STATE OF MICHIGAN
IN THE SUPREME COURT

Rita Kendzierski, Bonnie Haines, Greg Dennis, Louise Bertolini, John Barker, James Cowan, Vincent Powierski, Robert Stanley, Alan Moroschan, and Gaer Guerber, on behalf of themselves and those who are similarly situated, Circuit Co

Plaintiffs-Appellees,

v.

County of Macomb,

Defendant-Appellant.

Supreme Court No. 156086

Court of Appeals No. 329576

Lower Court: Macomb County

Lower Court Case No. 10001380 CK

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PLAINTIFF-APPELLEES RETIREES' OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

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LIST OF ABBREVIATIONS AND ACRONYMS

For concision and readability, this brief uses the following abbreviations and acronyms:

Retirees	Plaintiffs-Appellees
County	Defendant-Appellant Macomb County
CBAs	Collective Bargaining Agreements in effect between January 1989 and January 2011
BC/BS	Blue Cross/Blue Shield
HMO	Health Maintenance Organization
PPO	Preferred Provider Organization
2005-2007 CBA	2005-2007 CBA between the County and AFSCME Local 411
MCOA	Michigan Court of Appeals
TC	Macomb County Circuit Court (trial court)

COUNTER-STATEMENT ON WHY LEAVE IS UNWARRANTED, AND THE LEGAL INSIGNIFICANCE OF THE COUNTY'S NON-BINDING "INTENT"

This is a traditional contract action, fully and properly considered by the MCOA. It is unworthy of this Court's attention.

The MCOA (1) applied ordinary contract principles -- consistent with state and federal case law -- to *particular* collectively-bargained promises and (2) properly enforced the County's lifetime healthcare promises made to 1,600 retirees. (Ex. 1, MCOA Opinion).

The County invokes MCR 7.305(B)(2), (3), and (5)(a), but cannot justify leave under those standards.

The County conclusionarily asserts that this case has "*significant public interest*." In fact, the public interest lies in protecting the sanctity of contracts and the rights of retirees by requiring the County to keep its promises. This is exactly what the MCOA did -- based on the CBAs and the County's own admissions.

Next, the County similarly asserts that this case is of "*major significance*" to Michigan jurisprudence. In fact, the MCOA applied governing contract principles to particular CBAs. It did so in a fact-intensive context, applying specific MRE 801(d)(2) admissions like the statement of County Executive Mark Hackel:

> The County provides retiree health benefits to eligible County retirees (and their eligible beneficiaries) for their *lifetimes*. (Ex. 6, p. 28) (emphasis added).

The only jurisprudential issue is whether a promise is a promise. The MCOA, consistent with Michigan jurisprudence, affirmed that contracts are enforceable. (Ex. 1).

Third, the County asserts that the MCOA did "*material injustice*." In fact, the MCOA prevented injustice. Injustice would be done by granting leave -- permitting the County to prolong this 2010-filed suit in its unworthy efforts to improve its "bottom line" at the expense of 1,600 fixed-income retirees and their families.

In sum, the public interest, the rule of law, and justice will be served by denying leave and preserving the healthcare each retiree earned over a career of public service.

The County concludes its Preliminary Statement by musing on its lofty, but non-binding, intent to provide retirees with "quality healthcare benefits." Its introspections, as the County admits later in its Application, are not probative to this Court's analysis.

But, they are revealing. They clarify the County's remarkable claim that these CBA-promised retiree health care benefits are -- *post*-CBA expiration -- based on nothing more than the County's hope and intentions. This is so, the County urges, despite specific County admissions and practices that underscore the lifetime nature of these retiree healthcare benefits. It is so, the County further argues, even in the context of CBA language that restricts certain County changes to retiree healthcare

to mutually agreed-upon substantially equivalent changes -- restrictions that are pointless if, as the County claims, its contractual obligation for retiree healthcare expires with the term of each CBA.

In its reverie, the County misapplies a quote from *Gallo v Moen, Inc.*, 813 F3d 265 (CA 6, 2016), which is applicable only in the absence of vested benefits and CBA language that restricts unilateral changes in retiree healthcare.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should deny the County's Application for Leave to Appeal, or peremptory reversal, where the MCOA properly resolved the conflict under ordinary contract principles consistent with state and federal case law when it found that:

   a. Retirees had a vested lifetime healthcare benefits based on the CBAs and the County's admissions;

   b. The County could not modify any vested retiree healthcare benefits except in the case of pre-Medicare retirees healthcare, and then only if the County's proposed changes resulted in substantially equivalent benefits and were agreed to by the parties before implementation; and

   c. Retiree benefits were unilaterally and unlawfully reduced without the required agreement, despite the County's promises.

   MCOA answers: **Yes**

   Plaintiff-Appellee answers: **Yes**

   Defendant-Appellant answers: **No**

2. Whether the County has met its burdens under MCR 7.305 for leave to appeal, or peremptory reversal, when it has failed to demonstrate that the issues

raised by its Application involve a significant public interest, have major significance to the State's jurisprudence, or that the MCOA decision is clearly erroneous and results in a material injustice?

Plaintiff-Appellee answers: **No**

Defendant-Appellant answers: **Yes**

INTRODUCTION

The MCOA held that the Retirees' healthcare benefits were vested and the County improperly changed the benefits -- including the pre-Medicare Retirees' healthcare benefits that envisions pre-approved, substantially equivalent changes only. (Ex. 1, MCOA Opinion at 2-3).

The MCOA applied traditional rules of contract interpretation and found the CBAs ambiguous, requiring consideration of extrinsic evidence. (*Id.* at 4-5). The MCOA then considered the County's admissions, including a glaring, spot-on admission contained in the 2014 bond funding proposal that:

> The County provides retiree health benefits to eligible County retirees (and their eligible beneficiaries) for *their lifetimes*. (Ex. 6, p. 28, emphasis added).

This extrinsic evidence, the MCOA found, was unrefuted. (*Id.* at 5).

The County now seeks leave to appeal, or peremptory reversal, under MCR 7.305. It does so, it claims, because the application raises issues of significant public interest, involves legal principles of major significance to the State, and the MCOA's clear error causes a material injustice.

But, as explained below, the County's arguments do not meet this Court's standards for granting leave or peremptory reversal.

The County dismisses its CBA promises, and its unrefuted behavioral and verbal admissions, as merely expressions of intentions -- not binding obligations.

As such, it is free to reduce, dismantle or eliminate all retiree healthcare once the CBA expires. The County relies on *M & G Polymers USA, LLC v Tackett*, 135 S Ct 926, 929; 190 L Ed 2d 809 (2015) ("***Tackett***") for its argument. But, to support this claim, the County must rewrite history and its words and deeds.

Tackett does not suspend ordinary contract rules -- *i.e.*, patent and latent ambiguity principles. Nor does it release parties from there 801(d)(2) admissions.

COUNTER-STATEMENT OF FACTS

A. The Retiree class. This certified class action covers approximately 1,600 County retirees. Each former County employee retired under a CBA in effect at some time during the period January 1, 1989 through January 19, 2011.

B. The CBAs promise lifetime retiree healthcare. The CBAs generally promise fully paid BC/BS healthcare to each employee who retires and "is eligible for and receives" a County pension, *i.e.*, for life. (Ex. 3, Art. 18 B.2). The CBAs also promise spousal healthcare that ends at the "death of the retiree." Or, if the retiree chose a survivorship pension, healthcare continues as long as the surviving spouse is paid a County pension, *i.e.*, for life. (*Id.* at Art. 18 B.2.a).

For pre-Medicare Retirees, the CBAs permit the County to provide healthcare that is substantially equivalent to BC/BS, provided that "substantial equivalence" is reviewed and agreed to by the Union "prior to implementation of" any changes.

The CBAs promise $5 per-prescription co-pays applicable to generic, formulary, and non-formulary drugs for certain BC/BS coverage. They promise PPO and HMO options and an annual "open enrollment" period during which the Retirees can change healthcare plans. (*Id.* at Art. 18.B.2.c and h. and C.3).

C. County admissions. From at least 1993 to present, the County has repeatedly admitted that the CBAs promise lifetime retiree healthcare.

Most recently, in 2015, the County raised $263 million in "Health Care Obligation Bonds" to finance promised retiree healthcare "for the next 50 years." (Ex. 6 at 1). County Executive Hackel's 2014 bond proposal explained the County's reason for assuming this large indebtedness: healthcare is part of "vested" retirees' "benefit package" promised for the retirees' "lifetimes." (Ex. 6 at 1 and 28).

Other County admissions include:

(1) statements in County actuarial reports in 1993 and later that describe retiree healthcare as a County "IOU" to retirees that must be funded to ensure that "benefit promises are not empty promises" (Ex. 4);

(2) the establishment of the *Macomb County Retiree Health Care Fund* in the 1990's to fund lifetime retiree healthcare, and the Corporation Counsel's admissions -- made more recently while seeking County approval to amend the Fund's trust documents -- that the collectively-bargained retiree healthcare is a "contractual obligation" (Exs. 17-20);

(3) 2007 arbitration testimony by the County Finance Director that retiree healthcare is an "obligation" that must be funded (Ex. 5), and the admission of a County official during bargaining with AFSCME (the County's largest bargaining unit) that retiree healthcare is for life; and

(4) admissions by County benefits representatives to retiring employees and their spouses that, in addition to their County pensions, they will receive healthcare for "life." (Ex. 10).

D. The County's unilateral retiree healthcare reductions. Beginning on January 1, 2009, the County unilaterally reduced retiree healthcare. This reduction included pre-Medicare Retiree healthcare without the CBA-required union review and prior agreement. These included reductions: (1) increased retiree prescription co-pays in 2009 (Exs. 12-14); (2) forcing Medicare retirees into a reduced

UA/AmWins plan in January 2010 (Exs. 25 and 26); and (3) forcing pre-Medicare retirees into reduced PPO and HMO plans in March 2010 (Exs. 27-29). In 2013, during this litigation, the County forced retirees into a reduced BCBSM PPO Plan.

The County estimated its "savings" from the 2009 prescription co-pay increases to be $1.5 million per year. (Ex. 12). The County computed its "savings" from the 2010 healthcare reductions to be an additional $2.7 million per year. (Ex. 15). The County achieved these "savings" -- amounting to about $4.2 million per year and totaling over $25 million since 2009 -- by shifting County costs to fixed-income retirees. The County took these "savings" despite surpluses that totaled $1 billion in 2012. (Ex. 22).

E. The TC ruling (Ex. 2). After both parties filed motions for summary disposition, the TC held that undisputed County admissions and customs indicated lifetime retiree healthcare. But, the TC also held -- despite the CBAs' "substantial equivalence" and "review and agreement" clauses -- that the County had the unilateral right to make "reasonable" reductions to promised healthcare. The TC relied on *Reese v CNH America, LLC*, 574 F3d 315 (CA 6, 2009). (Ex 2 at 10-11).

The TC decision was made without the benefit of *Harper Woods Retirees' Ass'n v City of Harper Woods*, 312 Mich App 500; 879 NW2d 897 (2015) which, two weeks later, declined to apply *Reese* in similar circumstances and overturned

another trial court's ruling that a city could unilaterally change CBA-promised retiree healthcare. (Ex. 2).

F. The MCOA Ruling (Ex. 1). Unlike the TC, the MCOA found that the CBAs were ambiguous. As such, the MCOA concluded, it was appropriate to consider extrinsic evidence to determine the meaning of the CBA. After reviewing this extrinsic evidence, the MCOA concluded that the healthcare benefits were vested.

The MCOA further concluded that the County could modify the healthcare benefits of pre-Medicare retirees, but only if the changes were substantially equivalent and agreed to prior to their implementation. The MCOA found that the County had "failed to provide *any* evidence" of the Retirees' prior agreement to the changes (emphasis in original).

The MCOA rejected the TC's use of a "reasonableness" standard, set forth in *Reese v CNH America, LLC*, 694 F3d 681 (CA 6, 2012), to determine whether the County properly altered the retirees' healthcare benefits without the consent of the retirees. *Harper Woods*, 312 Mich App at 508. The MCOA reiterated its finding in *Harper Woods:* that *Reese* "does not stand for the proposition that an employer may always unilaterally alter its retirees' healthcare benefits under a CBA, regardless of the CBA's specific language…" *Harper Woods*, 312 Mich App at 510.

G. The County's Application for Leave to Appeal

The County now challenges the MCOA's decision by its Application for Leave to Appeal the MCOA decision. For the reasons stated below, this Court should deny the Application as well as the request for peremptory reversal.

COUNTER-STATEMENT ON STANDARD OF REVIEW

The County must demonstrate that its Application presents issues appropriate for the exercise of this Court's jurisdiction. MCR 7.305(B).

A review of a decision on a motion for summary disposition is reviewed *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Interpretation of a collective-bargaining agreement, like interpretation of any other contract, is also a question of law also subject to review *de novo*. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003); *Maurer v Joy Technologies, Inc*, 212 F3d 907, 914 (CA 6, 2000). A reviewing court interprets a collective-bargaining agreement "according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." *Tackett*, 135 S Ct at 929.

ARGUMENT

I. THE LAW GOVERNING COLLECTIVELY-BARGAINED RETIREE HEALTHCARE

A. Ordinary Contract Principles Determine Whether Retiree Healthcare is Vested and Unalterable

The U.S. Supreme Court has held that there is no "inference" in favor of concluding that certain rights have vested under an agreement. *Tackett*, 135 S Ct at 933.

Tackett rejected the Sixth Circuit's inference in favor of vesting—derived from *UAW v Yard-Man, Inc*, 716 F2d 1476 (CA 6, 1983), cert den, 465 US 1007 (1984). But *Tackett* did not abrogate the rules of contract construction. See *Reese v CNH Indus NV*, 143 F Supp 3d 609 (ED Mich 2015) aff'd 854 F3d 877 (CA 6, 2017) ("*Tackett* did not create new rules for construing CBAs" but "simply rejected" the *Yard-Man* inference).

Michigan courts have never applied the rejected *Yard-Man* inference. Rather, Michigan courts have always used inference-free "ordinary" contract principles. The MCOA in *Harper Woods* cited *Tackett*, 135 S Ct at 933, and found it "consistent" with "Michigan's contract jurisprudence regarding CBAs." *Harper Woods*, 312 Mich App at 513.

Under "ordinary contract principles" -- under Michigan precedent and *Tackett* -- the contracting parties' intentions control. Intentions are determined from the CBA terms and "context" of each "particular" CBA, and from the parties' "record evidence" and "known customs" and "usages" with "affirmative evidentiary support" in the "given case." See *Tackett*, 135 S Ct at 933, 935.

In the analysis of ordinary contract principles, this Court has stated that "[t]he foundational principle of our contract jurisprudence is that parties must be able to rely on their agreements." This applies "no less strongly to collective bargaining agreements." *Macomb Co v AFSCME Council 25 Locals 411 and 893*, 494 Mich 65, 80; 833 NW2d 225 (2013).

Just like any other contract, a collective bargaining agreement "is the product of informed understanding and mutual assent." *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 327; 550 NW2d 228 (1996). Unambiguous contractual language reflects, as a matter of law, the parties' intent, and "courts must interpret and enforce the contract as written." *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009).

Application of ordinary contract principles may prove the parties "intended to vest lifetime benefits for retirees." *Tackett*, 135 S Ct at 937. See also *Litton Financial Printing Div v NLRB*, 501 US 190 (1991).

Litton holds that a collective bargaining agreement's expiration does not end "obligations already fixed under the contract but as yet unsatisfied," that rights "accrued or vested" will "as a general rule, survive [CBA] termination," that whether obligations survive the contract expiration is "determined" by "contract interpretation," and that post-expiration rights may "arise" from "the express or implied terms of the expired agreement itself." 501 US at 203, 206-207. See also

Tackett v M & G Polymers USA, LLC, 811 F3d 204 (CA 6, 2016) ("***Tackett* III**") ("[c]onstraints upon the employer after" CBA expiration may arise from the CBA's explicit terms "as well as from implied terms of the expired agreement").

Michigan law agrees. See *County of Ottawa v Jaklinski*, 423 Mich 1, 23; 377 NW2d 668 (1985): (1) public employers can promise "vested" rights that "extend beyond contract expiration" and (2) "[a]n employee should not be deprived of already accrued or vested rights on the fortuity that they become ripe for enjoyment following expiration of the agreement." See also *Gibraltar School Dist v Gibraltar MESPA-Transportation*, 443 Mich 326, 340; 505 NW2d 214 (1993) (holding that *Jaklinski* "matches" the *Litton* principles).

B. Applying Ordinary Contract Principles, Michigan Courts Have Found Collectively-Bargained Retiree Healthcare Vested and Unalterable

Using ordinary contract principles -- without any *Yard-Man inference*, Michigan courts have repeatedly held that collectively-bargained retiree healthcare is vested and cannot be unilaterally reduced or eliminated.

See *e.g*. **(1)** *Genesee County Community Mental Health v Sprague*, 2011 WL 2557476 (Mich App) (Ex. 33) (retirees "were vested in their accrued [healthcare] benefit at the time they elected deferred retirement and terminated their employment"); **(2)** *Bachman v City of Jackson*, 2003 WL 22962068 (Mich App) (Ex. 32) (a later contract excluding healthcare for future deferred retirees was "not

controlling" for an already-retired police officer who was "entitled to health benefits" under the earlier CBA in force at his separation); **(3)** *Girardi v City of Sterling Heights*, 2000 WL 33529621 (Mich App) (Ex. 34) (retiree entitled to healthcare under the CBA in force at his separation, in which the "Employer agrees to provide to any officer covered by this Agreement who retires on or after July 1, 1982, Blue Cross/Blue Shield health insurance"); **(4)** *Loftis v City of Oak Park*, 2012 WL 3021659 (Mich App) (Ex. 35) (public safety officers who retired under a CBA were entitled to the "same level of [healthcare] coverage" in force at their separation; later unilateral reductions were unlawful and could not be offset by improvements).

C. CBAs Promise Lifetime Retiree Healthcare

The MCOA found retiree lifetime healthcare based on the parties' intentions and "custom" and on the undisputed County admissions.

1.

The CBAs promise retirees and surviving spouses healthcare as long as they receive County pensions -- *i.e.*, for life. The CBAs promise fully paid BC/BS coverage for each retiree who receives a County Pension. Spousal healthcare "terminates upon the death of the retiree" or -- if the retiree/spouse elected a survivorship pension -- the surviving spouse's healthcare continues for the duration of the survivorship pension -- *i.e.*, for the surviving spouse's life.

A CBA interpretation that would give retirees and surviving spouses healthcare coverage for, at most, three (3) years of a CBA -- *i.e.*, for terms less than the lifetime duration of their County pension -- nullifies clear contractual promises. Such an interpretation -- the County urged interpretation -- violates fundamental contract principles. See *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 297 (2009) ("contract terms should not be considered in isolation and contracts are to be interpreted to avoid absurd or unreasonable . . . results").

2.

Tackett itself recognizes the importance of CBA terms -- *such as those here* -- that link retiree healthcare to pensions (135 S Ct at 938, concur.):

> Because the retirees have a vested, lifetime right to a monthly pension … a provision stating that retirees "will receive" health-care benefits if they are "receiving a monthly pension" is relevant to this examination … So is a "survivor benefits" clause instructing that if a retiree dies, her surviving spouse will "continue to receive [the retiree's health-care] benefits ... until death or remarriage."

See also *Tackett* III, 811 F3d 204, 210, n. 2 (2016) (*Tackett* concurrence "identifies other principles of contract law governing retiree healthcare promises").

Moreover, collective bargaining agreement terms that require review and prior agreement of employer-instigated healthcare changes are evidence of vesting. See *UAW v Kelsey Hayes Co*, 854 F3d 862 (CA 6, 2017); *USW v Kelsey-Hayes Co*, 750 F3d 546 (CA 6, 2014), rev on other grounds 795 F3d 525 (2015). *USW* held that

"[b]y including ["mutual agreement" and "equivalent value" language] in the CBAs, the parties have removed any doubt not only that they intended that the right to retirement healthcare vest, but that they intended a particular kind of coverage to vest." 750 F3d at 556.

Here there are mutual agreement and "substantial equivalence" clauses applicable to pre-Medicare Retirees. If retiree healthcare terminated at each CBA expiration -- as the County now suggests -- these clauses are pointless.

But, these clauses are not without purpose. They preclude unilateral reductions in promised retiree healthcare. *Tackett* III, 811 F3d at 208 (courts should "avoid construction of contracts that would render promises illusory"). Fundamental contract principles require giving effect to the "whole" CBA, including the mutual agreement and "substantial equivalence" clauses. See *Loftis*, 2012 WL 3021659, at *2 (Ex. 35) (CBAs must be "read contracts as a whole, giving harmonious effect, if possible, to each word and phrase").

3.

The CBA terms promising retiree healthcare for the duration of the County pension take precedence over general durational clauses. This point was made in *UAW v Kelsey-Hayes Co*, 130 F Supp 3d 1111 (ED Mich, 2015) aff'd 854 F3d 862 (CA 6 2017). That case applied *Tackett* to a CBA promising that healthcare

beginning at retirement "shall be continued." Finding this language promised lifetime healthcare, the trial court held (130 F Supp 3d at 1119):

> All collectively-bargained vested benefits are promised in limited-duration CBAs with general duration clauses. The court must read the 1998 CBA as a whole and give effect to both the general duration clauses -- governing overall CBA expiration -- and the specific promises of "retiree health care" and "retiree medical" made in the 1998 CBA . . . "[W]ell-founded principles of contract law establish that 'specific terms and exact terms are given greater weight than general language'" and "separately negotiated or added terms are given greater weight than standardized terms." *Royal Ins Co v Orient Overseas Container Line Ltd*, 525 F3d 409, 420 (CA 6, 2008).

Here, the CBA language states that retiree healthcare continues so long as the retirees and surviving spouse receive a County pension, -- that is, for their lifetime.

D. CBA Context Proves Lifetime Retiree Healthcare

1. Promises of Lifetime Healthcare Within CBA Context

Each CBA read "as a whole" confirms the County's lifetime retiree healthcare obligations. Each CBA specifies the limited circumstances in which retiree healthcare may be terminated or suspended. This confirms that, absent these circumstances, CBA-promised lifetime healthcare is to unalterable.

1.

First, the event triggering termination of spousal coverage -- the retiree's death (unless the retirees chose a survivor pension option) -- is explicitly set out in the

CBAs. (Ex. 3, Art. 18.B.2.a). Retiree deaths may occur years or even decades after retirement, showing the promise is tied to the retirees' lifetimes, not CBA expiration.

Second, a retiree's failure to enroll in Medicare Part B at age 65 is "cause for termination" of County-paid retiree healthcare. (Ex. 3, Art. 18.B.2.d). As employees with sufficient service years can retire as young as age 50, Part B eligibility often occurs long after retirement, again showing that retiree healthcare is promised well into the future -- long after the CBA expires. (Ex. 3, Art. 19G).

Third, County-paid healthcare is suspended during periods that the retiree and spouse have coverage through non-County employment. But, it is *restored* when such coverage ends -- whether that is months, years, or decades after the CBA promising retiree healthcare has expired. This too underscores the vested nature of these benefits. (Ex. 3, Art. 18.B.2.e).

Fourth, a retiree may choose cash payment in lieu of County-paid healthcare during periods that the retiree has healthcare through a spouse's employment, but the retiree's healthcare *resumes* when the spouse's non-County coverage ends, which can occur long after the CBA expires. (Ex. 3, Art. 18.B.2.i.).

In short, the CBAs' specification of the narrow circumstances in which the County may terminate or suspend retiree healthcare -- and must reinstate it -- is proof that, absent those specific circumstances, retiree healthcare continues beyond the CBA expiration.

The contract principle of *expressio unius est exclusio alterius* applies. See *UAW v Kelsey-Hayes Co*, 130 F Supp 3d at 1119 (finding lifetime retiree healthcare; "when the parties intended to make certain benefits of a limited duration, they expressly provided as much in the contract" and "could have, but did not, provide that retiree healthcare would commence at retirement and end upon the expiration of the CBA or at some other determinable time"); *Noe v PolyOne Corp*, 520 F3d 548, 562-563 (CA 6, 2008) (applying "the *expressio unius est exclusio alterius* canon of interpretation" to find CBA promise of lifetime healthcare for retirees).

2.

The 2014-2016 CBA provision that excludes post-January 1, 2016 hires from retiree healthcare also proves vesting. This exclusion of specified future retirees (Ex. 6, p. 1) would have been unnecessary if, as the County now claims, retiree healthcare was not vested under the earlier CBAs. See *Reese*, 143 F Supp 3d 609, 614 (2015) (applying *Tackett* and holding that a CBA provision requiring post-December 1, 2004 retirees to contribute toward their healthcare -- unlike earlier retirees -- showed vesting for the earlier retirees):

> If the parties did not intend for retiree health care benefits to vest in the agreements preceding the 2005 agreements (*i.e.*, if they intended for coverage to expire with the prior agreements), why limit contributions to post-December 1, 2004 retirees?

Here, the CBAs link retirees' and their surviving spouses' healthcare to their County pensions. On remand after *Tackett*, *Reese* held that CBA terms tying retiree healthcare to pension benefits create "at least an ambiguity with respect to whether the parties intended" retiree healthcare to vest." *Reese*, 143 F Supp 3d at 615.

The MCOA properly recognized this ambiguity.

II. PROMISE OF LIFETIME HEALTHCARE BY COUNTY ADMISSIONS

Admissions and extrinsic evidence may be used where contracts are ambiguous about the contracting parties' intent.[1] This warrants consideration of County admissions and other extrinsic evidence which, as the MCOA held, prove lifetime retiree healthcare.[2]

Here, as we show below and as the MCOA found, there is ample evidence of undisputed County MRE 801(d)(2) admissions and other extrinsic evidence definitively proving vested lifetime retiree healthcare.

A. Trust Fund Admission

County actuary Gabriel Roeder reported in 1993 that the County "handed an IOU" -- then worth $108 million -- to retirees "for retiree health benefits

[1] See *Shay v Aldrich*, 487 Mich 648; 790 NW2d 629 (2010) (extrinsic evidence used to resolve latent ambiguity) and *Klapp v United Ins Group Agency, Inc*, 468 Mich 459 (extrinsic used to resolve patent ambiguity). See also *Wonderland Shopping Ctr Venture Ltd P'Ship v CDC Mortg Capital Inc*, 274 F3d 1085, 1092 (CA 6, 2001) (under Michigan law, courts may use "extrinsic evidence" to "dispose of" or "prove the existence of" a "potential ambiguity" or discern the parties' "actual intent" where "ambiguity exists"). This is consistent with *Tackett*, 135 S Ct at 938 (concur) ("when a contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties"). See also *Tackett* III, 811 F3d 204, 208-209.

[2] The MCOA properly found that retirees are entitled to lifetime retiree healthcare based on undisputed County admissions. (Exs. 1 and 2). In *Tackett* terms, the Courts looked to "known customs or usages … using affirmative evidentiary support" in the case. 135 S Ct at 935. See also *TCU v Union Pac. R.R.*, 385 US 157, 161 (1966) ("[i]n order to interpret [a labor] agreement, it is necessary to consider . . . practice, usage and custom").

commencing when you retire." The actuary advised the County to fund retiree healthcare in a "regular, orderly manner" so that these "benefit promises will not be empty promises." (Ex. 4).

The County Board agreed in 1994 that if the Retirement Commission adopted new actuarial assumptions which reduced the County's required annual pension contribution, the savings could be used to pre-fund retiree healthcare, as the actuary recommended. (Ex. 16). The Retirement Commission adopted the new pension assumptions in 1995. In 1997, the County created the *Macomb County Retiree Health Care Fund* to pay for retiree healthcare. (Exs. 17-20). From 1997 through 2003, the County contributed over $65 million to pre-fund the County's retiree healthcare obligations. (Ex. 6, p. 7).

The County stopped pre-funding retiree healthcare after 2003. (Ex. 6, p. 7). The County actuary issued later actuarial reports that again described retiree healthcare as the County's "IOU." The actuary again recommended regular funding to ensure that retiree "benefit promises will not be empty promises." (Ex. 4).

In 2012 -- indeed, during the pendency of this litigation -- the County amended the terms of the *Macomb County Retiree Health Care Fund's* trust documents. In seeking approval to amend these documents, Macomb County Corporation Counsel George Brumbaugh advised the County Board that the retiree healthcare promised in the "collective bargaining agreements" is a "contractual obligation." (Ex. 21).

As found by the MCOA, these undisputed MRE 801(d)(2) admissions, made in connection with the trust fund established to pay for lifetime retiree healthcare, prove that collectively-bargained healthcare is a vested and unalterable "contractual obligation." See *USW v Kelsey-Hayes Co*, 943 F Supp 2d 747, 754 (ED Mich, 2013), aff'd 750 F3d 546 (CA 6, 2014), remanded on other grounds 795 F3d 525 (CA 6, 2015) (where CBA is ambiguous, the parties' intent can be ascertained by evidence of the employer's admissions in "words and deeds").

B. Arbitration and Bargaining Admissions

When a public safety union and public employer cannot agree on a CBA, they can arbitrate under "Act 312," MCL 423.231 *et seq*. Act 312 arbitrations consider "the financial ability of the unit of government" to pay the cost of proposed CBA terms. MCL 423.239. In a 2007 Act 312 arbitration, County Finance Director David Diegel testified that police officers' bargaining proposals were unaffordable because of the high cost of the County's "obligation" to provide retiree healthcare and "fund that liability." Diegel did not mention to the Act 312 arbitration panel, that these retiree healthcare obligations -- this needed-to-be funded "liability" -- were actually limited to only the 3-year term of the CBA, as the County now argues.

Rather, Diegel testified that "the longer we put off putting money into the fund, the harder it's going to be to catch up to that liability." Diegel testified that an "obligation is an obligation." (Ex. 5).

During 1999-2000 CBA negotiations with AFSCME Local 411, County negotiator Ted Cwiek similarly resisted union wage and benefit proposals by asserting that County employees already had excellent benefits, including "lifetime" retiree healthcare. (Ex. 29). These MRE 801(d)(2) admissions also prove lifetime retiree healthcare.

C. Healthcare Obligation Bonds

In 2014, the County took preemptive action to permanently fund lifetime retiree healthcare: it issued "Health Care Obligation Bonds." Pursuant to 2012 PA 329, the County prepared a "comprehensive financial plan" with "an analysis of the *current and future obligations*" for "each post-employment healthcare benefit program." The County presented its analysis to the Michigan Treasury Department for approval. MCL 141.2518(4) (emphasis added).

The County analyzed its obligations in County Executive Mark Hackel's 2014 bond proposal. He proposed bonds in amounts sufficient to pay for retiree healthcare for "the next 50 years." Hackel wrote:

> "Historically, Macomb County has offered retiree healthcare to *vested* employees as part of their benefit package." (Ex. 6, p. 1, emphasis added).

Hackel supported the County's Michigan Treasury Department proposal with the County's actuarial valuation of retiree healthcare. This valuation succinctly

underscored the lifetime duration of the County's obligation to provide retiree healthcare:

> The County provides retiree health benefits to eligible County retirees (and their eligible beneficiaries) ***for their lifetimes***. (Ex. 6 at 28, emphasis added).

Echoing these admissions, County Finance Director Pete Provenzano told the Finance Committee that the bonds were necessary to avoid "break[ing] *contracts* with the existing retirees." (Ex. 7, emphasis added).

After receiving State approval in early 2015, County Board Chair Dave Flynn said the bonds were "the best option on the table if we wanted to keep our *obligation* to retirees." The County then sold $263 million in bonds, placing the proceeds in a trust to fund the promised retiree healthcare. (Ex. 6, p. 1 and Ex. 9).

Former County Corporation Counsel George Brumbaugh wrote in May 2015 that the bond proceeds would help the County "fulfill" its "promise of healthcare for retirees" and "meet its retiree healthcare *obligations*." (Ex. 9, emphasis added).

County officials made these retiree healthcare admissions -- using the terms "*vested*," "*lifetimes*," "*contracts*," "*obligations*," and "*promises*" -- during this class action lawsuit. So, while the County Executive, the Finance Director, and the Board Chair assured County residents, retirees, the State, the media, bond buyers, and others that *retiree healthcare was a vested lifetime contractual obligation and*

promise, the County's lawyers were arguing in this case that retiree healthcare was limited to the term of the applicable CBA.

The County's MRE 801(d)(2) admissions control. They prove, in the words of County Finance Director Pete Provenzano, that County promises of vested lifetime retiree healthcare obligations "must be fulfilled to avoid "break[ing] contracts with the existing retirees. (Ex. 7).

In *UAW v Kelsey-Hayes Co*, 854 F3d 862 (CA 6, 2017), as here, the Employer "told retiring employees that they would have company-paid healthcare coverage for life." *Id*. at 870. Because of the "veritable mount of evidence" that healthcare was vested for life, plaintiffs were entitled to receive the healthcare they were promised. *Id*, citing *Golden v Kelsey-Hayes Co*, 954 F Supp 1173, 1188 (1997). The Sixth Court ultimately concluded in *UAW v Kelsey Hayes Co*. that the ambiguity was resolved by the mountain of extrinsic evidence -- 801(d) admissions in word and deed – that promised lifetime retiree healthcare.

D. Admissions to Retiring Employees

As part of the retirement process, County human resources officials regularly met with about-to-retire employees and the spouses. County officials told these individuals and their spouses that, along with their County pensions, they are entitled to County-paid retiree healthcare "for life."

Typical is County Retirement Coordinator Wendy Fisher's statement to police Lieutenant John Barker and his wife: that retiree health benefits in effect "on the date of my retirement" would "remain the same for our lifetime." (Ex. 10). See also *USW v Kelsey-Hayes Co*, 943 F Supp 2d at 754 (citing employer admissions and "lifetime" assurances in finding CBA promise of lifetime vested healthcare).

These additional undisputed MRE 801(d)(2) admissions, coupled with the admissions already summarized, provide a "veritable mountain" of undisputed evidence proving vested lifetime retiree healthcare.

E. Adverse Inference Admissions

The County - in violation of the law and its own procedures -- deleted four years of County emails pertaining to retiree healthcare, including the emails regarding the 2009 and 2010 unilateral changes in retiree healthcare that it quietly planned. The deleted emails were written from 2008 to 2012. This included documents issued after the litigation began. These facts are undisputed. (Ex. 24).

The County had a duty to issue a "litigation hold" notice to all County employees to suspend the normal record retention/destruction policy to preserve this evidence. (Ex. 31). No notice was issued, although Corporation Counsel actively participated in this litigation. (Ex. 24).

The County is guilty of spoliation -- violating its duty to preserve evidence that it "knows or should know is relevant." *Brenner v Kolk*, 226 Mich App 149, 162;

573 NW2d 65 (1997). Adverse inferences may be drawn as a spoliation sanction. See *MASB-SEG Prop/Case Pool, Inc v Metalux*, 231 Mich App 393, 400; 586 NW2d 549 (1998) and *Ward v Consol Rail Corp*, 472 Mich 77, 84-89; 693 NW2d 366 (2005). This sanction could have been imposed at the summary disposition stage. *Banks v Exxon Mobil Corp*, 477 Mich 983, 84-89; 725 NW2d 455 (2007) (concur).

These spoliation-based adverse inferences only adds to the evidence of lifetime retiree healthcare. Neither the TC nor the MCOA addressed the County's spoliation. This Court may do so *de novo* and draw adverse inferences that add to the evidence that support the Retirees' claims.

Since at least 1993, the County has admitted to promising vested lifetime retiree healthcare. In establishing the *Macomb County Retiree Health Care Fund*, in arbitration testimony and CBA negotiations, in selling the "Health Care Obligation Bonds," and in exit interviews with retirees and their spouses, the County has freely, consistently and repeatedly admitted that retiree healthcare is a lifetime obligation. These undisputed County MRE 801(d)(2) admissions, supported by the adverse inference arising from the County's spoliation of years of pertinent document, refutes the County lawyers' for-litigation-purposes contrary assertions. The MCOA appropriately considered this evidence and resolved these issues properly.

III. THE RETIREES HEALTHCARE IS UNALTERABLE WITHOUT THEIR CONSENT, UNDER ORDINARY CONTRACT PRINCIPLES AND THE LANGUAGE OF THE CBAS, AS FOUND BY THE MCOA

A. Michigan Courts Hold That Vested Collectively-Bargained Retiree Healthcare Is Unalterable

This Court has held that "the principle of freedom to contract does not permit a party *unilaterally* to alter [an] original contract." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003). Rather, when the alteration of a provision in a CBA "affects vested rights already accrued, [the change] may give rise to a cause of action in contract." *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 530; 473 NW2d 652 (1991) (involving a change in compensation policy for work already preformed).

In *Harper Woods*, the city unilaterally imposed new healthcare plans that increased retirees' prescription co-pays and other out-of-pocket expenses. *Harper Woods* rejected the trial court's reliance on *Reese* and reversed the trial court's holding that "as a matter of law" the city could "unilaterally alter health benefits" vested under a CBA. The asserted "reasonableness" of the unilateral changes, and invocation of the federal *Reese I*, did not provide "a proper basis upon which to refuse enforcement of the contractual provisions" promising retiree healthcare. *Id.*

Harper Woods held that the "unilateral alteration of contracts is prohibited because 'mutuality is the centerpiece to waiving or modifying a contract.'" *Id.*, quoting *Quality Products*, 469 Mich at 364. *Harper Woods* held, too, that "a

modification clause in a written contract also raises a presumption, as a matter of law, that a contract may not be modified absent mutual assent." *Id.* at 515 fn 4. "Under established contract principles, vested retirement rights may not be altered without the [retiree]'s consent." *Harper Woods*, 312 Mich App at 511.

B. Changes to Pre-Medicare Retirees' Healthcare Must be Agreed to by the Parties Under the Clear Language of the CBA

The County imposed the 2009 and later healthcare reductions unilaterally. (Ex. 29). And, as to the pre-Medicare retirees, there was no prior review and mutual agreement on the County's changes. (Exs. 13 and 14).

The County asserts that it can unilaterally modify retiree healthcare without prior approval, but ignores the CBAs' mutual agreement clauses and disregards *Harper Woods* and similar federal cases which give effect to similar mutual agreement clauses. See *e.g.* **(1)** *Harper Woods*, 312 Mich App at 515, fn 4 (CBA-promised healthcare subject to a "modification clause" clause can only be changed with "mutual assent"); **(2)** *USW*, 943 F Supp 2d at 758-59 (mutual agreement clauses preclude unilateral retiree healthcare changes; vested retiree healthcare is "forever unalterable"); **(3)** *Hargrove v EaglePicher Corp*, 852 F Supp 2d 851, 855 (ED Mich, 2012) (employer cannot "modify the retirement healthcare benefits" or "assert the unilateral right to modify or terminate those benefits, or to threaten termination of those benefits" where the CBAs require "union consent"); **(4)** *Moore v Menasha Corp*, 724 F Supp 2d 795, 808-809 (WD Mich, 2010) aff'd 690 F3d 444 (2012)

(CBA permitting amendment "by mutual agreement of the parties" precluded employer "from taking these [retiree healthcare] benefits away absent mutual agreement"; "mutual agreement" clause "constitutes the 'express waiver' of Defendant's right to terminate the welfare benefits"), aff'd 690 F3d at 450, 458-59 ("[b]ecause the parties agreed on the procedure to be used in amending their agreement, it would read the provisions out of the contract to allow Defendant to unilaterally modify the terms;" vested retiree healthcare is "forever unalterable").

Here, the MCOA correctly found that, as to the healthcare of pre-Medicare Retirees, the County could make "substantially equivalent" changes to the CBA, subject to review and prior approval.

IV. THE COUNTY BREACHED THE CBAs' "SUBSTANTIALLY EQUIVALENT" STANDARD

As the County breached the CBAs' "mutual agreement" clauses, the County's "substantial equivalency" rationale, even if true, provides the County with no defense. But, as we show below, there is no "substantial equivalency" as a matter of fact and law.

The County significantly increased prescription co-pays. (Ex. 13). The following chart refutes "substantial equivalency."

IMPACT ON RETIREES OF COUNTY UNILATERAL PRESCRIPTION CO-PAY INCREASES

Pre-Medicare Retirees

	Before*	**Current****
Generic	$2 or $5	$ 5
Formulary	$2 or $5	$15 or $25
Non-Formulary	$2 or $5	$25 or $50

Medicare Retirees

	Before*	**Current**
Generic	$2 or $5	$ 0
Formulary	$2 or $5	$10
Non-Formulary	$2 or $5	$20

***** Before 2009, retirees had $5 co-pays under the traditional BC/BS and PPO plans and $2 co-pays under the HMO plans. (Ex. 3, Art 18.B.2.c.; Exs. 12-14).

****** For pre-Medicare retirees, HMO co-pays now are $5/$15/$25 and PPO co-pays now are 5/$25/$50. (Ex. 28).

As the chart shows, the unilateral prescription increases are significant. For example, now a pre-Medicare retiree's non-formulary prescription costs as much as $50 -- a 2500% increase from the $2 co-pays promised under the pre-2009 HMO plans and a 1000% increase from the $5 co-pays promised under the pre-2009 BC/BS traditional and PPO plan.

The County's changes also increased retiree costs for medical services. County Benefits Coordinator Stephanie Dobson compared the 2010 PPO changes -

- imposed on pre-Medicare retirees -- to the pre-2010 PPO. Of the 33 benefits listed, Dobson testified that only eight were unchanged. Twenty-five (25) changes, Dobson admitted, increased retiree expenses (Ex. 11, Dobson 173-174):

> Q. The rest of the 33, the remainder of the 33, represent increases in out-of-pockets and co-pays for the retiree if that retiree stays in the Community Blue PPO?
>
> A. Potentially, yes.

That is, 75% of the County unilaterally-imposed 2010 changes increased the retirees' healthcare costs. A retiree would "potentially" incur added expenses, Dobson grudgingly explained, "assuming" the retiree actually "has to have medical treatment." (Ex. 11, Dobson 173-174). Apparently Dobson was making the cold-hearted point that retirees can avoid the County-imposed increases by doing without "medical treatment."

The 2010 PPO also included new deductibles of $250 per person/$500 per family, and new co-insurance of $400 per person/$750 per family. (Ex. 11, Dobson 171-174).

For example, pre-Medicare retiree Connie Miller and her husband have had County-paid PPO coverage since her January 2004 retirement. The unilaterally-imposed 2010 PPO forced the Millers to pay a $500 annual deductible and $750 annual coinsurance. This is a $1,250 per year retiree-paid obligation that did not exist under the *pre*-2009 PPO. In addition, Mr. Miller's non- formulary heart drug

now costs the Millers $100 for a 90-day supply, far more than his $5 per-prescription co-pay in effect before 2009. The Millers also pay additional co-pays and out-of-pocket expenses for other medical services. (Ex. 30).

Medicare retirees were also adversely impacted by the County's unilateral changes. For example, the imposed 2010 UA/AmWins plan had $480 coinsurance that did not exist under the *pre*-2010 PPO and HMOs. And, the UA/AmWins plan had prescription co-pays of $10 for formulary drugs and $20 for non-formulary drugs -- multiples of the $2 or $5 co-pays in effect before 2009. The UA/AmWins plan also eliminated private nursing care coverage, services covered between 50% and 100% under the eliminated plans.

In *Loftis*, 2012 WL 3021659 at *1 (Ex. 35), the CBAs "effective at the time of plaintiffs' retirements" promised retirees "the same level of coverage that was provided at the time of their separation of employment with the city." The city nevertheless unilaterally changed retiree healthcare "because of increasing costs in employer sponsored healthcare premiums." *Id.* at *2. Among the changes: "prescription co-pays would be increasing from $10 to $15 generic and $30 specific." *Id.*

The city argued that the "same level" standard was met in the aggregate because enhanced benefits -- like newly-reduced office visit co-pays -- balanced out the prescription co-pay increases.

Loftis, however, rejected "aggregate" arithmetic, holding that retirees "were entitled to healthcare coverage under each rider category that is identical and equal to that which was received at the time of their respective retirements." *Id.* at *3 (emphasis added). *Loftis* concluded that the CBAs promised retirees "the identical and equal prescription rider coverage of $10 prescription co-pay." *Id.* at *4.

Here, no unilateral changes were permissible, as found by the MCOA. Moreover, the County's unilateral increases in prescription co-pays -- from $2 or $5 per-prescription to as much as $25 for formulary drugs and $50 for non-formulary drugs—fail the "equivalency" standard by any pertinent measure.

The same is true for the increased deductibles, coinsurance, medical co-pays, and reduced coverages. (Ex. 11, Dobson at 170-174; Ex. 12-14). Indeed, even small increases in healthcare expenses can inflict a hardship on retirees. See *Golden v Kelsey-Hayes Co*, 73 F3d 648, 657 (CA 6, 1996) (holding that "retirees, primarily because of their fixed income, are unable to absorb every relatively small increases in their expenses without extreme hardship").

The County's "savings" also refute any "equivalency" argument. The County reduced its prescription drug costs by $1.5 million per year as a result of the 2009 prescription co-pay increases and by an additional $2.7 million per year as a result of the imposed 2010 prescription increases. (Exs. 12 and 24). These County "savings" represent a $4.2 million cost burden shifted to retirees -- every year. The

County has saved over $25 million since this lawsuit began, wrongfully transferring its costs to the fixed-income retirees.

The County's unilateral changes violated ordinary contract principles and breached the CBAs' mutual agreement and "substantial equivalency" clauses. Indeed, the County is already at least $25 million short of "equivalency."

V. THE COUNTY BREACHED THE CBA *VIS A VIS* NON-MEDICARE ELGIBLE RETIREES

The County argues that, because it continued to fully pay *insurance premiums* for pre-Medicare eligible retirees, there was no breach of the CBAs as to the them. The County asserts that the CBA term "fully paid" only refers to premiums, and not the payment of deductibles, co-insurance or co-pays. So, the County's logic goes, as long as the County fully pays just the premiums, it can raise these out-of-pocket costs without violating the CBAs.

The County relies on no case law to support its claim, nor on the testimony of anyone who actually negotiated the CBAs. Instead, the County presented the affidavit of one "expert witness."

This insurance industry expert, who was not involved in County CBA negotiations, opined in the abstract on the vernacular of the insurance industry. His affidavit claims that the term "fully paid," which appear in the CBA, is a "term of art" that is inapplicable to co-pays, deductible and co-insurance, etc.

Perhaps. But, his affidavit is not probative to this issue. The CBAs are clearly not insurance "industry" contracts and the so-called expert does not and cannot testify as to what the collective bargaining parties intended by that term or how it fits into the mosaic of the CBA.

And, Courts must "avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich at 463. The County's reliance on its alleged "term of art" argument renders the substantial equivalent and prior mutual agreement CBA terms surplusage. As such, this argument fails.

CONCLUSION

For all of the above reasons, the Application for Leave to Appeal, or peremptory reversal, should be denied.

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August 7, 2017

CERTIFICATE OF SERVICE

On August 7, 2017, Dennis Flynn electronically filed the Plaintiffs-Appellees' Opposition to Defendant-Appellant's Application for Leave to Appeal and this Certificate of Service with the Clerk of the Michigan Supreme Court using the TrueCertify efile and serve system:

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