No. 19-___

IN THE

Supreme Court of the United States

WALID JAMMAL, et al.,

Petitioners,

v.

AMERICAN FAMILY INSURANCE COMPANY, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Like many federal statutes, the Employee Retirement Income Security Act of 1974 incorporates the traditional common-law test for distinguishing between employees (who are covered by the Act) and independent contractors (who are not). This case presents two questions about that important and oft-litigated test, both of which have divided the courts of appeals:

1. Whether a district court's finding that a worker is an employee under the common-law test should be reviewed for clear error, as the Fourth, Seventh, Ninth, and Tenth Circuits hold; using a hybrid standard, as the Second and Eighth Circuits hold; or de novo, as the Sixth Circuit held here.

2. Whether the same traditional inquiry governs under all the statutes that incorporate the common-law test for employee status, as several circuits hold, or whether courts may modify the test based on the purpose of each statute, as the Sixth Circuit held here.

PARTIES TO THE PROCEEDING

Petitioners, the plaintiffs below, are Walid Jammal, Kathleen Tuersley, Cinda J. Durachinsky, and Nathan Garrett. Petitioners represent a certified class of respondents' current and former insurance agents.

Respondents, the defendants below, are American Family Insurance Company, American Family Mutual Insurance Company, American Family Life Insurance Company, American Standard Insurance Company of Wisconsin, American Family Termination Benefits Plan, Retirement Plan for Employees of American Family Insurance Group, American Family 401k Plan, Group Life Plan, Group Health Plan, Group Dental Plan, Long Term Disability Plan, American Family Insurance Group Master Retirement Trust, 401k Plan Administrative Committee, and Committee of Employees and District Manager Retirement Plan.

RELATED PROCEEDINGS

Jammal v. American Family Insurance Co., No. 17-4125 (6th Cir. Jan. 29, 2019)

In re American Family Insurance Co., No. 17-308 (6th Cir. Oct. 26, 2017)

In re American Family Insurance Co., No. 17-307 (6th Cir. Oct. 26, 2017)

In re American Family Insurance Co., No. 16-305 (6th Cir. May 11, 2016)

Jammal v. American Family Insurance Group, No. 13-cv-437 (N.D. Ohio Aug. 1, 2017)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Walid Jammal, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-37a) is published at 914 F.3d 449. The opinion of the district court (Pet. App. 38a-89a) is not published in the Federal Supplement, but is available at 2017 WL 3268032.

JURISDICTION

The judgment of the court of appeals was issued on January 29, 2019. Pet. App. 1a. The court denied a timely petition for rehearing on March 25, 2019. *Id.* 90a. On June 11, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including August 22, 2019. No. 18A1287. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT RULE AND STATUTES

Federal Rule of Civil Procedure 52(a)(6) provides:

> Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

Relevant statutory provisions are set forth in the appendix to this petition. Pet. App. 92a-94a.

INTRODUCTION

In *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), this Court held that the Employee Retirement Income Security Act of 1974 (ERISA), incorporates the traditional common-law test for distinguishing between employees and independent contractors. The same test also governs under Title VII, the Internal Revenue Code, and scores of other federal statutes that turn on employment status. This case presents two related questions about that important and frequently litigated test—one procedural, the other substantive. Both have divided the courts of appeals.

The procedural question concerns the appropriate standard of appellate review. Explicitly rejecting its "sister circuits' jurisprudence," the Sixth Circuit held that both a district court's ultimate finding of employment status and its subsidiary findings on a dozen common-law factors must be reviewed de novo. Pet. App. 13a-14a. That holding creates a new fault line in an acknowledged circuit split. Because the common-law test is deeply fact-intensive, the Fourth, Seventh, Ninth, and Tenth Circuits have long held that a district court's finding of employment status may be reviewed only for clear error. The Second and Eighth Circuits apply a hybrid standard, reviewing findings on the common-law factors for clear error, but the ultimate finding of employment status de novo. Only the Sixth Circuit applies a fully de novo standard.

The substantive question is whether courts may modify the traditional common-law test on a statute-by-statute basis to better fit the perceived purposes of the various laws that incorporate it. The Sixth Circuit held that they may. Pet. App. 15a. It then held, based on its view of ERISA's purpose, that the hiring party's

"control and supervision"—the touchstone of the traditional common-law test—"is less important in an ERISA context" than it is under other statutes. *Id.* 18a (citation omitted). That holding defies this Court's decision in *Darden*, which emphatically disapproved statute-specific modifications to the common-law test in the very context of ERISA. It also conflicts with the decisions of other courts of appeals, which apply the same traditional control-focused inquiry under all the statutes that incorporate the common-law test—including ERISA.

This Court should grant review and bring uniformity to these important questions of federal law. Both questions regularly arise under some of the most frequently litigated statutes in the U.S. Code. And their significance is only growing as the rapid spread of nontraditional work arrangements—sometimes called the "gig economy"—leads to more and more disputes about employment status.

STATEMENT OF THE CASE

A. *Darden* and the common-law test

Over the years, this Court has "often been asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it." *Darden*, 503 U.S. at 322. In *Darden*, the Court resolved that recurring issue by adopting a presumption that when Congress uses the term "employee," it intends to incorporate the traditional common-law test for employee status.

1. Like this case, *Darden* arose under ERISA, which safeguards pensions and other benefits promised to employees, but not to independent contractors. 503 U.S. at 320-21. The plaintiff in *Darden* was a former

insurance agent who alleged that the termination of his pension had violated ERISA. *Id.* at 319-20. The district court rejected his claim, holding that he was not covered by ERISA because he was an independent contractor. *Id.* at 321.

On appeal, the Fourth Circuit acknowledged that the plaintiff likely did not qualify as an employee "under traditional principles of agency law." *Darden*, 503 U.S. at 321. But the Fourth Circuit believed that strict adherence to the common-law test would have been inconsistent with ERISA's "declared policy and purposes," which include protecting workers' expected benefits. *Id.* (citation omitted). It therefore held that ERISA should be construed to incorporate a broader test for employee status. *Id.* at 321-22.

This Court rejected that ERISA-specific approach. It emphasized that "where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Darden*, 503 U.S. at 322 (brackets, citation, and ellipses omitted). The Court explained that it had held that other statutes that use the term "employee" refer to "the conventional master-servant relationship as understood by common-law agency doctrine." *Id.* at 322-23 (citation omitted). The Court reaffirmed those holdings and adopted a general "presumption" that the term "employee" carries its "agency law definition" unless Congress "clearly indicates otherwise." *Id.* at 325. And the Court relied on that presumption to hold that ERISA's references to "employees" incorporate the traditional common-law test. *Id.* at 323.

2. Consistent with *Darden*'s presumption, this Court has held that the common-law test determines a worker's status under many other statutes, including Title VII, *see Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 211-12 (1997); the Americans with Disabilities Act, *see Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 444-51 (2003); the Internal Revenue Code, *see Darden*, 503 U.S. at 324; the National Labor Relations Act, *see NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968); the Copyright Act, *see Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-41 (1989); and the Federal Employers' Liability Act, *see Ward v. Atlantic Coast Line R.R.*, 362 U.S. 396, 398-400 & n.1 (1959) (per curiam).

3. The common law has long defined an employee (or "servant") as a worker whose performance of the job is subject to the hiring party's "control or right to control." Restatement (Second) of Agency § 220(1) (1958). In other words, a worker is an employee if the hiring party retains the authority to dictate "not only what shall be done, but how it shall be done." *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889) (citation omitted); *see, e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 541-42 (2019); *Clackamas*, 538 U.S. at 448.

In *Darden*, this Court reiterated that the common-law test focuses on "the hiring party's right to control the manner and means by which the product is accomplished." 503 U.S. at 323 (citation omitted). The Court explained that in conducting that inquiry, the factfinder should consider a nonexhaustive list of twelve factors drawn from the Restatement and other common-law sources:

> [1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of

> the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the right to assign additional projects to the hired party; [6] the extent of the hired party's discretion over when and how long to work; [7] the method of payment; [8] the hired party's role in hiring and paying assistants; [9] whether the work is part of the regular business of the hiring party; [10] whether the hiring party is in business; [11] the provision of employee benefits; and [12] the tax treatment of the hired party.

Id. at 323-24 (citation omitted). The Court emphasized that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 324 (citation omitted).

B. The present controversy

Petitioners are former insurance agents for respondent American Family Insurance Company. They filed this suit in 2013, contending that although American Family called them independent contractors, its pervasive control over their work means that they were in truth employees. Petitioners seek relief for American Family's failure to comply with ERISA's minimum standards in administering their pension plan. Pet. App. 40a.

1. The district court certified a class of American Family's current and former agents and denied American Family's motions to dismiss and for summary judgment. Pet. App. 39a-41a. The case proceeded to a trial, which the court bifurcated to first address petitioners' employment status. *Id.* 41a-42a.

During a twelve-day trial, the court and an advisory jury reviewed American Family's policies, training manuals, and other records. Pet. App. 38a-39a. They also heard from twenty-seven witnesses, including American Family executives, managers, and agents. *Id.* Those witnesses sometimes gave conflicting accounts of American Family's practices, and the parties vigorously disputed the relevant facts. *See, e.g.*, *id.* 55a, 60a-61a, 67a-68a.

2. After being instructed on the common-law test, the advisory jury unanimously found that petitioners were employees. Pet. App. 42a. The district court then reached the same determination based on its own extensive findings of fact. *Id.* 38a-89a.

The court explained that American Family controlled its agents through a network of sales managers whose only job was to supervise the agents' work. Pet. App. 59a-61a, 72a-73a. The court credited petitioners' evidence that "American Family trained its sales managers to treat agents in the same manner as they would treat employees." *Id.* 85a. And the court found that, "consistent with their training," managers "acted as if they had the right to control the manner and means by which their agents sold and serviced insurance policies." *Id.* 86a. In fact, some managers did not even know that agents were purportedly independent contractors. *Id.* 69a. Others "considered agents to be independent contractors 'for tax purposes only.'" *Id.* 86a.

The court found that, through these managers, American Family exercised far more control over its

agents than is typical in the insurance industry. For example:

- American Family prohibited agents from taking vacations or "otherwise being absent from the office" without approval. Pet. App. 78a.
- American Family required agents to submit detailed daily activity reports and to participate in various mandatory events. *Id.* 76a-78a.
- "[A]gents did not own a book of business" or "own any policies"; instead, customer relationships belonged to American Family. *Id.* 84a-85a.
- "American Family could and did unilaterally reassign policies" between agents. *Id.* 85a.
- "American Family could require agents to service policies they did not initiate" and to do so "without compensation." *Id.*
- "American Family actively discouraged and in some cases prohibited agents from taking on other employment even if it was unrelated to insurance sales." *Id.*

The court also made specific findings on each of the common-law factors identified in *Darden*. It found that the indefinite duration of the parties' relationship and the fact that the agents' work is American Family's core business "clearly favor employee status"; that the agents' tax treatment and commission-based pay "clearly favor independent contractor status"; and that the other factors were mixed. Pet. App. 83a-84a.

Based on its assessment of all of the relevant circumstances, the court determined that petitioners were employees. Pet. App. 87a. In so doing, it emphasized that American Family's "level and breadth

of control" distinguish this case from cases in which other insurance agents have been found to be independent contractors. *Id.*

3. The district court authorized an interlocutory appeal, and a divided panel of the Sixth Circuit reversed. Pet. App. 1a-37a.

a. The Sixth Circuit began with an extended analysis of the standard of review. Pet. App. 8a-15a. It explained that circuit precedent established that a district court's "ultimate conclusion" on employment status is reviewed de novo, but that the Sixth Circuit had not yet decided the standard applicable to subsidiary findings on the common-law factors. *Id.* 12a. The court acknowledged that "[o]ther circuits" have "explicitly considered this question" and treat those findings as "factual matters subject to review for clear error." *Id.* 13a. But the court rejected its "sister circuits' jurisprudence." *Id.* Instead, it held that de novo review is required because "[e]ach *Darden* factor is . . . itself a 'legal standard' that the district court is applying to the facts." *Id.* 14a.

The Sixth Circuit also held that it should "review de novo" the "weight assigned to each of the *Darden* factors." Pet. App. 15a. The court reasoned that de novo review is proper because "certain factors may carry more or less weight depending on the particular legal context" in which the common-law test is applied. *Id.*

b. Although it exercised de novo review, the Sixth Circuit did not disturb the district court's finding that the degree of control exercised by American Family's managers "was inconsistent with independent contractor status." Pet. App. 11a (citation omitted). It also accepted the district court's findings on ten of the

twelve common-law factors. *Id.* 15a n.4. It disagreed only with the district court's determinations that the "skill" factor counted "slightly in favor of employee status" and that the "hiring and paying of assistants" factor was "neutral." *Id.* 15a-18a. Instead, the Sixth Circuit determined, based on its own assessment of the evidence, that both factors "favored independent-contractor status." *Id.* 15a.

c. The Sixth Circuit also disagreed with the district court's overall weighing of the factors and other relevant circumstances. Pet. App. 18a-22a. It returned to the premise that the weight of specific common-law factors can differ depending on the statute in which the word "employee" appears. *Id.* 18a. Although the court recognized that the hiring party's right to control the work is the "crux" of the traditional common-law test, *id.* 11a (citation omitted), it held that "control and supervision is less important in an ERISA context," *id.* 18a (citation omitted). Instead, "[b]ecause ERISA cases focus on the financial benefits that a company should have provided," the court believed that "the *financial structure* of the company-agent relationship guides the inquiry." *Id.* 18a-20a.

Here, the Sixth Circuit concluded that the factors it deemed most relevant to "financial structure" (such as the agents' method of pay and tax treatment) favored independent-contractor status. Pet. App. 19a-20a. Accordingly, based on its recasting of the common-law test—and on its revision of the district court's findings on two specific factors—the Sixth Circuit held that petitioners were independent contractors. *Id.* 22a.

d. Judge Clay dissented. Pet. App. 23a-37a. He agreed with the circuits that have held that findings on "[t]he existence and degree of each *Darden* factor"

should be reviewed for clear error. *Id.* 27a-28a (brackets and citation omitted). He also argued that even under a de novo standard, the majority erred in disturbing the district court's findings on the "skill" and "assistants" factors. *Id.* 29a-33a. And he explained that the majority was wrong to hold that the hiring party's control is less significant under ERISA than under other statutes that incorporate the common-law test. *Id.* 33a-37a.

4. The Sixth Circuit denied rehearing en banc. Pet. App. 90a-91a.

REASONS FOR GRANTING THE WRIT

This case presents two recurring and important questions about how courts should decide whether a worker qualifies as an "employee" under the many federal statutes that incorporate the common-law test for employment status. On each question, the Sixth Circuit split with other circuits and contradicted this Court's precedent.

I. This Court should decide the proper standard of review for a district court's determination of employment status under the common-law test.

A. The courts of appeals are divided.

The courts of appeals have long used two different standards to review a district court's determination of employment status under the common-law test. *See Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1493-94 & nn. 8-10 (11th Cir. 1993) (noting the split). The Sixth Circuit has now broadened that recognized conflict by staking out a third position.

1. The Fourth, Seventh, Ninth, and Tenth Circuits review a district court's ultimate determination of

employment status under the clear-error standard in Federal Rule of Civil Procedure 52(a)(6).

The Fourth Circuit holds that "[t]he determination of an individual's employment status is a question of fact" reviewed for clear error. *Eren v. Comm'r*, 180 F.3d 594, 596 (4th Cir. 1999); *see, e.g.*, *Weber v. Comm'r*, 60 F.3d 1104, 1110 (4th Cir. 1995) (adopting the Tax Court's statement that "[w]hether the employer-employee relationship exists in a particular situation is a factual question").

The Seventh Circuit likewise applies the "clear error" standard. *Cent. States, Se. & Sw. Areas Pension Fund v. Nagy*, 714 F.3d 545, 551-52 (7th Cir. 2013). It has specifically rejected de novo review, holding that so long as the district court applied the correct legal test, its finding of employment status is subject to "the clear error rule." *Worth v. Tyer*, 276 F.3d 249, 262-63 (7th Cir. 2001); *see Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 380-81 (7th Cir. 1991).

The Ninth Circuit holds that a trial court's "determination of an employer-employee relationship" is subject to the "clearly erroneous standard of review" because it is "predominantly one of fact and does not involve constitutional issues." *Prof'l & Exec. Leasing, Inc. v. Comm'r*, 862 F.2d 751, 753 (9th Cir. 1988); *see Chin v. United States*, 57 F.3d 722, 725 (9th Cir. 1995).

Similarly, the Tenth Circuit has repeatedly held that "[t]he determination of whether an individual is an employee for purposes of ERISA is a question of fact, reviewable under the clearly erroneous standard." *Hockett v. Sun Co.*, 109 F.3d 1515, 1525-26 (10th Cir. 1997); *see Roth v. Am. Hosp. Supply Corp.*, 965 F.2d

862, 865 (10th Cir. 1992); *see also Marvel v. United States*, 719 F.2d 1507, 1515 (10th Cir. 1983).

2. The Second and Eighth Circuits apply a hybrid standard. As the Second Circuit explained, it reviews subsidiary findings on "the presence or absence" of the common-law factors for clear error, but reviews the "ultimate determination" of employment status de novo. *Aymes v. Bonelli*, 980 F.2d 857, 860-61 (2d Cir. 1992). The Eighth Circuit uses the same approach, reviewing findings on the "existence and degree of each factor" for clear error and "the ultimate conclusion of employment status" de novo. *Berger Transfer & Storage v. Cent. States, Se. & Sw. Areas Pension Fund*, 85 F.3d 1374, 1377-78 (8th Cir. 1996); *see, e.g.*, *Schwieger v. Farm Bureau Ins. Co.*, 207 F.3d 480, 484 (8th Cir. 2000).[1]

3. The Sixth Circuit's decision takes a third position in this longstanding circuit split. Expressly

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[1] The Sixth Circuit believed that the Fifth and Tenth Circuits also apply this hybrid standard. Pet. App. 13a. But it cited decisions involving the Fair Labor Standards Act (FLSA), which is the rare statute in which Congress clearly departed from the common law by defining "employee" in unusually broad terms. *See Darden*, 503 U.S. at 325-26 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947)). Courts thus use a somewhat different multifactor test to decide a worker's employment status under the FLSA. *See, e.g.*, *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989). The Tenth Circuit reviews the application of that FLSA-specific test using the hybrid standard, *see id.*, but reviews the application of the common-law test only for clear-error, *see supra* pp. 12-13. And although the Fifth Circuit has cited its FLSA precedents with approval in common-law cases, *see, e.g.*, *Breaux & Daigle, Inc. v. United States*, 900 F.2d 49, 51 (5th Cir. 1990), it has not definitively adopted the hybrid standard in this context.

rejecting the decisions of its "sister circuits," the panel majority held that both the ultimate determination of employment status and subsidiary findings on the common-law factors must be reviewed de novo. Pet. App. 13a-14a. And the full Sixth Circuit then cemented the conflict by denying rehearing en banc. *Id.* 90a-91a.

B. This Court should resolve the circuit conflict.

1. This Court routinely grants certiorari to resolve standard-of-review questions like the one presented here. *See, e.g.*, *Monasky v. Taglieri*, No. 18-935 (cert. granted June 10, 2019); *U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018); *McLane Co. v. EEOC*, 137 S. Ct. 1159 (2017); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016); *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318 (2015); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559 (2014).

The Court's close attention to these issues reflects their importance. The standard of review often "determines the outcome" of an appeal. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1391 (1995). Even when it does not, the standard of review is "critically important" in "allocating authority between trial courts . . . and the appellate bench." Harry T. Edwards & Linda A. Elliot, *Federal Courts Standards of Review*, at v (2007). Applying the proper standard ensures the efficient allocation of judicial resources by giving the tribunal best suited to answer a particular question primary responsibility for answering it. *See U.S. Bank*, 138 S. Ct. at 966-67.

2. The standard-of-review question presented here is unusually important because of the frequency with

which courts adjudicate disputes about employment status and the weighty consequences those decisions carry. To take just a few examples, whether a worker is a common-law employee determines whether her pension is guaranteed by ERISA, *see Darden*, 503 U.S. at 322-23; whether she is protected from discrimination based on race, sex, religion, disability, and age, *see, e.g.*, *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 444-51 (2003); and her rights and obligations under various tax laws, *see, e.g.*, *Eren*, 180 F.3d at 595-96; *Weber*, 60 F.3d at 1105. Employment status also has important consequences under other statutes, including the Copyright Act, *see Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737-41 (1989); the Federal Employers' Liability Act, *see Baker v. Tex. & P. Ry. Co.*, 359 U.S. 227, 227-28 (1959) (per curiam); and the Federal Tort Claims Act, *see Creel v. United States*, 598 F.3d 210, 213 (5th Cir. 2010).[2]

Disputes about the proper classification of workers under these statutes are becoming more and more common as companies increasingly adopt non-traditional work arrangements or otherwise seek to classify workers as independent contractors. "The use of independent contracting has grown dramatically

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[2] A worker's status is sometimes decided by a jury rather than the judge. *See, e.g.*, *Baker*, 359 U.S. at 227-29. But "[t]he general rule in ERISA cases is that there is no right to a jury trial." *McDougall v. Pioneer Ranch Ltd. P'ship*, 494 F.3d 571, 576 (7th Cir. 2007). A jury trial is likewise unavailable in the Tax Court (which is treated like a district court for standard-of-review purposes). 26 U.S.C. §§ 7459(a), 7482(a). And district judges often decide the question under other statues, either because a jury trial is not available or because the parties opt for a bench trial. *See, e.g.*, *Schwieger*, 207 F.3d at 482; *Knight*, 950 F.2d at 377.

over the past decade, with one estimate suggesting it has increased by almost 40%." David Weil, *Lots of Employees Get Misclassified as Contractors*, Harv. Bus. Rev. (July 5, 2017), https://perma.cc/7958-SEYQ. But many of those purported independent-contractor arrangements are at least arguably "misclassification[s]" subject to legal challenge by workers or regulators. *Id.* A recent Treasury Department report, for example, determined that "[t]he misclassification of employees as independent contractors is a nationwide problem which affects millions of workers." Treasury Inspector Gen. for Tax Admin., *Additional Actions Are Needed To Make the Worker Misclassification Initiative with the Department of Labor a Success* 1 (Feb. 20, 2018), https://perma.cc/L9XS-33DA.

3. Although specific classification disputes often pit workers against businesses, both groups have a shared interest in the proper resolution of the question presented. In this case, appropriately deferential review happens to favor the workers because they prevailed at trial. But in the aggregate, deference to the court that conducts the fact-intensive inquiry into the parties' relationship does not systematically favor either side. And businesses and workers alike have a strong interest in eliminating the confusion and uncertainty spawned by a three-way circuit split on a threshold issue that arises in each of the (many) appeals in which a district court's finding of employment status is at issue.

C. This case is an ideal vehicle for deciding the question presented.

This case offers a perfect opportunity to resolve the circuit split. The district court's finding that

petitioners are employees was the "sole issue" before the Sixth Circuit. Pet. App. 3a. Both the majority and the dissent squarely addressed the standard of review, analyzing the issue at length. *Id.* 8a-15a, 25a-29a.

Nor can there be any doubt that the majority's use of a de novo standard was outcome determinative. Under clear-error review, a finding must be upheld if it is "plausible in light of the record viewed in its entirety," even if the court of appeals "would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Here, the district court's finding that petitioners were employees was far more than "plausible." It rested on the court's painstaking review of the trial record, reflected in detailed findings of fact. Pet. App. 38a-89a. It accorded with the unanimous verdict of an advisory jury. *Id.* 42a. Judge Clay would have upheld it even under a de novo standard. *Id.* 29a-37a. And the majority itself acknowledged that this was a close case, noting that petitioners had "presented significant evidence to support their claim that American Family treats them more like employees" than independent contractors. *Id.* 5a-6a.

Given that evidence, the majority could reverse only by reviewing de novo both the district court's ultimate finding of employment status and its subsidiary findings on the common-law factors. Had American Family's appeal been heard in the Second, Fourth, Seventh, Eighth, Ninth, or Tenth Circuits, the result would have been different.

D. The Sixth Circuit's de novo standard is wrong.

Although the circuit split on this important question would provide ample reason to grant review

even if the Sixth Circuit's holding were correct, it is wrong to boot. A finding that a particular worker is an employee (or an independent contractor) is a deeply fact-intensive and case-specific determination that should be reviewed only for clear error. At minimum, clear-error review should apply to the even more factbound findings on specific common-law factors.

1. The question whether a worker is an employee or an independent contractor is neither a pure question of law nor a pure question of historical fact. Instead, it is a textbook "mixed question" of law and fact because it asks "whether the historical facts found satisfy the legal test" for employee status. *U.S. Bank*, 138 S. Ct. at 966.

As this Court recently reiterated, "the standard of review for a mixed question" depends "on whether answering it entails primarily legal or factual work." *U.S. Bank*, 138 S. Ct. at 967. De novo review is appropriate if resolving the question "involves developing auxiliary legal principles of use in other cases." *Id.* But clear-error review applies if the question "immerse[s] courts in case-specific factual issues," compelling them to "marshal and weigh evidence" or to "make credibility judgments." *Id.* For example, the clear-error standard applies to a determination that a transaction was conducted at arms' length, *id.* at 969, and to the similarly factbound conclusion that a transfer meets the legal standard for a gift, *Comm'r v. Duberstein*, 363 U.S. 278, 289-91 (1960).

This approach to reviewing mixed questions reflects "the respective institutional advantages of trial and appellate courts." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991). Appellate courts are best-suited to resolve questions that "contribute to the

clarity of legal doctrine." *Id.* But a second round of de novo consideration imposes added costs on judges and litigants alike, and it cannot pay its way when an appellate court's application of a legal standard to particular facts "will not much clarify legal principles or provide guidance to other courts resolving other disputes." *U.S. Bank*, 138 S. Ct. at 968. Instead, such case-specific findings are best made by the trial court, which "has both the closest and the deepest understanding of the record." *Id.*[3]

2. The common-law test for employment status is a classic example of a mixed question that calls for deference to the trier of fact. It contains "no shorthand formula or magic phrase that can be applied to find the answer." *Darden*, 503 U.S. at 324 (citation omitted). Instead, "all of the incidents of the relationship"—including at least a dozen different factors—"must be assessed and weighed with no one factor being decisive." *Id.* (citation omitted).

Like the mixed questions in *U.S. Bank* and *Duberstein*, therefore, the common-law test requires a court to "take[] a raft of case-specific historical facts," "consider[] them as a whole," and "balance[] them one against another." *U.S. Bank*, 138 S. Ct. at 968. This case provides a vivid illustration. After hearing twelve days' worth of evidence, the district court thoroughly considered the facts relevant to the common-law factors

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[3] A different rule governs in "the constitutional realm," where this Court has sometimes required de novo review "even when answering a mixed question primarily involves plunging into a factual record." *U.S. Bank*, 138 S. Ct. at 967 n.4; *see, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (reasonable suspicion and probable cause). But the common-law test for employment status does not implicate any constitutional issues.

and concluded that those factors pulled in different directions with varying strength. Pet. App. 71a-84a. It then weighed those factors—and all of the other relevant circumstances—to reach the case-specific conclusion that petitioners were employees. *Id.* 87a.

The district court, as the trier of fact, was in the best position to weigh the evidence and make that determination. And the case-specific nature of the inquiry means that de novo review would yield little benefit, because a decision applying the common-law test to the totality of the circumstances in one case provides scant guidance for the next. Here, for example, the district court determined only that these particular workers for this particular company were employees; it was careful to emphasize that its decision did not establish any general rule—or even extend to other insurance agents. Pet. App. 87a.[4]

3. Although this Court has not squarely decided the question presented, it has assumed that a district court's "finding of employment" under the common-law test may be set aside only if it is "clearly erroneous." *Kelley v. S. Pac. Co.*, 419 U.S. 318, 322-23 (1974). And in two closely analogous contexts, the Court has held that the fact-intensive nature of the common-law inquiry mandates deference to the decisionmaker closest to the facts.

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[4] The Sixth Circuit appeared to assume that de novo appellate decisions could provide guidance in future cases because courts of appeals can announce statute-specific modifications to the substance of the common-law test. Pet. App. 15a. But that premise is flatly inconsistent with *Darden.* In fact, that aspect of the Sixth Circuit's decision was a serious additional error that independently warrants this Court's review. *See infra* Part II.

First, when the question of employment status arises in case to be tried by a jury, this Court has deemed it "perfectly plain" that the common-law test "contains factual elements such as to make it [a question] for the jury," not the judge. *Baker*, 359 U.S. at 228; *see Ward v. Atlantic Coast Line R.R.*, 362 U.S. 396, 399-400 (1959) (per curiam). Like any other jury finding, a jury's determination of employment status may be set aside only if a reviewing court concludes that "reasonable men could not reach differing conclusions on the issue." *Baker*, 359 U.S. at 228.

Second, the Court has held that a finding of employment status by the National Labor Relations Board may not be set aside even if the reviewing court "would, as an original matter, decide the case the other way." *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968). Instead, the Board's finding is reviewed under the same deferential standard that governs agency findings of fact. *Id.* (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

This Court has thus already held that when a jury or an administrative agency applies the common-law test, its finding of employment status should be treated as the equivalent of a factual finding and reviewed deferentially. There is no reason to treat district-court determinations of employment status any differently.

4. Even if a district court's ultimate finding of employment status could be reviewed de novo, clear-error review should at minimum apply to its subsidiary findings on the common-law factors. Those factors include matters such as the "skill required" for the work, the "source of the instrumentalities and tools," and the "extent of the hired party's discretion

over when and how long to work." *Darden*, 503 U.S. at 323 (citation omitted). In analyzing those factors, the district court must make findings of historical fact, draw related inferences, and then assess the extent to which, under the circumstances of the case, each factor bears on "the hiring party's right to control the manner and means" by which the work is done. *Id.* (citation omitted). "Just to describe that inquiry is to indicate where it (primarily) belongs: in the court that has presided over the presentation of evidence" and "has heard all the witnesses." *U.S. Bank*, 138 S. Ct. at 968.

The Sixth Circuit nonetheless held that de novo review is required because it believed that each common-law factor is "a 'legal standard' that the district court is applying to the facts." Pet. App. 14a (citation omitted). But even if that characterization is correct, the Sixth Circuit went astray in holding that it mandates de novo review. To say that the common-law factors require the application of law to facts is just to say that they are mixed questions. *U.S. Bank*, 138 S. Ct. at 966. And this Court has repeatedly instructed that "mixed questions" should be subject to "deferential review" where, as here, "the district court is 'better positioned' than the appellate court to decide the issue." *Salve Regina*, 499 U.S. at 233; *see U.S. Bank*, 138 S. Ct. at 967-69.

II. This Court should decide whether the common-law test for employment status is subject to statute-specific modifications.

Apart from the standard of review, the other critical pillar of the Sixth Circuit's decision was its holding that specific common-law factors "may carry more or less weight depending on the particular legal

context in which the independent-contractor relationship is being determined." Pet. App. 15a. Based on that premise, the court held that "control and supervision is less important in an ERISA context" than under other statutes. *Id.* 18a (citation omitted). That statute-specific approach flouts this Court's decision in *Darden*—which was itself an ERISA case. It also conflicts with decisions of other courts of appeals, which apply the same traditional test regardless of statutory context.

The question whether courts may make statute-specific modifications to the common-law test is encompassed within the first question presented, because the Sixth Circuit's approval of such modifications was part of its justification for de novo review. Pet. App. 15a. But that aspect of the Sixth Circuit's decision also seriously distorted the *substance* of the common-law test—and created another circuit split in the process. The resulting conflict and uncertainty independently call for this Court's intervention.

A. *Darden* forecloses the Sixth Circuit's ERISA-specific approach.

1. In *Darden*, this Court emphatically disapproved the notion that the common-law test can be modified for ERISA-specific reasons. The Fourth Circuit had made such a modification because it found the traditional common-law test inconsistent with the "'declared policy and purposes' of ERISA." 503 U.S. at 321 (citation omitted). This Court rejected that approach, explaining that in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), it had definitively "abandon[ed]" its occasional prior practice of attempting to construe the term "employee" based on

"'the mischief to be corrected and the end to be attained'" by the particular statute in which that term appears. *Darden*, 503 U.S. at 325 (citation omitted). Instead, the Court relied on the familiar interpretive principle that when Congress "uses terms that have accumulated settled meaning under the common law," it incorporates "the established meaning of these terms." *Id.* at 322 (citation and ellipsis omitted). Based on that principle, the Court held that by using the word "employee" in ERISA, Congress incorporated the "common-law test for determining who qualifies as an 'employee.'" *Id.* at 323.

By definition, the meaning of that test is "settled" and "established" by the common law. *Darden*, 503 U.S. at 322 (citation omitted). As with any multifactor test, particular factors may carry more or less weight depending on the *factual* circumstances of each case. *See id.* at 324. But the test's *legal* content was fixed by the common law—it does not vary depending on the statute in which the term "employee" appears. The whole point of this Court's decision in *Darden* was that courts should get out of the business of inventing bespoke tests for employee status, and should instead presume that Congress incorporated that term's settled common-law meaning. *Id.* at 324-25.

2. Here, the Sixth Circuit did precisely what *Darden* forbids. It acknowledged that the "crux" of the traditional common-law test is "the hiring party's right to control the manner and means by which the product is accomplished." Pet. App. 11a (citation omitted); *see, e.g.*, *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003); *Darden*, 503 U.S. at 323-24. Yet the Sixth Circuit held that "control and supervision is less important in an ERISA context, where a

court is determining whether an employer has assumed financial responsibility for a person's pension status." Pet. App. 18a-19a (citation omitted). "Because ERISA cases focus on the financial benefits that a company should have provided," the court believed that "the *financial structure* of the [parties'] relationship guides the inquiry." *Id.* 19a.

Like the Fourth Circuit in *Darden*, therefore, the Sixth Circuit adopted an ERISA-specific test for employee status based on its views about the "'policy and purposes' of ERISA." *Darden*, 503 U.S. at 321 (citation omitted). Indeed, the Sixth Circuit has candidly acknowledged that its approach means that the common-law test could "produce disparate results" under different statutes—for example, deeming the same worker "an independent contractor for copyright purposes" but "an employee for ERISA qualification." *Ware v. United States*, 67 F.3d 574, 578 & n.5 (6th Cir. 1995); *see* Pet. App. 15a. The Sixth Circuit did not even try to square that result with *Darden*. Indeed, the only authority the Sixth Circuit cited for its statute-specific approach was dicta from its own prior decision in *Ware*, which was written by the author of the majority opinion in this case. Pet. App. 15a, 18a-19a.

B. The Sixth Circuit's approach conflicts with the decisions of other courts of appeals.

Unsurprisingly, post-*Darden* decisions by other courts of appeals have uniformly rejected the idea that the common-law test is subject to statute-specific modifications. And in the ERISA context, those courts have consistently adhered to the traditional common-law inquiry in which the hiring party's control—not

"financial structure"—is the touchstone. The Sixth Circuit's holding flatly contradicts those decisions.

1. Consistent with *Darden*, other courts of appeals have recognized that the traditional "common law definition of 'employee' is controlling, regardless of the purposes or corrective goals of the statute." *Roth v. Am. Hosp. Supply Corp.*, 965 F.2d 862, 866 (10th Cir. 1992); *see, e.g.*, *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105-06 (8th Cir. 1994). Other courts of appeals therefore hold that the term "employee" must be construed "identically" across *all* the statutes that incorporate the common-law test. *Sacchi v. IHC Health Servs., Inc.*, 918 F.3d 1155, 1158 n.1 (10th Cir. 2019). For example, in a case involving claims under both ERISA and the Americans with Disabilities Act, the First Circuit applied "the same common law agency standards" under both statutes. *Dykes v. DePuy*, 140 F.3d 31, 38 (1st Cir. 1998); *see, e.g.*, *Barnhart v. N.Y. Life Ins. Co.*, 141 F.3d 1310, 1312-13 (9th Cir. 1998) (applying the same test under both ERISA and the Age Discrimination in Employment Act); *Speen v. Crown Clothing Corp.*, 102 F.3d 625, 634 (1st Cir. 1996) (same).

2. In the ERISA context, moreover, other courts of appeals adhere to the traditional version of the common-law test, in which hiring party's "degree of control and supervision" is the "pivotal issue," *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1493 (11th Cir. 1993), and "the most important" consideration, *Mazzei v. Rock N Around Trucking, Inc.*, 246 F.3d 956, 963 (7th Cir. 2001) (citation omitted). Indeed, other courts recognize that in ERISA cases, as in other contexts, the purpose of examining the common-law factors "is to determine the extent to which the hiring party controls 'the manner and means by which the

product is accomplished.'" *Barnhart*, 141 F.3d at 1312 (citation omitted); *see, e.g.*, *Hockett v. Sun Co.*, 109 F.3d 1515, 1526 (10th Cir. 1997); *Hillstrom v. Kenefick*, 484 F.3d 519, 529 (8th Cir. 2007); *Berger Transfer & Storage v. Cent. States, Se. & Sw. Areas Pension Fund*, 85 F.3d 1374, 1378 (8th Cir. 1996). Those decisions squarely conflict with the Sixth Circuit's holding that "control and supervision is less important in an ERISA context." Pet. App. 18a (citation omitted).

C. The Court should resolve the conflict created by the Sixth Circuit's decision.

This Court should resolve the conflict created by the Sixth Circuit's holding that courts may make statute-specific modifications to the common-law test—and that the traditional touchstone of control is less important in ERISA cases. That question arises even more often than the first question presented because it goes to the heart of the substantive standard for employee status. It is thus relevant in *every* case in which employment status is disputed—including those where the initial determination of employment status is made by a jury or administrative agency rather than a court.

The circuit split on the meaning of the common-law test is particularly troubling because it affects primary conduct. As this case shows, the Sixth Circuit's ERISA-specific test excludes some workers who would qualify under the traditional control-focused inquiry—and who thus would be covered by ERISA in other circuits. It also *includes* some workers who would not qualify as employees under the traditional common-law test, but whose pay structure

and other financial circumstances favor employee status. *Cf. Ware*, 67 F.3d at 578 n.5.

Because of the Sixth Circuit's decision, therefore, the ERISA rights and obligations of workers and businesses depend on the happenstance of geography. And that conflict is especially intolerable because many employers operate in multiple circuits, and workers who live in one circuit may have their ERISA status adjudicated in another—here, for example, petitioners represent a nationwide class. Pet. App. 3a.

III. If the Court does not grant plenary review, it should hold this petition pending its decision in *Monasky*.

This Court recently granted certiorari to decide the standard of review for a district court's determination of a child's habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction. *See Monaksy v. Taglieri*, No. 18-935 (cert. granted June 10, 2019). The Court's decision on that question will not resolve the entrenched conflict on the distinct standard-of-review question presented here (and it will have no bearing on the second question presented). The Court should therefore grant plenary review notwithstanding the pendency of another standard-of-review issue, as it has done twice in the recent past.[5]

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[5] *See U.S. Bank Nat'l Ass'n v. Village at Lakeridge*, 137 S. Ct. 1372 (2017) (granting certiorari despite the pendency of *McLane Co. v. EEOC*, 137 S. Ct. 1159 (2017)); *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 134 S. Ct. 1761 (2014) (same with respect to *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559 (2014)).

If, however, the Court does not grant plenary review, it should at minimum hold this petition pending its decision in *Monasky*. The Court's analysis of the standard-of-review question presented there may shed additional light on the proper approach to the first question presented in this case. After issuing a decision in *Monasky*, the Court could either grant plenary review or vacate and remand to allow the Sixth Circuit to reconsider this case light of the Court's decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 22, 2019

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WALID JAMMAL; KATHLEEN TUERSLEY; CINDA J. DURACHINSKY; NATHAN GARRETT,

Plaintiffs-Appellees,

v.

AMERICAN FAMILY INSURANCE COMPANY; AMERICAN FAMILY MUTUAL INSURANCE COMPANY; AMERICAN FAMILY LIFE INSURANCE COMPANY; AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN; AMERICAN FAMILY TERMINATION BENEFITS PLAN; RETIREMENT PLAN FOR EMPLOYEES OF AMERICAN FAMILY INSURANCE GROUP; AMERICAN FAMILY 401K PLAN; GROUP LIFE PLAN; GROUP HEALTH PLAN; GROUP DENTAL PLAN; LONG TERM DISABILITY PLAN; AMERICAN FAMILY INSURANCE GROUP MASTER RETIREMENT TRUST; 401K PLAN ADMINISTRATIVE COMMITTEE; COMMITTEE OF EMPLOYEES AND DISTRICT MANAGER RETIREMENT PLAN,

Defendants-Appellants.

No. 17-4125

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 1:13-cv-00437—Donald C. Nugent, District Judge.

Argued: July 31, 2018

Decided and Filed: January 29, 2019

Before: BOGGS, CLAY, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Pierre H. Bergeron, SQUIRE PATTON BOGGS (US) LLP, Cincinnati, Ohio, for Appellants. Charles J. Crueger, CRUGER DICKINSON LLC, Whitefish Bay, Wisconsin, for Appellees. **ON BRIEF:** Pierre H. Bergeron, Lauren S. Kuley, Scott W. Coyle, Colter Paulson, SQUIRE PATTON BOGGS (US) LLP, Cincinnati, Ohio, Gregory V. Mersol, Gilbert Brosky, BAKER & HOSTETLER LLP, Cleveland, Ohio, for Appellants. Charles J. Crueger, Erin K. Dickinson, CRUGER DICKINSON LLC, Whitefish Bay, Wisconsin, Gregory F. Coleman, GREG COLEMAN LAW PC, Knoxville, Tennessee, Edward A. Wallace, Kara A. Elgersma, WEXLER WALLACE LLP, Chicago, Illinois, Drew T. Legando, LANDSKRONER GRIECO MERRIMAN, LLC, Cleveland, Ohio, for Appellees. J. Philip Calabrese, PORTER WRIGHT MORRIS & ARTHUR LLP, Cleveland, Ohio, C. Darcy Copeland Jalandoni, PORTER WRIGHT MORRIS & ARTHUR LLP, Columbus, Ohio, Shay Dvoretzky, JONES DAY, Washington, D.C., Paulo B. McKeeby, Ronald E. Manthey, MORGAN, LEWIS & BOCKIUS LLP, Dallas, Texas, Mary Ellen Signorille, AARP FOUNDATION LITIGATION, Washington, D.C., Seth

R. Lesser, KLAFTER OLSEN & LESSER LLP, Rye Brook, New York, for Amici Curiae.

BOGGS, J., delivered the opinion of the court in which ROGERS, J., joined. CLAY, J. (pp. 16–25), delivered a separate dissenting opinion.

OPINION

BOGGS, Circuit Judge. In this class action, the named plaintiffs represent several thousand current and former insurance agents for American Family Insurance Company and its affiliates (collectively, "American Family" or "the company"). The agents claim that American Family misclassified them as independent contractors, while treating them as employees, in order to avoid paying them benefits in compliance with the Employee Retirement Income Security Act of 1974 ("ERISA").

The sole issue in this interlocutory appeal concerns the nature of the parties' legal relationship: are the plaintiffs employees or independent contractors for American Family? The company appeals the district court's judgment that the plaintiffs are employees. Because American Family properly classified its agents as independent contractors, we reverse.

I

As with many insurance companies, American Family sells its products primarily through a network of insurance agents. American Family, in keeping with common industry practice, classifies its agents as independent contractors rather than employees.

Taking issue with this designation and the consequences it has on their ability to enjoy the protections of ERISA, the plaintiffs brought a proposed class action against American Family in 2013, alleging that the company misclassified them as independent contractors. The plaintiffs contended that their miscategorization "deprived [them] of the rights and protections guaranteed by state and federal law to employees, including their rights under ERISA." They sought, inter alia, a declaratory judgment that they are employees for all purposes, including but not limited to ERISA, and that as employees they are due benefits under ERISA.

Both parties filed several pre-trial motions, including motions by American Family to dismiss and later for summary judgment. The plaintiffs, for their part, moved for class certification. The district court granted the plaintiffs' motion and denied each of American Family's motions in whole or in part. The company sought permission from this court to appeal the district court's order granting class certification, but we denied the company's request. The district court subsequently denied two motions by American Family to decertify the class.

The case then proceeded to trial, which the district court bifurcated to allow for determination of the threshold question of the plaintiffs' employment status. Trial of this single issue took place before an advisory jury, pursuant to Federal Rule of Civil Procedure 39(c)(1), which permits district courts to "try any issue

with an advisory jury" in an action that is "not triable of right by a jury."[1]

During the twelve-day trial, the jury learned that the parties took many steps to structure their relationship consistent with American Family's position that its agents are independent contractors. Most pointedly, at the outset of the agents' tenure with the company, all agents signed a written agreement stating that they were independent contractors rather than employees. In keeping with this designation, the agents file their taxes as independent contractors and deduct their business expenses as self-employed business owners. American Family also pays its agents in commissions and does not provide them with vacation pay, holiday pay, sick pay, or paid time off.

Moreover, as the district court recounted, "[t]he company calls its agents 'business owners' and 'partners' and tells new agents they will be 'agency business' owners and that they need to 'invest' in 'their business.'" The agents work out of their own offices, set their own hours, and hire and pay their own staff. They also are responsible for providing most of the resources necessary to run their agencies, such as office furniture and office supplies.

But the plaintiffs also presented significant evidence to support their claim that American Family

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[1] Plaintiffs seeking relief under ERISA generally have no right to have their claims decided by a jury. *See, e.g.*, *Wilkins v. Baptist Healthcare Sys.*, 150 F.3d 609, 616 (6th Cir. 1998); *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 882–83 (6th Cir. 1997); *Bair v. Gen. Motors Corp.*, 895 F.2d 1094, 1096–97 (6th Cir. 1990).

treats them more like employees than independent partners and business owners. The company classifies everyone in its sales force—other than its agents—as employees. Nevertheless, the company's training manuals refer to the agents as "employees." Each agent must report to an Agency Sales Manager, and the plaintiffs presented testimony that American Family did not train these managers to treat the agents as independent contractors or even make the managers aware that the agents were classified as such.

According to the plaintiffs, the managers exerted a great amount of control over their day-to-day activities. The managers insisted, among other required tasks, that the agents complete daily activity reports, prioritize selling certain insurance policies, and participate in "life-call" nights in which the agents had to stay after normal business hours to solicit life insurance by calling prospective customers. The plaintiffs also offered testimony that the company retained some authority to approve or disapprove of the location of the agents' offices and to be involved in the hiring and firing of the agents' staff in a way that limited the plaintiffs' ability to run their own agencies.

The jury also heard testimony that American Family teaches agents everything they need to know to become licensed, run an agency, and sell the company's products. All agents attend a two-to-three-month-long comprehensive training program run by American Family on how to sell insurance and how to operate an agency. Once hired, the agents must sell insurance exclusively for American Family, and they are discouraged—but not forbidden—from taking other

work, even if it is unrelated to the insurance industry. There is no limit on the duration of the agency relationship, and American Family describes the agency position as a career position. Although the agents are not eligible for the same pension or retirement plans given to the company's employees, they are offered an "extended earnings" benefit that is described to them as a retirement plan.[2] When and if their relationship with the company does come to an end, the agents are prohibited for a year from soliciting business from any of their former American Family customers. And unlike most business owners, the agents cannot sell their agencies or assign any rights to income from their agencies.

At the close of the trial, the court presented the advisory jury with the following interrogatory:

> Please answer the following question "yes" or "no" according to your findings:
>
> Did Plaintiffs prove by a preponderance of the evidence that they are employees of Defendant American Family?

The jury answered "yes."

After giving the parties a final opportunity to present their proposed findings of fact and conclusions of law, the court issued an opinion in which it

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[2] The "extended earnings" program offered a lifetime annuity to agents and was reported as one of American Family's "Defined Benefit Plans" in its annual statement filed with insurance regulators. Agents were automatically enrolled in these plans, did not contribute to these plans, and received increasing benefits with increasing years of service.

acknowledged that although it was not bound by the advisory jury's determination, it believed that the jury's verdict "comport[ed] with the weight of the evidence presented at trial." Accordingly, the district court determined that the agents were employees for the purposes of ERISA.

The district court certified its ruling for an interlocutory appeal under 28 U.S.C. § 1292(b), and American Family filed a petition for interlocutory review of the court's order. We granted permission to appeal, which American Family did, arguing that the district court erred in determining that the plaintiffs are employees.[3]

II.

A.

The determination of whether a plaintiff qualifies as an employee under ERISA is a mixed question of law and fact that a judge normally can make as a matter of law. *See Weary v. Cochran*, 377 F.3d 522, 524 (6th Cir. 2004); *Waxman v. Luna*, 881 F.2d 237, 240 (6th Cir. 1989). After a bench trial to determine a plaintiff's employment status, this court typically reviews a district court's factual findings for clear error and its legal conclusions, including its ultimate decision about the plaintiff's status, de novo. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522 (6th Cir. 2011). However, "[o]n interlocutory

[3] The company also contends that the court's determination was erroneous because it relied on nonrepresentative class evidence. Because we decide the case on other grounds, we do not reach this issue.

appeal under 28 U.S.C. 1292(b), our review is limited to the district court's conclusions of law." *Sheet Metal Emp'rs Indus. Promotion Fund v. Absolut Balancing Co.*, 830 F.3d 358, 361 (6th Cir. 2016). We review those conclusions de novo, but "we have no authority to review the district court's findings of fact." *Nw. Ohio Adm'rs, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018, 1023 (6th Cir. 2001).

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines*, 463 U.S. 85, 90 (1983). The plaintiffs brought this action under 29 U.S.C. § 1132(a), which enables "participant[s]" in an employee benefit plan to enforce ERISA's substantive provisions. Under ERISA, a "participant" is "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7). Therefore, the plaintiffs can prevail on their ERISA claims only if they can show that they were American Family's employees. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 321 (1992).

ERISA defines an "employee" as "any individual employed by an employer." 29 U.S.C. § 1002(6). An "employer," in turn, "means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." § 1002(5). Because these definitions provide little guidance as to the meaning of "employee," "the Supreme Court has instructed courts to interpret the term by 'incorporating the common law of agency.'" *Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 656

F.3d 348, 352 (6th Cir. 2011) (quoting *Ware v. United States*, 67 F.3d 574, 576 (6th Cir. 1995) (citing *Darden*, 503 U.S. at 322–24)).

In *Darden*, the Supreme Court provided the following standard "for determining who qualifies as an 'employee' under ERISA." 503 U.S. at 323.

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 323–24 (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989)). In addition to these factors ("the *Darden* factors"), we have held that an express agreement between the parties concerning employment status is also a relevant consideration. *See Weary*, 377 F.3d at 525.

The "crux of *Darden*'s common law agency test is 'the hiring party's right to control the manner and means by which the product is accomplished.'" *Ibid.* (quoting *Darden*, 503 U.S. at 323). Thus, "our analysis of [the *Darden*] factors . . . reflects upon, and is relevant to, this core issue of control." *Ibid.* "[T]he relative weight given each factor may differ depending upon the legal context of the determination." *Ware*, 67 F.3d at 578. "Notwithstanding this recognition that certain factors may deserve added weight in some contexts, a court must evaluate all of the incidents of the employment relationship." *Ibid.*; *see also Darden*, 503 U.S. at 324 ("Since the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" (alteration in original) (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

Applying the test from *Darden* and its progeny, the district court determined that the plaintiffs were employees rather than independent contractors. After deciding that the *Darden* factors were "almost evenly split between favoring employee status and favoring independent contractor status," the court proceeded to a broader analysis of the level of control that American Family exercised over its agents. Ultimately, the court concluded that "[t]he degree of control managers were encouraged to exercise was inconsistent with independent contractor status and was more in line with the level of control a manager would be expected to exert over an employee." This, along with the evidence related to the other *Darden* factors, led the

court to determine that the plaintiffs were employees during the relevant class period.

B

Since in this interlocutory appeal we may review only the district court's conclusions of law, we must first decide which of the court's determinations were matters of law and which were factual. This much is clear: the district court's findings underlying its holding on each of the *Darden* factors are factual findings, and the court's ultimate conclusion as to whether the plaintiffs were employees is a question of law.

But what of the court's conclusions about the *Darden* factors—both of their existence and of the weight to be assigned them? Are these factual findings or conclusions of law? Although neither party has provided much briefing on this question, the plaintiffs suggest that these are issues of fact, while American Family claims that they are issues of law. The parties' dispute is understandable, as we have yet to clarify whether and to what extent a court's conclusions about the individual factors that make up the *Darden* standard are factual or legal in nature. Indeed, some of our decisions seem to be in tension with one another, with some indicating that a district court's determinations on the *Darden* factors are factual findings, *see Peno Trucking, Inc. v. C.I.R.*, 296 F. App'x 449, 454–60 (6th Cir. 2008) (stating, first, that the appropriate rule is to review factual findings for clear error and, second, that the Tax Court's findings about control and other factors were not clearly erroneous); *Moore v. Lafayette Life Ins.*, 458 F.3d 416, 440 (6th Cir. 2006) (concluding that the district court's findings

on *Darden* factors were not clearly erroneous), and others suggesting that they are legal conclusions, *see Janette v. Am. Fid. Grp., Ltd.*, 298 F. App'x 467, 473–74 (6th Cir. 2008) (describing the proper tests for the control factor and skill-required factor); *Weary*, 377 F.3d at 526 (explaining that a certain degree of limited authority is not the type of control that establishes an employer-employee relationship); *id.* at 532 (arguing that the majority erred in defining the skill-required factor and explaining what the "legal issue" is concerning that factor) (Clay, J., dissenting).

Other circuits, however, have explicitly considered this question and have come down on the side of treating these as factual matters subject to review for clear error. According to our sister circuits:

> The existence and degree of each factor is a question of fact while the legal conclusion to be drawn from those facts—whether workers are employees or independent contractors—is a question of law. Thus, a district court's findings as to the underlying factors must be accepted unless clearly erroneous, while review of the ultimate question of employment status is *de novo*.

Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988) (applying multi-factor "economic reality" test to claim under FLSA); *Berger Transfer & Storage v. Cent. States, Se. and Sw. Areas Pension Fund*, 85 F.3d 1374, 1377–78 (8th Cir. 1996); *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989).

Granting due weight to our own and our sister circuits' jurisprudence, we do not agree that a district

court's conclusion relating to the existence and degree of each *Darden* factor is entirely a question of fact. There is a distinction between a lower court's factual findings, which we review for clear error, and "the district court's application of the legal standard to them," which we review de novo. *Solis v. Laurelbrook Sanitarium and School, Inc.*, 642 F.3d 518, 522 (6th Cir. 2011). The lower court's determination of a *Darden* factor often necessarily involves the application of a legal standard to particular factual findings. Take, for example, *Darden*'s first factor: [W]hether the skill [required of an agent] is an independent discipline (or profession) that is separate from the business and could be (or was) learned elsewhere." *Weary*, 377 F.3d at 532 (Clay, J., dissenting); *see also Darden*, 503 U.S. at 323. As Judge Clay observed in his dissent in *Weary*, there is a "legal issue" inherent in the first factor as to whether to consider "the amount of skill required" or rather whether the skill is an independent discipline (or profession) that is separate from the business." *Weary*, 377 F.3d at 532 (Clay, J., dissenting). Each *Darden* factor is thus itself a "legal standard" that the district court is applying to the facts. *See also Ware*, 67 F.3d at 576 (distinguishing the "facts and circumstances" underlying the *Darden* factors from both "*the legal meaning and weight* that those facts should be given *individually and in the aggregat*e") (emphasis added). It is therefore appropriate for us to review de novo those determinations to the extent that they involve the application of a legal standard to a set of facts.

What's more, as we recognized in *Ware*, "the relative weight given to each [*Darden*] factor may differ depending upon the *legal context* of the determination." *Id.* at 578 (emphasis added). Thus, for example, "a hiring party's control is more relevant in the context of copyright ownership, because the statute assigns ownership on the basis of authorship unless the parties explicitly agree otherwise," but less important in an ERISA context." *Ibid.* This implies that certain factors may carry more or less weight depending on the particular legal context in which the independent-contractor relationship is being determined. *Ibid.* (noting that the "same test might produce disparate results in different contexts"). Accordingly, it is also appropriate for us to review de novo the district court's weight assigned to of each of the *Darden* factors, given the legal context in which the claim has been brought.

III

A

Here, the district court incorrectly applied the legal standards in determining the existence of the *Darden* factors relating to (1) the skill required of an agent and (2) the hiring and paying of assistants. Had the court applied those standards properly, it would have found that those factors actually favored independent-contractor status. We analyze each of those factors below.[4]

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[4] Since we do not find that the district court applied an improper legal standard to any of the other *Darden* factors, we do not address them here.

The first factor under *Darden* looks to "whether the skill [required of an agent] is an independent discipline (or profession) that is separate from the business and could be (or was) learned elsewhere." *Weary*, 377 F.3d at 532 (Clay, J., dissenting); *see also Janette*, 298 F. App'x at 474. The district court held that the "amount of skill" factor under *Darden* weighs "slightly in favor of employee status" primarily on the basis that American Family "sought out potential agents who were untrained." In doing so, the district court erred.

This circuit has previously held that the skill required of insurance agents weighs in favor of independent-contractor status because "the sale of insurance is a highly specialized field" that requires "considerable training, education, and skill." *Weary*, 377 F.3d at 526–27 (internal quotations omitted). The skill inquiry centers on whether the skill is an independent discipline that "could be" learned elsewhere. *Id.* at 532 (Clay, J., dissenting). Though American Family preferred hiring untrained, and often unlicensed, agents, the underlying discipline of selling insurance remains the same regardless of American Family's hiring preferences. *Ibid.* ("[B]ecause the skill of selling insurance is a general one, the majority may be correct in its conclusion that this factor favors independent contractor status."). The district court therefore misapplied the legal standard to the facts; the correct application would have weighed this factor in favor of independent contractor status, as this circuit has done previously.

Darden's eighth factor examines "the hired party's role in hiring and paying assistants." *Darden*, 503 U.S.

at 323–24. The court mistakenly weighed this factor as "neutral" after concluding that the agents "had primary authority to hire their own staff" and were solely responsible for all "staff compensation matters."

The district court found, as a factual matter, that American Family agents were responsible for paying their own staff, determining and paying for any benefits and taxes associated with that staff, and deciding whether to classify their staff as employees or independent contractors. While American Family provided "pre-approved" candidates, whom the agents could select as their staff, it did not require the agents to hire these pre-screened candidates. Agents also had sole discretion in staff-compensation matters and the sole responsibility to withhold and remit taxes to the federal government as the employers of their staff.

On the other hand, American Family imposed qualifications on appointed agency staff, including state licensure, clean driving records, education levels, credit history, and minimum income-to-debt ratios. American Family did not provide computer access to any non-approved appointed agency staff and required agency staff to agree to a lifetime non-solicitation agreement. American Family had the right to fire any agency staff, appointed or non-appointed, who did not live up to the American Family Code of Conduct, and it retained the right, although rarely exercised, to fire agency staff for any reason. American Family managers were also evaluated on the number of staff employed by their agents and would sometimes offer monetary subsidies to agents to hire more staff.

Considering all of these facts, the district court determined that "[a]lthough American Family retained

some right to override an agent's hiring and firing decision, on balance, agents had primary authority over hiring and paying their assistants." Yet the court inexplicably concluded from that finding that the factor was "neutral." This conclusion was contrary to *Darden*'s language. If the hired party has the "primary authority over hiring and paying its own assistants," the *Darden* factor regarding "the hired party's role in hiring and paying assistants" should weigh in favor of independent-contractor status. *Janette*, 298 F. App'x at 475–76 (Because plaintiff "could have hired assistants, at her expense," the factor favored independent-contractor status.). Any other conclusion conflicts with *Darden*'s clear language.

B

Further, given our determination regarding the existence of each of the *Darden* factors,[5] the district court also erred by not properly weighing those factors that are particularly significant in the legal context of ERISA eligibility. *Darden* asks us to look at the "hiring party's right to control the manner and means by which the product is accomplished," which we have determined to be "a broad consideration that is embodied in many of the specific factors articulated" there. *Weary*, 377 F.3d at 525. But "the relative weight given each [*Darden*] factor may differ depending upon the legal context of the determination." *Ware*, 67 F.3d at 578. In particular, "control and supervision is less important in an ERISA context, where a court is determining whether an employer has assumed

[5] That is to say, whether each *Darden* factor favors independent-contractor or employee status.

responsibility for a person's pension status." *Ibid.* Because ERISA cases focus on the financial benefits that a company should have provided, the *financial structure* of the company-agent relationship guides the inquiry. Here, the *Darden* factors that most pertain to that financial structure favor independent-contractor status and, accordingly, carry more weight in the ERISA context.

In this case, the district court found that the insurance agents invested heavily in their offices and instrumentalities, paid rent and worked out of their own offices, earned commissions on sales, were not eligible for employment benefits, and paid taxes as independent contractors. Accordingly, the court weighed factors two (the source of the instrumentalities and tools), three (the location of the work), seven (method of payment), eleven (provision of employee benefits), and twelve (tax treatment) in favor of independent-contractor status.[6] We have now corrected the district court's weighing of factors one (the skill required) and eight (the hired party's role in hiring and paying assistants) to favor independent-contractor status, as well. Because this inquiry exists in the legal context of ERISA benefits, this collection of factors—particularly the ones relating to the source of the instrumentalities and tools, the method of payment, the provision of employee benefits, and the agents' tax treatment—is especially important in

[6] The district court weighed the "method of payment" factor in favor of independent-contractor status for agents "once they began selling policies out of their own office." During the agents' "training period," the court weighed the factor in favor of employee status.

determining the parties' financial structure. Accordingly, these factors should have carried greater weight in the district court's final analysis. Had the court properly weighed those factors in accordance with their significance, it would have determined that the entire mix of *Darden* factors favored independent-contractor status.

As further evidence of the financial structure of the parties' relationship, the lower court should have also given greater weight to the parties' express agreement. In determining the parties' relationship in the *Darden* context, we have several times "look[ed] to any express agreement between the parties as to their status as it is the best evidence of their intent" and placed great weight on that agreement. *Janette*, 298 F. App'x. at 471; *Weary*, 377 F.3d at 525 (noting that the existence of a contract characterizing Weary as an independent contractor is "certainly relevant to the inquiry" and shows "how the parties themselves viewed the nature of their working relationship"). Our sister circuits have adopted this approach, as well. See *Brown v. J. Kaz., Inc.*, 581 F.3d 175, 181 (3d Cir. 2009) (noting that an independent-contractor agreement "is strong evidence" of independent-contractor status); *Schwieger v. Farm Bureau Ins. Co. of Neb.*, 207 F.3d 480, 487 (8th Cir. 2000) (same). A written contract shows "how the parties themselves viewed the nature of their working relationship" and therefore carries great—but not dispositive—weight in determining an independent-contractor relationship. *Weary*, 377 F.3d at 525.

The Agent Agreement governing the parties' business relationship here indicates that they structured their relationship so that the agents should

be treated as independent contractors. Each Agreement contained a paragraph either identical to or substantively similar to the following:

> It is the intent of the parties hereto that you are not an employee of the Company for any purpose, but are an independent contractor for all purposes, including federal taxation with full control of your activities and the right to exercise independent judgment as to time, place and manner of soliciting insurance, servicing policyholders and otherwise carrying out the provisions of this agreement. As an independent contractor you are responsible for your self-employment taxes and are not eligible for various employee benefits such as Workers and Unemployment Compensation.

The Agreement also provides that:

> Rates, rules, regulations and all provisions contained in the Company's Agent's Manuals and all changes to them shall be binding upon you. If any inconsistency or ambiguity exists between this agreement and such rate, rule, regulation, provision or other statement or statements, whether written or oral, *this agreement shall control*.

(emphasis added). The Agency Agreement therefore states in wholly unambiguous terms that agents are independent contractors who retain "full control" over several facets of their business.

The district court correctly recognized that the agreement favored independent-contractor status. But the court apparently did not weigh this important

component when reaching its conclusion regarding independent-contractor status. Had the lower court given this express agreement proper consideration, it would have further swung the balance in favor of independent-contractor status.

IV

This court has time and again declared insurance agents to have independent-contractor status—and appellees have presented no case in which we have not done so. *See, e.g., Weary*, 377 F.3d at 524; *Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245, 251 (6th Cir. 1989). Some of our sister circuits have in fact already found American Family agents to be independent contractors in other contexts. *Wortham v. Am. Family Ins. Grp.*, 385 F.3d 1139, 1140–41 (8th Cir. 2004); *Moore v. Am. Family Mut. Ins. Co.*, No. 90-3107, 1991 U.S. App. LEXIS 13574, *3 (7th Cir. June 25, 1991). The plaintiffs have not shown that the facts here are so radically different from these cases to justify what would be a significant departure from these rulings, especially in the "legal context" of ERISA eligibility where we have held that "control and supervision is less important" than the financial structure of the parties' relationship. *Ware*, 67 F.3d at 578. Accordingly, we REVERSE and REMAND for further proceedings in accordance with this holding.

DISSENT

CLAY, Circuit Judge, dissenting. The only issue in this interlocutory appeal is whether Plaintiffs are "employees" or "independent contractors" for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* The majority holds that Plaintiffs are independent contractors based on its analysis of the factors set forth by *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). However, because the majority (1) adopts an incorrect standard of review for district court determinations regarding whether and to what extent the *Darden* factors support employee or independent contractor status; (2) incorrectly analyzes *Darden* factors one and eight; and (3) incorrectly weighs the *Darden* factors, I respectfully dissent.

I. Background

American Family Insurance Company (hereinafter referred to as "American Family" or "Defendants") is an insurance company "whose business is selling insurance." (RE 320, District Court Opinion, PageID # 20949.)[1] Unsurprisingly, American Family's insurance agents "are core to [this] business." (*Id.*) Over the last five years, American Family's insurance agents have brought in 85% of American Family's insurance premiums—approximately $5.1 billion. Yet, American Family does not provide its agents with numerous

[1] Except as otherwise indicated, record citations refer to the record in district court action No. 13-cv-00437.

health, welfare, and retirement benefits, including "a retirement plan, 401K plan, group health plan, group dental plan, group life plan, and long-term disability plan." (*Id.* at PageID # 20945.) American Family claims it is not required to provide these benefits because it classifies its insurance agents as independent contractors, not employees, relieving it of all ERISA obligations.

Plaintiffs represent a class of some 7,200 current and former American Family insurance agents seeking ERISA benefits who challenge that classification. Plaintiffs argue that the circumstances of their relationship with American Family demonstrate that they are employees, regardless of what American Family chooses to call them. Accordingly, the district court bifurcated this case to determine at the outset whether Plaintiffs are employees or independent contractors for purposes of ERISA.

A twelve-day trial before an advisory jury ensued. Twenty-seven witnesses were called, and extensive documentary evidence was submitted. At the conclusion of the trial, the advisory jury unanimously concluded that Plaintiffs were employees. Though it was not bound by the jury's verdict, the district court reached the same conclusion.

In reaching that conclusion, the district court relied on the factors articulated in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) for determining whether an individual is an employee or an independent contractor. The *Darden* factors include:

> the skill required; the source of the instrumentalities and tools; the location of the

> work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hiring party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 323–24. This Court has also held that an express agreement between the parties is a relevant factor. *See Weary v. Cochran*, 377 F.3d 522, 525 (6th Cir. 2004). The crux of this test is "the hiring party's right to control the manner and means by which the product is accomplished." *Darden*, 503 U.S. at 323.

Although the majority reaches a different conclusion than did the advisory jury and the district court, it disagrees with only a few aspects of the district court's analysis of the *Darden* factors. Because I agree with the advisory jury and the district court, this dissenting opinion will address only those *Darden* factors that the majority discusses. The district court's well-reasoned opinion speaks for itself as to the remaining *Darden* factors.

Before addressing the majority's discussion of the *Darden* factors, a preliminary issue must be resolved.

II. Standard of Review and Legal Framework

As the majority explains, this case requires us to adopt a standard of review for district court determinations regarding the existence and degree of

the *Darden* factors—that is, whether and to what extent each factor supports employee or independent contractor status. Plaintiffs assert that these determinations are findings of fact typically reviewed for clear error, while Defendants assert that they are conclusions of law typically reviewed *de novo*. The Sixth Circuit has yet to explicitly address this issue, and our cases implicitly addressing this issue fail to provide a clear answer. *Compare Peno Trucking, Inc. v. Comm'r of Internal Revenue*, 296 F. App'x 449, 454–60 (6th Cir. 2008) (reviewing for clear error, without much discussion) *with Janette v. Am. Fidelity Grp., Ltd.*, 298 F. App'x 467, 472–76 (6th Cir. 2008) (reviewing *de novo*, without much discussion). Accordingly, it might be helpful to consider cases from other circuits.

Four circuits have explicitly addressed this issue, and all four held that the existence and degree of each *Darden* factor constitutes a finding of fact reviewed for clear error. *See Berger Transfer & Storage v. Cent. States Pension Fund*, 85 F.3d 1374, 1377–78 (8th Cir. 1996); *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043–44 (5th Cir. 1987).[2]

The Fifth Circuit's reasoning in *Mr. W Fireworks* is particularly instructive. In that case, the court explained that "[t]here are . . . three types of findings

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[2] Those cases that pre-date *Darden* address the same issue with regard to the *Darden* factors' predecessor, the *Silk* factors. *See United States v. Silk*, 331 U.S. 704 (1947), *abrogated by Darden*, 503 U.S. at 525.

involved in determining whether one is an employee within the meaning of the [Fair Labor Standards] Act." 814 F.2d at 1044. "First, there are historical findings of fact that underlie a finding as to one of [the factors]." *Id.* These are undisputedly reviewed for clear error. "Second, there are those findings as to [the factors] themselves." *Id.* These findings are "plainly and simply based on inferences from [the historical] facts and thus are [also] questions of fact that we may set aside only if clearly erroneous." *Id.* "Finally, the district court must reach an ultimate conclusion that the workers at issue are 'employees' or 'independent contractors'" *Id.* at 1045. This is undisputedly reviewed *de novo*, as "[t]he ultimate finding as to employee status is not simply a factual inference drawn from historical facts [like the findings as to the factors themselves], but more accurately is a legal conclusion based on factual inferences drawn from historical facts." *Id.*

The reasoning of the Second, Fifth, Eighth, and Tenth Circuits is sound. "The existence and degree of each [*Darden*] factor [are] question[s] of fact" because they are based on simple inferences drawn from underlying historical findings of fact. *Berger Transfer*, 85 F.3d at 1377–78. For instance, *Darden* factor five is "whether the hiring party has the right to assign additional projects to the hired party." *Darden*, 503 U.S. at 323–24. A finding that this factor supports employee status is based on a simple inference from a finding that "the hiring party had the right to assign additional projects to the hired party." *See Hi-Tech Video Prods., Inc. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093, 1096 (6th Cir. 1995). Thus, the two findings

should both be subject to the clear error standard of review.

The majority's contrary holding—that "[e]ach *Darden* factor is . . . itself a 'legal standard' that the district court is applying to the facts"—is belied not only by the unanimity of other circuits that have addressed this issue, but also by the cases on which it purports to rely. The majority's reliance on my dissent in *Weary v. Cochran*, wherein I referred to *Darden* factor one as a "legal issue," is misplaced. 377 F.3d 522, 532 (6th Cir. 2004). Needless to say, it is the majority opinion in *Weary* that binds this Court, including myself, no matter what is said in the dissent.[3] *See Johnson v. Doodson Ins. Brokerage, LLC*, 793 F.3d 674, 677 (6th Cir. 2015). The majority then cites *Ware v. United States*, in which this Court distinguished the "facts and circumstances" of an employment relationship from "the legal meaning and weight that those facts should be given." 67 F.3d 574, 576 (6th Cir. 1995). But the "legal meaning" that the *Darden* factors should be given—*i.e.*, whether Plaintiffs are employees or independents contractors for purposes of ERISA—and the "legal weight" that the *Darden* factors should be given—*i.e.*, which factors should be relied upon more than others and when—are both undisputedly conclusions of law reviewed *de novo*. *See Trs. of Resilient Floor Decorators Ins. Fund v.*

[3] The majority cites various portions of my dissent in *Weary* a total of five times throughout its opinion. Such cherry-picking does nothing to increase the persuasiveness of the majority's reasoning, particularly to the extent that my dissent is at odds with controlling case law and the subsequent published decisions of this Court.

A&M Installations, Inc., 395 F.3d 244, 249 (6th Cir. 2005); *Hi-Tech Video Prods., Inc. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093, 1096 (6th Cir. 1995). Thus, the majority's reliance upon *Ware* misses the point. That case says nothing about the *existence and degree* of each *Darden* factor, a distinct, factual determination that should be reviewed for clear error.

The procedural posture of this case may help explain the difficulty with the majority's reasoning. Because this is an interlocutory appeal, we "have no authority to review the district court's findings of fact." *Northwestern Ohio Adm'rs, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018, 1023 (6th Cir. 2001). Consequently, a holding that the district court's determinations regarding the existence and degree of each *Darden* factor are findings of fact to be reviewed for clear error would, in this case, preclude any review of such determinations, and diminish the majority's ability to reverse a decision that the majority believes goes against the weight of authority.

III. Analysis of *Darden* Factors One and Eight

Even assuming arguendo that district court determinations regarding the existence and degree of each *Darden* factor constitute applications of law to fact that we have authority to review in this case, the majority incorrectly analyzes *Darden* factors one and eight, the only two factors on which the majority disagrees with the district court's analysis.

Darden factor one is "the skill required"—here, of an insurance agent. *Darden*, 503 U.S. at 323–24. And "the sale of insurance is a 'highly specialized field,' requiring considerable 'training,' 'education,' and

'skill.'" *Weary*, 377 F.3d at 527 (quotation omitted). However, that is not the end of the inquiry. Because "'skills are not the monopoly of independent contractors' . . . [i]t is also important to ask how the worker acquired his skill." *Keller v. Miri Microsystems, LLC*, 781 F.3d 799, 809 (6th Cir. 2015) (quoting *Sec'y of Labor v. Laurtizen*, 835 F.2d 1529, 1537 (6th Cir. 1987)).[4] "[If] the company provides all workers with the skills necessary to perform the job, then that weighs in favor of finding that the worker is indistinguishable from an employee." *Id.* Accordingly, in *Keller*, this Court held that there was a genuine issue of material fact regarding the skill required of the plaintiff because "[the defendant] provided [the plaintiff] with the critical training necessary to do the work." *Id.*

It is undisputed that the same is true in this case. The district court found that "[Defendants] almost always hired untrained, and often unlicensed, agents and provided all the training they needed to be an American Family agent." (RE 320, PageID # 20972.) In fact, they "preferred to hire untrained agents so that they could be trained in the 'American Family' way." (*Id.* at PageID # 20972–73.) And "[i]f an agent had worked for a different company prior to being hired at American Family, they were re-trained in the ways of American Family agents upon hire." (*Id.* at PageID #

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[4] The Seventh Circuit has also recognized the importance of this question. *See Equal Emp't Opportunity Comm'n v. N. Knox Sch. Corp.*, 154 F.3d 744, 747 (7th Cir. 1998) (explaining that the Seventh Circuit's *Knight* factors, in which the *Darden* factors are "subsumed," include "the kind of occupation and nature of skill required, *including whether skills are obtained in the workplace*") (emphasis added).

20973–74.) Thus, because "the company provide[d] all workers with the skills necessary to perform the job," the district court was correct in its determination that *Darden* factor one supports the status of Plaintiffs as employees. *Keller*, 781 F.3d at 809.

The majority's contrary holding—that "this factor [weighs] in favor of independent contractor status"—is again undermined by the cases on which it purports to rely. The majority reasons that "[t]he first factor under *Darden* looks to 'whether the skill is an independent discipline (or profession) that is separate from the business and could be (or was) learned elsewhere,'" and that the skill of an insurance agent "could be" learned elsewhere, but in doing so relies solely on the dissent in *Weary*.[5] And the dissent in *Weary* glaringly conflicts with this Court's subsequent decision in *Keller*, in which this Court clearly stated that "[if] the company provides all workers with the skills necessary to perform the job," *Darden* factor one supports employee status. *Keller*, 781 F.3d at 809. Whether those skills *could have* been learned elsewhere is irrelevant, and the majority's holding to the contrary flies in the face of binding precedent.

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[5] The majority also cites this Court's unpublished decision in *Janette*, which quoted the same passage from the dissent in *Weary*. However, this Court in *Janette* cited that passage as though it were from the *majority* in *Weary*, failing to indicate "(Clay, J., dissenting)" after its pincite. *See* 298 F. App'x at 474. Thus, it is possible if not likely that this Court in *Janette* mistakenly believed it was quoting binding precedent as opposed to a nonbinding dissent. Regardless, *Janette* itself is an unpublished and therefore non-binding decision. *See United States v. Yates*, 886 F.3d 723, 728 (6th Cir. 2017).

Darden factor eight is "the hired party's role in hiring and paying assistants." *Darden*, 503 U.S. at 323–24. The greater the role that the hired party plays, the more this factor supports independent contractor status, and the greater the role that the hiring party plays, the more this factor supports employee status. *Weary*, 377 F.3d at 527.

In this case, the district court found that Plaintiffs "ha[d] primary authority to hire and fire their staff," but not "sole discretion" in doing so, and that they "ha[d] sole discretion in staff compensation matters." (RE 320, PageID # 20979.) Specifically, the district court found that Defendants played a role in hiring and firing Plaintiffs' staff (1) by "impos[ing] qualifications" on them, "including licensure, clean driving records, education levels, credit history, and minimum income to debt ratios;" (2) by requiring Plaintiffs' staff "to agree to a life-time non-solicitation agreement;" and (3) by "retain[ing] some authority to approve or disapprove of . . . agency staff selections, above and beyond the imposition of [these] qualification requirements." (*Id.*) This role included the ability of Defendants, without the consent of Plaintiffs, to "fire any agency staff . . . who did not live up to the American Family Code of Conduct." (*Id.*) Based on these facts, the district court determined *Darden* factor eight to be "neutral." (*Id.* at PageID # 20980.) I believe that *Darden* factor eight actually supports the status of Plaintiffs as employees.

The majority's contrary holding, that the district court *necessarily* should have determined that *Darden* factor eight supported independent contractor status because it found that Plaintiffs had "primary

authority" over hiring and paying assistants, notably lacks any supporting authority. The majority cites only this Court's unpublished decision in *Janette*, in which this Court rejected the plaintiff's argument that she had "no hiring authority" because she "could have hired assistants." 298 F. App'x at 475. No role of the defendant in hiring and paying the plaintiff's assistants was discussed in that case, and it is thus inapposite.

The majority seems to ultimately rest its argument on its reading of the phrase "primary authority." But "primary" does not *necessarily* mean more than anyone else; rather, it also means first in time. *See, e.g.*, *Primary*, Oxford English Dictionary, http://www.oed.com/ (last visited December 21, 2018) ("Occurring or existing first in a sequence of events . . ."); *Primary*, Merriam-Webster Dictionary, http://www.merriam-webster.com/ (last visited December 21, 2018) ("[F]irst in order of time or development."). And such usage by the district court when it found that Plaintiffs had "primary authority over hiring and paying assistants" would be entirely consistent with the facts of this case, because Defendants retained "some authority to approve or disapprove" or to "override" an agent's staff selections *after* they had been made. (RE 320, PageID # 20979–80.)

IV. Weight to be Afforded the *Darden* Factors

As previously discussed, "the crux of the *Darden* common law agency test is the hiring party's right to control the manner and means by which the product is accomplished." *Weary*, 377 F.3d at 525. Accordingly, "this Court has repeatedly held that the employer's

ability to control job performance and the employment opportunities of the aggrieved individual are the most important of the many factors to be considered." *Marie v. Am. Red Cross*, 771 F.3d 344, 357 (6th Cir. 2014). In contrast, contractual labels assigned by the parties, while "certainly relevant," *Weary*, 377 F.3d at 525, are less important. *See, e.g.*, *Keller*, 781 F.3d at 804 ("[W]e must look to see whether a worker, even when labeled as an 'independent contractor,' is, as a matter of 'economic reality,' an employee."); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522 (6th Cir. 2011) ("Whether an employment relationship exists under a given set of circumstances is not fixed by labels that parties may attach to their relationship . . . .").

Recognizing this hierarchy of the *Darden* factors, the district court found that "[Defendants] and [their] agents entered into Agent Agreements . . . indicat[ing] that the parties intended for [the] agents to be treated as independent contractors." (RE 320, PageID # 20971–72.) However, the district court also found that "[o]ther internal documents . . . indicate that [Defendants] expected [their] sales managers to exercise control over agents' methods and manner of performing their services." (*Id.* at PageID # 20972.) For instance, "[Defendants'] training manuals actually refer to agents as 'employees.'" (*Id.* at PageID # 20983.) The district court then analyzed the remaining *Darden* factors, and determined that they were "almost evenly split between favoring employee status and favoring independent contractor status." (*Id.*). As a result, the district court turned back to "the most important of the many factors to be considered"—"[t]he employer's

ability to control job performance and the employment opportunities of the aggrieved individual." (*Id.* at PageID # 20982.) (quoting *Marie*, 771 F.3d at 357).

The district court listed the numerous ways in which Defendants had the ability to control and did control Plaintiffs' job performance and employment opportunities. These include, but are not limited to, the following: (1) Plaintiffs did not own a book of business; (2) Plaintiffs did not own any policies; (3) Defendants unilaterally reassigned policies brought in by one agent to others; (4) Defendants could require Plaintiffs to service policies that they did not initiate, without any compensation; (5) Defendants did not allow Plaintiffs to sell insurance from other companies not financially connected to Defendants; (6) Defendants actively discouraged and in some cases prohibited Plaintiffs from taking on other employment, even if it was unrelated to insurances sales; (7) Defendants required Plaintiffs to sign a one-year non-compete agreement, and required Plaintiffs' staff to sign a lifetime non-compete agreement; and (8) Defendants trained their sales managers to believe they were Plaintiffs' bosses and had the authority to demand Plaintiffs' compliance—a belief which many acted upon. On these facts, and in accordance with this analysis, I agree with the district court that Plaintiffs are employees for purposes of ERISA.

The majority's holding to the contrary—that Plaintiffs are independent contractors for purposes of ERISA—is again undermined by the cases on which it purports to rely. The majority first reasons that "[b]ecause ERISA cases focus on the financial benefits that a company should have provided . . . the *Darden*

factors that most pertain to financial structure . . . carry more weight," as opposed to the employer's ability to control job performance and the employment opportunities of the aggrieved individual. But in doing so, the majority relies solely on this Court's decision in *Ware*, in which this Court stated that "the relative weight given each [*Darden*] factor may differ depending upon the legal context of the determination." 67 F.3d at 578. This Court in *Ware* then elaborated that the traditionally important control factors are "more relevant in the context of copyright ownership." *Id.* While it also noted that the reverse may be true in the ERISA context—that the traditionally important control factors may be "less important," *id.*—such speculation was merely dicta, as *Ware* exclusively concerned employment status in the copyright ownership context, and had nothing to do with ERISA. *See United States v. Hardin*, 539 F.3d 404, 411 (6th Cir. 2008) (holding that language in a prior decision was dicta because it "was not necessary to the determination of the issue on appeal"). And "one panel of this [C]ourt is not bound by dicta in a previously published panel opinion." *United States v. Burroughs*, 5 F.3d 192, 194 (6th Cir. 1993). Moreover, this characterization of the speculation about ERISA in *Ware* is further supported by this Court's decision in *Simpson v. Ernst & Young*, an ERISA case decided the year after *Ware*, in which this Court reaffirmed "the employer's ability to control job performance and employment opportunities of the aggrieved individual as the most important of many elements to be evaluated" when determining that individual's employment status. 100 F.3d 436, 442 (6th Cir. 1996).

The majority also reasons that the district court "should have considered the parties' express agreement to be of greater force." As briefly discussed above, this reasoning is unpersuasive because the district court properly considered the Agent Agreements as relevant but not dispositive evidence of independent contractor status. No greater consideration was warranted, particularly given that the language in the Agent Agreements is contradicted by language in other internal documents, including Defendants' training manuals, and that contractual labels are particularly susceptible to manipulation such that over-reliance on them would "defeat the purpose" of ERISA. *Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 575 (6th Cir. 2003); *see also Commodity Futures Trading Com'n v. Erskine*, 512 F.3d 309, 318 (6th Cir. 2008).

For all of the foregoing reasons, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed: August 1, 2017]

WALID JAMMAL, et al., *Plaintiffs*, v. AMERICAN FAMILY INSURANCE GRP., *et al.*, *Defendants*.	)))))))))	CASE NO. 1:13 CV 437 JUDGE DONALD C. NUGENT MEMORANDUM OPINION

This matter is pending before the Court following a twelve day bench trial, with an advisory jury, pursuant to Fed. R. Civ. Pro. 38(c)(1). During the course of the trial, the Plaintiffs called the following twenty-two witnesses: Dusty Rider; Scott Zurfluh (by video deposition); David Wunsch (by video deposition); Brian Edward McElroy (by video deposition); Ralph Kaye; Mary Schmoeger (by video deposition); Vicki Chvala (by video deposition); Gregory Benusa (by video deposition); Lori Snapp (by video deposition); Todd Struab (by video deposition); Deborah Ann Miller (by video deposition); La Tunja Jackson (by video deposition); Kathleen Tuersley; Walid Jammal; Ian H. Altman; Richard M. Steffen; Timothy Johnston (by video deposition); William Nystrom; Nathan Garrett; Gerald Shope (by video deposition); Renee Dauplaise (by video deposition);

Melissa Padgett (by video deposition); and, Brian Stetler (by video deposition). The Defendants called the following five witnesses: Lisa Diemer; Debbie Miller (by video deposition); Brian Stetler (by video deposition); Jerry Benusa; and, Kurt McCabe. Both sides submitted exhibits. Following trial, the parties were given the opportunity to submit proposed findings of fact and conclusions of law. (ECF #316, 317). The issues have now been fully presented.

PROCEDURAL HISTORY

Plaintiffs, Walid Jammal, and Dana LaRiche filed this proposed class action on February 28, 2013, against American Family Insurance Company (Group), American Family Mutual Insurance Company, American Family Life Insurance Company, and American Standard Insurance Company of Wisconsin. On April 5, 2013, the Complaint was amended, adding American Family Termination Benefits Plan, Retirement Plan for Employees of American Family Insurance Group, American Family 401K Plan, Group Life Plan, Group Health Plan, Group Dental Plan, Long Term Disability Plan, American Family Insurance Group Master Retirement Trust, 401K Plan Administrative Committee, and The Committee of Employee and District Manager Retirement Plan as Defendants.[1] (ECF #21). The Amended Complaint also added named Plaintiffs Patricia McClain-Evans, Kathleen Tuersley, Cinda J. Durachinsky, and John Vincent. (ECF #21).

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[1] The term "Defendants" will be used to refer to all Defendants, as well as, at times, to only the Defendant employers.

Defendants challenged the First Amended Complaint through a Motion to Dismiss, which was denied by the Court on August 9, 2013. On September 27, 2013, the Court issued an opinion postponing class discovery until discovery relating to the named Plaintiffs was complete and dispositive motions relating to those Plaintiffs had been addressed. On June 30, 2014, the Complaint was amended a second time. The Second Amended Complaint added named Plaintiff, Nathan Garrett, and eliminated Dana LaRiche, Patricia McClain-Evans, and John Vincent as named Plaintiffs. (ECF #67). Count One of the Complaint seeks declaratory judgment affirming that Plaintiffs and purported class members are "employees" for all purposes, including but not limited to ERISA; declaring that the Termination Benefits Plan is an employee benefit plan subject to ERISA's vesting and benefit accrual provisions; declaring that certain plan provisions violate ERISA; and, declaring that the Plaintiffs are entitled to reformation of the contracts and restitution of benefits allegedly withheld by American Family in violation of ERISA. Count Two seeks injunctive relief prohibiting Defendants from continuing to mis-classify its agents as independent contractors; prohibiting Defendants from implementing benefits plans that do not comply with ERISA; ordering American Family to comply with ERISA requirements with regard to the Termination Benefit Plan; and, ordering Defendants to recalculate and pay benefits under the proper calculation of benefits as provided by ERISA.

Count Three is a claim of benefits under ERISA § 502(a)(1)(B), seeking payments under the

Termination Benefit Plan in accordance with ERISA requirements. Count Four seeks restitution, contract reformation, and actual damages arising from Defendants' alleged breach of fiduciary duty arising from their refusal to recognize that the benefits provided under the Termination Benefits Plan were vested and non-forfeitable pursuant to ERISA's requirements, and for failing to follow ERISA accrual and vesting requirements. Counts Five and Six seek damages and injunctive relief based on Plaintiffs failure to provide Plaintiffs with health and welfare benefits offered to other employees, including a retirement plan, 401K plan, group health plan, group dental plan, group life plan, and long term disability plan, that are offered to those workers American Family has classified as employees.

Defendants filed Motions for Summary Judgment on the claims of the named Plaintiffs, Mr. Jammal, Ms. Durachinsky, Ms. Tuersley, and Mr. Garrett. (ECF #70, 75, 77, 79). The Court held that Ms. Tuersley was barred from pursuing her claim for breach of fiduciary duty under Count Four by the statute of limitations, and otherwise denied all four motions. (ECF #114). Plaintiffs later filed their Motion for Class Certification, and another Motion for Partial Summary Judgment. (ECF #119, 123). The Court denied the Defendants' Motion for Partial Summary Judgment (ECF #132), and granted the Motion for Class Certification (ECF #137). Defendants subsequently twice sought decertification of the class. (ECF #174, 220). Those requests were both denied. (ECF #212, 221).

Prior to trial, the Court granted a Motion to Bifurcate to allow for a primary determination of the

threshold question: Were Plaintiffs employees or independent contractors under ERISA? (ECF #222). Trial of this single issue commenced on April 3, 2017, before an advisory jury, pursuant to Fed. R. Civ. Pro. 39(c)(1). On April 18, 2017, following twelve days of trial, the jury answered "yes" to the following interrogatory:

Interrogatory

> Please answer the following question "yes" or "no" according to your findings:
>
> Did Plaintiffs prove by a preponderance of the evidence that they are employees of Defendant American Family?

After the advisory jury returned this finding, the parties were given a final opportunity to present their proposed findings of fact and conclusions of law. The Court is not bound by the advisory jury's determination, but finds that it comports with the weight of the evidence presented at trial.

ANALYSIS

1. Applicable law

The question at issue, at this stage of the litigation, is whether American Family agents were independent contractors or employees for purposes of the Employee Retirement Income Security Act of 1974, 28 U.S.C. § 1001, *et seq.* ("ERISA"). The Plaintiffs have the burden of proving by a preponderance of the evidence that they were employees and not independent contractors under ERISA.

In order to determine employment status under ERISA, courts are instructed to look at the degree to which the hiring party retains the right to control the manner and means by which the service is accomplished. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 320-21 (1992); *Weary v. Cochran*, 377 F.3d 522, 524 (6th Cir 2004). The Sixth Circuit has consistently held that a worker can be classified as an "employee" if the employer retains the right to direct or control the manner and means of work, if it does not exercise this right. *See, Peno Trucking, Inc. V. C.I.R.,* 296 F.App'x 449, 456 (6th Cir. 2008); *N.L.R.B. v. Cement Transp., Inc.*, 490 F.2d 1024, 1027 (6th Cir. 1974)("It is the right to control, not its exercise, that determines an employee relationship.").

The United States Supreme Court outlined several factors in *Darden* that a court should consider when deciding whether the hiring party retains the right to control the manner and means by which the service is accomplished. These include:

1) the skill required;
2) the source of the instrumentalities and tools;
3) the location of the work;
4) the duration of the relationship between the parties;
5) whether the hiring party has the right to assign additional projects to the hired party;
6) the extent of the hired party's discretion over when and how long to work;
7) the method of payment;

8) the hired party's role in hiring and paying assistants;

9) whether the work is part of the regular business of the hiring party;

10) the provision of employee benefits; and,

11) the tax treatment of the hired party.

Darden, 503 U.S. at 323-24. These factors are non-exclusive. *Ware v. United States*, 67 F.3d 574, 577 (6th Cir. 1995). Although the factors listed above are to be considered, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324.

The Sixth Circuit has held that an express agreement between the parties is also a relevant factor to be considered. *See, Weary v. Cochran*, 377 F.3d 522, 527 (6th Cir. 2004). Any such agreement is considered "best evidence" of the parties intent, but is not dispositive of the question of whether the employer retained the right to exercise control. *See, Weary* at 527; *Janette v. American Fidelity Group, Ltd.*, 298 F. App'x 467, 471 (6th Cir. 2008); *Taylor v. American Income Life Ins. Co.*, No. 1:13 CV 31, 2013 WL 2087359, at *2 (N.D. Ohio May 14, 2013). The Sixth Circuit has also "repeatedly held that the 'employer's ability to control job performance and the employment opportunities of the aggrieved individual' are the most important of the many factors to be considered." *Marie v. Am. Red Cross*, 771 F.3d 344, 356 (6th Cir. 2014)(quoting *Janette v. Am. Fid. Grp., Ltd.*, 298 F. App'x 467, 472 (6th Cir. 2008) and citing *Simpson v. Ernst & Young*, 100 F.3d 436, 442 (6th Cir. 1997); *Trs. Of the Resilient Floor*

Decorators Ins. Fund v. A & M Installations, Inc., 395 F.3d 244, 249 (6th Cir. 2005); and *Johnson v. City of Saline*, 151 F.3d 564, 568 (6th Cir. 1998)).

2. Evidence at Trial

American Family is an insurance company whose business is selling insurance. Tr. 224:24-25; 225:3-5. The testimony was undisputed that American Family agents are core to its business. Tr. 1214:3-7, 1220:17-20 ("the agents are the bedrock of American Family") (Steffen); Tr. 468:1-469:3 (Benusa). American Family took in an average of $6 billion in premiums over the last five years and, at least 85% of those premiums were brought in through American Family agents. Tr. 1215: 14 -1216:4 (Steffen); Tr. 469:11-469:3 (Benusa). American Family also has some employees, classified as such, who sell insurance and interact with customers. Tr. 1204:23-1205:9 (Steffen).

American Family does not require any specialized knowledge or expertise to be hired as an American Family agent. Tr. 230:5-231:11 (Zurfluh); Tr. 572:10-14 (Miller); see also, Tr. 1906:15-21 (Benusa); Tr. 1242:4-7 (Steffen); Tr. 128:3-6 (Rider); Tr. 904:1-12, 907:5-18 (Jammal); Tr. 1819:9-10 (Diemer); Tr. 741:13-742:11 (Tuersley); Tr. 413:19-24 (Kaye); Tr. 1340:15-19 (Nystrom); Tr. 1625:9-1626:20 (Garrett). The only requirements for hire are a high school diploma and two years of general work experience in any field. Tr. 230:5-231:11 (Zurfluh); Pl. Ex. 391, 547. American Family prefers to hire agents with no prior experience so they can be trained in the "American Family way" and will not have pre-established attitudes or procedures. Tr. 396:6-16 (Kaye); Tr.

247:6-8 (Wunsch); Tr. 288:17-289:8 (McElroy); Tr. 129:1-7 (Rider).

A license to sell insurance is not required for hire. Tr. 128:7-15 (Rider); 1340:18-19 (Nystrom). In fact, the company's general rule is that "any [candidate who] has ever been a sales agent or acted as one on behalf of any [other] Insurance Company, is not eligible for an agency position with American Family Insurance." Pl. Ex. 391; Tr. 1051:14-25, 1052:17-24; 1053:3-7 (Steffen). Obtaining and maintaining a license to sell insurance is a legal requirement imposed by the states. Tr. 1245:22-1246:3 (Steffen), 1480:21-23 (Garrett). After hire, American agents are required by the company to obtain and maintain a license "in accordance with the laws of the state in which [they] reside," at their own expense. Tr. 1480:4-10; 1480:24-1481:5 (Garrett).

American Family teaches agents everything they needed to know to become licensed, run an agency, and sell American Family insurance. Tr. 128:19-25 (Rider); Tr. 1340:20-25 (Nystrom); Tr. 1198:12-16 (Steffen); Tr. 289:25-290:3 (McElroy); Tr. 572:17-20 (Miller); Tr. 1644:1-9 (Shope); Tr. 752:9-755:5 (Tuersley); Tr. 917:9-23 (Jammal); Pl. Ex. 754. All agents are paid to attend a mandatory two to three month long "comprehensive training program" on how to sell and how to operate an agency. Pl. Ex. 754; Tr. 1648:25-1649:7 (Shope); Tr. 916:14-918:4 (Jammal); Tr. 1405:7-9 (Garrett). Agents are paid a monthly stipend and expenses during the training. *Id.* American Family maintained an agent-in-training program where it placed agents with a mentor to train in an already established American Family office. Tr. 1403:25-1404:5 (Garrett). During their

participation in the agent-in-training program, new agents were originally classified as independent contractors, but were paid a month salary, required to maintain regular hours, perform mandatory sales activities, and to track and report all of their activities on a weekly basis. Tr. 1406:8-20, 1407:2-24 (Garrett); Pl. Ex. 18-4. In 2013, agents-in-training were re-classified as employees. Tr 1204: 2-14 (Steffen).

Plaintiff, Mr. Garrett has a college degree in risk management in insurance. Tr. 1491:2-6 (Garrett); Defs.' Ex. 54 at p. 2. He took college courses in commercial insurance, group benefits and health insurance, financial management, and life insurance. Tr. 1491:7-1492:5 (Garrett). He acquired life insurance credits towards the Chartered Life Underwriter ("CLU") designation, a specialized designation in the insurance industry, as well as the group benefits credit. Tr. 1492:7-18 (Garrett); Defs.' Ex. 54 at p. 2. He interned with an insurance agent during his last two (2) years in college. Tr. 1493:8-1495:3 (Garrett); Defs.' Ex. 54 at p. 3; Defs.' Ex. 55 at p. 1. He also earned his Series 6 and 63 securities licenses. Defs.' Ex. 369 at p.1. Mr. Garrett had sales and managerial experience before he ever came to work at American Family, and felt that he was capable of running his own agency. Tr. 1497:6-20 (Garrett); Defs.' Ex. 54 at p. 3. Nothing in American Family's training taught Mr. Garrett how to form a relationship, gain trust, and get someone to make a sale; those were skills he already had. Tr. 1549:14-1550:22 (Garrett).

Plaintiff, Ms. Tuersley received her insurance license from Hondros College in 1995, which included

courses in property, casualty, and life insurance, approximately four years before becoming an American Family agent. Tr. 783:14-785:1 (Tuersley). She also had experience in sales and management with other industries, not involving the sale of insurance. Tr. 741:23-742:3, 785:2-6 (Tuersley). Plaintiff, Mr. Jammal owned his own business prior to becoming an American Family agent. Tr. 904:3-12 (Jammal). When he decided to seek other opportunities, Mr. Jammal obtained various insurance licenses, including life and health, after which he received a number of work offers from insurance companies. Tr. 904:13-905:18 (Jammal).

The Agent Agreement ("Agreement") entered into between the Plaintiffs and Defendant American Family Insurance Group contained a paragraph either identical to or substantively similar to the one below:

> It is the intent of the parties hereto that you are not an employee of the Company for any purpose, but are an independent contractor for all purposes, including federal taxation with full control of your activities and the right to exercise independent judgment as to time, place and manner of soliciting insurance, servicing policyholders and otherwise carrying out the provisions of this agreement. As an independent contractor you are responsible for your self-employment taxes and are not eligible for various employee benefits such as Workers and Unemployment Compensation.

Defs.' Ex. 57 at p. 4; Defs.' Ex. 132 at p. 4; Defs.' Ex. 206 at p. 4.

The Agreement also provides that:

> Rates, rules, regulations and all provisions contained in the Company's Agent's Manuals and all changes to them shall be binding upon you. If any inconsistency or ambiguity exists between this agreement and such rate, rule, regulation, provision or other statement or statements, whether written or oral, this agreement shall control.

Defs.' Ex. 57 at p. 8; Defs.' Ex. 132 at p. 8; Defs.' Ex. 206 at p. 8.

There is no limit on the duration of the agency relationship. Jt. Ex. 1-4 § 6.g; Tr. 576:17-21 (Miller); Tr. 744:4-11 (Tuersley). American Family describes the agency position as a "career" position. Pl. Ex. 754-1; Pl. Ex. 425; Tr. 912:9-16 (Jammal); Tr. 743:18-744:16 (Tuersley).

American Family pays its agents in commissions. Tr. 189:2-6 (Rider); Tr. 808:3-6 (Tuersley); 963:12-18 (Jammal); 1346:5-7 (Nystrom); 1577:13-15 (Garrett); 1888:10-13 (Miller); 1912:19-22 (Benusa). It sometimes also paid advance commissions to newer agents, which were then required to be re-paid. See, Tr. 1909:1-15 (Benusa); Tr. 791:3-12 (Tuersley). American Family does not provide agents with vacation pay, holiday pay, sick pay, or paid time off. Agents are not eligible for the same pension or retirement plans offered to American Family employees, and they are required to obtain and pay for their own insurance. Tr. 810:21-811:13 (Tuersley);

1251:15-17 (Steffen); 1587:6-20 (Garrett); 1915:4-6 (Benusa); Tr. 644:6-21 (Miller). The testimony showed that agents were offered an "extended earnings" benefit based on their years of service. Tr. 1247:8-1249:7 (Steffen); 1388:10-20 (Nystrom); 1587:21-1588:23 (Garrett); 1915:7-1917:10 (Benusa); Defs.' Ex. 57 at p. 5; Jt. Ex. 1-7. This plan offered a lifetime annuity, and was described to the agents as a retirement plan. Tr. 292:2-12 (McElroy); Tr. 574:15-575:5 (Miller); Tr. 746:3-20 (Tuersley); Tr. 129:16-17 (Rider); Tr. 1341:7-9 (Nystrom). Plaintiffs presented expert testimony from Mr. Altman during which he provided his opinion that the extended earnings or termination benefits outlined in the 1993 and 2003 Agent Agreements both have the characteristics of a retirement or pension plan. Tr. 1019: 18 -1024:5 (Altm12). American Family reported the extended earnings plan as one of its "Defined Benefit Plans" in the annual statement it filed with the insurance regulators. Pl. Ex. 976-29; P. Ex. 977-29.

The Plaintiffs testified that they filed their taxes as if they were independent contractors, and that they deducted business expenses as self-employed business owners. See, Tr. 822:23-823:5, 827:15-828:4 (Tuersley); 914:9-11, 989:9-17,1001:1-1002:21 (Jammal); 1590:9-1591:13, 1593:5-1594:2 (Garrett). Mr. Garrett took tax deductions for business expenses such as advertising, car and truck, commissions and fees paid, depreciation, insurance payments, legal and professional services, office expense, rent of business property, repairs and maintenance, supplies, taxes and licenses, business travel, meals and entertainment, utilities, wages paid to employees, postage, business telephone, dues and

subscriptions, and training. Tr. 1595:9-1598:8 (Garrett); Defs.' Ex. 41 at pp. 7-8; Defs.' Ex. 42 at pp. 3-4; Defs.' Ex. 43 at pp. 6-7; Defs.' Ex. 44 at pp. 2, 11; Defs.' Ex. 45 at pp. 1, 9; Defs.' Ex. 46 at pp. 1, 9; Defs.' Ex. 47 at pp. 1, 10. In 2005, Tuersley took tax deductions for business expenses in the amount of $86,373. Tr. 832:5-7 (Tuersley); Defs.' Ex. 197 at pp. 9-10, 15.

The company calls its agents "business owners" and "partners" and tells new agents they will be "agency business" owners and that they need to "invest" in "their business." Tr. 291:19-23 (McElroy); Tr. 574:4-14 (Miller); Tr. 2090:4-15 (McCabe); Tr. 909:11-910:24, 920:11-25 (Jammal); Tr. 742:18-743:5 (Tuersley); Tr. 1404:6-12, 1413:5-7 (Garrett); Tr. 1943:8 (Benusa); Tr. 2085:16-19 (McCabe). Agents do not own a book of business; there is no book of business separate and distinct from American Family's business. Tr. 1908:8-10 (Benusa); Tr. 291:8-14; Tr. 478:20-479:6; Tr. 210:2-3, 10-25; 211:8-14; Tr. 572:25-573:22 (Miller); Tr. 401:22-403:18 (Kaye); Tr. 211:11-14; Pl. Ex. 438-2. Mr. Wunsch testified that agents did not own their own policies. Tr. 247: 16 (Wunsch). American Family retains "total control over where those policies go and to what agent." Tr. 1160:18-23 (Steffen). Even during the agency relationship, the company retains the right to transfer customers to other agents at its own discretion, at any time. Tr. 1156:20-1161:2 (Steffen); Jt. Ex. 1-4, § 6.e.; Tr. 478:20-479:6 (Benusa).

An American Family agent cannot sell their agency. Tr. 2082:16-17, 2086:6-11 (McCabe). American Family prohibits agents from assigning any rights to income from their agency. Jt. Ex. 1-4,

§ 6.c. Customers brought in and serviced by agents are considered American Family customers who are merely being serviced by the agents. Pl. Ex. 438-2. It is undisputed that American Family agents are prohibited from selling competitive insurance products. Tr. 745:12-746:2 (Tuersley). Agents must work exclusively for American Family. Jt. Ex. 1-2 § 4a; Tr. 2082:18-21 (McCabe); Tr. 903:16-25 (Jammal); Tr. 745:12-14 (Tuersley); Pl. Ex. 532-10. They may not sell another company's policy "[e]ven if the insurance sold by that carrier isn't sold by American Family." Pl. Ex. 532-10; see also, Tr. 745:12-746:2 (Tuersley). American Family discourages additional employment by agents even if it is unrelated to the insurance industry, and has threatened to terminate agents in order to persuade them to leave a second job. Tr. 133:15-21 (Rider); Tr. 959:15-960:7 (Jammal). Agents are also required to agree to a one-year non-solicitation provision prohibiting them from contacting any customer credited to their account if they separate from American Family. Jt. Ex. 1-5, § 6.k. Any investment an agent makes to grow his client base is not recoverable if he or she separates from American Family. Tr. 1644:10-24 (Shope); Tr. 973:18-19 (Jammal); Tr. 1348:25-1349:7 (Nystrom).

American Family agents must work out of an agency office and may not work from home. Tr. 921:11-15 (Jammal); Tr. 750:24-751:3 (Tuersley). Mr. Jammal worked out of a building he had purchased. Tr. 923, 933:8-9, 987:3-24 (Jammal). He rented out space in the building to other entities. Tr. 990-991 (Jammal). Ms. Tuersley also had her own office. Tr. 818:14-17 (Tuersley). Mr. Garrett worked out of his

office in Pittsburg, Kansas. He could have sold insurance anywhere in the State of Kansas from that office. Tr. 1576:12-15 (Garrett). There was testimony that American Family assigns agents to a particular geographic district and that they have to maintain their office within that district. Tr. 751:16-21 (Tuersley). There was also testimony that American Family is regularly involved in its agents' office selections and retains a right to approve or disapprove where an agent's office is located. Tr. 401:2-6 (Kaye); Tr. 750:19-7511:25 (Tuersley); Tr. 921:11-924:6 (Jammal); Tr. 140:12-143:5 (Rider); Pl. Ex. 210-211. American Family has a general policy that agents should locate their offices at least one mile apart. Tr. 666:7-16; 667:4-16 (Jackson); Tr. 751:12-752:5, 820:2-15 (Tuersley). There was testimony indicating that American Family enforced its right to approve locations in some instances but not in others. For instance, Mr. Rider testified that American Family would not allow him to open a satellite office in a neighboring town. (Tr. 142:22-143:4 (Rider). American Family also told Mr. Jammal he could not use a building he had decided to purchase, and that he had to find a different location. Tr. 922:14-924:6 (Jammal). However, when Plaintiff, Ms. Tuersley asked American Family to tell another agent to re-locate because they were within a mile of her office, American Family told her it did not have the power to do so. Tr. 818:15-25, 820:2-25, 822-823:9 (Tuersley); Def. Ex. 228, 229. Also Ms. Diemer testified that she picked her own office location and no one from American Family had any input on her decision. Tr. 1833: 1-7 (Diemer).

Agents are required to comply with American Family's code of ethics. Tr. 803:24-805:1 (Tuersley); 1486:9-11 (Garrett). American Family monitored agents' emails and computer usage. Tr. 925:8-20 (Jammal); Tr. 753:23-754:2 (Tuersley); Tr. 145:22-146:4 (Rider); Tr. 673:21-674:1 (Jackson); Pl. Ex. 532-7. American Family retained the right to block agency access to websites, including on-line retailers, barred non-American Family computers from accessing the agents' internet, and barred agents and agency staff from using American Family issued computers to access their personal email accounts. Tr. 924:24-925:10 (Jammal); Pl. Ex. 532-8. Managers could use the American Family computer system to track and monitor agent activity on a daily basis. Tr. 1663:5-15 (Shope). Ms. Tuersley testified that other insurance agencies do not retain the right to access their independent agents' computer systems or monitor agents' email. Tr. 754:3-8 (Tuersley). When an agent's relationship with American Family is terminated, American Family shuts off computer access and collects the hardware. Tr. 146:9-18 (Rider); Tr. 775:24-776:6 (Tuersley). If agents do not return their computer, American Family can declare their retirement benefits forfeited and stop payment. Jt. Ex. 1-5, § 6.l.2; Jt. Ex. 1-7, § 6.u.; Tr. 146:9-18 (Rider).

Agents testified that they hired their own staff, paid the staff's wages, and decided whether to offer employee benefits to their staff. See, Tr. 987:25-988:9 (Jammal); Tr. 806:11-18, 807:3-20, 811:14-16 (Tuersley); Defs.' Ex. 369, at p. 1; 1523:7-21, 1533:4-8, 1542:9, 1622:13-17 (Garrett); Tr. 1834:14- 1835:15 (Diemer). American Family provides advertisement

for agency staff positions on its website, and it will recruit and screen potential agency staff for the agents. It also provides subsidies for some agents to help them hire staff. Pl. Ex. 756-1, 756-8; Tr. 1394:17-1395:3 (Nystrom). A former manager, Mr. McElroy testified that managers could tell agents what staff they could hire. Tr. 298: 14-17 (McElroy). There was testimony indicating that American Family retained the right to approve the hiring of staff, and to fire agency staff. Tr. 584:17-19 (Miller); Tr. 926:19-927:8, 928:6-8 (Jammal); Tr. 758:20-760:16 (Tuersley); Tr. 156:4-157:1 (Rider); Pl. Ex. 434; Tr. 340:7-25 (McElroy). American Family admits that they retained these rights with regard to appointed staff. Tr. 1161:7-1162:11, 1164:6-14 (Steffen). Appointed agency staff are those staff who interact with customers. Tr. 1154:11-18 (Steffen); 1834:17-20 (Diemer). There was conflicting testimony as to whether American Family had any role in hiring non-appointed staff. See, Tr. 1827:9-16 (Diemer); Tr. 926:19-927:8 (Jammal); Tr. 1877:9-15 (Miller). Managers were evaluated based on whether their agents hired a certain number of staff. Pl. Ex. 328-1; Pl. Ex. 884; Tr. 1418:2-16, 1419:17-1420:9 (Garrett). American Family imposes qualification standards on agents' appointed staff. Tr. 1161:7-1162:11, 1164:6-14 (Steffen). State insurance law also imposes some licensing requirements on agency staff. Tr. 1580:11-1582:23 (Garrett); Defs.' Ex. 62. American Family required that appointed staff be licensed. It also imposed minimum education standards, driving record requirements, and credit score requirements on agency staff. Pl. Ex. 533-1; Tr. 1343:9-1344:3 (Nystrom). After this lawsuit was filed, American Family eliminated the additional (non-licensing)

criteria. Tr. 2118:21-22 (McCabe). All agency staff are required to abide by American Family's Code of Conduct, and American Family retains the right to fire any staff for a breach of that Code. Pl. Ex. 532; Tr. 927:23-928:1 (Jammal). Appointed staff are required by American Family to sign a non-compete agreement prohibiting them forever from soliciting any policyholder credited to their agency's account. Tr. 1155:1-1156:11 (Steffen).

It is undisputed that American Family requires agents to pay for many of the tools of their trade, including some of the tools issued by the company. District Manager Kurt McCabe testified that after he became a District Manager, the agents in his district were responsible for purchasing items used to run their agencies, such as their offices, office supplies, telephones, office furniture, and automobile. Tr. 2005:14-2006:15 (McCabe). With the exception of a computer that American Family issued him, Mr. Garrett testified that he paid for all the other equipment he used. Tr. 1490:6-9 (Garrett). This included business expenses such as office rent, equipment, furniture, telephones, vehicle expenses, office supplies, utilities, employee wages, and some advertising. Tr. 1578:3-21 (Garrett). Ms. Tuersley testified that she paid for expenses associated with her agency, including setting up telephone lines, marketing, advertising, lunches or centers of influence, car, gas, utilities, postage, rent, legal and professional services, taxes, insurance licenses, client entertainment, business donations, cleaning, signage, professional publications and seminars. Tr. 828:20-833:10 (Tuersley).

The testimony was undisputed, that American Family provided all brochures, applications, letterhead, forms, products, marketing materials, and websites. Tr. 752:15-753:1, 754:10-25 (Tuersley). American Family also provided agents with "access to online tools" and "all branded resources," including the above-mentioned resources, office signs, the brand and logo, the benefit of national and regional advertising and marketing campaigns, and social media content. Tr. 1649:18-1650:2 (Shope); Pl. Ex. 754-1. American Family also provided agents with a call center that was "always available to agents and customers" for 24/7 customer service. Pl. Ex. 754-1. Mr. Jammal also testified that American Family retained the right to approve any advertising. Tr. 988:12-989:2 (Jammal). Company representatives testified that American Family subsidizes 50% of the agent's cost of marketing. Tr. 1078:6-12 (Steffen); Tr. 575:11-16 (Miller); Tr. 1647:23-1650:2 (Shope).

American Family also provided the computers and software agents are required to use. Tr. 145:14-21 (Rider); Tr. 924:8-21 (Jammal); Tr. 752:21-754:2 (Tuersley). There was some testimony that although American Family required use of the provided computers, it required the agents to lease the computers from American Family on a long-term lease at up to $300/month. Tr. 924:7-925:7 (Jammal); Tr. 146:2-4 (Rider). American Family provides each agent with their own American Family agent website and email address, which they are required to use, as well as other social media. Tr. 1119:24-1120:10 (Steffen). Agents are not permitted to use their own website, emails, or social media. See, Tr. 925:8-20 (Jammal); Tr. 1119:24-1120:10 (Steffen); Tr. 753:23-

754:2 (Tuersley); Tr. 673:21-674:1 (Jackson); Pl. Ex. 532-7.

There was testimony indicating that American Family reimbursed agents for certain staffing and marketing expenses. Tr. 1078:6-12 (Steffen); 1498:10-25, 1578:12-13 (Garrett); Tr. 1346:16-20 (Nystrom). Mr. McElroy testified that American Family would enter into subsidy programs for new agents to pay for all of their office expenses, including phone, power, electric, staff expense, and a monthly stipend for up to four years. Tr. 292:12 -293:2 (McElroy). He also testified that this program allowed American Family to exert additional control over the agents: "as long an agent owes American Family money, we own them. We can tell them exactly what to do." Tr. 293:6-22 (McElroy). There is evidence that this debt could take years to pay off, and that some agents never reached a point where it was fully paid. Tr. 293:10-22 (McElroy). There was also testimony that American Family would coerce agents into taking loans they did not need so they would be in debt to the company. Tr. 969:5-970:6 (Jammal).

There was evidence presented that American Family has invested significant amounts of money to train, supply, and support its agents. American Family's sales department has one thousand employees and entire departments that exist solely to support its 2,800 agents. Tr. 229:17-20; Tr. 1926:7-14, 1927:11-18 (Benusa); Tr. 458:17-459:17 (Chvala); Pl. Ex. 754-1. Mr. Steffen testified that "millions and millions of dollars" are spent on research and data to assist agents in servicing American Family customers. Tr. 1062:10-1063:8; 1064:23-1065:3 (Steffen). American Family pays its agents about

13.5% of its total revenue. Mr. Steffen testified that percentage would not change if they were to be considered employees, but would have to include costs that are now born by the agents themselves, including the cost of paid days off, and insurance. Tr. 1202:2-18 (Steffen).

American Family agents are assigned to a district and a geographical territory, and must report to an Agency Sales Managers. Tr. 227:4-228:25 (Zurfluh); Tr. 760:24-761:1 (Tuersley). American Family employs between 140-200 managers to manage approximately 3,000 agents. Tr. 1198: 22-25 (Steffen); Pl Ex. 1065-3; Pl. Ex. 1064-5. These Agency Sales Managers, previously referred to as "District Managers" ("managers") are employees of American Family. Tr. 1071:13-18, 1199:24-25 (Steffen); Although they are employees, managers are given an expense account to run promotions and incentives for their agents, and are required to pay for their own rent and assistants from that account. Although they are employees they are also responsible for hiring their own assistants. Tr. 1200: 20- 1201:11 (Steffen).

The Company describes the manger's role as a "strategic business partner who ensures alignment with corporate goals through the successful and sustainable implementation of agency business plans." Pl. Ex. 323; Pl. Ex. 329; Pl. Ex. 330 (emphasis added). The manager's objective is to "engage agents in corporate strategy and direction" and "influence desired results." *Id.* The "desired results," are those set by American Family, not the agents. Tr. 618:3-5 (Miller); Tr. 1335:3-23 (Nystrom); Tr. 166:19-168:2 (Rider); Tr. 938:24-939:21 (Jammal). American Family expects a manager's "key competencies" to

include: "Develops and executes plans to achieve results," "Achieves desired results," "Communicates clear expectations," and "Holds people accountable for performance." Pl. Ex. 338, Pl. Ex. 329, Pl. Ex. 330.

Agency Sales Managers report to State Sales Directors, who report to one of three Regional Vice-Presidents, who, in turn, report to the Chief Sales Officer. Tr: 227:4-228:25 (Zurfluh). Other than their agents, American Family classifies everyone in its sales force chain as employees. Tr. 228:11-229:3; Tr. 469:11-14 (Benusa); Tr. 571:24-572:2 (Miller). According to the managers' training policies, the job of this sales force is to implement and meet American Family's strategic plan for production (sales) and customer service goals. Pl. Ex. 338, 323, 329, 330; Tr. 1066:1-12, 1067:4-8 (Steffen); Tr. 613:8-16 (Miller); Tr. 294:10-295:16 (McElroy); Tr. 226:9-227:3 (Zurfluh). This hierarchy was established to ensure that agents sell the mix of business American Family prefers to sell, and that they interact with customers in the way American Family wants them to interact. Tr. 227:4-228:25; Tr. 280:4-24 (McElroy); Tr. 612:16-25; 613:8-16 (Miller), Pl. Ex. 338, 323, 329, 330, 18, 19, 328, 660; Tr. 2106:1-4; Tr. 2110:3-10 (McCabe); Tr. 1130:25-1131:24 (Steffen).

There was conflicting testimony as to whether agents had control over the methods and means of reaching the production, profitability, and service expectations established by American Family. Tr. 1188:15-1189:4 (Steffen); 1830:23-1831:2 (Diemer); Tr. 1349:25-1350:1 (Nystrom)("you have to do exactly what . . . corporate tells you to do."); Tr. 298:11-17 (McElroy)("We had direct control of all their activities."); Tr. 1639:6-21 (Shope)("I would say they

retain a great deal of authority. . . I'd say they control."). Ms. Diemer testified that American Family never told her she needed to sell insurance in a certain way, or using a certain technique. Tr. 1846:6-9 (Diemer).

American Family's witnesses agreed that the job of the managers is to manage the agents. Tr. 1067:25-1068:14 (Steffen); Tr. 508:7-9 (Benusa); Tr. 2080:22-2081:13 (McCabe). American Family's definition of the Agency Sales Manager's job responsibilities makes clear that their role is to manage the agents and implement American Family's sales plan at the agency level. Tr. 612:16-25; 613:8-16 (Miller); Pl. Ex. 338, Pl. Ex. 323, PX 329, Pl. Ex. 330.

There was testimony suggesting that managers did not simply track that agents met the numbers they were required to meet, but were also involved in the agents' day to day work, and influenced how agents met those goals. Tr. 581:8-16, 600:5-13 (Miller); Tr. 2097:4-15 (McCabe); Tr. 300:2-10 (McElroy). Mr. Kaye testified that American Family retains the right to control how agents do business. Tr. 403:15-24; Tr. 404:2-13 (Kaye). Some agents testified that the managers were very forceful and demanding, and threatened agents to achieve compliance. Tr. 764:19- 765:11 (Tuersley). Ms. Tuersley testified that her manager even ordered her to have his name on her premium trust bank account. Tr. 764:12-22 (Tuersley). American Family agent, Ms. Diemer testified that she viewed her manager as a business partner, and that he did not tell her what to do, how to run her agency, or how to go about selling insurance. Tr. 1824: 15-23 (Diemer).

Mr. McElroy testified that managers could tell the agents what hours they needed to be open. Tr. 298:11-17 (McElroy). There was testimony that American Family has a rule that agencies must be open and staffed by someone who can service customers during normal business hours. Tr. 113:12-13; Tr. 2262:13-21; Tr. 339:6-10 (McElroy); Tr. 583:14-584:16 (Miller); Tr. 1666:5-14 (Shope). Plaintiffs also testified, however, that they could have their own employees run their office in their place, at their discretion. Tr. 930:23-25, 996:10-997:12 (Jammal). Ms. Diemer testified that no one from American Family had ever told her when she had to have her agency open. Tr. 1837: 11-23 (Diemer). Managers could direct agents on when they could close the agency and Plaintiffs testified that agents could take no vacation without approval. Tr. 307:25-308:15 (McElroy); Tr. 166:1-5 (Rider); Tr. 1342:24-1342:1 (Nystrom); Tr. 960:19-961:3 (Jammal); Tr. 756:19-21 (Tuersley).

If an agent tried to implement "summer hours," closing the agency early on Fridays, they could and would be reprimanded. Tr. 1427:10-1431:8 (Garrett); Tr. 583:14-584:16 (Miller); Tr. 143-23:144:4 (Rider). Managers were required to do drop-ins to verify that agents had their offices open during regular business hours. Tr. 339:16-340:3 (McElroy); Tr. 932:4-22 (Jammal); Tr. 756:10-758:11 (Tuersley); Pl. Ex. 139-140. Ms. Tuersley testified that when a manager dropped by her office while she was on vacation he took over her office, answered her phone, and requested her password from her office staff. Tr. 756:25-758:11 (Tuersley). Ms. Diemer, however, testified that she has occasionally taken vacations,

personal days, or sick days. She testified that she did not need to obtain permission from her manager for vacations, but she did inform him as a matter of courtesy. Tr. 1838:3-18 (Diemer).

Agents received annual reviews and had production goals they were required to reach.

Tr. 866:4-6 (Tuersley); 1466:4-6 (Garrett); Tr. 766:4-18 (Tuersley); 948:3-20 (Jammal). Although some American Family witnesses testified that agents were allowed to set their own production goals and were not required to prepare business plans, (Tr. 1127:9-22 (Steffen); Tr. 1731:20-24 (Dauplaise)), there was significant evidence indicating that agents were required to develop business plans incorporating required initiatives; that managers could revise those plans; that the plans had to be approved by upper management; and, that, once approved, the plans, including any edits made by management, were binding on the agents. Pl. Ex. 204; Tr. 579:8-580:16, 586:3-5, 615:24-616:4 (Miller); Tr. 1667:21-1169:2 (Shope); Tr. 938:19-940:19 (Jammal); Tr. 768:7-8 (Tuersley); Tr. 1335:3-1336:2 (Nystrom); Tr. 166:19-168:2 (Rider); Pl. Ex. 338; 307:14-21 (McElroy).

American Family requires agents to meet certain production, profitability, and service expectations. Tr. 1187:14-24 (Steffen); 1216:12-20 (Steffen); 1291:23-1292:2 (Steffen); 1984:6-11 (Benusa). Agents were required to comply with deadlines and other requirements. Tr. 940:22-942:20 (Jammal); 947:23-949:17 (Jammal). The manager's job depends on the results of the agents and how much the agents sell. Tr. 319:4-320:2 (McElroy); Tr. 660:9-19 (Jackson). If

the agents in a manager's district did not perform, the manager faced termination. Tr. 212: 5-11 (Zurfluh); Tr. 319:4-320:2 (McElroy).

At American Family, an agent could run a solid, profitable agency but still risk termination if he or she did not grow at the pace American Family demanded or grew at a slower pace than other agents in the district. Tr. 1122:25-1123:17, 1125:6-18, 1130:1-10 (Steffen); Tr. 766:4-8 (Tuersley). American Family frames its growth demands as "production" requirements, but in reality upper-level managers could just direct the Agency Sales Managers to "find the bottom three [agents] in each district … and then issue performance letters to them" to start the termination process. Tr. 618:22-619:13 (Miller). Numbers could be manipulated "depending on which numbers [the manager] wanted to pull out of the hat," and this process generally targeted veteran agents with established agencies to persuade them to retire. Tr. 618:22-619:13 (Miller). Up through at least 2013, production requirements were based on the number of new applications filed, not on the premiums brought in by an agents, and agents had to meet their district's goals for new quotes and applications or be put on a performance improvement plan, regardless of much premium they brought to the company. Tr. 1125: 25-1126:12 (Steffen). American Family did not dispute that they can require agents to expand their business and sell certain specific mixes of policies. Tr. 1122:25-1123:17, 1125:6-18, 1130:1-10, 1131:20-24, 1132:19-1133:1 (Steffen); Tr. 288:3-6 (McElroy); Tr. 765:16-766:3 (Tuersley); Tr. 1417:16-22 (Garrett).

Plaintiffs presented undisputed testimony that agents were asked to provide sales reports, visit clients homes, complete business plans and produce other documents, as well as to attend training sessions. Pl. Ex. 539-1, 759; Tr. 736:5-740:9 (Tuersley). There was testimony that agents were required to do a certain number of personal insurance reviews each week and to report their activities to their managers. Tr. 1344:20-1345:2 (Nystrom); Pl. Ex. 56-2; Tr. 949:2-17 (Jammal); 1408:4-6 (Garrett). They were also encouraged to follow certain activities American Family considered to be "best practices". Pl. Ex. 204-25; Tr. 1003:25-1094:13 (Steffen). Although agents were told these best practices were voluntary, their managers' compensation was tied to the agent's compliance with those practices. As a result, many managers implemented mandatory programs for their agents to increase compliance with these standards. Pl. Ex. 530; Pl. Ex. 204: Tr. 1095:13-23 (Steffen). Mr. Nystrom testified that these practices were "just another way of controlling my activities in – in the agency." He also testified that he would have opted out if it were voluntary. Tr. 1339:4-14 (Nystrom).

Agents were required to attend sales and training meetings. Tr. 733:18-20 (Tuersley); 736:2-4 (Tuersley); 739:24-740:20 (Tuersley); 916:14-18 (Jammal); 935:6-17 (Jammal); 937:19-24 (Jammal); 1408:7-13 (Garrett); Pl. Ex. 262, 193-194, 196-197, 199-201. Agents were required to participate in calling nights and other marketing activities, such as manning a booth at a sporting event. Tr. 337:1-338:3, 359:5-360:1 (McElroy); 582:13-583:13 (Miller); Tr. 761:22-25 (Tuersley); Pl. Ex. 262; Tr. 951:17-Tr.

955:15 (Jammal); Tr. 1413:23-24 (Garrett). Agents were often required to complete daily or weekly activities reports. Tr. 581:8-582:8 (Miller); Pl. Ex. 56-2; Pl. Ex. 262; Tr. 940:20-942:20; 947:20-951:3 (Jammal); Tr. 761:18-763:18, 767:20-768:6 (Tuersley); Tr. 1344:20-23 (Nystrom); Tr. 1407:12-14 (Garrett); Pl. Ex. 203-8. They were also told what types of policies they had to sell and which to prioritize. Tr. 288: 3-6, 298:14-17 (McElroy): Pl. Ex. 203; Tr. 1131:20-24. They were required to adopt specific sales techniques and participate in sales campaigns directed at particular types of policies. Tr. 164:11-165:14; 166:3-12 (Rider)(he was told: "everybody is going to do this," "you will do it," and "you don't have a choice.") ; Pl. Ex. 913-21; Pl. Ex. 914-142; Pl. Ex. 916-61; Pl Ex. 931-1723; Pl Ex. 935-98, 99.

Agents were required to attend monthly district meetings. Tr. 341:12-18 (McElroy); Tr. 587:3-9 (Miller); Tr. 1669:6-20, 1672:9-24 (Shope); Tr. 935:6-936:6, 937:19-938:18 (Jammal); Tr. 735:16-736:4, 768:24-769:1 (Tuersley); Tr. 486:18-487:24 (Benusa); Pl. Ex. 531, 539, 185-187, 192-194; 198; Tr. 216:19-217:12 (Zurfluh). Managers communicated to agents that these district meetings were mandatory, even if they interfered with sales appointments, and agents were reprimanded if they showed up late. Pl. Ex. 531, 539, 759, 185-188, 192-194; 196-198; 1672:9-24 (Shope); Tr. 935:6-936:6 (Jammal); Tr. 216:19-217:12; 732:19-740:20 (Tuersley); 159:25-160:8 (Rider); Tr. 287:7-16 (McElroy).

Agents were required to do property re-inspections or surveys, and personal insurance reviews. Tr. 766:9-18 (Tuersley); Tr. 949:2-9 (Jammal); Tr. 1408:4-6 (Garrett); Tr. 1101.17-1102:5

(Steffen); Pl. Ex. 262-2. Property re-surveys were unrelated to selling or servicing insurance and were also performed by outside hired third-parties. Tr. 961:11-962:14 (Jammal); Tr. 1345:5- 1346:4 (Nystrom); Tr. 679:3-680:2 (Jackson). Agents were also sometimes required to accept transferred policies and to service those policies for a year without compensation, and at a reduced commission thereafter. Tr. 2084:3-17 (McCabe); Tr. 955:25-956:25 (Jammal). Agents could also be required to service policies that would never be counted toward their commission base. Tr. 1159:4-11 (Steffen); Tr. 956:8-957:13 (Jammal).

There was testimony that many of these tasks were part of an agent's sales and service obligations and some were required under the Agreement. Tr. 1134:1-1136:17, 1178:4-1180:10, 1242:17-1245:5 (Steffen); 1485:15-20, 1520:19-1521:10, 1531:19-22, 1536:18-22 (Garrett); Defs.' Ex. 68 at 8; Defs.' Ex. 57 at p. 2; Defs.' Ex. 132 at p. 3; Defs.' Ex. 206 at p. 3.

There was conflicting testimony as to whether agents would suffer consequences for disregarding American Family requests. Tr. 732:19-736:4, 857:21-858:4 (Tuersley); Tr. 971:4-972:14 (Jammal); Tr. 1418:4-16, 1422:25-1423:16, 1426:10-15, 1539:5-1541:11, 1541:19-1542:9, 1543:18-20 (Garrett); Tr. 359:6-360:6 (McElroy); Tr. 1382:9-1383:10 (Nystrom); Tr. 1831:10-15 (Diemer); Tr. 1879:25-1880:10, 1885:17-1888:9 (Miller); Tr. 1911:8-1912:4 (Benusa); Tr. 2026:8-17 (McCabe); Pl. Ex. 539-1. American Family witnesses claimed that many of the above activities were "expected" but not mandatory. Tr. 674:10-13 (Jackson). They also claim that no American Family agent has ever been terminated for

failing to do any of these activities. Tr. 1256:3-1257:22 (Steffen); Tr. 2020:6-19 (McCabe).

Plaintiffs presented testimony that showed American Family managers regularly threatened the agents with termination to obtain compliance, and some terminated employees attributed their termination to a failure to follow the "suggested" policies. Tr. 1646:25-1647:6, Tr. 1674:10-23 (Shope); Tr. 123:23-124:5, 159:16-160:8, 171:4-8 (Rider); 1336:3-1337:13, 1347:1-1348:5, 1391:12-18 (Nystrom); 932:23-933:24 (Jammal); Tr. 765:1-11 (Tuersley); Pl. Ex. 761-762. Plaintiffs testified that they were punished whenever they suggested that their manager was exerting control in a manner inconsistent with their independent contractor status. Pl. Ex. 140, Tr. 1450:9-1455:24, 1459:1-1467:13 (Garrett); Pl Ex. 761-762; Tr. 769:6-777:7 (Tuersley); Tr. 971:4-972:24 (Jammal). Even managers were threatened or disciplined if they refused to exert high levels of control over their agents. Tr. 618:1-641:23, 570:1-17 (Miller); Pl. Ex. 340-341.

Managers risked no discipline or termination for telling agents what to do. Tr. 502:13-16 (Benusa); Tr. 1646:25-1647:6 (Shope); Tr. 581:8-582:8 (Miller); Tr. 336:15-21, 338:22-339:5 (McElroy). Under American Family's system, if the managers did not exert control or failed to meet their sales, retention, and sales capacity targets, they risked termination. Tr. 2109:24-2110:2 (McCabe); Tr. 1736:6-9 (Dauplaise); Tr. 618:12-21 629:19-22; 627:17- 628:3; 630:1-632:19; Pl. Ex. 340-2; Pl. Ex. 341 (Miller); Tr. 319:4-320:2 (McElroy). Shope, a former manager and long-time agent, explained, "I was threatened when I wouldn't

go threaten [agents for noncompliance]." Tr. 1647:6, 1646:20-21 (Shope) ("you're threatened with it all the time, that your contract will be terminated."). Mr. McElroy testified that "American Family told us that we control these agents' lives and if you told them to jump they had better jump." Tr. 284:13-287:16 (McElroy).

American Family did not train managers to treat agents as independent contractors, or even make managers aware that agents were independent contractors. Tr. 1769:12-1773:6 (Padgett); Tr. 475:20-476:22; 477:24-478:5; 481:12-482:5 (Benusa); Tr. 296:1-297:12 (McElroy); Tr. 1577:16-1578:19; Tr. 1650:18-1651:18; 1652:3-5 (Shope); Tr. 2077:15-2079:3 (McCabe). Chief Sales Officer Gerry Benusa testified that it would be inappropriate to teach managers to manage agents as if they were employees. Tr. 483:23 - 484:9 (Benusa). However, mangers were taught from materials that referred to agents as employees. Pl. Ex. 15,1 6; Tr. 590:6 - 592:17(Miller); Tr. 1652:6-1655:23 (Shope); Pl. Ex. 339. The managers' training manuals instructed managers that they should act as the agents' bosses; "tell them what to do, how to do it, and when it should be done;" show agents that they don't "have good answers to key objections;" refuse to "permit any deviation from what it takes to succeed;" "require compliance with your directives;" and, require that their "instructions must be followed." Pl. Ex. 519-15, 20; Pl. Ex. 543;40; Pl. Ex. 414-42; Pl. Ex. 521-118; Pl. Ex. 520-144; Pl. Ex. 190-5, 8, 9, 11,; Tr. 1327:16-1329:13 (Johnston).

Some American Family witnesses testified that these instructions were a mistake. Tr. 1256:2-6;

1266:1-3 (Steffen); Tr. 483:23-484:9 (Benusa). This testimony was contradicted by manager testimony, and American Family corporate testimony, which verified that all manuals were approved by American Family, that these techniques and instructions were taught to every manager in training courses, that they were reinforced by higher level sales management at American Family, and that they were consistently used by American Family managers. Tr. 289:19-24 (McElroy); Tr. 610:3-10; 611:11-23 (Miller); Tr. 343:11-21 (McElroy); Tr. 1320:22 -1329:12 (Johnston); Tr. 1342:2-3 (Nystrom); Tr. 1767:2-1768:21, 1776:19-1778:19 (Padgett); Tr. 700:22-701:12 (Jackson). Managers also testified that the policies taught in these manuals were universal and consistent policies at American Family for decades both before and after the publication of the written manuals, themselves. Tr. 404:25-411:9 (Kaye); Tr. 327:15-335:12 (McElroy); Tr. 604:5-611:23 (Miller); Tr. 1660:11-1661:23 (Shope); Tr. 1337:14-1338:4 (Nystrom). Mr. Kaye testified that when he tried to raise the issue of the agent's possible misclassification as independent contractors with his superiors, he was ignored and told to drop it. Tr. 397:11-16, 397:23-398:18 (Kaye).

A former high-level officer testified that the Company considered the agents to be independent contractors for IRS purposes only, and that he and other American Family senior management misled the agents by telling them they would be independent contractors for all purposes. Tr. 396:17-399:6 (Kaye). This was corroborated by other high-level managers, including Mr. Wunsch, a sales management development director who put together a District

Manager manual. Tr: 249:3-11 (Wunsch); Tr. 242:4-5, 15-20 (Wunsch); Tr. 197:8-12 (Rider). Mr. Nystrom testified that his manager told him he was not an "independent contractor" but more like a franchisee who has to follow all of the company's rules, regulations and procedures, and do exactly what corporate tells him to do. Tr. 1349:17-1350:1 (Nystrom). Mr. Benusa could not explain why American Family classified agents as independent contractors other than it "has always been that way." Tr. 469:23-470:12 (Benusa).

The above summary of the evidence presented at trial is representative, but is not a comprehensive recitation of all of the relevant evidence presented at first phase of the trial. Therefore, the trial transcripts found at ECF #304-314 are incorporated by reference.

FINDINGS OF FACT/CONCLUSIONS OF LAW

The Court makes the following findings of fact and conclusions of law based upon the evidence presented at trial:

1. This Court has original jurisdiction under 28 U.S.C. § 1331 because the Plaintiffs' claims arise under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*

2. The burden of proof rests with plaintiffs to prove by a preponderance of the evidence that they were common law employees and not independent contractors under ERISA.

3. American Family and its agents entered into Agent Agreements that governed their relationship.

4. The Agreements indicate that the parties intended for agents to be treated as independent contractors.

5. Other internal documents including the District Managers Manual and other training manuals indicate that American Family expected its sales managers to exercise control over agents' methods and manner of performing their services.

6. Under the *Darden* factors, courts are instructed to determine "whether the skill [required of an agent] is an independent discipline (or profession) that is separate from the business and could be (or was) learned elsewhere." *Janette v. American Fidelity Group, Ltd.*, 298 F. App'x 467, 471 (6th Cir. 2008)(Jannette "held numerous jobs for various employers doing exactly this kind of work for more than a decade.")

7. Insurance agents may be educated, trained, and licensed prior to being hired by a specific agency.

8. No one can operate as an insurance agent unless they have been licensed by the state in which they work.

9. American Family almost always hired untrained, and often unlicensed, agents and provided all the training they needed to be an American Family agent. They provided them all of the training and tools necessary to become an American Family agent and run an agency.

10. American Family closely supervised its agents through a network of sales management employees, including District Managers who were generally very involved in the day to day activities of their agents.

American Family's sales department has one thousand employees and entire departments that exist solely to support its 2,800 agents. The managers are involved in goal setting, creating the agents business plans, encouraging and directing agents, and enforcing compliance with these goals and plans. A manager's job depends on the results of the agents and how much they sell.

11. American Family preferred to hire untrained agents so they could be trained in the "American Family" way.

12. "[I]f the individual requires substantial training and supervision, an employee/employer status is more likely." *Worth v. Tyer*, 276 F.3d 249, 263 (7th Cir. 2001).

13. Although it is a consideration, the fact that agents are licensed by the state and/or certified through professional agencies, or that they are able to obtain outside education in their field is not heavily weighted, as there are many professions where employees are required or encouraged to have degrees and/or be certified in their respective areas of expertise prior to hire (i.e. law, accounting, nursing, home care, etc.). Further, in this case, the evidence shows that no such prior training was required prior to being hired by American Family.

14. Under the specific facts of this case, the "amount of skill" factor under Darden weighs slightly in favor of employee status. Although it is possible to obtain licensing and other skills useful in the job of an agent prior to or outside of employment at American Family, and courts have previously held that insurance agents require the requisite level of

skill to be considered independent contractors, the evidence in this case shows that American Family specifically sought out potential agents who were untrained. The testimony also showed that they sought untrained potential agents because they wanted to train them in their own procedures and perspectives and wanted them to follow the "American Family" way. Further, there was no evidence presented that would show that the skills learned in American Family training were separate from the business of American Family. If an agent had worked for a different company prior to being hired at American Family, they were re-trained in the ways of American Family agents upon hire. There was no testimony as to whether skills learned from American Family translated to work at other agencies upon separation.

15. The agent's investment in his or her own equipment and tools should be considered in relation to the company's investment in the overall operation when looking at the "source of instrumentalities and tools" factor. *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015); *Ware v. United States*, 67 F.3d 574, 577 (6th Cir. 1995).

16. American Family agents paid, among other things, for their own rent or building purchase, furniture, equipment, marketing, legal and professional services, client lunches/entertainment, telephone, office supplies, health insurance, automobile, continuing education, and repairs and maintenance for their offices.

17. American Family required agents to use their computers and their software, but charged a monthly fee for the computer use.

18. American Family provides agents with software, websites, social media connections, 24 hour call center support, and sometimes subsidized marketing, staff, and other expenses of the agents.

19. Agents invest heavily in their offices and instrumentalities, and claim significant expenses in their IRS filings. This is weighed against American Family's provision of certain tools and instrumentalities which create uniformity among agencies, its control and supply of the computers and software essential to the performance of the agent's job, and its significant investment in research, management, and support functions which benefit both the agent and the company, itself.

20. In this case, the "instrumentalities and tools" factor under *Darden* weighs slightly in favor of independent contractor status.

21. When an agent does not work at offices owned or controlled by the company and is not subject to physical supervision in the performance of daily tasks, this *Darden* factor weighs in favor of independent contractor status. *Weary v. Cochran*, 377 F.3d 522, 527 (6th Cir. 2004); *see also Schwieger v. Farm Bureau Ins. Co.*, 207 F.3d 480, 485 (8th Cir. 1999).

22. American Family agents each had their own office building and did not work onsite at American Family.

23. American Family agents paid the rent/purchase price and operation costs of their own offices.

24. American Family agents could not work out of their homes.

25. American Family retained the right to approve the location of an agent's office, although they did not often exercise this right.

26. American Family managers sometimes came to agent's office to inspect the office and oversee the agent's work practices.

27. Although American Family retained some right of control over the location of the work and maintained some degree of supervision over the agents despite their off-site location, the "location" factor under the *Darden* test weighs moderately in favor of independent contractor status.

28. The evidence shows, and the parties agree that the "duration of the relationship" factor under the *Darden* test weighs in favor of employee status.

29. Whether American Family has the right to assign additional projects not directly related to the sale of insurance products is an[o]ther factor to consider under *Darden*. The extent to which the agents have discretion to accept or reject additional projects determines whether this factor weighs in favor of employee or independent contractor status.

30. American Family required agents to provide sales reports, visit homes, participate in call nights, do cold calling, conduct personal insurance reviews, do re-surveys, prepare business plans, service policies

without compensation, and fill out daily activity and other reports.

31. Agents did not feel that they were able to refuse to accept these duties.

32. Re-surveys were usually conducted by American Family employees or third party hires who were not agents.

33. Agents were sometimes assigned to service policies that they did not bring in, and for which they were not compensated.

34. The remaining complained of duties were all closely associated with their sale of insurance. While these tasks do not affect the weighting of this factor, they do provide evidence of a high level of control by the company over how and when the agents performed their job of selling insurance.

35. American Family did assign some duties to agents that were not a part of the sale of policies that they were required to perform under their Agent Agreement.

36. The "right to assign additional projects" factor under the *Darden* test weighs slightly in favor of employee status.

37. When the company does not have any authority or discretion over when or how long an agent works, this weighs in favor of independent contractor status. *Weary*, 377 F.3d at 526.

38. American Family requires its agents to keep their offices open during regular business hours, and managers do drop-ins to verify that agents had their offices open during regular business hours.

39. American Family does not require that an agent work during all regular business hours, as long as there is an appointed staff on-site at the office during those hours.

40. American Family does require agents to work specific times and places for periodic campaign drives, mandatory meetings, and call nights. They have been trained that they have the authority to enforce participation in these events.

41. American Family managers have the authority to approve or deny agent vacations, and have in some instances reprimanded agents for taking vacation or otherwise being absent from the office without approval.

42. American Family agents do not punch a clock or record their time worked.

43. American Family agents are, however, supposed to file daily activity reports.

44. American Family managers have the final say over agents' business plan, including productivity goals and means of achieving them. This impacts the agents' ability to control their own hours.

45. Even agents who did not believe they had to get approval for vacations notified their managers when they planned to take vacation.

46. Although agents have some discretion over when and how long to work," American Family, through its managers retains some authority to regulate these decisions. Therefore, this factor weighs slightly in favor of employee status.

47. The payment of commissions based on sales, rather than payment of a set salary supports an independent contractor relationship. *Weary v. Cochran*, 377 F.3d at 527; *Ware*, 67 F.3d at 577.

48. Agents were paid on a commission basis based on their sales.

49. Agents were paid a monthly stipend unrelated to sales while in training.

50. Agents were sometimes required to provide services on policies without receiving a commission.

51. Agents were given loans on future commissions under an Advance Compensation Plan or Agent Financing Plan. These plans were available primarily to new agents.

52. The "method of payment" factor weighs in favor of employee status for plaintiffs for the duration of their training period only, and weigh s in favor of independent contractor status for plaintiffs once they began selling policies out of their own office.

53. When an insurance agent "employed his own staff at his own expense; had sole discretion in hiring, firing, and compensation matters; and, withheld and remitted taxes to the federal government in his capacity as the employer of his staff members, this weighs in favor of independent contractor status. *Weary*, 377 F.3d at 527.

54. Independent contractor status is not diminished when a company retains the right to impose qualification standards on an agent's staff, so long as the company didn't dictate who agent could hire. *Chai v. Allstate Ins. Co.*, No. C-1-03-566, 2005 WL 6778901, at *7 (S.D. Ohio Apr. 28, 2005).

55. American Family agents had primary authority to hire their own staff and had discretion in who they would hire.

56. The agents were responsible for paying their own staff, determining and paying for any benefits and taxes associated with that staff, and determining whether to classify their staff as employees or independent contractors.

57. Some agents employed family members as staff.

58. Agents had the option not to hire any staff, but it would have been extremely difficult, if not impossible, to meet required production requirements without the assistance of staff.

59. American Family imposes qualifications on appointed agency staff, including state licensure, clean driving records, education levels, credit history, and minimum income to debt ratios.

60. American Family did not provide computer access to any non-approved appointed agency staff.

61. American Family required agency staff to agree to a life-time non-solicitation agreement.

62. American Family advertised for, recruited and interviewed potential agency staff and provided "pre-approved" candidates from which the agents could select their staff.

63. Agents were not required to hire these pre-screened candidates.

64. American Family retained the right to fire any agency staff, appointed or non-appointed, who did not live up the American Family Code of Conduct.

65. Agents did not have sole discretion in hiring and firing their staff.

66. Agents did have primary authority to hire and fire and their staff.

67. Agents had sole discretion in staff compensation matters, and the sole responsibility to withheld and remitting taxes to the federal government as the employers of their staff.

68. American Family managers were evaluated on the number of staff employed by their agents, and would sometimes offer monetary subsidies to agents to hire more staff.

69. American Family retained some authority to approve or disapprove of both appointed and non-appointed agency staff selections, above and beyond the imposition of relevant qualification requirements on appointed staff.

70. American Family retained the right to fire agency staff, although this right was not widely exercised.

71. Although American Family retained some right to override an agent's hiring and firing decisions, on balance, agents had primary authority over hiring and paying their assistants.

72. The "party's role in hiring and paying assistants" factor under Darden is neutral.

73. "The more integral the worker's services are to the business, then the more likely it is that the parties have an employer-employee relationship." *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015).

74. American Family could not exist as a company without the sales generated by their agents.

75. The parties agree, and the evidence supports a finding that the work performed by agents is not only an integral part of American' Family's regular business, but is part and parcel of its core function, which is to sell and service insurance policies.

76. In this case, the degree to which the "work is part of the regular business of the hiring party" factor under *Darden* weighs heavily in favor of employee status.

77. If American Family provided agents with regular employee benefits, or the same benefits it provided to its employees, it would factor in favor of employee rather than independent contractor status. *See, e.g., Wolcott v. Nationwide Mutual Ins. Co.*, 884 F.2d 245, 251 (6th Cir. 1989).

78. American Family did not provide agents with vacation pay, holiday pay, sick pay, or paid time off.

79. Vacation pay, holiday pay, sick pay, and other paid time off are regular employee benefits, at least some of which were provided to American Family's employees.

80. American Family agents are not eligible for the pension and retirement plans offered to American Family employees.

81. American Family agents are required to obtain, maintain, and pay for their own health insurance.

82. American Family did offer its agents a retirement or pension plan in the form of extended

earnings. Agents were automatically enrolled in these plans, did not contribute to these plans, and received increasing benefits with increasing years of service.

83. American Family provides a death benefit to agents.

84. American Family provides life insurance to some agents, but others have to pay for their own.

85. American Family did not offer its agents the same benefits it provided to its employees.

86. American Family did not provide its agents with all of the regular employee benefits.

87. American Family did provide retirement, and sometimes life insurance, benefits that would be considered "regular employee benefits."

88. The "provision of employee benefits" under *Darden* weighs slightly in favor of independent contractor status.

89. There is no dispute that American Family treated their agents as independent contractors for tax purposes, and that agents filed their taxes as independent contractors.

This weighs in favor of independent contractor status under *Darden*.

90. The *Darden* factors are almost evenly split between favoring employee status and favoring independent contractor status.

91. The method of payment (following the training period), and tax treatment clearly favor independent contractor status. The duration of the

relationship, and the fact that the agents' work is the core business of the company clearly favor employee status. All other factors contain a mix of characteristics between the two designations.

92. American Family, either directly or through its managers, appeared to retain at least some degree of control, albeit sometimes slight, over their agents' decisions in nearly every category. When an agent met American Family standards and employed American Family techniques, this control was not exercised. However, if the agent did not agree with or follow American Family directives and suggestions, control would be exercised by most managers in the form of reprimands, threats, and potential termination.

93. *Darden* factors are not exclusive in the determination of employee versus independent contractor status.

94. "The 'employer's ability to control job performance and the employment opportunities of the aggrieved individual' are the most important of the many factors to be considered." *Marie v. Am. Red Cross*, 771 F.3d 344, 356 (6th Cir. 2014)(quoting *Janette v. Am. Fid. Grp., Ltd.*, 298 F. App'x 467, 472 (6th Cir. 2008) and citing *Simpson v. Ernst & Young*, 100 F.3d 436, 442 (6th Cir. 1997); *Trs. Of the Resilient Floor Decorators Ins. Fund v. A & M Installations, Inc.*, 395 F.3d 244, 249 (6th Cir. 2005); and *Johnson v. City of Saline*, 151 F.3d 564, 568 (6th Cir. 1998)).

95. American Family agents did not own a book of business.

96. American Family agents did not own any policies.

97. American Family could and did unilaterally reassign policies brought in by one agent, to other agents.

98. American Family could require agents to service policies that they did not initiate without compensation.

99. American Family did not allow agents to sell insurance from any other companies, even when American Family did not carry the type of coverage offered by a competitor, except through approved partner agencies with a financial connection to American Family.

100. American Family actively discouraged and in some cases prohibited agents from taking on other employment even if it was unrelated to insurance sales.

101. American Family required its agents to sign a one year non-compete agreement effective upon termination. American Family required agency staff to sign a lifetime noncompete agreement prohibiting any contact with American Family agency clients.

102. American Family controlled the employment opportunities of its agents.

103. American Family trained its sales managers to treat agents in the same manner as they would treat employees.

104. American Family trained its sales managers to believe that they were the agents' bosses and had

the authority to demand compliance from agents whenever an agent disagreed with them.

105. American Family held their sales managers liable for any perceived shortcomings of their agents.

106. American Family training manuals actually refer to agents as "employees."

107. These manuals and training methods were reviewed and approved by the Company. They were not mistakes or aberrations, but documented the approach American Family wanted their managers to take when managing agents.

108. Managers were not instructed to treat agents as independent contractors.

109. Some, but not all, managers considered agents to be independent contractors "for tax purposes only."

110. American Family managers, consistent with their training, acted as if they had the right to control the manner and means by which their agents sold and serviced insurance policies. They believed that they had the authority to reprimand and terminate (or at least threaten termination) in order to require compliance when an agent disagreed with their decisions or requests.

111. Not all managers exercised this right, but many did.

112. The employer does not have to exercise its right to direct or control the manner and means of work, if it retains the right to do so. *See, Peno Trucking, Inc. V. C.I.R.,* 296 F.App'x 449, 456 (6th Cir. 2008); *N.L.R.B. v. Cement Transp., Inc.*, 490

F.2d 1024, 1027 (6th Cir. 1974)("It is the right to control, not its exercise, that determines an employee relationship.").

113. Although the Sixth Circuit, along with several others, has found insurance agents to be independent contractors and not employees for the purpose of federal employment law, none of the factual scenarios presented in any of the cited cases show retention of the same level and breadth of control by the Company that was evidenced in this case. Further, Defendants have not cited any Sixth Circuit cases involving American Family agents.

114. The advisory jury in this case unanimously found that Plaintiffs proved by a preponderance of the evidence that they are employees of Defendant American Family.

115. It is within the trial court's discretion to accept or reject the verdict, or the interrogatory responses of an advisory jury. *Hyde Properties v. McCoy*, 507 F.2d 301, 306 (6th Cir. 1974); *Morelock v. NCR Corp.*, 546 F.2d 682, 689 (6th Cir. 1976), *vacated on other grounds*, 435 U.S. 911 (1978); *see also* Fed. R. Civ. P. 52(a)(1).

116. This Court finds that based on all of the evidence and arguments presented, that the jury's response to the interrogatory was consistent with the evidence and the law.

117. This Court finds that American Family agents are and were employees for purposes of ERISA during the class period.

CONCLUSION

For the foregoing reasons this Court finds, that although the retention and exercise of control of the means and manner of the agents' service was not technically allowed under the terms of the Agency Agreement, American Family did expect its managers to exercise such control whenever necessary to achieve compliance with Company goals and standards. American Family trained its managers to exercise control over the means and manner of agents' sales and service duties when the company deemed it necessary, and reprimanded managers who did not exercise such control when the Company deemed it beneficial to do so. Consequently, at least some managers did, in fact, exercise a high level of control over some of their agents. The degree of control managers were encouraged to exercise was inconsistent with independent contractor status and was more in line with the level of control a manger would be expected to exert over an employee. This, along with the evidence related to the other factors set forth above, supports a finding that the American Family agents defined in the class description should have been classified as employees and not independent contractors. Therefore, the Court finds that the class Plaintiffs in this case were employees of American Family during the relevant class period.

The Court finds, pursuant to 28 U.S.C. § 1292(b), that an interlocutory appeal may materially advance the ultimate termination of the litigation because: (1) there was evidence supporting both sides in this case; (2) prior case law has been nearly unanimous in finding that insurance agents generally are to be classified as independent contractors; (3) the

repercussions of this finding are so far-reaching; and, (4) the resolution of damages will be unusually complicated. Therefore, the Court authorizes the parties to take an interlocutory appeal of this Order, pursuant to 28 U.S.C. § 1292(a)(1). This case shall be stayed pending the resolution of any such appeal. The parties shall notify the Court within ten days whether an appeal was, in fact, filed. IT IS SO ORDERED.

/s/ Donald C. Nugent
Judge Donald C. Nugent
United States District Judge

DATED: July 31, 2017

APPENDIX C

No. 17-4125

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 25, 2019
Deborah S. Hung, Clerk

WALID JAMMAL; KATHLLEEN TUERSLEY; CINDA J. DURACHINSKY, NATHAN GARRETT,

Plaintiffs-Appellees,

v.

AMERICAN FAMILY INSURANCE COMPANY, ET AL.,

Defendants-Appellants.

ORDER

BEFORE: BOGGS, CLAY, and ROGERS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

Title 29. Labor
Chapter 18. Employee Retirement Income Security Program
29 U.S.C. A. § 1002

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

* * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * *

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

* * *

APPENDIX E

Title 29. Labor
Chapter 18. Employee Retirement Income Security Program
Subchapter I. Protection of Employee Benefit Rights
Subtitle B. Regulatory Provisions
Part 5. Administration and Enforcement
29 U.S.C.A. § 1132

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

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