No. 18-___

IN THE

Supreme Court of the United States

SEPTEMBER ENDS CO.; BACK IN BLACK CO.,

Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, expressly makes corporate successors to a business liable for unpaid pension obligations in certain circumstances. *See* 29 U.S.C. §§ 1369(b), 1384(b), 1398. In the decision below, however, the Sixth Circuit decided that a supplemental "federal common law of successor liability is necessary to promote fundamental ERISA policies in this case," and therefore proceeded to enact additional rules. Pet. App. 24a. In doing so, it refused to adopt traditional state common law principles of successor liability as the federal rule, holding that courts may resort to state law only if pre-existing federal common law rules from other areas of the law are unavailable to fill the gap. The Sixth Circuit purported to find such a rule in this Court's 1960s-era collective bargaining cases, which adopted a rule much broader than that provided by common law. In doing so, the Sixth Circuit followed a growing trend of treating the Court's labor law cases as establishing a broad federal common law rule of successor liability for an expanding list of federal statutes. That decision conflicts with the law of other circuits and this Court's repeated admonition that federal courts are not to create federal common law to rewrite federal statutes and that even when federal common law rules are authorized, they are to be filled by adopting state common law principles absent clear congressional direction to the contrary.

The question presented is:

What is the proper standard for successor liability for unpaid ERISA pension obligations?

RULE 29.6 STATEMENT

The parent corporation of Petitioners September Ends Co. and Back in Black Co. is Superior Trim Holdings, Ltd. None of these corporations is a publicly held company. No publicly held company owns 10% or more of their stock.

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INTRODUCTION

Petitioners purchased certain assets of two auto parts plants previously owned by a failed business. That business had defaulted on its pension obligations, causing the Pension Benefit Guaranty Corporation (PBGC) to take over payments to the employees. PBGC subsequently sued Petitioners, alleging they were responsible for all of the unpaid pension obligations of the firm whose assets they had acquired.

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, contains express rules governing successor liability for unpaid pension obligations. 29 U.S.C. §§ 1369(b), 1384(b), 1398. PBGC did not claim Petitioners were liable under any of those rules. Instead, it asked the Sixth Circuit to expand upon those rules by developing a federal common law of ERISA successor liability. The Sixth Circuit obliged, finding that a "federal common law of successor liability is necessary to promote fundamental ERISA policies in this case." Pet. App. 24a.

Petitioners argued that if the court of appeals perceived a gap in the statute, federal common law should fill the void with the long-standing successor liability rules applied at common law by Ohio (where the case took place) and elsewhere. But the Sixth Circuit refused, holding that "as a general matter, the court must look to the federal common law and should draw guidance from state common law only when federal common law does not provide an established standard." Pet. App. 27a. The court found such a federal rule in several of this Court's decisions from the 1960s under the Labor Management Relations Act, 1947, 29 U.S.C. § 141 *et seq.*, and National Labor

Relations Act, 29 U.S.C. § 151 *et seq*. Pet. App. 28a (citing *Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 554 (6th Cir. 2006) (describing origins of rule)). The Sixth Circuit construed that rule to extend far beyond the common law, under which asset purchasers generally do not assume the liabilities of the seller. *See, e.g.*, *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1325-26 (7th Cir. 1990) (describing common law rule). Instead, the court adopted a multi-factor test that "requires the court to balance (1) the interests of the defendant, (2) the interests of the plaintiff, and (3) 'the goals of federal policy, in light of the particular facts of a case and the particular legal obligation at issue.'" Pet. App. 28a (quoting *Cobb*, 452 F.3d at 554).

Everything about the decision – the conclusion that additional federal common law rules were authorized, the presumption against adopting state common law as the federal rule, and the resulting rule of successor liability itself – is in conflict with the decisions of this Court and other circuits. At the same time, the decision is part of a growing trend of turning this Court's expansive successor liability principles from 1960s-era collective bargaining cases into an all-purpose federal rule that exposes asset purchasers to unpredictable and often catastrophic liability for the debts of others. The Court should grant certiorari in this case to restore order to this area of the law.

PETITION FOR A WRIT OF CERTIORARI

Petitioners September Ends Co. and Back in Black Co. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is published at 902 F.3d 597. The opinion of the district court (Pet. App. 52a-62a) is not published in the *Federal Supplement* but is available at 2016 WL 7474404.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2018. Pet. App. 1a. On November 5, 2018, the court of appeals denied Petitioners' timely petition for rehearing en banc. Pet. App. 65a. On January 20, 2019, Justice Sotomayor extended the time to file this petition through March 5, 2019. No. 18A750. On February 22, 2019, Justice Sotomayor further extended the deadline through April 4, 2019. *Id*. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

29 U.S.C. § 1369. Treatment of transactions to evade liability; effect of corporate reorganization

(a) Treatment of transactions to evade liability

If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date of the termination on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date. This subsection shall not cause any person to be liable under this subtitle in connection with such plan termination for any increases or improvements in the benefits provided under the plan which are adopted after the date on which the transaction referred to in the preceding sentence becomes effective.

(b) Effect of corporate reorganization

For purposes of this subtitle, the following rules apply in the case of certain corporate reorganizations:

(1) Change of identity, form, etc.

If a person ceases to exist by reason of a reorganization which involves a mere change in identity, form, or other place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the person to whom this subtitle applies.

(2) Liquidation into parent corporation

If a person ceases to exist by reason of a liquidation into a parent corporation, the parent corporation shall be treated as the person to whom this subtitle applies.

(3) Merger, consolidation, or division

If a person ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the person to whom this subtitle applies.

STATEMENT OF THE CASE

The 2008 crash of the U.S. stock market and the Great Recession hit the automotive industry particularly hard. One casualty was Findlay Industries, Inc. (Findlay), an Ohio corporation that sponsored and administered a pension plan for its employees. Dist. Ct. Doc. 3 (Complaint) at 7. In December 2012, Findlay and PBGC agreed that the pension plan was terminated effective July 18, 2009. *Ibid*. PBGC then became responsible for paying benefits due under the plan. *Ibid*.

On May 8, 2009, a company owned by Michael J. Gardner, Findlay's former CEO, purchased certain equipment, inventory and receivables associated with just two of Findlay's plants. Complaint 34; Pet. App. 7a. Gardner transferred ownership of these assets to Petitioners September Ends Co. and Back in Black Co., of which he was the majority owner. Complaint 34.

PBGC sued several defendants, including Petitioners, to recover unpaid pension benefits, premiums, interest, and penalties associated with the overall pension plan for the much-larger Findlay company. Complaint 88-90.

ERISA contains extensive express provisions for extending liability for pension obligations to other corporations. One provision extends liability for an employer's pension obligations to all corporations under "common control" of the employer or its owners. 29 U.S.C. § 1301(b)(1). Another provides for successor liability when a firm changes corporate identity, is liquidated into a parent corporation, or merges with another firm. *Id.* § 1369(b). The statute further directs that if "a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle," the sale of a company shall be disregarded for ERISA liability purposes under certain circumstances. *Id*. § 1369(a).

Recognizing that petitioners were not liable for Findlay's ERISA obligations under any of these provisions, PBGC instead sought to hold Petitioners liable for the entire amount demanded in the Complaint under a federal common law theory of successor liability. Complaint 34-39.

The district court dismissed PBGC's federal common law claim. Pet. App. 60a, 62a. The court noted that Congress did not list Petitioners among the entities that PBGC is authorized to sue for successor liability, and further noted that PBGC did not allege Petitioners were otherwise liable under 29 U.S.C. § 1369. Pet. App. 59a. The court rejected PBGC's request for a new federal common law rule of successor liability that applies to asset purchasers, for three reasons. First, "ERISA is neither silent nor ambiguous" because it "clearly identif[ies] who may be pursued for monetary recovery," and the potentially liable parties do not include mere asset purchasers. *Id.* at 60a-61a. Second, "there is no statutory gap for federal common law to fill" because Section 1369(b) "define[s] the contours of successor liability" for single-employer pension plans. *Id.* at 61a-62a. Third, a federal common law rule is not essential to promote fundamental ERISA policies because Congress authorized PBGC to pursue several types of entities for unpaid pension benefits and "[a]dding more targets is not necessary to fulfill ERISA's policy of protecting plan participants." *Id.* at 62a.

In a 2-1 decision, a panel of the Sixth Circuit reversed. Pet. App. 1a-2a. The majority did not conclude that ERISA is silent or ambiguous on the issue of successor liability. Nor did it conclude that an awkward gap in ERISA's statutory scheme must be filled by federal common law. Instead, relying solely on the allegations in the Complaint, the majority concluded that "fundamental ERISA policies" would be furthered by extending successor liability beyond ERISA's express provisions to include certain asset purchasers by means of federal common law. *Id.* at 23a-24a. The majority fashioned a new rule purportedly based on "the test developed under different provisions of federal labor and employment law." *Id.* at 27a. The majority rejected Petitioners' argument that any federal common law rule should be based on state law, holding that "as a general matter, the court must look to the federal common law and should draw guidance from state common law only when federal common law does not provide an established standard." *Ibid.*

The dissent rejected the majority's federal common law rule, reasoning that "[i]f ERISA speaks to an issue, a party cannot complain because it does not like what the statute says." Pet. App. 43a. The dissent stated that it was "convince[d]" by both the text and the legislative history of 29 U.S.C. § 1369 that "Congress intentionally restricted successor liability to those circumstances indicated in [Section] 1369(b)." Pet. App. 45a. The dissent also concluded that because Congress deliberately adopted a narrow form of successor liability, an expanded federal common law rule cannot be essential to the promotion of fundamental ERISA policies. *Id.* at 48a-49a.

REASONS FOR GRANTING THE WRIT

Whether and how courts should supplement federal statutes with common law rules is a recurring question that has bedeviled the lower courts in a variety of contexts for years. This Court has repeatedly been required to reign in some federal courts' desire to improve upon the work of Congress and the common law by inventing new rules and remedies never approved by any legislature and unknown to legal tradition. *See, e.g.*, *United States v. Bestfoods*, 524 U.S. 51 (1998); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90 (1991); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979).

The Court's intervention is required again. The decision below is part of a growing line of cases in which federal courts of appeals have adopted principles of successor liability that far exceed anything enacted by Congress or recognized at common law, purportedly based on certain of this Court's 1960s-era decisions in the collective bargaining context. Courts following this trend have done so in conflict with the law of other circuits and in derogation of this Court's repeated holdings that federal courts lack the authority to create remedies Congress elected not to provide and that any federal common law developed to fill gaps in federal law must adopt traditional state law rules absent clear direction from Congress to the contrary. The Court should grant this petition to clear lower courts' confusion about what its precedents require and restore uniformity to the law of successor liability under ERISA and elsewhere.

I. The Courts Are Divided Over The Proper Standard For Successor Liability Under ERISA And Other Federal Statutes.

Even accepting the Sixth Circuit's conclusion that ERISA was in need of supplemental successor liability rules, *but see infra* § II, every major step of the court's analysis, as well as its ultimate decision on what rule to adopt, is the subject of a circuit conflict and is irreconcilable with this Court's modern precedents.

A. The Sixth Circuit's Presumption Against Adopting State Law Rules Conflicts With The Decisions Of This Court And Other Circuits.

The conflicts begin with the rule for deciding whether federal common law should be filled with state common law principles or rules of the federal courts' own devising.

1. This Court Has Established A Strong Presumption That Gaps In Federal Statutes Should Be Filled By Adopting State Law Rules As The Federal Common Law.

Petitioners argued below that any federal common law of successor liability should be drawn from state common law, citing this Court's decision in *United States v. Kimbell Foods*, 440 U.S. 715 (1979). *See* Pet. C.A. Br. 62. In that case, the Court explained that deciding that a question must be resolved as a matter of federal common law does not "inevitably require resort to uniform federal rules." 440 U.S. at 727-28. Instead, "[w]hether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy," which turns on the "need for a nationally uniform body of law," "whether application of state law would frustrate the specific objectives of the federal programs," and "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." *Id*. at 728-29.

In *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991), this Court held that *Kimbell Foods* and cases like it

> indicate that a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards, or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand.

Id. at 98 (internal quotation marks omitted). "Otherwise," the Court explained, "we have indicated that federal courts should 'incorporate state law as the federal rule of decision,' unless 'application of the particular state law in question would frustrate specific objectives of the federal programs.'" *Ibid*. (quoting *Kimbell Foods*, 440 U.S. at 728) (alterations omitted). This "presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Ibid*. "Corporation law is one such area." *Ibid*.

Even when courts properly decide that a *uniform* federal rule is needed, the Court has directed that general state common law principles be adopted as the uniform federal rule, unless Congress clearly indicates otherwise. In *United States v. Bestfoods*, 524 U.S. 51 (1998), the Court considered a close cousin of the successor liability question here, deciding when parent corporations could be liable for the environmental law violations of their subsidiaries. The Court explained that it "is a general principle of corporate law . . . that a parent corporation . . . is not liable for the acts of its subsidiaries," *id.* at 61, except under the established common law test for corporate veil piercing, *id*. at 62. As in this case, the Government asked the courts to create a different federal common law rule that would broaden its ability to extract payment from related corporations. This Court rejected that argument out of hand. "Nothing in [the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.*] purports to rewrite this well-settled rule," which made it "like many another congressional enactment in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." 524 U.S. at 63 (internal quotation marks omitted). The Court then held that failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *Ibid*. (internal quotation marks omitted).[1]

2. The Sixth Circuit Applied The Opposite Presumption, In Conflict With This Court's Precedents And The Law Of Other Circuits.

a. The Sixth Circuit's decision could not have applied a more different rule. Relying on its own precedent, the court held that "as a general matter, the court must look to the federal common law and should draw guidance from state common law only when federal common law does not provide an established standard." Pet. App. 27a (citing *Tinsley v. Gen. Motors Corp*., 227 F.3d 700, 704 (6th Cir. 2000)). It thus never asked, as *Kimbell Foods* requires, whether there was some special need for a uniform federal rule.

Moreover, even if the Sixth Circuit had provided some convincing reason why successor liability rules cannot vary from State to State, its presumption that the uniform rule should be derived from federal common law developed in other contexts is irreconcilable with *Bestfoods*. Rather than being a source of last resort, as the Sixth Circuit held, this Court has required that state corporation law fill the gaps in federal statutes unless the statute "speak[s] directly to the question addressed by the common

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[1] The Court left open whether "courts should borrow state law, or instead apply a federal common law" drawn from general common law principles. 524 U.S. at 63 n.9. But either way, the Court ruled out developing federal principles to expand the liability beyond that recognized at common law, absent clear statutory direction.

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

b. The proper presumption for when to apply state common law to fill a gap in ERISA and other statutes is the subject of a longstanding circuit conflict.

For example, the Sixth Circuit's presumption conflicts with the rule applied in the Eighth Circuit in cases like *Greater Kansas City Laborers Pension Fund v. Superior General Contractors, Inc.*, 104 F.3d 1050 (8th Cir. 1997). There, a firm was sued under ERISA to recover unpaid fringe benefit contributions, on the theory that it was the alter ego of the predecessor company that owed the money.[2] Just as PBGC here argued for a broad successor liability standard developed in federal labor law cases, the plaintiffs in the Eighth Circuit asked the court to apply the "alter ego doctrine as developed under the National Labor Relations Act," which applies "a more lenient standard for disregarding the corporate form than that employed in corporate law." *Id*. at 1055. Consistent with *Kimbell Foods* and *Bestfoods*, the Eighth Circuit held that courts must apply "corporate law principles to determine employer liability under ERISA" unless those principles do not "comport with the language and purposes of the statute." *Ibid*.

The Fourth Circuit likewise recognized the presumption in favor of state law rules in *United States ex rel. Bunk v. Government Logistics N.V.*, 842

[2] Alter ego theory is a related ground for holding a successor liable for the debts of another corporation. *See, e.g.*, *Mass. Carpenters Cent. Collection Agency v. Belmont Concrete Corp.*, 139 F.3d 304, 307 (1st Cir. 1998).

F.3d 261 (4th Cir. 2016). There, the plaintiff asked the court to apply the federal labor law standard to determine successor liability under the False Claims Act, 31 U.S.C. § 3729 *et seq*. To decide that question, the court appropriately applied *Bestfoods*, requiring textual proof of a congressional decision to displace general common law standards. 842 F.3d at 274.

By contrast, in *Einhorn v. M.L. Ruberton Construction Co.*, 632 F.3d 89 (3d Cir. 2011), the Third Circuit, like the Sixth Circuit in this case, held "where the statute does not provide explicit instructions, it is well settled that Congress intended that the federal courts would fill the gaps" not by borrowing from state law, but "by developing, in light of reason, experience, and common sense, a federal common law of rights and obligations imposed by the statute." *Id*. at 96-97. Based on that presumption, the court adopted a successor liability rule based on this Court's labor law decisions, like the Sixth Circuit here. *Ibid*.; *see also Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 150-51 (3d Cir. 2014) (rejecting application of state law to successor liability question under Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, without conducting *Kimbell Foods* or *Bestfoods* analysis).

B. The Circuits Are Also Divided Over The More Specific Question Of Whether To Adopt State Law Rules To Govern Successor Liability In Federal Employment-Related Statutes Like ERISA.

The Sixth Circuit's selection of the wrong presumption led it down a path that has been trodden by too many others, adopting what is quickly becoming an all-purpose federal rule of successor liability for federal employment-related and other statutes based on a misreading of some of this Court's older collective bargaining decisions.

1. In a series of cases in the late 1960s and early 1970s, this Court upheld agency decisions imposing certain collective bargaining responsibilities and liabilities on asset purchasers in circumstances that, the Court acknowledged, would not have prompted general successor liability at common law. *See generally Holland v. Williams Mountain Coal Co.*, 256 F.3d 819, 827-30 (D.C. Cir. 2001) (Sentelle, J., concurring) (describing evolution of cases).

Principal among these decisions was Justice Brennan's opinion for the Court in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). He explained that the "principal question for decision in this case" was "whether the bona fide purchaser of a business, who acquires and continues the business with knowledge that his predecessor has committed an unfair labor practice in the discharge of an employee, may be ordered by the National Labor Relations Board to reinstate the employee with backpay." *Id.* at 170. The Court explained that Congress had authorized the Board to remedy a violation of the National Labor Relations Act through "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." *Id.* at 175 (quoting 29 U.S.C. § 160(c)). The Board's exercise of this delegated power, the Court emphasized, was "subject to limited judicial review." *Id.* at 181 (internal quotation marks omitted). Under this lenient standard, the Court held that a successor company could be forced to reinstate with backpay a worker illegally terminated by the predecessor company so long as the purchaser knew of the violation. *Id*. at 181-85. In a footnote, Justice Brennan stated that "so long as there is a continuity in the 'employing industry,' the public policies underlying the doctrine will be served by its broad application." *Id*. at 183 n.5.

Certain courts of appeals have treated this decision as creating an all-purpose federal common law "substantial continuity" standard for successor liability under an ever-expanding list of statutes. *See, e.g.*, *Einhorn*, 632 F.3d at 94 ("Federal courts beginning with *Golden State* have developed a federal common law successorship doctrine imposing liability upon successors beyond the confines of the common law rule when necessary to protect important employment-related policies."). The list now includes:

- **ERISA**: *Einhorn*, 632 F.3d at 96; Pet. App. 28a; *Ind. Elec. Workers Pension Benefit Fund v. ManWeb Servs., Inc.*, 884 F.3d 770, 776 (7th Cir. 2018); *Haw. Carpenters Trust Funds v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289, 294 (9th Cir. 1987).

- **Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253**: *Brzozowski v. Corr. Physician Servs., Inc.*, 360 F.3d 173, 177 (3d Cir. 2004); *Rojas v. TK Commc'ns, Inc.*, 87 F.3d 745, 750 (5th Cir. 1996); *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974); *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1236 (7th Cir. 1986); *Bates v. Pac. Mar. Ass'n*, 744 F.2d 705, 709-10 (9th Cir. 1984); *Trujillo* *v. Longhorn Mfg. Co.*, 694 F.2d 221, 224-25 (10th Cir. 1982).

- **Fair Labor Standards Act**: *Thompson*, 748 F.3d at 150; *Steinbach v. Hubbard*, 51 F.3d 843, 846 (9th Cir. 1995).
- **Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.***: *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 747-48 (7th Cir. 1994).
- **Railway Labor Act, 45 U.S.C. § 151 *et seq.***: *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 26 (1st Cir. 2000).
- **CERCLA**: *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 518-19 (2d Cir. 1996);[3] *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992); *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 487-90 (8th Cir. 1992).

The trend also extends to other theories for holding successor corporations liable, such as alter ego doctrine. *See Bhd. of Locomotive Eng'rs*, 210 F.3d at 27 (collecting cases in which circuits have adopted "less rigorous" alter ego standards from labor law "to fulfill [a federal] statute's goals," including under ERISA; the Clayton Act, 15 U.S.C. § 12 *et seq.*; and the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*).

2. The successor liability cases are not, however, completely uniform. For example, the Fourth Circuit recently applied *Bestfoods* to reject application of a substantial continuity test to the False Claims Act.

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[3] This case was subsequently reversed, as discussed *infra*.

Bunk, 842 F.3d at 274 (citing *Bestfoods*, 524 U.S. at 63). A number of circuits have likewise rejected the test in CERCLA cases after *Bestfoods*. *See New York v. Nat'l Servs. Indus., Inc.*, 352 F.3d 682 (2d Cir. 2003) (rejecting prior use of federal substantial continuity rule); *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358 (9th Cir. 1998) (adopting common law rule). *But see United States v. Gen. Battery Corp.*, 423 F.3d 294, 298 (3d Cir. 2005) (reaffirming prior embrace of federal substantial continuity test).

C. The Trend Of Applying The Broader Labor Law Successor Liability Rules To ERISA And Other Statutes Is Irreconcilable With This Court's Modern Precedents.

Given *Kimbell Foods* and *Bestfoods*, it's doubtful the Court would adopt a substantial continuity test in derogation of the common law today, even in the labor law context. But there can be little doubt that lower courts' reflective extension of that test to other statutes is in conflict with this Court's modern precedents. That is particularly evident in this case.

Neither the Sixth Circuit nor PBGC provided any substantial reason why ERISA requires a uniform federal rule to supplant established state law. The fact that ERISA broadly preempts state law (Pet. App. 27a) is no reason; the issue presented here only ever arises when courts decide that a question must be resolved by federal common law, rather than by state law's direct application, yet this Court has made state law the default rule for filling such gaps. *See Kamen*, 500 U.S. at 98; *Kimbell Foods*, 440 U.S. at 727-28. The Sixth Circuit's invocation of ERISA's "goal" of achieving "uniform national treatment of pension benefits," Pet. App. 28a (internal quotation marks omitted), is inapt as well. Nothing in the choice of successor liability rules affects the treatment of plans in themselves – the only question is who will pay for those benefits in the event of default, PBGC or bona fide purchasers of the defaulting company's assets. *See Kimbell Foods*, 440 U.S. at 729 (rejecting argument that purposes of federal loan program required uniform federal common law of lien priority to facilitate the Government's recovery of unpaid loans).

Regardless, even if there were a need for a uniform rule, that simply raises the question of whether that uniform rule should be drawn from the common law or, instead, by federal courts' intuitions about what modifications are helpful to achieve the statute's general purposes. *Bestfoods* decisively answers that question: corporate law questions arising in the administration of federal statutes are to be answered by applying general common law principles unless "the statute . . . speak[s] directly to the question addressed by the common law." 524 U.S. at 63 (internal quotation marks omitted). Neither PBGC nor the Sixth Circuit have even pretended that such textual instructions exist in ERISA.

Finally, as other circuits have recognized, "the labor law cases" from which some circuits have developed their broad successor liability rules "are particular to the labor law context" and therefore "cannot easily be extended to other areas of federal common law." *New York*, 352 F.3d at 686. "[E]ven where the labor cases did involve an asset purchase, the focus was not on whether the successor corporation should be responsible for general corporate liabilities . . . ." *Ibid.* Instead, the relief sought under the statutes involved in the *Golden State* line of cases "is *typically* 'nonmonetary and can be effective only if directed against the workers' current employer.'" *Holland*, 256 F.3d at 826 (internal quotation marks omitted). In addition, *Golden State* "reviewed the [National Labor Relations] Board's interpretation of its organic statute" under a deferential standard of review, not judicial development of a common law principle. *Id*. at 828 (Sentelle, J., concurring).

D. Even The Circuits Applying A Federal "Substantial Continuity" Rule Disagree About The Test.

Even the circuits purporting to apply this Court's labor law successor liability rules have disagreed about what those cases require.

The Sixth Circuit here adopted an exceedingly vague standard it had previously applied under the FMLA: "Successor liability is an equitable doctrine that requires the court to balance (1) the interests of the defendant, (2) the interests of the plaintiff, and (3) 'the goals of federal policy, in light of the particular facts of a case and the particular legal obligation at issue.'" Pet. App. 28a (quoting *Cobb*, 452 F.3d at 554). The Ninth Circuit applies a similar totality-of-the-circumstances balancing test, adding a list of seven factors to consider. *Waiola Carpenter Shop*, 823 F.2d at 294.

In contrast, the Third and Seventh Circuits have adopted a specific three-part test: successor liability "applies when an employer substantially assumes a predecessor's assets, continues the predecessor's operations without interruption or substantial change, and has notice at the time of acquisition." *ManWeb*, 884 F.3d at 776 (internal quotation marks and alterations omitted); *Einhorn*, 632 F.3d at 99 (embracing Seventh Circuit test).

II. Federal Courts Are Not Authorized To Create A Federal Common Law Of ERISA Successor Liability To Supplement The Express Successor Provisions Of The Statute.

Of course, there is another source for ERISA successor liability rules as well — the text of the statute Congress wrote. *See* 29 U.S.C. § 1369. The Sixth Circuit's decision to supplement the rules Congress actually enacted disregards decades of this Court's settled precedent, establishing new and unpredictable liabilities on vast numbers of businesses on the basis of nothing more than a court's sense that the statute would be more effective if Congress had written it differently.

A. Federal Courts Have Only Limited Authority To Develop Federal Common Law Rules To Implement ERISA.

Federal courts, unlike their state counterparts, do not have the power to make laws; that power is reserved for Congress and its elected representatives. *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981). In those limited circumstances where courts are permitted to make federal common law, they must nevertheless "respect the will of Congress" and its "paramount authority." *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 95-96 (1981).

This Court has held that ERISA authorizes courts to "develop a federal common law of rights and obligations under ERISA-regulated plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (internal quotation marks omitted). While the scope of courts' authority to create federal common law under ERISA is not fully settled,[4] it is clearly limited by this Court's instruction that the power to create federal common law "is not the authority to revise the text of the statute." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993).

The authority to develop federal common law that implements ERISA is further limited by the presumption that Congress deliberately omitted any unstated remedies from ERISA, which is a "comprehensive and reticulated statute" with integrated enforcement procedures. *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (internal quotation marks omitted); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). Outside of the ERISA context, this Court has similarly cautioned courts not to "fashion new remedies that might upset carefully considered legislative programs." *Nw. Airlines*, 451 U.S. at 97.

These rules restricting a federal court's power to make federal common law apply even if the policies underlying the statute seem to favor the requested remedy. "[V]ague notions of a statute's 'basic purpose'

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[4] Successor liability is not governed by the terms of "ERISA-regulated plans," 489 U.S. at 110 (internal quotation marks omitted), but rather determines the liability of third parties. It therefore does not fall within *Firestone*'s description of the proper subjects for federal common law rules.

are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens*, 508 U.S. at 261. "This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Id*. at 262.

B. Where Congress Has Expressly Addressed An Issue, Federal Courts Are Not Free To Modify The Statute.

This Court has repeatedly held that where Congress has addressed an issue, courts are confined to interpreting the statute and cannot use federal common law to rewrite it. *E.g.*, *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725-26 (2017) (describing "the proper role of the judiciary" as being "to apply, not amend, the work of the People's representatives"); *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2168-69 (2015) ("Our job is to follow the text even if doing so will supposedly 'undercut a basic objective of the statute.'") (citation omitted); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) ("We will not alter the text in order to satisfy the policy preferences of the Commissioner. These are battles that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch."); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85, 89 (1994) ("By presuming to judge what constitutes malpractice, this argument demonstrates the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy."); *Milwaukee*, 451 U.S. at 315 ("Our commitment to the separation of powers is too fundamental to . . . judicially decree[] what accords with common sense and the public weal when Congress has addressed the problem.") (internal quotation marks omitted); *Nw. Airlines*, 451 U.S. at 95-97 & n.34 ("[O]nce Congress addresses a subject . . . the task of the federal courts is to interpret and apply statutory law, not to create common law.").

This Court has further explained that federal courts are not well-suited to second-guessing the legislative process. "Dissatisfaction . . . is often the cost of legislative compromise" since the typical legislative process involves "highly interested parties attempting to pull the provisions in different directions" and "a change in any individual provision could . . . unravel[] the whole." *Barnhart*, 534 U.S. at 461. Thus, "[t]he deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President . . . are not for us to judge or second-guess." *Ibid*.

Similarly, this Court has explained that the nature of the legislative process makes it unwise for federal courts to rely on a statute's purpose to create federal common law. "[N]o legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam), *quoted in Henson*, 137 S. Ct. at 1725. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Ibid*.

C. Because Congress Directly Addressed Successor Liability, The Sixth Circuit Erred By Using Federal Common Law To Expand It.

Congress created a narrow set of rules imposing successor liability for single-employer pension plans. 29 U.S.C. § 1369.[5] Nevertheless, the Sixth Circuit chose to create a federal common law rule that expands successor liability beyond the rules in the statute. Decisions from this Court establish that the Sixth Circuit erred by using federal common law to rewrite the conditions for successor liability enacted by Congress.

As noted above, federal courts have only limited authority to develop federal common law rules to implement ERISA. The Sixth Circuit strayed far outside of its limited authority in this case. It expanded the deliberate limitations in 29 U.S.C. § 1369, thereby usurping Congress's role and impermissibly rewriting the text of the statute. *Nw. Airlines*, 451 U.S. at 95-96; *Mertens*, 508 U.S. at 259. It failed to consider whether and how the facts alleged in this case are sufficient to rebut the presumption that Congress deliberately omitted unstated remedies from ERISA. *Knudson*, 534 U.S. at 209; *Russell*, 473 U.S. at 147. Perhaps most importantly, its sole rationale for creating federal common law was that it

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[5] Congress also directly addressed successor liability for multi-employer pension plans. *See* 29 U.S.C. § 1398. Yet federal courts have applied the same federal common law successor liability rules in this context as well. *See, e.g.*, *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1325-29 (7th Cir. 1990).

is necessary to carry out what it deems to be the correct policy choice to promote its view of the fundamental purposes of ERISA. This decision flies in the face of this Court's warnings not to engage in such legislative exercises. *Mertens*, 508 U.S. at 261; *O'Melveny & Myers*, 512 U.S. at 85, 89; *see also* Jeffrey A. Brauch, *The Federal Common Law of ERISA*, 21 Harv. J.L. & Pub. Pol'y 541, 545-46 (1998) ("[F]ederal common law is only legitimate when it is necessary to carry out Congress's will, not when it is used to carry out the will of a particular court.").

The panel majority's decision is particularly indefensible because Congress deliberately rejected the Sixth Circuit's rule when it enacted Section 1369, as ably explained by the dissent. Pet. App. 44a-45a.

As noted above, this Court has repeatedly held that where Congress has expressly addressed an issue, federal courts are not free to modify the statute. Here, Congress expressly addressed the issue of successor liability for single-employer pension plans by enacting 29 U.S.C. § 1369(b). This provision imposes successor liability for single-employer pension plans on certain corporate reorganizations that did not occur in this case. Unhappy with the limitations imposed by Congress, the Sixth Circuit effectively amended and expanded Section 1369(b) by creating a federal common law rule that imposes successor liability on asset purchasers where Congress itself elected not to. That decision disregards the limits this Court has set on federal courts' authority and warrants immediate correction.

III. The Questions Raised In This Petition Are Recurring And Important.

The questions in this case are of broad practical and doctrinal importance.

A. The Questions Presented Have Recurring Practical Significance For A Broad Range Of Industries.

The proper successor liability rule under ERISA arises constantly in the federal trial and appellate courts, affecting virtually every industry. *See, e.g.*, *ManWeb*, 884 F.3d at 774 (refrigeration and cold-storage engineering); *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 421 (5th Cir. 2016) (utilities and mass transportation); *Resilient Floor Covering Pension Tr. Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1093 (9th Cir. 2015) (construction); *Nutt v. Kees*, 796 F.3d 988, 990 (8th Cir. 2015) (healthcare); *Tsareff v. ManWeb Servs., Inc.*, 794 F.3d 841, 846 (7th Cir. 2015) (engineering, construction, and installation-related services); *Einhorn*, 632 F.3d at 98 (construction); *Moriarty v. Svec*, 164 F.3d 323, 329 (7th Cir. 1998) (funeral services); *Teamsters Pension Tr. Fund of Phila. & Vicinity v. Littlejohn*, 155 F.3d 206, 209 (3d Cir. 1998) (trucking and other unionized industries); *Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995) (furniture); *Stotter Div. of Graduate Plastics Co. v. Dist. 65, UAW, AFL-CIO*, 991 F.2d 997, 1002 (2d Cir. 1993) (plastics); *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1327 (7th Cir. 1990) (furniture); *Waiola Carpenter Shop*, 823 F.2d at 294-95 (construction); *Members of Bd. of Admin. of*

Toledo Area UAW Ret. Income Plan v. OBZ, Inc., 2017 WL 4759031, at *3-4 (N.D. Ohio Oct. 20, 2017) (citing numerous district court cases in the Sixth Circuit alone); *see also Cement Masons' Union Local No. 592 Pension Fund v. Almand Bros. Concrete, Inc.*, 2018 WL 4462395, at *7 (D.N.J. Sept. 18, 2018) (construction); *Cent. States, Se. & Sw. Areas Pension Fund v. B&M Marine Construction, Inc.*, 2018 WL 318483, at *4 (N.D. Ill. Jan. 8, 2018) (construction); *Cent. States, Se. & Sw. Areas Pension Fund v. Sidney Insulation, Inc.*, 235 F. Supp. 3d 1044, 1046, 1054 (N.D. Ill. 2017) (construction); *Carpenters Health & Sec. Tr. of W. Wash. v. Paramount Scaffold, Inc.*, 159 F. Supp. 3d 1229, 1234 (W.D. Wash. 2016) (construction); *Trs. of the Chi. Painters & Decorators Pension Fund v. NGM Servs., Inc.*, 2014 WL 7330939, at *2 (N.D. Ill. Dec. 22, 2014) (painting); *Trs. of the Chi. Reg'l Council of Carpenters Pension Fund v. Conforti Construction Co.*, 2013 WL 3771415, at *2 (N.D. Ill. July 17, 2013) (construction); *Cent. States, Se. & Sw. Areas Pension Fund v. TAS Inv. Co.*, 2013 WL 1222042, at *7 (N.D. Ill. Mar. 25, 2013) (trucking and construction); *Auto. Indus. Pension Tr. Fund v. S. City Ford, Inc.*, 2012 WL 1232109, at *2 (N.D. Cal. Apr. 12, 2012) (auto manufacturing); *Trs. of the Utah Carpenters' & Cement Masons' Pension Trust v. Daw, Inc.*, 2009 WL 77856, at *3 (D. Utah Jan. 7, 2009) (construction); *Preite v. Charles of the Ritz Grp., Ltd. Pension Plan*, 471 F. Supp. 2d 1271, 1282 (M.D. Fla. 2006) (cosmetics); *Grimm v. Healthmont, Inc.*, 2002 WL 31549095, at *8 (D. Or. Oct. 29, 2002) (healthcare).

And these are just examples from the ERISA context; the trend towards supplanting the traditional common law rule is much broader. *See supra* at 16-17;

Taylor J. Phillips, *The Federal Common Law of Successor Liability and the Foreign Corrupt Practices Act*, 6 Wm. & Mary Bus. L. Rev. 89 (2015).

Moreover, as this case illustrates, the financial stakes in this recurrent litigation can be enormous. PBGC seeks in excess of $30 million from Petitioners in this case alone. Pet. App. 2a.

With that kind of potential liability on the line, businesses deserve a clear answer as to when acquiring a defunct company's assets will result in acquiring their pension obligations as well. But the trend of abandoning rules established in the statutory text or at common law deprives firms of that certainty. As this Court has recognized, in "structuring financial transactions, business[es] depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved." *Kimbell Foods*, 440 U.S. at 739. Here, the courts' inability to agree even on the basic starting presumption for developing successor liability rules makes it impossible for firms doing business in circuits that have yet to take a position on the proper liability rule. They can only guess what rule their circuit will apply.

Firms in circuits that *have* adopted a standard may not be much better off. The mushy, multifactor balancing tests the Sixth Circuit and some others apply require "juggling the many factors a creative legal mind can envision," an "ambulatory approach [that] confounds businesses by being so vague that it is impossible to know the legal rule until lengthy and expensive suits are over." *McCleskey v. CWG Plastering, LLC*, 897 F.3d 899, 906 (7th Cir. 2018) (Easterbrook, J., concurring); *see also* Meaghan VerGow, *No Exit: The Sixth Circuit Extends Common-*

Law Successor Liability to Single-Employer Plans in PBGC v. Findlay, 26 No. 4 ERISA Litig. Rep. NL 1 (Nov. 2018) ("[*Findlay*]'s successor liability holding . . . provides little clear guidance at all. This is in part a function of the doctrine more generally, whose equitable balancing test invites *ex post* evaluations of completed transactions. . . .").

Getting successor liability rules right is also of critical importance to American businesses and, ultimately, their employees. As Judge Easterbrook has observed, a broad standard that favors PBGC today "may come at the expense of all funds tomorrow." *McCleskey*, 897 F.3d at 907 (Easterbrook, J., concurring). The reality is "[b]usinesses fail, and leave creditors unpaid, precisely when their assets are worth less than their liabilities. If buying the assets means also accepting the liabilities, then the assets have a negative value and purchases do not occur," *ibid.*, even when a sale would be better than bankruptcy for everyone involved, including the employees ERISA was enacted to protect.

It is no surprise, then, that the business community has reacted to the decision in this case with alarm. *See* McGuireWoods, *Third Parties Face Pension Liability Under Controlled-Group and Successorship Theories* (Sept. 18, 2018), http://bit.ly/2Wq8UIU ("Employers, investors, shareholders and lenders" see "dangers" in "pension liability arising from membership in a controlled group or successorship"); *see also* Robert R. Perry, *A Troubling Expansion of Successor Liability* 1, 4 (JacksonLewis, Employee Benefits for Employers Winter 2015), http://bit.ly/2FDzSah (Sixth Circuit's "expansion of the successor liability doctrine" is causing "concern [to] employers who have purchased or are contemplating purchasing the assets of a unionized business"); Michael J. Kaczka & Maria G. Carr, *Buyer Beware: Sixth Circuit Expands PBGC's Ability to Recover Underfunded Pension Liabilities—Is Expansion of Successor Liability Next* 5, 6 (Turnaround Times Nov./Dec. 2018), http://bit.ly/2uyMLff (the "implications" of *Findlay* are "important for all involved in distressed businesses, especially those with outstanding pension liabilities").

B. This Case Presents Questions Of Substantial Doctrinal Importance As Well.

The doctrinal questions at the heart of this case are also important.

As shown above, the questions of whether to create federal common law to supplement the terms of a statute, and if so, whether to borrow state law principles to fill the void, arises frequently and across a broad spectrum of statutes.

These questions implicate fundamental questions about the proper division of authority between Congress and the federal courts, and between state and federal law. The recurrent theme of the Court's modern cases is that federal courts are to play a minor role in inventing new legal rules, leaving that task to Congress and presuming that gaps in federal statutes are to be filled instead by time-honored principles of state common law. But as this petition has documented, and others have observed, the lower courts have resisted this limitation on their lawmaking powers. *See generally* Rodney B. Griffith & Thomas M. Goutman, *A Hiccup in Federal Common Law Jurisprudence:* Sosa, Bestfoods *and the Supreme*

Court's Restraints on Development of Federal Rules of Corporate Liability, 14 U. Miami Bus. L. Rev. 359 (2006). The Court should grant the petition in order to restore the federal courts to their proper role.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2, 2019

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0196p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-3520

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff-Appellant,

v.

FINDLAY INDUSTRIES, INC., et al.,
Defendants,

PHILIP D. GARDNER INTER VIVOS TRUST AGREEMENT DATED JANUARY 20, 1987; SEPTEMBER ENDS CO.; BACK IN BLACK CO.; ROBIN L. GARDNER, Executor of Estate of Michael J. Gardner,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Ohio at Toledo.
No. 3:15-cv-01421—Jack Zouhary, District Judge.

Argued: November 28, 2017
Decided and Filed: September 4, 2018

Before: DAUGHTREY, McKEAGUE, and DONALD, Circuit Judges.

* * *

DAUGHTREY, J., delivered the opinion of the court in which DONALD, J., joined, and McKEAGUE, J., joined in part. McKEAGUE, J. (pp. 23-35), delivered a separate opinion concurring in part and dissenting in part.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. Following the financial collapse of the Studebaker Company in 1963, more than 11,000 autoworkers lost 85 percent of their vested pension interest when the company's retirement plan was terminated. The resulting political pressure culminated in passage of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (ERISA), which regulates private-sector pension and health funds. In addition to setting up requirements for defined pension-benefit plans, as part of ERISA Congress also created the Pension Benefit Guaranty Corporation (PBGC), which insures uninterrupted payment of benefits under those plans upon their termination. The program is designed to be self-financed, funded primarily by insurance premiums paid by sponsoring companies and also from assets acquired from terminated plans and recovered from underfunded plan sponsors when bankruptcy occurs. To keep premiums as low as possible, ERISA provides that the sponsor of a terminated plan and the "trades or businesses" related to the sponsor through ties of common ownership (known as "control group members") are jointly and severally liable to PBGC for underfunded benefit liabilities.

It was against this background that PBGC sued to collect more than $30 million in underfunded pension liabilities from Findlay Industries following the shutdown of its operation in 2009, apparently a casualty of the worsening economy at the time. When Findlay could not meet its obligations, PBGC looked to hold liable a trust started by Findlay's founder, Philip D. Gardner (the Gardner Trust), treating it as a "trade or business" under common control by Findlay. PBGC also asked the court to apply the federal-common-law doctrine of successor liability to hold Michael J. Gardner, Philip's son, liable for some of Findlay's debt. Michael, a 45 percent shareholder of Findlay and its former-CEO, had purchased Findlay's assets and started his own companies using the same land, hiring many of the same employees, and selling to Findlay's largest customer.[1] The district court refused to hold either the trust or Michael and his companies liable.

In determining whether the Gardner Trust was a "trade or business" under Findlay's common control, the district court rejected the approach of our sister circuits that apply a "categorical test" to determine liability. The categorical test treats any entity leasing to a commonly controlled entity as a trade or business under ERISA. Instead of the categorical test, the district court applied a fact-intensive test cribbed from *Commissioner v. Groetzinger*, 480 U.S. 23, 24 (1987), a case interpreting the term "trade or business" as used in the tax code, 26 U.S.C. §§ 162(a), 62(a)(1). The court held, under the so-called "*Groetzinger* test," that the trust was not liable. Next, after analyzing the requirements for creating and invoking federal

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[1] Although there were originally ten defendants, several of them were dismissed with prejudice and are not involved in this appeal. The remaining appellees include the Gardner Trust, Robin L. Gardner (executor of the estate of Michael J. Garner, who died during the proceedings), and Michael Gardner's two companies, Back in Black Co. and September Ends Co.

common-law principles of successor liability, the district court declined to apply successor liability in this case. We conclude that the district court erred on both fronts.

First, an entity that owns land and leases it to an entity under common control should be considered, categorically, a "trade or business" under ERISA. As noted below, this interpretation recognizes the differences between ERISA and the tax code, satisfies the purposes of ERISA, and brings this court into agreement with its sister circuits. In addition, under the facts of this case, successor liability is necessary to implement the fundamental ERISA policy of protecting employees, in part by guaranteeing that employers who have promised pensions uphold their part of the deal. Refusing to apply successor liability here would allow Findlay to make promises to employees, fail to uphold those promises, and then engage in clever financial transactions that leave PBGC to pay millions in pension liabilities. Holding Findlay responsible, on the other hand, is a commonsense answer that fulfills ERISA's goals.

We therefore find it necessary to reverse the rulings below and remand the case to the district court.

BACKGROUND

Statutory Background

Private employers are not required to offer pension plans, but if they do, ERISA requires that the pension plans meet certain standards and retain certain protections. That way, "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it."

Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 375 (1980). Before ERISA, lack of oversight and legal standards often left pension plans without enough money, and employees who counted on those funds with nothing for retirement. *Id.* at 374-75.

As a "major part of Congress'[s] response to [that] problem," ERISA instituted a termination-insurance program, PBGC. *Id.* at 375. Although ERISA's funding, disclosure, and other standards made it more likely that pension plans would have the money that they had promised their beneficiaries, Congress built in the extra protection of PBGC-operated insurance. Subchapter III of ERISA requires PBGC to charge participating companies premiums so that if a pension plan fails, PBGC can "provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries." 29 U.S.C. § 1302(a).

Despite the significant increases in coverage ushered in by ERISA, a few years after its introduction, PBGC warned Congress "that ERISA did not adequately protect plans from the adverse consequences that resulted when individual employers terminate their participation in, or withdraw from, multiemployer plans" set up under collective bargaining agreements. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 722 (1984). In other words, the statute provided the necessary protection for when a company ended its own pension plan, but when multiple companies pooled assets into a single pension plan, a withdrawing employer risked saddling the remaining companies with all of the plan's liabilities. In response, Congress passed the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461

(MPPAA), amending ERISA to ensure that multiemployer plans also served the statute's goals.

Under the MPPAA, multiemployer plans are subject to many of the same standards as single-employer plans. For example, the MPPAA requires multiemployer plans to pay premiums for PBGC insurance, just as single-employer plans are required to do. 29 U.S.C. §§ 1321-1322a. And PBGC holds employers directly liable for underfunded—but promised—benefits, interest, and penalties, whether the liable employer is part of a single-employer pension plan or a multiple-employer pension plan. 29 U.S.C. §§ 1362, 1381.

Factual and Procedural Background

Findlay Industries was a company that produced auto parts before going out of business in 2009. Since 1964 it had offered pension benefits to some of its employees, and by the time production was stopped, its pension obligation was underfunded by millions of dollars. To satisfy that liability, PBGC looked to assets that might be treated as Findlay's—specifically, a trust started by Findlay's founder and assets purchased from the company by the founder's son in 2009.

The Trust: At the end of 1986, Findlay transferred two pieces of property to the company's founder and owner, Philip D. Gardner. Less than a month later, Gardner transferred the property to an irrevocable trust. The trust was to provide for Gardner's sisters through the end of their lives, at which point the trust was to be distributed equally to Gardner's two sons—Philip J. and Michael Gardner. In addition, son Philip J. was the trustee and Michael was his successor.

From at least 1993 until 2009, when Findlay folded, the trust leased the two plots of land back to Findlay. Thus, for the majority of the time that the trust existed, it was leasing back to Findlay the very land that Findlay, through Gardner, had donated to the trust. Gardner's last sister died in early 2014, and a month later the entire trust was split between his sons, who ran and owned a majority of Findlay in its final years.

The Assets: In May 2009, after Findlay failed, a company named F I Asset Acquisition LLC purchased all of the equipment, inventory, and receivables from two of Findlay's plants. The two plants contained all of Findlay's equipment and machinery of value. The sale had a price tag of $2.2 million in cash and $1.2 million in assumed trade debt. It appears that Findlay's former assets then were transferred from F I Asset Acquisition to Michael Gardner and another company owned entirely by Michael. Shortly after, Michael Gardner transferred the assets again, this time to two other of his recently formed companies—Back in Black and September Ends.

Every step of the sale went through the hands of Michael Gardner. For the relevant time leading up to the sale, until just two months before the sale in May 2009, Michael was Findlay's CEO and a director. And at all times, he was an owner of almost 45 percent of Findlay's stock. At the end of 2008, an outside company offered to purchase Findlay's assets. Weeks later, Michael—who was still at Findlay—made Findlay an offer on behalf of F I Asset Acquisition, a company of which he was also a member (and, at some point, its managing member). As a Findlay director, Michael did recuse himself from considering other companies' bids for Findlay's assets. But he still had access to information that Findlay received about the potential sale, including a letter from PBGC and a request from a potential purchaser for indemnification for pension-plan liabilities. A month after the potential purchaser requested indemnification, F I Asset Acquisition made an offer that did *not* assume the underfunded-pension liabilities. That offer clinched the sale, and the assets were transferred from Findlay to F I Asset Acquisition, then to another company owned by Michael (MJG Inc.), and finally to September Ends and Back in Black—the two companies that ended up with the Findlay assets. September Ends and Back in Black were owned and controlled by Michael Gardner—he owned 52 percent of the stock and his minor children owned the other 48 percent.

More than mere ownership passed from father's company to son's companies, however. Michael Gardner's new businesses were duplicates of Findlay in many ways. The two businesses—September Ends and Back in Black—each established a plant on one of the old Findlay lots. One of those companies rehired substantially all of the former Findlay employees, and the other rehired six of nine salaried employees and 15 of 25 hourly employees. The two new companies also started selling to Findlay's largest customer.

According to PBGC, Michael's gambit paid off. When he purchased Findlay's assets, Michael knew or should have known that Findlay was responsible for over $18 million in pension liabilities. But without accepting any responsibility for those liabilities, Michael paid only $3.4 million for the company. Strikingly, between May 2009 and December 2013, the net income—or bottom line—of Back in Black and September Ends was $11.9 million, more than triple the amount Michael had paid. A cynic might observe that Michael was, indeed, "back in the black."

Although the former Findlay assets were being used to turn a profit, Findlay's pension remained drastically underfunded; taking into account interest and fines, PBGC claimed that Findlay's liability was more than $30 million. To collect on that liability, PBGC brought this suit and, in 15 counts, alleged that ten defendants, all connected to Findlay, engaged in a number of internal structures, set-ups, and sales to avoid liability for the pensions formerly promised to Findlay employees. This appeal addresses three of those counts, III, IX, and XV—each of which was dismissed by the district court on a motion to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Because Count IX depends completely on Count III, we will not address it separately; thus, only two of the three dismissed counts are at issue here.

First, the PBGC complaint alleged that the trust Philip D. Gardner started in 1987 was jointly and severally liable for Findlay's pension liabilities. Specifically, the complaint alleged that the trust was under the control of Philip D. Gardner's sons, Michael and Philip J., who also controlled Findlay. And under the control of the Gardners, the trust leased land to Findlay for at least 16 years. Because the trust shared a "substantial economic nexus" with Findlay, the complaint alleged that Findlay and the trust were under common control. The complaint also alleged that the trust was a trade or business for ERISA purposes. Thus, as a trade or business, commonly controlled, the trust was jointly and severally liable for Findlay's liabilities.

In its motion to dismiss, the Gardner Trust argued that PBGC had relied on the wrong legal standard to determine liability. Specifically, the trust argued that PBGC's "substantial economic nexus" theory had been rejected as a test to show that an entity was a trade or business for ERISA's purposes. Instead, the trust argued, the proper standard was the fact-intensive analysis of *Groetzinger*, 480 U.S. 23, the tax case. Therefore, because PBGC had not provided an analysis under *Groetzinger*, the trust contended that the complaint must be dismissed.

In response, PBGC argued that *Groetzinger*'s application was limited to the tax code and did not provide the correct standard in this circumstance. Instead, PBGC explained, the court should apply the "categorical test," concluding that an entity is categorically a trade or business when that entity leases to a commonly controlled entity

The district court agreed with the trust. Recognizing that neither this court nor the Supreme Court has defined "trade or business" under ERISA, the district court started with the dictionary definition of each word. The court explained that the dictionary "defines 'trade' as 'the business or work in which one engages regularly' and 'business' as 'a usually commercial or mercantile activity engaged in as a means of livelihood.'"[2] The court held that *Groetzinger*'s test—that a person must regularly

[2] The district court cited Merriam-Webster, but did not identify the edition.

engage in the activity in question primarily for profit or income—embodies the "ordinary, common-sense meaning of the words at issue." Because the trust was created "with the express purpose of providing for the care and eventual funeral expenses of [Gardner's] sisters," the court concluded that neither the plain meaning of the words nor the *Groetzinger* test supported a conclusion that the trust was a trade or business under ERISA.

Rejecting PBGC's argument that the categorical test was appropriate, the court reasoned that the case law from other circuits adopting the categorical test arose under the MPPAA, and not under single-employer pension plans. Aside from describing the MPPAA as "a separate statutory scheme with its own legislative history and purpose," the court did not explain why MPPAA case law should not apply to single-employer cases. In any event, the court concluded that because "the purpose of the [trust's] rental activity was not to dissipate Findlay's assets or to profit Gardner" and because "there is no possibility the rental activity was used to dissipate or fractionalize the employer's assets, there can be no controlled group liability."

Next, the court addressed PBGC's contention that Michael and his companies should be held liable under the federal common law of successor liability. Specifically, PBGC had alleged that these defendants had notice of Findlay's pension-plan liabilities, knew that Findlay was unable to pay its liabilities, and that Back in Black and September Ends had substantially continued Findlay's operations.

The district court disagreed. Applying the disjunctive three-part test outlined by this court in

DiGeronimo Aggregates, LLC v. Zemla, 763 F.3d 506, 511 (6th Cir. 2014), the court held that successor liability does not justify the rare exercise of creating common law under ERISA. The court held that PBGC failed the first part of the test because ERISA is not silent as to who can be responsible for successor liabilities of single-employer plans. Specifically, the district court held, because a portion of the statute discusses the effects of corporate reorganization, Congress did not intend for liability of entities beyond what is listed in the statute.

The court next concluded that the second part of *DiGeronimo*'s test was not satisfied because there is no "awkward gap" to fill in the statute. In doing so, the court rejected PBGC's argument relying on cases from other circuits that found successor liability under ERISA. The court distinguished those cases, pointing out that they all arose under the MPPAA and thus applied only to multiemployer plans. The court reasoned that because the MPPAA did not address corporate reorganizations, common law played a necessary gap-filling role in those other cases. But, the court said, because the statute does address corporate reorganization of employers in single-employer plans, there is no awkward gap.

Finally, the court held that successor liability is not essential to carrying out fundamental ERISA policies. Because the fundamental policy of ERISA is to make sure that employees get their pensions, and PBGC already has a list of who it can hold accountable, the court observed that "[a]dding more targets is not necessary to fulfill ERISA's policy of protecting plan participants."

DISCUSSION

Standard of Review

We review a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) under a *de novo* standard of review. *United Food & Commercial Workers Union-Emp'r Pension Fund v. Rubber Assocs., Inc.*, 812 F.3d 521, 524 (6th Cir. 2016). We accept all well-pleaded allegations as true and "determine whether they plausibly state a claim for relief." *DiGeronimo*, 763 F.3d at 509 (quotation marks and citation omitted). The complaint must address all material elements of the plaintiff's chosen legal theory. *Id.* Either direct or inferential allegations will suffice. *Id.*

Appropriate Test to Determine Trust's Liability

When an employer terminates its pension plan, ERISA liability does not end with the company that actually promised pension payments. Instead, a "trade or business" under "common control" of the employer is treated as part of the employer and so incurs joint-and-several liability under ERISA. *See* 29 U.S.C. §§ 1362(a), 1301(a)(14)(B), 1301(b)(1). This standard applies to both single-employer and multiemployer plans. *See, e.g.*, 29 U.S.C. § 1301(a)(3), (b)(1). The Gardner Trust assumes but does not concede that it and Findlay were under common control. The trust contends, however, that it is not a trade or business under ERISA.

ERISA does not define "trades or businesses," and neither the Supreme Court nor this court have defined the phrase in the context of ERISA. The Supreme Court, however, has defined those terms as used in the Internal Revenue Code. In *Groetzinger*, the Court applied a fact-intensive test to determine what constitutes a trade or business, examining (1) the primary purpose of the entity in question and (2) whether the entity's activity is continuous and regular. 480 U.S. at 35. Despite the Court's warning that its interpretation of "trade or business" was confined to "specific sections" of the tax code, *id.* at 27 n.8, some courts have relied on *Groetzinger* to define the same terms under ERISA. *See, e.g.*, *UFCW Local One Pension Fund v. Enivel Props., LLC*, 791 F.3d 369, 375 (2d Cir. 2015). But other courts, including some that have otherwise relied on *Groetzinger*, have eschewed the *Groetzinger* test when the entity-in-question's activity is leasing property to a company under common control. *See, e.g.*, *Cent. States, Se. & Sw. Areas Pension Fund v. Nagy*, 714 F.3d 545, 551 (7th Cir. 2013). Those courts, instead, have concluded that the entity that leases property to its commonly controlled company is categorically a trade or business for ERISA purposes.

The first step in statutory construction is to "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Fullenkamp v. Veneman*, 383 F.3d 478, 481 (6th Cir. 2004) (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)). The district court thus turned to a dictionary and reasoned that a "trade" is "the business or work in which one engages regularly" and that "business" is "a usually commercial or mercantile activity engaged in as a means of livelihood." Without any additional explanation, the court concluded that *Groetzinger*'s fact-intensive test "embodies this ordinary, commonsense meaning of the words at issue." The court then looked to the trust's "express purpose of providing for the care and eventual funeral expenses of [Gardner's] sisters" and concluded that there was "no possibility [that] the rental activity was used to dissipate or fractionalize the employer's assets." Thus, the court ruled, the trust was not a trade or business.

But, contrary to the district court's conclusion, the dictionary does not provide us the "plain and unambiguous meaning" that one might seek. *See Fullenkamp*, 383 F.3d at 481. Both "trade" and "business" are broad terms, susceptible to a range of meanings. For example, "business" is defined as "a commercial or sometimes an industrial enterprise," MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2006), "[c]ommercial, industrial, or professional dealings," AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002), or "[c]ommercial transactions," BLACK'S LAW DICTIONARY (10th ed. 2014). "Trade" is defined as "[t]he business of buying and selling or bartering goods or services," BLACK'S LAW DICTIONARY (10th ed. 2014), and "[t]he business of buying and selling commodities; commerce," AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002).

In light of the breadth of these definitions, *Groetzinger*'s test does not, as the district court held, embody the "ordinary, common-sense meaning" of "trade" or "business." Quite the opposite. By reasoning that "not every income-producing and profit-making endeavor constitutes a trade or business" and that "transactions entered into for profit" are not necessarily trade or business, *Groetzinger* highlights the fact that tax law's treatment of the terms "trade" and "business" does not, like many of the dictionary definitions, rely on a broad idea of "commerce" but, rather, is narrow and specific to tax law. 480 U.S. at 35.

What is more, in an application that the Supreme Court recognized was unique not only to tax law but also to one specific passage of the tax law, *Groetzinger* requires the court to determine the *primary* purpose of an activity. *Id.* at 27 n.8, 35. The district court did not explain why the dictionary definitions it cited support a legal test that turns on the primary purpose of the entity in question. And moreover, reading a primary-purpose requirement into the statutory language would create dangerous incentives and would not serve ERISA's purposes.

Under the district court's decision, as long as the *primary* reason for dissipating one's assets was not to escape liability under ERISA, those assets would be shielded from a plan sponsor's liability. But companies can have more than one reason to dissipate assets. For example, if the owner of a construction business was personally stressed and put the majority of his company's assets into opening a bakery because baking was soothing to him, PBGC would have to pick up the tab when the construction company's pension was not funded because the primary purpose behind the bakery was stress relief. Under *Groetzinger*, it would not matter that the baker's secondary purpose could have been to shield his company's assets from ERISA liability for the underfunded pension. Or, as could have been the case here, one could want to stow company assets safely in trust *and* provide for the well-being of loved ones. There is nothing in the record that proves that avoiding ERISA liabilities was indeed Philip D. Gardner's motivating force. But if *Groetzinger* controls, entities certainly would be encouraged to try such reorganization and would not be held liable for it as long as they had a different primary purpose.

Not only would application of *Groetzinger* create dangerous incentives, it would not serve ERISA's purposes. Under ERISA, whether Gardner's primary motivation was to dissipate Findlay's assets is not important. What is important is determining whether those assets were effectively Findlay's and thus should be used to help pay what Findlay promised its employees. The commonsense conclusion is yes: when a business gives land to the business's sole owner, who then puts it in a trust—run by his sons—which then leases the land back to his business, that land never stopped being a part of the company's functional assets.

For all of these reasons, there is no plain and unambiguous reading of ERISA that supports adopting *Groetzinger*. But our analysis does not stop there. When, as here, the meanings of the words at issue are not plain and unambiguous, we turn to the purpose and the structure of a statute to determine the meaning of the terms at issue. *See Fullenkamp*, 383 F.3d at 483.

Structurally, ERISA holds employers liable for the promises of pensions that they make to employees. After a PBGC determination that a pension plan has insufficient assets to meet its liabilities, 29 U.S.C. § 1341(c), ERISA holds the plan sponsor liable, 29 U.S.C. § 1362(a). The statute then guarantees that a liable sponsor cannot evade its responsibility through tactics such as corporate reorganization, *see* 29 U.S.C. § 1369(b), or sales to avoid liability for an impending plan termination, *see* 29 U.S.C. § 1369(a). And although PBGC exists to ensure that employees receive the pensions that they were promised, ERISA holds the employers primarily accountable and relies on PBGC to pay only as a last resort. To that end, ERISA enforces employers' promises by extending liability for those promises to commonly controlled entities. 29 U.S.C. § 1362(a). Indeed, "the primary purpose of the common control provision is to ensure that employers will not circumvent their ERISA and MPPAA obligations by operating through separate entities." *Mason & Dixon Tank Lines, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 852 F.2d 156, 159 (6th Cir. 1988). Put another way, ERISA generally seeks to hold employers liable for their promises to employees; the common-control rules stop employers from escaping that liability by spreading their assets.

In light of the purpose and the structure of the ERISA provisions at issue, we hold that the categorical test applies. That test concludes simply that any entity that leases property to a commonly controlled company is categorically a trade or business for ERISA purposes. *Cent. States Se. & Sw. Areas Pension Fund v. Messina Prods., LLC*, 706 F.3d 874, 882 (7th Cir. 2013). In doing so, the categorical test stops leases between commonly controlled entities as a way of offering those entities protection from ERISA liability at very little risk. The facts here highlight how. By giving the land to a commonly controlled entity, Findlay guaranteed that it still had the benefit of use (and likely control) of the land, just the same as if it had never given the land away at all. But now, the land did not technically belong to Findlay, so it did not count among Findlay's assets. Thus, Findlay had all of the meaningful benefit of the land, but none of the risk or responsibility that came with outright ownership. And the Gardner Trust did not have to put in any of the effort or face any of the risk of an arms-length leasing arrangement with a lessee that was not under common control. This situation is precisely the type that the common-control rules exist to prevent.

Applying the categorical test also aligns us with other courts around the country. Indeed, the defendants here were unable to present a single case in which leasing between commonly controlled entities did *not* result in an entity being a trade or business for ERISA purposes. And we have found none. PBGC, on the other hand, cites cases of other circuits and of district courts in and outside of this circuit that support its conclusion. The Seventh Circuit, for example, adopted the categorical test, concluding that "the likelihood that a true purpose and effect of the 'lease' is to split up the withdrawing employer's assets is self-evident." *Messina Prods. LLC*, 706 F.3d at 882. The Eighth Circuit noted that the business-or-trade inquiry is a factual inquiry but then upheld the district court's categorical conclusion that leasing between commonly controlled entities "established the existence of a trade or business for ERISA purposes." *Vaughn v. Sexton*, 975 F.2d 498, 503 (8th Cir. 1992). The Ninth Circuit has gone even further, concluding that leasing for profit "is plainly sufficient" to be a trade or business—regardless of whether the investments are active or passive and regardless of whether the lease was to a commonly controlled entity. *Bd. of Trustees of W. Conf. of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892, 894-95 (9th Cir. 1988).

Rejecting this case law, the district court reasoned that the cases relied on by PBGC arose under the

MPPAA and did not address single-employer plans. But the goal of stopping employers from splitting their assets to escape liability is equally as important for single-employer plans as it is for multiemployer plans. Neither the district court nor defendants provided any reason why multiemployer plans should be treated any differently; thus, neither provided any grounds for limiting the extensive case law outlined above to cases arising under the specific portions of ERISA that address multiemployer plans. And upon reflection, we cannot think of any. After all, the rules against dissipating assets are meant to protect both "ERISA *and* MPPAA obligations." *Mason & Dixon Tank Lines, Inc.*, 852 F.2d at 159 (emphasis added).

Defendants argue that we should follow three other circuits to adopt *Groetzinger*.[3] But only one of those cases involved a lease to a commonly controlled entity, and that case does not help defendants' argument: The Seventh Circuit reasoned that *Groetzinger* is the general standard to apply, but that the categorical test is appropriate for leases between commonly controlled entities. *Messina Prods., LLC*, 706 F.3d at 882-83. Hence, we do not need to decide whether *Groetzinger* applies to leases made outside of a commonly controlled group—as the Seventh and Second Circuits have done—or whether *any* leasing activity is a trade or business—as the Ninth Circuit has done. It is sufficient here—and does not conflict with any sister circuits—to join the courts that have

[3] *Enivel Props., LLC*, 791 F.3d at 373 (Second Circuit); *Messina Prods., LLC*, 706 F.3d at 883 (Seventh Circuit); *Connors v. Incoal, Inc.*, 995 F.2d 245, 251 (D.C. Cir. 1993).

held that leasing to a commonly controlled entity is categorically a trade or business for ERISA purposes.

Defendants' remaining arguments fare no better. First, defendants make a single-paragraph argument that the ordinary meaning of trade or business does not include leasing, but they do not provide any support for that counterintuitive conclusion. Next, relying on ERISA's purpose of stopping employers from avoiding liability by dissipating assets, defendants contend that the facts prove that Philip D. Gardner did not intend to use the trust to avoid ERISA liabilities. But beyond asking this court to repeat the district court's error and draw factual conclusions in the defendants' favor,[4] that argument is an attempt to get *Groetzinger*'s fact-intensive analysis in through the back door. As explained above, such a fact-intensive test does not serve ERISA's purposes and, instead, would create significant problems with its administration.

On that note, Judge McKeague's concurring opinion, concerned that the categorical test will lead to unfair results, asks us to tread carefully and adopt a less-than-categorical version of the test. He urges us to imagine an alternative set of facts in which the trust

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[4] The district court concluded that "the purpose of the rental activity was not to dissipate Findlay's assets or to profit Gardner"; that "the timing, form, and scope of the trust" proved that the motivation was "personal not commercial"; and that there was "no possibility" that the arrangement here was "used to dissipate or fractionalize" Findlay's assets. Thus, even if *Groetzinger* were the correct test to apply, the district court improperly viewed PBGC's direct and inferential allegations in a light favorable to defendants and not PBGC. *See DiGeronimo*, 763 F.3d at 509.

vested in the heirs of the sisters, as opposed to the Gardners. How would it be fair, he aptly inquires, to take the trust assets from the sisters' heirs, who have nothing to do with Findlay? However, the legitimate concern raised in the concurrence is already contemplated by the common-control rules.

The rules for common control apply complex regulations to determine who has an actuarial interest in the trust, and thus how much of the trust the ultimate beneficiary is considered to own at any given time. *See* 26 C.F.R. §§ 1.414(c)-4(b)(3), 1.414(c)-2. One look at PBGC's complaint shows that PBGC has applied those rules to allege properly that the Gardners were in common control of both Findlay and the trust. If instead of the Gardners, the sisters' heirs were the ultimate beneficiaries—as Judge McKeague hypothesizes—there would be no common control between Findlay and the trust. And because both entities being under common control is a prerequisite for the categorical test, the categorical test would not apply. Judge McKeague's concern over a possible inequitable result for "an 'innocent' third party," should be allayed by taking the common-control regulations into account.

Successor Liability

According to PBGC's complaint, Findlay owes more than $30 million in pension liability. Yet Michael Gardner purchased all of Findlay's valuable assets for only $3.4 million and within four-and-a-half years had turned a nearly $12 million profit using Findlay assets, employing former Findlay employees, making former Findlay products, and selling to Findlay's biggest customer. PBGC does not contend that the transfer of Findlay assets to Michael and his companies made Michael or his companies liable under 29 U.S.C. § 1369(b), the section of ERISA that asserts liability for certain corporate reorganizations. Instead, PBGC asked the district court to rely on federal common law's treatment of successor liability to hold Michael and his companies accountable for Findlay's liability. The district court declined to do so.

The district court was correct to reason that the creation of common law under ERISA is something to be done in narrow circumstances. But because the federal-common-law doctrine of successor liability serves fundamental ERISA policies, we conclude that the creation and application of federal common law is appropriate in this case.

"At the time of ERISA's enactment, Congress in general encouraged the courts to develop a federal common law of employee benefits because many issues relating to employee benefits would arise where there would be no specific rule to govern the question." *DiGeronimo*, 763 F.3d at 510-11. But "where Congress has established an extensive regulatory network . . . courts do not lightly create additional rights under the rubric of federal common law." *Id.* at 511.

To satisfy those competing interests, we have developed a three-part standard to determine whether and when it is appropriate to create federal common law under ERISA. We undertake such a step if (1) ERISA is silent or ambiguous on the issue before the court, (2) there is an awkward gap in the statutory scheme, or (3) "federal common law is essential to the promotion of fundamental ERISA policies." *Local 6-0682 Int'l Union of Paper v. Nat'l Indus. Grp. Pension Plan*, 342 F.3d 606, 609 (6th Cir. 2003) (quotation marks and citation omitted). The standard is phrased in the disjunctive so that if any one of the three circumstances is present, creation of federal common law is appropriate.

PBGC contends that all three circumstances are present here. The defendants, unsurprisingly, agree with the district court that none of the three are. We must resolve that precise dispute, because we conclude that the federal common law of successor liability is necessary to promote fundamental ERISA policies in this case. Hence, we need not address the other prongs of the standard.

ERISA's fundamental protections of employment benefits function in two ways: guaranteeing that employees receive the benefits they were promised and making sure that employers keep up their end of the deal. To that end, the official policy of ERISA is to protect "the interests of participants in employee-benefit plans and their beneficiaries" while "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." 29 U.S.C. § 1001(b).

Additionally, 29 U.S.C. § 1302(a) creates PBGC and explains the purpose of Subchapter III of ERISA—Plan Termination Insurance. The purposes of Subchapter III—which gives PBGC the power to sue and lists the liabilities for which it can sue—include that PBGC "encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants" and "provide for timely and uninterrupted payment of pension benefits to participants and beneficiaries." 29 U.S.C. § 1302(a). But most important, one of PBGC's purposes is to maintain the lowest possible PBGC insurance premiums. *Id.* The way that PBGC maintains low premiums is to pay out the lowest possible amount by holding employers liable for their promises to employees.

Thus, when 29 U.S.C. § 1001(b) and § 1302(a) are viewed together, it is clear that PBGC enforcing employers' own promises to their employees is a fundamental premise of ERISA. The district court was correct to acknowledge that a fundamental policy of ERISA is to protect employees but wrong, however, to ignore the fundamental policy of PBGC's enforcement powers and instead treat successor liability as a desire to go after "more targets."

Successor liability promotes fundamental ERISA policies by guaranteeing that substance matters over form. Taking the complaint in this case as true, it appears that Michael Gardner had extensive information about Findlay's debts and pension funding. As Findlay's CEO, board member, and 45 percent shareholder, Michael offered to purchase Findlay's assets but refused to take on any pension liability. The assets that his company purchased for $3.4 million netted his two companies nearly $12 million in four-and-a-half years. And the companies operated from two former Findlay sites, with former Findlay employees, making the same products, and selling to Findlay's principal customer.

Because Michael purchased the assets—although he did so in a way that does not represent an arms-length sale—none of the provisions of § 1369(b) apply to him. But this result is certainly the kind of transaction that frustrates the fundamental policies of ERISA: Findlay did not keep its promises to its employees, and instead of using its assets to meet its obligations, it sold the assets to its CEO, who then left the government to pay millions of dollars in pension liabilities.

Not only does successor liability promote fundamental policies of ERISA, refusal to apply the principles of successor liability here would frustrate ERISA policies. If there is no successor liability here, this case will provide an incentive to find new, clever financial transactions to evade the technical requirements of ERISA and, thus, escape any liability—a result that flies in the face of § 1001(b). And if employers can so easily escape millions of dollars in liabilities, PBGC will be left to pay the underfunded pension benefits. That situation will force PBGC to raise its rates, which will strain still-existing plans further, and which risks forcing them to be underfunded and possibly fail. Such a result plainly would frustrate the purpose of Subchapter III.[5]

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[5] In dissent, Judge McKeague concludes that even if it is fundamental for PBGC to recoup money that it paid employees for their employers' broken promises, creation of common law is not essential because PBGC can always lobby Congress. Relying on PBGC's reports to Congress that led to the passage of the MPPAA, Judge McKeague concludes that the PBGC can do it again. Judge McKeague reads into the past more than the history can support. When it was enacted, ERISA delayed PBGC's coverage of multiemployer plans for four years. *R.A. Gray & Co.*, 467 U.S. at 720. And "[a]s the date for mandatory coverage of multiemployer pension plans approached, Congress became concerned that a significant number of plans were experiencing extreme financial hardship." *Id.* at 721. Congress then extended the date, and ordered PBGC to prepare a report on problems caused by ERISA's treatment of multiemployer plans. *Id.* PBGC's report highlighted the potentially disastrous effects of withdrawal

In choosing the form of successor liability to apply in this case, we opt for the test developed under different provisions of federal labor and employment law. As PBGC points out, "ERISA's broad preemption provision makes it clear that Congress intended to establish employee benefit plan regulation as an exclusive federal concern, with federal law to apply exclusively, even where ERISA itself furnishes no answer." *In re White Farm Equip. Co.*, 788 F.2d 1186, 1191 (6th Cir. 1986). In certain circumstances, such as in contract interpretation, "the federal court may take direction from the law of the state in which it sits" so long as "the rule used [is] the one that best comports with the interests served by ERISA's regulatory scheme." *Regents of Univ. of Mich. v. Emps. of Agency Rent-A-Car Hosp. Ass'n*, 122 F.3d 336, 339 (6th Cir. 1997) (internal quotation marks and citation omitted). But, as a general matter, the court must look to the federal common law and should draw guidance from state common law only when federal common law does not provide an established standard. *See Tinsley v. Gen. Motors Corp.* 227 F.3d 700, 704 (6th Cir. 2000).

Because there is a body of federal common law applying successor liability in employment and labor cases, it is appropriate to apply that law here, too.

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from multiemployer plans and contributed to the passage of the MPPAA. *Id.* at 722-24.

The history of PBGC lobbying Congress is actually a history of Congress ordering PBGC to provide information and PBGC doing so. At Congress's behest, PBGC prepared a report to provide a fix for a potential impending, structural crisis of which Congress was aware. That background is far from the situation we face today and is an insufficient reason to avoid holding successors in less-than-arms-length deals liable.

Successor liability is an equitable doctrine that requires the court to balance (1) the interests of the defendant, (2) the interests of the plaintiff, and (3) "the goals of federal policy, in light of the particular facts of a case and the particular legal obligation at issue." *Cobb v. Contract Trans., Inc.*, 452 F.3d 543, 554 (6th Cir. 2006) (applying successor liability to the Family and Medical Leave Act).

Furthermore, adopting the federal common law of successor liability would best serve ERISA's purposes. "ERISA's goal, [the Supreme] Court has emphasized, is uniform national treatment of pension benefits." *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 17 (2004) (internal quotation marks and citation omitted). By applying the federal common law of successor liability, this court also will align itself with the Seventh and the Ninth Circuits, both of which have done so in MPPAA cases. *See Resilient Floor Covering Pension Trust Fund Bd. of Trustees v. Michael's Floor Covering*, 801 F.3d 1079, 1095 (9th Cir. 2015); *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture*, 920 F.2d 1323, 1327 (7th Cir. 1990).

The defendants argue that if the court applies the common law of successor liability, it should apply Ohio common law and not federal common law. Instead of explaining why that rule would best serve ERISA's purposes, the defendants contend that the doctrine of federal successor liability is too broad and will "disrupt[] the settled commercial expectations of parties who purchase assets . . . under state law." But this generic appeal to settled commercial expectations fails for two reasons. First, the defendants do not explain what their settled commercial expectations were and why this court should protect them. Perhaps for good reason: The complaint alleges that Michael Gardner underpaid for the profitable parts of Findlay—the company he ran—turned a hefty profit using those assets, and knowingly left the government to pay millions of dollars in Findlay's unkept pension promises. If true, those actions do not reflect commercial expectations that this court should ever protect, certainly not under ERISA. Second, the fear that applying successor liability will upset settled commercial expectations more generally is unfounded. Finding successor liability here does not mean that successor liability applies in every instance. All that we decide today is that when there is a sale that is not conducted at arm's length, successor liability can apply. And although we are reluctant to impose successor liability to reorganizations of failing businesses, that principle cannot be stretched so far as to demand judicial approval of deals that are not above board.

In a similar vein, instead of justifying the reliance on Ohio law, the defendants repeat their factual assertions, totally outside of the record, that Michael's companies would have failed had Michael not "taken the risk of purchasing these plants' assets . . . and then succeeded in turning a profit and keeping employees in their jobs." The defendants then conclude—again, without any support in the record—that applying federal successor liability "would effectively bankrupt the Companies, put its employees out of work, and discourage the purchase and reorganization of failing businesses."

Although it is improper to consider the defendants' statement that the two companies will go out of business, the argument brings up a point that is worth acknowledging. It is true that this court is "reluctant to impose successor liability when it might inhibit the reorganization of failing businesses." *Peters v. N.L.R.B.*, 153 F.3d 289, 301 (6th Cir. 1998). But as noted above, successor liability is an equitable doctrine. *Cobb*, 452 F.3d at 554. As such, its application will balance the interests of both parties—protecting asset purchasers from being blindsided by massive liabilities, and guaranteeing that employers cannot easily avoid their ERISA obligations through clever financial transactions.

CONCLUSION

We conclude that the district court's decision is flawed in two respects. First, an entity that leases property to an entity under common control should be considered a "trade or business," categorically. This reading of the statute recognizes the differences between ERISA and the tax code, satisfies the purposes of ERISA, and brings this court in line with its sister circuits. Next, in this specific instance, successor liability is required to promote fundamental ERISA policies. Refusing to apply successor liability would allow employers to fail to uphold promises made to employees and then engage in clever financial transactions to leave PBGC paying out millions in pension liabilities. Holding the employers responsible, on the other hand, is a commonsense answer that fulfills ERISA's goals.

We therefore VACATE the district court's order of dismissal and REMAND the case for further proceedings.

CONCURRING IN PART AND DISSENTING IN PART

DAVID W. McKEAGUE, Circuit Judge, concurring in part and dissenting in part. Findlay Industries ("Findlay") went out of business in 2009 with over $30 million in unfunded pension liabilities. The Pension Benefit Guaranty Corporation ("PBGC") picked up the tab and filed this lawsuit to recoup those losses. The issues raised by this interlocutory appeal involve two defendants: (1) A trust that obtained property from Findlay's founder but then leased it right back to Findlay ("the Trust"); and (2) the companies that eventually acquired all of Findlay's assets after it went under ("the Successors"). Neither the Trust nor the Successors expressly assumed—or believe they must assume—Findlay's pension liabilities. The district court agreed with the defendants and dismissed the PBGC's claims against them.

The majority concludes that the PBGC may sue both defendants. I agree with the majority that the claims against the Trust were improperly dismissed. However, since Congress deliberately chose not to impose liability on entities like the Successors in this case, I respectfully dissent from the majority's decision to revisit that policy judgment through the federal common law.

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I agree that the Trust is a trade or business subject to common-control liability. However, I am hesitant to adopt the Categorical Test advocated by the PBGC as the rule for all future cases. Instead, I would follow a more circumscribed approach.

A

There are two kinds of ERISA liability relevant to this case. The first is "Termination Liability," which attaches when any plan terminates without enough funds to satisfy its obligations. 29 U.S.C. §§ 1307(e)(2), 1362(a)(1). The second is "Withdrawal Liability," which attaches when one employer in a multiemployer pension plan leaves the group. *Id.* § 1381(a). Congress created Withdrawal Liability after the PBGC informed it that some employers were sending group pension plans into a death spiral by withdrawing their contributions. *Mason & Dixon Tank Lines, Inc. v. Central States*, 852 F.2d 156, 158 (6th Cir. 1988) (discussing the Multiemployer Pension Plan Amendments Act, or "MPPAA"). Congress also empowered the PBGC—a government guarantor of pension payments—to sue any "employer" to which either form of liability attaches to recoup its losses. *Id.* at 158-60.

Further, all "trades or businesses" under the common control of the ERISA plan sponsor are deemed to be one employer for liability purposes. *Id.* at 159 (quoting 29 U.S.C. § 1301(b)(1) ("[A]ll employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades or businesses as a single employer.")). This doctrine is colloquially known as "common-control liability." The point of common-control liability is to "ensure that employers will not circumvent their ERISA and MPPAA obligations by operating through separate entities." *Id.*

This statute and its accompanying regulations should not be applied in a wooden, formalistic manner.

In re Challenge Stamping Co., 719 F.2d 146, 151 (6th Cir. 1983). Thus, we've previously held that when the bankruptcy laws deny the defendant actual control over the relevant entity, the PBGC cannot hold them liable, even if the defendant meets all the statutory and regulatory requirements for control. *Id.* We justified this rule by asserting that "Congress sought to determine the plain fact of control, rather than any subjective motives or reasons for control . . . There is no support for a view that Congress's chief intent in employing [the common-control test] was to invade the deepest pocket in a business failure. . . . The purpose of [the regulation] is obviously to find the party in *control*." *Id.*

B

Not all entities under common control with the plan sponsor are subject to ERISA's common-control doctrine. *Central States v. Messina Prods., LLC*, 706 F.3d 874, 880 (7th Cir. 2013). Only those entities that can fairly be said to be part of the common owner's *trade or business* (as opposed to mere investments) are governed by § 1301(b)(1), because ERISA does not abrogate the ordinary rule that shareholders are not personally liable for the obligations of a corporation. *Id.*

The issue here is whether a commonly controlled family trust qualifies under this rule. Specifically, the trust in this case obtained property from the plan sponsor—through its CEO—and then immediately leased it back to the plan sponsor in exchange for rent. Although the primary purpose of the trust was to provide for the well-being of the CEO's sisters during their life, the property reverted back to the CEO's sons upon the sisters' death. The sons, in turn, were the sole trustees and assumed control of the plan sponsor when their father retired. The parties have stipulated to the issue of common control for the purposes of this interlocutory appeal.

This is an issue of first impression for the Sixth Circuit. All the other circuits to have considered the issue hold that these leaseback arrangements are categorically a trade or business under ERISA, and the PBGC urges us to follow that rule ("the Categorical Test"). The Trust asks us to adopt a narrower, fact-intensive test originating from the Supreme Court's interpretation of the tax code ("the *Groetzinger* Test"). But I agree with the majority that the *Groetzinger* Test is a bad fit for these questions, and so I would apply a modified Categorical Test to cases like this one.

1

The Trust offers the *Groetzinger* Test as an alternative to the Categorical Test. But it makes no sense to apply *Groetzinger* here.

First, *Groetzinger* was about income taxes, and the Court expressly limited its holding to the sections of the Internal Revenue Code ("IRC") examined in that case. *Commissioner v. Groetzinger*, 480 U.S. 23, 27 n.8 (1987). As a matter of common sense, the Trust's invitation for us to disobey the Court's characterization of its own holding is ill-advised. The IRC uses the phrase "trade or business" about fifty times. If the Court was wary about defining the term throughout the IRC in one fell swoop, we should be even more skeptical when asked to export the meaning to a different statute entirely. And, of course, the same words can sometimes mean different things in different parts of the U.S. Code. *See Nat'l Fed'n of Indep. Business v. Sebelius*, 567 U.S. 519, 544-45 (2012).

Second, the context of ERISA differs significantly from the sections interpreted by *Groetzinger*. That case involved the IRC's deduction for expenses "attributable to a trade or business carried on by the taxpayer." 26 U.S.C. §§ 62(1), 162(a). These provisions are exculpatory; they reduce a person's tax liability. And the Court has held that tax exemptions and deductions must be construed strictly against the taxpayer. *United States v. Burke*, 504 U.S. 229 (1992) (Souter, J., concurring in the judgment); *United States v. Wells Fargo Bank*, 485 U.S. 351 (1988).

In contrast, the common-control provisions of ERISA are inculpatory and remedial. They exist to "fence in" employers who fragment their ownership to try and avoid contractual obligations. *Mason & Dixon*, 852 F.2d at 159. As remedial sections,[1] they should therefore be construed broadly when their meaning is unclear. *See A-T-O, Inc. v. PBGC*, 634 F.2d 1013, 1020 (6th Cir. 1980); *Rettig v. PBGC*, 744 F.2d 133, 155 n.54 (D.C. Cir. 1984); *see also Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980) (cataloguing the remedial goal of ERISA).

The cases that the Trust cites do not alter the analysis. Indeed, in every published case where the Trust says a Circuit has applied the *Groetzinger* Test, the facts are starkly different. As explained in more detail below, the courts draw a sharp distinction

[1] This is distinct from the ERISA plans themselves, which must be construed narrowly. *Health Cost Controls v. Isbell*, 139 F.3d 1070 (6th Cir. 1997).

between (1) cases where a common owner leases property back to the plan sponsor, and (2) cases where the common owner leases property to an unrelated third party. The *Groetzinger* Test has only been applied in the latter cases. *See UFCW Local One Pension Fund v. Enviel Props., LLC*, 791 F.3d 369, 371 (2d Cir. 2015); *Central States v. Fulkerson*, 328 F.3d 891, 895 (7th Cir. 2001); *Central States v. White*, 258 F.3d 636, 644 (7th Cir. 2001); *Connors v. Incoal, Inc.*, 995 F.2d 245, 246 (D.C. Cir. 1993). Since this case fits in the former category, the latter cases are not helpful. The Categorical Test, however, presents other problems.

2

The PBGC insists that *all* commonly controlled entities that lease property back to the plan sponsor are "categorically" trades or businesses under ERISA. It cites a litany of Circuit Court[2] and District Court cases in support of its conclusion. While the test's pedigree is impressive, I think we should apply it with care.

The most helpful case for the PBGC is *Vaughn v. Sexton*, 975 F.2d 489, 502-03 (8th Cir. 1992). In *Vaughn*, the Eighth Circuit held that a family trust, by leasing to the plan sponsor, was categorically a "trade or business" under ERISA. *Id.* at 503. However, the court offered little support for its conclusion, and it made no attempt to fend off the trust's argument

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[2] All the Circuit Court cases cited by the PBGC deal with multiemployer pension plans, but I cannot think of any reason to apply a different rule to single-employer plans. The "trade or business" language comes from the same statute for both single- and multi-employer plans. 29 U.S.C. § 1301(b)(1).

that "its primary purpose was not to generate income or profit but instead to assist in . . . estate planning arrangements." *Id.* Instead, the court cited a list of cases involving business leases and concluded that they were persuasive.

Every other Circuit Court case cited by the PBGC involved business leases where the lessor was either an individual or a commonly controlled, for-profit business. *Messina Prods.*, 706 F.3d at 882-83 (personal leases to the plan sponsor); *Central States v. Nagy*, 714 F.3d 545, 546 (7th Cir. 2013) (same); *Central States v. Slotky*, 956 F.2d 1369, 1371 (7th Cir. 1992) (individual leasing buildings to plan sponsor); *Bd. of Trustees of the Western Conf. of Teamsters Pension Fund v. Lafrenz*, 837 F.2d 892, 893 (9th Cir. 1988) (single proprietorship leasing equipment to the plan sponsor). The categorical logic of these cases therefore does not fit perfectly with a case like this one, where the lessor is an irrevocable family trust for the primary benefit of the settlor's sisters. However, the test deserves serious consideration because of the universal acceptance it has received in other Circuits.

The PBGC and the Trust engage in a dizzying battle of citations and counter-citations, each attempting to prove that these other Circuits have adopted its preferred test and rejected the other side's. The PBGC wins this battle. After recognizing the tension in the case law, the Seventh Circuit recently drew a clear line between two types of leasing behaviors by commonly owned lessors: (1) cases where the lessee was the plan sponsor (where the Categorical Test applies); and (2) cases where the lessee was a business enterprise unrelated to the plan sponsor (where *Groetzinger* applies). *Messina Prods.*, 706 F.3d at 880-82. Thus, both tests are valid; they simply apply to different leasing arrangements. The U.S. District Court in Chicago also recently explained why the Categorical Test is desirable in the latter case. Regardless of intent, "[i]t is the fact that the economic relationship *could* be used to dissipate or fractionalize assets that makes leasing property to a withdrawing employer a 'trade or business.'" *Central States v. Sidney Truck & Storage*, 182 F. Supp. 3d 855, 860 (N.D. Ill. 2016).

This logic fits with our precedent. It has long been the law in this Circuit that Congress created the common-control provisions to prevent employers from avoiding liability "by operating through separate entities." *Mason & Dixon*, 852 F.2d at 159. Any test we adopt must adhere to that goal. For those reasons, I agree that we must reverse the district court on this count, but under the more circumscribed language offered below.

3

On the facts here, the Trust's argument collapses. Although set up as an irrevocable family estate-planning device, several facts show that it was part of the defendants' business enterprise:

- The settlor (Phillip D. Gardner) received the property as a gift from the plan sponsor, which he controlled and operated;
- The settlor donated the property to the trust himself;
- The overwhelming majority of the trust's corpus was the two plots of land on which the plan sponsor operates;

- The trustees (the settlor's sons and residual beneficiaries) immediately leased the property back to the plan sponsor;
- The benefits to the settlor's sisters were only for life, and on their death, the property reverted to the *settlor*'s sons, instead of vesting in the sisters' heirs; and
- The residual beneficiaries assumed control of the plan sponsor after the settlor's death.

The Trust complains that "the property that Phillip D. Gardner donated to the Trust could never revert to him or to Findlay." Appellee Br. at 28. True, the property would not return to Gardner himself, but Gardner knew the property *would* return to his two sons, whom he almost certainly intended to run Findlay after he died. This sort of a leasing arrangement is exactly the kind of "economic relationship [that] could be used to dissipate or fractionalize assets." *Sidney Truck & Storage*, 182 F. Supp. 3d at 860. The common-control rules prevent this sort of maneuvering.

Although we should follow the other Circuits in adopting the Categorical Test in most cases (including this one), I would leave some issues open for future litigation. Commercial leases from a common owner to the plan sponsor should categorically be considered "trades or businesses" within § 1301(b)(1)'s reach. Trusts, however, create problems depending on (1) the revenue sources of the trust, (2) who controls the trust assets, and (3) who ultimately benefits from the trust. Here, all three factors militate in favor of ERISA liability. First, the revenue of the trust was derived almost exclusively from rent paid by the plan sponsor, for land on which it operated, and on land which it had previously owned. If common control is assumed, the lease was never truly a liability or an asset on the balance sheet of the common owners: It simply shifted assets from one commonly controlled entity to another. Second, the same people who owned and controlled the plan sponsor also controlled the distribution of trust assets and ultimately received the land on the expiration of the sisters' life estate. Imposing liability on these facts fits with both the goals of common-control liability articulated by *Mason & Dixon* and the flexible, practical analysis used in *Challenge Stamping*.

However, where any of these factors are not met, I would leave the issue open for further litigation. Imagine one tiny change to the facts of this case. Instead of returning the trust property to the sons, suppose that the trust instrument dictated that title vested in the sisters' heirs (or someone else) upon the expiration of the life estate. I find it difficult to believe that Congress intended to wrench assets away from an "innocent" third party just to satisfy a company's pension obligations. Again, this logic flows from *Challenge Stamping*, where we stated that "[t]here is no support for a view that Congress's chief intent in employing [common-control liability] was to invade the deepest pocket" no matter who it belongs to. 719 F.2d at 151. In such cases—like in cases where creditors seek to levy on a business venture with no connection to the plan sponsor—a more flexible, pragmatic inquiry may be appropriate from the start. *Cf. Messina Prods.*, 706 F.3d at 880-82.

The majority suggests that I am proposing a "less-than-categorical version" of the Categorical Test. Maj.

Op. at 18. I have done no such thing. Commercial leases from a common owner to the plan sponsor are *categorically* covered by § 1301(b)(1). That holding is coextensive with the judgments of our sister Circuits. I write separately only to note that our decision today should not be understood to go beyond the facts it presents, and that future panels should be free to consider creating narrow exceptions if a family trust arrangement presents it with more challenging facts and a potentially inequitable result.

II

However, I disagree completely with the majority on the next issue. The majority creates federal common law to hold the successors liable for Findlay's pension obligations. The Successors argue that 29 U.S.C. § 1369 enumerates the only circumstances where the PBGC can impose Termination Liability on the successor to a plan sponsor. The Successors are right.

ERISA is one of the few areas where the federal courts are empowered to create federal common law. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989); *DiGeronimo Aggregates, LLC v. Zemla*, 763 F.3d 506, 510-11 (6th Cir. 2014). However, we exercise that power with care and only create ERISA common law "in a few and restricted instances." *DiGeronimo*, 763 F.3d at 511. If "Congress has established an extensive regulatory network and has expressly announced its intention to occupy the field, courts do not lightly create additional rights under the rubric of federal common law." *Id.* Further, the Supreme Court's instructions in *Firestone* were directed primarily at the administration of ERISA plans and only have secondary application to other parts of the statute. *See Firestone*, 489 U.S. at 110; Erwin Chemerinsky, Federal Jurisdiction § 6.3.2, p. 415 (7th ed 2016).

We have restricted our common-law authority under ERISA to circumstances in which: (1) ERISA is silent or ambiguous, (2) ERISA leaves an awkward gap in the statutory scheme, or (3) federal common law is "essential" to promote "fundamental ERISA policies." *DiGeronimo*, 763 F.3d at 511. Using these principles, we have created common law to address restitution claims, some estoppel claims, and undue influence claims. *Whitworth Bros. Storage v. Central States*, 794 F.2d 221, 233-36 (6th Cir. 1986) (restitution allowed when employer paid too much into the fund); *Bloemaker v. Laborers Local 265 Pension Fund*, 605 F.3d 436, 440 (6th Cir. 2010) (beneficiaries can bring equitable estoppel claim against fund based on reasonable reliance on written benefit statement); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 403-04 (6th Cir. 1998) (en banc) (beneficiaries may bring promissory estoppel claim against plan sponsor when sponsor promised to provide coverage for life); *Tinsley v. Gen. Motors Corp.*, 227 F.3d 700, 704-05 (6th Cir. 2000) (creating common-law standard for undue influence exerted by beneficiaries of life insurance policy). Notice, again, that each of these cases addressed ERISA plans—i.e., disputes between the plan and its beneficiaries—not disputes between the plan and third parties.

In the few cases where parties have asked us to create common-law doctrines in the latter circumstance, we have declined to do so. *United Food & Commercial Workers Union v. Rubber Assocs., Inc.*, 812 F.3d 521

(6th Cir. 2016) (refusing to create equitable reduction in withdrawal liability imposed by an arbitrator); *Central States v. Mahoning Nat'l Bank*, 112 F.3d 252 (6th Cir. 1997) (rejecting plaintiffs' common-law withdrawal liability claim because they could have—but did not—pursue their claim in a timely manner under ERISA's withdrawal-liability statute). This background creates an even stronger presumption against creating federal common law in this case, and the PBGC's arguments do not overcome it. With this background in place, I turn to the three factors identified by *DiGeronimo*: (1) whether ERISA is silent on the issue, (2) whether the statute leaves an awkward gap, or (3) whether common law is necessary to promote fundamental ERISA policies.

A

If ERISA speaks to an issue, a party cannot complain because it does not like what the statute says. *Girl Scouts of Middle Tenn. v. Girl Scouts of the U.S.A.*, 770 F.3d 414, 420-21 (6th Cir. 2015). Relevant to this case, "[w]here ERISA allows for recovery on an issue under some but not all circumstances, ERISA is not silent on that issue." *Id.* at 421. Thus, in *Girl Scouts*, the court noted that "ERISA is far from silent on the contractual claims [plaintiff] alleges. ERISA simply fails to afford [plaintiff] an avenue for recovery in this context." *Id.* Here, the Successors point out that § 1369 addresses certain "transactions to evade liability" and "corporate reorganization[s]," indicating a Congressional intent to limit successor liability. The PBGC contends that Congress did not intend this section to be the sole vehicle for successor liability under ERISA. The legislative history refutes the PBGC's conclusion.

The Congress that passed ERISA considered two versions of the language that eventually became § 1369(b). The first version, drafted by the Labor Committees of both chambers, imposed liability on the employer "or any successor in interest to such employer . . ." S. 4, 93rd Cong. § 405(a) (1973), *reprinted in* ERISA Legis. Hist. 143, 538, 1240-41 (1976); H.R. 2, 93rd Cong. § 405(a) (1973), *reprinted in* ERISA Legis. Hist. 2326. Both Committees included this language because they were concerned about "acquiring companies . . . [that] failed to take over the liability for vested benefits owed to the employees of the predecessor company." The committees therefore felt that it was necessary for "successors in interest to be liable for [obligations] owed by predecessor companies." S. Rep. No. 93-127, at 26 (1973), *reprinted in* ERISA Legis. Hist. 612; H.R. Rep. 93-533 (1973), *reprinted in* ERISA Legis. Hist. 2363.

The second version, proposed by the Senate Finance Committee, contained the language now codified in § 1369(b). S. 1179, 93rd Cong. § 462(e) (1973), *reprinted in* ERISA Legis. Hist. 933-34. After a long, drawn-out fight between the Labor and Finance Committees, both chambers agreed to the Finance Committee's language, and it remained in that form until final passage. 119 Cong. Rec. 1579 (1973), *reprinted in* ERISA Legis. Hist. 1590-91; H.B. 2, 93rd Cong. § 462(e) ("Successor Liability") (as passed by the Senate), *reprinted in* ERISA Legis. Hist. 3727-28; Conference Bill on H.B. 2, 93rd Cong. § 4062(d) (recodified without substantive change by Conference Committee, "Successor Liability" header deleted), *reprinted in* ERISA Legis. Hist. 4509-10; Employee Retirement Income Security Act of 1974, Pub. L. No.

93-406 § 4062(d), 88 Stat. 829 (93rd Cong., Sept. 2, 1974) (same as Conference Bill). It was not until 1986 that Congress added the title "Effect of Corporate Reorganization," and even then, it did so in an Omnibus budget bill with no explanation whatsoever. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 11013(a), 100 Stat. 82, 260-61 (99th Cong., April 7, 1986); H.R. Rep. 99-300, at 318.

This history convinces me that Congress intentionally restricted successor liability to those circumstances indicated in § 1369(b). Where Congress considered and rejected "the very language that would have achieved the result [a party] urges," that fact "weighs heavily against" the party's interpretation. *Hamdan v. Rumsfeld*, 548 U.S. 557, 578-80 (2006). This fact disposes of both the silence inquiry and the "awkward gap" question under *DiGeronimo*. It is true that several Circuits have imposed common-law successor liability in cases dealing with multiemployer plans—in contrast to the single-employer plan here—and the lack of a uniform rule would be somewhat awkward. *See Resilient Floor Covering Pension Tr. Fund v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1093-95 (9th Cir. 2015); *Tsareff v. Manweb Servs., Inc.*, 794 F.3d 841, 844-47 (7th Cir. 2015). But Congress created this awkward situation; it should be the one to fix it. *Girl Scouts*, 770 F.3d at 420-21. Thus, the PBGC's only viable remaining argument is that federal common law is essential to further ERISA's fundamental purposes.

B

Not every ERISA policy justifies creating common law. Similarly, the fact that a plaintiff's claim is based on a "fundamental" ERISA policy does not itself mandate the creation of common law. *DiGeronimo*, 763 F.3d at 511. Only when the interest is "fundamental" and the creation of common law is "essential" to protect that interest should the courts exercise their lawmaking authority. Although this factor is independent of the silence and awkward-gap question, it does not ignore the facts discovered in those inquiries. *See Local 6-0682 Int'l Union of Paper v. Nat'l Indus. Grp. Pension Plan*, 342 F.3d 606, 610 (6th Cir. 2003); *Tassinare v. Am. Nat'l Ins. Co.*, 32 F.3d 220, 225 (6th Cir. 1994)).

Here, we must ask whether the asserted policy is "fundamental." If it is, then we must examine whether the creation of federal *common law*—not merely the creation of a new federal *remedy*—is "essential" to accomplish that policy. Previous panels of this Court have suggested that ERISA established a fundamental policy of "ensuring that . . . participants and beneficiaries obtain the benefits to which they are entitled." *Tassinare*, 32 F.3d at 225 (quoting *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 281 (2d Cir. 1992)). But the court has not expressly created federal common law on this ground, or anything close to it. The only other cases relying on the fundamental-ERISA-policy rationale asserted interests in protecting the integrity of written ERISA plans, *Bloemker*, 605 F.3d at 440-41; *Sprague*, 133 F.3d at 403-04, or in fulfilling Congress's desire to fully preempt state law, *Whitworth Bros.*, 794 F.2d at 235-36. Further, the interest in ensuring payment to beneficiaries is distinct from the PBGC's interest in recouping those payments, which is the real issue here. Admittedly, the PBGC's recoupment claims are an important cog in ERISA's enforcement mechanism. But even if this policy is fundamental, common law is not essential to protect it here.

Something is *essential* if it is "basic and necessary." Black's Law Dictionary, *Essential* (10th ed. 2014). In our federal system, common law is only necessary as a last resort—if no one else has done something about the problem, and if it's unlikely that anyone else will. Individual beneficiaries who find themselves left out in the cold by a gap in ERISA will usually not be able to muster the political clout to work clarifications in the law. Thus, at least when it comes to rules governing specific ERISA plans, the equitable powers of a court are crucial to filling these gaps. *See Firestone*, 489 U.S. at 110; *Bloemker*, 605 F.3d at 440-41.

The PBGC, however, is not so powerless to instigate legislative change. Indeed, the MPPAA was enacted, in part, because the PBGC notified Congress of a loophole in ERISA's original language. *See* 29 U.S.C. § 1001a; *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 722 (1984). The problem identified here is similar: someone exploited a loophole in § 1369's reorganization language. However, the legislative history indicates that the narrow scope of this section was at least somewhat intentional. It is possible, even likely, that the Senate Finance Committee was "reluctant to impose successor liability when it might inhibit the reorganization of failing businesses." *Peters v. NLRB*, 153 F.3d 289, 301 (6th Cir. 1998). But it compromised—acknowledging the Labor Committee's concerns about evasive corporate transactions. Thus, if the problem at bar is truly so serious that it upsets the legislative balance set in 1974, the PBGC is certainly capable of convincing Congress to right the ship.

The majority is absolutely correct that, ultimately, the PBGC might not be able to persuade Congress to change the law, even though it has more clout than the ordinary citizen. Maj. Op. at 22 n.5. But that is precisely the point. Congress *deliberately* selected the narrow kind of successor liability we have before us, and it may decide (over the PBGC's objection) to choose that narrow road again. The outcome of this policy battle is not our concern—Congress's current intent is clear, and we are obligated to honor it. *Miller v. French*, 530 U.S. 327, 336 (2000). The majority, however, veers around Congress's intent without even discussing it by declaring that the outcome advocated by the Successors "plainly would frustrate the purpose of Subchapter III." Maj. Op. at 22. I find it unlikely that Congress "shot itself in the foot," so to speak, by deliberately adopting language in such fundamental conflict with the purpose of the statute it was enacting. And I find it even more difficult to believe that we should find such "frustration" when the legislative history resolves any tension between the statute's text and its purpose.

Our power to create federal common law is the authority to fill gaps created or neglected by Congress. *DiGeronimo*, 763 F.3d at 511. But it is emphatically *not* the authority to sit as a "superlegislature" to rewrite laws we think are unfair or to alter policy judgments we think are unwise. *Cf. Exxon Corp. v. Maryland*, 437 U.S. 117, 124 (1978); *Hodel v. Indiana*, 452 U.S. 314, 333 (1981). I would welcome a discussion of common-law successor liability if Congress had forgotten about it when passing ERISA. But Congress didn't forget about successor liability—it deliberately adopted a narrow form of the concept. I therefore cannot agree that expanding successor liability is essential to the promotion of fundamental ERISA policies when the policymaker has already considered and rejected that argument. I therefore respectfully dissent from the opinion of the court on this issue.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:15 CV 1421

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,

v.

FINDLAY INDUSTRIES, INC., et al.,
Defendants.

ORDER CERTIFYING APPEAL
AND STAYING CASE

JUDGE JACK ZOUHARY

Without objection, Plaintiff's Motion to Amend and Certify Orders for Interlocutory Appeal, and for a Stay Pending Appeal (Doc. 64) is granted. This Court's September 9, 2016 and December 29, 2016 Orders (Docs. 54, 60) are amended to include the following statement, under 28 U.S.C. § 1292(b):

"This Order involves controlling questions of law as to which there are substantial grounds for differences of opinion, and an immediate appeal from the Order may materially advance the ultimate termination of the litigation."

Therefore, this Court certifies both Orders for immediate appeal to the United States Court of Appeals for the Sixth Circuit, under 28 U.S.C. § 1292(b). This case is stayed pending the outcome of the appeal and closed for statistical purposes.

IT IS SO ORDERED.

s/

JACK ZOUHARY
U.S. DISTRICT JUDGE

March 10, 2017

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:15 CV 1421

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,

v.

FINDLAY INDUSTRIES, INC., et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

JUDGE JACK ZOUHARY

INTRODUCTION

Defendant Findlay Industries, Inc. (Findlay) established a pension plan (Plan) in June 1964 (Doc. 3 at ¶ 26). Findlay remained the sponsor and administrator of the Plan from its inception until its termination effective July 2009 (*id.* at ¶¶ 28-29). Plaintiff Pension Benefit Guaranty Corporation (Pension Benefit) claims several Defendants are jointly and severally liable for the termination liabilities incurred by Findlay (*id.* at 2-3). Pension Benefit brings this action against Defendants under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), *as amended*, 29 U.S.C. §§ 1301-1461, and the Federal Debt Collection Procedures Act, 28 U.S.C. § 3001 *et seq.* (*id.* at 2).

Findlay and certain other Defendants have been dismissed (Minute Entry 11/22/16); the remaining Defendants move to dismiss selective claims. Pending are two Motions to Dismiss under Federal Civil Rule 12(b)(6). Defendant The Philip D. Gardner Inter Vivos Trust Agreement Dated January 20, 1987 (Trust 1987) moves to dismiss Counts III and IX of the First Amended Complaint (Docs. 21, 37, 48). Defendants September Ends Co. (September Ends) and Back in Black Co. (Back in Black) move to dismiss Count XV (Docs. 22, 38, 43).

STANDARD OF REVIEW

An action may be dismissed if the complaint fails to state a claim upon which relief can be granted. Federal Civil Rule 12(b)(6). At this stage, this Court must accept all well-pled factual allegations as true and construe the Complaint in the light most favorable to Pension Benefit. *Haviland v. Metro. Life Ins. Co.*, 730 F.3d 563, 566-67 (6th Cir. 2013). Although the Complaint need not contain "detailed factual allegations," it does require more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, the Complaint will survive a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted). And "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

DISCUSSION

Counts III and IX

Trust 1987 moves to dismiss Counts III (Controlled Group Liability of PDG Trust 1987 under 29 U.S.C. §§ 1306, 1307, 1362) and IX (Fraudulent Transfers by HG3 under 28 U.S.C. §§ 3304, 3306, 3307) for failure to state a claim. The Estate of Michael Gardner also moves to dismiss those Counts (Docs. 33, 46-47).

Philip D. Gardner (Gardner) founded and owned Findlay until his death. In January 1987, Gardner established Trust 1987 (Doc. 21 at 4; Doc. 21-1 at 1).[1] Gardner donated two parcels of property to the trust (Doc. 21-1 at 1, Ex. A). The trustee was directed to "hold, manage and control the property comprising the Trust estate, collect the income therefrom, and . . . disburse the net income and distribute the corpus thereof" to provide for the "care, support, maintenance, and welfare" of Gardner's sisters (Doc. 21-1 at 1). Later, the funds were also to be used for the sisters' funeral expenses as the trustee saw fit (*id.* at 3). After

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[1] While a court may not normally consider matters outside the pleadings without converting a motion to dismiss to a motion for summary judgment, "a court may consider . . . exhibits attached to defendant's motion to dismiss so long as they are referred to in the complaint and are central to the claims contained therein without converting the motion . . . ." *Rondigo, LLC v. Twp. of Richmond,* 641 F.3d 673, 681 (6th Cir. 2011). Here, Pension Benefit refers to Trust 1987, as well as its purpose and structure, in the First Amended Complaint (Doc. 3 at ¶¶ 59-64). The trust itself is central to Pension Benefit's claims. Accordingly, this Court will consider the trust documents in evaluating the motion to dismiss, without converting the motion to one for summary judgment. *See Rondigo*, 641 F.3d at 681.

the passing of the last sister, the balance of the trust was to be split between Gardner's two sons, Defendants Philip J. Gardner and Michael J. Gardner (Gardner sons) (*id.*). The Gardner sons served successively as trustees (Doc. 21-1 at 1, 4; Doc. 3 at ¶ 3). The trust was irrevocable (Doc. 21-1 at 8). Under the terms of the trust, the remaining real property, personal property and cash were transferred to the Gardner sons in 2014, following the death of the last sister (Doc. 3 at ¶¶ 138-40).

In Count III, Pension Benefit alleges Trust 1987 was "leasing a parcel of real property to [Findlay] from no later than July 1, 1993, through at least November 2009" (Doc. 3 at ¶ 64). Pension Benefit goes on to allege this lease "had a substantial economic nexus with [Findlay], such that including [Trust 1987] in [Findlay]'s controlled group would further the purpose of the controlled group rules, preventing employers from limiting their responsibilities by fractionalizing into separate entities" (*id.* at ¶ 65; Doc. 37 at 11).

Under ERISA, when "a single-employer plan is terminated . . . by [Pension Benefit] . . . any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's controlled group shall incur liability . . . ." 29 U.S.C. § 1362(a). For single-employer plans, a controlled group consists of all persons under common control, including "two or more trades or businesses under common control." 29 C.F.R. § 4001.3(b)(1). The phrase "trades or businesses" is not defined by ERISA or the relevant regulations.

According to Pension Benefit, the "categorical rule is that leasing property to a plan sponsor who is under the common control of the property owner constitutes a 'trade or business'" for ERISA purposes (Doc. 37 at 11). Pension Benefit therefore concludes Trust 1987 is in Findlay's controlled group, making Trust 1987 jointly and severally liable for termination liabilities (*id.*; Doc. 3 at ¶¶ 66 & 68). Trust 1987 disputes both the "economic nexus" test referenced in the Complaint and the "categorical rule," instead relying on the test identified in *Commissioner v. Groetzinger*, 480 U.S. 23, 35 (1987). In *Groetzinger*, the Supreme Court held that to constitute a trade or business for tax purposes, a person must engage in an activity (1) for the primary purpose of income or profit, and (2) with continuity and regularity. *Id.* Under this standard, Trust 1987 argues Pension Benefit fails to plead facts necessary to establish the trust was a trade or business, and thus, Trust 1987 cannot be held liable for termination liabilities under ERISA (Doc. 21 at 7).

Neither the Supreme Court nor the Sixth Circuit has defined the term "trade or business" in the specific context of ERISA termination liability. Therefore, this Court "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). Merriam-Webster Dictionary defines "trade" as "the business or work in which one engages regularly" and "business" as "a usually commercial or mercantile activity engaged in as a means of livelihood." The Supreme Court's *Groetzinger* test embodies this ordinary, common-sense meaning of the words at issue. *Groetzinger*, 480 U.S. at 35.

Here, Gardner created Trust 1987 with the express purpose of providing for the care and eventual funeral expenses of his sisters (Doc. 21-1 at 1). In July

1993, six years after the trust's inception, the trust began leasing one of its parcels to Findlay (Doc. 3 at ¶ 64). The trust continued to lease the parcel to Findlay until November 2009 (*id.*). Thus, the trust operated according to its purpose, leasing part of its real property to generate money for the care of Gardner's sisters during their lifetimes. Thereafter, the balance of the trust was split between the Gardner sons as an inheritance (*id.* at ¶¶ 138-40). Nothing in these facts suggests the leasing activity rose to the level of a "trade or business" under the plain meaning of the phrase or under the *Groetzinger* test.

Pension Benefit would have this Court adopt an approach utilized by other Circuits, which recognize a "categorical rule" that leasing property to a withdrawing employer constitutes a trade or business. *See, e.g.*, *Cent. States Se. and Sw. Areas Pension Fund v. Messina Prods., LLC*, 706 F.3d 874, 881 (7th Cir. 2013); *Bd. of Trs. of W. Conference of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892, 894 (9th Cir. 1988). This Court, however, declines to adopt the categorical rule in this case. The Circuits that have developed and applied the categorical rule did so in the context of the Multiemployer Pension Plan Amendments Act (MPPAA), which seeks to prevent employers from avoiding liability by fractionalizing into separate entities. *See, e.g., Messina Prods.*, 706 F.3d at 881-83 (contrasting *Messina* and other cases). As an initial matter, it is not clear that a single-employer plan is governed by case law developed in the context of the MPPAA, which is a separate statutory scheme with its own legislative history and purpose. Moreover, in this case, although Trust 1987 rented property to Findlay (the withdrawing employer), the purpose of the rental activity was not to dissipate Findlay's assets or to profit Gardner. This is evident from the timing, form, and scope of the trust, which was personal not commercial. Where, as here, there is no possibility the rental activity was used to dissipate or fractionalize the employer's assets, there can be no controlled group liability. *See id.*, citing *Central States v. White*, 258 F.3d 636, 644 (7th Cir. 2001).

Pension Benefit maintains the allegations in the First Amended Complaint are sufficient, and it declines to amend to plead facts establishing Trust 1987 was a "trade or business" under *Groetzinger*. Accordingly, Count III, and Count IX which the parties agree cannot survive the dismissal of Count III, are dismissed with prejudice.

Count XV

Defendants September Ends and Back in Black move to dismiss Count XV of the First Amended Complaint for failure to state a claim under Federal Civil Rule 12(b)(6).

In December 2012, Pension Benefit and Findlay agreed to terminate the Plan effective July 2009 (Doc. 3 at ¶ 29). In May 2009, F I Asset Acquisition LLC (FIAA) purchased Findlay's equipment, inventory, and receivables associated with the Springfield and Molded Products plants (*id.* at ¶ 208). FIAA then transferred these purchases to Michael Gardner and his wholly-owned corporation Milstein, Jaffe & Goldman Inc. (*id.* at ¶ 209), which in turn transferred the assets to September Ends and Back in Black (*id.*). September Ends now operates the Springfield plant, and Back in Black operates the Molded Products plant (*id.* at ¶ 210).

Pension Benefit advances a claim of successor liability under federal common law against September Ends and Back in Black (*id.* at ¶ 211), alleging both are subject to the termination liabilities because: (1) they had notice of Findlay's termination liabilities; (2) Findlay was unable to pay the termination liabilities; and (3) there was "substantial continuity of operations" between Findlay and these two companies (*id.*).

September Ends and Back in Black argue that as asset purchasers they do not fall within the limited types of companies for which ERISA provides successor liability (Doc. 22 at 3). Under the relevant ERISA statutes, those who may be liable include the contributing sponsor, the plan administrator, and members of the contributing sponsor's controlled group. 29 U.S.C. §§ 1362(a) & 1307(e). September Ends and Back in Black fit none of these categories.

Congress empowered trustees to seek contributions to underfunded single-employer pension plans from a limited group of additional entities in the event of corporate reorganization. For example, if a reorganization results in a "mere change in identity, form, or place of organization," Pension Benefit may pursue the successor corporation. 29 U.S.C. § 1369(b)(1). Likewise, Pension Benefit may pursue a parent company when that company liquidates its subsidiary. *Id.* § 1369(b)(2). Finally, Pension Benefit may pursue the successor corporation that results from a merger, consolidation, or division. *Id.* § 1369(b)(3). It is undisputed that September Ends and Back in Black, as asset purchasers, do not fit these categories either.

With no statutory support, this leaves Pension Benefit to ask this Court to apply a federal common law doctrine of successor liability to this case (Doc. 38 at 14), citing *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1327 (7th Cir. 1990), and other cases.

"[W]here Congress has established an extensive regulatory network and has expressly announced its intention to occupy the field, courts do not lightly create additional rights under the rubric of federal common law." *DiGeronimo Aggregates, LLC v. Zemla*, 763 F.3d 506, 511 (6th Cir. 2014). This Court's authority to create federal common law with respect to ERISA "is restricted to instances in which (1) ERISA is silent or ambiguous; (2) there is an awkward gap in the statutory scheme; or (3) federal common law is essential to the promotion of fundamental ERISA policies." *Id.* Analyzing 29 U.S.C. §§ 1307(e), 1362(a), and 1369 under this standard, this Court concludes the creation of federal common law would be inappropriate here.

ERISA is neither silent nor ambiguous in terms of who may be pursued for termination liabilities. Rather, the Supreme Court recognizes ERISA as a "comprehensive and reticulated statute" based upon detailed findings made by Congress. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361-62 (1980). The statutory provisions at issue here clearly identify who may be pursued for monetary recovery: namely, the plan administrator, the contributing sponsor along with members of the sponsor's controlled group, as well as successor corporations which are essentially alter egos of their original corporations. 29 U.S.C. §§ 1362(a), 1307(e), & 1369(b). Nowhere in these provisions did Congress suggest, let alone endorse, successor liability for asset purchasers, leading this Court to conclude that Congress did not intend such entities to be included.

Further, there is no statutory gap for federal common law to fill. Pension Benefit describes in great detail the similarities between withdrawal liability for multiemployer plans and termination liability for single-employer plans (Doc. 38 at 19-23), arguing these similarities justify extending the federal common law doctrine from the first context to the second. But the statutory provisions governing multiemployer plans do not define the contours of successor liability, creating a gap. Single-employer plans, on the other hand, are subject to 29 U.S.C. § 1369(b). The explicit language of that provision leaves no gap to fill.

Pension Benefit also argues that "ERISA provides that a nearly identical group of entities is liable for Withdrawal Liability [from multiemployer plans], and each of the several courts considering the issue has held that the Federal Successor Doctrine applies to Withdrawal Liability" (Doc. 38 at 31). Pension Benefit suggests that declining to apply the federal common law to single-employer plans would be inconsistent and create an "awkward gap" in the common law (*id.* at 32). Yet this argument ignores the many differences between single and multiemployer plans. The very point of the MPPAA was to create special provisions for multiemployer plans and to treat them differently. Further, Pension Benefit focuses on the wrong gap. The question is not whether a gap will be left in the federal common law by declining to apply it, but whether there exists in the first place a statutory gap that requires the creation of federal common law. *See*

DiGeronimo, 763 F.3d at 511. For the reasons explained above, this Court finds no statutory gap.

Finally, the creation of federal common law here is not essential to the promotion of fundamental ERISA policies. *See Girl Scouts of Middle Tenn. v. Girls Scouts of the U.S.A.*, 770 F.3d 414, 420 (6th Cir. 2014). "The principal object of [ERISA] is to protect plan participants and beneficiaries." *Boggs v. Boggs*, 520 U.S. 833, 845 (1997). As Congress has established several categories of persons and entities which may be pursued for contributions to underfunded single-employer pension plans, Pension Benefit has avenues of redress to protect the pensions of vested employees. Adding more targets is not necessary to fulfill ERISA's policy of protecting plan participants.

Accordingly, this Court concludes that Count XV is not grounded in the statute or established federal common law. Because this Court declines to create federal common law "to fill a gap" where none exists, Count XV is dismissed with prejudice.

CONCLUSION

This Court grants the Motion to Dismiss Counts III and IX and the Motion to Dismiss Count XV. This Court schedules a Phone Status on **Friday, January 6, 2017 at 9:30 AM** to discuss the remaining Counts with counsel for the non-settling parties. At that time, counsel shall call the District Court conference line.

IT IS SO ORDERED.

s/

JACK ZOUHARY
U.S. DISTRICT JUDGE

December 29, 2016

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:15 CV 1421

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,

v.

FINDLAY INDUSTRIES, INC., et al.,
Defendants.

ORDER GRANTING MOTIONS TO DISMISS

JUDGE JACK ZOUHARY

Pending before this Court is the Motion of Defendants PDG Trust 1987 and Michael J. Gardner to Dismiss Counts III and IX of the First Amended Complaint (Doc. 21). Plaintiff opposes (Doc. 37), and Defendants reply (Doc. 48).

This Court finds Plaintiff has not pled facts necessary to establish the Trust as a "trade or business." Counts III and IX are dismissed with prejudice.

Also pending before this Court is the Motion of Defendants September Ends Co. and Back in Black Co. to Dismiss Count XV of the First Amended Complaint (Doc. 22). Plaintiff opposes (Doc. 38), and Defendants reply (Doc. 43).

This Court finds Count XV is not grounded in the statute or on established federal common law, and this

Court declines to create federal common law "to fill a gap" where none exists. Count XV is dismissed with prejudice.

In light of these holdings, Plaintiff's Motion for Oral Argument (Doc. 52) is denied as moot. This Court will supplement this Order with memorandum opinions further detailing the basis for these holdings. Counsel are reminded to submit a proposed revised Case Schedule. *See* Doc. 51.

IT IS SO ORDERED.

s/______________________

JACK ZOUHARY
U.S. DISTRICT JUDGE

September 9, 2016

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-3520

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff-Appellant,

v.

FINDLAY INDUSTRIES, INC., et al.,
Defendants,

PHILIP D. GARDNER INTER VIVOS TRUST AGREEMENT DATED JANUARY 20, 1987; SEPTEMBER ENDS CO.; BACK IN BLACK CO.; ROBIN L. GARDNER, Executor of Estate of Michael J. Gardner,
Defendants-Appellees.

FILED Nov. 5, 2018
DEBORAH S. HUNT, Clerk

ORDER

BEFORE: DAUGHTREY, McKEAGUE, and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/________________________

Deborah S. Hunt, Clerk