely on the mutual agreement clause to reach that conclusion. We would reach the same result regardless of the presence of the mutual agreement clause.

Id. at 556.

78. As recognized by the Sixth Circuit in *USW v. Kelsey-Hayes* and by this Court in its Summary Judgment Ruling, the mutual consent analysis applies to the *Reese* issue. By expressly providing a process for changing the terms of the parties' agreements, the parties demonstrated their intent that those terms not be changeable through some other non-specified process, which is what Whirlpool utilized in this case. Retirees prevail on Issue 1 on this alternative basis.

\ **F. The Facts in this Case Are Unlike the Facts the Sixth Circuit Relied on in Finding That the *Reese I* Parties Intended to Allow Reasonable Alteration of Retiree Healthcare Benefits**

79. There is another reason to rule in favor of Retirees on Issue 1: the facts in *Reese* on which the Sixth Circuit relied to conclude that benefits could be reasonably altered are not present in this case.

80. Several material factors present in *Reese* are absent in this case. First, the Sixth Circuit in *Reese I* emphasized the lack of "precision" in the governing CBA with respect to the healthcare benefits to be provided. The *Reese* CBA merely stated that "[e]mployees who retire under the Case Corporation Pension Plan for Hourly Paid Employees after 7/1/94 . . . shall be eligible for [health-care benefits.]" *Reese I*, 574 F.3d at 324. In particular, the court explained, "[t]he CBA does not spell out what 'Medical' benefits are included; it just says that '[e]ligibility for specific coverage [will be] based on each plan's eligibility requirements.'" *Id.* at 318. The Sixth Circuit similarly underscored this lack of precision in the governing language in *Reese II*, explaining that the difficulty of the reasonableness inquiry "flows at least in part from the vagueness of the commitment underlying this litigation. It is well to remember the language of the relevant commitment: 'Employees who retire under the Case Corporation Pension Plan for Hourly Paid Employees after 7/1/94 . . . shall be eligible for the Group benefits as described in the following paragraphs." *Reese II*, 694 F.3d at 685.

81. In this case, in contrast to the "vagueness" of the operative language in *Reese*, the

collectively bargained Welfare Plans specifically detailed the nature of the benefits to be provided. For example, employees retiring on or after January 1, 1993, "shall have the opportunity to continue elements of the medical insurance in accordance with the following principles[,]" and those principles include specific per person and family monthly contributions tied to years of pension credit at retirement for pre-Medicare Retirees, with no contributions for Medicare-eligible Retirees, as well as a particular Major Medical lifetime maximum. *See* Fact No. 43, *supra*. The Welfare Plans also specify that "eligible retired employees who were hired prior to July 8, 1988, will be eligible to retain Basic and Major Medical coverage," and "shall also be eligible for a mail order prescription drug program with a $3.00 per prescription deductible ($1.00 for generic prescriptions) in addition to the prescription coverage of the Major Medical Plan." *See* Fact No. 39, *supra*. Furthermore, Retirees hired after July 8, 1988 "will be eligible to retain the Comprehensive Plan," and "eligible prescription drug coverage shall be available through the Comprehensive Plan." *Id.*

82. Second, and as the Court explained in its Summary Judgment Ruling, "compelling evidence that 'the parties did not perceive the relevant CBAs as establishing fixed, unalterable benefits'" was "central" to the Sixth Circuit's reasoning in *Reese I*. ECF No. 191 at PageID #: 6332–33. In particular, the Sixth Circuit concluded that the 1998 CBA "reset the rules" by imposing managed care on existing retirees. 574 F.3d at 325. The imposition of managed care "represented a reduction in the effective choices of coverage available for all

retirees and the coverage actually provided to many, if not most, of them." *Id.* Furthermore, the court reasoned, "[m]anaged care plans were not popular when they were introduced because they often restricted the availability of 'discretionary or elective' services." *Id.* (citation omitted). In addition, "[s]uch plans usually control costs by covering only a limited network of providers, a type of limitation against which covered insureds often rebel . . . and against which the UAW had rebelled when negotiating earlier CBAs." *Id.* (citations omitted).

83. In this case, there was no evidence, compelling or otherwise, that the parties did not perceive their bargained documents as establishing fixed, unalterable benefits. Nor, despite Whirlpool's arguments to the contrary, was there anything akin to the imposition of managed care. The Court has already rejected Whirlpool's argument that subclass members' benefits are subject to reduction because the Company allegedly imposed managed care on Retirees. Endeavoring to show that this case is like *Reese*, Whirlpool has argued that "between 1983 and 1992, the Company implemented a major overhaul of the retirees' benefits, most notably in 1986, when it imposed the first of several managed care programs." ECF No. 212 at PageID #: 7374–75; *see also id.* at PageID #: 7376 ("These [1986] modifications, which were unilaterally imposed by the Company on past retirees, included predetermination certification, second surgical opinion requirements, managed care, and subrogation"). Whirlpool distorts the meaning of "managed care." This case is not like *Reese*, as the Company has not forced any managed care program, much less "several managed care programs," on Retirees. Rather, the only managed care program in this case, "Alternative Medical Coverage," was provided to Retirees as option, as the Court already has found. There was no language in the operative contracts allowing

Whirlpool to terminate the Basic and Major Medical and Comprehensive coverages. *See* ECF No. 191 at PageID #: 6305; ECF No. 310 at PageID #: 10187.

84. Third, the Sixth Circuit in *Reese I* relied on a letter of understanding signed by the employer and the union, stating that additional retiree contributions would not be required "over the term of the 1998 labor agreement." *Reese I*, 574 F.3d at 325. This language suggested that additional contributions could be required after that labor agreement expired. In this case, unlike in *Reese I*, there was no agreement between the Union and the Company suggesting that benefits could be altered upon contract expiration.

85. Finally, the Sixth Circuit's distinction of *Reese I* and *Reese II* in *USW v. Kelsey-Hayes* provides even more bases for concluding that the present case is unlike *Reese*:

> We disagree with defendants that the result warranted here is the same as the one in the *Reese* cases. To that end, we note that this case is factually different from the *Reese* cases as well. First, it was critical to the *Reese I* court that the 1998 CBA there "reset the rules" for employees who had retired under the previous CBA. By contrast, here, there was no resetting of the rules—each CBA here contained identical language to its predecessor with regard to retiree health care benefits. Unlike in the *Reese* cases, the parties here were playing by the same set of rules all along. Second, unlike in *Reese*—where the plaintiffs waited six years to sue—plaintiffs here did not wait idly by to take action; as soon as they received notice of defendants' intent to implement the HRAs, plaintiffs sued. Third, unlike in *Reese*, where CNH simply "replac[ed] some managed care providers with others," the HRAs not only were not what was bargained for (in that they are vouchers, not group coverage), but the HRAs also shifted the risk of excess cost from defendants to plaintiffs.

USW v. Kelsey-Hayes, 750 F.3d at 556.

86. In this case, as in *USW v. Kelsey-Hayes* and contrary to *Reese*, there was no

"resetting of the rules" that materially reduced retiree medical benefits. Nor did Retirees did wait "idly" for six years, but instead sued in August 2011, mere months after Whirlpool's May 2011 announcement that it was cutting benefits. Moreover, as in *USW v. Kelsey-Hayes* and unlike in *Reese*, Medicare-eligible Retirees will not receive what was bargained for if the proposed changes are allowed. The HRAs Whirlpool has proposed are vouchers, not group coverage. Furthermore, the HRAs shift all risk of excess cost from defendants to plaintiffs. Pre-Medicare Retirees face annual premiums of either $3,662.40 or $3,852.72; per-person deductibles ranging up to $4,000; out-of-pocket limits exclusive of deductibles as high as $10,000 per person in-network and $20,000 per person out-of-network; and hospitalization co-payments of up to 40% in-network, and 50% out-of-network. There is nothing in the record suggesting that the Union or Retirees intended to allow Whirlpool to unilaterally impose such a drastic increase in the burden on pre-Medicare Retirees.

87. The Sixth Circuit in *USW v. Kelsey-Hayes* concluded that "this case contains none of the indicia of intent present in *Reese* that led those courts to conclude that the parties intended for the health care benefits to be unilaterally modifiable." *USW v. Kelsey-Hayes*, 750 F.3d at 556. The record in this case likewise is devoid of any indicia that the parties intended to allow an unknown subsequent purchaser of the Hoover facility, such as Whirlpool, to impose reductions of this sort.

G. Whirlpool's Various Other Arguments Are Unavailing

88. Throughout this litigation, Whirlpool has heavily relied on summary plan descriptions ("SPDs"), Group Insurance Plans ("GIPs"), enrollments forms, and other documents

unilaterally drafted by the Company or its agents, such as insurance companies. The Court has already rejected Whirlpool's reliance on these unilaterally drafted documents:

> Again, Whirlpool misstates the law. Unilaterally published summaries "are not considered to be 'legally binding' nor are they 'parts' of the benefit plan themselves . . . [although] they may be used as extrinsic evidence to resolve ambiguities latent in the contractual language." At most, the GIPs and SPDs may serve as extrinsic evidence. They are not, however, part of the CBAs, and the RORs are not contractually binding provisions.
>
> The Court rejects Whirlpool's next contention that the GIPs were "explicitly incorporated" into the CBAs.

ECF No. 191 at PageID #: 6323 (citations omitted); *see also* ECF No. 310 at PageID #: 10192 ("Unlike the Welfare Plans, the GIPs were not contract documents and therefore did not govern retiree health benefits"). The Court reiterates this ruling.

IV. Issue 2: Although the Court Need Not Reach the Second *Reese* Question, the Court Concludes, in the Alternative, That Even if the Parties Intended to Allow Whirlpool to Reasonably Alter Retiree Medical Benefits, Whirlpool's Proposed Alterations Are Not Reasonable

A. Whirlpool's Announced Changes Are Not "Reasonably Commensurate"

89. The Court has concluded on several alternative bases that the parties did not intend to give Whirlpool a right to impose unilateral benefit reductions. Although the Court need not reach the question of whether Whirlpool's benefit reductions are reasonable, the Court finds and concludes in the alternative that even if retiree medical benefits were subject to reasonable reduction under *Reese*, the benefit reductions proposed by Whirlpool would not be permitted.

90. As discussed, the *Reese* rulings cite various factors to be addressed as part of

the reasonableness analysis. After *Tackett*, the Court may not apply any particular *Reese* factor unless, after concluding that the parties intended to allow Whirlpool to impose reasonable benefit reductions, the Court also finds that the parties intended the particular factor to be relevant to the reasonableness determination. The Court concludes that, even assuming that the parties intended to allow reasonable benefit reductions, there is no evidence that they intended to make any of the particular *Reese* factors pertinent to the analysis. Nonetheless, for purposes of this section only, the Court will presume that the parties intended to allow Whirlpool to make benefit reductions that are "reasonably commensurate" with prior benefits.

i. Medicare-eligible Retirees

91. The Court relies on certain materials found on the Medicare.gov website, which the parties jointly identified as Joint Exhibit 125. The Court notes that it properly admitted this joint exhibit into evidence. Rule 803 of the Federal Rules of Evidence provides that "public records" are not excluded by the rule against hearsay. A document is a "public record" if it is a "a record or statement of a public office" and "it sets out…a matter observed while under a legal duty to report" and "the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." Fed. R. Evid. 803. Furthermore, under Rule 201, the court can take judicial notice of adjudicative facts, including "'[p]ublic records and government documents available from reliable sources on the Internet,' such as websites run by governmental agencies." Fed. R. Evid. 201; *U.S. ex rel. Modglin v. DJO Glob. Inc.*, 48 F. Supp. 3d 1362, 1381 (C.D. Cal. 2014); *see also Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 166 (S.D.N.Y. Aug. 31, 2015) ("As to the seven documents retrieved from

official government websites [including Medicare.gov,] it is clearly proper to take judicial notice. Courts routinely take judicial notice of such governmental records."); *Tomaszycki v. Turkelson*, No. 15-CV-12298, 2015 WL 6605441, at *1 n.1 (E.D. Mich. Oct. 30, 2015) ("Public records and government documents, including those available from reliable sources on the Internet, are subject to judicial notice.").

92. The proposed benefit changes in *Reese* and those announced by Whirlpool are distinctly different in the way they allocate risk. By adopting a HRA-model for Medicare-eligible Retirees and limiting its contribution to a set monthly amount (which it does not indicate that it intends to increase),[5] Whirlpool would immediately shift all risk of future healthcare price increases to Retirees. Whirlpool's proposed change mirrors the change addressed in *USW v. Kelsey-Hayes*—except that Whirlpool shifts far more costs onto retirees—rather than the change in *Reese*. *See USW v. Kelsey-Hayes*, 750 F.3d at 556 ("the HRAs not only were not what was bargained for (in that they are vouchers, not group coverage), but the HRAs also shifted the risk of excess cost from defendants to plaintiffs"). CNH, in comparison, sought to impose greater cost-sharing on the *Reese* retirees, but under its proposal it would continue to share the risk of increased healthcare costs. *Reese*, 143 F. Supp. 3d at 631.

93. In particular, CNH sought to impose the following changes on Medicare-eligible retirees, as is apparent from the district court's decision on remand from *Reese II*:

- Premiums would increase from $0 to $120 in the first year, and would then

[5] As found above, Whirlpool sought to impose the same $85 monthly stipend in 2016 as it did when it first announced the proposed changes that were to take effect three years prior. *See* Facts No. 196, 200, *supra.*

increase by 60% of the total cost increase of retiree medical coverage from one year to the next;

- Annual deductibles for in-network services would be increased from $0 to $250;
- Retiree obligation for in-network co-insurance would be increased from 0% to 20%;
- In-network out-pocket-maximums per individual would be increased from $1000 to $1500; and
- Prescription drug co-payments of $5 would be replaced with no prescription drug coverage.

Id. at 618–23.

94. The district court, on remand from *Reese II*, was able to compare total costs and share of costs paid by retirees and by CNH under the existing plan and under the proposed plan. *Id.* at 623–24. The court was able to project these costs into the future because, unlike the employer in *USW v. Kelsey-Hayes* (who committed to two years of HRA contributions) and unlike Whirlpool (who has not made any time commitment), CNH had committed to continue funding the plan at specified levels through 2032, or at least so the district court presumed.

95. The *Reese II* court noted that, in evaluating whether proposed changes are reasonably commensurate with existing benefits, courts should consider how quickly each side's costs are likely to grow. *Reese II*, 694 F.3d at 685. In this case, Whirlpool has structured its Medicare-eligible contribution such that its costs are frozen. There is no reason to believe that Whirlpool's share of costs will ever exceed $1020 per retiree per year, unless Whirlpool unilaterally decides to increase its contribution. Moreover, Whirlpool has reserved its right to reduce its contribution or even eliminate it entirely. Retirees are left to absorb 100% of any cost

increases.

96. As addressed above, the Sixth Circuit recently noted that "[t]he cost of health insurance premiums increases every year, and this growth shows no signs of slowing." *Kelsey-Hayes*, 750 F.3d at 557 (citation omitted).

97. In this case, there is simply no argument that the minimal HRA contribution announced by Whirlpool is reasonably commensurate with the premium-free Company-provided healthcare that the parties agreed was required. The promised premium-free comprehensive coverage and $85 stipend are neither "equal in measure or extent" nor "corresponding in size, extent, amount, or degree," the above-cited definition of "commensurate" referenced by the district court in *Reese*. To the contrary, Whirlpool has proposed a drastic change, and shifted all risk to Retirees.

98. Furthermore, Whirlpool's announced changes are *per se* unreasonable based on the most recent calculations provided by Whirlpool's actuaries. According to Whirlpool's numbers, the present value of the retiree medical benefits of Medicare-eligible Subclass Members would decline from $176.8 million under the current benefit scheme to $26.9 million under the benefit scheme that Whirlpool seeks to impose. As to post-Medicare retirees, the value of the proposed benefit structure equals less than one sixth of the benefits that Whirlpool contracted to provide. This does not satisfy the "reasonably commensurate" element.

ii. Pre-Medicare Retirees

99. As for pre-Medicare Retirees, it bears noting that all members of Subclasses A,

B, and C, and Groups 1 and 2 of Subclass D who are not yet 65 and who do not die before reaching 65 will age into the Medicare-eligible category. As structured, Whirlpool's proposed scheme will deny all surviving subclass members participation in Whirlpool benefit plans, even the pre-Medicare retirees.

100. As shown, the parties negotiated for pre-Medicare Retirees to receive comprehensive benefits with low premiums, low deductibles, low coinsurance, and low out-of-pocket limits, as well as prescription drug coverage with $1 to $3 co-payments. *See* Fact No. 53, *supra*.

101. Whirlpool now seeks to unilaterally and dramatically increase the burden on Retirees as to each of these promises. As found above, for 2016, Whirlpool sought to replace annual premium costs ranging from $0 to $180 with annual premiums of either $3,662.40 or $3,852.72; deductibles of $100 or $200 per person with deductibles from $500 to $4,000 per person; coinsurance of 0% or 15% with varying co-insurance amounts; and out-of-pocket maximums of $500 or $800 with out-of-pocket maximums of $2,500 to $20,000. In addition, as to prescription drugs, for 2016, Whirlpool sought to replace contracted-for mail order co-payments of $1 to $3 with five "tiers" of drug pricing, with Retires paying $0 for Tier 0 drugs, 10% (after deductible) for Tier 1 drugs, 20% for Tier 2 drugs, 50% for Tier 3 drugs and 100% for Tier 4 drugs.

102. Moreover, Whirlpool has not committed to maintaining even this new scheme,

but reserves its right to further burden Retirees or eliminate the Whirlpool contribution altogether. Indeed, as found above, Whirlpool has dramatically raised premiums over the past several years, increasing total premium costs by almost $1,000 between 2014 and 2016.

103. The Court concludes that Whirlpool's proposed changes for pre-Medicare Retirees are not "reasonably commensurate."

104. The Court also notes that Whirlpool attempted to negotiate benefit changes in 2005, which were similar to what it now seeks to unilaterally impose on pre-Medicare Retirees. *See* Plaintiffs' Exhibit 15 (Union "Special Update Notice" regarding Steam Vac negotiations). In the course of 2005 "Steam Vac" negotiations, Whirlpool proposed that existing retiree medical benefits be replaced with the "MAYTAG MODEL." This model plan required "retiree contributions of up to 40% of the actuarial value with higher co-pays and larger deductibles"—much like the plan that Whirlpool now seeks to unilaterally impose on non-Medicare-eligible retirees except apparently without an almost 2000% premium increase. *See id.* The Union refused to discuss this proposal and Whirlpool made no attempt to unilaterally impose it, demonstrating that neither party believed that Whirlpool had the power to impose the very changes that Whirlpool now seeks to impose. Furthermore, in 2005, Whirlpool viewed its retiree healthcare obligations as "staggering." ECF No. 255 at PageID #: 8929.

105. The Court concludes that Whirlpool's changes are not "reasonably commensurate" with the contractual benefits, and that this element alone provides a sufficient basis for concluding that Retirees prevail as to Issue 2 as to pre-Medicare Retirees.

B. Additional Factors Referenced in *Reese*

106. As to whether the benefits are "roughly consistent with the kinds of benefits provided to current employees," the 2003 Welfare Plan establishes that the parties did not intend this to be a pertinent consideration. As reflected in this contract, the parties agreed in 2003 to drastically reduce healthcare benefits for future retirees who were not grandfathered, as well as for current employees, beginning in 2005. At the same time that the parties agreed to enormous benefit reductions for current employees and future retirees, they made no changes to benefits for existing retirees. This distinction demonstrates that the parties did not intend that healthcare benefits for existing retirees be limited to the healthcare benefits provided to current employees. Rather, the parties' contract shows that they believed that benefits could be altered for both future retirees and current employees, but they could not be altered for existing retirees.

107. Furthermore, there are no current employees at the Hoover facility where Retirees formerly worked, so for this independent reason this *Reese* factor is inapplicable to this case. More fundamentally, neither the contract language nor extrinsic evidence indicates that the parties intended to give a subsequent purchaser of the Hoover facility a right to impose on Hoover retirees a new benefit structure, even if it was the benefit structure the purchaser provided to its current employees or retirees. It defies reason to presume that the Union would have intended to give this right to any and all unknown purchasers, risking a situation in which the purchaser elects to provide no benefits at all to its employees.

108. *Reese II* also instructs courts to compare quality of care under the existing plan

with quality of care under the proposed plan. *Reese II*, 694 F.3d at 685. There is no evidence that the parties in this case intended this to be a relevant consideration. In any event, because of the HRA structure of Whirlpool's proposed plan, this is analysis is impossible for Medicare-eligible Retirees. To the extent that Retirees can afford to obtain a new plan and have the wherewithal to do so, Retirees may select any of a broad range of plans. Plaintiffs' expert has opined that even the most expensive and comprehensive plan available to Medicare-eligible Retirees, which would cost $188 a month solely for medical coverage, requiring at further cost a prescription drug plan, is "inferior" to the benefits agreed to in the parties' Welfare Plans. *See* Joint Exhibit 126 at 2–3 (Supplemental Tomczyk Report); *id.* at 5 ("these changes [for Medicare-eligible Retirees], if implemented, would constitute a drastic increase in costs borne by Hoover Retirees and, based on my experience as a healthcare consultant and my understanding that these Retirees live on fixed and limited incomes, would hence occasion a drastic reduction in the quality of benefits available to Hoover Retirees").

109. As for pre-Medicare Retirees, with new annual premiums of either $3,662.40 or $3,852.72 and new high deductibles, co-insurance, and out-of-pocket maximums, many subclass members will no doubt face significant challenges in paying for the healthcare coverage they currently receive.

110. Finally, it is noteworthy that under Whirlpool's proposed scheme of changes, not all of its enormous cost savings would be borne at the expense of Retirees. Whirlpool's plan would also oblige the federal government to absorb some of the costs that Whirlpool contracted to provide. The law discourages such offloading. Rather, ERISA's principal policy objective is

securing employees' retirement income so that in retirement, they can rely on private financial support rather than public subsidy. *Musto v. Am. Gen. Corp.*, 615 F.Supp. 1483, 1505 (M.D. Tenn. 1985) ("As between public financing and financing by [the employer] . . . [the employer] should be required to continue to honor the promises . . . to finance the medical insurance plan."), *rev'd on other grounds*, 861 F.2d 897 (6th Cir. 1988); *see also Howe v. Varity Corp.*, No. 88-1598, 1989 WL 95595, at *14 (S.D. Iowa July 14, 1989) (retirees "may simply become burdens on the state" without injunctive relief), *aff'd in part, rev'd in part on other grounds*, 896 F.2d 1107 (8th Cir. 1990); *Jansen v. Greyhound Corp.*, 692 F. Supp. 1029, 1039 (N.D. Iowa 1987) (same); *Keffer v. Connors Steel*, No. 84-3137, 1986 WL 22427, at *17 (S.D.W.Va. Oct. 6, 1986) ("[t]he inability of some of the plaintiffs to discharge large medical and hospital bills that the medical coverage in issue here would have paid had it not been terminated ultimately will cast a greater burden upon the public in the form of increased medical costs to compensate medical services agencies, in part at least, for some of plaintiffs' failures to discharge their obligations to such agencies").

111. As discussed above, *Reese III* criticized the district court because it did not consider increased benefits enjoyed by the plaintiff retirees under the new proposed plan, in the form of access to new and better medical procedures. *Reese III*, 854 F.3d at 885. In this case, with respect to Medicare-eligible retirees, it is impossible to compare the benefits available under the promised plan and the "proposed plan", because there is no particular plan. Rather, Medicare-eligible retirees will be provided with a static HRA contribution of $85 per month for an unspecified duration.

112. Plaintiffs' expert Thomas Tomczyk explained that the most expensive and comprehensive Medicare Advantage plan available in applicable zip codes in 2016, the Aetna Medicare Connect Plus PPO, cost $188 per month—more than twice Whirlpool's monthly contribution—and still provided inferior coverage, including hundreds of dollars in additional deductibles, hundreds of additional dollars for in-hospital co-payments (as to pre-1988 hires), and more expensive prescription drug co-payments. Plaintiffs' Exhibit at 3-4.

113. Mr. Tomczyk opined in this regard:

> these changes, if implemented, would constitute a drastic increase in costs borne by Hoover Retirees and, based on my experience as a healthcare consultant and my understanding that these Retirees live on fixed and limited incomes, *would hence occasion a drastic reduction in the quality of benefits available to Hoover Retirees.*

Id. at 5 (emphasis added).

114. The drastic reduction in the quality of benefits available to Retirees is underscored by the fact that Whirlpool has not committed to continuing even its minimal and frozen HRA contribution for Medicare-eligible retirees for more than a year, but indeed has expressly reserved its right to terminate its HRA contributions at any time. *See* Plaintiffs' Exhibit 47 (2015 Notice advising Retirees that Whirlpool "reserves the right, at its discretion, to change or terminate any part of the benefits offered at any time and in any manner").

115. *Reese III* concluded that the *Reese* district court also erred because it assumed that the *Reese* retirees would foot the entire bill for costs shifted away from their former employer, when in fact a substantial portion of the costs would be covered by the federal government. *Reese III*, 854 F.3d at 885. This Court makes no such assumption. While the Court discussed the cost savings to Whirlpool from replacing Retirees' promised benefits with the HRA

supplement, the Court does not rely on this fact as paramount. Rather, the Court relies on the massive shift in costs from Whirlpool to Retirees, as well as on Whirlpool's shift to retirees of all risk of future cost increases and all risk that Whirlpool may decide at any time to terminate its HRA contribution.

116. *Reese III* also found that while the *Reese* district court was correct to acknowledge the particularly harsh impact of the proposed changes on a subset of thirteen class members, the district court place too much emphasis on this group. *Id.* at 885. This Court does not rely on the impact on any particular small subset of class members, but rather on the drastic detrimental impact on class members as a whole.

117. *Reese III* also concluded that the *Reese* district court erred by failing to conclude that the fact that the proposed plan was equal in substance to the plan offered to CNH's current employees and retirees weighed in favor of reasonableness, noting that the plaintiff retirees would receive substantially the same benefits as current employees and retirees, while paying less for them. *Id.* In this case, the Plaintiff Retirees will not pay less than Whirlpool's other retirees under the proposed plan. Moreover, as explained above, the Court believes that the pertinent comparator is not Whirlpool employees and retirees in general, but rather Hoover employees and retirees, since the governing contracts were negotiated with Hoover, not Whirlpool. The negotiating parties obviously never contemplated that retirees might eventually see their benefits brought down to the level of whatever unknown corporation might someday purchase it. Nonetheless, in light of *Reese III*, the Court finds that this factor weighs in favor of

concluding that the proposed changes are reasonable, but does not outweigh all the other factors discussed herein which demonstrate that the proposed changes are unreasonable.

118. *Reese III* also criticized the *Reese* district court's determination of whether the proposed plan was reasonable in light of changes to healthcare, because that court used the plaintiffs' comparators and dismissed the employer's comparators. *Id.* The Court has carefully considered the evidence with regard to comparators provided by both parties. Whirlpool's expert, Mark Hall, briefly cites a number of studies involving various employers which support the proposition that American employers are successfully endeavoring to provide progressively lower retiree healthcare benefits. *See* ECF No. 421-2 at PageID #: 12457–60. Plaintiffs' expert, Mr. Tomczyk, specifically criticized Mr. Hall's approach on several points, but agreed that employers are looking for ways to reduce their obligation for providing retiree medical and prescription drug benefits. Plaintiffs' Exhibit 41 at 8–9. The Court agrees with both experts that there is a trend toward reducing retiring healthcare benefits, but concludes that this factor, when combined with all the other factors addressed herein, does not render Whirlpool's proposed changes reasonable.

119. Finally, *Reese III* found that the *Reese* district court erred in holding that it could not consider the reasonableness of the proposed plan in a piecemeal fashion. *Reese III*, 854 F.3d at 886. Unlike Whirlpool, CNH specifically asked the *Reese* district court to sever any proposed modifications it found unreasonable. *See* 143 F. Supp. 3d at 631. Whirlpool made no such request, and hence has waived this issue. Even if Whirlpool had made such a request, the

Court finds that it would provide no basis for relief. As discussed herein, each of Whirlpool's proposed modifications is unreasonable.

FINAL CONCLUSIONS, JUDGMENT, AND RETENTION OF JURISDICTION

1. For the foregoing reasons, the Court enters judgment in favor of all members of Subclasses A, B, C, and D with respect to the two *Reese* issues.

2. For the reasons stated herein; in the Court's September 19, 2014 Trial Ruling (ECF No. 310); in its October 30, 2015 Memorandum of Opinion and Order addressing Whirlpool's motion to reconsider in light of *Tackett* (ECF No. 360); and its December 31, 2015 Memorandum of Opinion and Order granting Retirees' motion to reconsider as to Subclass B (ECF No. 373), the Court determines that all subclass members are entitled to a permanent injunction in their favor.

3. Under the terms of this injunction, Whirlpool shall comply with its collectively bargained obligations regarding retiree healthcare benefits and shall promptly restore the *status quo ante* and provide subclass members with the healthcare benefits in the Basic and Major Medical Plans or the Comprehensive Plan (as appropriate, depending on date of hire, as set forth in the negotiated Welfare Plans) in force in 2010, and shall continue to provide these healthcare benefits, at the premium cost (or no cost, as applicable) set forth in the applicable Welfare Plans, for the lifetime of each Subclass member (except as to certain members of Subclass D, who will receive the benefits described in the 2003 Welfare Plan). Benefit descriptions in the parties' negotiated documents, such as the Welfare Plans and settlement agreements (and not in unilaterally documents drafted by the Company such as SPDs), shall control.

4. In addition, Whirlpool shall promptly take such action as necessary to identify and make subclass members whole for the expenses incurred by subclass members due to Whirlpool's unilateral changes imposed on the subclass members during the period from January 1, 2010 until the date that the *status quo ante* is restored.[6] This includes but is not limited to expenses incurred as a result of Whirlpool's 2011 increase in prescription drug co-payments and any unreimbursed expenses incurred by members of Subclass B after Whirlpool terminated their coverage effective January 1, 2016.

5. In addition, no later than 21 days after entry of these Findings of Fact and Conclusions of Law, Whirlpool will file a detailed explanation of its actions pursuant to the preceding paragraph, describing what categories of expenses it has addressed and what was done to ensure that all subclass members' expenses were fully reimbursed as to each such category.

6. The Court specifically orders that subclass members now enrolled in any "alternative" PPO-type plan be allowed to immediately re-enroll, and to enroll or re-enroll on an annual basis, in the Basic and Major Medical Plans or the Comprehensive Plan (as appropriate, depending on date of hire). *See* ECF No. 191 at PageID #: 6321 (citations omitted) ("There is no dispute that this litigation concerns Retirees' rights to health benefits under the Basic and Major

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[6] See *Hargrove v. EaglePicher Corp.*, 852 F. Supp. 2d 851, 857 (E.D.Mich. 2012); *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Svc. Workers Int'l Union, AFL–CIO–CLC v. Kelsey-Hayes*, No. 11-15497, 2013 WL 2435079, at *4 (E.D. Mich. June 5, 2013) and *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Svc. Workers Int'l Union, AFL–CIO–CLC v. Kelsey-Hayes*, No. 4:11-CV-15497, 2016 WL 337467, at *7 (E.D. Mich. Jan. 28, 2016) (reaffirming prior award of injunctive relief); *UAW v. Cadillac Malleable Iron Co., Inc.*, 1982 WL 20483, at *9 (W.D. Mich. Apr. 28, 1982), for entry of similar orders of relief in retiree health cases.

Medical Plan, or the Comprehensive Plan. If a retiree has vested rights to certain medical coverage, then those rights are not lost merely because she is currently enrolled in a different plan . . . . Furthermore, Schiltz testified that the Company permitted retirees to switch from the PPO Plan back to the Basic and Major Medical Plan, or the Comprehensive Plan, when they so desired").

7. The Court shall retain jurisdiction over any post-judgment matters and issues of implementation and enforcement of this order, judgment, and permanent injunction.

8. The Court will also retain jurisdiction over the award of attorneys' fees and costs, which the Court will address, including any required class notice under Fed. R. Civ. P. 23(h),[7] after final judgment is issued. No later than 21 days after entry of these Findings of Fact and Conclusions of Law, Plaintiffs' counsel shall file their motion under Fed. R. Civ. P. 23(h) and

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[7] Rule 23(h) provides:

> Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:
>
> > (1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
> >
> > (2) A class member, or a party from whom payment is sought, may object to the motion.
> >
> > (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).
> >
> > (4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Fed. R. Civ. P. 54(d) for fees and costs pursuant to the common fund doctrine[8] or ERISA's statutory fee-shifting provision[9] along with a proposed notice to subclass members describing the fee request. The Court shall then set a notice period, determine the form of the appropriate notice, and set a timetable and a hearing date to judge the fairness of the proposed fee award.

9. The Court deferred until the conclusion of the case its decision on Defendants' Motion for Judgment on the Partial Findings. ECF No. 429. For the foregoing reasons, Defendants' Motion is denied.

IT IS SO ORDERED.

July 27, 2017
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge

[8] The common fund doctrine entitles litigants or lawyers who recover a common fund for the benefit of persons other than themselves or their clients to recover a reasonable attorney's fee from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

[9] ERISA's statutory fee-shifting provision permits the court in its discretion to allow a reasonable attorney's fee and costs of action to either party. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (quoting 29 U.S.C. § 1132(g)(1)).