No. ________

In The
Supreme Court of the United States

NEW ENGLAND TEAMSTERS AND
TRUCKING INDUSTRY PENSION FUND,

Petitioner,

v.

SUN CAPITAL PARTNERS III, LP;
SUN CAPITAL PARTNERS III QP, LP;
AND SUN CAPITAL PARTNERS IV, LP,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Circuit's holding that the Sun Funds did not form a partnership-in-fact is inconsistent with this Court's precedent in *Culbertson v. Commissioner* and presents a conflict among the circuits.

2. Whether the First Circuit's analysis has created a judicial exemption shielding private equity funds from withdrawal liability in contravention of the purpose of ERISA and the MPPAA as intended by Congress and as set forth by this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Edward F. Groden is an individual who is the Executive Director and fiduciary of the New England Teamsters and Trucking Industry Pension Fund ("the Pension Fund"). Mr. Groden states that the Pension Fund has no parent corporation and that no publicly held company has a 10% or greater ownership interest in it.

The Pension Fund is a trust fund formed pursuant to Section 302 of the Labor-Management Relations Act and is not a nongovernmental corporation.

RELATED CASES

Sun Capital Partners III, LP, Sun Capital Partners III QP, LP and Sun Capital Partners IV, LP v. New England Teamsters and Trucking Industry Pension Fund, United States District Court for the District of Massachusetts, C.A. No. 10-10921 DPW, Judgment Entered October 18, 2012

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Sun Capital Partners III, LP, Sun Capital Partners III QP, LP and Sun Capital Partners IV, LP v. New England Teamsters and Trucking Industry Pension Fund v. Scott Brass Holding Corp. and Sun Scott Brass, LLC, United States District Court for the District of Massachusetts, C.A. No. 10-10921 DPW, Judgment Entered on Remand March 28, 2016 and Amended Final Judgment Entered on Remand November 30, 2018

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INTRODUCTION

This case has a lengthy procedural history and arises out of a claim for payment of withdrawal liability under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq*., including provisions added by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381, *et seq*. ERISA requires withdrawing employers to pay their proportionate share of a pension fund's vested but unfunded liabilities ("withdrawal liability"). ERISA §§ 4201, 4211, 29 U.S.C. §§ 1381, 1391.

Petitioner, the New England Teamsters and Trucking Industry Pension Fund, is seeking to collect withdrawal liability from the Respondents as members of an implied partnership-in-fact under "common control" with Scott Brass, Inc. ("SBI"), a withdrawing employer from the Pension Fund. Respondents, Sun Capital Partners III, LP, Sun Capital Partners III QP, LP (together, "Sun Fund III") and Sun Capital Partners IV, LP ("Sun Fund IV") (collectively, "the Sun Funds") are private equity funds that are trades or businesses[1] under ERISA. The district court determined that the Sun Funds created a partnership-in-fact which was the ultimate parent of SBI, its portfolio

[1] Sun Fund IV was found to be a "trade or business" by the U.S. Court of Appeals for the First Circuit in its July 24, 2013 decision, *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*, 724 F.3d 129 (1st Cir. 2013). Sun Fund III was found to be a "trade or business" by the U.S. District Court for the District of Massachusetts in its March 28, 2016 decision (*See* Appendix 47-89) and this ruling was not appealed by the Respondents.

company. As such, the Sun Funds are under common control with SBI and liable for SBI's withdrawal liability to the Pension Fund under the statute.

The First Circuit's decision reversing the district court's finding of a partnership-in-fact is based upon its "reluctance" to impose withdrawal liability for private equity funds and instead provides a blueprint for such funds to escape withdrawal liability while securing virtually risk-free investments in portfolio companies with known, unfunded pension liability. By doing so, the decision limits recovery of withdrawal liability by a multiemployer pension fund.

In reaching its decision, the First Circuit has created a conflict among the circuit courts on this important federal question. It failed to follow the totality of the circumstances test outlined by this Court in *Commissioner v. Culbertson*, 337 U.S. 722 (1949), which is the seminal case in determining whether a partnership exists. Instead, the First Circuit conducted a narrower analysis under *Luna v. Commissioner*, 42 T.C. 1067 (1964), a Tax Court case. By limiting its analysis to the "*Luna* factors," the decision ignores the facts that throw light on the "true intent" of the parties, specifically the undisputed fact that all of the entities in question were controlled by the same two men – Marc Leder ("Leder") and Rodger Krouse ("Krouse"). Leder and Krouse, as the sole members of the limited partner committees, made all of the decisions (both before and after the purchase of SBI), while hiding behind the guise of an LLC.

Further, the First Circuit's analysis is informed by a misstatement of the purpose of ERISA and the MPPAA. It finds without justification that a principal purpose of the statute is "to encourage the private sector to invest in, or assume control of, struggling companies with pension plans." Citing this misstatement, it seeks authorization from Congress and the Pension Benefit Guaranty Corporation ("PBGC") which reaches beyond what is provided in the current statute in order to hold private equity funds liable for withdrawal liability. In essence, it has created a judicial exemption to withdrawal liability that shields private equity firms. The resulting decision is completely at odds with the purpose of the MPPAA acknowledged by this Court – to protect multiemployer plans from the financial burdens that result when one employer withdraws from a multiemployer plan without first funding uncovered liabilities of the plan attributable to the employer.

The undisputed material facts of this case are set forth in the decisions by the district court dated March 28, 2016 (Appendix ("App.") 47-89) and November 26, 2018 (App. 27-46), the decision of the U.S. Court of Appeals for the First Circuit dated November 22, 2019 (App. 1-26), as well as the decision by the U.S. Court of Appeals for the First Circuit dated July 24, 2013, *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*, 724 F.3d 129 (1st Cir. 2013).

OPINIONS BELOW

The opinion of the court of appeals is reported at 943 F.3d 49 (1st Cir. 2019) and reprinted in the Appendix at 1-26. The opinions of the district court are reported at 329 F.R.D. 102 (App. 27-46) and at 172 F. Supp. 3d 447 (App. 47-89).

JURISDICTION

The court of appeals rendered its decision on November 22, 2019 (App. 1-26), and denied Petitioner's petition for rehearing and petition for rehearing en banc on March 13, 2020 (App. 90-91). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutes and regulations are 26 U.S.C. § 414(c), 29 U.S.C. § 1301(b)(1), 26 C.F.R. § 1.414(c)-2(b), 29 C.F.R. § 4001.2, and 29 C.F.R. § 4001.3. They are reproduced in relevant part in the Appendix, App. 112-15.

CONCISE STATEMENT OF THE CASE

The First Circuit's Decision

On March 28, 2016, the district court held that the Sun Funds formed a partnership-in-fact under

common control with SBI which was responsible for the payment of the withdrawal liability. The court stated: "no reasonable trier of fact could find that the Sun Funds' joint operation of Scott Brass was carried out solely through their LLC or that their relationship was defined entirely by the agreements governing the LLC." App. 81. The First Circuit reversed the district court's finding of a partnership-in-fact by limiting its analysis to a checklist of eight (8) items set forth in *Luna*, 42 T.C. at 1077-78. The decision creates a conflict among the circuits as it fails to use the pivotal case with respect to partnership set forth by this Court in *Culbertson* which relies upon a "totality of the circumstances" analysis that looks to facts that determine what the parties "really and truly intended" to do. *Culbertson*, 337 U.S. at 741-42, quoting *Commissioner v. Tower*, 327 U.S. 280 (1946).

Further, the First Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court and the intent of Congress. It relies upon a misstatement of the purpose of ERISA and the MPPAA to create a judicial exemption to the statute that shields private equity funds from withdrawal liability. In addition, the Court's conclusion that no partnership-in-fact existed between Sun Fund III and Sun Fund IV contravenes clear Congressional intent with respect to control group liability in the MPPAA.

The History of the MPPAA

As stated by the district court below, "The 'primary goal' of ERISA, and of the MPPAA in particular, is 'protecting employees' benefits.' " App. 66-67.

Specifically, the MPPAA was enacted in 1980 to strengthen the protection of multiemployer plans and its genesis is explained extensively in *Mason & Dixon Tank Lines, Inc. v. Cent. States, Southeast & Southwest Areas Pension Fund*, 852 F.2d 156, 158 (6th Cir. 1988). According to the statement of the PBGC Executive Director in 1978:

> A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage – or force – further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

Id., citing *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, at 723 n.2 (1984) (quoting Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Oversight of the House

Committee on Ways and Means, 95th Cong., 2d Sess. 22 (1978) (statement of Matthew M. Lind, Executive Director of the Pension Benefit Guaranty Corporation)).

> [Additionally,] a congressional study revealed that "the preexisting pension plan termination program, enacted as title IV of [ERISA], perversely operated to provide employers with an incentive to withdraw from financially weak plans." *I.A.M. National Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415, 416 (D.C. Cir. 1987). The threat of significant employer withdrawals also jeopardized the solvency of the Pension Benefit Guaranty Corporation, which was created to provide benefits to plan participants in the unfortunate event that a pension plan was terminated without sufficient assets to cover guaranteed benefits. *R. A. Gray*, 467 U.S. at 721.

Mason & Dixon Tank Lines, 852 F.2d at 158.

The MPPAA amended Title IV of ERISA to provide that members of a "common controlled group" are held jointly and severally liable for withdrawal payments. ERISA § 4001(b)(1), 29 U.S.C. § 1301(b)(1); *Board of Trustees, Sheet Metal Workers' National Pension Fund v. Palladium Equity Partners, LLC, et al.*, 722 F. Supp. 2d 854, 858 (E.D. Mich. 2010); *Central States Southeast & Southwest Areas Pension Fund v. Chatham Props.*, 929 F.2d 260, 263 (6th Cir. 1991). "Congress enacted section 1301(b), the common control provision, 'in order to prevent businesses from shirking their ERISA obligations by fractionalizing operations

into many separate entities.' " App. 67. "Liability is therefore not limited to the business entity that itself withdrew from a multiemployer pension plan. Rather, it 'in effect[] pierces the corporate veil and disregards formal business structures.' " *Id*.

The MPPAA and Federal Tax Law

The MPPAA states: "[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 and businesses as a single employer." 29 U.S.C. § 1301(b)(1). Here, only the second part of this test – common control – is at issue and the common control test under the MPPAA "is derived from tax law." *See* 26 C.F.R. § 1.414(c)-2(b); 29 C.F.R. §§ 4001.2, 4001.3(a) (incorporating regulations promulgated under 26 U.S.C. § 414(c)). App. 9, 12-14.

"In 1986, Congress authorized PBGC to promulgate regulations for implementing the common control provision 'consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26' of the Internal Revenue Code." App. 12. Ten years later, PBGC adopted the Treasury Department's regulations regarding "common control." *Id*.

For purposes of the facts of the present case, entities are under "common control" if they are members of a "parent-subsidiary group of trades or businesses under common control." 26 C.F.R. § 1.414(c)-2(b); 29

C.F.R. §§ 4001.2, 4001.3(a). The Treasury regulations define a "parent-subsidiary group" as:

> one or more chains of organizations conducting trades or businesses connected through ownership of a controlling interest with a common parent organization if . . . (i) [a] controlling interest in each of the organizations, except the common parent organization, is owned . . . by one or more of the other organizations; and (ii) [t]he common parent organization owns . . . a controlling interest in at least one of the other organizations.

26 C.F.R. § 1.414(c)-2(b)(1), App. 13. A "controlling interest" is defined as an 80% ownership. *Id.* at 14.

It is the Pension Fund's position, which was adopted by the district court below, that Respondents are liable for the withdrawal liability of SBI having formed a partnership-in-fact that qualifies under the parent-subsidiary regulations as the "parent" in a control group of trades or businesses in which SBI, Scott Brass Holding Company ("SBHC") and Sun Scott Brass-LLC ("SSB-LLC") are members. SBI was wholly owned by SBHC, which was in turn wholly owned by SSB-LLC. *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*, 724 F.3d 129, 135-36 (1st Cir. 2013) ("*Sun Capital II*"). Although Sun Fund IV held a 70% ownership stake in SSB-LLC while Sun Fund III held the remaining 30%, the partnership-in-fact, which they formed to purchase and manage SBI and five other portfolio companies, owns 100% of the LLC. This meets the 80% needed for

a controlling interest and is the parent that is "'sitting atop' the LLC: a site of joining together and forming a community of interest." App. 80-81.

The Sun Entities

Leder and Krouse "founded and serve as the co-CEOs and sole shareholders" of Sun Capital Advisors, Inc. ("SCAI"), a "private equity firm which pools investors' capital in limited partnerships, assists these limited partnerships in finding and acquiring portfolio companies, and then provides management services to those portfolio companies." App. 5, 7. SCAI established the Sun Funds which "are controlled by the same two men [Leder and Krouse], and they coordinate to identify, acquire, restructure, and sell portfolio companies." App. 4. *Prior* to any acquisition, the Sun Funds develop restructuring and operating plans through SCAI. App. 7-8. "The [Sun] Funds form and finance subsidiary LLCs, through which they acquire and control portfolio companies" including SBI. App. 4.

Sun Fund III and Sun Fund IV are Delaware limited partnerships and each has a general partner, Sun Capital Advisors III, LP and Sun Capital Advisors IV, LP, respectively. App. 5. Each general partner owns a respective subsidiary management company – Sun Capital Partners Management III, LLC and Sun Capital Partners Management IV, LLC, which "act as intermediaries between SCAI and holding companies.[2]"

[2] The general partners' management companies typically "contract with the holding company that owns the acquired

App. 5-6. Since the Sun Funds do not have any offices or employees, "the management companies' contract with SCAI for the management services of SCAI's employees and consultants, and then with the holding company to provide these management services." App. 6.

"The Sun Funds' limited partnership agreements vest exclusive control of the Sun Funds in their respective general partners, assign the general partners percentages of the [Sun] Funds' total commitments and investment profits, and require the [Sun] Funds to pay their general partners an annual management fee." *Id*. In turn, the general partners are themselves limited partnerships and the general partners' respective limited partner agreements vest exclusive control of the general partners' "material partnership decisions" in the limited partner committees. App. 6-7. The sole members of these limited partner committees are Leder and Krouse, therefore, they "essentially ran things for both the [Sun] Funds and SBI" because they "wholly controlled the general partners and, by extension, the Sun Funds." App. 7, 20-21 n.14.

The Acquisition and Bankruptcy of Scott Brass, Inc.

The Sun Funds first took steps to buy SBI in 2006 and completed the sale in 2007. *Sun Capital II*, 724

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company to provide management services for a fee, and contract with SCAI to provide the employees and consultants." *Sun Capital II*, 724 F.3d at 135.

F.3d at 135. Prior to the purchase of SBI, the following events took place:

- "Leder and Krouse made the decision to invest in SBI in their capacity as members of the limited partner committees." *Id.*
- On November 28, 2006, a Sun Capital affiliated entity sent a letter of intent to SBI's outside financial advisor to purchase the company. *Id*.
- In December 2006, the Sun Funds formed SSB-LLC as a vehicle to invest in SBI, with Sun Fund III owning 30% and Sun Fund IV owning 70% of the LLC. *Id*.
- SSB-LLC had no employees or offices. App. 72.
- The Sun Funds invested a total of $3 million with $900,000 from Sun Fund III and $2.1 million from Sun Fund IV. *Sun Capital II*, 724 F.3d at 135.
- On December 15, 2006, SSB-LLC formed SBHC and then transferred the $3 million to SBHC. *Id*. at 135-36.
- The purchase price reflected a 25% discount from the fair market value of the stock because of SBI's known, unfunded pension liability, i.e., the withdrawal lability. App. 8.
- The stock purchase agreement to acquire SBI's stock was entered into on February 8, 2007. *Sun Capital II*, 724 F.3d at 136.

These steps highlight how the Sun Funds "[seek] out potential portfolio companies and, through SCAI, [develop] restructuring and operating plans *before* acquisition." App. 7-8 (emphasis added). Because they had sole management authority and were the only members of the limited partner committees, Leder and Krouse authorized all of this work. App. 20 n.14. The district court took particular note of the decisions to split the ownership 70/30 and to keep ownership under 80%, which showed "an identity of interest and unity of decisionmaking between the [Sun] Funds rather than independence and mere incidental contractual coordination." App. 79-80. Additionally, there was no evidence of any "disagreement between Sun Fund III and Sun Fund IV over how to operate the LLC, as might be expected from independent members." App. 80-81. There is only evidence of "smooth coordination" between the Sun Funds. *Id*.

On February 9, 2007, SBHC signed an agreement for management services with a subsidiary of the general partner of Sun Fund IV. *Sun Capital II*, 724 F.3d at 136. The management company thus "acted as a middle-man, providing SBI with employees and consultants from SCAI." *Id*. Leder and Krouse "exerted substantial operational and managerial control over SBI" and the company made its pension contributions until the fall of 2008 when SBI "lost its ability to access credit and was unable to pay its bills." *Id*. SBI withdrew from the Pension Fund in October 2008 when it ceased making pension contributions and, in

November 2008, an involuntary Chapter 11 bankruptcy proceeding was brought against the company. *Id*.

At the time of its withdrawal from the Pension Fund, SBI was fully owned by SBHC, which, in turn, was fully owned by SSB-LLC. App. 66.

REASONS FOR GRANTING THE PETITION

I. The Decision of the First Circuit is Inconsistent with Almost All Other Circuits and Ignores this Court's holding in *Culbertson v. Commissioner*.

The Petition should be granted because the First Circuit created a conflict when it conducted its analysis under *Luna* instead of *Culbertson*, which is the leading case on this issue. All circuit courts reviewing the issue have used the "totality of the circumstances test" in *Culbertson* to determine whether or not a partnership exists under federal law. In so doing, the decision below failed to take into account facts relevant to the intent of the parties as required under *Culbertson* and this is an error of law.

A. The First Circuit's Decision Creates a Conflict in the Circuits.

The Circuit Court's decision "turns on an application of the multifactored partnership test in *Luna v.*

Commissioner, 42 T.C. 1067 (1964)." App. 2-3. However, an examination of other circuits finds that the chief case on the partnership issue is *Commissioner v. Culbertson*. Rather than using the narrow *Luna* analysis, almost every circuit relies on *Culbertson*'s totality of the circumstances test to determine whether or not a partnership exists. The First Circuit's analysis using *Luna* over *Culbertson* creates a conflict in the circuits.

In *TIFD III-E, Inc. v. United States*, 459 F.3d 220, 231 (2d Cir. 2006), the Second Circuit cited as error the lower court's failure to use the *Culbertson* test and noted *Luna* as a case with "factors a court might consider" (emphasis added). Similar decisions were handed down in the U.S. Courts of Appeals in the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh and D.C. circuits. *Historic Boardwalk Hall, LLC v. Commissioner*, 694 F.3d 425, 449 (3d Cir. 2012); *Pension Benefit Guar. Corp. v. Beverley*, 404 F.3d 243, 251-52 (4th Cir. 2005); *Consol. Cable v. Comm'r of Internal Revenue,* No. 92-4856, 1993 U.S. App. LEXIS 40971, at *4-5 (5th Cir. June 3, 1993); *Griffith v. Sec'y of Health & Human Servs*., 863 F.2d 48 (6th Cir. 1988) (citing *Cobb v. Commissioner*, 185 F.2d 255 (6th Cir. 1950)); *Kanter v. Commissioner*, 590 F.3d 410, 424-25 (7th Cir. 2009); *Estate of Smith v. Commissioner*, 313 F.2d 724, 728 (8th Cir. 1963) ("The landmark cases setting forth what constitutes a valid partnership for federal income tax purposes are *Commissioner v. Tower*, 327 U.S. 280, 66 S.Ct. 532, 90 L.Ed. 670, and *Commissioner v. Culbertson*, 337 U.S. 733, 69 S.Ct. 1210, 93

L.Ed. 1659."); *Broadwood Inv. Fund LLC v. United States*, 611 F. App'x 440, 440-41 (9th Cir. 2015); *Connors v. Ryan's Coal Co.*, 923 F.2d 1461 (11th Cir. 1991); *Boca Investerings P'ship v. United States*, 314 F.3d 625, 631 (D.C. Cir. 2003).

The U.S. Court of Appeals for the Tenth Circuit had no relevant decisions.

Clearly, *Culbertson*, which has stood since 1949, is the seminal case for determining when a partnership exists for federal tax purposes.

B. The Decision Below Ignored this Court's Holding in *Culbertson v. Commissioner*.

Culbertson, which was used by the district court in finding a partnership-in-fact in this case, outlines a "totality of the circumstances test" for determining the existence of a partnership under federal law. *See Historic Boardwalk*, 694 F.3d at 449. *Luna*, on the other hand, is a Tax Court case which lists factors used for finding the existence of a joint venture.

A Memorandum from the Chief Counsel Office of the IRS offers insight into how the two cases have subtle differences. The memo outlines a particular set of facts and uses *Luna* to find a joint venture and then *Culbertson* to further find a partnership based on the intent of the parties:

> In the present case, our consideration of the *Luna* factors indicates that C is a joint

> venture. Considering the facts and circumstances of this case, we further conclude that the overall standard set forth in *Culbertson* is satisfied. The facts demonstrate that A and B, acting with a business purpose, *intended* to and did join together in the conduct of a business enterprise. A and B clearly evince this *intent* through the sharing in the net profits and losses from the manufacture, development, and marketing of Product. Accordingly, C is a partnership for federal tax purposes (emphasis added).

2013 IRS CCA LEXIS 68 (I.R.S. February 21, 2013). App. 92-111.

"Both parties agree that Sun Fund III and Sun Fund IV formed a jointly controlled business entity." App. 70. Considering the facts of the present case and the decisions of other circuits, the *Culbertson* test was correctly used by the district court. By only using the eight (8) factor checklist outlined in *Luna*, the First Circuit failed to fully explore the issue of intent, which is clearly noted in *Culbertson*, and allows for the discussion of "any other facts throwing light on [the parties'] true intent." *Culbertson*, 337 U.S. at 742. In fact, the First Circuit blatantly ignored these important facts which highlight the parties' true intent:

- Both Sun Funds make investments in portfolio companies with "the principal purpose of making a profit." *Sun Capital II*, 724 F.3d at 142.
- The Sun Funds admitted that "an important purpose in dividing ownership of portfolio

companies between multiple funds is to keep ownership below 80% and avoid withdrawal liability." App. 68-69.

- The Sun Funds made a "conscious decision" to split their ownership stake 70/30. App. 79.
- SSB-LLC was merely "a vehicle for the coordination of the two Sun Funds – and an attempt to limit liability" rather than "a truly independent entity." App. 72.
- The Sun Funds "are not passive investors . . . brought together by happenstance, or coincidence." They created the LLC to invest in SBI and they also "coinvested in five other companies, using the same organizational structure." App. 78.
- The Sun Funds' activity prior to the formation of the LLC and the acquisition of the business "was plainly intended to constitute a partnership-in-fact." *Id*.

The First Circuit's sole discussion of intent was focused on what the Sun Funds' intended *not* to do, rather than on what they intended to do. The Sun Funds' intent *not* to form a partnership weighed heavily in the court's decision. However, "an entity is not shielded from MPPAA withdrawal liability because it intended to be shielded from withdrawal liability. Rather, the inquiry must be whether the Sun Funds intentionally engaged in conduct which would support the existence of a partnership . . . that owns the Scott Brass business" and "must . . . reflect the economic realities of the

business entities created by the Sun Funds for their acquisition of Scott Brass, Inc." App. 70-71 n.11.

Instead, the First Circuit's decision emphasizes form over substance and in doing so completely contradicts its own findings:

> The MPPAA, ERISA, and tax law *require* courts to look beyond how the parties label, or structure, themselves. Courts must rather look to the *substance* of the relationships. *See*, e.g., *Connors*, 923 F.2d at 1467-68 (finding MPPAA withdrawal liability where individuals formed a partnership despite never explicitly agreeing to form one); *Johnson*, 991 F.2d at 391-94 (adopting the test in *Connors*).

App. 19 (emphasis added). *See also Tower*, 327 U.S. at 282, 291-92. (Supreme Court disregarded a partnership when the substance of their relationship did not evidence a partnership.)

Therefore, the First Circuit's analysis using *Luna* is erroneous and the facts of the case should be weighed under the *Culbertson* test as is done by the district court and in the majority of the other U.S. Courts of Appeals.

Assuming, *arguendo*, that *Luna* was the correct case for the First Circuit to use to conduct its analysis, these facts should have also been considered:

- Again, the Sun Funds' principal purpose for investing in portfolio companies was to make a profit, but the First Circuit never mentioned

the profits made by these entities. (*Luna* factors No. 3 and 4) *Sun Capital II*, 724 F.3d at 142.

- The purchase price of SBI reflected a 25% discount because of SBI's pension fund liability. (*Luna* factor No. 1) *Id*. at 135.

- The Sun Funds' active involvement in the management of the portfolio companies encompassed even small details like signing checks for the companies and holding meetings with senior staff. (*Luna* factors No. 1 and 8) *Id*. at 142.

- The partnership agreements of the general partners give power to the limited partner committee ("LPC") to make determinations "about hiring, terminating, and compensating agents and employees" of the Sun Funds and their portfolio companies. (*Luna* factor No. 8) *Id*.

- "It is the purpose of the Sun Funds to seek out potential portfolio companies that are in need of extensive intervention, . . . provide such intervention, and then to sell the companies." (*Luna* factors No. 1 and 8) *Id*.

- The providing of management services "was done on behalf of and for the benefit of the Sun Funds." (*Luna* factors No. 1 and 8) *Id*. at 148.

- The Sun Funds have no employees or offices; the LPCs hired agents to manage the companies. (*Luna* factor No. 1) *Id*. at 134, 147.
- The Sun Funds' active involvement in management provided a direct economic benefit. (*Luna* factors No. 1 and 8) *Id*. at 143.

Inexplicably, these facts were important enough to be examined and noted by the First Circuit in their 2013 decision, but then the court completely disregarded them in its latest decision.

II. The Court's Decision Misstates and Subverts the Purpose of ERISA and the MPPAA.

Supreme Court Rule 10(c) states that one of the factors the Court considers in granting a Petition for a Writ of Certiorari is whether a U.S. Court of Appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." The First Circuit's decision conflicts with decisions of this Court in two ways. It relies upon a misstatement of the principal purpose of ERISA and the MPPAA set forth by Congress and recognized by this Court. Based on this misstatement, it creates a judicial exception to withdrawal liability that shields private equity funds. In essence, it creates a loophole that eviscerates the purpose of the statute. Second, the First Circuit ignores Congressional intent in its control group analysis.

A. The Decision Relies Upon a Misstatement of the Principal Purpose of ERISA and the MPPAA.

In its decision, the First Circuit states:

> Moreover, we are reluctant to impose withdrawal liability on these private investors because we lack a firm indication of congressional intent to do so and any further formal guidance from PBGC. Two of ERISA and the MPPAA's principal aims – to ensure the viability of existing pension funds and to encourage the private sector to invest in, or assume control of, struggling companies with pension plans – are in considerable tension here.

App. 23-24. This remarkable statement, which seeks to protect private equity funds from withdrawal liability, relies upon the unsubstantiated claim that, " . . . imposing liability would likely disincentivize much-needed private investment in underperforming companies with unfunded pension liabilities. This chilling effect could, in turn, worsen the financial position of multiemployer pension plans." App. 3.

Congress declared the policy of the MPPAA:

> (1) to foster and facilitate interstate commerce, (2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans, (3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and (4) to provide a financially self-sufficient program

> for the guarantee of employee benefits under multiemployer plans.

29 U.S.C. § 1001a(c).

This Court has recognized that congressional intent in matters pertaining to ERISA, the MPPAA and specifically withdrawal liability is clear and concise. One of the central purposes of ERISA was to "prevent the great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980). "Congress passed the MPPAA as an amendment to ERISA in order to protect multi-employer pension plans from the financial burdens that result when one employer withdraws from a multi-employer plan without first funding uncovered liabilities of the plan attributable to the employer. *R. A. Gray & Co.*, 467 U.S. at 722-23 & n.2, 104 S. Ct. at 2714-15 & n.2." *Carriers Container Council, Inc. v. Mobile S.S. Assn., Inc.-International Longshoreman's Assoc. etc.*, 896 F.2d 1330, 1342 (11th Cir. 1990). This Court has further stated:

> Among the principal purposes of this "comprehensive and reticulated statute" was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361-62, 374-75 (1980). *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510-11 (1981).

> Congress wanted to guarantee that "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, supra*, at 375; *Alessi, supra*, at 510.

R. A. Gray & Co., 467 U.S. at 720. *See also Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 214 (1986).

All circuits, including the First (prior to the instant case), have agreed on the principal purposes of MPPAA. In its 2013 decision, the First Circuit held: "The MPPAA was enacted by Congress to protect the viability of defined pension benefit plans, to create a disincentive for employers to withdraw from multiemployer plans, and also to provide a means of recouping a fund's unfunded liabilities. (citation omitted)." *Sun Capital II*, 724 F.3d at 138. *See Korea Shipping Corp. v. New York Shipping Assn.-International Longshoremen's Assn. Pension Trust*, 880 F.2d 1531, 1536-37 (2d Cir. 1989); *Bd. of Trs. v. C&S Wholesale Grocers, Inc.*, 802 F.3d 534, 536-37 (3d Cir. 2015); *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Four-C-Aire, Inc.*, 929 F.3d 135, 138-39 (4th Cir. 2019); *Central States Southeast & Southwest Areas Pension Fund v. T.I.M.E.-DC, Inc.*, 826 F.2d 320, 321 (5th Cir. 1987); *Mason & Dixon Tank Lines, Inc. v. Central States, Southeast & Southwest Areas Pension Fund*, 852 F.2d 156, 158 (6th Cir. 1988); *Ind. Elec. Workers Pension Ben. Fund v. ManWeb Servs.*, 884 F.3d 770, 775-76

(7th Cir. 2018); *I.A.M. Nat'l Pension Fund, Plan A, A Ben. v. Clinton Engines Corp.*, 825 F.2d 415, 416 (D.C. Cir. 1987); *Seaway Port Auth. v. Duluth-Superior ILA Marine Ass'n Restated Pension Plan*, 920 F.2d 503, 505-06 (8th Cir. 1990); *Heavenly Hana LLC v. Hotel Union & Hotel Indus. of Haw. Pension Plan*, 891 F.3d 839, 842 (9th Cir. 2018); *Ceco Concrete Constr., LLC v. Centennial State Carpenters Pension Trust*, 821 F.3d 1250, 1252-53 (10th Cir. 2016); *Carriers Container Council, Inc.*, 896 F.2d at 1342. No court has cited encouraging private investment in struggling companies with underfunded pension plans as a principal purpose of ERISA or the MPPAA.

One district court, when addressing an employer's claim that control group liability would discourage employers from participating in a pension plan, stated that on the contrary, it would promote participation in a plan because an entering employer would be assured that a large employer who withdraws "would not be able to foist the effects of its withdrawal on the remaining employers who still contribute to the plan." *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641, 659 (N.D. Ill. 1986).

Relying upon this misstatement of purpose, the First Circuit goes further, stating it is reluctant to hold private equity funds liable without "clear congressional intent." It creates in essence a judicial exception for private equity funds. This is a clear error of law. ERISA, a comprehensive and reticulated statute, contains many exemptions which allow employers to reduce or even avoid withdrawal liability. ERISA

§ 4225(a) reduces liability to a fraction of the liquidation value of an employer selling assets to an unrelated third party. ERISA §§ 4225(b) and (e) provide a reduction for employers undergoing liquidation or dissolution. ERISA §§ 4225(c) and (d) allows reductions for sole proprietorships, partnerships and insolvent employers. ERISA § 4204 allows an employer to avoid liability when selling assets if certain statutory requirements are met. ERISA § 4209 reduces or eliminates liability under the de minimis rule. ERISA §§ 4203(b) and (c) exempt employers in the construction and entertainment industry. ERISA § 4210 eliminates liability for employers contributing to a plan for a limited time. If Congress intended to exempt private equity funds from withdrawal liability, it would have done so.

There is no basis for the Court's reluctance or refusal to hold such private equity funds responsible if the funds meet the statutory definition of employer. The Court must apply the applicable law – no more specific Congressional "direction" is required.

Rather, as stated by the district court,

> . . . , in the absence of further meaningful direction from Congress and/or orderly rule-making by the PBGC, *cf. Sun Capital Partners III*, 724 F.3d at 148, the current applicable law in this area requires the resolution reflected in the amended judgment that will be issued in connection with this Memorandum and Order.

App. 44-45. Even the First Circuit in its prior decision states: "We recognize that Congress may wish to encourage investment in distressed companies by curtailing the risk to investors in such employers of acquiring ERISA withdrawal liability. If so, Congress has not been explicit, and it may prefer instead to rely on the usual pricing mechanism in the private market for assumption of risk." *Sun Capital II*, 724 F.3d at 148. In this case, the Sun Funds discounted its purchase price of Scott Brass by 25% because of the known withdrawal liability – i.e., market forces at work. App. 8.

The First Circuit also required more guidance from the PBGC. Notably, the PBGC filed an amicus brief and appeared at oral argument in the case at bar. The Court did not lack guidance; it chose to ignore it. The PBGC's brief contained an analysis of the statute and the district court's decision stating: "The district court's conclusion that [Sun] Fund III and [Sun] Fund IV formed a partnership (citations omitted) for purposes of determining common control is consistent with, and furthers the goals of, ERISA's controlled group liability provisions." Brief of Amicus Curiae Pension Benefit Guaranty Corporation in Support of Appellee, p. 19 (filed July 12, 2019, accepted July 16, 2019).

Curiously, there was no evidence presented by the Sun Funds or any analysis by the First Circuit supporting the notion that private equity investment in companies with unfunded pension liabilities benefits multiemployer plans. On the contrary, private equity's purchase and sale of companies with withdrawal liability in many cases poses the opposite result, leaving

millions of dollars in unfunded pension liabilities and further straining the PBGC. Speaking on the issue of private equity firms, Joshua Gotbaum, the former director of the PBGC and a former partner in a private equity firm, stated:

> "What we've seen is that financial firms essentially take the money and run, leaving their employees and the PBGC holding the bag," said Gotbaum, who was appointed to head the agency by President Barack Obama in 2010.
>
> According to a 2013 tally by Gotbaum, companies controlled by private-equity firms have used bankruptcy to shed more than $650 million of pension obligations. That leaves the government's pension insurer or employees to pick up the tab.
>
> Since bankruptcy law changed in 1978, Gotbaum said, "the business community has been inventing new uses of the bankruptcy courts. The private-equity community realized they could use Chapter 11 to do pension laundering."

Peter Whorisky, *As A Grocery Chain Is Dismantled, Investors Recover Their Money. Worker Pensions Are Short Millions*, Washington Post, Business (December 28, 2018) (describing the bankruptcy of Marsh Supermarkets and four other Sun Capital companies resulting in $280 million in unpaid pension liabilities)[3]. In

[3] https://www.washingtonpost.com/business/economy/as-a-grocery-chain-is-dismantled-investors-recover-their-money-worker-pensions-are-short-millions/2018/12/28/ea22e398-0a0e-11e9-85b6-41c0fe0c5b8f_story.html

Private Equity at Work: When Wall Street Manages Main Street,[4] a comprehensive look at private equity through carefully analyzed case studies, the authors conclude: "The main point of consistency across the PE-owned companies was that, with few exceptions, and no matter what the attitudes of private equity toward labor, employees experience losses in job and/or wages and benefits." The First Circuit may be in fact encouraging investment by private equity funds that is detrimental, not beneficial, to underfunded pension funds.

B. The First Circuit's Analysis of Common Control Ignores Clear Congressional Intent.

The First Circuit has stated: "ERISA, of which the MPPAA is a part, as a remedial statute, is to be construed liberally. We have, held, in consequence that the common control provisions 'in effect, pierces the corporate veil and disregards formal business structures.' " App. 11-12, cites omitted.

> Congress enacted §1301(b) in order to prevent businesses from shirking their ERISA obligations by fractionalizing operations into many separate entities:
>
> the committee . . . intends to make it clear that the coverage and antidiscrimination provisions cannot be avoided by operating

[4] Eileen Applebaum & Rosemary Batt, *Private Equity at Work: When Wall Street Manages Main Street* 233 (Russell Sage Foundation 2014).

> through separate corporations instead of separate branches of one corporation. S. Rep. No. 383, 93d Cong., 2d Sess. 43, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4890, 4928; *see also* H. Rep. No. 807, 93d Cong., 2d Sess. 50, *reprinted in* 1974 U.S. Code Cong. & Ad. News, 4670, 4716 (citations omitted).

Board of Trustees of Western Conference etc. v. H.F. Johnson, Inc., 830 F.2d 1009, 1013 (9th Cir. 1987). *See also Mason & Dixon Tank Lines, Inc*., 852 F.2d at 159 (MPPAA enacted to ensure employers will not circumvent their ERISA and MPPAA obligations by operating through separate entities); *Cent. States Southeast & Southwest Areas Pension Fund v. Messina Prods*., *LLC*, 706 F.3d 874, 878 (7th Cir. 2013) (MPPAA enacted to prevent business from fractionalizing operations into many separate entities). "To ensure the viability of multiemployer pension plans against the failure of a contributing employer, the MPPAA has broad provisions that disregard the usual legal barriers between affiliated, but legally distinct, businesses." App. 67.

Despite giving lip service to an analysis that must construe the statute liberally looking beyond form to the substance of the relationship between the Sun Funds, the First Circuit fails to do so. Here, Leder and Krouse's intent in setting up the purchase of SBI was to limit liability and insulate the Sun Funds from withdrawal liability. App. 72. This is an admitted fact – "the [Sun] Funds forthrightly admit that an important purpose in dividing ownership of portfolio companies between multiple funds is to keep ownership

below 80% and avoid withdrawal liability." App. 68-69. In so doing, they created an LLC which the district court states "appears to be better understood as a vehicle for the coordination of the two Sun Funds – and an attempt to limit liability – than as a truly independent entity. It is another layer in a complex organizational arrangement." *Sun Capital II*, 724 F.3d at 135. Most importantly, Leder and Krouse, as the sole members of the limited partner committees, held the power to control both entities. As stated in the First Circuit's decision: "Although the Sun Funds have different limited partners, these partners may not participate in management decisions, and so Leder and Krouse had sole management authority." App. 20, n.14.

Yet, the First Circuit's decision gives primacy to form as can be seen by looking at its conclusion. Under its decision, the SSB-LLC is the parent entity of SBI, yet the LLC is an entity with no employees and no assets, created merely as a vehicle to pool the Sun Funds' assets to purchase SBI and to divide the ownership interest of the Sun Funds to escape withdrawal liability. Meanwhile the Sun Funds, which together under the direction of Leder and Krouse pooled their resources to identify, acquire and manage every aspect of SBI, bear no responsibility. This result is precisely the situation that control group liability was enacted to remedy.

CONCLUSION

The First Circuit's analysis flows from its "reluctance" to hold private equity funds liable for the withdrawal liability of their portfolio companies. It errs in mistating the encouragement of private investment in companies with underfunded pension plans to be a principle purpose of ERISA and the MPPAA. It does so without any clear evidence that private equity investment actually benefits multiemployer plans. It goes so far as to seek Congressional or PBGC approval to hold private equity funds liable. With this mindset, it ignores the *Culbertson* "totality of the circumstances" test to define partnership. This is the seminal case set forth by this Court and followed by almost all other circuits. It relies solely on the much narrower test in *Luna* using the factors in that case to create a definitive checklist for partnership analysis. It puts more weight on the Sun Funds' intention *not* to form a partnership than to the hallmark factors of the partnership – their clear intention to pool resources to purchase, manage and sell co-invested portfolio companies, including SBI, for profit. It celebrates form over function ignoring the purpose of control group liability in ERISA cases. It creates a loophole that undermines the true primary purpose of ERISA and the MPPAA – the protection of the "interests of participants and beneficiaries in financially distressed multiemployer plans and ensure benefit security to plan participants." H.R. Rep. No. 96-869(I), at 71 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 2918, 2939. *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund*, 929 F.3d at 138-39.

For the foregoing reasons, the First Circuit's decision should be reversed and the District Court's Judgment reinstated.

Respectfully submitted,

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