No. 13-648

In The Supreme Court of the United States

SUN CAPITAL PARTNERS III, LP;
SUN CAPITAL PARTNERS III QP, LP;
and SUN CAPITAL PARTNERS IV, LP,

Petitioners,

v.

NEW ENGLAND TEAMSTERS AND
TRUCKING INDUSTRY PENSION FUND,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CATHERINE M. CAMPBELL
Counsel of Record
RENEE J. BUSHEY
MELISSA A. BRENNAN
FEINBERG, CAMPBELL & ZACK, PC
177 Milk Street, Suite 300
Boston, MA 02109
(617) 338-1976
cmc@fczlaw.com

Attorneys for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTRODUCTION

This case arises out of a claim for payment of withdrawal liability under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, including provisions added by the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. § 1381 *et seq*. ERISA requires withdrawing employers to pay their proportionate share of a pension fund's vested but unfunded liabilities (hence the term "withdrawal liability"). ERISA §§ 4201, 4211, 29 U.S.C. §§ 1381, 1391.

Petitioners, Sun Capital Partners III, LP, Sun Capital Partners III, QP, LP (together, "Sun Fund III") and Sun Capital Partners IV, LP ("Sun Fund IV")[1] are private equity funds and Delaware limited partnerships. App. 6a. Respondent, the New England Teamsters and Trucking Industry Pension Fund ("the Pension Fund"), is seeking to collect withdrawal liability from the Sun Funds as an employer under common control with Scott Brass, Inc. ("SBI"), a withdrawing employer from the Pension Fund. App. 12a-13a.

The undisputed material facts of this case are set forth in the decision by the United States Court of Appeals for the First Circuit dated July 24, 2013. App. 5a-15a.

[1] Petitioners will be referred to hereafter collectively as "the Sun Funds."

REASONS FOR DENYING THE WRIT

I. Certiorari Should Be Denied Because a Final Judgment Has Not Been Rendered by the Court Below.

This Court has made clear that "we generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *VMI v. United States*, 508 U.S. 946 (1993) (citing cases). The fact that the decision of a district court is not final alone is "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Under the ERISA framework, an entity is responsible for the liability of a withdrawn employer if it is both a "trade or business" and under "common control" with the withdrawing employer. 29 U.S.C. § 1301(b)(1). The decision by the First Circuit, answers only one part of the two-part inquiry and only for one of the three Petitioners. The First Circuit ordered:

> Because to be an "employer" under § 1301(b)(1) the entity must be both a "trade or business" and be under common control, we reverse entry of summary judgment on the § 1301(b)(1) claim in favor of Sun Fund IV and vacate the judgment in favor of Sun Fund III. We remand the § 1301(b)(1) claim of liability to the district court to resolve whether Sun Fund III received any benefit from an offset from fees paid by SBI and for the district court to decide the issue of common control.

App. 39a.

The only issue that has been resolved is the First Circuit's holding that Sun Fund IV is a trade or business. In its remand order, the First Circuit directed the District Court to do three things: 1) make further factual findings on the fee offset issue with respect to Sun Fund III, 2) determine whether Sun Fund III is trade or business and 3) determine whether the Petitioners are under common control with the withdrawn employer. Unless the Pension Fund is successful on all three of the remaining issues, no withdrawal liability will attach to the Petitioners.

Simply put, because there is no final judgment and the record is not fully developed, certiorari should be denied. Once a final judgment is rendered, the Petitioners could then raise their current claim along with any additional claims in another petition for a writ of certiorari. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). Nothing in the First Circuit's limited decision affecting multiemployer plans would justify such an abrupt departure from this sensible, well-established procedure.

II. The Court of Appeals Decision Does Not Create a Conflict Among Other Circuits or with the Holdings of this Court.

The First Circuit's decision adheres to a long line of cases with respect to the issue of "trade or business" under MPPAA. Petitioners' assertion that there is a conflict among the circuits is simply incorrect. They have "manufactured" a conflict by falsely alleging that the First Circuit's decision is contrary to the holdings of the Seventh Circuit in *Cent. States Se. & Sw. Areas Pension Fund v. Messina Products, LLC*, 706 F.3d 874 (7th Cir. 2013) and the D.C. Circuit in *Connors v. Incoal, Inc.*, 995 F.2d 245 (D.C. Cir. 1993) on the issue of "trade or business." In fact, the First Circuit specifically relies upon the reasoning in both these cases to *support* its decision that Sun Fund IV is a trade or business under MPPAA rather than a "passive investor."

A. There is No Conflict in the Circuits.

Petitioners rely on *Comm'r of Internal Revenue v. Groetzinger*, 480 U.S. 23 (1987) in arguing that there is a split in the circuits. But most courts do not simply apply the *Groetzinger* analysis. Instead, they have developed a more complex and fact-specific approach, which has been used by all circuits, including the First Circuit in the instant case. As the First Circuit stated, "The conclusion we reach is consistent with the conclusions of other appellate court decisions,

though none has addressed this precise question." App. 27a.

Under the test established by the Supreme Court in *Groetzinger*, an activity is a trade or business if it is: 1) being conducted for the primary purpose of income or profit; and 2) continuous and regular. *Groetzinger*, 480 U.S. at 35. But the Court cautioned that its interpretation of the phrase "trade or business" was confined to the specific income tax provisions at issue in that case.[2] This Court further stated that any trade or business analysis, "requires an examination of the facts in each case" even though this may be "thought by some to be a less-than-satisfactory solution, for facts vary." *Id.* at 36.

The holding in *Groetzinger* has been used by some circuits as the "starting point" in the analysis of the trade or business issue under MPPAA. *Nat'l Integrated Group Pension Plan v. Dunhill Food Equip. Corp.*, 938 F. Supp. 2d 361, 373 (E.D.N.Y. 2013). Yet, circuit courts have consistently applied a fact-based analysis when determining "trade or business" in the ERISA context. *Messina,* 706 F. 3d at 880-84 (analyzing the facts and circumstances surrounding an employer's leasing operations to determine if it is a trade or business); *Connors,* 995 F.2d at 253-54 (analyzing the facts surrounding an employer's farming business to determine if it is a trade or

[2] 26 U.S.C. § 162(a) ("the Code" or "I.R.C.").

business);[3] *Bd. of Trs. v. Del. Valley Sign Corp*., 945 F. Supp. 2d 649, 653-54 (E.D. Va. 2013) (examining specific facts to support the holding that employer's leasing business is a trade or business under MPPAA). In *Board of Trustees v. Lafrenz*, 837 F.2d 892, 895 n.7 (9th Cir. Wash. 1988), the Ninth Circuit stated, "We do not hold that every 'passive investment' is necessarily a trade or business. We hold only that the facts in this case justify the conclusion that the truck-leasing operation is a trade or business."

Even when courts use the *Groetzinger* analysis as a "starting point," they further "look to the purposes of ERISA and MPPAA to determine whether an entity is a trade or business." *Dunhill*, 938 F. Supp. 2d at 373; *ILGWU Nat'l Ret. Fund v. Minotola Indus., Inc.*, No. 88 Civ. 9131, 1991 U.S. Dist. LEXIS 6147, 1991 WL 79466, at *12-13 (S.D.N.Y. May 3, 1991) (citing cases).

The First Circuit's decision in this matter is no different; it is in harmony with the holdings and analysis of the majority of courts. It first examines

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[3] In their attempt to portray a conflict among the circuit courts, Petitioners mischaracterize the analysis in the *Connors* case by stating that section 162(a) provides a single definition for the construction of "trade and business." App. 15. Rather, the Court states, "We read the Groetzinger Court to mean that the question of whether an activity is a 'trade or business' is one of ultimate fact." *Connors* then cites cases involving section 162(a) simply to support the proposition that the facts of each case must be carefully analyzed. *Connors*, 995 F.2d 245.

the facts of this case following what has been deemed the "investment plus" analysis of the Pension Benefit Guaranty Corporation ("PBGC"). PBGC is the entity tasked by Congress to interpret MPPAA.[4] As the First Circuit states, PBGC "applied a two-prong test it purported to derive from *Commissioner of Internal Revenue v. Groetzinger*, 480 U.S. 23, to determine if the private equity fund was a 'trade or business' for purposes of the first part of the § 1301(b)(1) requirement." App. 18a-19a.[5] "Investment plus" is a phrase coined by the court in *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Palladium Equity Partners, LLC*, 722 F. Supp. 2d 854, 869 (E.D. Mich. 2010). Using the *Groetzinger* framework, it describes the factors which distinguish activities of the private equity fund as a trade or business from those of a passive investor. *Id*. at 869-70.

Additionally, the First Circuit relies upon the findings and holding of the Seventh Circuit in *Messina,* "Further, even if we were to ignore the PBGC's interpretation, we, *like the Seventh Circuit*, would reach the same result through independent

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[4] The Supreme Court has regularly deferred to PBGC's construction of ERISA, noting that "to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA would be to embark upon a voyage without a compass." *Beck v. Pace Int'l Union,* 551 U.S. 96, 104 (2007) (quoting *Mead Corp. v. Tilley,* 490 U.S. 714, 722, 725-26 (1989)).

[5] The PBGC's analysis, which was set forth in an Appeals Board decision, was given *Skidmore* deference. *See Skidmore v. Swift & Co*., 323 U.S. 134 (1944). App. 20a-22a.

analysis. . . . [T]he Seventh Circuit employed an 'investment plus'-like analysis without reference to any PBGC interpretation. We agree with that approach." App. 23a (emphasis added).

Using the dual analyses, the First Circuit makes the following detailed findings which support its holding that Sun Fund IV is a trade or business – not a passive investor. The purpose of the Sun Funds was to manage and supervise their investments giving the general partner "exclusive and wide-ranging" management authority. App. 24a. The Sun Funds sought portfolio companies in need of extensive intervention in their management and operations, provided such intervention and sold them in two to five years for a profit. App. 25a. The principals of the Sun Funds' general partners took controlling interests in the companies in order to involve themselves in the minutiae of company management "encompass[ing] even small details, including signing of all checks for its new portfolio companies and the holding of frequent meetings with senior staff to discuss operations, competition, new products and personnel." *Id*. Sun Fund IV received a direct benefit from the active involvement in management that "an ordinary passive investor would not derive." App. 26a. As a result of management fees paid by SBI to its general partner, Sun Fund IV received, "an offset against the management fees it otherwise would have paid its general partner for managing the investment." App. 26a-27a; 36a-37a.

Contrary to Petitioners' contentions, the Seventh, D.C. and First Circuits as well as the PBGC apply a fact-based test to the specific facts in each case. Although the Ninth Circuit has not expressly adopted the *Groetzinger* test, it nevertheless adheres to the same fact-based analysis using a long line of MPPAA cases. Accordingly, there is no circuit conflict.

B. The Decision by the First Circuit is Consistent with the Holdings of this Court.

The First Circuit questions whether the holdings in *Higgins v. Commissioner*, 312 U.S. 212 (1941) and *Whipple v. Commissioner*, 373 U.S. 193 (1963), involving provisions of the I.R.C. other than those that inform the meaning of a "trade or business" under § 1301(b)(1), are relevant to this case. App. 30a. Nevertheless, the First Circuit clearly states that its holding is not inconsistent with either *Higgins* or *Whipple* – the facts in those cases are simply distinguishable. In *Higgins*, "the taxpayer 'did not participate directly or indirectly in the management of the corporations in which he held stock or bonds.'" App. 32a. "Unlike the investor in *Higgins*, the Sun Funds did participate in the management of SBI, albeit through affiliated entities." *Id.*

In finding *Whipple* distinguishable, the First Circuit noted that this Court found that "[d]evoting one's time and energies to the affairs of a corporation is not of itself, and *without more*, a trade or business

of the person so engaged." *Id*. In applying *Whipple* to the facts of the present case, the court stated:

> The Sun Funds say that, because they earned no income other than dividends and capital gains, they are not "trades or businesses." But the Sun Funds did not simply devote time and energy to SBI, "without more." Rather they were able to funnel management and consulting fees to Sun Fund IV's general partner and its subsidiary. Most significantly, Sun Fund IV received a direct economic benefit in the form of offsets against the fees it would otherwise have paid its general partner. It is difficult to see why the *Whipple* "without more" formulation is inconsistent with an MPPAA "investment plus" test.

App. 33a. Accordingly, the First Circuit's decision presents no conflict with the decisions of this Court.

C. The Petitioners Mischaracterize the Supporting Arguments Made by the First Circuit.

Petitioners mischaracterize the First Circuit's decision by omitting relevant passages to support their argument that there is a conflict among the circuit courts in applying section 162(a) of the Code where none exists. None of the Sun Funds' filings in the lower courts, the decision of the district court nor the decision of the First Circuit make reference to this section.

Petitioners also state that "the Seventh Circuit has never suggested (as the First Circuit held here) that an owner of a company that has incurred withdrawal liability could be treated as a 'trade or business' *solely due* to activity managing the very company that incurred withdrawal liability." Pet. 17-18 (emphasis added). That is not the holding of either circuit court. The Seventh Circuit in *Messina* stated that the pension fund in that case was not trying to hold the owners "liable merely because of their ownership of or positions within Messina Trucking, nor could it," *Messina*, 706 F.3d at 880. But Petitioners did not include the entire passage from the case. Importantly, the Court continued: "Instead, the Fund seeks to hold the Messinas liable for operating a 'trade or business' as commercial and residential landlords." *Id*. Just as the First Circuit looked at the additional activities of the Sun Funds, the Seventh Circuit took into account the additional activities of the Messinas. Neither the Sun Funds, nor the Messinas, are trades or businesses merely based on ownership.

Petitioners assert that the First Circuit followed the Ninth Circuit by rejecting "the proposition that, apart from the provisions covered by 26 U.S.C. § 414(c), interpretations of other provisions of the Internal Revenue Code are *determinative* of the issue of whether an entity is a 'trade or business' under 1301(b)(1)." Pet. 16 (citing App. 30a). The Petitioners also state that the First Circuit's citing of *Carpenters' Pension Tr. Fund for N. Cal. v. Lindquist*, 491 F. App'x

830 (9th Cir. 2012), makes it "clear" the First Circuit was taking the Ninth Circuit's point of view.

A closer reading of the decision shows that what the First Circuit rejected was Sun Funds' argument that cases "interpreting the phrase 'trade or business' as used anywhere in the Internal Revenue Code are binding because Congress intended for that phrase to be a term of art with a consistent meaning across uses." App. 29a-30a.

Perhaps Petitioners' real issue with the First Circuit's decision is the court's analysis of the facts. App. 25. But by this Court's own rules, "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

III. The Petitioners Vastly Overstate the Repercussions of the First Circuit's Decision.

The Petitioners are misguided in claiming that the First Circuit's decision will spark a "tidal wave of litigation." Pet. 31. In the fall of 2007, PBGC issued a decision holding that a private equity fund was a "trade or business" under ERISA.[6] In the more than

[6] *See* Pension Benefit Guaranty Corporation Appeals Board Decision, *Liability Within a Group of Companies 2007-09-26*, available at: http://www.pbgc.gov/prac/appeals-board/appeals-decisions.html.

six years since PBGC's decision, there has been no such tidal wave, and in the few cases where the issue was presented, courts have had no trouble applying the factors PBGC articulated. In 2010, the Eastern District of Michigan coined the phrase "investment plus" to describe PBGC's standards, and applied them in finding that another private equity fund was a trade or business.[7] And in the small number of similar cases, courts have easily applied the "investment-plus" standard.[8]

The Petitioners' predictions of severe economic repercussions from stifled investment are equally unsupported. Pet. 32-33. Years after PBGC determined that private equity funds can be trades or businesses, and legal practitioners warned that funds can be held liable under ERISA,[9] Sun Capital and their directed funds continue to purchase distressed companies with pension obligations – including SBI and Friendly's Ice Cream Corporation.[10] Thus, while

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[7] *See Palladium,* 722 F. Supp. 2d at 869.

[8] *See Palladium*, 722 F. Supp. 2d 854; *Messina*, 706 F.3d 874; *Harrell v. Eller Maritime Co.,* No. 8:09-cv-1400-T-27AEP, 2010 WL 3835150 (M.D. Fla. Sept. 30, 2010); App. 1a.

[9] *See, e.g.,* Kirkland & Ellis Private Equity News Letter, *PBGC Holds Private Equity Fund Liable for Portfolio Company's Pension Underfunding*, January 7, 2008, available at: http://www.kirkland.com/siteFiles/Publications/473EBD3300F8D315D278301BCBC2D7AC.pdf.

[10] *See Friendly's to Stay with Sun Capital*, available at: http://online.wsj.com/news/articles/SB10001424052970204720204577128813255393348. Other private equity funds also continue to acquire companies with pension obligations, *See, e.g., Foamex*

(Continued on following page)

Petitioners warn that the First Circuit's holding will drastically change the legal and economic landscape, the past six years and the Petitioners' own practices prove otherwise.

Neither the Petitioners, nor Amicus Private Equity Growth Capital Council, mention the immense profits that these funds are earning. Amicus 2. In fact, a commentator noted:

> [a] sample of 837 funds outperformed the S&P 500 over the period 1984-2010 by an average of 1.5 percent per year, net of fees. David T. Robinson and Berk A. Sensoy, 'Private Equity in the 21st Century: Cash Flows, Performance, and Contract Terms from 1984-2010' (2011). After restoring the fees, and extrapolating the above-market return to the total capital of the fund industry, the funds' profits are immense.

S. Rosenthal, *Taxing Private Equity Funds as Corporate "Developers,"* Tax Notes, Jan. 21, 2013, at 361, 364 & n.31. The Petitioners, as with other private equity funds, seek to buy and turn around underperforming companies. Such purchases involve many risks. In the marketplace of buying and selling companies,

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International Acquired, Renamed, available at: http://www.bizjournals.com/charlotte/stories/2009/07/13/daily15.html; *Thermadyne Holdings Corporation Agrees to be Acquired by Irving Place Capital*, available at: http://www.irvingplacecapital.com/newsDetail.php?../newsDetail.php?Thermadyne-Holdings-Corporation-Agrees-to-be-Acquired-by-Irving-Place-Capital-75.

withdrawal liability is just one of many risk factors to consider. The irony in the present case is that the Petitioners purchased SBI, the portfolio company, at a discount because there was a contingent withdrawal liability. Now that the contingency occurred, the Sun Funds seek to avoid payment. Pet. 104a.

CONCLUSION

The case has been remanded to the district court for further factual and legal determinations. Certainly there is no reason to review this issue without a final judgment and a fully developed record.

Further, the First Circuit's decision in this case is consistent with the conclusions of other appellate courts. Its holding is fact-driven relying upon the PBGC and other courts' consideration of factors that draw the line between a "trade or business" and a "passive investment" in the MPPAA context. Its analysis is informed by and consistent with this Court's holdings in *Groetzinger*, *Higgins* and *Whipple*. App. 33a-34a. There is no circuit conflict – simply an analysis of these facts applied under longstanding case law.

The private equity industry expects to reap the rewards of its investments but seeks protection from this Court against the risks posed by such investments. Such protection from withdrawal liability, unavailable to other entities, must be weighed against the purpose for which Congress enacted

MPPAA, "to protect the viability of defined pension benefit plans, to create a disincentive for employers to withdraw from multiemployer plans, and also to provide a means of recouping a fund's unfunded liabilities." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 720-22, (1984). A reversal of the First Circuit's decision would be contrary to that purpose.

Dated: January 29, 2014

Respectfully submitted,

CATHERINE M. CAMPBELL
Counsel of Record
RENEE J. BUSHEY
MELISSA A. BRENNAN
FEINBERG, CAMPBELL & ZACK, PC
177 Milk Street, Suite 300
Boston, MA 02109
(617) 338-1976
cmc@fczlaw.com