

No. _____

In the
Supreme Court of the United States

GCIU-EMPLOYER RETIREMENT FUND
and BOARD OF TRUSTEES OF THE
GCIU-EMPLOYER RETIREMENT FUND,

Petitioners,

v.

MNG ENTERPRISES, INC., DBA DIGITAL FIRST MEDIA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

There is a split between the Ninth and Sixth Circuits about whether contribution history can transfer from a predecessor to its successor for purposes of withdrawal liability.

Two newspapers were purchased in asset sales in 2006 and 2007, and the GCIU-Employer Retirement Fund included their contribution histories in the withdrawal assessments of their purchasers after the purchasers completely withdrew in 2013 and 2014. Finding notice of potential withdrawal liability and substantial continuation of the newspapers' operations, the Arbitrator and the District Court upheld the inclusion of the contribution histories, citing to Ninth Circuit successor cases. Their holdings were consistent with *Sofco Erectors, Inc. v. Trs. Of Ohio, Operating Eng'r's Pension Fund*, 15 F.4th 407 (6th Cir. 2021), which held a predecessor's contribution history was properly included in its successor's withdrawal assessment.

The Ninth Circuit, ignoring *Sofco*, overturned the District Court, finding that the dates of the asset sales rather than the dates of the withdrawals were the relevant dates for determining successorship and the equitable inclusion of contribution history. *GCIU-Employer Ret. Fund v. MNG Enters.*, 51 F.4th 1092, 1101 (2022).

The Question Presented is:

Whether a predecessor's contribution history is properly included in the withdrawal liability assessments of its successor.

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants/ Cross-Appellees below

The Petitioners are the GCIU-Employer Retirement Fund (“Pension Plan”) and the Board of Trustees of the GCIU-Employer Retirement Fund, who, in their capacities as trustees, are appellees in the proceedings below.

The Trustees of the Pension Plan are:

- Eddie Williams
- Steve Nobles
- Clark Ritchey
- George Tedeschi
- Jim Longerbone
- Thomas Sarnecki
- Charles Kamen
- Jim Janiga
- Lisa McCauley

Respondent and Defendant-Appellee/ Cross-Appellant below

The Respondent is MNG Enterprises, Inc., dba Digital First Media.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, counsel certifies that neither Petitioner has a parent corporation and there is no publicly held company that owns 10% or more of its stock.

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit
Case Nos. 21-55864, 21-55923

GCIU-Employer Retirement Fund;
Board of Trustees of the GCIU-Employer Retirement
Fund, *Plaintiffs-Appellants/Cross-Appellees*
v. MNG Enterprises, Inc. d/b/a Digital First Media,
Defendant-Appellee/Cross-Appellant.

Date of Final Judgment: October 28, 2022

Date of Rehearing Denial: December 6, 2022

United States District Court
Central District of California

Case No. 2:21-cv-00061-PA-JEM (C.D. Cal.) 2021
U.S. Dist. LEXIS 145112, *1 (July 8, 2021 C.D. Cal.)

GCIU-Employer Retirement Fund;
Board of Trustees of the GCIU-Employer Retirement
Fund, *Plaintiffs/Counter-Defendants* v.
MNG Enterprises, Inc. d/b/a Digital First Media,
Defendant/Counter-Claimant.

Date of Decision: July 8, 2021

Date of Entry of Judgment: August 2, 2021

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OPINIONS BELOW

The District Court’s Judgment (App. B, 18a-30a, App. B2, 34a-35a) is CV 21-00061 PA (JEMx) 2021 U.S. Dist. LEXIS 145112, *1 (C.D. Cal. July 8, 2021) . The Court of Appeal’s Opinion (App. A, 1a-17a) is reported at 51 F.4th 1092 (9th Cir. 2022).



JURISDICTION

In accordance with 29 U.S.C. § 1401(b)(2), the District Court exercised jurisdiction over the parties’ consolidated action to enforce and vacate the arbitration award under 29 U.S.C. § 1451(c) and 28 U.S.C. § 1331. The District Court entered a final judgment confirming the arbitration award on August 2, 2021. *GCIU-Employer Ret. Fund v. MNG Enterprises, Inc.*, Case No. 2:21-cv-00061-PA-JEM (C.D. Cal. 2021) (App.B2, 34a-35a). The Court of Appeals affirmed in part and reversed in part the District Court on October 28, 2022 (App. A, 1a-17a). Petitioners’ timely petition for rehearing was denied on December 6, 2022. (App. D, 50a-51a). On February 15, 2023, Justice Kagan granted Petitioner’s Application to Extend the Time for Filing a Petition for a Writ of Certiorari from March 5, 2023 to May 5, 2023. (See SCOTUS Application No. 22A745) This Court has jurisdiction under 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1401(a)

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

29 U.S.C. § 1401(a)(3)(A)

(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

29 U.S.C. § 1401(b)

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings.

- (1) If no arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsor under section 4219(b)(1) [29 U.S.C. § 1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.
- (2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's

award, in an appropriate United States district court in accordance with section 4301 [29 U.S.C. § 1451] to enforce, vacate, or modify the arbitrator's award.

- (3) Any arbitration proceedings under this section shall, to the extent consistent with this title, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpoena power), and enforced in United States courts as an arbitration proceeding carried out under title 9, United States Code [9 U.S.C. §§ 1 et seq.].

29 U.S.C. § 1401(c)

- (c) Presumption respecting finding of fact by Arbitrator. In any proceeding under subsection (b), there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the Arbitrator were correct.



STATEMENT OF MATERIAL FACTS

This action arises from an arbitration proceeding initiated by MNG Enterprises, Inc. (“MNG Enterprises”) after the GCIU-Employer Retirement Fund (“the Pension Plan”) assessed withdrawal liability against both the MediaNews Group controlled group (“MNG”) and the California Newspaper Partnership Controlled Group (“CNP”). MNG and CNP received separate notices and demands for payment dated May 30, 2018 (See, Excerpt of Record for Appellants at ECF No. 14/10 at 2-ER-030-034 and 2-ER-035-054, *GCIU-Employer Ret. Fund v. MNG Enters.*, 51 F.4th 1092 (9th Cir. 2022) (Nos. 21-55864, 21-55923).¹

The Plan’s assessment of withdrawal liability against MNG included 2012 and 2013 partial withdrawals, and a 2014 complete withdrawal pursuant to ERISA Sections 4203 and 4205, 29 U.S.C. § 1383, § 1385. The Plan’s assessment of withdrawal liability against CNP was for a 2013 complete withdrawal pursuant to ERISA Section 4203, 29 U.S.C. § 1383. At the time of the 2014 complete withdrawal by MNG (and the 2012 and 2013 partial assessments), the *Torrance Daily Breeze* newspaper was a member of MNG’s controlled group. Likewise, the *Santa Cruz Sentinel* was a member of the CNP controlled group at

¹ At the time of the withdrawal liability assessments that are at issue, there were two separate controlled groups, the MediaNews Group Controlled Group (“MNG”) and the California Newspaper Partnership Controlled Group (“CNP”); since MNG and CNP’s complete withdrawals from the Plan, they became part of the same controlled group referred to here as MNG Enterprises, Inc. (“MNG Enterprises”).

the time of withdrawal. The assessments were calculated by the Plan’s consulting actuary, Rex Barker of Milliman, a national actuarial firm. (See, Excerpt of Record for Appellants at ECF No. 14/10 at 2-ER-055-063, *GCIU-Employer Ret. Fund v. MNG Enters.*, 51 F.4th 1092 (9th Cir. 2022) (Nos. 21-55864, 21-55923).

The following facts, established by undisputed record evidence, were the subject of factual findings by the Arbitrator, and were subsequently affirmed by the District Court: The *Daily Breeze* last contributed to the Pension Plan in 2005. In December of 2006, the *Daily Breeze* was transferred to the MNG Controlled Group through an asset purchase agreement. Notably, the Arbitrator held that there was no evidence that the *Daily Breeze* withdrew from the Pension Plan prior to the December 2006 asset sale. (App. C, 40a, fn.2). The Pension Plan included the *Daily Breeze*’s contribution history in calculating MNG Controlled Group’s withdrawal liability. Similarly, in October 2006 the Community Newspaper Group LLC purchased the assets of the *Santa Cruz Sentinel* and then in February of 2007, CNP Controlled Group acquired 100% of the membership interest in Community Newspaper Group, LLC, which included the *Santa Cruz Sentinel*. The Pension Plan included the contribution history for the *Santa Cruz Sentinel* in calculating the withdrawal liability for the CNP Controlled Group. (App. B, 18a-30a)

MNG Enterprises, on behalf of MNG and CNP, requested review of the above referenced assessments and initiated arbitration.

Following a hearing, the Arbitrator issued a final award (“Award”) on January 5, 2021. (App. C, 36a-49a). The Award concluded that both the contribution

histories of the *Santa Cruz Sentinel* (in the CNP assessment) and the *Torrance Daily Breeze* (in the MNG assessment) were properly included. The Arbitrator specifically found, as a matter of fact, that MNG Enterprises (the combined controlled group for purposes of this litigation), had notice of the potential withdrawal liability at the time of the asset sales and that there was a substantial continuation of operations after the sales. The Arbitrator also held that it was MNG Enterprises' burden to prove otherwise on both issues, and that they had produced no evidence, thus not meeting their burden under 29 U.S.C. § 1401(a)(3) and *Resilient Floor Covering Pension Trust Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1084 (9th Cir. 2015) and *Heavenly Hana LLC v. Hotel Union & Hotel Indus. of Haw. Pension Plan*, 891 F.3d 839, 842 (9th Cir. 2018).

The Plan subsequently filed a District Court action pursuant to 29 U.S.C. § 1401(b)(2) requesting that the portion of the Award addressing the contribution histories be affirmed. MNG Enterprises filed a cross-claim requesting the Court to vacate the Award as to the contribution histories.

The District Court affirmed the relevant portion of the Arbitrator's Award, finding that the inclusion of both the contribution histories of the *Torrance Daily Breeze* and the *Santa Cruz Sentinel* were proper. The District Court cited *Resilient Floor Covering Pension Trust Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1084 (9th Cir. 2015) and *Heavenly Hana LLC v. Hotel Union & Hotel Indus. of Haw. Pension Plan*, 891 F.3d 839, 842 (9th Cir. 2018) for its holding.

Following briefing and oral argument, the Ninth Circuit vacated and remanded the District Court judgment as to the contribution history, holding that, “The record does not reflect whether GCIU determined MNG’s liability with respect to the newspapers based on the total contribution as of MNG’s withdrawal in 2014 or if GCIU determined that portion of liability based on the status of the asset sales dates in 2006 and 2007. Any withdrawal liability that the *Daily Breeze* or the *Sentinel* incurred would have existed at the time of the withdrawals, which occurred in 2006 or 2007.” *GCIU-Employer Ret. Fund v. MNG Enters.*, 51 F.4th 1092, 1101 (2022).



REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT COURT OF APPEALS' HOLDING IGNORED ITS OWN PRECEDENT AND CREATED A SPLIT WITH THE SIXTH CIRCUIT.

In affirming the inclusion of the contribution histories of the *Santa Cruz Sentinel* and the *Torrance Daily Breeze* to MNG Enterprises, the Arbitrator and the District Court applied the Ninth Circuit's successor decisions in *Resilient Floor Covering Pension Trust Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1084 (9th Cir. 2015) and *Heavenly Hana LLC v. Hotel Union & Hotel Indus. of Haw. Pension Plan*, 891 F.3d 839, 842 (9th Cir. 2018) which requires a finding of notice of the withdrawal liability and substantial continuity in the operation of the business before and after the asset sale. It is critical to note that both the Arbitrator and the District Court made factual findings that notice was given and that there was a substantial continuity of the operation of the businesses as noted above. Those findings have not been challenged.

The legal issue presented in this petition is whether the contribution histories of the *Santa Cruz Sentinel* and the *Torrance Daily Breeze* were properly included in the MNG withdrawal liability assessment given the Arbitrator's undisturbed finding of successorship. Looking at case law in the Sixth Circuit along with successor liability law in the Ninth Circuit, the answer is an unequivocal *yes*. The Court of Appeals' holding in this matter creates a split in the federal Circuits insofar as it is directly contrary to the decision

in *Sofco Erectors, Inc. v. Trs. of Ohio, Operating Eng'r's Pension Fund*, 15 F.4th 407 (6th Cir. 2021).

In creating the Circuit split, the Panel also misapplied the Ninth Circuit decisions in *Resilient Floor Covering Pension Tr. Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1084 (9th Cir. 2015) and *Heavenly Hana LLC v. Hotel Union & Hotel Indus. of Haw. Pension Plan*, 891 F.3d 839, 842 (9th Cir. 2018) which held that a successor is liable for a predecessor's withdrawal liability following an asset sale if there was notice of the withdrawal liability and a substantial continuation of operations.

Sofco is the only other case besides this one to have addressed the issue of whether successorship liability is a basis to transfer contribution history. In *Sofco*, relying on common law successorship cases similar to *Resilient Floor and Heavenly Hana*, the Sixth Circuit held as a matter of law that contribution history can transfer from a predecessor to a successor on the basis of common law successor liability following an asset sale.

Sofco involved facts similar to this case. In *Sofco*, the employer completely withdrew in 2017. The employer purchased the assets of a predecessor in 2004 and its withdrawal liability assessment included the pre-2004 contribution history of the predecessor in its 2017 complete withdrawal assessment, and its 2011-2013 partial withdrawal assessments. Thus, the span of time between the asset sale (2004) and the withdrawal assessment was over 15 years.

Here, the Plan included the pre-2006 and pre-2007 contribution histories of predecessor newspapers in their respective controlled groups' assessments, on the

basis that CNP and MNG were common law successors under the standard set forth in *Resilient Floor* and *Heavenly Hana*. Consistent with *Sofco*, the Arbitrator and District Court upheld the Plan’s determination. The Appellate Court, failing to even mention *Sofco*, held that the date of those asset sales in 2006 and 2007, rather than 2013 when CNP and 2014 when MNG completely withdrew, is the relevant date to determine whether CNP and MNG were a successor and whether the contribution histories should be equitably included. *GCIU-Employer Ret. Fund v. MNG Enters.*, 51 F.4th 1092, 1101 (2022).

The Ninth Circuit Panel’s decision to ignore *Sofco* —the only other case to have addressed this issue—is problematic for several reasons. First, there are pension plans and employers with national operations, so there is a need for national uniformity. If there is no national uniformity on this issue, the different standards in the Ninth and Sixth Circuits will result in forum shopping, and likely additional splits in other circuits due to the flexibilities in venue selection afforded to entities with national operations. Also, the Panel’s decision overlooks potential circumstances that would require a Plan to include contribution history of a predecessor in a successor’s withdrawal calculation. First, employers do not always inform plans that there has been a sale of assets and a plan may not know until the successor employer withdraws. Contributions keep coming in, and plans may not realize that there has been a change in corporate structure triggering a withdrawal until years later. This is what occurred in *Sofco*. Second, the Ninth Circuit Panel fails to understand that not every asset sale to a large controlled group results in a complete or partial

withdrawal. For example, a participating controlled group's facility may be sold in an asset sale and not trigger a complete withdrawal because it still contributes for other facilities to the plan. Additionally, in that same scenario, an asset sale may not even trigger a partial withdrawal if the controlled group does not continue to perform work at that facility. Thus, in the context of successor liability, if the plan does not include a predecessor's contribution history in the assessment at the time of withdrawal, the plan (and ultimately the other employers in the plan and the PBGC) will be stuck with the responsibility for the predecessor's underfunding even though the successor who carried on its business should be responsible.



CONCLUSION

The transfer of contribution history to a successor is an issue of first impression in this Court. It is exceptionally important because it impacts the pensions of thousands of workers throughout the country. Because a Circuit split has been created, the Court should grant this Petition and consider whether a ruling consistent with the *Sofco* case is warranted.

Respectfully submitted,

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