Case No. 17-4125

United States Court Of Appeals
FOR THE SIXTH CIRCUIT

WALID JAMMAL, ET AL.,

Plaintiffs-Appellees

v.

AMERICAN FAMILY INSURANCE COMPANY, ET AL.,

Defendants-Appellants

On Appeal from the United States District Court for the Northern District of Ohio, No. 1:13-cv-00437-DCN

BRIEF OF DEFENDANTS-APPELLANTS, AMERICAN FAMILY INSURANCE COMPANY, ET AL.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, American Family Insurance Company and its affiliates that are parties to this action make the following disclosures:

I. Are said parties a subsidiary or affiliate of a publicly-owned corporation?

No.

II. Is there a publicly-owned corporation, not a party to the appeal, which has a financial interest in the outcome?

No.

/s/ Pierre H. Bergeron
Counsel for American Family
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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case represents possibly the first case in the country where a district court certified a class of insurance agents and held them to be employees rather than independent contractors under *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). The district court itself appreciated the novelty of its holding (which conflicts with several other jurisdictions, including authority from this Court) and accordingly certified this matter for interlocutory review under 28 U.S.C. § 1292(b). This case carries wide-reaching implications for the entire insurance industry and beyond, and American Family Insurance Company and the affiliated Defendants (collectively, "American Family") accordingly respectfully submit that oral argument will aid the Court's decisional process.

INTRODUCTION

Like many national insurance companies, American Family sells its insurance products primarily through a network of talented, entrepreneurial insurance agents. At the outset of their relationship, American Family and the agents execute an agreement providing that the agents are independent contractors rather than employees, ineligible for employment benefits. These agreements allocate full control over the manner and means of soliciting insurance to the agents, who accordingly manage their own agencies, hire and pay staff members, and cultivate relationships with potential clients in their communities. American Family pays the agents on a commission basis, and the agents cover all of their business expenses (which they deduct from their taxes) from their commissions. For more than a quarter century, this Court has consistently held that insurance agents exercising similar autonomy are properly classified as independent contractors rather than employees under federal law. *See Weary v. Cochran*, 377 F.3d 522 (6th Cir. 2004); *Ware v. United States*, 67 F.3d 574 (6th Cir. 1995); *Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245 (6th Cir. 1989).

Breaking with this precedent, the decision below reclassified over 7,200 current and former American Family insurance agents as employees rather than independent contractors largely because the company exercised "control" over its agents to ensure compliance with basic goals and standards. Although the district

court acknowledged that the structural factors (*e.g.*, contract terms, commissions, tax treatment, eligibility for benefits) described by the Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), weighed in favor of independent contractor status, the court marginalized those factors in favor of peripheral *Darden* factors less relevant in the insurance context, placing an improper thumb on the *Darden* scales. But that contravenes the teaching of this Court, which has repeatedly described these structural factors as "particularly telling" in the insurance agent context and relied on these factors to uphold independent contractor status. *See Ware*, 67 F.3d at 578; *Wolcott*, 884 F.2d at 251. All of the structural factors in this case weighed in favor of independent contractor status, and by subordinating them, the district court fundamentally reshaped the *Darden* calculus.

The district court's error appears rooted in a misunderstanding of *Darden*'s "control" analysis, in which it conflated control over a company's goals and objectives (which comports with independent contractor status) with control over the manner and means of an agent's production (which evinces employee status). In this vein, it found that a handful of the *Darden* factors "slightly" favored employee status because American Family took steps to ensure that agents met basic production, profitability, and service requirements—even though such "control" over goals and outcomes aligns with independent contractor status. American Family certainly did not micro-manage the day-to-day affairs of its agents, and the

court's own factual findings demonstrated that American Family exercised no more control over the manner and means of its agents' production than that endorsed by this Court in prior decisions upholding independent contractor status for insurance agents.

The district court's error frustrates the very purpose of the *Darden* inquiry, which is to promote advance planning and predictability. As the individual Plaintiffs conceded, the parties here intended an independent contractor relationship, and they had every reason to believe their choice would be respected. But the district court wielded the testimony of a handful of agents to override the parties' intent, injecting uncertainty and confusion into the *Darden* landscape where none previously existed. This Court should reaffirm the approach that has prevailed in this Circuit for decades on the application of *Darden* in the insurance agent context, and reverse the judgment of the district court.

JURISDICTIONAL STATEMENT

The district court exercised federal question jurisdiction pursuant to 28 U.S.C. § 1331 because the case arose under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq*. After a bench trial in a bifurcated proceeding, the district court entered a memorandum opinion in which it certified an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). R.320, Opinion, PageID20943. American Family accordingly filed a petition for interlocutory

review pursuant to Fed. R. App. P. 5, which this Court granted on October 26, 2017. This Court accordingly has appellate jurisdiction.

STATEMENT OF THE ISSUE

Whether the district court misapplied the *Darden* standard when it discounted the financial structure of the parties' relationship and overrode the terms of the parties' agreements to become one of the first courts in the country to hold that insurance agents are employees rather than independent contractors under federal law.

STATEMENT OF THE CASE

American Family offers a variety of insurance products to businesses and individuals alike. Similar to many other insurance companies, American Family relies on insurance agents to sell its products, and these agents run their own businesses selling and servicing insurance policies pursuant to written independent contractor agreements. In this class action, Plaintiffs challenged the predicate upon which American Family's business was built, claiming that current and former agents should be reclassified as common-law employees entitled to employee benefits under ERISA. R.67, Compl., PageID3050-86. Although these agents worked in 19 different states under 141 different managers, the district court ultimately certified three classes with 7,261 current and former insurance agents. R.137, Opinion, PageID12477, 12482-83; R.126-6, Declaration, PageID11914-45.

The district court eventually bifurcated the proceedings and convened a twelve-day trial before an advisory jury limited to the "single issue" of whether Plaintiffs proved "that they are employees of Defendant American Family." R.301, Jury Interrog., PageID18458; R.320, Opinion, PageID20946. To decide this critical issue, the district court needed to apply *Darden*'s multi-factor "common-law agency" test to analyze the relationship between American Family and its insurance agents. Everything else in the case would await the results of the trial and, if necessary, be continued in a second phase.

A. American Family's Agents Agreed To Be Independent Contractors That Provide Their Own Office Space, Staffing, and Benefits.

After the trial, the district court issued findings that the insurance agents signed contracts with American Family in which they agreed to run their own businesses as independent contractors (the "Agency Agreements"), with the contractual right to control the manner in which they solicited and sold insurance products:

> 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 … you are responsible for your self-employment taxes and are not eligible for various employee benefits...

R.320, Opinion, PageID20952 (emphasis added); *see also* R.67-1, Agency Agreement Cover Letter, PageID3088 ("You control the number of hours you work and the scheduling of those hours.").

Plaintiffs did not dispute that the parties intended to form an independent contractor relationship. In fact, all three remaining class representatives[1] testified that they understood at the time of appointment that they would be independent contractors ineligible for regular employee benefits. *See* R.307, Transcript, PageID19275-76 (Tuersley); R.308, Transcript, PageID19450 (Jammal); R.310, Transcript, PageID19943-44, 20063-64 (Garrett).

Consistent with the Agency Agreements, the district court recognized that American Family agents "invest heavily in their offices" and must select and pay for their own office space and equipment. R.320, Opinion, PageID20974. Agents must also purchase their own health insurance and other benefits. *Id.* at PageID20974, 20981. Agents bear responsibility for everything else attendant with running a business, including hiring "their own staff," paying "the staff's wages," and choosing "whether to offer employee benefits to their staff." *Id.* at 20956, 20978, 20980.

[1] A fourth representative, Cinda Durachinsky, sought to withdraw, R.278, Notice, PageID18328, although the district court never acted on her notice.

Agents must also obtain a state insurance license at their own expense, which includes maintaining that license by taking continuing education courses as dictated by state law. R.320, Opinion, PageID20949-50, 20972-74. While American Family requires only two years of post-high school work experience, *id.*, many agents have previous business or insurance experience. Among the three class representatives, Mr. Garrett had a degree in risk management and significant sales and management experience, Ms. Tuersley had an existing insurance license along with years of management and sales experience, and Mr. Jammal already had various insurance licenses and had also previously owned his own business. *Id.* at PageID20951; R.307, Transcript, PageID19369.

After obtaining a license, the agent bears ultimate responsibility for the decisions that will dictate the success of the business, including which clients to target, how to locate and pursue those clients, and what types of advertising to invest in. R.320, Opinion, PageID20953, 20958; R.310, Transcript, PageID19982; R.311, Transcript, PageID20313-14; R.312, Transcript, PageID20594. Aside from partial reimbursement for some marketing expenses paid by American Family, an agent's expenses fell on her own shoulders. R.320, Opinion, PageID20959; R.311, Transcript, PageID20313-14. Similarly, while agents must have someone staffing their offices during normal business hours, the agents control what hours they work and do not punch a time clock. R.320, Opinion, PageID20976-77, 20980.

B. Agents Are Paid On Commission For Selling And Servicing Insurance Policies.

As a cornerstone of the independent contractor relationship, American Family agents accept the risk, responsibility, and potential of growing their own insurance agency and client base. The district court found that agents are paid on commission for every new policy and new client—and they receive a percentage of each renewal every year thereafter. R.320, Opinion, PageID20977; R.312, Transcript, PageID20471–72. Successful agents therefore create a return on their investment by growing (and retaining) a stable base of policy holders over the years, with average agents receiving more than $240,000 annually in commissions (with many agents exceeding $500,000). R.309, Transcript, PageID19728. But not everyone succeeds. Agents who fail to develop and retain customer relationships, such as the three class representatives, receive significantly less earnings. R.308, Transcript, PageID19428; R.312, Transcript, PageID20541.

Because agents are not eligible for employee benefits, they do not participate in American Family's pension and retirement benefit plans. R.320, Opinion, PageID20980-81. The Agency Agreement, however, includes a feature known as the "Extended Earnings" provision, which compensates qualifying, exiting agents based upon the renewal commissions earned by the agent during the six to twelve months prior to their departure. R.305, Transcript, PageID18738, 18884-86; *see* R.320, Opinion, PageID20953; R.67, Agency Agreement, PageID3092. Although

agents could receive Extended Earnings well before the typical retirement age (some received it in their thirties), the district court viewed the Extended Earnings provision as akin to a "retirement" plan. R.320, Opinion, PageID20981.

Agents file their taxes as independent contractors, with each of the named plaintiffs claiming independent contractor status and deducting significant business expenses from their taxable income. R.320, Opinion, PageID20953-54, 20974. These deductions included the basic costs of running their business, such as advertising, transportation, depreciation, wages paid to their own employees, professional training, and other items that totaled over $85,000 for one class representative. *See, e.g.*, *id.*; R.307, Transcript, PageID19213, 19297.

C. Managers Ensure That Agents Comply With American Family's Production, Profitability, And Service Requirements.

Like any responsible business, American Family requires agents and their staff to adhere to basic standards of conduct to sell its insurance products, including American Family's "[r]ates, rules, regulations." R.320, Opinion, PageID20952. Agents also promise to meet expectations of "production, profitability, and service" (which is part of promoting the American Family brand). *Id*. at 20962. Potential agents receive comprehensive training and ongoing support about how "to become licensed, run an agency, and sell American Family insurance." *Id*. at 20950, 20960.

The district court pointed to evidence that American Family employs managers to assist agents in meeting the company's basic expectations. R.320,

Opinion, PageID20961-65. Testimony at trial showed that the relationship between manager and agent varied widely depending on personalities and performance. *Id*. Some agents testified that their managers did not tell them "what to do, how to run [an] agency, or how to go about selling insurance," whereas others testified about "forceful and demanding" managers. *Id*.

To satisfy production and profitability requirements, particularly when agents were new or struggling, some managers instructed agents to perform cold calls or participate in other organized sales efforts. *Id*. at 20966; R.310, Transcript, PageID20129, 20162-64. While the parties debated whether such tasks were mandatory, Plaintiffs adduced no evidence that American Family ever terminated an agent's contract for failing to participate in such organized sales efforts. R.320, Opinion, PageID20968.

Although the three class representatives testified about what they described as overbearing managers, all three were examples of unsuccessful agents who required more oversight. R.320, Opinion, PageID20963-64. In fact, American Family terminated the contracts of two of them for failing to meet minimum productivity and service requirements, R.308, Transcript, PageID19612, 19428; R.312, Transcript, PageID20541, and the third voluntarily terminated his agreement in the aftermath of concerns over his performance and after acknowledging inappropriate conduct. R.310, Transcript, PageID19926-27, 19932, 20019-21. Such terminations

were exceptionally rare: American Family only terminated the contracts of seven out of about 2,800 agents in 2016—all of which were for performance reasons. R.311, Transcript, PageID20405-06.

D. The District Court Held That American Family's Agents Should Be Reclassified As Employees.

After the advisory jury deemed the agents employees, the district court followed suit, holding that American Family should have classified its insurance agents as employees rather than independent contractors under *Darden*. R.320, Opinion, PageID20946, 20985. As a threshold matter, the court acknowledged that the Agency Agreements "indicate that the parties intended for agents to be treated as independent contractors," which favored independent contractor status. R.320, Opinion, PageID20972; *see id*. at 20948-49. The district court also held that five additional *Darden* factors, which reflect the structure of the company-agent relationship, also pointed in that direction. *See id*. at 20975-81 (method of compensation; employee benefits; tax treatment; instrumentalities and tools; work location and physical supervision). However, in the district court's view, five other factors supported reclassification. *Id*. at 20973-77, 20980 (amount of skill; right to assign additional projects; regulation of when and how long to work; duration of relationship; part of the regular business). The court held that one factor, the agent's role in hiring and paying assistants, was neutral. *Id*.

Although it believed the *Darden* factors were "almost evenly split," the court nevertheless held that American Family retained sufficient control over the "manner and means" by which agents sold and serviced insurance policies to render them employees. *Id*. at 20981, 20984-85. Appreciating that "the repercussions" of its reclassification decision would be "far-reaching" to both American Family and the insurance industry, the district court certified its order for interlocutory review under 28 U.S.C. § 1292(b). *Id*. at 20985-86. This Court accepted American Family's petition under Section 1292(b).

SUMMARY OF ARGUMENT

This Court should uphold the interpretation of *Darden* that has prevailed in the insurance industry for over a quarter-century and reject the district court's reformulation of the standard. This Court has four independent grounds upon which it should reverse the district court:

First, this Court's precedent under *Darden*, aligned with cases around the country, focuses on certain key factors reflecting the core of an insurance agent's relationship with an insurance company. When affirming independent-contractor status, courts have emphasized these common structural hallmarks—in particular, a contract identifying the agent as an independent contractor, payment of taxes (and deduction of expenses) as an independent contractor, the agents' hiring and paying their own employees, ineligibility for regular employee benefits, and payment by

commission. All of those factors are present here, but the district court marginalized them in its analysis, which distorted its view of *Darden* and led it to depart from the weight of authority on these matters.

Second, the district court mistook American Family's need to impose certain standards and outcomes on agents (a feature necessary in any business relationship) for control over the day-to-day "manner and means" that agents might use to achieve those outcomes. Under this Court's precedent, however, insurance companies may enforce minimum standards for independent contractor agents for productivity and customer service (not to mention to ensure compliance with state licensing and regulatory requirements). The control over goals and standards exercised by American Family is indistinguishable from what this Court has previously endorsed in the insurance context. The district court accordingly fundamentally altered *Darden* by interpreting control over goals and standards to be synonymous with control over "manner and means."

Third, the court misunderstood various *Darden* factors and the weight that they should be afforded in the insurance context. For example, it held that professional insurance agents were not "skilled"—even though this Court has twice held the exact opposite. Similarly, the court found that the agents did not control their own hours because managers had "some authority" to require certain agents to occasionally participate in various meetings or activities. Once again, that

conclusion cannot be squared with this Court's prior application of *Darden*. Given that the district court relied on only a few, relatively insignificant *Darden* factors to find employee status, reversal on any of the individual factors alters the balance and dictates reversal of the judgment.

Finally, the district court's utilization of representative evidence in the class context is out-of-step with recent Supreme Court and Sixth Circuit authority. The court considered the testimony of only a handful of agents and managers, but it *never* identified a common, overarching policy that applied to all American Family agents. Nor did the court analyze whether the individual testimony presented at trial was fairly representative (or statistically significant) of the class as a whole. These failings assume greater significance given that the court noted, but did not resolve, various factual disputes regarding how agents were treated by their individual managers. Leaving such questions undecided, coupled with failing to make any determinations regarding the representative nature of the evidence, prevented the court from reaching any reliable class-wide conclusions.

Applied properly, the *Darden* factors and this Court's precedent lead inexorably to the conclusion that American Family's agents are independent contractors. This Court should reverse.

STANDARD OF REVIEW

"This court applies de novo review to the question of whether an individual is an employee or an independent contractor." *Trs. of Resilient Floor Decorators Ins. Fund v. A & M Installations, Inc.*, 395 F.3d 244, 249 (6th Cir. 2005); *see also Solis v. Laurelbrook Sanitarium & School, Inc.*, 642 F.3d 518, 521-22 (6th Cir. 2011) ("Whether a particular situation is an employment relationship is a question of law."). Although factual findings are reviewed for clear error, "findings of ultimate facts which result from the application of legal principles to subsidiary factual determinations" trigger *de novo* review. *Waxman v. Luna*, 881 F.2d 237, 240 (6th Cir. 1989) (citation omitted); *Solis*, 642 F.3d at 521-22. This Court thus reviews *de novo* the district court's conclusion that American Family insurance agents constitute "employees" rather than "independent contractors" under ERISA. *Waxman*, 881 F.2d at 240.

ARGUMENT

I. The Structural Factors Under *Darden* Demonstrate That American Family Properly Classified Its Agents As Independent Contractors.

The parties structured their relationship, including every aspect of their financial dealings, to ensure that the insurance agents contracting with American Family would be independent contractors under *Darden*. Given the preeminence of the structural factors in the insurance context, the district court here erred by holding

that other collateral factors, which it found only slightly favored employee status, transcended the financial and contractual structure of the parties' relationship.

A. *Darden* Focuses On The Structure Of The Relationship In The Insurance Context.

"[T]his Court has repeatedly held that insurance agents are independent contractors, rather than employees, in a variety of contexts." *Weary*, 377 F.3d at 524; *see Ware*, 67 F.3d at 574-75 (tax purposes); *Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245, 251 (6th Cir. 1989) (ERISA). Virtually every other court outside this Circuit has reached the same conclusion. *See Murray v. Principal Fin. Grp., Inc.*, 613 F.3d 943, 944-45 (9th Cir. 2010) ("We, along with virtually every other Circuit . . . have held that insurance agents are independent contractors" under ERISA); *Birchem v. Knights of Columbus*, 116 F.3d 310, 313 (8th Cir. 1997) ("federal courts have consistently held that insurance agents are unprotected independent contractors"). Many courts have also held that American Family agents, specifically, are independent contractors under *Darden*. *See, e.g.*, *Wortham v. Am. Family Ins. Grp.*, 385 F.3d 1139, 1140-41 (8th Cir. 2004) (ADEA and Title VII); *Moore v. Am. Family Mut. Ins. Co.*, 1991 U.S. App. LEXIS 13574, *3 (7th Cir. June 25, 1991) (Title VII); *see also unpublished opinions collected at* R.84-14-16, PageID7683-7708.

In the ERISA context, this Court applies the non-exhaustive factors from the common-law agency test initially explained by *Community for Creative Non-*

Violence v. Reid, 490 U.S. 730 (1989), and later embraced by *Darden*, to distinguish independent contractors from employees:

> 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.

Darden, 503 U.S. at 323-24 (citation omitted).

Under the *Darden* analysis, the relative weight of individual factors varies "depending on the occupation and the factual context in which the services are performed." *Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 656 F.3d 348, 354 (6th Cir. 2011) (quoting revenue ruling). Thus, the *Darden* factors are not "merely . . . tallied but should be weighed according to their significance in the case." *Hi-Tech Video Prods. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093, 1096 (6th Cir. 1995) (citation omitted). This means that different factors should carry different weights (or even be inapplicable) when applied to insurance agents rather than, for example, package delivery drivers. *See id.; Aymes v. Bonelli*, 980 F.2d 857, 861-62 (2d Cir. 1992) (giving greater weight to certain factors in the context of a computer programmer).

For insurance agents in ERISA benefits cases, the most important factors are the agents' structural and financial relationships with the insurance company. This Court has found "particularly telling" the fact that an agent "worked for commission," reported "self-employed income, as well as his business expenses, to the IRS," "hired his own employees, exercised managerial skill, owned and maintained his own office, was responsible for most of his expenses, paid his own insurance, and was required to have and retain a license to sell insurance." *Ware*, 67 F.3d at 578 (discussing this Court's ERISA holding in *Wolcott*, 884 F.2d at 251). This Court has also underscored that a written contract shows "how the parties themselves viewed the nature of their working relationship." *Weary*, 377 F.3d at 525. All of this rings particularly true where agents admit that they intended to be independent contractors (as in this case). *See Weary*, 377 F.3d at 525-26.

Much of the district court's error can be traced to its failure to faithfully apply authority from this Court and others in the specific context of insurance agents. This led it to fundamentally reshape the *Darden* test in a manner inconsistent with its design, as described more fully below.

B. The Drivers Of The *Darden* Analysis For Insurance Agents Confirm That American Family Agents Are Independent Contractors.

Consistent with extant case law, the district court should have held that the core factors establishing how American Family and its agents structured their

relationship outweigh any countervailing considerations under *Darden*. Here, that structure rests on three pillars: (1) the parties' own contract; (2) the parties' financial relationship, including tax treatment, payment by commission, and benefits; and (3) the agents' ability to invest in their businesses and, ultimately, to choose their level of success. This Court has found these factors to be critical in cases brought by insurance agents.

1. The Parties' Agreement Presents Compelling Evidence Of Their Intent To Create An Independent Contractor Relationship.

A written agreement carries significant weight in the *Darden* analysis, as it sheds light on the parties' intended status. *See Weary*, 377 F.3d at 525-26; *Hi-Tech Video*, 58 F.3d at 1097-98 (the parties' "perceptions or understanding as relevant to a worker's employment status" may be "highly indicative" of independent contractor status). As this Court has explained, "any express agreement between the parties as to their status" affects the *Darden* analysis because it is "the best evidence of their intent." *Janette v. Am. Fid. Grp., Ltd.*, 298 Fed. App'x 467, 471 (6th Cir. 2008). Other circuits agree. *See Brown v. J. Kaz, Inc.*, 581 F.3d 175, 181 (3d Cir. 2009) (an independent contractor agreement "is strong evidence of independent contractor status"); *Schwieger v. Farm Bureau Ins. Co.*, 207 F.3d 480, 487 (8th Cir. 2000) (same); *Jones v. A.W. Holdings LLC*, 484 Fed. App'x 44, 47-48 (7th Cir. 2012) (an agreement stating "that [plaintiff] was not an employee . . . strongly reflects that the

parties intended [plaintiff] to work as an independent contractor"). Because a contract serves as the definitive statement of the parties' respective rights, courts should hesitate to interfere when parties, as here, structure their relationship as independent contractors from the outset.

An agreement between the parties assumes particular relevance under the Supreme Court's policy of encouraging "predictability through advance planning" of independent contractor status. *Reid*, 490 U.S. at 750. In *Reid*, the Court emphasized that "the parties at the outset can settle on relevant contractual terms" to "predict in advance" their legal status. *Id*. 749-50. It rejected an "actual control" test because parties would not get the "bargain[ed] for" result if they were to "guess incorrectly" about "whether the hiring party will sufficiently control a given work." *Id*. at 750 (citation and quotation marks omitted). *Darden* echoed the same concerns by rejecting an approach that was "unable to furnish predicable results." 503 U.S. at 326. Rather, the *Darden* test permits "companies like Nationwide to figure out who their 'employees' are" by allowing "categorical judgments about the 'employee' status of claimants with similar job descriptions." *Id.* at 327.

The parties here made such "categorical judgments" about the status of the agents, going even farther than other agreements this Court has previously found supportive of independent contractor status. The Agency Agreements not only declare that the agent is an independent contractor (important evidence in its own

right), but also that the agent retains "full control" over the "time, place and manner of soliciting insurance, servicing policyholders and otherwise carrying out the provisions of this agreement." R.67, Agency Agreement, PageID3091.

In that vein, basic expenses (such as office rent, equipment, any employee salaries, and advertising) "shall be at your discretion and paid by you," and accordingly the agent receives commissions, not a salary. *Id*. at 3090. The cover letter for the contract reinforces that the agent controls "the number of hours you work and the scheduling of those hours," and the agent's commissions depend on "your individual efforts and degree of success." *Id.* at PageID3088. The Agreement thus reflects the critical hallmarks of an independent contractor relationship for an insurance agent. Perhaps not surprisingly, all three class representatives who appeared at trial testified that they expected to be independent contractors when they executed their agreements. *See* R.307, Transcript, PageID19212, 19275-76 (Tuersley); R.307, Transcript, PageID19379-80 (Jammal); R.310, Transcript, PageID19943-44 (Garrett). Consistent with *Darden* and *Reid*, the parties' mutual understanding of this point should be respected. *See Weary*, 377 F.3d at 525-26.

2. The Parties' Financial Relationship, Including Tax Treatment, Compensation, And Benefits.

It is undisputed that the insurance agents in this case paid taxes (and took deductions) as independent contractors, earned commissions on sales, and were not eligible for employee benefits. Each of these three structural components of the

parties' relationship is highly probative of independent contractor status. *See Hi-Tech Video*, 58 F.3d at 1097 (manner of compensation, employee benefits, and tax treatment are a "strong indication of a worker's employment status" in "virtually every case"); *Birchem*, 116 F.3d at 313 ("the parties' financial relationship strongly suggests [the agent] was an independent contractor"); *Aymes*, 980 F.2d at 862 (employee benefits and payroll taxes are "highly indicative" of the correct status).

The district court found that American Family agents are paid by commission, R.320, Opinion, PageID20977, which strongly favors independent contractor status because agents directly control their financial prospects. *Ware*, 67 F.3d at 580. The court also found that agents filed as independent contractors with the IRS, and that American Family treated them as such for tax purposes. R.320, Opinion, PageID20974, 20981. The agents deducted significant business expenses that they incurred while running their own insurance agencies. *Id.*; *see* R.256-2, IRS Ruling, PageID17813 (IRS ruling that American Family agents are properly classified for tax purposes as independent contractors). Tax treatment is compelling evidence of independent contractor status. *Jones*, 484 Fed. App'x at 47-48 (treating tax characterization as important factor); *see also Lerohl v. Friends of Minn. Sinfonia*, 322 F.3d 486, 492 (8th Cir. 2003) ("Every case … has found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes.").

In addition, no one disputes that American Family did not provide agents with access to its employee benefit plans, such as health, 401(k), or pension plans. R.320, Opinion, PageID20980-81. Importantly, the class representatives testified that they understood from the outset that they would not be entitled to employee benefits. *See* R.307, Transcript, PageID19275-76 (Tuersley); R.308, Transcript, PageID19450 (Jammal); R.310, Transcript, PageID20052 (Garrett). While certain agents qualified for extended earnings upon their departure, these payouts were calculated by policy renewal fees earned in the year before they left. R.320, Opinion, PageID20953, 20981. The fact that American Family provided specific benefits to its employees that were not available to its agents strongly favors independent contractor status. *Ware*, 67 F.3d at 578 (in the ERISA context, explaining that "[a] court might properly emphasize how an employer treated a party with respect to other pension and fringe benefits").

Taken together, these three "factors weigh very heavily in favor of finding independent contractor status." *See Hi-Tech Video*, 58 F.3d at 1097 (independent contractor status favored even where only two of three are satisfied); *see also Wolcott*, 884 F.2d at 251 (discussing the three factors).

3. The Agent's Management Of Her Own Office, Expenses, Employees, And Investments.

Each agent is also the source of the instrumentalities and tools used in that agent's insurance agency. The district court found that agents bore responsibility

for "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." R.320, Opinion, PageID20974-75. Agents also obtained professional licensure, and maintained that licensure through continuing education credits, on their own dime. *Id.* at PageID20953, 20958.

In addition to these significant capital expenditures, agents made all of the substantive decisions for their insurance agency:

- Whether to rent or purchase an office, finding appropriate real estate, and deciding how to furnish their office space. *Id*. at 20974-75.
- Whether to hire any of "their own staff," how much to pay for "the staff's wages," whether to offer "employee benefits," and how to manage the staff members. *Id*. at 20957, 20978-79.
- Whether, where, and how much to invest in advertising. *Id*. at 20958, 20974.
- What hours to work, what hours the agent will be present in the office, and how and when to visit and solicit clients. *Id*. at 20976-77.

The district court discounted these factors whenever American Family provided standards, guidance, or subsidies. R.320, Opinion, PageID20974-75. It found that requiring agents to use computers compatible with American Family's system, subsidizing advertising, and investing "in research, management, and support functions" favored employee status. *Id.* But the court acknowledged that these actions "benefit both the agent and the company." *Id.* The fact that the parties

agree to share costs for certain investments that benefit both parties (such as computers or advertising) is both reasonable and irrelevant to the agent's status.

The focus should have been on the scope of the agents' economic investment in their agencies, not whether some items are required or subsidized. Employees do not usually pay *anything* for office space, staffing, or advertising. *Schwieger* explained that subsidies for advertisements, office space, and education "seem less indicative of heavy-handed control over agents' businesses than of Farm Bureau's willingness to help its agents succeed—a stance that naturally leads to policies that are of mutual benefit to both the company and the agents." 207 F.3d at 485. Similarly, *Nationwide Mut. Ins. Co. v. Mortensen*, 606 F.3d 22, 32 (2d Cir. 2010), held that requiring agents to use computers and to give up ownership of customer information "hardly constitutes full control over the 'manner and means of production.'" *See also Ware*, 67 F.3d at 579 (agent furnished "most," but not all, of his business tools and made only "some" investment in his "facilities"). Each of these cases held that the agents were independent contractors because they were responsible for economic investment and success in their own agencies. American Family agents are no different.

4. Summary of the Structural Factors

The three structural pillars outlined above have compelled this Court, in prior cases with substantially similar facts, to hold that insurance agents are independent contractors under *Darden*, and there is no reason to treat this case any differently.

In *Weary*, 377 F.3d at 526-28, this Court highlighted several of the structural factors present here: tax treatment, relevant contractual language, payment by commission, the lack of employee benefits, and the agent's responsibility to pay for his own office space, staff, equipment, and client entertainment. The Court also noted that the agent paid for his own continuing education and licensure in the "highly specialized field" of insurance sales. *Id*. at 527. Unlike the district court in this case, the Court in *Weary* found nothing remarkable about mandatory attendance at "periodic compliance meetings" and "sales meetings," or in the company's imposition of "minimum selling standards" and office staffing requirements.

Similarly, in *Ware*, 67 F.3d at 578-80, this Court focused on the financial structure of the relationship, emphasizing that the insurance agent's "financial responsibility for the enterprise dwarfed [the company's] financial role and investment," as the agent had his own office and hired his own staff. As part of that responsibility, the commission-paid agent covered "most of his business and travel expenses," furnished "almost all of his tools and materials," and "made a significant investment in the enterprise." *Id*. at 580. The Court concluded the agent's

investment in his business "strongly favor[ed] independent contractor status," even though, as a captive agent, he had no protections from termination or changes to his business model. *Id*. at 579.

This same relationship structure also appears in *Wolcott*, 884 F.2d at 251, which upheld independent contractor status under ERISA. This Court noted that the agent "hired his own employees and exercised managerial skill," owned and maintained his own office, was paid by commission, deducted his own business expenses, was ineligible for employee benefits, and signed a contract explicitly declaring him an independent contractor. *Id.*; s*ee also Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 440 (6th Cir. 2006) ("Plaintiff's self-representation to the Social Security Administration is compelling. When viewed in conjunction with the issuance of 1099s, Plaintiff's responsibility for his own payroll taxes, and reference to Plaintiff as an 'independent contractor' by the CSA itself, Plaintiff is not a common law employee and therefore ineligible under an ERISA benefit plan.").

The factors highlighted in *Weary*, *Ware*, and *Wolcott* resonate here. Though each case had factors that could favor employee status, this Court held that the structural factors constituted "overwhelming evidence" that "compels" a decision favoring independent contractor status. *Weary*, 377 F.3d at 528. The district court here erred in allowing a minority of the *Darden* factors (which were largely irrelevant or only militated "slightly" in favor of employee status based on the

district court's appraisal) to upend the core structure of the parties' relationship. This Court should accordingly decline to reclassify American Family agents as employees in contravention of the mandates of *Darden*.

II. In Addition To Minimizing The Structural Factors, The District Court Also Misapplied The Balance Of *Darden*'s Common Law Test.

Instead of focusing on the structure of the relationship between the parties, the district court went astray based on its idiosyncratic understanding of other factors. It held, contrary to this Court's precedent, that American Family could not set productivity and service standards for its independent-contractor agents, disregarding the agents' day-to-day control of their businesses. It also misunderstood several other minor *Darden* factors, concluding that they favor employee status, which fundamentally distorted its balancing of the factors.

A. Monitoring Goals And Standards For Agent Performance Does Not Transform Agents Into Employees.

The district court overemphasized and misconstrued *Darden*'s control and supervision considerations in an ERISA benefits case. As a threshold matter, this Court has explained that "control and supervision is *less important* in an ERISA context, where a court is determining whether an employer has assumed responsibility for a person's pension status." *Ware*, 67 F.3d at 578 (emphasis added). Because ERISA cases focus on the financial benefits that a company should

have provided, the financial structure of the company-agent relationship should naturally guide the inquiry. *Id.*

Here, however, the district court magnified, rather than downplayed, the importance of "control and supervision," and did so in a way as to eclipse the significance of the structural factors discussed above. The district court improperly assumed that setting standards and goals for agents, as well as coaching agents to meet those goals, constitutes the type of control that stands at odds with independent contractor status. But this Court's cases recognize that control over the *results* of the relationship is necessary and reasonable in the context of insurance agents (indeed, if a company could not control that, why would it ever engage an independent contractor?). The district court failed to appreciate the importance of the agents' day-to-day control of their own investments and income, which points decisively in favor of independent contractor status.

1. Control Over "Goals And Objectives" Does Not Mean Control Over The "Manner And Means" Of Production.

The district court confused standards of productivity with control over the "manner and means" of production. *See Darden*, 503 U.S. at 323. Requiring compliance with company standards is essential to any business relationship, and it does not equate to the "daily supervision of [the hired party's] activities" that represents the hallmark of an employee relationship. *Reid*, 490 U.S. at 752. As the Eleventh Circuit explains, the "essence" of the common law test "is the control of

details." *Langfitt v. Fed. Marine Terminals, Inc.*, 647 F.3d 1116, 1121 (11th Cir. 2011) (emphasis added).

Maintaining and enforcing company standards is "not the type of control that establishes an employer/employee relationship." *Weary*, 377 F.3d at 525-26 (citation omitted). Rather than defeat independent contractor status, performance and standard-oriented requirements are permissible and "understandable." *Id.*; *see also Schwieger*, 207 F.3d at 485-86 (imposing "goals and sales quotas" comports with independent contractor status). In *Weary*, for instance, the company set "minimum selling standards," required compliance with guidelines, and imposed certain mandatory meetings. 377 F.3d at 523-24, 527. The agent's manager also "set higher standards" than the minimum, "as he was permitted to do," and then fired the agent for failing to meet them. *Id*. Yet the Court affirmed independent contractor status. *Id.*

This Court has repeatedly required control over the daily *details* of an agent's work in order to find support for an employee relationship. *Ware* recognized that the company's "actual influence over *how* [an agent] did business was *minimal*" despite controlling how the agent conducted his hires and selected his office hours, and despite requiring compliance with company guidelines. 67 F.3d at 576, 579 (emphasis added); *see also Janette*, 298 Fed. App'x at 473 (control over "setting deadlines and formatting requirements" did not "amount to the level of control

regarding the 'means and manner' of her work product to warrant a finding of employee status"); *Mazzei v. Rock-N-Around Trucking, Inc.*, 246 F.3d 956, 964 (7th Cir. 2001) (the record showed "little more than the basic level of supervision required to ensure that the arrangement … is of some value to [the hiring party]").

Disregarding this precedent, the court below fixated on the notion that managers exercised control "to achieve compliance with Company goals and standards." R.320, Opinion, PageID20985. And while the court suggests that some managers controlled unspecified "day to day activities," *id*. at 20972, the court's actual findings show control over only goals and performance outcomes: "[t]he 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*." *Id.* at 20972-73 (emphasis added); *id*. at 20977 (control over "agent's business plan" and "productivity goals"). And, importantly, the district court found that American Family *did not exercise control* over agents who "met American Family standards and employed American Family techniques." *Id*. at 20982. Managers only assumed an active role over struggling agents (the class representatives served as prominent examples) to help them meet income targets and to assist them as they tried to improve their businesses. *Id.* at 20961, 20982-83. Managers might periodically visit an agent's office, recommend limiting a vacation, or threaten

termination of the Agency Agreement, *id.* at 20975-82, but corrective actions varied widely among different managers and agents, *id.* at 20961-68. Such episodic events do not, in any event, qualify as controlling an agent's "day to day activities." *Id.* at 20972. *See, e.g.*, *Schwieger*, 207 F.3d at 484-87 (no improper oversight even though the insurance agent submitted "weekly and monthly production reports to a manager who kept track of whether she was meeting her goals and sales quotas" and was required to attend training, read literature, provide notice of vacations, among other things).

The district court's findings on the training the managers received, *id.* at 20983-84, similarly failed to appreciate the distinction between exercising control over standards and goals and exercising control over the manner and means of production. American Family left the day-to-day details—what hours to work, what clients to solicit, how to treat clients, and how to manage staff—up to individual agent discretion. *See Freund v. Hi-Tech Satellite, Inc.*, 185 Fed. App'x 782, 783 (11th Cir. 2006) (control went to the "end result of customer satisfaction," not "the day-to-day regulation of [] work habits").

As *Weary* holds, managers can require independent contractors to meet goals and standards without altering the overall nature of the relationship. 377 F.3d at 523-24, 527. Nor is coaching agents in the "American Family Way" inappropriate. *See* R.320, Opinion, PageID20949. In *Weary*, a requirement to comply with the

"Northwestern Mutual Way" was not equivalent to dictating the day-to-day details of the agents' sales practices. *See id.* at 526-27; *id*. at 530 (Clay, J., dissenting)*; see also Ware*, 67 F.3d at 576 (insurance company set forth "production requirements" for its agents).

American Family's approach to agent management reflects industry norms and does not transform agents into employees. Indeed, state law compels agent oversight because it regulates the minutiae of the industry, such as which words may be used in advertisements for annuities, *see* Ohio Admin. Code § 3901-1-47, or how agents use a customer's credit history, *see id*. at § 3901-1-55, and insurance companies must comply with those rules. Oversight to ensure compliance with state law (in addition to basic productivity objectives) does not constitute improper agent control.

The district court erred by relying on control over standards of productivity and basic goals as a substitute for control over the day-to-day details of running an insurance agency. This Court's precedent, and other circuits applying the *Darden* test, demonstrates that the control exercised by American Family is normal and expected in the insurance industry for independent contractor agents.

2. The Agents' Ability To Grow And Profit From Their Businesses Demonstrates That Agents Controlled The Manner And Means Of Their Insurance Sales.

An American Family agent's ability to invest in her business and profit from her own efforts further demonstrates that agents controlled their own manner and means of insurance sales—setting them apart from typical employees. Agent compensation depends upon what they put into the business and the effectiveness of their own strategies. R.320, Opinion, PageID20977. Even the "average" American Family agents do well, earning over $240,000 per year in commissions, with significant numbers of agents exceeding $500,000. R.309, Transcript, PageID19728. Agents enjoy the freedom to achieve their financial goals through their own investments and efforts. R.311, Transcript, PageID20411-12.

Drawing from the revenue ruling noted in *Darden*, this Court in *Ware* recognized that the agent's stake in his business and the concomitant potential for profit (or loss) are important indicators of independent contractor status. 67 F.3d at 579-80; *see Darden*, 503 U.S. at 324 (citing Rev. Rul. 87-41 (1987)). Honoring the intent of the parties, *Ware* acknowledged that they "bargained for Ware's entrepreneurship and the profit incentive… [P]art and parcel of that arrangement is Ware's ability and freedom to invest accordingly in additional office help, equipment and advertising for his own benefit." 67 F.3d at 580.

Neglecting these points, the district court instead focused on the agents' inability to "own" the policies they sold or to sell insurance from other companies. R.320, Opinion, PageID20982. The court also emphasized a non-solicitation agreement that precluded former agents from soliciting American Family clients for one year following termination.[2] *Id*. at 20983. But such terms and restrictions are industry-standard. *Ware*, 67 F.3d at 576 (book of business was property of AAA). Indeed, more onerous restrictions appeared in *Wolcott*, 884 F.2d at 247, where this Court deemed a captive Nationwide insurance agent an independent contractor. At termination, the agent was entitled to extended earnings determined by his prior year's renewal fees, but was subject to a one-year non-compete clause and a *lifetime* non-solicitation provision. *Id.* Given that such facts did not give the Court pause in finding independent contractor status, a one-year non-solicitation provision certainly should not.

* * *

[2] Although the district court referred to this provision as a "one year non-compete agreement" in its factual findings, *see* R.320, Opinion, PageID20983, the Agency Agreement merely prohibited former agents from soliciting American Family clients for one year following the agreement's termination. *See* R.67-1, Agency Agreement §6.k, PageID3092. The district court acknowledged as much earlier in its opinion, describing the same provision as a "one-year non-solicitation provision." R.320, Opinion, PageID20955. Indeed, Plaintiff Jammal started working for a competing insurance company immediately after his separation from American Family. R.308, Transcript, PageID19455-57.

The district court's conflation of "goals and objectives" with "manner and means" represents a radical transformation of the *Darden* test that runs afoul of existing precedent. Properly understood, any control that American Family exercised over its agents is of the nature that this Court and others have recognized comports with independent contractor status. Accordingly, this Court should reverse the judgment.

B. The Balance Of *Darden* Factors, Properly Analyzed, Do Not Support The District Court's Conclusion.

Turning to the specifics of the district court's *Darden* analysis, the court departed from this Circuit's precedent to hold that Plaintiffs were common law employees rather than independent contractors based primarily upon its assessment of several ancillary *Darden* factors. Although the court concluded that the Agency Agreement and five of *Darden*'s structural factors supported independent contractor status, the court also found that five other factors[3] supported employee status (with one factor neutral). But in arriving at this result, the district court misconstrued

[3] Two of these—the duration of the parties' relationship and whether the work was part of the regular business of the hiring party—are of little consequence in the insurance agent context. *See Janette*, 298 Fed. App'x at 474 (holding that "the duration of the parties' relationship is afforded little weight, and particularly so when the other factors overwhelmingly favor a finding of independent contractor"); *Weary*, 377 F.3d at 528 (holding that the "duration" and "regular part of the business" factors did not offset "overwhelming evidence" that insurance agents are independent contractors).

several of the *Darden* factors, concluding that they were neutral or "slightly" favored employee status for reasons that this Court has previously rejected. Under the proper analysis, the *Darden* factors weigh heavily in favor of independent contractor status. Because the district court's error on the factor-by-factor analysis infected its ultimate conclusion that the *Darden* factors were in "equipoise," reversal on any of the grounds below warrants reversal of the judgment.

1. The Amount Of Skill Required Of American Family Agents Weighs In Favor Of Independent Contractor Status.

The first *Darden* factor "relates to the skill required to perform the job in question." *Weary*, 377 F.3d at 526. Although the district court acknowledged that Plaintiffs are licensed insurance agents who "invest heavily" in their individual agencies and are responsible for managing their own operating costs and expenses, the court held that the "skill" factor weighed "slightly in favor of employee status" because American Family "specifically sought out potential agents who were untrained" and "provided all the training they needed to be an American Family agent." R.320, Opinion, PageID20972-74. In the district court's view, the fact that American Family invested substantial time and resources training its agents in "the 'American Family' way" demonstrated that Plaintiffs lacked the "requisite level of skill to be considered independent contractors." *Id.* at 20973-74.

The district court's analysis cannot be squared with this Court's precedent, as the opinion below tacitly acknowledges. *See id.* (admitting that "courts have

previously held that insurance agents require the requisite level of skill to be considered independent contractors"). In *Weary*, this Court held that the skill required of insurance agents weighed in favor of independent contractor status because "the sale of insurance is a highly specialized field" that requires "considerable training, education and skill." 377 F.3d at 526-27 (internal quotations omitted). The Court specifically noted that "a state license was required in order to sell insurance," and that the plaintiff in that case "had taken licensure examinations in 'several' states.'" *Id.* at 527.

This Court reached the same conclusion in *Wolcott*, 884 F.2d at 251, a pre-*Darden* case applying the common law test (subsequently endorsed by *Darden*) to evaluate the status of a Nationwide insurance agent. *Wolcott* affirmed independent contractor classification because, *inter alia*, the agent "exercised managerial skill in the operation of his business" and "was responsible for obtaining and maintaining a license to sell insurance." *Id*. *Weary* and *Wolcott* comport with similar decisions of this Court's sister circuits. *See, e.g.*, *Schwieger*, 207 F.3d at 485 (holding amount of skill required of insurance agent weighed "heavily" in favor of independent contractor status because agent "was licensed by the state," "was subject to a code of professional ethics," and "had been certified by professional associations").

The district court departed from this precedent, ostensibly because American Family "sought out" untrained agents and trained them in the American Family

"way." R.320, Opinion, PageID20973. But that approach, which fails to account for the level of skill actually required to run an insurance agency, has been squarely rejected by the courts. *See, e.g.*, *Aymes*, 980 F.2d at 862 (holding district court misconstrued the "skill" factor by focusing on contractor's "relative youth and inexperience" rather than "the skill necessary to perform the work"); *Alfred v. Tenn. Farmers Mutual Ins. Co.*, 8 F. Supp. 2d 1024, 1028 (E.D. Tenn. 1997) (rejecting argument that the "skill" factor weighed in favor of employee status because defendant hired inexperienced agents: "The question presented by the factor is whether the work performed is of an unskilled nature, generally performed in a factory or office setting under managerial supervision, or is more skilled work involving individual initiative and the exercise of some personal discretion."); *Van Gorp v. Am. Family Mut. Ins. Co.*, No. 4:9-cv-168 (E.D. Mo. Feb. 6, 1998), *available at* R.84-14, PageID7683, 7688-89 (rejecting plaintiffs' argument that "no skill was required" of American Family agents because the company "trained them from beginning to end," and holding that "[t]he labor involved" in selling American Family insurance products "was skilled as evidenced by the necessity for a license").

Indeed, the opinion below appears to draw from Judge Clay's dissent in *Weary*, where he explained his view that, "[t]he legal issue … is not the amount of skill required but, rather, whether the skill is in an independent discipline (or profession) that is separate from the business and could be (or was) learned

elsewhere." 377 F.3d at 532 (Clay, J., dissenting). Because the insurance company "helped to train" the agent in *Weary*, Judge Clay found that his "skill was not acquired independently of his relationship with [the company]." *Id*. Notwithstanding that concern, Judge Clay recognized that "*the skill of selling insurance is a general one*," and concluded that, "on balance, … the majority may be correct in its conclusion that this factor *favors independent contractor status*." *Id*. (emphasis added). Even if this Court were to consider whether Plaintiffs acquired their skills "independently" of American Family, *Weary* thus confirms that insurance agents possess the requisite level of "general" skill to support independent contractor status.

Consistent with this authority, the district court erred in finding that the skill factor militated in favor of employee status.

2. The "When And How Long To Work" Factor Weighs In Favor Of Independent Contractor Status.

The district court similarly misconstrued *Darden*'s "when and how long to work" factor by focusing on periodic requirements to attend sales meetings and to meet certain productivity goals, rather than on whether American Family exercised day-to-day control over Plaintiffs' hours. The court acknowledged that American Family does *not* require its agents to keep a set schedule or to work a particular number of hours. Yet it held this factor weighed "slightly in favor of employee status" because the company, "through its managers[,] retains some authority to

regulate these decisions." R.320, Opinion, PageID20976-77. To support this conclusion, the district court pointed to evidence that American Family required agents to keep their offices open during regular business hours (although the offices could be staffed by the agent's employees), "to work specific times and places for periodic campaign drives, mandatory meetings, and call nights," and to file daily activity reports. *Id*. The court also found that American Family provided managers with "final say" over agents' business plans and productivity goals, which "impacts the agents' ability to control their own hours." *Id*.

On similar facts, this Court has previously held that such incidental impact on an insurance agent's daily schedule does *not* weigh in favor of employee status. In *Ware*, an insurance company required its agents to keep their agencies open "at least 45 hours per week, including 9 a.m. to 5 p.m.," although agents were "not required to be present personally at any particular time, since it was expected that agents would be out of the office making sales calls." *Ware*, 67 F.3d at 576. The agent's contract also established certain "production requirements," and the company "offered various training meetings and seminars" for its agents to attend. *Id*. Although the company required regular hours for its agencies and established certain productivity goals, this Court affirmed independent contractor status because the agent's services "need not be provided personally" and the company "did not set the

sequence of his activities." *Id*. at 579. The "existence of fixed working hours" did not change this Court's analysis. *Id*.

This Court reached the same conclusion in *Weary*, holding that the "when and how long to work" factor favored independent contractor status because the company did not have "any authority or discretion regarding when or how long [the insurance agent] worked, except to require him to attend periodic compliance meetings and sales meetings and to meet minimum selling standards." *Weary*, 377 F.3d at 527. The fact that meeting these "minimum selling standards" may have some collateral effect on the agent's hours did not affect the Court's analysis. *Id*.

Ware and *Weary* sit comfortably alongside precedent from this Court's sister circuits, which have construed the "when and how long to work" factor to focus on whether a company controls its agents' daily schedules. *See, e.g.*, *Murray*, 613 F.3d at 946 (holding "when and how long to work" factor "strongly favor[ed]" independent contractor status because agent remained free to operate her business "without day-to-day intrusions"); *Wortham*, 385 F.3d at 1140 ("American Family did not supervise [the agent's] day-to-day activities"). The fact that agents might have to attend periodic sales meetings or satisfy basic production requirements is not tantamount to control over their daily schedules. *See, e.g.*, *Barnhart v. New York Life Ins. Co.*, 141 F.3d 1310, 1312-13 (9th Cir. 1998) (holding insurance agent's freedom "to operate his business as he saw fit without day-to-day intrusions"

supported independent contractor status, even though company imposed "minimum production standards").

In this case, it is undisputed that "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." *Id.* at PageID20977. Plaintiffs thus maintain substantial discretion over their daily schedules—a right secured by the Agency Agreement. R.320, Opinion, PageID20952. As this Court held in *Ware* and *Weary*, an agent's ability to set her own hours and to determine how long to work each day weighs in favor of independent contractor status.

3. The Right to Assign Additional Projects Weighs in Favor of Independent Contractor Status.

The district court took a similarly myopic view of whether American Family "has the right to assign additional projects" to its agents. *Darden*, 503 U.S. at 323. The district court held that this factor weighed slightly in favor of employee status because 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." R.320, Opinion, PageID20976. Although Plaintiffs failed to identify any written policy or contractual provision requiring agents to participate in such activities, the court found that Plaintiffs "did not feel that they were able to refuse to accept these duties." *Id*.

The court's analysis fundamentally misconstrues *Darden*'s "additional projects" factor, for two reasons. First, "projects" such as creating business plans, conducting insurance reviews, and submitting regular sales reports are directly related to Plaintiffs' primary obligation under their Agency Agreements: "to meet the Company's production, profitability and *service* requirements." R.67-1, Agency Agreement §4.h, PageID3089 (emphasis added). As other courts have recognized, an insurance company does "not exercise so much control over the manner and means of [an agent's] sales operation as to render her an employee" where it requires an agent to "submit weekly and monthly production reports" to allow a manager to track "whether [the agent] was meeting her goals and sales quotas." *Schwieger*, 207 F.3d at 484-85. This is not a case in which American Family required its agents to perform duties unrelated to the sale or servicing of insurance products, such as claims adjustment. Rather, the "projects" found by the district court were necessary to the agent's own purpose: "to sell insurance and to meet certain production requirements in doing so." *Alfred*, 8 F. Supp. 2d at 1029

Second, even if these projects were unrelated to the sale and servicing of insurance projects, the district court failed to make the findings necessary to hold that this factor weighs in favor of employee status under *Darden*.

As this Court explained in *Janette*, the "additional projects" factor focuses on whether the company retained *the right* to assign additional projects. 298 Fed.

App'x at 475; *see also Darden*, 503 U.S. at 323 (defining the relevant factor as "whether the hiring party has *the right* to assign additional projects to the hired party" (emphasis added)). Mere requests to perform additional projects are insufficient to support employee status because the hired party can decline such requests (or negotiate additional pay for extra-contractual work). *Janette*, 298 Fed. App'x at 475. Rather, plaintiff must present "evidence that [the company] had the *right* to assign her additional tasks." *Id.* (emphasis in original).

In this case, Plaintiffs failed to identify any written policy or contractual provision that required American Family agents to perform extraneous "additional projects." In fact, the district court found that such projects "were *not* a part of" the services the agents were required to perform under their agreements. R.320, Opinion, PageID20976 (emphasis added). Although the district court found that agents "did not feel that they were able to refuse" the projects, this is not the same as American Family retaining a legal right to assign such projects. *See Janette*, 298 Fed. App'x at 475. The lack of such a finding is fatal to the district court's conclusion that the "additional projects" factor weighs in favor of employee status.

4. The Agents' Role In Hiring And Paying Assistants Weighs In Favor Of Independent Contractor Status.

The district court found that one *Darden* factor—the hired party's role in hiring and paying assistants—was "neutral" and favored neither independent contractor nor employee status. R.320, Opinion, PageID20980. Although the

district court recognized that Plaintiffs "had primary authority to hire their own staff" and were solely responsible for all "staff compensation matters," the court held that this factor did not support independent contractor status because American Family "retained some right to override an agent's hiring and firing decisions." *Id.* at 20979-80. The court noted that American Family did not require Plaintiffs to hire from a list of pre-screened candidates, but imposed certain "qualifications" (*e.g.*, state licensure and credit history) on appointed agency staff, required all staff to comply with the American Family Code of Conduct, and "retained the right to fire agency staff, although this right was not widely exercised." *Id*.

Properly analyzed, however, the district court's own findings demonstrate that the "assistants" factor weighs heavily in favor of independent contractor status. Although the district court focused primarily on *American Family's* limited oversight of hiring and firing decisions, *Darden* directs the courts to examine "*the hired party's role* in hiring and paying assistants." *Darden*, 503 U.S. at 323-24 (emphasis added). If the hired party has the authority to hire and pay its own assistants, this factor weighs heavily in favor of independent contractor status. *Hi-Tech Video*, 58 F.3d at 1099 ("[T]he exercise of authority to hire assistants tends to show independent contractor status."); *see also Alexander v. Avera St. Luke's Hospital*, 768 F.3d 756, 762 (8th Cir. 2014) (holding plaintiff's "contractual right" to hire assistants at his own expense "strongly" favored independent contractor

status); *Janette*, 298 Fed. App'x at 475-76 (holding fact that plaintiff "could have hired assistants, at her own expense," favored independent contractor status); *Wortham*, 385 F.3d at 1140-41 (holding American Family agent was independent contractor because, *inter alia*, she "hired her assistants" and "paid all office-related expenses, including assistants' salaries"); *Shah v. Deaconess Hospital*, 355 F.3d 496, 500 (6th Cir. 2004) (finding independent contractor because company "does not dictate [plaintiff's] hours or hire and pay [his] assistants"). Conversely, if the hired party lacks the authority to hire assistants or its assistants are paid by the company, this factor points in favor of employee status. *See, e.g.*, *Absolute Roofing & Constr. Co. v. Sec'y of Labor*, 580 Fed. App'x 357, 363 (6th Cir. 2014) (holding carpenter's lack of authority "to hire or fire anyone" supported employee status); *Schwieger*, 207 F.3d at 486 (holding "hiring and paying assistants" factor was neutral because agents' assistants were paid directly by the insurance company and agent "had no say in setting the amount, method, or timing of pay for her own employees").

In this case, it is undisputed that Plaintiffs (1) had the authority to hire their own assistants, if they chose to do so; (2) "had discretion in who they would hire"; and (3) were solely responsible for paying their assistants, including withholding taxes and providing any employee benefits. R.320, Opinion, PageID20978-79. Plaintiffs—the "hired parties"—thus played the "primary" role in "hiring and paying

their assistants," as the district court expressly found. *Id.* at 20980. These findings weigh in favor of independent contractor status. *See Darden*, 503 U.S. at 323-24; *Hi-Tech Video*, 58 F.3d at 1099.

The district court, however, backed away from this conclusion, holding that American Family's imposition of basic hiring qualifications and a code of conduct neutralized this factor. R.320, Opinion, PageID20979-80. But the district court failed to cite any authority for this proposition, which stands inconsistent with the conclusions of this Court and others that a company's retention of "limited authority" over some aspects of an insurance agent's business is "not the type of control that establishes an employer/employee relationship." *Weary*, 377 F.3d at 526; *see also Murray*, 613 F.3d at 946 (holding dispute over "*the degree* of autonomy that [insurance agent] had to select and retain her assistant" did not affect "the overall picture presented" of agent's independent contractor relationship (emphasis added)); *Johnson v. FedEx Home Delivery*, 2011 U.S. Dist. LEXIS 142425, at *32-34 (E.D.N.Y. Dec. 12, 2011) (holding "assistants" factor weighed "strongly in favor" of independent contractor status even though FedEx imposed strict hiring criteria including a physical exam, drug screening, written exam, and road test and required compliance with company policies).

Moreover, the district court failed to explain how the "hiring and paying assistants" factor could be in equipoise given its own finding that Plaintiffs had

"*primary* authority" over hiring and firing decisions and "*sole* discretion in staff compensation matters." R.320, Opinion, PageID20979-80 (emphasis added). American Family does not pay the agents' assistants, and Plaintiffs themselves maintain sole discretion to determine the amount, method, and timing of their assistants' pay. In the absence of any countervailing evidence, the fact that Plaintiffs maintain "primary authority" to hire assistants and "sole discretion" over how much to pay those assistants weighs heavily in favor of independent contractor status.

III. The District Court Improperly Relied Upon Individual Evidence Without Any Showing That Such Evidence Was Fairly Representative Of The Class As A Whole.

In the alternative, even if Plaintiffs could prove employee status under *Darden* for a particular individual, they failed to establish that on a class-wide basis. Although the opinion below determines that American Family misclassified thousands of current and former agents, that holding hinged primarily upon the testimony of a handful of individual former agents and managers who testified at trial. Notably, in its factual and legal conclusions, the district court *never* identified a common, overarching policy that applied to all American Family agents and nullified their agreements, nor did it analyze whether the individual testimony presented at trial was fairly representative of the class as a whole. Indeed, in many instances, the court noted inconsistent testimony on several of the *Darden* factors, but failed to resolve the disputes. As explained below, the trial court's reliance upon

such testimony to render a *class-wide* decision on employment status constitutes reversible error.

1. Representative Evidence Can Only Be Used To Establish Class-Wide Liability If Such Evidence Is Fairly Representative Of The Class As A Whole.

Both this Court and the Supreme Court have recently addressed the proper use of representative evidence in class or collective actions. In *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016), the Supreme Court refused to adopt any categorical rule regarding the use of representative evidence, holding that "[i]ts permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." The Court ultimately endorsed the use of a sample, grounded in statistical analysis, because it satisfied basic indicia of reliability: "If the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action." *Id.* at 1046-47. The Court cautioned, however, that "[r]epresentative evidence that is statistically inadequate or based on implausible assumptions" does not permit a "fair and accurate" inference as to the experiences of all class members, and thus cannot be used to establish class-wide liability. *Id*.

In the wake of *Tyson Foods*, a divided panel of this Court addressed similar issues in *Monroe v. FTS USA LLC*, 860 F.3d 389 (6th Cir. 2017), *cert. petition pending* (Case No. 17-637). The *Monroe* plaintiffs relied upon the testimony of individual employees drawn from a "representative sample" of fifty class members "agreed upon by both parties" to demonstrate that defendant "required its employees to systematically underreport their overtime hours." *Id.* at 393, 401.

Relying upon *Tyson Foods*, the Court held that plaintiffs could use representative testimony to establish class-wide liability (in an FLSA collective action context) because the parties had agreed upon the representative sample, the sample consisted of a statistically significant percentage of the class, and the testifying employees fairly represented the class as a whole. *Id.* at 409-10. The Court emphasized that the testifying employees "were geographically spread among various [offices] and were subject to the same job duties, timekeeping system, and compensation plan as nontestifying [employees]." *Id.* at 409-10. Judge Sutton dissented, arguing that differences between individual class members undermined any showing of representativeness and that plaintiffs failed to prove they were all subject to the same "policy." *See id.* at 416-22 (Sutton, J., concurring in part and dissenting in part).[4]

[4] Although American Family believes it should prevail under the majority's decision in *Monroe*, it specifically preserves arguments premised on Judge Sutton's dissent should the Supreme Court grant *certiorari* and reverse.

Tyson Foods and *Monroe* confirm that a court cannot simply assume that the testimony of a few individual plaintiffs is fairly representative of a nationwide class of thousands of potential claimants. To support *class-wide* liability, the court must first determine that representative testimony would be admissible in individual actions, and that all class members—testifying and non-testifying alike—were subject to the same "policy." These requirements comport with the general rule that class treatment is inappropriate where "[a] named plaintiff who proved his own claim would not necessarily have proved anybody else's claim." *Sprague v. General Motors Corp.*, 133 F.3d 388, 398-99 (6th Cir. 1998) (en banc).

2. The District Court Failed To Determine Whether The Individual Testimony Offered By Plaintiffs Was Fairly Representative Of The Class As A Whole.

The district court's treatment of the individual testimony offered by plaintiffs in this case violates the basic guidelines set forth in *Tyson Foods* and *Monroe*, for two reasons.

First, the opinion below contains no analysis of whether the individual testimony relied upon by the district court fairly represented the class as a whole. The certified classes consist of 7,200 current and former American Family agents, who were managed by approximately 140 different managers. But just over a dozen agents or managers testified, many of whom ceased being agents long before the class period. The opinion offers no statistical analysis demonstrating that this small,

non-random sample of agents and managers can be reliably extrapolated to such a sprawling class. *Cf. Tyson Foods*, 136 S. Ct. at 1048-49 (holding that "statistically inadequate" sample cannot be used to infer class-wide liability); *Monroe*, 860 F.3d at 410 (noting plaintiff's sample of 5.7% of class members fell within the range "commonly accepted by the courts"); *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) (holding that classwide liability cannot be based on "small, unrepresentative sample" of plaintiffs handpicked by the parties, distinguished by *Monroe* on other grounds). Nor does the opinion below identify any other objective criteria demonstrating that the testimony offered at trial was fairly representative of non-testifying class members. *Cf. Monroe*, 860 F.3d at 409 (noting geographic diversity of testifying employees and an overarching common policy).

To ensure that the testimony of individual plaintiffs can be reliably extrapolated to all class members, courts in this Circuit typically decide at trial whether the evidence offered by class plaintiffs is "fairly representative" of the class as a whole. *See, e.g.*, *Pierce v. Wyndham Vacation Resorts, Inc.*, 2017 U.S. Dist. LEXIS 163529, at *23 (E.D. Tenn. Oct. 3, 2017) ("Determining whether the Plaintiffs have actually presented representative testimony of liability and damages of the collective action is reserved for trial."); *Takacs v. Hahn Auto. Corp.*, 1999 U.S. Dist. LEXIS 22146, at *10 (S.D. Ohio Jan. 25, 1999) (permitting plaintiffs to "attempt to prove" class claims through the testimony of only four to six class

members but holding that Plaintiffs "bear the risk of failing to establish that the testifying employees are fairly representative" at trial); *see also Monroe*, 860 F.3d at 409 (examining the trial record to determine whether testifying plaintiffs were representative of the class as a whole). The district court, however, skipped that question in this case, basing its decision on assumptions rather than reliable evidence. The opinion below jumps straight from a summary of testimony to a series of factual findings and conclusions of law applicable to the entire class. But this misses a critical link, and it represents the exact approach rejected by the Supreme Court in *Tyson Foods*. *See* 136 S. Ct. at 1046-48.

Second, the district court's own description of the testimony offered at trial illustrates the impropriety of the use of representative testimony in this case because Plaintiffs failed to establish that class members were subject to uniform, company-wide policies.

Throughout its recitation of the trial record, the opinion below notes "conflicting testimony" on several of the *Darden* factors. *See, e.g.*, R.320, Opinion, PageID20957 ("conflicting testimony" regarding role in hiring non-appointed agency staff); 20962 ("conflicting testimony" regarding control over production, profitability, and service goals); 20968 ("conflicting testimony" regarding consequences for disregarding company requests). With respect to *Darden*'s "when and how long to work" factor, for example, the trial court summarizes the testimony

of nine individual agents and managers, who provided varying accounts of American Family's practices regarding office hours and vacation days. *Id.* at 20963-64. One agent, Lisa Diemer, testified that "no one from American Family had ever told her when she had to have her agency open," and that she was free to take vacation or personal days without obtaining permission from her manager. *Id*. Another agent, Dusty Rider, testified that American Family required him to keep his agency open during regular business hours, and that he could not take vacation without prior approval from his manager. *Id.* at 20963.

In the face of this conflicting testimony, the district court made no effort to resolve these conflicts or to determine which agents (if any) were "representative" of the class as a whole. It made no findings as to the credibility of Agents Diemer or Rider, nor did it attempt to determine whether the experiences of either agent were the product of rogue managers or a company-wide policy. Instead, the district court merely determined—without explanation—that the "when and how long to work" factor weighed in favor of employee status because American Family "requires its agents to keep their offices open during regular business hours," and managers "have the authority to approve or deny agent vacations." *Id.* at 20976-77. The district court made these findings on a *class-wide* basis, even though the conflicting testimony demonstrated that not all class members had the same experience.

This conflicting testimony illustrates the problems the district court encountered, but did not resolve, when extrapolating individual testimony to a nationwide class, which is exactly what *Tyson Foods* sought to prevent. *Tyson Foods*, 136 S. Ct. at 1046-47; *see also Monroe*, 860 F.3d at 416 (Sutton, J., concurring in part and dissenting in part). As the Diemer-Rider conflict illustrates, the individual testimony chronicled in the opinion below simply cannot support the class-wide conclusions reached by the district court. The testimony featured by the district court confirms that not all American Family agents were subject to the same policies, as the degree of "control" exercised by American Family varied substantially based upon an individual agent's manager. The district court accordingly erred by purporting to invoke representative evidence without resolving these disputes or offering any predicate findings that the individual evidence was fairly representative of the class as a whole.

CONCLUSION

For the foregoing reasons, the Court should reverse the order of the district court and remand for entry of judgment in favor of American Family.

Respectfully submitted,

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DESIGNATION OF THE RECORD

Pursuant to Rule 28(b)(1)(A)(i), Defendants-Appellants American Family Insurance Company, et al. designate the following documents to facilitate the Court's review:

Record Number	**Date Filed**	**Document**	**PageID#**
67	June 30, 2014	Sec. Am. Complaint	3050-86, 3088, 3090-92
67-1	June 30, 2014	Agency Agreement Cover Letter	3088-89, 3092
84-14-16	September 10, 2014	Unpublished Opinions	7683-7708
126-6	November 23, 2015	Declaration	11914-45
137	March 2, 2016	Opinion	12477, 12482-83
256-2	March 27, 2017	IRS Ruling	17813
278	April 12, 2017	Notice	18328
301	April 18, 2017	Jury Interrogatories	18456
305	May 4, 2017	Transcript	18738, 18884-86
307	May 4, 2017	Transcript	19212-13, 19275-76, 19297, 19369, 19379-80,
308	May 4, 2017	Transcript	19428, 19450, 19455-57, 19612
309	May 4, 2017	Transcript	19728
310	May 4, 2017	Transcript	19926-27, 19932, 19943-44, 19963-64, 19982, 20019-21, 20052, 20129, 20162-64

311	May 4, 2017	Transcript	20313-14, 20405-06, 20411-12
312	May 4, 2017	Transcript	20471–72, 20541, 20594,
320	August 1, 2017	Opinion	20943, 20946, 20948-68, 20972-86

CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(c)-(d) and 32(a)(7)(B)(i). The brief was prepared in Microsoft Word, using Times New Roman 14-point font. According to the word count function, the word count, including footnotes and headings, is 12,743.

/s/ Pierre H. Bergeron
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CERTIFICATE OF SERVICE

It is hereby certified that on January 17, 2017, the foregoing was electronically filed with the Clerk of the Court via the Court's ECF system. Counsel for Plaintiffs will be served by the ECF system.

/s/ Pierre H. Bergeron
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