No. 21-

IN THE

Supreme Court of the United States

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND,

Petitioner,

v.

C&S WHOLESALE GROCERS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"Congress enacted the [Multiemployer Pension Plan Amendments Act of 1980] MPPAA to protect the financial solvency of multiemployer pension plans." *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 196 (1997). One of MPPAA's central features is the mandatory payment of withdrawal liability when an employer withdraws from participation in a multiemployer plan, which "Congress imposed . . . to discourage withdrawals *ex ante* and cushion their impact *ex post*." *Id.* at 201-02. In order to effectuate this policy, Congress prohibited "any transaction" for which "a principal purpose . . . is to evade or avoid" withdrawal liability. 29 U.S.C. § 1392(c). Further, lower courts have unanimously applied the "any substantial continuity" successor liability doctrine articulated by this Court to the collection of withdrawal liability.

The questions presented are:

1. Whether the Second Circuit erred in holding that 29 U.S.C. § 1392(c) requires fraudulent conduct, in conflict with, among others, the Third Circuit's holding that the statute "is unambiguous" and "[t]he text in no way suggests that it only applies to sham or fraudulent transactions." *SUPERVALU, Inc. v. Bd. of Trs. of Sw. Pa. & W. Md. Area Teamsters & Emps. Pension Fund*, 500 F.3d 334, 343 (3d Cir. 2007).

2. Whether the Second Circuit erred in refusing to consider, as part of its "any substantial continuity" analysis, all of the facts and circumstances of the

case, including that the transaction at issue was not at arm's-length or for fair market value, in conflict with, among others, the Sixth Circuit's holding that when "a sale . . . is not conducted at arm's-length, successor liability can apply" and that "underpa[ying] for the profitable parts of [a business]" while leaving pension liability behind "do[es] not reflect commercial expectations that this court should ever protect, certainly not under ERISA." *Pension Benefit Guar. Corp. v. Findlay Indus., Inc., et al.*, 902 F.3d 597, 612 (6th Cir. 2018).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The caption contains the names of all the parties to the proceedings below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that New York State Teamsters Conference Pension and Retirement Fund has no parent corporation and no stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States District Court for the Northern District of New York, the United States District Court for the District of Columbia, and the United States Court of Appeals for the Second Circuit:

- *New York State Teamsters Conference Pension and Retirement Fund v. C&S Wholesale Grocers, Inc.*, No. 5:16-cv-00084 (N.D.N.Y.), judgment entered March 18, 2020;

- *New York State Teamsters Conference Pension and Retirement Fund v. C&S Wholesale Grocers, Inc.*, 1:20-cv-02434 (D.D.C.), case transferred August 12, 2021;

- *New York State Teamsters Conference Pension and Retirement Fund v. C&S Wholesale Grocers, Inc.*, 5:21-CV-00906 (N.D.N.Y.), case stayed August 13, 2021;

- *C&S Wholesale Grocers, Inc. v. New York State Teamsters Conference Pension and Retirement Fund*, 5:20-CV-01152 (N.D.N.Y.), case stayed November 19, 2020;

- *New York State Teamsters Conference Pension and Retirement Fund v. C&S Wholesale Grocers, Inc.*, No. 20-1185 (2d Cir.), judgment entered January 27, 2022, rehearing denied March 3, 2022.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

New York State Teamsters Conference Pension and Retirement Fund respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 24 F.4th 163 and reproduced at App.1a. The Second Circuit's order denying rehearing is unpublished and reproduced at App.90a.

The Northern District of New York's summary judgment decision is reported at 448 F.Supp.3d 188 and reproduced at App.39a. The Northern District of New York's motion to dismiss decision is unreported but electronically available at 2017 WL 1628896 and reproduced at App.57a.

JURISDICTION

The Second Circuit entered judgment on January 27, 2022 and denied Petitioner's petition for rehearing on March 3, 2022. The Second Circuit denied Petitioner's petition for rehearing on March 3, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4212(c) of the Employee Retirement Income Security Act, 29 U.S.C. § 1392(c), states: "If a principal purpose of any transaction is to evade or avoid liability

under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction."

STATEMENT OF THE CASE

A. Legal Background

This case concerns multiemployer pension plan withdrawal liability under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Multiemployer pension plans are "maintained pursuant . . . collective bargaining agreements between . . . employee organizations and more than one employer[.]" 29 U.S.C. § 1002(37)(A)(ii). In order to "protect the financial solvency of multiemployer pension plans[,]" the statute "requires employers who withdraw from underfunded multiemployer pension plans to pay a 'withdrawal liability.'" *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of California*, 522 U.S. 192, 195-96 (1997). "This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits[.]'" *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 725 (1984).

In order to "discourage[] companies from using corporate forms and manipulations to shield themselves from withdrawal liability[,]" *Chicago Truck Drivers v. El Paso CGP Co.*, 525 F.3d 591, 596 (7th Cir. 2008), Congress prohibited transactions which have "a principal purpose . . . to evade or avoid" withdrawal liability. 29 U.S.C. § 1392(c). This "evade or avoid" prohibition is broader than a similar provision in a nearby section of

ERISA applicable to single employer plans. *See* 29 U.S.C. § 1369(a). Among other differences, the multiemployer provision covers transactions which seek to "evade or avoid" liability, 29 U.S.C. § 1392(c), while the single employer provision only covers transaction which seek to "evade" liability. 29 U.S.C. § 1369(a). The multiemployer provision also applies to "any transaction" which has such "a principal purpose," 29 U.S.C. § 1392(c), while the single employer provision applies only to transactions in which a person who "would be subject [to liability]" "enter[s] into any transaction" with such "a principal purpose." 29 U.S.C. § 1369(a). Prior to the decision in this case, lower courts had unanimously interpreted the multiemployer "evade or avoid" provision as not requiring fraud. *See, e.g.*, *SUPERVALU, Inc. v. Bd. of Trs. of Sw. Pa. & W. Md. Area Teamsters & Emps. Pension Fund*, 500 F.3d 334, 343 (3d Cir. 2007) ("§ 4212(c) is unambiguous. The text in no way suggests that it only applies to sham or fraudulent transactions.").

Additionally, this Court has held, in the context of certain labor and employment obligations, that successor liability applies where "based upon the totality of the circumstances of a given situation . . . there is 'substantial continuity' between the enterprises." *See, e.g.*, *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27, 43 (1987). Lower courts, including the Second Circuit in this case, have unanimously applied this doctrine to withdrawal liability cases under ERISA, where the purchaser is on notice of the liability. *See* App.24a ("[W]e have held that (1) a successor must have notice of its predecessor's liability, and (2) there must be 'substantial continuity of identity in the business enterprise.'"); *see also* App.27a-33a; *Tsareff v. ManWeb Servs., Inc.*, 794 F.3d 841, 845-47 (7th Cir. 2015);

Resilient Floor Covering Pension Tr. Fund Bd. of Trs. v. Michael's Floor Covering, Inc., 801 F.3d 1079, 1093-95 (9th Cir. 2015).

B. Factual and Procedural History.

1. The Primary Players.

Petitioner New York State Teamsters Conference Pension and Retirement Fund (the "Pension Fund") is a multiemployer pension plan as defined in Section 3(37)(A) of ERISA, 29 U.S.C. § 1002(37)(A). *See* App.3a. The Pension Fund is based in Syracuse, New York, and pays pension and retirement benefits to nearly 34,000 active and retired Teamsters members and their families. *See* Pension Fund Second Circuit Brief, Dkt. 36 ("Fund Br.") at 2. At all relevant times, the Pension Fund has been underfunded such that withdrawing employers would be subject to withdrawal liability.

Respondent C&S Wholesale Grocers, Inc. ("C&S") is a wholesale grocery company, based in Keene, New Hampshire, which operates warehouses and distributes the groceries it procures to retail grocery stores. *See* App.3a.

The Penn Traffic Company ("Penn Traffic") was a grocery company based in Syracuse that operated retail grocery stores as well as two warehouses (one in Syracuse that was associated with withdrawal liability, and one in DuBois, Pennsylvania that was not) – which were used to service both its own retail grocery stores and other "independent" retail stores. *See id*. At its Syracuse warehouse, Penn Traffic employed approximately 450 union employees pursuant to a collective bargaining

agreement that required Penn Traffic to contribute to the Pension Fund. *See id.* Penn Traffic filed bankruptcy in November 2009, less than a year after its transaction with C&S. *See* App.5a.

2. C&S's Scheme to Take Over Penn Traffic's Supply Chain Business.

C&S wanted to acquire Penn Traffic's supply chain business without paying any of the associated withdrawal liability. In 2007, C&S offered to procure groceries for Penn Traffic and to operate its Syracuse and DuBois warehouses, with a condition: Penn Traffic fire all of the warehouse employees for the sole purpose of triggering and paying withdrawal liability, so that C&S would have no exposure to it. *See* Fund Br. at 8.[1] When Penn Traffic ultimately declined to structure the transaction in a manner that would require it to pay any withdrawal liability, C&S repeatedly proposed a multi-phase "master plan." *See* Fund Br. at 8-9, 12-13. First, C&S would take over all of Penn Traffic's procurement operations, purchase the rights to service Penn Traffic's "independent" retail customers, and purchase all of Penn Traffic's inventory in the warehouses. *See* Fund. Br. at 12. Second, after Penn Traffic's collective bargaining agreement expired (and, with it, the obligation to contribute to the Pension Fund), C&S would take over the warehouses. *See* Fund. Br. at 12-13.

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1. The Second Circuit's opinion states that "[i]n March 2008, C&S began investigating a possible acquisition of Penn Traffic." App.3a. C&S had actually been investigating that possibility as early as 2001, with various iterations and schemes in between. *See, e.g.*, Fund Br. at 4-11.

C&S and Penn Traffic formally completed the first phase of their "master plan" in December 2008, when they executed an asset purchase agreement. *See* App.3a-4a. C&S's CEO Richard Cohen confirmed in an e-mail to C&S's Board of Advisors that "when [Penn Traffic's] contract expires with their union, we will do the distribution piece. So that will add another 5 plus million dollars of Profit." Fund Br. at 15-16. As the Second Circuit explained:

> C&S did not want to acquire Penn Traffic's Syracuse warehouse because of the pension withdrawal liability associated with it. C&S therefore attempted to structure its $43 million acquisition transaction, executed in December 2008, in such a way as to limit its exposure to that liability: C&S acquired "Penn Traffic's wholesale distribution contracts, customers, equipment, files, records, goodwill, intellectual property, accounts receivable, and employees dedicated to Penn Traffic's wholesale distribution division who were not members of Teamsters Local 317." And C&S did not purchase the Syracuse warehouse.
>
> Following the transaction, Penn Traffic continued to run its Syracuse warehouse and distributed products to both its own stores and the independent stores that were now C&S customers based on the December 2008 transaction. This activity was governed by a third-party logistics agreement ("Logistics Agreement") that created an independent contractor relationship between Penn Traffic and C&S. Penn Traffic retained responsibility

> for "all employees, [f]acility and storage leases, material handling and transportation equipment, contracts and all other liabilities associated with" the Syracuse warehouse.

App.3a-4a (footnote omitted). In order to ensure continuity of operations and customer relationships, C&S hired senior Penn Traffic employees, including Penn Traffic's former CEO. *See* Fund. Br. at 41-42. Following the transaction, approximately 70% of the Syracuse warehouse was used to service Penn Traffic's retail stores (now supplied by C&S) and approximately 30% of the warehouse was used to service the "independent" customers C&S acquired from Penn Traffic. *See* App.35a.

C&S, however, did not directly hire the union employees at the Syracuse warehouse to continue servicing the Penn Traffic retail stores or independent customers. Instead, C&S entered into the third-party Logistics Agreement with Penn Traffic, pursuant to which C&S – the nation's largest company specializing in running retail grocery companies' warehouses – paid a retail grocery company to do warehousing on its behalf, was unprecedented in C&S's history. *See* Fund. Br. at 14-15. It was the functional equivalent of a professional sports team waking up one morning and deciding the best way to make the playoffs was to hire some of its fans to play. It made no business sense and was economically inefficient for all parties – and it was only tolerated, as a temporary measure, to avoid the payment of withdrawal liability. *See* Fund. Br. at 14-16.

No part of the "master plan" was accomplished at arm's-length. C&S's former Co-President, Mark Gross,

had been working to acquire Penn Traffic since 2001 (at that time through a deal with Penn Traffic's competitor, and existing C&S customer, Tops Markets, LLC ("Tops Markets")). *See* Fund Br. at 4-5. Mr. Gross subsequently left C&S, formed his own single-member LLC consulting firm of which he was the sole employee – and within months negotiated a consulting agreement to work for Penn Traffic on corporate transactions, and lied to Penn Traffic's Board, claiming he was not still being paid by C&S. *See* Fund Br. at 6-7. In reality, C&S was paying Mr. Gross a base of $2 million per year, with incentive fees for successful transactions, and his formation of the consulting firm was a condition of his additional severance payments. *See* Fund Br. at 6-7. C&S acknowledged in an internal e-mail between its two most senior executives that, "with respect to Mark [Gross] . . . working with [Penn Traffic] on the wholesale business and the distribution deal. I don't see how that is not a conflict but I also don't see how it hurts us, as he is motivated highly to get a deal done." Fund Br. at 7.

Mr. Gross, acting as C&S's double agent, "advocated to [Penn Traffic] that they complete a total outsourcing of their procurement and distribution operations with C&S." Fund Br. at 7. Meanwhile, Mr. Gross worked in secret with a senior C&S executive to "reshap[e] the [Penn Traffic] board." Fund Br. at 7. Other examples of overlapping personnel include Penn Traffic's CEO being a former C&S executive, Penn Traffic's general counsel coming over from C&S and providing legal advice to Penn Traffic while still employed by C&S, and Penn Traffic sending company-wide e-mails seeking to fill positions for C&S. *See* Fund Br. at 48-49. It is no wonder that C&S was able to pay substantially less than fair market value: approximately $30 million for Penn Traffic's wholesale

business, which had recently been appraised at $50 to $70 million. *See* Fund Br. at 16-17.[2]

The terms of the transaction were so unfair that C&S had an alternative to the second phase of its "master plan." C&S could wait, as originally planned, until the collective bargaining agreements expired (which was not until 2011, *see* Fund Br. at 12-13), or it could help push Penn Traffic into bankruptcy sooner and attempt to escape the collective bargaining agreements that way. Within weeks of acquiring Penn Traffic's wholesale business for less than fair market value, C&S began preparing for Penn Traffic's potential bankruptcy. *See* Fund Br. at 16. As a result of the terms of the transaction orchestrated by C&S, Penn Traffic's primary lender became uncomfortable with Penn Traffic's financial stability, and began limiting Penn Traffic's liquidity, ultimately leading to its bankruptcy in November 2009, less than a year after its asset sale to C&S. *See* Fund Br. at 16; App.5a. As Penn Traffic's condition deteriorated, Mr. Gross fed C&S "inside info" about Penn Traffic's condition and position with its lender, which caused C&S to refuse to remit to Penn Traffic deductions it was owed – further accelerating Penn Traffic's decline. *See* Fund Br. at 18. C&S noted that "we could probably get a better deal if [Penn Traffic] were to fail," and that "[w]e will let them go into bankruptcy." *See* Fund Br. at 18.

Prior to Penn Traffic's bankruptcy filing, Mr. Gross worked on C&S's behalf with Tops to ensure that Tops

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2. Although C&S paid Penn Traffic a total of $43 million, *see* App.3a-4a, only $30 million of that $43 million was for the wholesale business itself. *See* Fund Br. at 16.

would acquire Penn Traffic's retail stores (which would be C&S customers under an existing supply agreement with Tops) in Penn Traffic's bankruptcy, as well as the DuBois warehouse (which Tops would transfer to C&S), leaving the Syracuse warehouse and the pension liability behind, while C&S shifted the work to other warehouses. *See* Fund Br. at 17-19. There was no business purpose for closing the Syracuse warehouse, as a senior C&S executive admitted at his deposition: "[we were] never able to show real savings [from closing Syracuse]. So the business advantage to closing Syracuse really didn't exist." Fund Br. at 19. The result of these grossly inefficient machinations was that C&S ended up with, just as it planned, Penn Traffic's entire supply chain business, while – with surgical precision and otherwise contrary to everyone's interests – excising the only part of the operation associated with withdrawal liability.

The Pension Fund filed a claim for withdrawal liability of approximately $63.6 million in Penn Traffic's bankruptcy proceeding, but was only able to recover approximately $5 million of that from Penn Traffic's bankruptcy estate – and, in the instant proceeding, sued C&S to recover the remaining approximately $58 million in unpaid withdrawal liability. App.5a.

3. The District Court's Decisions.

On May 1, 2017, the district court issued a decision granting-in-part and denying-in-part C&S's motion to dismiss the Pension Fund's Amended Complaint. *See* App.57a.[3] The district court granted C&S's motion to dismiss the Pension Fund's evade or avoid claim under 29 U.S.C. § 1392(c), holding that provision inapplicable

3. The district court had jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1451(c).

because Penn Traffic's transaction with C&S did not render it "immediately insolvent." *See* App.82a. The district court, however, denied C&S's motion to dismiss the Pension Fund's successor liability claim, explaining that:

> A strict rule that forecloses applying successor liability for the singular reason that the selling company continues to exist nominally would create an arbitrary impediment to a doctrine that has its foundation in equity and flexibility. . . . Defendant's position would create a loophole where businesses would merely insist on keeping the predecessor afloat for a period of time after an asset sale to avoid withdrawal liability. Successor liability, however, is not about drawing lines in the sand; rather, it is an equitable doctrine that flexes and bends based "upon the totality of the circumstances of a given situation" and the federal rights at stake.

App.72-a73a (citing *Fall River*, 482 U.S. at 43). The district court also explained that "for successor liability to apply in this factual context, the Court must give special consideration to Defendant's relationship with the work that the union employees completed." App.76a.

On March 18, 2020, the district court issued a decision granting C&S's motion for summary judgment on the Pension Fund's successor liability claim. App.39a. The district court ruled that it "need not analyze Defendant's relationship with the work that the union employees completed" because it had already determined that "the Court finds that Defendant did *not* substantially continue

Penn Traffic's business after the 2008 transaction." App.54a.

4. The Second Circuit's Decision.

On January 27, 2022, the Second Circuit affirmed the district court's decisions. App.1a. With respect to the evade or avoid claim, the Second Circuit did not address the Pension Fund's argument that the district court erred in imposing an "immediate insolvency" requirement. *See* Fund Br. at 26-29.[4] Instead, the Second Circuit held that "[t]here are no allegations of fraud in this case," and while "non-employers" could be "liable for withdrawal liability under an 'evade or avoid' theory . . . it is the exceptional circumstance—involving fraud, or an employer who is otherwise working *with* a non-employer to make recovery on withdrawal liability unavailable . . . ." App.12a, 14a-15a.

With respect to the successor liability claim, the Second Circuit limited itself to analyzing the same facts discussed by the district court, without addressing the Pension Fund's argument that the district court should have analyzed "Defendant's relationship with the work that the union employees completed" as part of the "substantial continuity" analysis. *See* Fund Br. at 10-11. Without considering, *inter alia*, whether the transaction was at arm's-length or for fair market value, the Second Circuit held that "one overriding fact is ultimately decisive: *C&S did not purchase the Syracuse warehouse or employ the Union members who worked there*." App.35a.

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4. Among other arguments, the Pension Fund pointed out that another provision in ERISA expressly contemplates that an evade or avoid transaction can take place at least five years before a company withdraws from a plan. *See* 29 U.S.C. §§ 1401, (e) (f); Fund Br. at 28-29.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Creates At Least Two Circuit Splits.

1. The Second Circuit's Fraud Requirement Is Inconsistent With the Approaches Taken by the Third and Seventh Circuits.

The Second Circuit's holding that the Pension Fund's "evade or avoid" cause of action fell short because "[t]here are no allegations of fraud in this case," App.12a, conflicts with the precedent of at least two other circuits. Both the Third and Seventh Circuits have held that the provision is not limited to fraudulent or sham transactions. *See SUPERVALU*, 500 F.3d at 343 ("§ 4212(c) is unambiguous. The text in no way suggests that it only applies to sham or fraudulent transactions."); *Santa Fe Pac. Corp. v. Cent. States, Se. & Sw. Areas Pension Fund*, 22 F.3d 725, 729-30 (7th Cir. 1994) ("The statutory criterion is not whether the transaction is a sham, having no purpose other than to defeat the goals of the Multi-employer Pension Plan Amendments Act by leaving the other employers in the multiemployer pension plan holding the bag."). The Second Circuit's narrow construction of the "evade or avoid" provision is also inconsistent with the Fourth Circuit's holding that "§ 1392(c) . . . be liberally construed in favor of protecting the participants in employee benefit plans." *Teamsters Joint Council No. 83 of the Va. Pension Fund v. Weidner Realty Assocs.*, 377 F. App'x 339, 344 (4th Cir. 2010).

2. The Second Circuit's Refusal to Consider Whether the Transaction Was at Arm's-Length and for Fair Market Value Is, at a Minimum, Inconsistent With the Approach Taken by the Sixth Circuit.

The Second Circuit's refusal to consider all of the facts and circumstances of the case, including that the transaction was not at arm's-length or for fair market value, conflicts with, at a minimum, Sixth Circuit precedent. The Sixth Circuit has held that when "a sale is not conducted at arm's-length, successor liability can apply" and that "underpa[ying] for the profitable parts of [a business]" while leaving pension liability behind "do[es] not reflect commercial expectations that this court should ever protect, certainly not under ERISA." *Pension Benefit Guar. Corp. v. Findlay Indus., Inc., et al.*, 902 F.3d 597, 612 (6th Cir. 2018). Notably, the divergent holdings of the Second and Sixth Circuits resulted despite both courts relying on the same precedent from other circuits regarding the standard for successor liability. *See id.*; App.23a at n.52 (both relying on *Resilient Floor Covering*, 801 F.3d 1079 and *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1327 (7th Cir. 1990) as the basis for applying the federal any substantial continuity successor liability doctrine in the context of ERISA cases).

The Second Circuit's successor liability analysis is also inconsistent with this Court's decision in *Fall River Dyeing & Finishing Corp. v. National Labor Relations Board*, 482 U.S. 27 (1987), and the Seventh Circuit's

decision in *Indiana Electrical Workers Pension Benefit Fund v. ManWeb Servs., Inc.*, 884 F.3d 770 (7th Cir. 2018).

In *Fall River*, this Court held that: (i) there was substantial continuity where "60% to 70% of [a] business" was not acquired, 482 U.S. at 30; and (ii) purchasing "*some* of [a textile plant's] remaining inventory" on the open market at an auction supported a finding of successor liability. *Id.* at 32, 44. By contrast, the Second Circuit: (i) held that 70% "is a large enough majority" to weigh against a finding of substantial continuity, App.35a; and (ii) affirmed the district court's decision to give no weight to C&S's acquisition of 100% of the warehouse's inventory – which was its most valuable asset – in a non-arm's-length transaction. *See* App.36a-37a. *See also* Fund Br. at 45.

In *ManWeb*, the Seventh Circuit vacated a "district court [opinion which] emphasized the fact that no union employees went to work for ManWeb," and held there was "significant continuity of the workforce" where the successor hired "key individuals" from the predecessor. *See* 884 F.3d at 780-81. By contrast, the Second Circuit held that with respect "to the continuity of workforce and management . . . the relevant [employees were] Union employees," App.35a, and did not even mention that C&S hired Penn Traffic's former CEO for the express purpose of maintaining continuity. *See* Fund. Br. at 41-42.

B. The Decision Below Is Wrong and Conflicts With This Court's Decision in *Fall River*.

1. The Second Circuit's Interpretation of the Evade or Avoid Provision Is Wrong.

As discussed above, the Second Circuit's interpretation of the "evade or avoid" provision as requiring fraudulent conduct is inconsistent with Third and Seventh Circuit precedent. *See supra* at 13. The Second Circuit's outlier interpretation is also objectively wrong. It is true that the term "evade" is often associated with fraud. *See, e.g.*, *Kawashima v. Holder*, 565 U.S. 478, 488 (2012) (holding that "evasion-of-payment cases will almost invariably involve some affirmative acts of fraud or deceit . . . ."); *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 356, 357 (2016) (holding that "'actual fraud' . . . encompasses other traditional forms of fraud . . . such as a fraudulent conveyance of property made to evade payment to creditors"). Congress, however, not only prohibited "any" transaction with "a principal purpose" to "evade" withdrawal liability, but also those that seek to "avoid" withdrawal liability. 29 U.S.C. § 1392(c).

The clear intent of Congress to extend protection for multiemployer plans well beyond fraudulent transactions is further confirmed by comparison to a nearby provision in ERISA applicable to transactions involving single employer plans. While ERISA Section 4212(c) prohibits "any transaction" with "a principal purpose . . . to evade or avoid liability," 29 U.S.C. § 1392(c) (applicable to multiemployer plans), ERISA Section 4069(a) only prohibits "any transaction" with "a principal purpose . . . to evade liability." 29 U.S.C. § 1369(a) (applicable to

single employer plans). By limiting the single employer provision to only transactions which "evade" liability, while prohibiting all transactions relating to multiemployer plans which "evade or avoid" liability, Congress acted "intentionally and purposely" to extend liability beyond only those transactions involving fraud or evasion. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (alteration omitted).[5]

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5. As the Second Circuit correctly held, C&S's argument that the evade or avoid provision is inapplicable to buyers is "clearly . . . contrary" to precedent. *See* App.14a. That precedent is consistent with the plain text of the "evade or avoid" provision, which – unlike the provision applicable to single employer plans – is not limited to transactions in which a seller who is already subject to the liability seeks to evade it. *Compare* 29 U.S.C. § 1369(a) (only prohibiting transactions for which "a principal purpose of any person in entering into any transaction is to evade liability to which ***such person*** would be subject") (emphasis added) *with* 29 U.S.C. § 1392(c) (prohibiting "any transaction" for which "a principal purpose . . . is to evade or avoid [withdrawal] liability"). Accordingly, there is no basis to decline to apply the plain text of the statute based on a policy concern that it would be "imprudent[]," absent fraud, to impose liability on "[a] non-employer[.]" App.15a. In any event, applying the evade or avoid prohibition to the circumstances at issue here, where an acquisition is not at arm's-length or for fair market value, would not necessitate applying it to a transaction in which a buyer "merely" "decline[s] to assume . . . liability" by "not. . .purchas[ing] an encumbered asset." *Id.*

2. The Second Circuit's Application of the "Any Substantial Continuity" Successor Liability Test Is Wrong.

Under this Court's precedent, the Second Circuit should have ensured that "the totality of the circumstances of a given situation" was considered in determining "whether there is 'substantial continuity' between the enterprises." *Fall River*, 482 U.S. at 43. The Second Circuit did not do so, and failed to even mention – much less analyze – numerous key facts, including: (i) C&S's former Co-President's role as a conflicted double agent; (ii) the incestuous relationship and overlap between senior executives at C&S and Penn Traffic; and (iii) that C&S paid only $30 million for Penn Traffic's wholesale business, despite it being valued at $50-$70 million. *See supra* at 7-8. The Sixth Circuit's holding that whether a transaction is at "arm's-length" and whether a buyer "underpaid" are relevant considerations with respect to the applicability of successor liability, *see Findlay*, 902 F.3d at 612, is obviously correct. Unable to dispute the Sixth Circuit's holding, the Second Circuit simply ignored it and generally limited its analysis to the same incomplete set of facts discussed by the district court.[6]

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6. The district court's error appears to have been the result of it turning a universally recognized two-stage test of "notice" and "substantial continuity" into a three-stage test of "notice," "substantial continuity," and "Defendant's relationship with the work that the union employees completed" (which should have been analyzed as part of the "substantial continuity" test, but the district court never reached). *See* App.54a ("the Court finds that Defendant did *not* substantially continue Penn Traffic's business . . . . Therefore the Court need not determine . . notice . . . , nor must it analyze Defendant's relationship with

Nor can the Second Circuit's decision be justified by its statement that "one overriding fact is ultimately decisive: *C&S did not purchase the Syracuse warehouse or employ the Union members who worked there*." App.35a. That is not the test for successor liability. *See, e.g.*, *ManWeb*, 884 F.3d at 783 ("Isolated individual factors must be balanced as a whole to determine if successor liability is appropriate. The presence or absence of any one factor 'does not compel a particular conclusion.'"). And this Court has made clear that where, as here, a company refuses to hire union members solely to avoid the attendant obligations, that self-serving action cannot be used as the basis for declining to find successor liability. *See Howard Johnson Co. v. Detroit Local Joint Exec. Bd., Hotel & Rest. Emps. & Bartenders Int'l Union, AFL-CIO*, 417 U.S. 249, 262 n.8 (1974) ("[A] new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union."); *see also Monroe Sander Corp. v. Livingston*, 377 F.2d 6, 12 (2d Cir. 1967) (holding that in circumstances where "the failure to hire . . . employees . . . [cannot] be determinative" of successor liability, the fact that otherwise "similar" operations are shifted to a different physical location does not pose a hurdle to a finding of "any substantial continuity").

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the work that the union employees completed"). *See also supra* at 11-12. This error was raised with the Second Circuit. *See* Fund Br. at 36-37. Despite acknowledging that the proper test was the two-stage test, *see* App.24a, the Second Circuit ignored the district court's error, while asserting that it was able to "easily agree with [the district court's] conclusion" that there was no substantial continuity based on the district court's purportedly "tightly reasoned and thorough opinion." App.33a.

The Second Circuit's failure to consider "the totality of the circumstances of a given situation," *Fall River*, 482 U.S. at 43, is an error which warrants correction regardless of whether C&S is ultimately held liable as a successor. *See, e.g.*, *Lombardo v. City of St. Louis, Missouri*, 141 S. Ct. 2239, 2241-42 (2021) (per curiam) (vacating and remanding a case to the Eighth Circuit to consider "in the first instance" a multi-factor test that "cannot [be] appl[ied] . . . mechanically" and "requires careful attention to the facts and circumstances of each particular case" where the Eighth Circuit's opinion "failed to analyze [certain] evidence or characterized it as insignificant" and "could be read to" establish " a *per se* rule [that] would contravene the careful, context-specific analysis required by this Court's . . . precedent").

C. This Case Presents an Ideal Vehicle for Resolving Important and Recurring Questions.

As counsel for C&S has acknowledged, the Second Circuit's decision is "an important new precedent on withdrawal liability under ERISA," and addresses "a number of recurring legal issues . . . including the scope of liability under the statute's 'evade or avoid' provision . . . and the framework for evaluating successor liability." Jones Day, *C&S Wholesale Grocers defeats pension liability claims on appeal* (Jan. 2022).[7] The Second Circuit's decision has already begun wreaking havoc at the district court level, where it has been construed as holding that if a party does "not want to acquire . . . withdrawal

7. https://www.jonesday.com/en/practices/experience/2022/01/camps-wholesale-grocers-defeats-pension-liability-claims-on-appeal.

liability" the parties may simply "transact[] around it" even if the original employer "file[s] for bankruptcy shortly after." *Finkel v. Zizza & Assocs. Corp.*, No. 14-CV-4108(JS)(ARL), 2022 WL 970670, at *10 (E.D.N.Y. Mar. 31, 2022). Following that logic, the district court held that the transfer of a consulting business to a newly-formed entity in order to avoid the payment of withdrawal liability cannot "support evade-or-avoid liability as articulated by Second Circuit case-law" because "the Court cannot create a transaction that never existed, such as by re-imagining Mr. Zizza's decision to move his advisory and consulting business from Zizza & Co. to Zizza & Associates and then to Bergen Cove as one that involved a transaction between those parties." *Id.*

The problem will only get worse as transactional lawyers continue to see the case as "establish[ing] a potential framework for structuring transactions" to circumvent what had been the existing case law that "purchasers are more often than not held liable as successors[.]" Michael G. McNally, *Asset Purchaser Defeats Successor Liability Claim for Unpaid Withdrawal Liability*, Fox Rothschild LLP (Apr. 21, 2020).[8] This ongoing harm is directly contrary to the purpose of MPPAA, which is "to protect the financial solvency of multiemployer pension plans." *Bay Area Laundry*, 522 U.S. at 196.

The Second Circuit's refusal to consider "the totality of the circumstances of a given situation," *Fall River*,

8. https://www.foxrothschild.com/publications/asset-purchaser-defeats-successor-liability-claim-for-unpaid-withdrawal-liability.

482 U.S. at 43, including factors previously identified as relevant by other Circuits and this Court, makes this case an ideal vehicle for this Court to clarify the proper scope of the "any substantial continuity" successor liability test. Notably, after a series of decisions on this topic between 1964 and 1987, *see, e.g.*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Fall River*, 482 U.S. 27, this Court has not provided further guidance on the "any substantial continuity" test, even though it remains an area of active litigation in the district courts and courts of appeals.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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June 1, 2022

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JANUARY 27, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 20-1185-cv

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, BY ITS TRUSTEES, MICHAEL S. SCALZO, SR., JOHN BULGARO, DANIEL W. SCHMIDT, TOM J. VENTURA, BOB SCHAEFFER, BRIAN HAMMOND, MARK MAY AND PAUL MARKWITZ,

Plaintiff-Appellant,

v.

C&S WHOLESALE GROCERS, INC.,

Defendant-Appellee.[*]

May 3, 2021, Argued
January 27, 2022, Decided

As Corrected March 21, 2022.

On Appeal from the United States District Court for the Northern District of New York.

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[*] The Clerk of Court is directed to amend the caption as set forth above.

Appendix A

Before: CABRANES, RAGGI, and CARNEY, *Circuit Judges*.

JOSÉ A. CABRANES, *Circuit Judge:*

This case presents four questions: (1) whether the United States District Court for the Northern District of New York (Frederick J. Scullin, Jr., *Judge*) erred in dismissing the claim of Plaintiff New York State Teamsters Conference Pension and Retirement Fund (the "Fund") that Defendant C&S Wholesale Grocers ("C&S") "evaded and avoided" withdrawal liability under the Employee Retirement Income Security Act ("ERISA"); (2) whether the District Court erred in dismissing the Fund's claim that C&S was subject to withdrawal liability under a theory of "common control"; (3) whether the District Court erred in not finding that C&S was subject to withdrawal liability as an "employer"; and (4) whether the District Court erred in granting C&S's motion for summary judgment on the Fund's claim that C&S was subject to withdrawal liability as a "successor" under the "substantial-continuity doctrine." We hold that the District Court did not err in dismissing the claims based on the first two liability theories or in failing to find that C&S was an "employer." We also hold that while a "successor" can be subject to withdrawal liability under ERISA, the District Court, in the circumstances presented here, did not err in granting the Defendant's motion for summary judgment as to that claim. Accordingly, we **AFFIRM** the District Court's order and judgment.

Appendix A

I. BACKGROUND

Penn Traffic Company ("Penn Traffic") was a company based in Syracuse, New York, that operated approximately 80 retail grocery stores. Penn Traffic also operated two warehouses—one in Syracuse and one in DuBois, Pennsylvania—where it stored wholesale groceries, which it then distributed both to its own retail stores and to other "independent" retail stores.

At its Syracuse warehouse, Penn Traffic employed approximately 450 members of the Teamsters Local 317 union ("Union") under a collective bargaining agreement ("CBA") that required Penn Traffic to contribute to the Fund. The Fund, the Plaintiff-Appellant in this action, is organized as a "multiemployer plan" regulated by ERISA, under which Penn Traffic was subject to significant "withdrawal liability" if it ceased to make contributions. Briefly, if Penn Traffic "withdrew" from the Fund by ceasing to make contributions to it, Penn Traffic was liable to the Fund for its share of the Fund's unfunded vested benefits.[1]

Defendant C&S is a grocery wholesaler that also operates warehouses and distributes groceries to retailers. In March 2008, C&S began investigating a possible acquisition of Penn Traffic. C&S did not want to acquire Penn Traffic's Syracuse warehouse because of the pension withdrawal liability associated with it. C&S therefore attempted to structure its $43 million

1. *See* Section II.A, *infra*.

acquisition transaction, executed in December 2008, in such a way as to limit its exposure to that liability: C&S acquired "Penn Traffic's wholesale distribution contracts, customers, equipment, files, records, goodwill, intellectual property, accounts receivable, and employees dedicated to Penn Traffic's wholesale distribution division who were not members of Teamsters Local 317."[2] And C&S did not purchase the Syracuse warehouse.

Following the transaction, Penn Traffic continued to run its Syracuse warehouse and distributed products to both its own stores and the independent stores that were now C&S customers based on the December 2008 transaction. This activity was governed by a third-party logistics agreement ("Logistics Agreement") that created an independent contractor relationship between Penn Traffic and C&S. Penn Traffic retained responsibility for "all employees, [f]acility and storage leases, material handling and transportation equipment, contracts and all other liabilities associated with" the Syracuse warehouse.[3] The Logistics Agreement made clear that Penn Traffic was still responsible for employees at the Syracuse warehouse (the "Teamsters"), and that C&S was not:

> Penn Traffic Employees shall not be considered or deemed in any way to be employees of C&S. C&S shall not exercise any authority over the Penn Traffic Employees, including, but not limited to, selecting, engaging, fixing the

2. App'x 44 ¶ 52 (emphasis in the original).

3. Suppl. App'x 126.

> compensation of, discharging and otherwise managing, supervising and controlling the Penn Traffic Employees and no joint employer relationship shall exist.[4]

In November 2009, Penn Traffic filed for protection under Chapter 11 of the Bankruptcy Code. C&S then purchased the DuBois warehouse. A Penn Traffic competitor and longtime C&S client purchased many of Penn Traffic's retail stores. The Syracuse warehouse closed in May 2010, triggering the claimed withdrawal liability for which the Fund filed a $63.6 million claim in Penn Traffic's bankruptcy proceeding. The bankruptcy estate was able to cover only $5 million of that amount. The Fund then sought the remainder of the withdrawal liability—about $58 million—from C&S in this action, alleging various theories under which Penn Traffic's withdrawal liability was either transferred to, or jointly shared with, C&S.

The Fund's initial complaint was filed on January 22, 2016. On March 21, 2016, C&S moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief can be granted. On April 8, 2016, the Fund filed an amended complaint alleging theories of C&S's liability in four counts: (1) C&S was subject to the withdrawal liability as the "successor" to Penn Traffic ("successor liability"); (2) C&S had intentionally avoided the withdrawal liability, triggering a statutory provision, 29 U.S.C. § 1392(c), designed to

4. Suppl. App'x 144.

re-impose the liability in such a case ("evade-or-avoid liability"); (3) C&S was subject to the withdrawal liability because it had "common control" over the Syracuse warehouse Teamsters ("common control liability"); and (4) C&S was subject to the withdrawal liability as a "joint employer" of the Syracuse warehouse Teamsters ("joint employer liability").

On April 22, 2016, C&S filed a supplemental motion to dismiss, addressing the Fund's amended complaint. On May 1, 2017, the District Court granted C&S's supplemental motion in part and denied it in part. The District Court dismissed the theories of evade-or-avoid, common control, and joint employer liability, leaving as viable only the Fund's theory of successor liability. The District Court held that withdrawal liability could obtain under a successor liability theory and that the Fund's pleadings on this count were sufficiently plausible to withstand a motion to dismiss.

C&S moved for a certificate of appealability, under 28 U.S.C. § 1292(b), seeking to argue before us that, as a matter of law, there was no successor withdrawal liability under ERISA. On February 6, 2018, the District Court denied that motion. The parties proceeded to discovery, at the conclusion of which they filed cross-motions for summary judgment.

On March 18, 2020, the District Court granted C&S's motion for summary judgment, holding that C&S "did not substantially continue Penn Traffic's business after the 2008 transaction" and therefore could not "be held

responsible for Penn Traffic's withdrawal liability under the doctrine of successor liability."[5]

On appeal, the Fund challenges: (1) the District Court's dismissal of the "evade-or-avoid liability" theory; (2) its dismissal of the "common control liability" theory; (3) its finding that C&S was not an "employer" for the purpose of determining withdrawal liability;[6] and (4) its grant of summary judgment to C&S on the "successor liability" theory. We review each of these challenges in turn.

II. DISCUSSION

We review *de novo* a dismissal of a complaint for failure to state a claim upon which relief can be granted.[7] Likewise, "[w]e review *de novo* a district court's grant of summary judgment after construing all evidence, and drawing all reasonable inferences, in favor of the non-moving party."[8]

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5. Special App'x 53-54 (emphasis omitted).

6. The Fund abandons its theory of "joint employer liability" on appeal and asserts, instead, a challenge to the District Court's failure to find that C&S's logistics agreement was a "subterfuge," rendering C&S an "employer" of the Syracuse warehouse Teamsters. *See Section* II.D *infra*.

7. *Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465, 467 (2d Cir. 2019).

8. *Sotomayor v. City of New York*, 713 F.3d 163, 164 (2d Cir. 2013).

Appendix A

A. Withdrawal Liability

Congress enacted ERISA in 1974 in part "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans."[9] Plans to which multiple employers contributed jointly presented special concerns in this regard, because if one employer pulled out, this "reduce[d] a plan's contribution base" and "pushe[d] the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities."[10] Within the first few years after ERISA's enactment, a "significant number" of multiemployer plans were experiencing "extreme financial hardship."[11]

To address this concern, in 1980, Congress passed the Multiemployer Pension Plan Amendments Act ("MPPAA"), which amended ERISA to provide that "[i]f an employer withdraws from a multiemployer plan . . . then the employer is liable to the plan in the amount determined

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9. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984).

10. *Id.* at 722 n.2 (quoting *Pension Plan Termination Insurance Issues: Hearings before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 95th Cong. 22 (1978) (statement of Matthew M. Lind, Executive Director of the Pension Benefit Guarantee Corporation)).

11. *Id.* at 721.

. . . to be the withdrawal liability."[12] This statutory scheme was designed to "reduc[e] the burden of withdrawal on the plan and remaining employers," [13] and thereby "protect the financial solvency of multiemployer pension plans."[14]

Withdrawal liability is calculated based on the MPPAA, and generally represents the portion of a multiemployer pension fund's "unfunded vested benefits" allocable to the withdrawing employer.[15] A "complete withdrawal," which can trigger liability under the statute, occurs when an employer "permanently ceases to have an obligation to contribute under the plan" or "permanently ceases all covered operations under the plan," for example by going out of business, or renegotiating the terms of its CBA.[16] When this occurs, "the entity maintaining the plan[] must determine the amount of the employer's

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12. 29 U.S.C. § 1381(a); *see generally R.A. Gray*, 467 U.S. at 720-25 (explaining the history of the passage of the MPPAA).

13. *R.A. Gray*, 467 U.S. at 722 (internal quotation marks omitted).

14. *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 196, 118 S. Ct. 542, 139 L. Ed. 2d 553 (1997).

15. 29 U.S.C. § 1381(b)(1); *see generally ILGWU Nat'l Ret. Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879, 881 (2d Cir. 1988) (outlining the statutory scheme for the imposition of withdrawal liability).

16. 29 U.S.C. § 1383(a); *see HOP Energy, LLC v. Loc. 553 Pension Fund*, 678 F.3d 158, 161 (2d Cir. 2012) (noting that a company may be subject to withdrawal liability if "it permanently went out of business").

withdrawal liability, notify the employer of the amount[,] and make a demand for payment."[17]

B. Evade-or-Avoid Liability

The Fund argues that C&S acted intentionally to "evade or avoid" withdrawal liability by structuring its 2008 acquisition of Penn Traffic's distribution business in such a way as to never assume control of the Syracuse warehouse or its employees. According to the Fund, C&S can therefore be held liable under 29 U.S.C. § 1392(c), a provision of the MPPAA which establishes "evade-or-avoid" liability.

Section 1392 provides that "[i]f a principal purpose of any transaction is to evade or avoid [withdrawal] liability," then withdrawal liability "shall be applied (and liability shall be determined and collected) without regard to such transaction."[18] In other words, employers who are subject to withdrawal liability generally cannot engage in a transaction—the sale of their assets, for example—for the purpose of evading or avoiding that liability. If they do, they are subject to the liability as though the transaction in question did not occur.[19] Congress's intent in imposing

17. *Levy Bros. Frocks*, 846 F.2d at 881; 29 U.S.C. § 1382.

18. 29 U.S.C. § 1392(c).

19. *See, e.g., IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1053, 1056, 1057-58 (2d Cir. 1993) (noting that withdrawal liability claim was sufficiently stated where the alleged "principal purpose" of a company's sale of assets and bonuses issued to the company's owner "was to evade or avoid withdrawal liability").

evade-or-avoid liability was to "prevent withdrawing employers from threatening the financial stability of a plan by requiring the employers to pay their share of unfunded vested benefit liability."[20]

C&S argues that it was never subject to withdrawal liability to begin with, because it never owned the Syracuse warehouse or entered into an employment relationship with the Teamsters who worked there. Therefore, the first question we must answer is: Does "evade-or-avoid" liability apply only to "employers" seeking to avoid their withdrawal liability, or can non-employers also be held liable under the statute?

In evaluating the issue, we consider our decision in *IUE AFL-CIO Pension Fund v. Herrmann*.[21] There, an employer ("Manufacturing") entered into an agreement with a buyer ("Mowers"), in which Mowers acquired Manufacturing's assets but did not assume any of Manufacturing's liability under a multiemployer pension plan. Manufacturing's owner, Herrmann, was alleged to have siphoned significant funds away from his company in the course of the acquisition, in the form of signing bonuses and side-deals. The pension fund alleged that "[t]hese transactions . . . rendered Manufacturing insolvent."[22] When Manufacturing went bankrupt and

20. *SUPERVALU, Inc. v. Bd. of Trs. of Sw. Pa. & W. Md. Area Teamsters & Emps. Pension Fund*, 500 F.3d 334, 342 (3d Cir. 2007).

21. 9 F.3d 1049.

22. *Id.* at 1053.

withdrew from its multiemployer pension plan, the fund sued not just Manufacturing (the relevant employer), but also Herrmann and Mowers to recover under Section 1392. We held that "[t]o calculate and collect liability, 'without regard to [the] transaction,' any assets that were transferred in order to 'evade or avoid liability,' as well as the parties to whom they were improperly transferred,"—*i.e.*, non-employers Herrmann and Mowers—"must be within the reach of the statute."[23]

According to the Fund, in the instant case, because C&S clearly structured its acquisition of Penn Traffic's assets in a way that limited its exposure to the withdrawal liability associated with the Syracuse warehouse and the Teamsters, the logic of *Herrmann* exposes C&S to liability under Section 1392.

In our view, *Herrmann* does not require that C&S similarly "must be within the reach of the statute." First, the plaintiffs in *Herrmann* sufficiently pleaded that the asset transfer at issue was fraudulent.[24] There are no allegations of fraud in this case, and any such claims would, at this stage, be waived.[25] Herrmann allegedly

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23. *Id.* at 1056 (emphasis omitted) (quoting 29 U.S.C. § 1392(c)).

24. *Id.* at 1058 (finding that the "fraud claims alleged in the [c]omplaint are legally sufficient").

25. *See Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*, 54 F.3d 69, 73 (2d Cir. 1995) ("Generally, a federal appellate court does not consider an issue not passed upon below." (internal quotation marks omitted)).

controlled Manufacturing and *worked together* with Mowers to illicitly direct Manufacturing's funds so that it could avoid Manufacturing's withdrawal liability. The analogous scenario in this case would be one in which Penn Traffic worked with C&S to bankrupt *itself* in order to avoid *its own* withdrawal liability. As the District Court correctly pointed out, while C&S and Penn Traffic may have structured their deal so that C&S avoided assuming Penn Traffic's withdrawal liability, "they did not structure the transaction so that Penn Traffic became . . . unable to pay [Penn Traffic's] withdrawal liability."[26] In *that* hypothetical scenario, it might have made sense to bring Section 1392 claims against Penn Traffic, and C&S as well. But no such claims are alleged here.

In *Herrmann*, the reason Section 1392 could be applied to non-employers Herrmann and Mowers was that the assets at issue were alleged to have been "improperly *transferred*" to them.[27] Apportioning liability and engaging in recovery "without regard to [the] transaction"—as contemplated by the MPPAA—effectively required the plaintiffs to be able to negate the transaction and recover from the non-employer parties then possessing those funds.[28]

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26. Special App'x 21.

27. *Herrmann*, 9 F.3d at 1056 (emphasis added).

28. *Id.* ("To calculate *and* collect liability, . . . any assets that were transferred . . . as well as the parties to whom they were improperly transferred, must be within the reach of the statute."); *see also Connors v. Marontha Coal Co.*, 670 F. Supp. 45, 47 (D.D.C. 1987) ("Whenever a transaction *has removed assets*

Here, by contrast, the Fund essentially alleges the opposite: that C&S improperly *failed to acquire* the assets at issue from Penn Traffic. This difference is critical. We agree with what the First Circuit has held in a similar context: that Section 1392 "requires courts to put the parties in the same situation as if the offending transaction never occurred; that is, to erase that transaction. It does not, by contrast, instruct or permit a court to take the affirmative step of writing in new terms to a transaction or to create a transaction that never existed."[29]

This is not to say that non-employers *cannot* be liable for withdrawal liability under an "evade or avoid" theory simply because they were not the original employer subject to that liability. *Herrmann* and the law of our Circuit are clearly to the contrary.[30] But it is the exceptional

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from the formal structure of the corporation being assessed for withdrawal liability, liability can only be 'collected' if there is a right of action against the transferee, whether or not it fits the definition of 'employer.' If, for example, a defendant company divided itself into two corporations for the purpose of evading the collection of withdrawal liability, liability would undoubtedly be collectible from both new corporations." (emphasis added)).

29. *Sun Cap. Partners III, LP v. New Eng. Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 149 (1st Cir. 2013); *see also Lopresti v. Pace Press, Inc.*, 868 F. Supp. 2d 188, 206 (S.D.N.Y. 2012) ("[T]here is a difference between declining to assume withdrawal liability that one never had the obligation to pay and evading withdrawal liability that one is already legally obligated to pay.").

30. *See N.Y. State Teamsters Conf. Pension & Ret. Fund v. Express Servs., Inc.*, 426 F.3d 640, 647 n.6 (2d Cir. 2005) ("[A]

circumstance—involving fraud, or an employer who is otherwise working *with* a non-employer to make recovery on withdrawal liability unavailable[31]—that brings the collaborating employers and non-employers together "within the reach" of Section 1392.

A non-employer *cannot* be said to evade or avoid liability merely by declining to assume that liability in the first place. To hold otherwise would be to paradoxically and imprudently encumber with liability the perfectly sensible business decision precisely *not to purchase* an encumbered asset. The District Court therefore properly dismissed the Fund's claim for "evade or avoid" liability.

C. Common Control Liability

The Fund argues separately that Penn Traffic and C&S were under "common control," and that C&S is therefore liable for withdrawal liability.

Under 29 U.S.C. § 1301(b)(1), "all employees of trades or businesses . . . which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer" for

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non-employer . . . can be sued for engaging in evade-or-avoid transactions. . . . The district court was therefore mistaken when it stated that an evade-or-avoid lawsuit is more properly brought against an admitted employer." (cleaned up)).

31. *See id.* (noting that evade-or-avoid liability may obtain against a non-employer who works "in conjunction with" an employer).

the purposes of determining withdrawal liability under ERISA. ERISA adopts a definition of "common control" from tax regulations promulgated by the Secretary of the Treasury.[32] Under that definition, businesses are under "common control" if they are: (1) part of the same parent-subsidiary corporate structure; (2) majority-owned by the same group of five or fewer persons; or (3) a combination of (1) and (2).[33]

Reviewing the Fund's amended complaint, we find nothing to suggest that Penn Traffic and C&S satisfied any part of this regulatory definition for common control. In fact, the Fund does not plead that C&S and Penn Traffic had *any* common owners.[34]

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32. *See* 29 U.S.C. § 1301(a)(14)(B). Such parallel definitions are common, given that Title III of ERISA explicitly requires the Secretary of Labor and the Secretary of the Treasury to work together to administer ERISA. *See* 29 U.S.C. § 1204(a) ("Whenever in this chapter or in any provision of law amended by this chapter the Secretary of the Treasury and the Secretary of Labor are required to carry out provisions relating to the same subject matter (as determined by them) they shall consult with each other and shall develop rules, regulations, practices, and forms which . . . are designed to reduce . . . conflicting or overlapping requirements . . . ."); *see also* Colleen E. Medill, Introduction to Employee Benefits Law: Policy and Practice 29-30 (5th ed. 2018) (explaining the division of authority between the Department of Labor, the Treasury Department, and the Pension Benefit Guaranty Corporation under ERISA).

33. *See* 26 C.F.R. § 1.414(c)-2.

34. *Cf.* App'x 36 (acknowledging the "technical separation in ownership between C&S and the Penn Traffic Company under state law"); *id.* at 38 ¶¶ 13-17.

On appeal, the Fund suggests that common control for the purposes of ERISA can be established by a "partnership-in-fact." Such a claim is without any basis in the caselaw of our Circuit, but the First Circuit has adopted an eight-part test from the jurisprudence of the United States Tax Court to determine whether such a "partnership-in-fact" exists and establishes common control under ERISA.[35] Even assuming, without deciding, that the law of the First Circuit is persuasive or applicable here, the Fund's claim would not succeed. The amended complaint's allegation that "C&S and Penn Traffic each stood to realize a profit or loss" based on whether the Syracuse warehouse business was successful neither satisfies the First Circuit's test nor convinces us that a "partnership-in-fact" could have existed between these businesses.[36]

In sum, we agree with the District Court that the Fund has "not even remotely" pleaded facts that would sustain a claim under Section 1301(b).[37] The District Court was therefore correct to dismiss the "common control" count.

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35. *See Sun Cap. Partners III, LP v. New Eng. Teamsters & Trucking Indus. Pension Fund*, 943 F.3d 49, 57-58 (1st Cir. 2019) (citing *Luna v. Comm'r*, 42 T.C. 1067, 1077-78 (1964)).

36. *See* App'x 51 ¶ 95.

37. Special App'x 23.

D. Employer Liability

Next, the Fund argues that C&S used its Logistics Agreement as a "subterfuge" to mask the fact that it was actually the "employer" of the Syracuse warehouse Teamsters, and that C&S is therefore subject to withdrawal liability.[38] This argument is before us in a somewhat unusual posture that requires analysis.

At the outset, it is important to distinguish this argument from the fourth count of the Fund's amended complaint. Under that count, the Fund argued that C&S was subject to withdrawal liability as an "employer" under the "joint employer" doctrine, and the District Court dismissed that count under Rule 12(b)(6) in its May 1, 2017 order.[39] On appeal, the Fund abandons that argument and the associated count of its amended complaint.

By contrast, the Fund first articulated a version of its "subterfuge" argument in its opposition to C&S's motion for summary judgment. Therefore, on appeal, the "subterfuge" argument can only be properly understood as an appeal of some error made by the District Court in its summary judgment order of March 18, 2020, even though that order dealt only with the "successor" liability count of the amended complaint (the District Court having already dismissed the other three counts).[40] In effect, therefore, the Fund in its "subterfuge" argument attempts

38. Appellant's Br. 50-51.

39. Special App'x 23–26.

40. *Id.* at 45.

to shoe-horn an "employer" theory of liability (that might have been more appropriate under the dismissed and abandoned fourth count of the Fund's amended complaint, or under a separate count entirely) into its appeal of the District Court's treatment of the separate but sole-surviving first count of its amended complaint, *i.e.*, successor liability.

C&S therefore urges that the "subterfuge" argument is "new" and "forfeited."[41] We recognize instead that the argument *was* before the District Court at the summary judgment stage, albeit in an abbreviated and defensive form, rather than articulated—as it is on appeal—as an independent theory of C&S's withdrawal liability. Still, we have no problem rejecting the Fund's "subterfuge" theory of "employer" liability and finding that the District Court committed no error with regard to it.

Under the Logistics Agreement, C&S agreed to reimburse a portion of the costs—including a portion of the labor costs—Penn Traffic incurred on behalf of C&S as an independent contractor operating the Syracuse warehouse.[42] The Fund argues that this reimbursement contract was essentially a facade that allowed C&S to employ the Teamsters without doing so officially. Instead, in the Fund's view, Penn Traffic continued to act as the official employer, and C&S simply reimbursed Penn Traffic's costs—thereby reaping the benefits of the Teamsters' labor without having to assume the liabilities of formal employment (such as withdrawal liability). This

41. Appellee's Br. 50-51.

42. Suppl. App'x 129-31.

argument relies on a single footnote in *Division 1181 A.T.U.-New York Employees Pension Fund By Cordiello v. City of New York Department of Education*. There, we opined:

> There may be cases in which a plaintiff seeking to recover withdrawal liability payments plausibly alleges that the defendant used reimbursement as a subterfuge to avoid accepting a contractual obligation to contribute. We do not foreclose the possibility that such allegations, if proven, could render the reimbursing entity an "employer" under the MPPAA.[43]

Far from "holding" that a defendant is made an employer for the purpose of withdrawal liability by engaging in a so-called subterfuge reimbursement, in *Division 1181* we merely declined to foreclose that possibility.[44] We found such a holding unnecessary, because the plaintiffs in that case had not, in fact, shown any subterfuge.[45]

Just so here. The Fund submits that because agreements such as the Logistics Agreement were "not part of the ordinary course of C&S's business," the agreement was therefore the type of "subterfuge" contemplated in our *Division 1181* footnote.[46] This

43. 910 F.3d 608, 616 n.4 (2d Cir. 2018).

44. *Compare id. with* Appellant's Br. 51.

45. *See Div. 1181*, 910 F.3d at 616 n.4.

46. Appellant's Br. 51.

somewhat vague suggestion runs up against our *actual* holding in *Division 1181*, and solid caselaw from our sister circuits more broadly, that an obligation to reimburse an independent contractor for contributions to a pension plan is not the same as an obligation to contribute directly to that plan: "[R]eimbursement and contribution are distinct concepts under the MPPAA" and therefore "no obligation to contribute" to a multiemployer pension plan "aris[es] under . . . contracts" that require non-employers to reimburse an employer's contributions under such a plan.[47]

C&S entered into a well-recognized form of contractual agreement in which C&S reimbursed Penn Traffic for certain expenses that Penn Traffic incurred as an independent contractor operating the Syracuse warehouse. The fact of a reimbursement arrangement alone—even for a company that may not frequently enter into such arrangements—does not a "subterfuge" make.

Is sum, the Fund failed to allege that C&S was an "employer" based on its "subterfuge" theory, and the District Court committed no error in this regard.

E. Successor Liability

The Fund's final theory of liability is that, based on its acquisition of Penn Traffic's wholesale and distribution

47. *Div. 1181*, 910 F.3d at 616-17; *accord Transpersonnel, Inc. v. Roadway Exp., Inc.*, 422 F.3d 456, 461 (7th Cir. 2005) ("[T]he obligation to *reimburse* for contributions made by another is not the equivalent of an obligation to *contribute* in the first instance, and this distinction is important for purposes of [the] definition of 'employer' under the MPPAA.").

business, C&S was the "successor" to Penn Traffic and therefore C&S assumed Penn Traffic's withdrawal liability. In allowing this theory to proceed past the motion-to-dismiss stage, the District Court held that successor liability could apply to withdrawal liability under ERISA.

Having never explicitly addressed that question ourselves, we examine successor liability and its application to withdrawal liability prior to turning back to the circumstances of the instant case.

1. Successor Liability Generally

Under the general common law rule, "a corporation that merely purchases for cash the assets of another corporation does not assume the seller corporation's liabilities."[48] However, the Supreme Court has "imposed liability upon successors beyond the bounds of the common law rule in a number of different employment-related contexts in order to vindicate important federal statutory policies."[49] The Supreme Court has held, for example, that a "successor employer may be required to arbitrate with [a] union" under a predecessor's CBA,[50] or may be held liable for a "predecessor employer's unfair labor practices"

48. *Stotter Div. of Graduate Plastics Co. v. Dist. 65*, 991 F.2d 997, 1002 (2d Cir. 1993) (internal quotation marks omitted).

49. *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1326 (7th Cir. 1990).

50. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964).

under the National Labor Relations Act ("NLRA").[51] Federal courts have further expanded the boundaries of "successor liability" to include other federal statutory schemes, such as ERISA,[52] the Fair Labor Standards Act,[53] the Family and Medical Leave Act,[54] and Title VII of the Civil Rights Act of 1964,[55] among others.[56]

Successor liability is thus a "deviation" from the general common law rule.[57] In fashioning this body of

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51. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184, 94 S. Ct. 414, 38 L. Ed. 2d 388 (1973); *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987).

52. *See, e.g., Resilient Floor Covering Pension Tr. Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1093-95 (9th Cir. 2015); *Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89, 99 (3d Cir. 2011); *Artistic Furniture*, 920 F.2d at 1327.

53. *See, e.g., Teed v. Thomas & Betts Power Sols., LLC*, 711 F.3d 763, 766-77 (7th Cir. 2013); *Steinbach v. Hubbard*, 51 F.3d 843, 845 (9th Cir. 1995).

54. *See, e.g., Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 781 (9th Cir. 2010).

55. *See, e.g., Bates v. Pac. Maritime Ass'n*, 744 F.2d 705, 708 (9th Cir. 1984).

56. *See, e.g., Scalia v. Wynnewood Refin. Co.*, 978 F.3d 1175, 1184 (10th Cir. 2020) (Occupational Safety and Health Act); *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 747-48 (7th Cir. 1994) (Age Discrimination in Employment Act); *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 748-50 (7th Cir. 1985) (race-based employment discrimination under 42 U.S.C. § 1981).

57. *New York v. Nat'l Servs. Indus., Inc.*, 352 F.3d 682, 688

law, federal courts have attempted to "strik[e] a balance between the conflicting legitimate interests of the . . . successor, the public, and the affected employee[s]."[58] In other words, "[s]uccessor liability is an equitable doctrine, not an inflexible command."[59] The Supreme Court has therefore emphasized that there is "no single definition of 'successor' which is applicable in every legal context," and that the question of whether to hold a new employer to the obligations of a former employer is one that must be considered "in light of the facts of each case and the particular legal obligation which is at issue."[60]

In the cases where we have found it appropriate to impose successor liability, we have held that (1) a successor must have notice of its predecessor's liability, and (2) there must be "substantial continuity of identity in the business enterprise."[61] Other circuits have employed similar formulations.[62]

(2d Cir. 2003) (Leval, J., concurring).

58. *Golden State Bottling*, 414 U.S. at 181.

59. *Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995).

60. *Howard Johnson Co. v. Detroit Loc. Joint Exec. Bd.*, 417 U.S. 249, 263 n.9, 94 S. Ct. 2236, 41 L. Ed. 2d 46 (1974).

61. *See, e.g., Stotter*, 991 F.2d at 1001 (quoting *Wiley*, 376 U.S. at 551); *see also Golden State Bottling*, 414 U.S. at 185 ("[A] successor must have notice before liability can be imposed . . . .").

62. *Ind. Elec. Workers Pension Benefit Fund v. ManWeb Servs., Inc.*, 884 F.3d 770, 777 (7th Cir. 2018) ("Successor liability under the MPPAA requires two distinct components: notice of the

The Supreme Court has said that factors to consider in order to establish "substantial continuity" include:

> whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.[63]

However, the Courts of Appeals have grouped these considerations slightly differently,[64] or emphasized certain

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potential liability and substantial continuity of the business."); *Resilient Floor*, 801 F.3d at 1095 ("[A] bona fide successor can be liable . . . so long as the successor had notice of the liability."); *Einhorn*, 632 F.3d at 99 (purchaser of assets may be liable "where the buyer had notice of the liability prior to the sale and there exists sufficient evidence of continuity of operations between the buyer and seller").

63. *Fall River Dyeing*, 482 U.S. at 43; *see Proxy Commc'ns of Manhattan, Inc. v. NLRB*, 873 F.2d 552, 554 (2d Cir. 1989) (per curiam).

64. *Compare, e.g., Resilient Floor*, 801 F.3d at 1090-91 ("Whether there has been a substantial continuity of the same business operations; whether the new employer uses the same plant; whether the same or substantially the same work force is employed; whether the same jobs exist under the same working conditions; whether the same supervisors are employed; whether the same machinery, equipment, and methods of production are used; and whether the same product is manufactured or the same service is offered." (cleaned up)), *with Einhorn*, 632 F.3d at 99 ("Under the substantial continuity test courts look to, *inter alia*,

factors more than others, depending on the statutory scheme to be vindicated and the circumstances of the case.[65]

In other words, "the concept of substantial continuity" is not "satisfied in the same way in each circumstance," and "the test developed for one statute differs from the test developed for another."[66] Ultimately, the question of whether there is substantial continuity between a predecessor and a successor "is primarily factual in nature and is based upon the totality of the circumstances of a given situation."[67]

As the Supreme Court itself has indicated, this factual focus is "especially appropriate" given the "difficulty" of the successorship doctrine and "the absence of congressional guidance as to its resolution."[68]

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the following factors: continuity of the workforce, management, equipment and location; completion of work orders begun by the predecessor; and constancy of customers.").

65. *See, e.g., Resilient Floor*, 801 F.3d at 1096 (explaining that certain "factors are more relevant to NLRA contexts than to the MPPAA withdrawal liability context," and therefore weighting factors differently).

66. *Nat'l Servs. Indus.*, 352 F.3d at 688 (Leval, *J.*, concurring); *accord Resilient Floor*, 801 F.3d at 1093 ("[T]he cases that have considered in various labor and employment law contexts whether an employer is a successor have tailored their analyses to the particular policy concerns underlying the applicable statute and to the particular claim. The successorship standards are flexible and must be tailored to the circumstances at hand.").

67. *Fall River Dyeing*, 482 U.S. at 43.

68. *Howard Johnson*, 417 U.S. at 256.

Therefore, some caution is appropriate when faced with a decision—as we are in the instant case—as to whether the doctrine is properly applied in a new context.

2. Successor Liability for ERISA Withdrawal Liability

We have previously applied successor liability to delinquent pension fund contributions under ERISA. In *Stotter Division of Graduate Plastics Co. v. District 65*,[69] we considered the purchase of the assets of one plastic goods manufacturer ("Stotter") by another ("GPC"). Stotter had been obligated to make contributions to a union pension plan on behalf of its employees. Stotter fell behind on its contributions, and the union representing its employees commenced an arbitration. As the arbitration was pending, GPC purchased Stotter, and the arbitration resulted in an award for the union that the arbitrator ruled was enforceable against GPC as Stotter's successor.[70] The district court applied the Supreme Court's decision in *John Wiley & Sons, Inc. v. Livingston*,[71] which held that an arbitration provision in a predecessor's CBA was enforceable against a successor where there was "substantial continuity of identity in the business enterprise."[72] The district court held that successor liability had therefore been properly applied to Stotter's

69. 991 F.2d 997 (2d Cir. 1993).

70. *Id.* at 998-99.

71. 376 U.S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964).

72. *Id.* at 551.

delinquent ERISA contributions, and we affirmed.[73]

In doing so, we noted the "substantial continuity of Stotter's operations under GPC" and concluded that the arbitrator had correctly "impos[ed] liability for the contribution delinquencies" on GPC.[74]

To be sure, the facts presented in *Stotter* differ from those presented here. Most importantly, and as C&S emphasizes, GPC had agreed to be bound by Stotter's CBA.[75] Still, the logic of *Stotter* rested on *Wiley*, in which the successor had *not* agreed to be bound by the predecessor's CBA—indeed, *Wiley* stands for the very proposition that a successor "which *did not itself sign* the collective bargaining agreement on which [a] [u]nion's claim to arbitration depends" can still be "bound" by that arbitration provision.[76] Based on *Stotter*, at a minimum, we are confident that ERISA is precisely the sort of statute—embodying the sort of federal labor relations policy goals—to which the successor liability doctrine can legitimately apply.

But we have never held that successor liability can be applied to *withdrawal liability* under ERISA. Both the Seventh and Ninth Circuits have considered that question squarely, and both have concluded that it can.[77]

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73. *Stotter*, 991 F.2d at 1000, 1002-03.

74. *Id.* at 1002-03.

75. *Id.* at 999.

76. *Wiley*, 376 U.S. at 547 (emphasis added).

77. *See Tsareff v. ManWeb Servs., Inc.*, 794 F.3d 841, 845-47 (7th Cir. 2015); *Resilient Floor*, 801 F.3d at 1093-95.

Both of those circuits had, themselves, previously applied the doctrine to delinquent ERISA contributions,[78] and neither saw any reason not to apply the same rule to withdrawal liability as well. As the Ninth Circuit explained:

> We see no reason why the successorship doctrine should not apply to MPPAA withdrawal liability just as it does to the obligation to make delinquent ERISA contributions. The primary reason for making a successor responsible for its predecessor's delinquent ERISA contributions is that, "absent the imposition of successor liability, present and future employer participants in the union pension plan will bear the burden of the predecessor's failure to pay its share," which will threaten the health of the plan while the successor reaps a windfall. That rationale applies with equal, if not greater, force to a predecessor's MPPAA withdrawal liability.[79]

Relying on our decision in *Stotter* and persuaded by the rationale of *Resilient Floor*, the District Court, in its May 1, 2017 order, held that "the theory of successor liability is applicable to withdrawal liability under ERISA."[80] We agree.

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78. *See Artistic Furniture*, 920 F.2d at 1327; *Trs. for Alaska Laborers-Constr. Indus. Health & Sec. Fund v. Ferrell*, 812 F.2d 512, 516 (9th Cir. 1987); *see also Einhorn*, 632 F.3d at 99 (same).

79. *Resilient Floor*, 801 F.3d at 1093-94 (alterations omitted) (quoting *Artistic Furniture*, 920 F.2d at 1328).

80. Special App'x 10.

On appeal, C&S argues that 29 U.S.C. § 1384 demonstrates that successor liability ought not extend to withdrawal liability. That section provides that, under certain conditions, a seller-employer does not incur withdrawal liability "as a result of a . . . sale of assets to an unrelated party."[81] In other words, Section 1384 "protect[s] an employer from withdrawal liability with respect to a sale of assets that meets certain requirements."[82]

But those requirements are all "designed to shift the obligation for contributions to the purchaser while leaving the seller secondarily liable."[83] That is, *sellers* are protected from withdrawal liability by the statute if their purchasers effectively assume responsibility for contributing to the plan themselves. But that does not mean that, under Section 1384, *purchasers* can *only* assume that liability "by consent" as C&S suggests.[84] Rather, if purchasers find a way to *not* assume withdrawal liability pursuant to the terms of the asset sale—but they do, in fact, qualify as successors under the substantial continuity doctrine—they may still be liable.[85]

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81. 29 U.S.C. § 1384(a)(1).

82. *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Cullum Cos.*, 973 F.2d 1333, 1337 (7th Cir. 1992) (citation omitted).

83. *Id.* (citation omitted).

84. Appellee's Br. 43.

85. Likewise inapposite is the specific case covered by § 1384(a)(1)(C), in which the purchaser subsequently withdraws from the plan, triggering the seller's secondary liability. While this is "one circumstance in which a[] [purchaser] employer who might . . . otherwise fit into the successor category is not liable for withdrawal payments," in that case the liability would shift

More theoretically, C&S urges that the extension of successor liability to withdrawal liability is the sort of federal common lawmaking prohibited by *United States v. Bestfoods*,[86] and analogous to our now-overruled decision in *BF Goodrich v. Betkoski*,[87] which extended the doctrine of successor liability to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[88]

Following *Bestfoods*'s holding that CERCLA did not displace common law principles regarding a parent corporation's liability for the actions of its subsidiary, and its admonition that "to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law,"[89] we overruled *Betkoski* in *New York v. National Services Industries, Inc.*[90]

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back to the seller, and such a scenario therefore "does not address whether the broader employment and labor law successorship doctrine applies where those stringent conditions are not met." *Resilient Floor*, 801 F.3d at 1094 (emphasis omitted).

86. 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998).

87. 99 F.3d 505 (2d Cir. 1996).

88. *Id.* at 518-20.

89. 524 U.S. at 63 (internal quotation marks omitted).

90. 352 F.3d 682, 685 (2d Cir. 2003).

But *National Services* is easily distinguishable. There, the question was "whether, in *the context of CERCLA*, the substantial continuity rule for successor liability" could apply to liability for environmental harms.[91] We held that while "the substantial continuity doctrine is well established in the area of labor law," the doctrine did not apply "*for CERCLA purposes*."[92] In other words, both *Bestfoods* and *National Services* concerned CERCLA specifically. They did not purport to address or undermine the concept of successor liability in the labor law context.

Despite C&S's suggestions to the contrary, the successor liability doctrine is not limited to the NLRA or collective bargaining *per se*. The Supreme Court has never suggested as much, and multiple authorities demonstrate the opposite.[93] ERISA, too, effects the goals of federal labor policy. It is therefore part of the labor law context in which successor liability originates, and into which it can be carefully yet confidently extended.[94]

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91. *Id.* at 684 (emphasis added).

92. *Id.* at 686, 687 (emphasis added).

93. *See supra* notes 52–56.

94. *Cf. Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 377, 122 S. Ct. 2151, 153 L. Ed. 2d 375 (2002) ("Congress intended a 'federal common law of rights and obligations' to develop under ERISA . . . ." (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987)).

C&S's warnings of a "potential policy catastrophe" that will "wreak havoc on the free flow of capital"[95]—while raising an important issue worth considering in *any* decision to broaden successor liability—are ultimately unpersuasive in this instance. As the instant case demonstrates (and as we explain below), just because successor liability *can* apply to withdrawal liability does not mean that any asset purchaser qualifies as a successor under the substantial continuity doctrine. To the contrary, a finding of substantial continuity depends on a circumstance-specific inquiry.

3. Successor Liability Analysis for C&S and Penn Traffic

In a tightly reasoned and thorough opinion, the District Court entered summary judgment for C&S on the successor liability count of the Fund's amended complaint, holding that C&S "did not substantially continue Penn Traffic's business after the 2008 transaction."[96] We easily agree with this conclusion.

Again, the proper substantial continuity analysis takes its general shape from the Supreme Court's guidance:

> [T]he focus is on . . . whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions

95. Appellee's Br. 46-47.

96. Special App'x 53 (emphasis omitted).

> under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.[97]

The substantial continuity doctrine is applied most comfortably when a purchaser *acquires* the assets of a seller—not when a purchaser *fails to acquire* those assets. The latter situation in this case forces the Fund to argue elliptically for each continuity factor, essentially asking us (as it has, in different forms, for all its theories of liability) to disregard Penn Traffic's continued existence as C&S's independent contractor following the 2008 transaction. The result is that while the factors in the substantial continuity analysis are the same, the framing of our analysis differs from the standard case where a purchaser acquires the assets of a seller. The relevant questions become, for example, whether C&S acquired Penn Traffic's Syracuse warehouse employees and customers, not whether Penn Traffic's Syracuse warehouse employees and customers remained the same.

The District Court undertook this analysis in three parts (workforce and management, customers, and facilities and equipment), which was appropriate and useful "in light of the facts of [the] case and the particular legal obligation . . . at issue."[98]

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97. *Fall River Dyeing*, 482 U.S. at 43.

98. *Howard Johnson*, 417 U.S. at 262 n.9. Other circuits have enumerated substantial continuity factors in "cleaner" lists. *See, e.g., Leib v. Ga.-Pac. Corp.*, 925 F.2d 240, 247 (8th Cir. 1991) (enumerating

In our review, even construing all the facts in favor of the Fund as we are required to do, one overriding fact is ultimately decisive: *C&S did not purchase the Syracuse warehouse or employ the Union members who worked there*. Penn Traffic continued to own the warehouse and employ the Union members.[99]

As to the continuity of workforce and management, the record demonstrates that C&S did not acquire *any* of the relevant Union employees from Penn Traffic (because they remained employed by Penn Traffic). Similarly, as to the continuity of facilities and equipment, C&S did not acquire the Syracuse warehouse or the equipment there. And as to the continuity of customers, it is enough to note—and the Fund does not materially dispute—that about 70% of the volume of product distributed by Penn Traffic from the Syracuse warehouse was to Penn Traffic's own retail stores, not to the wholesale customers acquired by C&S.[100] This is a large enough majority, for the purpose of a *substantial* continuity analysis, to tip the customer continuity question in C&S's favor. In other words, given

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a seven-factor test); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992) (enumerating an eight-factor test). We decline to do so here, lest such a formulation be confused as a definitive "substantial continuity test" in our Circuit. On the contrary, unless the Supreme Court itself or the Congress speak more definitively on substantial continuity, in our view the concept must continue to be "flexible" and "tailored to the circumstances at hand." *Resilient Floor*, 801 F.3d at 1093.

99. App'x 465-66 ¶¶ 21-22; Suppl. App'x 126, 144.

100. Appellant's Br. 43; Appellee's Br. 8; App'x 461 ¶ 7, 469 ¶ 32.

the structure of the 2008 transaction, we agree with the District Court's conclusion that C&S did not "substantially continue" Penn Traffic's business.

None of the Fund's arguments on appeal upset this conclusion.

The Fund's cited authorities concerning workforce continuity amount to the argument that a change in workforce *alone* does not automatically defeat successor liability.[101] This is true. After all, substantial continuity is established through a multifactor analysis. But this certainly does not somehow transform a change in workforce into a factor weighing *in favor* of finding substantial continuity.

The Fund's argument that the warehouse's inventory—owned by C&S—should be considered "facilities and equipment" for the purposes of establishing substantial continuity, is also unconvincing. Clearly, in assessing continuity in a grocery warehousing business, the more appropriate consideration is who owns the warehouse itself (in this case, a third party, but leased by Penn Traffic),[102] and who owns the forklifts and other warehousing equipment (Penn Traffic itself),[103] not who owns the crates

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101. *See* Appellant's Br. 39-42.

102. App'x 463 ¶ 15

103. *Id.* at 467 ¶ 28. That the Supreme Court in *Fall River Dyeing* appeared to consider a successor's partial possession of a predecessor's inventory as one factor in a successorship analysis, *see* 482 U.S. at 32, again, only indicates that inventory might be

of groceries passing through the warehouse bound for retail.

Finally, even if, as the Fund suggests, 30% of the customers receiving groceries from the warehouse were, after the 2008 transaction, buying those groceries from C&S, this does not tip the balance back towards substantial continuity. Penn Traffic was still performing the *warehousing and distribution* of C&S's groceries for those customers, which is the relevant "business" to consider with reference to the Syracuse warehouse and its Union employees.[104]

In sum, then, C&S did not take over any significant part of—much less "substantially continue"—Penn Traffic's relevant business: the Syracuse warehouse or the employment of its Union employees.[105] C&S therefore

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one factor considered in a multifactor analysis, depending on the particularities of a given case. It does not upset our conclusion here.

104. We likewise reject the Fund's argument that C&S succeeded Penn Traffic because it acquired as customers Penn Traffic's retail stores that were sold to Tops (a Penn Traffic competitor) in bankruptcy. Given the totality of the circumstances, we find decisive that the Fund has adduced no evidence that these retail stores were served out of the Syracuse warehouse, which was closed in 2010 after Penn Traffic's bankruptcy. *Cf. Proxy Commc'ns*, 873 F.2d at 554 (identifying successorship where the successor "provided the same services . . . from the same location and for the same customers").

105. We need not address the important requirement that a successor must have notice of a predecessor's liability, as the substantial continuity analysis decides the question in this case.

is not subject to Penn Traffic's withdrawal liability under a theory of successor liability.

III. CONCLUSION

To summarize, we hold as follows:

(1) the District Court did not err in dismissing the Fund's "evade-or-avoid" liability theory;

(2) the District Court did not err in dismissing the Fund's "common control" liability theory;

(3) the District Court did not err in finding that C&S was not an "employer" of the Union employees at the Syracuse warehouse; and

(4) "successor liability" can, as a matter of law, apply to withdrawal liability under ERISA, but

(5) the District Court in this case did not err in granting C&S's motion for summary judgment because C&S did not substantially continue Penn Traffic's relevant business, and therefore was not subject to "successor liability."

For the foregoing reasons, we **AFFIRM** the District Court's May 1, 2017 order and its March 18, 2020 judgment.

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED MARCH 18, 2020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

5:16-CV-84 (FJS/ATB)

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, BY ITS TRUSTEES, MICHAEL S. SCALZO, SR., JOHN BULGARO, DANIEL W. SCHMIDT, TOM J. VENTURA, BOB SCHAEFFER, BRIAN HAMMOND, MARK MAY AND PAUL MARKWITZ,

Plaintiff,

v.

C&S WHOLESALE GROCERS, INC.,

Defendant.

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Pending before the Court are (1) Defendant's motion for partial judgment on the pleadings pursuant to Rule 12(c), *see* Dkt. No. 131; (2) Defendant's motion for summary judgment pursuant to Rule 56, *see* Dkt. No. 136; and (3) Plaintiff's cross-motion for summary judgment pursuant

to Rule 56 of the Federal Rules of Civil Procedure, *see* Dkt. No. 139.

II. BACKGROUND

A. Undisputed facts

The Penn Traffic Company ("Penn Traffic") was a publicly traded regional grocery business located in the Northeastern United States. *See* Dkt. No. 136-1, Def.'s Stmt. of Undisputed Material Facts ("DSUMF"), at ¶ 2.[1] Before filing for bankruptcy in November 2009, Penn Traffic owned and operated approximately 80 retail grocery stores ("the corporate stores") and a wholesale business that procured, warehoused, and distributed groceries for more than 100 independent retail grocery stores. *See id.* at ¶¶ 3-4. Penn Traffic operated two warehouse facilities, one of which was in Syracuse, New York. *See id.* at ¶ 6. Penn Traffic was obligated under three collective bargaining agreements ("CBAs") with Teamsters Local 317 to contribute to the New York State Teamsters Conference Pension and Retirement Fund ("Plaintiff" or "the pension fund") for work members of Teamsters Local 317 performed at the Syracuse warehouse. *See id.* at ¶ 9.

C&S Wholesale Grocers, Inc. ("Defendant") is a privately-owned company that provides procurement,

1. The Court references Plaintiff's Response to Def.'s Stmt of Undisputed Material Facts ("PSUMF") when there are minor discrepancies, such as word-choice or conclusions of law; but the Court emphasizes that all of the facts in this section are undisputed.

warehousing, and distribution services for grocery businesses across the United States. *See id.* at ¶ 1. In December 2008, Defendant entered into an agreement with Penn Traffic, whereby Penn Traffic agreed to sell Defendant its relationships and contracts with its wholesale customers in exchange for a cash payment. *See id.* at ¶¶ 12-13. Defendant did not acquire Penn Traffic's retail stores, the Syracuse warehouse lease, or the trailers, trucks, or forklifts used at the warehouse. *See id.* at ¶¶ 14-16; PSUMF at ¶¶ 15(a)-16(a).

Pursuant to the 2008 transaction, Defendant agreed to hire 30 Penn Traffic employees who had supported Penn Traffic's wholesale business, none of whom worked in the Syracuse warehouse unloading trucks or storing, selecting, packing, or shipping products. *See* DSUMF at ¶¶ 19, 22; PSUMF at ¶ 22(a). Defendant did not hire any members of Teamsters Local 317, nor did it expressly enter into a CBA with Teamsters Local 317. *See* DSUMF at ¶¶ 17-18; PSUMF at ¶ 18(a). The 2008 transaction did not alter Penn Traffic's CBA with Teamsters Local 317, and its obligation to contribute to the pension fund continued. *See* DSUMF at ¶ 23.

Following the 2008 transaction, Penn Traffic and Defendant entered into a separate agreement, in which Defendant paid Penn Traffic as a subcontractor for services provided at the Syracuse warehouse. *See generally id.* at ¶ 34. These services included warehousing and distributing products out of the Syracuse warehouse for Defendant's wholesale customers. *See id.* at ¶ 31.

After Penn Traffic's bankruptcy in November 2009, Defendant did not purchase Penn Traffic's interest in the Syracuse warehouse or any of the equipment used at the Syracuse warehouse from Penn Traffic's bankruptcy estate. *See id.* at ¶ 47. In May 2010, as part of its liquidation, Penn Traffic closed the Syracuse warehouse; and, at that time, it withdrew from the pension fund and incurred withdrawal liability. *See id.* at ¶¶ 48, 49. The exact amount of withdrawal liability is disputed, but Plaintiff alleged that Penn Traffic owed nearly $60 million. *See* Dkt. No. 28, First. Amend. Compl. at ¶ 80. When Plaintiff filed its complaint in 2016, Penn Traffic had only paid Plaintiff $5,206,088.34 of that liability. *See id.*

B. Procedural history

As a result of Penn Traffic's unpaid withdrawal liability, Plaintiff filed its complaint in the instant action on January 22, 2016. *See generally* Dkt. No. 1, Compl. In its complaint, Plaintiff alleged the following three counts against Defendant: (1) withdrawal liability as a successor to Penn Traffic, (2) liability for transacting to evade or avoid withdrawal liability, and (3) withdrawal liability as an employer and/or joint employer. *See id.* at ¶¶ 48-61. Plaintiff amended its complaint on April 8, 2016, to allege another cause of action for liability as an entity under common control with Penn Traffic. *See* Dkt. No. 28 at ¶¶ 98-96. Defendant then moved to dismiss Plaintiff's amended complaint. *See* Dkt. No. 23.

On May 1, 2017, the Court granted Defendant's motion in part and denied it in part. *See* Dkt. No. 75, Memorandum-Decision and Order, at 27 ("the 2017

Order"). The Court ultimately dismissed Plaintiff's claims based on the theories of evade or avoid liability, common control liability, and joint employer liability. *See generally id.* The Court found that Plaintiff pled a plausible cause of action against Defendant based on a theory of successor liability. *See id.* at 17. In so finding, the Court held—for the first time in this Circuit— that the theory of successor liability is applicable to withdrawal liability under the Employee Retirement Income Security Act of 1974 ("ERISA"). *See id.* at 10. Following that decision, Defendant moved for a certificate of appealability on this issue. *See* Dkt. No. 79. The Court denied that motion. *See* Dkt. No. 97.

In addition to defending this case in federal court, Defendant initiated a related arbitration proceeding challenging Plaintiff's calculation of withdrawal liability. *See* Text Minute Entry, Feb. 28, 2018, re Dkt. No. 99, Status Report; *see also* Dkt. No. 116, Text Order. The arbitrator has yet to reach a decision on the amount of withdrawal liability Defendant would have to pay if found responsible. *See* Dkt. No. 182, Status Report. This ongoing arbitration does not affect the parties' agreement that the Court address *liability* issues and not damages in the pending round of dispositive motions. *See* Dkt. No. 116.

III. DISCUSSION

A. Parties' cross-motions for summary judgment

After the Court's 2017 Order, the only remaining cause of action is based on Plaintiff's argument that Defendant is responsible for Penn Traffic's withdrawal liability under

the doctrine of successor liability. The parties address this issue in their cross-motions for summary judgment, which the Court discusses below. *See generally* Dkt. Nos. 136, 139.

1. Legal standard governing motions for summary judgment

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. Under this Rule, the entry of summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When deciding a summary judgment motion, a court must resolve any ambiguities and draw all reasonable inferences in a light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (citation omitted).

2. Defendant's responsibility for Penn Traffic's withdrawal liability as a "successor"

a. Introduction

In its 2017 Order, the Court determined that the theory of successor liability could apply to withdrawal liability under ERISA and the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). *See* Dkt. No. 75 at 10. "[T]he primary reason for making a successor responsible for resulting withdrawal liability is that, "'[a]bsent the imposition of successor liability, present

and future employer participants in the union pension plan will bear the burden of [the predecessor's] failure to pay its share," which will threaten the health of the plan while the successor reaps a windfall.'" *See id.* at 13-14 (quoting *Resilient Floor Covering [Pension Trust Fund Bd. of Trs. v. Michael's Floor Covering, Inc.]*, 801 F.3d [1079,] 1093 [(9th Cir. 2015)] (quoting *Artistic Furniture*, 920 F.2d at 1328)).

"An entity has successor liability where '(1) it "had notice of its predecessor's obligations" and (2) "'a sufficient continuity of identity exists between the two businesses.'"'" *See id.* at 15 (quoting *Romita v. Anchor Tank Lines, LLC*, No. 11 Civ. 9641, 2014 U.S. Dist. LEXIS 37621, 2014 WL 1092867, *4 (S.D.N.Y. Mar. 17, 2014) (quoting *Bd. of Trs. of the Sheet, Metal Workers Local Union No. 137*, 1995 U.S. Dist. LEXIS 9330, at *3, 1995 WL 404873 (quoting *Stotter Div. of Graduate Plastics*, 991 F.2d at 1002-03)) (other citation omitted). Thus, the Court must determine whether Defendant had notice of Penn Traffic's obligations and whether Defendant "substantially continued" Penn Traffic's business. "Finally, for successor liability to apply in this factual context, the Court must give special consideration to Defendant's relationship with the work that the union employees completed." *See id.* at 16 (citing *Howard Johnson [Co., Inc. v. Detroit Local Joint Exec. Bd., Hotel & Rest. Emps. & Bartenders Int'l Union, ALF-CIO*], 417 U.S. [249,] 262 n.9, 94 S. Ct. 2236, 41 L. Ed. 2d 46 [(1974)]).

b. Substantial continuity factors[2]

"'[S]ubstantial continuity in the operation of the business before and after the sale' of its assets is a requirement for successor liability. For had the business not changed there would be no reason for its financial structure to change—no reason therefore to allow the successor company to obtain a windfall by acquiring assets free of liabilities, leaving its predecessor with liabilities but no assets." *Bd. of Trs. of Auto. Mechanics' Local No. 701 Union & Indus. Pension Fund v. Full Circle Grp., Inc.*, 826 F.3d 994, 998 (7th Cir. 2016) (quoting *Tsareff v. ManWeb Services, Inc.*, 794 F.3d [841,] 845 [(7th Cir. 2015)]). In its 2017 Order, the Court cited to the various factors that courts analyze to determine whether there is substantial continuity between businesses, including "continuity of the workforce, management, equipment and location" and "constancy of customers." *See* Dkt. No. 75 at 12 (quoting [*Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89,] 99 [(3d Cir. 2011)] (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987))) (other citation omitted).

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2. In this section, the Court addresses the parties' arguments regarding whether Defendant substantially continued Penn Traffic's business immediately after the 2008 transaction but *before* Penn Traffic went bankrupt. Defendant additionally argues that it did not "substantially continue" the Syracuse warehouse operations following Penn Traffic's bankruptcy. *See* Dkt. No. 136-2, Def's Memorandum of Law, at 37-44. Because the Court ultimately concludes that Defendant did not substantially continue Penn Traffic's business following the 2008 transaction, the Court does not reach the merits of Defendant's post-bankruptcy argument.

i. Continuity of the workforce and management

The most important continuity factor that the Court must consider is whether there was continuity of the workforce and management. *See Members of Bd. of Admin. of Toledo Area Indus. UAW Ret. Income Plan v. OBZ, Inc.*, 348 F. Supp. 3d 635, 648 (N.D. Ohio 2018). The facts of this case present a novel scenario in which a buyer of a business's assets—but not its employees—hires the business as a subcontractor so that the business could continue to do the same work it did before the sale of its assets. In cases where a buyer acquires the seller's assets, including its employees, other courts have found substantial continuity of the workforce unless other questions of fact were present. *See, e.g., OBZ, Inc.*, 348 F. Supp. 3d at 639; *Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89, 91-92 (3d Cir. 2011).

For example, in *Einhorn v. M.L. Ruberton Constr. Co.*, Statewide, a highway construction company, faced a series of financial hardships; and it was delinquent on its contributions to Teamsters Local 676's and other CBAs' pension funds. *See Einhorn*, 632 F.3d at 91-92. To resolve some of these issues, Local 676 and Ruberton, a general construction company, entered into an agreement whereby Ruberton would hire Statewide's existing workforce covered by the current CBA, and that the CBA would govern such employment until a new CBA was negotiated. *See id.* at 92. In a second agreement, Statewide sold its assets to Ruberton for $1.6 million in cash. *See id.* In addition to the existing employees, Ruberton hired more

than half of Statewide's former employees in the months following the sale, including its Vice President and 33% shareholder. *See id.* Statewide remained in business for some time after the asset sale using subcontractors, and it hired Ruberton as one such subcontractor, billing Statewide more than $400,000 for rented employees and equipment. *See id.*

The *Einhorn* court noted that the parties disputed whether Ruberton continued Statewide's business; and, if so, to what extent. *See id.* at 100. For example, the court noted, "Ruberton argues that 'even if Ruberton were deemed to have continued Statewide's business, that continuation would be limited to the ... business' covered by the Local 676 CBA and it could not be liable for contributions owed in connection with Statewide's other CBAs." *Id.* (citation omitted). The court held that the presence of factual disputes rendered summary judgment inappropriate. *See id.*

Additionally, in *OBZ, Inc.*, Lockrey, a machining and fabricating company, executed an asset purchase agreement with Toledo Wire, in which Lockrey would pay Toledo Wire $250,000 for its machinery, customer list, and its goodwill. *See OBZ, Inc.*, 348 F. Supp. 3d at 639. After the sale, Lockrey offered jobs to all of Toledo Wire's employees and hired former Toledo Wire manager Eric Fodor. *See id.* at 640. The court noted that continuity of the workforce was the "most important[ ]" factor that weighed in favor of finding that Lockrey substantially continued Toledo Wire's business. *See id.* at 648. However, because a reasonable person could draw conflicting inferences

from Lockrey's use of Toledo Wire's intangible assets, the court found that neither side was entitled to summary judgment. *See id.* at 648-49.

The Court finds that the inverse of these courts' rulings is true; if a buyer does not acquire a seller's employees, this weighs against substantial continuity. There is no dispute that Defendant did not actually employ the workers in the Syracuse warehouse; Penn Traffic did. *See* DSUMF at ¶¶ 20-22; PSUMF at ¶¶ 20(a)-22(a).[3] This weighs in favor of Defendant. It is further undisputed that, from December 2008 until the closure of the warehouse, Penn Traffic retained authority to hire, terminate, and discipline employees who worked at the Syracuse warehouse. *See* DSUMF at ¶¶ 37, 39. After the 2008 transaction, Penn Traffic continued to handle benefits and payroll for the members of the Teamsters Local 317 who worked at the Syracuse warehouse. *See* DSUMF at ¶ 38. The 2008 agreement did not alter Penn Traffic's CBA with Teamsters Local 317 or its obligation to contribute to the pension fund at all. *See* DSUMF at ¶ 23. Additionally, from December 2008 until the closure of the warehouse, Penn Traffic continued to employ the

3. Plaintiff denies this fact only insofar as Defendant claims that its employees were physically located outside of the Syracuse warehouse facility and that David Adamsen, the person in charge of the entire wholesale business, was not present and in day-to-day contact with Penn Traffic's Vice President of Distribution, Tim Cipiti. These are not genuine issues of material fact. Simply being in the same building, by itself, does not show that Defendant substantially continued Penn Traffic's Syracuse warehouse. Additionally, Plaintiff does not assert that Mr. Adamsen had authority over Mr. Cipiti, even if they had day-to-day contact.

managers who oversaw the Syracuse warehouse workers, and those workers reported to supervisors at Penn Traffic. *See* DSUMF at ¶¶ 40-41.

The Court finds that the above-stated facts, taken together with the caselaw, show that Defendant's failure to acquire the warehouse workers as its own employees ultimately means that it did not substantially continue Penn Traffic's workforce and management after the 2008 transaction. Thus, this factor weighs in Defendant's favor.

ii. Constancy of customers

To determine the second factor, courts look at whether the successor took over the predecessor's customers. *See generally Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 57-58, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987). Before the 2008 transaction, the Syracuse warehouse served two sets of customers: (1) independent stores that contracted with Penn Traffic to obtain their products and receive other services, and (2) the corporate stores owned and operated by Penn Traffic itself. The corporate stores were the dominant customers, responsible for greater than 70% of the volume of product that was shipped through the warehouse, whereas the independent stores accounted for only 30% of the warehouse traffic. *See* DSUMF at ¶¶ 6-7, 32.

Defendant argues that these percentages did not change after it acquired Penn Traffic's customer relationships for the independent stores in the 2008 transaction. *See* Dkt. No. 136-2 at 28. According

to Plaintiff, however, Defendant made a "conscious decision" to take over Penn Traffic's relationships with its independent wholesale customers; and, further, taking over 30% of the warehouse inventory intended for Defendant's wholesale customers "is at least some evidence of substantial continuity." *See* Dkt. No. 139-2 at 44-45. To the contrary, Defendant responds that taking over 30% of the operations should not justify imposing on it 100% of Penn Traffic's withdrawal liability. *See* Dkt. No. 154, Def's Reply, at 14. "That is why the successorship doctrine requires '*substantial*' continuity," Defendant asserts, and 30% is *not* substantial. *See id.*

The Court finds that this case is analogous to a case the Second Circuit recently decided, in which the Department of Education ("DOE") and the Union negotiated a written agreement whereby the DOE agreed to insert Employee Protection Provisions into all of its transportation contracts, including those with its Contractors who employed drivers and escorts responsible for driving buses and supervising and aiding students on their trips to and from school. *See Div. 1181 A.T.U. - N.Y. Emps. Pension Fund v. City of New York Dep't of Educ.*, 910 F.3d 608, 612-13 (2d Cir. 2018). The Employee Protection Provisions required each Contractor to contribute to the Union's pension fund on behalf of the participating employees in amounts determined by its DOE contract or with its CBA with the union. *See id.* at 613.

Ultimately, the pension fund's trustees determined that the Contractors effected a "complete withdrawal" from the fund, triggering "withdrawal liability" under

the MPPAA. *See id.* (citing 29 U.S.C. § 1381(a)). After discovery, which was limited to the pension fund's alter ego claim, the DOE moved for summary judgment. *See id.* The district court granted Defendant's motion, reasoning that no reasonable jury could conclude, based on the evidence proffered by the pension fund, that the Contractors were the corporate alter egos of the DOE. *See id.* at 614. The Second Circuit affirmed, thus holding that the DOE was not responsible for the Contractors' withdrawal liability. *See generally id.* at 619.

The undisputed facts in this case show that Defendant subcontracted Penn Traffic to handle distribution and warehousing for its independent wholesale clients (whom Defendant purchased from Penn Traffic). *See* DSUMF at ¶ 31; PSUMF at ¶ 31(a). Based on this agreement, Defendant paid Penn Traffic for the warehouse work it did for Defendant's customers, and Penn Traffic contributed to the pension fund for that work. *See* Dkt. No. 154 at 14. Defendant argues that this situation is essentially the same as the DOE hiring Contractors to transport the school district's children to school and contribute to the bus driver's and escort's pension fund for that work, which did *not* result in liability for the DOE. *See* Dkt. No. 154 at 14 (citing *Div. 1181 A.T.U.*, 910 F.3d at 618). The Court finds this rationale persuasive; and, thus, the "constancy of customers" factor weighs in Defendant's favor.

iii. Continuity of facilities and equipment

This factor asks whether the successor acquired the predecessor's facilities and equipment. *See generally*

Fall River Dyeing, 482 U.S. at 44. Defendant notes that, although it purchased assets from Penn Traffic in 2008, those assets were associated with the wholesale business, not the Syracuse warehouse's operations. *See id.* In fact, Defendant asserts, the 2008 Asset Purchase Agreement specifically excluded all tangible and intangible assets relating to the warehouse facilities. *See id.* at 30. Plaintiff argues that it is most important that Defendant owned all the inventory inside of the warehouse; and, thus, it owned the most valuable assets associated with the warehouse. *See* Dkt. No. 139-2 at 49. Plaintiff asserts that, by virtue of the fact that Defendant had "full and complete ownership of any inventory" in the warehouse, it was *de facto* Defendant's warehouse. *See id.*

Defendant responds that it is "wrong ... to characterize inventory as an 'asset' of the warehouse. The role of the warehouse was to store and distribute inventory—not to buy, sell, or own it. Thus, the relevant assets are those used for warehousing work (e.g., forklifts, racking, and trucks), not cases of groceries. [Defendant] was no more the '*de facto*' owner of Penn Traffic's warehouse ... than Amazon is the '*de facto*' owner of the U.S. Postal Service's warehouse." *See* Dkt. No. 154 at 17.

Looking at the undisputed facts, Penn Traffic continued to lease the warehouse from a third party after the 2008 transaction, meaning that neither Penn Traffic nor Defendant owned the building. *See* DSUMF at ¶ 15; PSUMF at ¶ 15(a). Penn Traffic also continued to own the forklifts, trucks, trailers, and other equipment used at the Syracuse warehouse up until it closed in May 2010. *See*

DSUMF at ¶ 28; PSUMF at ¶ 28(a). Additionally, following the 2008 transaction, Penn Traffic provided "warehousing and distribution services" for Defendant's customers out of the Syracuse warehouse — not procurement or other inventory-based services. *See* DSUMF at ¶ 31; PSUMF at ¶ 31(a). Based on these facts, the Court finds that Defendant did not substantially continue Penn Traffic's facilities or equipment; and, thus, this factor weighs in Defendant's favor.

iv. Conclusion

For the above-stated reasons, the Court finds that Defendant did *not* substantially continue Penn Traffic's business after the 2008 transaction. Therefore the Court need not determine whether Defendant was on notice of Penn Traffic's pension obligations, nor must it analyze Defendant's relationship with the work that the union employees completed.[4] Based on the Court's finding, Defendant cannot be held responsible for Penn Traffic's withdrawal liability under the doctrine of successor liability. As such, the Court finds Plaintiff's remaining arguments are without merit.

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4. However, if the Court were to decide the issue of notice, it would find that Defendant was on notice of Penn Traffic's withdrawal liability. This is because "an asset buyer is on notice of, and therefore subject to, successor liability if he has 'notice that the seller may be contingently liable for withdrawal liability'" under the MPPAA. *Full Circle Grp., Inc.*, 826 F.3d at 997 (quoting *Tsareff v. ManWeb Services, Inc.*, 794 F.3d at 844-47). Defendant admitted that "[o]f course, [it] knew that the Fund was underfunded, and that if Penn Traffic closed the warehouse, Penn Traffic would incur withdrawal liability." *See* Dkt. No. 136-2 at 34. Therefore, the notice element for successor liability is satisfied.

B. Defendant's motion for partial judgment on the pleadings

Also pending before the Court is Defendant's motion for partial judgment on the pleadings. *See* Dkt. No. 131. This motion asks the court to "cap[ ] any liability at the unpaid balance of the sum set forth in a settlement agreement between Plaintiff and the Penn Traffic Company." *See id.* Notably, Plaintiff and Penn Traffic reached a settlement during Penn Traffic's bankruptcy proceedings whereby the parties agreed that Plaintiff was entitled to (1) a single general unsecured claim against Penn Traffic in the amount of $32,096,880.00, (2) a single administrative claim against Penn Traffic in the amount of $991,768.00, and (3) priority claims against Penn Traffic in the amount of $371,597.00. *See* Dkt. No. 131-3, Ex. 1.

The Court construes this motion as asking the Court to cap damages. *See* Dkt. No. 131-1, Def.'s Memorandum in Support of Mot. on Pleadings, at 6 (arguing "[Plaintiff]'s recovery is capped at approximately $28 million, as a matter of law. [Defendant] is thus entitled to judgment on the pleadings respecting [Plaintiff]'s demands in excess of that figure." (citation omitted)). The Court does not reach the merits of this motion, however, because it finds that Defendant is not responsible for Penn Traffic's withdrawal liability. Thus, the Court denies Defendant's motion for partial judgment on the pleadings as moot.

IV. CONCLUSION

After carefully considering the entire file in this matter, the parties' submissions, and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant's motion for summary judgment, *see* Dkt. No. 136, is **GRANTED**; and the Court further

ORDERS that Plaintiff's cross-motion for summary judgment, *see* Dkt. No. 139, is **DENIED**; and the Court further

ORDERS that Defendant's motion for partial judgment on the pleadings, *see* Dkt. No. 131, is **DENIED** as moot; and the Court further

ORDERS that the Clerk of the Court shall enter judgment in favor of Defendant and close the case.

IT IS SO ORDERED.

Dated: March 18, 2020
Syracuse, New York

/s/ Frederick J. Scullin, Jr.
Frederick J. Scullin, Jr.
Senior United States District Judge

APPENDIX C — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, DATED MAY 1, 2017

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

5:16-CV-84
(FJS/ATB)

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND BY ITS TRUSTEES, MICHAEL S. SCALZO, SR., JOHN BULGARO, DANIEL W. SCHMIDT, TOM J. VENTURA, BOB SCHAEFFER, BRIAN HAMMOND, MARK MAY AND PAUL MARKWITZ,

Plaintiff,

v.

C&S WHOLESALE GROCERS, INC.,

Defendant.

May 1, 2017, Decided;
May 1, 2017, Filed

SCULLIN, Senior judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Pending before the Court is Defendant's motion to dismiss for failure to state a claim pursuant to Rule 12(b)

(6) of the Federal Rules of Civil Procedure. *See* Dkt. No. 23. Defendant filed this motion prior to Plaintiff amending its complaint as of right. After Plaintiff filed its amended complaint, the Court provided Defendant with the option to file a new motion to dismiss or to supplement its original motion. Defendant chose to supplement its original motion. Therefore, Defendant's motion, as supplemented, is directed at Plaintiff's amended complaint.

II. BACKGROUND

Penn Traffic Company ("Penn Traffic") was a Syracuse-based food retail and wholesale company that operated under the "P&C Foods," "Bi-Lo Foods," and "Quality Markets" trade names. *See* Dkt. No. 28, First Amended Complaint, at ¶ 16. Penn Traffic owned two warehouses located in Syracuse, New York, and DuBois, Pennsylvania. *See id.* at ¶ 17. At the Syracuse warehouse, Penn Traffic employed approximately 450 members of Teamsters Local 317. *See id.* at ¶ 19. Penn Traffic was a party to "various collective bargaining agreements with Teamsters Local 317." *See id.* at ¶ 20. Relevant to this litigation, Penn Traffic was required to contribute to a pension fund on behalf of employees who worked at the Syracuse warehouse and whom Teamsters Local 317 represented. *See id.* at ¶ 20.

Plaintiff Pension Fund is managed by a Board of Trustees and regulated pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") and the Labor Management Relations Act ("LMRA"). *See id.* at ¶ 9. Plaintiff Pension Fund is organized as a

"multiemployer plan," which means that Penn Traffic is one of several employers who contribute to Plaintiff Pension Fund. *See id.* Penn Traffic's participation in Plaintiff Pension Fund exposed it to substantial withdrawal liability if it ceased making contributions. *See id.* at ¶ 30.

In May 2010, after filing for bankruptcy, Penn Traffic fired all 450 employees whom Teamsters Local 317 represented and permanently closed its Syracuse warehouse. *See id.* at ¶ 73. Since the Teamsters Local 317 members were no longer employed, Penn Traffic was no longer making any contributions to Plaintiff Pension Fund. *See id.* Thus, Penn Traffic triggered withdrawal liability pursuant to ERISA. *See id.*

In April 2010, Plaintiff Pension Fund delivered a notice and demand for payment of the withdrawal liability in the amount of $63,592,689.25 to Penn Traffic. *See id.* at ¶ 75. Penn Traffic did not contest the amount of withdrawal liability. *See id.* at ¶ 80. As a result of Penn Traffic's bankruptcy proceedings, however, Plaintiff Pension Fund only received $5,206,088.34, leaving a balance of $58,386,600.91 in unpaid withdrawal liability. *See id.* at ¶ 80. Plaintiff Pension Fund commenced this action in an attempt to recover the unpaid funds, not from Penn Traffic, which is not a party to this lawsuit, but from Defendant.

Defendant is a national wholesale supply company. *See id.* at ¶ 13. Around March 2008, Defendant began negotiations to acquire Penn Traffic's wholesale

distribution division. *See id.* at ¶ 29. One complication in Defendant's plan was that an outright purchase of Penn Traffic's Syracuse warehouse would trigger Penn Traffic's withdrawal liability, a result Defendant wanted to avoid. *See id.* at ¶¶ 42-43. Therefore, Defendant attempted to structure the takeover to foreclose exposure to Penn Traffic's withdrawal liability — a strategy that Plaintiff Pension Fund deems an actionable scheme and Defendant labels "prudent business judgment." *See id.*

In December 2008, Defendant entered into an asset purchase agreement and other agreements to assume control of specified assets and liabilities within Penn Traffic's wholesale distribution division. *See* Dkt. No. 28 at ¶ 51. "[Defendant] acquired, *inter alia*, Penn Traffic's wholesale distribution contracts, customers, equipment, files, records, goodwill, intellectual property, accounts receivable, and employees dedicated to Penn Traffic's wholesale distribution division who were *not* members of Teamsters Local 317." *See id.* at ¶ 52; *see also* Dkt. No. 23-3, Miller Declaration Exhibit "A" at § 1.2(a)-(h) (listing acquired assets), § 4.21(c) (providing that Defendant would hire only those Penn Traffic employees not subject to collective bargaining agreements). However, Defendant did not acquire, among other things, Penn Traffic's retail business, facilities, leases and subleases, cash, and employee benefit plans. *See id.* at § 1.3(a)-(e). Furthermore, Defendant specifically disclaimed any authority or power over any of Penn Traffic's employees who were associated with Teamsters Local 317. *See* Dkt. No. 23-4, Miller Declaration Exhibit "B" at § 10.

These agreements created an "independent contractor" relationship between Penn Traffic and Defendant. *See id.* Defendant shipped merchandise to Penn Traffic's warehouses, including the Syracuse warehouse; and Penn Traffic stored, handled, and ultimately distributed the merchandise to Defendant's customers. *See id.* at § 1.2. Under the contract, Penn Traffic retained responsibility for "all employees, Facility and storage leases, material handling and transportation equipment, contracts and all other liabilities associated with the Facilities and any other storage." *See id.*

According to Plaintiff, operations at the Syracuse warehouse "were materially identical to what they would have been had [Defendant] formally acquired the entirety of Penn Traffic's wholesale distribution." *See* Dkt. No. 28 at ¶ 64. The only difference was that Penn Traffic continued to operate independently and remained the employer of record for all 450 Teamsters Local 317 employees. *See id.*

Finally, Plaintiff alleges, and Defendant does not dispute, that Defendant's plan was to acquire Penn Traffic's wholesale business without becoming responsible for Penn Traffic's withdrawal liability. *See* Dkt. No. 42 at 4. Plaintiff claims that Defendant "modified the deal structure for no reason other than shirking pension obligations to the Syracuse employees and the Pension Fund." *See id.; see also* Dkt. No. 28 at ¶¶ 24-28.

Appendix C

III. DISCUSSION

A. Standard of review

Courts use a two-step process when addressing a Rule 12(b)(6) motion. "First, they isolate the moving party's legal conclusions from its factual allegations." *Hyman v. Cornell Univ.*, 834 F. Supp. 2d 77, 81 (N.D.N.Y. 2011). Second, they accept factual allegations as true and "determine whether [those allegations] plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). A pleading must contain more than a "blanket assertion[] of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 n.3, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Thus, to withstand a motion to dismiss, a pleading must be "'plausible on its face'" such that it contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (quotation and other citation omitted).[1]

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1. When addressing a Rule 12(b)(6) motion, a court may "consider documents attached to or incorporated by reference in [a] complaint[.]" *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998) (citation omitted). Even where "'a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint,' the court may . . . take the document into consideration in deciding the defendant's motion to dismiss, without converting the proceeding to one for summary judgment." *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (quotation omitted). Since the contracts between Penn Traffic and Defendant are integral to Plaintiff's amended complaint, the Court will consider them when addressing the pending motion.

Appendix C

B. Plaintiff's first amended complaint

Plaintiff asserts four claims against Defendant. In its first cause of action, Plaintiff alleges that Defendant is responsible for Penn Traffic's withdrawal liability as the successor to Penn Traffic. *See* Dkt. No. 28 at ¶¶ 84-88. Specifically, Plaintiff claims that Defendant was aware of Penn Traffic's withdrawal liability and understood the approximate amount of liability to expect. *See id.* at ¶¶ 84-86. Furthermore, Plaintiff asserts that Defendant maintained the same address, telephone number and facility as Penn Traffic, serviced the same customers as Penn Traffic, and used the same personnel as Penn Traffic. *See id.* at ¶ 87. Therefore, according to Plaintiff, under federal common law, Defendant is jointly and severally liable for the outstanding withdrawal liability. *See id.* at ¶ 88.

In its second cause of action, Plaintiff alleges that "a principal purpose of the Transaction undertaken by [Defendant] and Penn Traffic was to evade or avoid withdrawal liability, in violation of ERISA." *See id.* at ¶ 91. Thus, according to Plaintiff, under ERISA, Defendant is liable for the balance of the withdrawal liability together with interest, costs, attorney's fees and penalties. *See id.* at ¶ 92.

In its third cause of action, Plaintiff contends that Defendant was an employer under ERISA in "common control" with Penn Traffic and is thus jointly and severally liable for withdrawal liability. *See id.* at ¶ 96. To support this claim, Plaintiff asserts that Defendant and Penn

Traffic jointly executed a plan to split up Penn Traffic's wholesale distribution business to avoid liability. *See id.* at ¶ 94. Furthermore, Plaintiff argues that Defendant and Penn Traffic kept financial information about the Syracuse facility separate from their other business lines and stood to realize a profit based on the business. *See id.* at ¶ 95.

Finally, in its fourth cause of action, Plaintiff alleges that Defendant shares liability as a joint employer. *See id.* at ¶¶ 97-101. Plaintiff claims that Defendant made payments to Penn Traffic that were related to obligations under the collective bargaining agreement. *See id.* at ¶ 99. Alternatively, Plaintiff argues that Defendant had a "duty" to Plaintiff under applicable law. *See id.* at ¶ 100.

C. Plaintiff's first cause of action — successor liability

As a preliminary matter, the Court must determine whether the theory of successor liability applies to withdrawal liability under ERISA. The Second Circuit has not squarely addressed this issue.[2] However, the Second Circuit, as well as other circuits, has applied successor liability in addressing delinquent contributions under ERISA. *See Stotter Div. of Graduate Plastics Co., Inc. v. Dist. 65, United Auto Workers, AFL-CIO*, 991 F.2d 997, 1002 (2d Cir. 1993); *Einhorn v. M.L. Ruberton Constr. Co.*,

2. At least one district court in the Second Circuit, however, has applied successor liability in the context of a claim for withdrawal liability. *See Burke v. Hamilton Installers, Inc.*, No. 02 CV 519 A, 2004 U.S. Dist. LEXIS 18021, 2004 WL 1946457, *6 (W.D.N.Y. Aug. 31, 2004) (citing *Truck Drivers Union v. Tasemkin, Inc.*, 59 F.3d 48 (7th Cir. 1995)).

632 F.3d 89, 99 (3d Cir. 2011); *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1327 (7th Cir. 1990); *Trs. for Alaska Laborers-Constr. Indus. Health & Sec. Fund v. Ferrell*, 812 F.2d 512, 516 (9th Cir. Cir. 1987). In this regard, the Ninth Circuit has held that

> [t]he primary reason for making a successor responsible for its predecessor's delinquent ERISA contributions is that, "[a]bsent the imposition of successor liability, present and future employer participants in the union pension plan will bear the burden of [the predecessor's] failure to pay its share," which will threaten the health of the plan while the successor reaps a windfall.

Resilient Floor Covering Pension Trust Fund Bd. of Trustees v. Michael's Floor Covering, Inc., 801 F.3d 1079, 1093 (9th Cir. 2015) (quoting *Artistic Furniture*, 920 F.2d at 1328).

Defendant attempts to distinguish cases applying successor liability to delinquent contributions by observing that delinquent contributions are *extant* liabilities under a contract, whereas withdrawal liability is a *contingent* liability arising under ERISA. *See* Dkt. No. 23-1 at 27 n.3. However, withdrawal liability under ERISA's Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA") is mandatory, not contingent. *See Textile Workers Pension Fund v. Standard Dye & Finishing Co., Inc.*, 725 F.2d 843, 857 (2d Cir. 1984) (stating that

"[t]he MPPAA modified those existing provisions to effect mandatory — rather than contingent — withdrawal liability"). That being said, the fact that withdrawal liability does not become due until a company withdraws from the plan might be relevant in determining whether a successor had notice of a predecessor's withdrawal liability, *see Bd. of Trs. v. Full Circle Group, Inc.*, 826 F.3d 994, 997 (7th Cir. 2016) (holding that a successor had notice of a predecessor's withdrawal liability merely by knowing that the predecessor employed union workers), but it does not preclude applying successor liability to withdrawal liability in the first instance.

Those circuits that have addressed the issue of whether successor liability applies to withdrawal liability concluded that it did. *See Tsareff v. ManWeb Servs., Inc.*, 794 F.3d 841, 847 (7th Cir. 2015); *Resilient Floor Covering*, 801 F.3d at 1094 (finding that the rationale to apply successor liability to delinquent contributions under ERISA applied "with equal, if not greater, force" to withdrawal liability). In *Tsareff*, the Seventh Circuit reasoned that "[s]uccessor liability is an equitable doctrine, *Tasemkin*, 59 F.3d at 49, and in every instance where we have found the imposition of federal successor liability to be appropriate, we have done so after carefully balancing the need to vindicate important federal statutory policies with equitable considerations." *Tsareff*, 794 F.3d at 845. Likewise, the Ninth Circuit noted that "[a] primary purpose of ERISA is 'to ensure that employees and their beneficiaries [a]re not . . . deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans.'" *Resilient Floor Covering*,

801 F.3d at 1094 (quoting *R.A. Gray & Co.*, 467 U.S. at 722, 104 S. Ct. 2709). Therefore, in *Resilient Floor Covering*, the Ninth Circuit held that "a bona fide successor can be liable for its predecessor's MPPAA withdrawal liability . . . so long as the successor had notice of the liability." *Id.* at 1095 (footnote omitted); *see also Full Circle Group, Inc.*, 826 F.3d at 998 (explaining that there is "no reason . . . to allow the successor company to obtain a windfall by acquiring assets free of liabilities, leaving its predecessor with liabilities but no assets").

Defendant argues that this Court should not follow the Seventh and Ninth Circuits because ERISA already has a "'detailed statutory scheme for allocating responsibility for withdrawal liability between seller and purchaser in a sale of assets.'"[3] *See* Dkt. No. 23-1 at 26 (quoting *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Cullum Cos., Inc.*, 973 F.2d 1333, 1337 (7th Cir. 1992)). However, ERISA's statutory scheme does not address how to allocate responsibility for withdrawal liability *after* it has been assessed; rather, "[i]f the requirements of section 1384 are met, an employer's sale of assets is *not considered a withdrawal* from the pension fund."

3. Under § 1384, an employer's sale of assets does not result in withdrawal liability as long as the sale meets the following requirements: (1) it must be a bona fide, arm's-length sale, *see* 29 U.S.C. § 1384(a)(1); (2) the purchaser must have an obligation "for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan," 29 U.S.C. § 1384(a)(1)(A); (3) the purchaser must provide a bond to secure its contribution obligation, *see* 29 U.S.C. § 1384(a)(1)(B); and (4) the seller must remain secondarily liable for withdrawals that occur within five years after the sale, *see* 29 U.S.C. § 1384(a)(1)(C).

Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Cullum Cos., Inc., 973 F.2d 1333, 1337 (7th Cir. 1992) (emphasis added). Under § 1384, a purchaser assumes the obligation to contribute to the fund and becomes primarily liable for future withdrawal liability, while the seller remains secondarily liable. *See id.* Thus, § 1384 is, "'in effect, a "safe harbor" protecting an employer from withdrawal liability with respect to a sale of assets that meets certain requirements, all of which are designed to shift the obligation for contributions to the purchaser while leaving the seller secondarily liable for a five-year period after the sale.'" *Id.* (quoting *I.A.M. National Pension Fund v. Clinton Engines, Corp.*, 825 F.2d 415, 420, 263 U.S. App. D.C. 278 (D.C. Cir. 1987)). Therefore, § 1384 does not preclude applying successor liability to withdrawal liability. *See Resilient Floor Covering*, 801 F.3d at 1094 (stating that, "[a]lthough § 1384 establishes one circumstance in which an employer who might — but would not necessarily — otherwise fit into the successor category is *not* liable for withdrawal payments, it does not address whether the broader employment and labor law successorship doctrine applies where those stringent conditions are not met").

The Court finds the reasoning of the Seventh and Ninth Circuits persuasive and, therefore, finds that the theory of successor liability is applicable to withdrawal liability under ERISA. Accordingly, the Court must consider whether Plaintiff has alleged sufficient facts to support a plausible claim of successor liability against Defendant.

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Defendant argues that successor liability is not applicable to this case because, in light of the fact that Penn Traffic continued to exist and operate independently after the asset sale, Defendant could not have succeeded Penn Traffic. *See* Dkt. No. 23-1 at 24. In this regard, Defendant asserts that the "test [for successor liability] presupposes a 'predecessor' that ceases 'operations,' which are then 'continued' by the asset-purchaser." *See id.* at 23.

There do not appear to be any cases in which courts have expressly addressed whether withdrawal liability would apply in situations in which two companies exist simultaneously. However, the Third Circuit has found that successor liability can be applied to delinquent ERISA contributions despite the selling company remaining "in business for some time after the asset sale[.]" *Einhorn*, 632 F.3d at 92. The facts in *Einhorn* are somewhat similar to those in the present case. In *Einhorn*, Statewide, a highway construction company, was facing financial difficulties and allegations of fraud. *See id.* at 91. During this time, Statewide was a party to two collective bargaining agreements ("CBA"), which bound it to contribute to two multiemployer benefit plans established under ERISA. *See id.* Moreover, Statewide had delinquencies owed under both the aforementioned CBAs. *See id.* Ruberton, a general construction company, learned of Statewide's troubles and entered into negotiations to purchase its assets. *See id.* During these discussions, Ruberton specified that its objective was to ensure that it would not be held to be the successor to Statewide and, therefore, liable for Statewide's delinquent contributions. *See id.* at 92. To that effect, Ruberton agreed to hire,

subject to need, Statewide's existing workforce, which was covered by the existing CBA, and to negotiate a new CBA in the future. *See id.* On October 10, 2005, Statewide sold its assets to Ruberton for $1.6 million in cash. *See id.* Ruberton then began to make contributions to the fund. *See id.* "Statewide remained in business for some time after the asset sale using subcontractors to provide the necessary equipment and labor. Ruberton was one such subcontractor, billing Statewide more than $400,000 for rented employees and equipment." *Id.* In January 2006, Statewide ceased all operations. *See id.*

On December 13, 2005, the pension funds filed an action against Statewide and Ruberton, seeking to recover the delinquent contributions. *See id.* at 93. Statewide initially agreed to pay all of the delinquents funds but was unable to do so because it became insolvent. *See id.* Thereafter, the pension funds filed a new action against Ruberton for the delinquent contributions, alleging that Ruberton was Statewide's successor and thus liable. *See id.*

The Third Circuit, although not expressly mentioning the simultaneous existence of Statewide and Ruberton, held that successor liability was applicable to suits seeking delinquent contributions under ERISA and might be available in the case before it. Ultimately, the Third Circuit remanded to the district court to consider the substantial continuity test, focusing on the following factors: "continuity of the workforce, management, equipment and location; completion of work orders begun by the predecessor; and constancy of customers." *Id.* at

99 (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987); *Artistic Furniture*, 920 F.2d at 1329). Importantly, the Third Circuit held that, unlike the *de facto* merger and mere continuation exceptions at traditional common law,[4] "commonality of ownership is not required" under the substantial continuity test, *id.* (citations omitted), insinuating that parallel existence was not an obstacle to imposing liability based on the substantial continuity doctrine.

Moreover, the Supreme Court has suggested that "the real question in each of these 'successorship' cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative?" *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd., Hotel & Rest. Emps. & Bartenders Int'l Union, ALF-CIO*, 417 U.S. 249, 262 n.9, 94 S. Ct. 2236, 41 L. Ed. 2d 46 (1974). In *Howard Johnson*, the Court recognized that "[t]he answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue," which, in *Howard Johnson*, was the duty to pay withdrawal liability. *Id.* Thus, the Court emphasized that there was "no single definition of 'successor' which is

4. The mere continuation test "requires the existence of a single corporation after the transfer of assets, with an identity of stock, stockholders, and directors between the successor and predecessor corporations." *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519 (2d Cir. 1996), *overruled on other grounds by New York v. Nat'l Servs. Indus., Inc.*, 352 F.3d 682, 685 (2d Cir. 2003) (citation omitted).

applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others."[5] *Id.* (citations omitted)

In the context of withdrawal liability, the primary reason for making a successor responsible for resulting withdrawal liability is that, "'[a]bsent the imposition of successor liability, present and future employer participants in the union pension plan will bear the burden of [the predecessor's] failure to pay its share,' which will threaten the health of the plan while the successor reaps a windfall." *Resilient Floor Covering*, 801 F.3d at 1093 (quoting *Artistic Furniture*, 920 F.2d at 1328). Furthermore, a primary purpose of ERISA is "to ensure that employees and their beneficiaries [a]re not . . . deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984) (citations omitted). A strict rule that forecloses applying successor liability for the singular reason that the selling company continues to exist nominally would create an arbitrary impediment to a doctrine that has its foundation in equity and flexibility. *See Resilient Floor Covering*, 801 F.3d at 1093 (stating

5. Ultimately given the factual context in *Howard Johnson*, the Court found that the defendant could not be bound as a successor to the prior company's duty to arbitrate, noting that in that particular legal context the most important factor to consider was whether the new employer employed the same employees. *See Howard Johnson*, 417 U.S. at 260. However, the Court stated that the defendant had succeeded in some aspects of the other business despite only purchasing limited assets and leaving the other business largely intact. *See id.* at 262 n.9.

that "[t]he successorship standards are flexible and must be tailored to the circumstances at hand"). Therefore, the Court finds that the same policy considerations that favor applying successor liability to withdrawal liability in the first place favor rejecting Defendant's formalistic argument that successor liability cannot exist absent the dissolution of a seller in a partial asset sale. *See Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987) (stating that "[c]ourts have without difficulty disregarded form for substance where ERISA's effectiveness would otherwise be undermined").

In addition to the aforementioned policy considerations, the statutory scheme imposing withdrawal liability favors applying successor liability to parallel companies. Withdrawal liability is triggered when an employer "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a). Axiomatically, withdrawal liability is triggered at the end of the life of a business or entity. Defendant's position would create a loophole where businesses would merely insist on keeping the predecessor afloat for a period of time after an asset sale to avoid withdrawal liability. Successor liability, however, is not about drawing lines in the sand; rather, it is an equitable doctrine that flexes and bends based "upon the totality of the circumstances of a given situation" and the federal rights at stake. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987).[6]

6. The Court notes that, because there are many similarities between alter ego liability and successor liability, cases discussing

Accordingly, the Court concludes that, although Penn Traffic did not cease to exist after its asset sale to Defendant and both Penn Traffic and Defendant existed simultaneously, this does not necessarily foreclose Plaintiff from relying on a successor liability theory as a basis for its claims against Defendant. That being said, however, to withstand a motion to dismiss, Plaintiff must allege sufficient facts to assert a plausible claim of successor liability against Defendant.

An entity has successor liability where "(1) it 'had notice of its predecessor's obligations' and (2) "'a sufficient

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alter ego liability are helpful to determine the applicability of successor liability. *See, e.g., Full Circle Group, Inc.*, 826 F.3d at 998 (noting that, "if fraudulent intent is subtracted as a factor [to determine whether there is alter ego liability,] all that is left are factors that establish successor liability"); *Ret. Plan of UNITE HERE Nat'l Ret. Fund v. Kombassan Holdings A.S.*, 629 F.3d 282, 288 (2d Cir. 2010) (rejecting the defendant's argument that "alter ego status [could not] apply where the entities exist[ed] simultaneously"); *Massachusetts Carpenters Cent. Collection Agency v. Belmont Concrete Corp.*, 139 F.3d 304, 307-08 (1st Cir. 1998) (stating that, "[a]lthough developed in the labor law context, alter ego or successor liability analysis has been applied to claims involving employee benefit funds brought under ERISA and the LMRA" and that, "although the alter ego doctrine is primarily applied in situations involving successor companies, 'where the successor is merely a disguised continuance of the old employer,' . . . it also applies to situations where the companies are parallel companies" (citations omitted)); *Roofers Local 195 Pension, Health & Accident, Annuity & Joint Apprenticeship Training Funds v. Shue Roofing, Inc.*, No. 5:01-CV-562, 2004 U.S. Dist. LEXIS 1409, 2004 WL 395893, *1 n.2 (N.D.N.Y. Feb. 3, 2004) (finding that both alter ego and successor liability applied to the facts of the case).

continuity of identity" exists between the two businesses.'" *Romita v. Anchor Tank Lines, LLC*, No. 11 Civ. 9641, 2014 U.S. Dist. LEXIS 37621, 2014 WL 1092867, *4 (S.D.N.Y. Mar. 17, 2014) (quoting *Bd. of Trs. of the Sheet, Metal Workers Local Union No. 137*, 1995 U.S. Dist. LEXIS 9330, at *3, 1995 WL 404873 (quoting *Stotter Div. of Graduate Plastics*, 991 F.2d at 1002-03)) (other citation omitted). This determination "is primarily factual in nature and is based upon the totality of the circumstances of a given situation[; successor liability thus] requires that the [court] focus on whether the new company has 'acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.'" *Fall River*, 482 U.S. at 43 (quotation omitted).

As to the issue of notice, Plaintiff asserts that Penn Traffic provided Defendant with estimates of the withdrawal liability; Defendant commissioned studies of its own to estimate withdrawal liability; and Defendant would not agree to the asset purchase if it had to assume that liability. *See* Dkt. No. 28 at ¶¶ 32, 34, 39; *see also Full Circle Group, Inc.*, 826 F.3d at 997 (holding that mere knowledge that predecessor was unionized was sufficient to alert the buyer to the possibility of withdrawal liability); *Battino v. Cornelia Fifth Ave., LLC*, 861 F. Supp. 2d 392, 407 (S.D.N.Y. 2012) (holding a company had notice when it was fully aware of potential liabilities).

Furthermore, with regard to the issue of continuity, Plaintiff alleges that, after Defendant took over Penn Traffic's warehouse, operations continued in the same

manner as before. *See* Dkt. No. 28 at ¶ 87. For instance, Defendant used the same warehouse, fulfilled the same contracts, used the same inventory, and maintained the same workforce to complete the job. *See id.* at ¶¶ 52, 53, 62, 64. Plaintiff also alleges that Defendant maintained the same address and became the direct employer of all former Penn Traffic non-union employees. *See id.* at ¶ 87.

Finally, for successor liability to apply in this factual context, the Court must give special consideration to Defendant's relationship with the work that the union employees completed. *See Howard Johnson*, 417 U.S. at 262 n.9. In this regard, Plaintiff maintains that, although Penn Traffic nominally continued as the employer of record for the union members, Defendant directed, controlled, and benefitted from all union members. *See id.* at ¶¶ 46-47, 87. In sum, Plaintiff alleges that Penn Traffic and Defendant were doing essentially the same job, under the same working conditions, with the same supervisors, the same employees, the same production process, and serving the same customers. *See Resilient Floor Covering*, 801 F.3d at 1095 (listing factors to consider to determine substantial continuity).

Accepting Plaintiff's allegations as true as it must at this stage of the litigation, the Court finds that Plaintiff has pled a plausible claim against Defendant based on a theory of successor liability. Therefore, the Court denies Defendant's motion to dismiss Plaintiff's first cause of action.

D. Plaintiff's second cause of action — evade or avoid liability

With regard to Plaintiff's second cause of action, the parties' dispute focuses on the proper interpretation of 29 U.S.C. § 1392(c). To support its position, Plaintiff relies on the Second Circuit's holding in *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049 (2d Cir. 1993). As in this action, the plaintiff in *Herrmann* was a multi-employer pension fund ("Fund"). The defendants were Lock Manufacturing, Inc. ("Manufacturing"), Thomas Herrmann ("Herrmann"), and Lock Mowers, Inc. ("Mowers"). Hermann became the president and sole shareholder of Manufacturing in October 1986. At that time, Manufacturing was bound to make contributions to the Fund. Later, in November 1988, Mowers "offered to acquire the business and certain assets of Manufacturing[.]" *Id.* at 1053. Then, in April 1989, Mowers, Manufacturing, and Herrmann entered "into the acquisition agreement pursuant to which Mowers purchased Manufacturing's assets, but did not assume liability 'actual or contingent, whatsoever, including, without limitation, for any withdrawal liability of Seller under any multiemployer pension plan.'" *Id.* (quotation omitted). The Second Circuit noted that

> the Fund allege[d] that the parties dropped the purchase price to $350,000 and gave Herrmann at $50,000 signing bonus instead. It is also alleged that Herrmann received a one year service arrangement for $75,000 and over $370,000 payable over three years for a

> covenant not to compete. Prior to the asset sale, Herrmann used a Manufacturing line of credit to pay himself an extra bonus of more than $250,000. *These transactions allegedly rendered Manufacturing insolvent.*

Id. (emphasis added).

One month after the sale was complete, in May 1989, "Manufacturing ceased operations and effectuated a complete withdrawal from the Fund." *Id.* In essence, after Mowers paid Manufacturing and Herrmann for the assets, Herrmann drove the business into bankruptcy. The Fund subsequently sent Manufacturing a demand for withdrawal liability amounting to $636,098. *See id.* Since Manufacturing was unable to make any payments, the Fund sued Manufacturing, Herrmann, and Mowers based on 29 U.S.C. § 1451(a)(1), which provides, that

> [a] plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by *the act or omission of any party under this subtitle with respect to a multiemployer plan*, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

29 U.S.C. § 1451(a)(1) (emphasis added).

According to the plaintiff in *Herrmann*, the defendants "participated in a scheme, the principal purpose of which was to evade or avoid withdrawal liability by depriving

Manufacturing of funds sufficient to meet its pension liability." *Herrmann*, 9 F.3d at 1056 (citations omitted).

Reading §§ 1451(a)(1) and 1392(c)[7] together, the Second Circuit held that,

> if a pension fund (such as the Fund in this case) is adversely affected by the acts of any party who has attempted to "evade or avoid liability" under the MPPAA (such as Manufacturing, Mowers or Herrmann), then the MPPAA shall be applied "without regard to such transaction." To calculate *and* collect liability, "without regard to such transaction," any assets that were transferred in order to "evade or avoid liability," as well as the parties to whom they were improperly transferred, must be within the reach of the statute. *Further, to apply the MPPAA "without regard to such transaction," the transferor entity must be deemed to be in possession of improperly transferred assets. Those assets must therefore be recoverable from the parties to whom they have been illegitimately transferred.* Those parties thus become "part[ies] under this subtitle" within the meaning of § 1451(a)(1). . . .

Id. (citation omitted) (emphasis added).

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7. Section 1392(c) provides that, "[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction." 29 U.S.C. § 1392(c).

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According to the Second Circuit, the main focus of § 1392(c) is to give a pension fund a tool to recapture assets when a company bankrupts itself in lieu of paying its withdrawal liability. In other words, § 1392(c) applies when Company A, which is bound to make contributions to a fund, illicitly sells its assets to Company B, and Company A then uses the proceeds of that sale to pay large bonuses to its executives, emptying Company A's coffers and thereby forcing Company A into bankruptcy. "Those assets must therefore be recoverable from the parties to whom they have been illegitimately transferred," *id.*, i.e., the assets Company A illicitly sold to Company B and the bonuses that Company A paid to its executives.

This reading of *Herrmann* comports with the plain language of the statute. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000) (stating that "we begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says there'" (quotation omitted)). To reiterate, § 1392(c) provides as follows: "If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (*and liability shall be determined and collected*) without regard to such transaction." 29 U.S.C. § 1392(c) (emphasis added).

To support its position, Defendant argues that, because Penn Traffic retained its withdrawal liability, Penn Traffic did not evade or avoid its liability, and Defendant had nothing to evade or avoid in the first place because it was never obligated to make contributions.

See Dkt. No. 23-1 at 17. Both the Second Circuit's decision in *Hermann* and the statute itself foreclose this interpretation of § 1392(c). *See Herrmann*, 9 F.3d at 1056 (holding third parties liable even when the original party retained its liability); 29 U.S.C. § 1392(c) (using the words "any party" rather than the more specific "employer" that Defendant's interpretation would import); *see also New York State Teamsters Conference Pension & Ret. Fund v. Express Servs., Inc.*, 426 F.3d 640, 647 n.6 (2d Cir. 2005) (finding that non-employers may be held liable under § 1392 (citations omitted)).

Defendant next argues that "[t]he sole remedy for an evade-or-avoid transaction is to disregard the transaction." *See* Dkt. No. 23-1 at 19. According to Defendant, that would mean setting aside the transaction and leaving Penn Traffic and Defendant in the positions they would have been in had the transaction never occurred. *See id.* at 19-20. In this regard, Defendant contends that the court is not entitled to "'writ[e] in new terms to a transaction or create a transaction that never existed.'" *See id.* at 20 (quoting [*Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129,] 149 [(1st Cir. 2013)]). This argument, however, ignores the parenthetical statement "(and liability shall be determined and collected) without regard to that transaction." 29 U.S.C. § 1392(c). Therefore, despite Defendant's argument to the contrary, the Court finds that the remedy is not to ignore the transaction completely but, rather, to determine and collect liability without reference to that transaction. That is exactly what the court in *Herrmann* authorized, holding that, to "collect" the withdrawal liability the

assets transferred to evade or avoid liability "must . . . be recoverable from the parties to whom they have been illegitimately transferred." *Herrmann*, 9 F.3d at 1056. Accordingly, the Court concludes that, consistent with the Second Circuit's holding in *Herrmann*, the statute should be read to allow a pension fund to "determine and collect" funds illicitly transferred in an attempt to evade or avoid withdrawal liability.

In this case, Plaintiff alleges that Penn Traffic's executives received $1 million in bonuses for closing the deal with Defendant. *See* Dkt. No. 28 at ¶¶ 44, 66. However, those individuals are not parties to this suit nor does Plaintiff allege with any particularity that the bonuses were paid in an effort to funnel money away from a company that was on the precipice of being assessed withdrawal liability as was the case in *Herrmann*.[8] Furthermore, in this case, Defendant paid Penn Traffic more than $27 million for the asset sale, *see id.*; *see also* Dkt. No. 23-3 at § 3.1 (stating that the purchase price was $27,600,000.00); and, despite bankruptcy, Penn Traffic was still able to pay more than $5 million to the Pension Fund, *see* Dkt. No. 28 at ¶ 80. In other words, although Penn Traffic and Defendant might have structured the transaction so that Defendant could avoid the assumption of Penn Traffic's withdrawal liability, they did not structure the transaction so that Penn Traffic became immediately insolvent and unable to pay withdrawal liability. In fact, the opposite is

8. In *Herrmann* the parties entered into the acquisition agreement on April 10, 1989, and Manufacturing ceased operations on May 9, 1989, *see Herrmann*, 9 F.3d at 1053; whereas, in this case, Penn Traffic continued in business for eighteen months.

true, "[f]ollowing the Transaction, [Penn Traffic's CEO] informed the public that [Defendant's] takeover of Penn Traffic's wholesale distribution division would allow Penn Traffic to focus on its retail division, restore Penn Traffic's profitability, and position Penn Traffic for long-term success." *See id.* at ¶ 65.

Accordingly, for all these reasons, the Court finds that Plaintiff has not stated a plausible claim under 29 U.S.C. §§ 1392(c), 1451(a)(1) and grants Defendant's motion to dismiss Plaintiff's second cause of action.

E. Third cause of action - common control liability

Businesses that are under "common control," also referred to as businesses that are members of a control group, are treated as a single employer for purposes of ERISA withdrawal liability. *See* 29 U.S.C. § 1301(b)(1). Section 1301(b)(1) defines "common control" by reference to Treasury Regulations prescribed under 26 U.S.C. § 414(c). *See Amalgamated Lithographers of Am. v. Unz & Co. Inc.*, 670 F. Supp. 2d 214, 223 (S.D.N.Y. 2009). "The Internal Revenue regulations set out three ways a group of trades or businesses can be commonly controlled — a parent-subsidiary group, a brother-sister group, or a 'combined' group consisting of both parent-subsidiary and brother-sister relationships." *Cent. States, Se. & Sw. Areas Pension Fund v. SCOFBP, LLC*, 668 F.3d 873, 880 (7th Cir. 2011) (citing 26 C.F.R. § 1.414(c)-2(a)).

Plaintiff has not alleged facts to state a plausible claim that any of the relationships that fall within the

ambit of § 1301(b) and the Treasury Regulations exist in this case. In fact, rather than relying on the IRS regulations to support its position, Plaintiff relies on a single district court case from Massachusetts. *See* Dkt. No. 42 at 30 (citing *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 172 F. Supp. 3d 447, 2016 WL 1239918 (D. Mass., 2016)). Plaintiff's reliance on this case, however, is misplaced. In *Sun Capital Partners*, the court merely held that a joint venture, as a group, could hold a controlling interest in a subsidiary when the members of the joint venture individually would not have a sufficient interest. See *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 172 F. Supp. 3d 447, 2016 WL 1239918, *17 (D. Mass., 2016).[9] *Sun Capital Partners* presents an entirely different factual scenario than this case and is, therefore, inapposite. Accordingly, because Plaintiff has not even remotely alleged facts that would plausibly suggest that Defendant and Penn Traffic constituted a single employer for purposes of ERISA withdrawal liability, the Court grants Defendant's motion to dismiss Plaintiff's third cause of action.

9. In other words, if Companies A, B, and C each owned 30% of Company X, alone they would fail to meet the IRS regulations for a parent-subsidiary relationship, which requires 80% ownership. However, if Companies A, B, and C formed a joint venture to control Company X, the court would aggregate their ownership percentages, which equal 90%, and find that their joint venture was a *de facto* parent company in common control with Company X.

F. Fourth cause of action - joint employer liability

Although the MPPAA does not define the term "employer," the Second Circuit has adopted a definition. *See Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoremen's Ass'n Pension Trust Fund*, 880 F.2d 1531, 1537 (2d Cir. 1989) (holding that the term "employer" means "'a person who is *obligated to contribute* to a plan either as a direct employer or in the interest of an employer of the plan's participants'" (quotation and other citations omitted) (emphasis added)). Furthermore, although the Second Circuit has never clarified what "obligation to contribute" means, other circuits have. In this regard, the Sixth Circuit has recognized the connection between the accepted definition of employer having the "obligation to contribute" and the explicit definition of "obligation to contribute" in the MPPAA. *See Cent. States, Se. & Sw. Areas Pension Fund v. Int'l Comfort Prods., LLC*, 585 F.3d 281, 286 (6th Cir. 2009). In *Int'l Comfort Prods.*, the Sixth Circuit noted that the MPPAA defined "obligation to contribute" as an "'obligation to contribute arising — (1) under one or more collective bargaining (or related) agreements, or (2) *as a result of a duty under applicable labor-management relations law*.'" *Id.* (quoting 29 U.S.C. § 1392(a) (emphasis added)). Thus, the Sixth Circuit held that the term "employer" includes a business with a contractual relationship to contribute as well as a business "that had an obligation to contribute to the Fund 'under applicable labor-management relations law.'" *Id.* at 287 (quoting 29 U.S.C. § 1392(a)(2)).

On the other hand, the Seventh, Eighth, and Ninth Circuits have held that "an entity's obligation to contribute

must be 'created by contract' in order for the entity to be an employer under the MPPAA." *Int'l Comfort Prods.*, 585 F.3d at 285; *see, e.g., Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 85 F.3d 1282, 1287 (7th Cir. 1996) (holding that "[t]he appropriate inquiry is whether the alleged employer had an obligation to contribute [to the pension fund] as well as the nature of that obligation" and "the nature of the obligation to contribute [is] contractual, and therefore the party 'who is signatory to a contract creating the obligation to contribute is the "employer" for purposes of establishing withdrawal liability'" (quoting *Rheem*, 63 F.3d at 707); *Rheem Mfg. Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, 63 F.3d 703, 707 (8th Cir. 1995) (holding that, for purposes of MPPAA liability, an "employer" is an entity that has assumed a contractual obligation to make contributions to a pension fund); *H.C. Elliott, Inc. v. Carpenters Pension Trust Fund for N. California*, 859 F.2d 808, 813 (9th Cir. 1988) (holding that the term "employer" "describes one who was a signatory employer with respect to the plan").

Plaintiff concedes that Defendant did not have a contractual obligation to contribute to the Pension Fund but argues, nonetheless, that the Court should reject the reasoning of the Seventh, Eighth and Ninth Circuits. *See* Dkt. No. 42 at 31-32. Although the Second Circuit has not yet addressed this issue, district courts in the Second Circuit that have done so have reached different conclusions. *Compare Div. 1181 Amalgamated Transit Union - New York Emps. Pension Fund v. New York City Dep't of Educ.*, No. 13-cv-9112, 2014 U.S. Dist. LEXIS 123782, 2014 WL 4370724, *8 (S.D.N.Y. Aug. 27, 2014)

(holding that *Korea Shipping* incorporates statute's definition of obligation to contribute) *with Olivieri v. P.M.B. Constr., Inc.*, 383 F. Supp. 2d 393, 404 (E.D.N.Y. 2005) (relying on *Rheem* to conclude that ERISA does not incorporate the joint-employer doctrine).

Although there are merits to both approaches, the Court finds the reasoning of the Sixth Circuit persuasive because, rather than creating a judicial definition of the term "obligation to contribute," the Sixth Circuit incorporates the words of the statute to give meaning to *Korea Shipping*'s holding.

In any event, even if joint-employer liability did apply to this case, Plaintiff has failed to allege sufficient facts to survive a motion to dismiss. "A joint employer relationship may be found to exist where there is sufficient evidence that the respondent had immediate control over the other company's employees." *NLRB v. Solid Waste Servs., Inc.*, 38 F.3d 93, 94 (2d Cir. 1994) (*per curiam*) (citations omitted). Factors relevant to this determination include "commonality of hiring, firing, discipline, pay, insurance, records, and supervision." *Id.* Importantly, the contracts between Defendant and Penn Traffic specifically foreclosed Defendant's participation in any control over the employees. *See* Dkt. No. 23-4 at § 10. In this regard, the contract provided that "[Defendant] shall not exercise any authority over the Penn Traffic Employees, including, but not limited to, selecting, engaging, fixing the compensation of, discharging, and otherwise managing, supervising, and controlling the Penn Traffic Employees and no joint employer relationship shall exist." *See id.*

The existence of this contract creates a strong presumption that Defendant's relationship with the Teamsters Local 317 employees, who are the only employees relevant in the joint-employer context, was not one of "immediate control," and the complaint fails to allege any facts to the contrary.[10] Although Plaintiff alleges some facts that tend to show that Defendant exercised some supervision over the relevant employees, Plaintiff does not allege any facts regarding the other factors that are relevant to the analysis of this issue. As to Plaintiff's claim that "[Defendant] directed, controlled, and benefitted from the day-to-day activities of Teamsters Local 317 members," *see* Dkt. No. 28 at ¶ 21, this conclusory statement, while potentially relevant to the factor of "supervision," fails again to state any specifics. Furthermore, merely instructing the warehouse employees where and how to deliver the inventory is insufficient to show "immediate control." Accordingly, after considering the contracts together with the scant allegations in the amended complaint, the Court concludes that Plaintiff has not stated a plausible joint-employer claim and, therefore, grants Defendant's motion to dismiss Plaintiff's fourth cause of action.[11]

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10. The Court notes that there is an important distinction between "successor liability" and "joint employer liability." Successor liability looks to the relationship between two companies based on the totality of the circumstances and the federal right that is implicated, whereas joint employer liability looks to the relationship between one company and another company's employees.

11. In this regard, the Court notes that Plaintiff's reliance on the factors listed in *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61 (2d Cir. 2003), is misplaced. In *Zheng*, the court addressed the issue

Appendix C

IV. CONCLUSION

Having reviewed the entire file in this matter, the parties' submissions and the applicable law and for the above-stated reasons, the Court hereby

ORDERS that Defendant's motion to dismiss Plaintiff's first amended complaint, *see* Dkt. No. 23, is **GRANTED in part** and **DENIED in part**. In this regard, the Court grants the motion with regard to Plaintiff's second, third and fourth causes of action and denies the motion with regard to Plaintiff's first cause of action; and the Court further

ORDERS that this matter is referred to Magistrate Judge Baxter for all further pretrial matters.

IT IS SO ORDERED.

Dated: May 1, 2017
Syracuse, New York

/s/ Frederick J. Scullin, Jr.
Frederick J. Scullin, Jr.

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of joint employment under the Fair Labor Standards Act of 1938 ("FLSA"), which uses ""the broadest definition [of 'employ'] that has ever been included in any one act"" and encompasses "'working relationships, which prior to [the FLSA], were not deemed to fall within an employer-employee category.'" *Id.* at 69 (quotations and footnote omitted) (recognizing that the FLSA's definition of employer is broader than common law and holding that the four-factor test the district court had used was inappropriately narrow).

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MARCH 3, 2022

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No: 20-1185

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, BY ITS TRUSTEES, MICHAEL S. SCALZO, SR., JOHN BULGARO, DANIEL W. SCHMIDT, TOM J. VENTURA, BOB SCHAEFFER, BRIAN HAMMOND, MARK MAY AND PAUL MARKWITZ,

Plaintiff-Appellant,

v.

C&S WHOLESALE GROCERS, INC.,

Defendant-Appellee.

ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of March, two thousand twenty-two.

Appendix D

Appellant, New York State Teamsters Conference Pension and Retirement Fund, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk