App. No. ___

IN THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER ENDS CO.; BACK IN BLACK CO.,

Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Respondent.

PETITIONERS' APPLICATION TO EXTEND TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Sonia Sotomayor, as Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Petitioners September Ends Co. and Back In Black Co.[*] respectfully request that the time to file a Petition for a Writ of Certiorari be extended thirty days from February 3, 2019, to and including March 5, 2019. The U.S. Court of Appeals for the Sixth Circuit issued its order denying Petitioners' petition for panel hearing and en banc rehearing on November 5, 2018, App. A, *infra*, after issuing its opinion and judgment on September 4, 2018, App. B, *infra*. Absent an extension, the petition therefore would be due on February 3, 2019. This Application is being filed at least 10 days before that date. *See* Sup. Ct. R. 13.5.

[*] Petitioners have no parent corporations, and no publicly held company owns 10% or more of either Petitioner's stock.

Background

1. Findlay Industries, Inc. (Findlay) is a defunct Ohio company that sponsored and administered a pension plan for its employees. On May 1, 2009, a company owned by Michael J. Gardner, Findlay's former CEO, purchased equipment, inventory and receivables associated with two of Findlay's plants. Ownership of these assets was transferred to Petitioners September Ends Co. and Back In Black Co., of which Gardner was the majority owner. In 2012, Findlay and Respondent Pension Benefit Guaranty Corporation (PBGC) agreed the pension plan was terminated effective July 18, 2009.

Title IV, Subtitles A-D of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1301-1371, establish a plan termination insurance program and govern PBGC's authority to recover unpaid pension liabilities for single-employer pension plans. Section 1369 limits PBGC's authority to sue successor corporations for such liabilities:

> (a) Treatment of transactions to evade liability
> If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date of the termination on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date....
>
> (b) Effect of corporate reorganization
> For purposes of this subtitle, the following rules apply in the case of certain corporate reorganizations:

> (1) Change of identity, form, etc.
> If a person ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the person to whom this subtitle applies.
>
> (2) Liquidation into parent corporation
> If a person ceases to exist by reason of liquidation into a parent corporation, the parent corporation shall be treated as the person to whom this subtitle applies.
>
> (3) Merger, consolidation, or division
> If a person ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the person to whom this subtitle applies.

29 U.S.C. § 1369. There is no allegation that Section 1369 applies to Petitioners in this case.

2. PBGC filed suit against several defendants, including Petitioners, to recover unpaid pension liabilities from the Findlay single-employer pension plan. PBGC alleged in Count XV that Petitioners were liable for the pension liabilities under a federal common law theory of successor liability. The district court granted Petitioners' motion to dismiss the claim, reasoning that federal common law should not be created where ERISA already addressed the issue and there was no gap to be filled.

3. On an interlocutory appeal, a divided panel of the Sixth Circuit reversed. App. B. The panel majority noted that the Sixth Circuit had "developed a three-part standard to determine whether and when it is appropriate to create federal common law under ERISA. We undertake such a step if (1) ERISA is silent or ambiguous on the issue before the court, (2) there is an awkward gap in the statutory scheme, or

(3) 'federal common law is essential to the promotion of fundamental ERISA policies.'" App. B at 17. The panel majority explained that "[t]he standard is phrased in the disjunctive so that if any one of the three circumstances is present, creation of federal common law is appropriate." *Id*. The panel majority concluded that "because ... the federal common law of successor liability is necessary to promote fundamental ERISA policies in this case.... we need not address the other prongs of the standard." *Id.*

The panel majority held that successor liability would promote the fundamental policies of ERISA in this case because Gardner allegedly purchased the assets in a way that did not represent an arm's-length sale. App. B at 18. The Court chose to create a rule of successor liability that has been developed in labor and employment cases but added an arm's-length requirement. *Id*. at 19-21. The Court did not explain the contours of this new rule, address the directly contrary statutory text in Section 1369, or address legislative history that shows Congress deliberately omitted a broader rule of successor liability. *Id*. at 30-32 (McKeague, J., concurring in part and dissenting in part).

Reasons For Granting An Extension Of Time

1. Petitioners only recently retained Supreme Court counsel to file a petition on their behalf. Additional time is necessary for counsel to study the facts and the law and prepare a thorough petition for this Court's review. The press of other matters before this and other courts will make preparation of the petition difficult absent an extension of time. Among other things, counsel must file a brief in the

Ninth Circuit by January 22, 2019 and present oral argument before the D.C. Circuit on February 1, 2019.

2. No prejudice will result from granting this request for an extension. Whether the extension is granted or not, the case would still be considered on its merits next Term if the Court grants the petition.

3. The Court is likely to grant the petition. While further research is required to fully elucidate the basis for that review, this case raises significant issues about the extent of federal courts' authority to create federal common law under ERISA. The panel majority's decision conflicts with the text of ERISA, is inconsistent with its legislative history, and creates a rule that does not exist elsewhere in state or federal law. The decision below conflicts with this Court's precedent regarding both the separation of powers and federal common law. Finally, the Sixth Circuit is the only Circuit that permits federal courts to create federal common law under ERISA where there is no gap in the statute and the rule created is inconsistent with Congress's intent, based solely on the federal court's view of what rule will further the purposes of ERISA. At least eight circuits expressly require both a gap to be filled and consistency with Congress's intent before creating federal common law under ERISA. This case provides an ideal vehicle to decide these exceptionally important issues.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended for thirty days to and including March 5, 2019.

Respectfully submitted,

Kevin K. Russell
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
kr@goldsteinrussell.com

and

Caroline H. Gentry
PORTER WRIGHT MORRIS & ARTHUR, LLP
One South Main Street
Suite 1600
Dayton, Ohio 45402
(937) 449-6748
cgentry@porterwright.com

January 18, 2019