

WAIVER

SUPREME COURT OF THE UNITED STATES

Supreme Court Case No. 18-1265

September Ends Co.; Back in Black Co. v. Pension Benefit Guaranty Corporation
(Petitioner) (Respondent)

I DO NOT INTEND TO FILE A RESPONSE to the petition for a writ of certiorari unless one is requested by the Court.

Please check the appropriate boxes:

- Please enter my appearance as Counsel of Record for all respondents.
- There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):

- I am a member of the Bar of the Supreme Court of the United States.
- I am not presently a member of the Bar of this Court. Should a response be requested, the response will be filed by a Bar member.

Signature Judith R. Starr
Date: April 30, 2019

(Type or print) Name Judith Roxanne Starr
 Mr. Ms. Mrs. Miss

Firm Pension Benefit Guaranty Corporation

Address 1200 K Street, N.W.

City & State Washington, D.C. Zip 20005

Phone (202) 326-4020, ext. 3083 Email Starr.Judith@pbgc.gov

A COPY OF THIS FORM MUST BE SENT TO PETITIONER'S COUNSEL OR TO PETITIONER IF *PRO SE*. PLEASE INDICATE BELOW THE NAME(S) OF THE RECIPIENT(S) OF A COPY OF THIS FORM. NO ADDITIONAL CERTIFICATE OF SERVICE IS REQUIRED.

CC: Kevin K. Russell, Caroline H. Gentry, Counsels for Petitioner; Noel J. Francisco, SG



Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

Honorable Scott S. Harris
Clerk, United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

APR 30 2019

Re: *September Ends Co. & Back In Black Co. v. Pension Benefit Guaranty Corporation*, No. 18-1265, petition for cert. docketed April 2, 2019

Dear Mr. Harris:

With this letter, the Pension Benefit Guaranty Corporation (“PBGC”) waives its right to file an opposition to the petition for certiorari captioned above, unless a response is requested by the Court.

PBGC is a wholly owned United States government corporation created by Title IV of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), 29 U.S.C. §§ 1301 – 1461, which establishes the pension insurance programs for single-employer and multiemployer plans. Subject to statutory limitations, PBGC guarantees the payment of nonforfeitable benefits to participants in terminated pension plans covered by Title IV of ERISA. 29 U.S.C. § 1322(a). PBGC has the power “to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal.” 29 U.S.C. § 1302(b)(1).

Petitioners September Ends Co. and Back in Black Co. (“Petitioners”) seek review of the September 4, 2018 decision of the United States Court of Appeals for the Sixth Circuit, which vacated the district court’s order of dismissal and remanded for further proceedings. *PBGC v. Findlay Industries, Inc.*, 902 F.3d 597 (6th Cir. 2018), *rev’g* 2016 WL 7474404 (N.D. Ohio Dec. 29, 2016). Rehearing *en banc* was denied on November 5, 2018. In relevant part, the Sixth Circuit held that the federal common law doctrine of successor liability can apply to pension plan termination liabilities under ERISA. This case clearly does not warrant review by this Court as it is in accord with Title IV precedent from other circuits and is narrowly focused on the particular language and statutory context of a Title IV provision that is enforceable only by PBGC.

This case involves Petitioners’ efforts to avoid successor liability resulting from their purchase of assets from the sponsor of an underfunded pension plan terminated by PBGC. PBGC alleged that the Petitioners, owned by the former CEO and 45% owner of the plan sponsor, bought the business at a substantial discount in a non-arms’ length sale, and essentially duplicated it, using the same plants and equipment, hiring many of the same employees, and selling to the sponsor’s largest customer. After the pension plan terminated with insufficient assets to pay promised benefits to participants, PBGC sued to collect the plan’s termination liabilities of more than \$33 million from responsible parties, including Petitioners as successors. In vacating the district court’s grant of Petitioners’ motion to dismiss, the Sixth Circuit followed

other circuits in applying the federal common law of successor liability to ERISA, and specifically, to Title IV liability. *Findlay*, 902 F.3d at 612.

Petitioners assert that the federal common law of successor liability conflicts with decisions of this Court and other circuits holding that federal common law should be based on state common law. Petition at 9-20. But this Court recognized the federal common law of successor liability over forty-five years ago. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 174-85 (1973). Since then, courts have applied it to fill gaps in ERISA and other labor and employment law statutes -- as Petitioners acknowledge, without citing any cases declining to apply federal successor law to such statutes. Petition at 16-17, 27-28. Instead, they attempt to fabricate a circuit conflict by citing cases in unrelated areas of law. Petition at 9-11, 17-18.

Petitioners also attempt to construct a conflict among the circuits regarding the test for federal successor liability, misstating the law in the Third, Sixth, Seventh, and Ninth Circuits. Petition at 20-21. ERISA cases in the Third, Seventh, and Ninth Circuits require two elements in applying federal successor liability: the successor's notice of the predecessor's liability before the sale, and substantial continuation of the business.¹ The Sixth Circuit's test incorporates these elements in its balancing test. *Findlay*, 902 F.3d at 612 (citing *Cobb v. Contract Trans. Inc.*, 452 F.3d 543, 554 (6th Cir. 2006) (elements are considered in the three-prong balancing approach)). Importantly, and not mentioned by Petitioners, the Sixth Circuit aligned itself with Title IV precedent from the Seventh and Ninth Circuits, both of which applied this successor liability test to cases arising under the substantially similar multiemployer provisions of Title IV.²

Petitioners claim that 29 U.S.C. § 1369(b) contains express rules governing successor liability for unpaid pension liabilities. Petition at 25-26. But, as the Sixth Circuit noted, section 1369(b) pertains only to certain corporate reorganizations, not asset sales as occurred here. See *Findlay*, 902 F.3d at 607, 610.

Finally, Petitioners contend that the decision below should be reviewed because it will have repercussions across American industry. But the court below applied a well-known test in the context of a highly targeted statute that is enforceable only by the PBGC. The circumstances in which successor liability is applicable are narrow and have arisen only occasionally in PBGC's 4 ½ decades of enforcing Title IV. As the Sixth Circuit noted, "[a]ll that we decide today is that when there is a sale that is not conducted at arm's length, successor liability can apply." *Findlay*, 902 F.3d at 612.

The Sixth Circuit's decision does not conflict with a statute or a decision of this Court or any other circuit court, nor does it decide an important federal question that should be settled by this Court. Accordingly, the petition for certiorari should be denied.

¹ *Indiana Electrical Workers Pension Benefit Fund v. ManWeb Services, Inc.*, 884 F.3d 770, 777 (7th Cir. 2018); *Resilient Floor Covering Pension Trust Fund Bd. Of Trustees v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1095 (9th Cir. 2015); *Einhorn v. M.L. Ruberton Const. Co.*, 632 F.3d 89, 99 (3d Cir. 2011).

² *Findlay*, 902 F.3d at 612 (citing *Resilient Floor Covering, supra*; *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture*, 920 F.2d 1323, 1327 (7th Cir. 1990)).

Honorable Scott S. Harris
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Respectfully,

A handwritten signature in black ink that reads "Judith R. Starr". The signature is written in a cursive style with a large initial "J".

Judith R. Starr
General Counsel
(202) 326-4400, ext. 3083

cc: Caroline H. Gentrey, Esq.
James D. Curphey, Esq.
Kevin K. Russell, Esq.