United States Court of Appeals
For the First Circuit

Nos. 16-1376
19-1002

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

Plaintiffs, Appellants,

v.

NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND,

Defendant, Third Party Plaintiff, Appellee,

SCOTT BRASS HOLDING CORP.; SUN SCOTT BRASS, LLC,

Third Party Defendants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS,

[Hon. Douglas P. Woodlock, U.S. District Judge].

Before

Lynch, Stahl, and Lipez,
Circuit Judges.

John C. O'Quinn, with whom John F. Hartmann, Devin A. DeBacker, Kirkland & Ellis LLP, Theodore J. Folkman, and Pierce Bainbridge Beck Price & Hecht LLP, were on brief for appellants.

Catherine M. Campbell, with whom Melissa A. Brennan, Renee J. Bushey, and Feinberg, Campbell & Zack, PC were on brief for appellee.

Craig T. Fessenden, with whom Judith R. Starr, Kartar S. Khalsa, Charles L. Finke, and Louisa A. Soulard were on brief for Pension Benefit Guaranty Corporation, amicus curiae.

November 22, 2019

LYNCH, Circuit Judge. The issue on appeal is whether two private equity funds, Sun Capital Partners III, LP ("Sun Fund III") and Sun Capital Partners IV, LP ("Sun Fund IV"), are liable for $4,516,539 in pension fund withdrawal liability owed by a brass manufacturing company which was owned by the two Sun Funds when that company went bankrupt. The liability issue is governed by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Under that statute, the issue of liability depends on whether the two Funds had created, despite their express corporate structure, an implied partnership-in-fact which constituted a control group. That question, in the absence of any further formal guidance from the Pension Benefit Guaranty Corporation ("PBGC"), turns on an

application of the multifactored partnership test in Luna v. Commissioner, 42 T.C. 1067 (1964).

If the MPPAA imposes such withdrawal liability, PBGC states it assumes the New England Teamsters & Trucking Industry Pension Fund ("Pension Fund") intends to look to the private equity funds, including their general partners and their limited partners, to pay the liability. The issues raised involve conflicting policy choices for Congress or PBGC to make. On one hand, 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. On the other hand, if the MPPAA does not impose liability and the Pension Fund becomes insolvent, then PBGC likely will pay some of the liability, and the pensioned workers (with 30 years of service) will receive a maximum of $12,870 annually. See 29 U.S.C. § 1322a.

The district court held that there was an implied partnership-in-fact which constituted a control group. We reverse because we conclude the Luna test has not been met and we cannot conclude that Congress intended to impose liability in this scenario.

I.

We describe the facts as to the organizational structures of the Sun Funds[1] and related entities. We also refer to the facts set forth in our previous opinion in Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund, 724 F.3d 129, 135 n.3 (1st Cir. 2013) (Sun Capital II). The two Sun Funds are each distinct business entities with primarily different investors and investments. But they are controlled by the same two men, and they coordinate to identify, acquire, restructure, and sell portfolio companies. The Funds form and finance subsidiary LLCs, through which they acquire and control portfolio companies, including Scott Brass, Inc. ("SBI"), the brass manufacturing company. While the Funds jointly owned SBI, it filed for bankruptcy and subsequently withdrew from the Pension Fund, a multiemployer pension fund, incurring withdrawal liability.[2] We

[1] Sun Fund III and Sun Fund IV are collectively referred to as the "Sun Funds" or "Funds." Sun Fund III technically comprises two funds: Sun Capital Partners III, LP and Sun Capital Partners III QP, LP. Because these are parallel funds, share a single general partner, and invest nearly identically, we treat them as one entity, as we did in Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund, 724 F.3d 129, 135 n.3 (1st Cir. 2013).

[2] The price of copper dropped in 2008, reducing the value of SBI's inventory, which caused a breach of SBI's loan covenants. This prevented SBI from accessing credit and paying its bills, causing its bankruptcy and subsequent withdrawal from the Pension Fund. Sun Capital II, 724 F.3d at 136. There is no suggestion that mismanagement of SBI by the Funds caused, or even contributed to, the bankruptcy. It is clear that declining copper prices, likely a product of the global recession, caused SBI's

restate here only certain facts, and then briefly give a procedural history of the litigation leading to the instant appeal.

A. The Organization of the Sun Funds

Sun Capital Advisors, Inc. ("SCAI") is 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. SCAI established at least eight funds. Two of them, Sun Fund III and Sun Fund IV, appellants here, are the investors in SBI, and both are organized under Delaware law as limited partnerships. The Sun Funds themselves do not have offices or employees, do not make or sell goods, and report to the IRS only investment income. The Funds expressly disclaimed in their respective limited partnership agreements any partnership or joint venture with each other. The Funds also maintained distinct tax returns, financial books, and bank accounts.

Sun Funds III and IV each have one general partner, Sun Capital Advisors III, LP and Sun Capital Advisors IV, LP, respectively. These general partners each own respective subsidiary management companies,

bankruptcy. The Funds' acquisition of SBI may have prolonged the operation of SBI, and so lengthened the employment of its employees, but there is no evidence of how the Funds' investment in SBI impacted the company. There is also no indication that SBI employees had any alternative retirement savings vehicles (e.g., a 401(k) plan).

Sun Capital Partners Management III, LLC ("SCPM III") and Sun Capital Partners Management IV, LLC ("SCPM IV"). The two management companies act as intermediaries between SCAI and holding companies. 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.

Sun Funds III and IV, respectively, have 124 and 230 limited partners. Sixty-four of these limited partners overlap between the Funds. The limited partners include both individual and institutional investors, including pension funds, other private equity funds, family trusts, and universities.[3] The Sun Funds' limited partnership agreements vest exclusive control of the Funds in their respective general partners, assign the general partners percentages of the Funds' total commitments and investment profits, and require the Funds to pay their general partners an annual management fee.[4] The Sun Funds' general partners, which

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[3] The identities of the limited partners remain under seal.

[4] The Sun Funds owe to their general partners an annual management fee equal to two percent of their total commitments. A general partner may waive these fees to receive "waived fee amounts," which reduce its capital obligations in the event of a Sun Fund's future capital call. Additionally, the Sun Funds receive an offset to the fees they owe their general partners commensurate to a portion of the fees the portfolio companies pay the management companies. When a Fund's management fee offsets exceed its management fees owed in a six-month period, it receives a "carryforward" that may offset the fees owed in the subsequent six-month period.

are themselves organized as limited partnerships, have limited partnership agreements, which vest exclusive control over the general partners' "material partnership decisions" in limited partnership committees. These limited partnership committees are each made up of two individuals, Marc Leder and Rodger Krouse. These two men also founded and serve as the co-CEOs and sole shareholders of SCAI. Leder and Krouse were the co-CEOs of the management company SCPM IV.[5]

B. The Operation of the Sun Funds and SBI

The Funds used their controlling share of portfolio companies "to implement restructuring and operational plans, build management teams, become intimately involved in company operations, and otherwise cause growth in the portfolio companies." Sun Capital II, 724 F.3d at 134. The Sun Funds owned and managed their acquisitions through various corporate intermediaries. The Sun Funds together sought out potential portfolio companies and, through SCAI, developed restructuring and operating plans before

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The district court quite properly found Sun Fund III's fee waivers and Sun Fund IV's carryforwards to be direct economic benefits because they each provided either current, or potential future, financial benefits that a passive investor would not accrue. Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund, 172 F. Supp. 3d 447, 453-54 (D. Mass. 2016) (Sun Capital III).

[5] The record does not include SCPM III's Limited Liability Company Agreement, and so does not set forth the identity of SCPM III's executives.

acquisition. The Sun Funds then would attempt to sell a portfolio company for a profit, typically within two to five years of acquisition. The Sun Funds would acquire, restructure, and sell companies both independently and together.[6]

As part of their acquisition of SBI, the Sun Funds formed and financed Sun Scott Brass, LLC ("SSB-LLC"). Sun Fund III owned 30% of SSB-LLC and Sun Fund IV owned 70% of SSB-LLC. These shares reflect Sun Fund III investing $900,000 and Sun Fund IV investing $2.1 million in SSB-LLC. SSB-LLC in turn formed and financed Scott Brass Holding Corporation ("SBHC"), a wholly owned, subsidiary holding company. SBHC used the Sun Funds' $3 million investment in SSB-LLC and $4.8 million in debt to purchase all of SBI's stock. The purchase price reflected a 25% discount from the fair market value of the SBI stock at acquisition to account for SBI's known, unfunded pension liability. The Funds, through SCAI employees placed in SBI, jointly operated SBI.

C. Procedural History

In Sun Capital II, we remanded to the district court to determine whether the Funds were under common control with SBI and whether Sun Fund III

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[6] The record shows that Sun Funds III and IV held interests in eighty-eight entities at the relevant times, of which only seven overlapped. Only the ownership of SBI is at issue here.

engaged in trade or business.[7] 724 F.3d at 150. It determined that the Sun Funds had formed a partnership-in-fact sitting on top of SSB-LLC and that this partnership-in-fact owned 100% of SBI through SSB-LLC, and so concluded the Funds met the "common control" test utilized in MPPAA law. Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund, 172 F. Supp. 3d 447, 463-66 (D. Mass. 2016). That test 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)). The district court held that this partnership-in-fact engaged in "trade or business" in its operation of SBI. Sun Capital III, 172 F. Supp. 3d at 466-67. Accordingly, the district court held the Sun Funds jointly and severally responsible for SBI's withdrawal liability. Id. at 467.

The Sun Funds appealed the rulings that they were under common control with SBI, that they formed a partnership-in-fact, and, if a partnership-in-fact did exist, that it engaged in trade or business. PBGC filed an amicus brief in support of the district court ruling.

[7] On remand, the district court held that Sun Fund III engaged in trade or business. Sun Capital III, 172 F. Supp. 3d at 454-55. The Funds acknowledge that our decision in Sun Capital II controlled this holding and do not challenge it on appeal. But the Funds "reserve the right to seek further review of this . . . decision."

II.

A. Standard of Review

This case reaches the court on appeal from a grant of summary judgment. "We review a grant or denial of summary judgment, as well as pure issues of law, de novo." Sun Capital II, 724 F.3d at 138 (citing Rodriguez v. Am. Int'l Ins. Co. of P.R., 402 F.3d 45, 46-47 (1st Cir. 2005)). This includes both the determination of withdrawal liability and the recognition of a partnership-in-fact. See Pension Ben. Guar. Corp. v. Beverley, 404 F.3d 243, 246, 250-53 (4th Cir. 2005). Because the parties filed cross-motions for summary judgment, we "view each motion, separately, in the light most favorable to the non-moving party, and draw all reasonable inferences in that party's favor." OneBeacon Am. Ins. Co. v. Commercial Union Assurance Co. of Can., 684 F.3d 237, 241 (1st Cir. 2012) (internal quotation marks omitted).

B. Withdrawal Liability under the MPPAA

Congress enacted the MPPAA to ensure defined pension benefit plans remain viable, dissuade employers from withdrawing from multiemployer plans, and enable a pension fund to recoup any unfunded liabilities. See PBGC v. R.A. Gray & Co., 467 U.S. 717, 720-22 (1984). An employer completely withdraws from a multiemployer plan when it "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a). On withdrawal, an employer

must pay its proportionate share of the plan's "unfunded vested benefits." Id. § 1391; see also id. § 1381; Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 608-11 (1993); Sun Capital II, 724 F.3d at 138.

To prevent evasion of the payment of withdrawal liability, the MPPAA imposes joint and several withdrawal liability not only on the withdrawing employers but also on all entities (1) under "common control" with the obligated organization (2) that qualify as engaging in "trade or business." 29 U.S.C. § 1301(b)(1); see also Sun Capital II, 724 F.3d at 138. The imposition by Congress of withdrawal liability on commonly controlled group members can have the beneficial effect of delaying or preventing pension plans from becoming insolvent, preventing reductions in pension benefits, and limiting claims on public monies, i.e., PBGC's multiemployer insurance fund. See PBGC v. Dickens (In re Challenge Stamping & Porcelain Co.), 719 F.2d 146, 150 (6th Cir. 1983).

C. Common Control

The MPPAA's "common control" provision exists to prevent the "shirking [of] ERISA obligations by fractionalizing operations into many separate entities." Cent. States Se. & Sw. Areas Pension Fund v. Messina Prods., LLC, 706 F.3d 874, 878 (7th Cir. 2013) (quoting Cent. States, Se. & Sw. Areas Pension Fund v. White, 258 F.3d 636, 644 (7th Cir. 2001)). ERISA, of which the MPPAA is a part, as a remedial statute, is to be

construed liberally. Teamsters Pension Tr. Fund-Bd. of Trs. of W. Conference v. Allyn Transp. Co., 832 F.2d 502, 507 (9th Cir. 1987). We have held, in consequence, that the common control provision "in effect, pierces the corporate veil and disregards formal business structures." Sun Capital II, 724 F.3d at 138. And other circuits which have addressed the question agree. See Messina, 706 F.3d at 877 (holding that the MPPAA can "pierce corporate veils and impose [withdrawal] liability on owners and related businesses"); Ceco Concrete Constr., LLC, v. Centennial State Carpenters Pension Tr., 821 F.3d 1250, 1260 (10th Cir. 2016) (holding the same). The legislative history is also consistent with this view. See S. Rep. No. 383, at 43 (1974) ("[T]he committee, by [§ 1301(b)], intends to make it clear that the . . . provisions cannot be avoided by operating through separate corporations instead of separate branches of one corporation."); H.R. Rep. No. 807, at 50 (1974) (same).

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. 29 U.S.C. § 1301(b)(1).

The MPPAA regulations adopted in 1996 by PBGC, in turn, adopt the Treasury Department's regulations governing "common control." The regulations state that entities are under common control if they are members of a "parent-subsidiary group of trades or

business under common control."[8] 26 C.F.R. § 1.414(c)-2(b); 29 C.F.R. §§ 4001.2, 4001.3(a) (incorporating Treasury regulations under 26 U.S.C. § 414(c)). Notably, PBGC has not provided the courts or parties with any further formal guidance on how to determine common control specifically in the MPPAA context. Nor has PBGC updated its regulation on common control, 29 C.F.R. § 4001.3, since that regulation's adoption.

The Treasury regulations[9] define a "parent-subsidiary group" under the term "parent-subsidiary groups of trades or businesses under common control" 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).

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[8] There are also regulations defining "brother-sister groups of trades or businesses under common control," but these are not relevant to this appeal. See 26 C.F.R. § 1.414(c)-2(c).

[9] We also do not engage the Funds' argument that we should consider interpreting present Treasury regulations in light of the fate of earlier IRS regulations concerning partnerships and corporations which were rejected by some circuits.

Treasury regulations also establish that there is a "controlling interest" if there is "ownership of stock possessing at least 80 percent of total combined voting power . . . or at least 80 percent of the total value of shares." Id. § 1.414(c)-2(b)(2)(A). The plain language of these provisions requires us to find, and ascribe liability to, the entity that controls (by at least 80%) the withdrawn employer. See Dickens, 719 F.2d at 151 ("The purpose of the 80% regulation is obviously to find the party in control.").

D. Federal Partnership Law

Like the district court, we inquire into the legal question of whether the record demonstrates the Funds formed a partnership-in-fact, as a matter of federal common law, to acquire and operate SBI through SSB-LLC.

We must look to federal tax law on the partnership-in-fact issue. We do so because Congress "intended that a body of Federal substantive law [would] be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156 (1985) (quoting Remarks of Senator Javits, 120 Cong. Rec. 29,942 (1974)); Bd. of Trs. of W. Conference of Teamsters Pension Tr. Fund v. H.F. Johnson, Inc., 830 F.2d 1009, 1014 (9th Cir. 1987) (quoting the same with respect to MPPAA withdrawal liability). Moreover, by statute, PBGC's "common control" regulations must be "consistent and coextensive" with

treasury regulations under § 414(c). 29 U.S.C. § 1301(b)(1). These treasury regulations incorporate federal tax law's definition of partnership. 26 C.F.R. § 1.414(c)-2(a) (referencing 26 U.S.C. § 7701(a)(2)). And courts facing similar issues have relied on federal tax law. See, e.g., Connors v. Ryan's Coal Co., Inc., 923 F.2d 1461, 1466-67, 1467 n.37 (11th Cir. 1991) (relying on federal tax precedent to affirm recognition of a partnership and holding one of the partners responsible for the other partner's withdrawal liability).

Federal tax law provides that the choice(s) of organizational form under state law does not control this question of whether a partnership-in-fact was established. See Comm'r v. Tower, 327 U.S. 280, 287-88 (1946) (holding that federal law governs whether parties formed partnership for tax purposes); H.F. Johnson, Inc., 830 F.2d at 1014 (concluding that federal law governed whether parties formed a partnership and so were liable for pension withdrawal under ERISA). But state law, and express disclaimers of partnership formation that are determinative under state law, do provide some guidance. H.F. Johnson, Inc., 830 F.2d at 1014 (holding that, "while [a court] may look to state law for guidance," federal law governs whether joint venturers share withdrawal liability).

The Internal Revenue Code defines a "partnership" to include "a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation."

26 U.S.C. § 7701(a)(2) (emphasis added). It similarly defines "partner" to include "a member in such a syndicate, group, pool, joint venture, or organization." Id.

We look to the partnership[10] factors the Tax Court adopted in Luna. 42 T.C. at 1077-78. The factors are:

1. "The agreement of the parties and their conduct in executing its terms";
2. "the contributions, if any, which each party has made to the venture";
3. "the parties' control over income and capital and the right of each to make withdrawals";
4. "whether each party was a principal and coproprietor, sharing a mutual proprietary interest in the net profits and having an obligation to share losses, or whether one party was the agent or employee of the other, receiving for his services contingent compensation in the form of a percentage of income";
5. "whether business was conducted in the joint names of the parties";
6. "whether the parties filed Federal partnership returns or otherwise represented to respondent or to persons with whom they dealt that they were joint venturers";

[10] A joint venture differs from a partnership primarily in scope, see Podell v. Comm'r, 55 T.C. 429, 432 (1970), and the differences do not affect our analysis. Consequently, and like the district court and parties to this case, we employ the terms "partner" and "partnership" in our analysis.

7. "whether separate books of account were maintained for the venture"; and
8. "whether the parties exercised mutual control over and assumed mutual responsibilities for the enterprise."

Id.

To the extent the Funds argue we cannot apply the Luna factors because they have organized an LLC through which to operate SBI, we reject the argument. Merely using the corporate form of a limited liability corporation cannot alone preclude courts recognizing the existence of a partnership-in-fact. There is precedent for recognizing a partnership-in-fact where the parties have formed a different entity through an express agreement. Wabash Railway Co. v. American Refrigerator Transit Co., 7 F.2d 335, 342-44 (8th Cir. 1925), cert. denied, 270 U.S. 643 (1926), and Shorb v. Beaudry, 56 Cal. 446, 450 (1880), do just that. See also In re Hart, Nos. 09-71053, 11-42424, 2014 WL 1018087, at *20 n.11 (Bankr. N.D. Cal. Mar. 14, 2014) ("Shorb [v. Beaudry], though dated, is still authority in California."). Given our understanding, we also reject the separate argument made by the Funds that the question of liability is resolved by the district court's conclusion that "[t]he conventional theories of a general partnership – those that on the face reflect operational and institutional overlap between the Funds – are not evident here." Sun Capital III, 172 F. Supp. 3d at 463.

If the Funds have, under this multifactored Luna test, formed a partnership-in-fact, then under the

common control regulations they are jointly and severally liable for the debts of the partnership, including MPPAA withdrawal liability, if the separate trade or business test is also met. E.g., Cent. States, Se. & Sw. Areas Pension Fund v. Johnson, 991 F.2d 387, 391-92 (7th Cir. 1993).

Importantly, federal common law[11] allows a pre-incorporation venture or partnership to survive the fact of the partners incorporating. See Wabash Ry., 7 F.2d at 342-44; cf. Chi., Milwaukee & St. Paul Ry. Co. v. Minn. Civic & Commerce Ass'n, 247 U.S. 490, 498 (1918) (holding, for the purposes of a regulatory regime, that a "technically . . . separate," subsidiary corporation was "a mere agency or instrumentality" of the two railway corporations that wholly controlled it). That is, under federal law, if entities have in fact formed a partnership, merely creating a corporation through which they pursue the goals of the partnership does not necessarily end that partnership. Although not as onerous as the common law veil piercing standard, the test is rigorous: when parties, including when operating as a partnership, "control[] a subsidiary company so that it may be used as a mere agency or instrumentality," a court may "deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." Wabash Ry., 7 F.2d at 344.

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[11] See also Jolin v. Oster, 44 Wis.2d 623, 172 N.W.2d 12, 16 n.1 (Wis. 1969) (collecting cases stating whether jurisdictions recognize joint ventures may survive incorporation, and noting the Eighth Circuit does).

III.

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).[12] PBGC regulations direct us to Treasury regulations governing common control, which in turn require us to determine, under federal partnership law and the Luna test, whether the Funds formed a partnership-in-fact. There are some facts here under the Luna factors that tend to support a conclusion that the Sun Funds formed a partnership-in-fact to assert common control over SBI, but consideration of all of the factors leads to the opposite conclusion.

We first consider the Luna factors that favor a finding of de facto partnership. Even before incorporating SSB-LLC, the Sun Funds together "[sought] out potential portfolio companies . . . in need of extensive intervention with respect to their management and operations, to provide such intervention, and then to sell the companies." Sun Capital II, 724 F.3d at 142 (emphasis added). The Funds, through SCAI, developed restructuring and operating plans for target companies

[12] Indeed in Tower, the Supreme Court disregarded the parties' own identification as a partnership when the substance of their relationship did not evidence a partnership. 327 U.S. at 282, 291-92.

before actually acquiring them through LLCs.[13] Id. This behavior is some evidence of the Sun Funds "exercis[ing] mutual control over and assum[ing] mutual responsibilities for the enterprise" of identifying, acquiring, and selling portfolio companies together. Luna, 42 T.C. at 1078. Moreover, if the Sun Funds had in fact formed a partnership through these pre-incorporation activities, the mere creation of SSB-LLC would not, as a matter of law, in and of itself end this already-existing partnership-in-fact. See Wabash Ry., 7 F.2d at 342-44.

The organization of the control of the Sun Funds and of control over SBI also is some evidence of a partnership-in-fact. The two men in control of the Funds' general partners, Leder and Krouse, essentially ran things for both the Funds and SBI.[14] Together, and at Leder and Krouse's direction, the Sun Funds placed SCAI employees in two of SBI's three director positions, allowing SCAI to control SBI. Sun Capital III, 172 F. Supp. 3d at 467. Moreover, this pooling of

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[13] This was a usual mode of operation; the Funds similarly coinvested and comanaged other companies between 2005 and 2008. They adopted the same organizational structure for these companies as they did with SBI.

[14] Sun Capital III, 172 F. Supp. 3d at 461-62. As the only members of the Sun Funds' general partners' limited partner committees, Leder and Krouse wholly controlled the general partners and, by extension, the Sun Funds. Sun Capital II, 724 F.3d at 134. 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. See B. Cheffins & J. Armour, The Eclipse of Private Equity, 33 Del. J. Corp. L. 1, 9 (2008) (discussing the role of limited partners).

resources and expertise in SCAI, which the Funds used not only to identify, acquire, and manage portfolio companies, and structure those deals, but to provide management consulting and employees to portfolio companies, including SBI, is evidence tending to show a partnership. See Cahill v. Comm'r, 106 T.C.M. (CCH) 324, 2013 WL 5272677, at *4 (2013) (concluding a party's desire "to pool his resources and to develop business jointly" evidenced a partnership); Luna, 42 T.C. at 1078 (holding that "mutual control over and . . . mutual responsibilities for [an] enterprise" indicate a partnership-in-fact). Indeed, the record does not show a single disagreement between the Sun Funds over how to operate SSB-LLC. The Funds' conduct in managing SSB-LLC is further evidence of a partnership-in-fact sitting above. Cf. Luna, 42 T.C. at 1077 (paralleling Luna factor one: "[t]he agreement of the parties and their conduct in executing its terms" (emphasis added)).

We next discuss the Luna factors that counsel against recognizing a partnership-in-fact. The record evidence is clear that the Funds did not "intend[] to join together in the present conduct of the enterprise" (at least beyond their coordination within SSB-LLC). Comm'r v. Culbertson, 337 U.S. 733, 742 (1949); see also Luna, 42 T.C. at 1077 (counting against factor one). The fact that the Funds expressly disclaimed any sort of partnership between the Funds counts against a partnership finding as to several of the Luna factors. See Luna, 42 T.C. at 1077-78 (counting against factor one, the "agreement of the parties"; factor five,

"whether business was conducted in the joint names of the parties"; and factor six, "whether the parties . . . represented to . . . persons with whom they dealt that they were joint venturers"). Most of the 230 entities or persons who were limited partners in Sun Fund IV were not limited partners in Sun Fund III. The Funds also filed separate tax returns, kept separate books, and maintained separate bank accounts – facts which tend to rebut partnership formation.[15] Id. at 1078 (counting against factors six and seven). The Sun Funds did not operate in parallel, that is, invest in the same companies at a fixed or even variable ratio, which also shows some independence in activity and structure.

The creation of an LLC by the Sun Funds through which to acquire SBI also shows an intent not to form a partnership (although not as categorically as the Funds contend). The formation of an LLC both prevented the Funds from conducting their business in their "joint names" (Luna factor five) and limited the manner in which they could "exercise[] mutual control over and assume[] mutual responsibilities for" managing SBI (Luna factor eight). Id.

The fact that the entities formally organized themselves as limited liability business organizations under state law at virtually all levels distinguishes this case from Connors and other cases in which courts

[15] There was some disagreement at oral argument about whether the record shows the Sun Funds co-investing with entities that Leder and Krouse do not control. The answer to this question would not change our decision.

have found parties to have formed partnerships-in-fact, been under common control, and held both parties responsible for withdrawal liability. E.g., Connors, 923 F.2d at 1467-68. These cases often involved individuals (typically married couples), rather than limited liability business entities like limited partnerships, further distinguishing them from the instant case. E.g., id. at 1464. And many of the cases in which courts have recognized these types of partnerships involved fractionalizing already-existing businesses, rather than pursuing investments in different ones. E.g., id. at 1467-68; Johnson, 991 F.2d at 392-94. Using the Luna factors, we conclude that most of them, on these facts, point away from common control.

We credit the district court for its careful and reasoned analysis of the complex facts and law at hand. Nonetheless, the district court (and the Pension Fund and PBGC) too greatly discounted the Luna factors rebutting partnership-in-fact formation. Importantly, although the district court correctly concluded that incorporating SSB-LLC did not in and of itself prevent recognizing a partnership-in-fact between the Funds, SSB-LLC's incorporation implicates many Luna factors counting against that recognition (an analysis absent from the district court's opinion).

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.

We do not reach other legal issues in the case, including the trade or business issue. We decide the issue of common control only as it has been framed before us and do not reach other arguments that might have been available to the parties.

IV.

We reverse entry of summary judgment for the Pension Fund and remand with directions to enter summary judgment for the Sun Funds. No costs are awarded.

United States Court of Appeals
For the First Circuit

Nos. 16-1376
19-1002

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

Plaintiffs, Appellants,

v.

NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND,

Defendant, Third Party Plaintiff, Appellee,

SCOTT BRASS HOLDING CORP.; SUN SCOTT BRASS, LLC,

Third Party Defendants.

JUDGMENT

Entered: November 22, 2019

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's entry of summary judgment for the New England Teamsters & Trucking Industry Pension Fund is

reversed, and the matter is remanded with directions to enter summary judgment for Sun Capital Partners III, LP, Sun Capital Partners III QP, LP, and Sun Capital Partners IV, LP. No costs are awarded.

By the Court:

Maria R. Hamilton, Clerk

cc:
Hon. Douglas P. Woodlock
Robert Farrell, Clerk, United States District Court for the District of Massachusetts
Theodore Joel Folkman
Jeffrey S. Quinn
John F. Hartmann
John C. O'Quinn
Catherine M. Campbell
Renee J. Bushey
Melissa Ann Brennan
Craig T. Fessenden

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SUN CAPITAL PARTNERS III, LP, SUN CAPITAL PARTNERS III QP, LP, and SUN CAPITAL PARTNERS IV, LP, Plaintiffs/ Counter-Defendants, v. NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND, Defendant/ Counter-Plaintiff, v. SCOTT BRASS HOLDING CORP., and SUN SCOTT BRASS, LLC, Third-Party Defendants.	CIVIL ACTION NO. 10-10921-DPW

AMENDED FINAL JUDGMENT

November 30, 2018

In accordance with (a) the Memorandum and Order issued March 16, 2016, *Sun Capital Partners, III, LP*, v. *New England Teamsters and Trucking Industry Pension Fund*, 172 F. Supp. 3d 447 (D. Mass. 2016), under direction of (b) the remand from the United States Court of Appeals for the First Circuit, *Sun Capital Partners III, L.P., et al* v. *New England Teamsters &*

Trucking Industry Pension Fund, 724 F.3d 129 (1st Cir. 2013), *see also id*. at 132 n.1 (noting that while default judgment had entered against the third-party defendants, defendant/counterclaim plaintiff had abandoned its claims against those parties) and (c) the Memorandum and Order issued November 26, 2018, *Sun Capital Partners, III, L.P.*, v. *New England Teamsters Trucking and Trucking Industry Pension Fund*, 2018 WL 6169366 (D. Mass. Nov. 26, 2018), it is HEREBY ORDERED:

That the defendant and counterclaim plaintiff, New England Teamsters and Trucking Industry Pension Fund recover from the plaintiffs and counterclaim defendants, Sun Capital Partners III, LP, Sun Capital Partners III QP, LP, Sun Capital Partners IV, LP, jointly and severally, the amount of Nine Million Three Hundred Eighty Thousand One Hundred and 13/100 Dollars ($9,380,100.13), which consists of the following amounts:

Withdrawal liability $4,516,539.00
Prejudgment interest at
6% per annum $3,619,275.75
Liquidated damages $903,307.80
Attorney's fees and costs $340,977.58

plus post-judgment interest at the rate of 2.67% per annum.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SUN CAPITAL PARTNERS III, LP, SUN CAPITAL PARTNERS III QP, LP, and SUN CAPITAL PARTNERS IV, LP, Plaintiffs/ Counter-Defendants, v. NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND, Defendant/ Counter-Plaintiff,	)	CIVIL ACTION NO. 10-10921-DPW

MEMORANDUM & ORDER

November 26, 2018

Having prevailed in this action after remand from the Court of Appeals, the defendant, New England Teamsters and Trucking Industry Pension Fund ("the Pension Fund"), brought the motion pending before me under Fed. R. Civ. P. Rule 59(e) to amend the resulting judgment. Specifically, the Pension Fund contends that the remand judgment was entered in error because it failed to include interest, liquidated damages, and attorney fees and costs, as required by 29 U.S.C. § 1132(g)(2). A Rule 59(e) motion should be granted "when the original judgment evidence[s] a manifest error of law . . . " *Biltcliffe* v. *CitiMortgage, Inc.*, 772 F.3d

925, 930 (1st Cir. 2014) (citation and internal quotation marks omitted). There was plainly such error here.

The plaintiff limited partnerships, collectively referred to as "Sun Funds", initially opposed the motion to amend not on the merits, but on procedural grounds. After a further explanatory submission by counsel for the Pension Fund, Sun Funds withdrew certain of its grounds for opposition. Because the Sun Funds' opposition implicates important procedures independently enforceable by the court itself and because the underlying merits of my disposition on remand seemed to me to require some further reflection, I have used consideration of the motion to amend the judgment to engage *sua sponte* in full reconsideration of the remand decision. This Memorandum explains my determination to amend the judgment only to the extent requested by the Pension Fund and to leave unmodified the Pension Fund's status as prevailing party.

I. MANIFEST ERROR

At issue in the case is the obligation of Sun Funds to make contributions to the Pension Fund under the Multiemployer Pension Plan Amendments Act ("MPPAA") which amended the Employee Retirement Income Security Act ("ERISA"). When judgment is awarded in favor of a pension plan in such a suit, ERISA requires a court to award:

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of –

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

29 U.S.C. § 1132 (g) (2).

The initial judgment I entered on remand awarded only the amount of the unpaid contributions under § 1132(g)(2)(A) and failed to include the additional, mandatory remedies under § 1132(g)(2)(B)–(D). Through its motion, the Pension Fund seeks in excess of $2,253,787.76 in interest, $903,307.80 in liquidated damages, and $340,977.58 in attorneys' fees and costs.[1] It is uncontested that the judgment I entered on remand was manifestly in error as a result of the failure to include these mandatory items. Barring some

[1] Given the passage of time between the filing of the motion to amend and my allowance on the basis of this motion, the additional mandatory interest remedy must be recalculated to reflect the time value of the judgment to which the Pension Fund is entitled. I will direct the parties to submit promptly an agreed upon amended judgment to embody the determination I have made in this Memorandum and Order.

disqualifying misstep by the Pension Fund, if the underlying declaratory judgment for the Pension Fund stands, it must be modified to incorporate award of the additional items sought by the Pension Fund. I will take up the missteps identified by the Sun Funds in Parts II and III before reporting the results of my further consideration of the underlying judgment in Part IV.

II. LOCAL RULE 7.1

The Sun Funds initially asserted that the Pension Fund's Rule 59 motion should be denied in its entirety for failure to comply with Local Rule 7.1. Local Rule 7.1(a)(2) provides that "[n]o motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue." Here, the Pension Fund's motion included no certification of compliance with Rule 7.1. The Sun Funds assert – and the Pension Fund does not contest – that the Pension Fund's counsel in fact never conferred with them on this issue before filing its motion.

Local Rule 7.1 plays an important role in the practices and procedures of this District. "[I]t fosters discussion between parties about matters before they come before the court, and it preserves scarce judicial resources." *Martinez* v. *Hubbard*, 172 F. Supp. 3d 378, 385 (D. Mass. 2016). It is "not an empty exercise." *Id.* Sanctions for non-compliance are both available and appropriate. Moreover, because the Rule protects judicial resources as much as it protects opposing parties,

there is no need to show prejudice to a party for sanctions to attach. *Converse Inc*. v. *Reebok Int'l Ltd*., 328 F. Supp. 2d 166, 170 (D. Mass. 2004).

However, while dismissal of a non-compliant motion is available as a sanction, *id.* at 174 n.7, such a sanction is not appropriate for every violation of the Rule. *See Gerakaris* v. *Champagne*, 913 F. Supp. 646, 651 (D. Mass. 1996) ("[W]hile a litigant's failure to observe the Local Rules invites sanctions, omitting to confer prior to filing a motion certain to be opposed does not warrant so severe a sanction as summary denial."); *Edwards* v. *New England Tel. & Tel. Co*., 86 F.3d 1146 (1st Cir. 1996) (per curiam) (approving of the district court's analysis in *Gerakaris*).[2]

Here, it does not appear that a pre-motion conference between the parties would have changed the parties' fundamental positions. Moreover, the motion is one of considerable significance, involving the otherwise mandated award of additional judgment amounts in the millions of dollars. It would be entirely disproportionate to dismiss the motion outright in response to this Rule 7.1 violation.

In response to the Sun Funds' initial opposition to the motion to amend, the Pension Fund's counsel

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[2] Monetary sanctions are also available under the Local Rule. *See Martinez* v. *Hubbard*, 172 F. Supp. 3d 378, 385 (D. Mass. 2016). But the Sun Funds have not requested monetary sanctions and, in any case, I find them unnecessary and inappropriate for the same reasons I decline to sanction the Pension Fund's failure to consult about the motion by denying the underlying motion.

presented a compelling personal explanation for her failure to comply with Rule 7.1 in connection with this motion. Had this explanation been invoked in the consultation, the Local Rule 7.1 grounds to oppose the Pension Fund's motion to amend would have been obviated, as is evidenced by the withdrawal of this ground for opposition by the Sun Funds after receiving the explanation belatedly provided by Pension Fund's counsel. While I reaffirm the central role that Local Rule 7.1 plays in the procedures of this district, the particular violation before me does not require sanction. Nevertheless, I will use this occasion to outline the practice pursued in this session regarding any motion filed without a Local Rule 7.1 certification regarding consultation.

Prompted by the issues raised by this motion and an awareness that Local Rule 7.1 certification has been subject to considerable backsliding since its adoption, I have introduced a practice in my session of denying – without prejudice to compliant resubmission – any motion not accompanied by a Local Rule 7.1 certification in the absence of a showing that obtaining such a certification is not feasible. While counsel may view consultation as inefficient or, otherwise, a needless bother and consider the likelihood of resolving or narrowing the issues unlikely, there is no harm in requiring that such an attempt be made. In fact, there is considerable benefit to requiring lawyers to take the time to discuss motion practice because it provides an occasion short of formal court hearings for adversaries

to consider their respective cases from something broader than a blinkered unilateral approach.

Of course, if counsel are not prepared to comply with the spirit of the Rule, the immediate substantive benefit of consultation is unlikely to be fully satisfactory. But compliance with the formalities anticipated by the letter of the rule is a necessary first step. The alternative of ignoring non-compliance with the formality will ultimately make a dead letter of the Rule. Attaching increased transaction costs for non-compliance, such as likely denial and the requirement of compliant resubmittal in order to secure the relief sought, seems a measured step to encourage that the Rule's letter – and, hence, its spirit – will be observed.

III. FEDERAL RULES OF CIVIL PROCEDURE 59 AND 54

In addition to their broad initial challenge under Local Rule 7.1, the Sun Funds also attack the propriety of awarding attorneys' fees and costs at this point given the interplay between Federal Rules of Civil Procedure 54 and 59. This aspect of their argument does not extend to the Pension Fund's claims for interest and liquidated damages, nor do the Sun Funds contest the methods of calculation of the interest and liquidated damages sought.

The Sun Funds assert that attorney fees and costs are not appropriate subjects of a Rule 59 motion, because they are instead properly addressed under a Rule 54(d) motion for fees. Under clear Supreme Court

precedent, this is so as a general proposition. *White* v. *New Hampshire Dep't of Employment Sec*., 455 U.S. 445, 451 (1982) ("[F]ederal courts generally have invoked Rule 59(e) only to support reconsideration of matters properly encompassed in a decision on the merits. By contrast, a request for attorney's fees . . . raises legal issues collateral to the main cause of action – issues to which Rule 59(e) was never intended to apply.") (internal citations omitted);[3] *see also Bender* v. *Freed*, 436 F.3d 747, 750 (7th Cir. 2006) (under ERISA, attorneys' fees properly brought under Rule 54).

The difference in vehicle for pursuing attorneys' fees involves a difference in the required timing for seeking them. Rule 59 motions may be filed up to 28 days after judgment; the Pension Funds' motion was filed on the 28th day. Rule 54 motions for attorneys' fees, in contrast, must be filed "no later than 14 days after the entry of judgment." Fed. R. Civ. P. 54(d)(2)(B)(i). Thus, at first glance, the portion of the Pension Funds' motion seeking attorneys' fees –

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[3] In contrast, Rule 59(e) is the "proper procedural vehicle" for awards of interest, whether mandatory or discretionary. *Crowe* v. *Bolduc*, 365 F.3d 86, 92-93 (1st Cir. 2004) (citing *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989)). The liquidated damages at issue here are clearly not "collateral" to the merits of the case – indeed, they are tightly linked to interest under the statutory scheme and are meant to "remedy the injury giving rise to the [underlying] action"; consequently, they likewise fall within the ambit of Rule 59. *Cf. Osterneck*, 489 U.S. at 176 n.3 (quoting *Budinich* v. *Becton Dickinson & Co*., 486 U.S. 196, 200 (1988)). Understandably, the Sun Funds do not challenge the interest and liquidated damages sought on grounds that Fed. R. Civ. P. 59(e) is not the proper grounds to pursue them.

effectively a Rule 54 motion – seemingly came two weeks late and should be denied. *Alexander* v. *Weiner*, No. 09-10776-JLT, 2013 WL 5817578, at *3 (D. Mass. Oct. 28, 2013) (failure to timely file Rule 54 motion grounds for denial) (quoting *Logue* v. *Dore*, 103 F.3d 1040, 1047 (1st Cir. 1997)).

The interplay between Rules 54 and 59 in this case, however, effectively revives the Pension Fund's motion. The timely-filed Rule 59 motion and its success in securing liquidated damages and interest undoes the finality of the earlier March 28, 2016 judgment, and consequently renders a new Rule 54 motion for attorneys' fees timely. While the First Circuit has not definitively addressed this issue, s*ee Drumgold* v. *Callahan*, 806 F. Supp. 2d 428, 434 (D. Mass. 2011), I conclude that the applicability of Rule 54 in this setting is clear and supportive of the Pension Fund's initiative to pursue attorney fees through a motion to amend the judgment.

Rule 54(d) starts the clock for a motion for attorneys' fees from the date of "judgment." As the Advisory Committee Notes underscore, this refers to "final judgment." Fed. R. Civ. P. 54 Advisory Committee Note (1993); *see also Miltimore Sales, Inc*. v. *Int'l Rectifier, Inc*., 412 F.3d 685, 688 (6th Cir. 2005). And, as the Advisory Committee Notes to Rule 59 make plain, Rule 59 motions "affect the finality of the judgment." Fed. R. Civ. P. 59 Advisory Committee Notes (1995). The judgment only becomes final once the Rule 59 motion is disposed of. At that point, the 14-day clock of Rule 54(d) recommences.

Case law outside the First Circuit supports this approach. The Courts of Appeals that have considered this issue have all reached the conclusion that any Rule 59 motion resets the 14-day period for attorneys' fee motions.[4] So, too, has the only reported decision in this District – of which I am aware – that has confronted the issue. *Drumgold*, 806 F. Supp. 2d at 435.

Notably, these courts do not distinguish between post-trial motions made before and after the expiration of the period for fee requests, as the Sun Funds argue must be done. Because a Rule 59 motion destroys the finality of judgment, its effect on the timing of fee

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[4] *Radtke* v. *Caschetta*, 822 F.3d 571, 574 (D.C. Cir. 2016) ("[W]hile appellants' fee petition originally was untimely, the court's entry of an amended judgment created '[a] new period for filing' and cured that untimeliness. . . ."); *Bailey* v. *Cty. of Riverside*, 414 F.3d 1023, 1025 (9th Cir. 2005) ("[T]he Rule 54(d)(2)(B) motion for fees is timely if filed no later than 14 days after the resolution of a Rule 50(b), Rule 52(b), or Rule 59 motion."); *Miltimore Sales, Inc*. v. *Int'l Rectifier, Inc*., 412 F.3d 685, 691 (6th Cir. 2005) ("On January 2, 2002, International Rectifier, Inc. filed a Rule 59 motion that destroyed the finality of the December 19, 2001 judgment. Thus, while we only know this retrospectively, and Miltimore Sales, Inc. could not have known this at the time, the fourteen-day period did not begin to run."); *Members First Fed. Credit Union* v. *Members First Credit Union of Florida*, 244 F.3d 806, 807 (11th Cir. 2001) (per curiam) (same); *Weyant* v. *Okst*, 198 F.3d 311, 315 (2d Cir. 1999) ("Because the 14–day period established by Rule 54(d)(2)(B) for the filing of a motion for attorneys' fees was introduced in large part to avoid piecemeal appeals of merits and fee questions, that 14–day period begins to run with the entry of a final judgment. And because the finality of a judgment is negated by the timely filing of a motion under Rule 50(b), 52(b), or 59, we conclude that a Rule 54(d)(2)(B) motion is timely if filed no later than 14 days after the resolution of such a Rule 50(b), 52(b), or 59 motion.").

requests is not a matter of tolling the 14-day period, in which case the relative timing of the post-trial motion might be of import, but rather the creation of an altogether new 14-day period by an amended judgment. The 2009 revisions to the Federal Rules of Civil Procedure, which changed the relevant time periods, have not undercut this approach. *Sorenson* v. *Wolfson*, 170 F. Supp. 3d 622, 628 (S.D.N.Y. 2016) ("Cases decided after the 2009 amendments have continued to interpret *Weyant* [v. *Okst*, 198 F.3d 311 (2nd Cir. 1999)] as establishing that a 'motion for attorney's fees is timely under FRCP 54(d)(2)(B) when filed within 14 days after the entry of judgment, or within 14 days of the resolution of postjudgment motions.' ") (quoting *Farinella* v. *EBay, Inc*., No. 05–CV–1720, 2011 WL 1239959, at *2 (E.D.N.Y. Mar. 30, 2011)).[5]

Indeed, following the 2009 revisions, the D.C. Circuit joined its sister circuits in holding that "a fee petition is timely if filed no later than 14 days after the resolution of a Rule 50(b), Rule 52(b), or Rule 59

[5] Additionally, *Sorensen* directs attention to *Slep–Tone Entm't Corp.* v. *Karaoke Kandy Store, Inc.*, 782 F.3d 313, 317 (6th Cir. 2015); *Watrous* v. *Borner*, 995 F. Supp. 2d 84, 88 (D. Conn. 2014) ("[U]nder *Weyant*, a party's motion for attorney's fees is timely, unless filed outside the fourteen-day window following the court's last ruling on any pending Rule 50(b), 52(b), or 59 motions. . . ."), appeal dismissed, (Sept. 19, 2014); *Registry Sys. Int'l, Ltd.* v. *Hamm*, No. 08cv00495 (PAB)(MJW), 2012 WL 4476635, at *5 (D. Colo. Sept. 28, 2012) ("[The plaintiff] is correct that the 14 day period does not begin to run until after the Court rules on the Rule 59(e) motions."). *Id.*

motion." *Radtke* v. *Caschetta*, 822 F.3d 571, 573 (citations and internal quotation marks omitted).

The only divide among courts concerns whether all Rule 59 motions reset the clock, or whether only successful motions do so. One district court has held the latter. *See Mary M*. v. *N. Lawrence Cmty. Sch. Corp*., 174 F.R.D. 419, 422 (S.D. Ind. 1997). In *Mary M.*, Chief Judge Barker relied on the text of Rule 54, which sets forth the 14-day time limit; on a comparison of Rule 54 to Federal Rule of Appellate Procedure 4(a), which more explicitly discusses the effect of post-judgment motions on the finality of judgment; and, most persuasively, on the Advisory Committee Notes to Rule 54, which state that "A new period for filing will automatically begin *if a new judgment is entered* following a reversal or remand by the appellate court or the granting of a motion under Rule 59." *Id.;* Fed. R. Civ. P. 54 Advisory Committee Notes (1993) (emphasis supplied). Chief Judge Barker emphasized that had she "granted a motion for a new trial or for amendment of the judgment under Fed. R. Civ. P. 59, thus vacating or changing the original judgment, a new period for filing fee petitions would have begun at that time." *Mary M.*, 174 F.R.D. at 422.[6]

[6] The Sun Funds attempt to distinguish this aspect of *Mary M.* by arguing that the Rule 59(e) motion at issue here does not truly change the original judgment because it does not affect the merits of the case or the right to attorneys' fees. This is an area of law, however, where the Supreme Court has instructed that implementing a "bright-line rule" is particularly important. *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). The Federal Rules of Civil Procedure have provided such a bright-line

In this case, I will first grant the Pension Fund's Rule 59 motion as to interest and liquidated damages. The question of when a Rule 54 fees motion may be brought when a Rule 59 motion is denied is consequently not before me. But as to whether a successful Rule 59 motion allows for another 14 days during which attorneys' fees can be requested, there can be no doubt. This case falls under the clear instructions of the Advisory Committee Notes requiring a "new period for filing" fee petitions. Fed. R. Civ. P. 54 Advisory Committee Notes (1993).

Given an amendment of the judgment under Fed. R. Civ. P. 59, the Pension Fund requested attorneys' fees in a timely manner and subsequently submitted the requisite estimate and documentation of a specific fee amount. Fed. R. Civ. P. 54(d)(2)(B)(iii). Because the request for attorneys' fees is procedurally sound and mandatory under the MPPAA, I must grant reasonable fees and costs if the underlying judgment is sustained.

In addressing requests for attorney fees, I must choose when, relative to the pending appeal, to rule on that request. When attorneys' fees are sought and an appeal on the merits of the case has also been taken, a court has three options. It "may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal

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rule. I decline to blur that line with case-by-case determinations of when an amendment of a judgment, involving merits questions, sufficiently addresses the "true" merits of the case.

has been resolved." Fed. R. Civ. P. 54, Advisory Committee Notes to 1993 Amendments. The First Circuit has instructed that, in general, "the better practice . . . [is] to set the fee at the conclusion of the trial, allowing the parties to appeal the fee award along with any substantive issues." *Tobin* v. *Liberty Mut. Ins. Co*., 553 F.3d 121, 149 (1st Cir. 2009). That guidance notwithstanding, the First Circuit also recognizes the discretion of a district court to choose between these options for "pragmatic" reasons such as "judicial efficiency." *Id.* Although some districts have developed local rules requiring a particular approach, *see*, *e.g.*, D. Me. Local Rule 54.2 (fee applications must be made after final disposition of appeals), the District of Massachusetts has not done so.

Adjudicating fee disputes immediately, rather than after the conclusion of an appeal, carries certain benefits. In particular, it allows resolution "while the services performed are freshly in mind," and it facilitates the joint appellate review of fee issues "at the same time as review on the merits of the case." Fed. R. Civ. P. 54, Advisory Committee Notes to 1993 Amendments. For this reason, it is common for courts to address fees even while appeals are pending. *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, No. CIV.A. 03-3924, 2007 WL 4287393, at *2 (E.D. Pa. Dec. 4, 2007) (collecting cases).

On the other hand, judicial efficiency often supports tabling the fee issue until after appeal. *See* Fed. R. Civ. P. 58, Advisory Committee Notes to 1993 Amendments ("Particularly if the claim for fees

involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved."). This is especially so where courts foresee an appellate decision potentially affecting the availability of fees. *See*, *e.g.*, *Madrid* v. *Concho Elementary Sch. Dist. No. 6 of Apache Cty.*, No. CV-07-8103-PCT-DGC, 2010 WL 2991562, at *1 (D. Ariz. July 26, 2010); *Certusview Techs., LLC* v. *S & N Locating Servs., LLC*, No. 2:13CV346, 2015 WL 3466842, at *2 (E.D. Va. June 1, 2015). Balancing these values is deeply context-dependent. *Compare Barrella* v. *Vill. of Freeport*, 56 F. Supp. 3d 169, 173 (E.D.N.Y. 2014) *with Mhany Mgmt. Inc*. v. *Inc. Vill. of Garden City*, 44 F. Supp. 3d 283, 286 (E.D.N.Y. 2014) (same judge, in similar cases, reaching different conclusions based on procedural posture of each case and appeal).

In this circumstance, I will follow the First Circuit's preferred approach and resolve the fee dispute at this point. This sequencing offers particular benefits here, where there is no factual dispute over the reasonable amount of attorneys' fees owed; only the previously discussed legal dispute about procedural elements of the fee requests is at issue. The uncontested figure of attorneys' fees and costs incurred by the Pension Fund at this point is $340,977.58 and will be added to the judgment in this case if the underlying judgment is maintained. I turn now to address that issue.

IV. THE UNDERLYING REMAND DETERMINATION

I have taken the occasion provided by consideration of the motion to amend the judgment to engage in a full reconsideration of the decision I initially issued in support of the judgment on remand. After extensive re-evaluation, I am fully satisfied that the remand decision faithfully follows the teachings of the First Circuit's remand directions. *See generally Sun Capital Partners III* v. *New England Teamsters*, 724 F.3d 129 (1st Cir. 2013). I am satisfied as well that my decision granting summary judgment on remand to the Pension Fund fairly accommodates the "tensions that stem irremediably from differences between the goals of the MPPAA and the formalism of the tax code." *Sun Capital Partners III*, 172 F. Supp. 3d at 460. That decision on remand, supplemented by this Memorandum and Order, continues to reflect my best justification for the proper resolution of this exceedingly fact intensive and complex matter and I find no reason to modify, refine, or reformulate the grounds for that resolution.

Nevertheless, I am acutely aware that the result disrupts hopeful expectations by the private equity plaintiffs in this case and in other similar settings where withdrawal liability might be asserted against them. However, in the absence of further meaningful direction from Congress and/or orderly rulemaking 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.

The private equity plaintiffs here chose in their calculus of risk and return to structure their business to breach what the First Circuit accurately characterized as "fine lines," *Sun Capital Partners III*, 724 F.3d at 148, governing the circumstances in which withdrawal liability will be imposed upon those who invest in distressed businesses. Their expectations, in the absence of definitive supporting authority, that this effort to avoid ERISA obligations would be without consequence was a risky gambit. Its choice has resulted in a diminished return for their investments. Any recalibration of the reasonable expectations of investors in companies with ERISA obligations must come from some source other than courts applying current applicable law.

V. CONCLUSION

For the reasons set forth above, the Pension Fund's Motion to Amend the Judgment [Dkt. No. 185] is GRANTED IN PART. In accordance with Fed. R. Civ. P. 59, the Judgment of this court will be amended to include interest in the amount of not less than $2,253,787.76; liquidated damages in the amount of $903,307.80; amendment of the judgment having been allowed, I GRANT the remainder of the Motion [Dkt. No. 185] pursuant to Fed. R. Civ. P. 54, awarding attorneys' fees and costs in the amount of $340,977.58. Given the passage of time since the filing of the Motion

to Amend, the parties shall file on or before November 30, 2018 a proposed agreed upon amended judgment bringing current the time value dimension to the amended judgment being entered.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SUN CAPITAL PARTNERS III, LP, SUN CAPITAL PARTNERS III QP, LP, and SUN CAPITAL PARTNERS IV, LP, Plaintiffs/ Counter-Defendants, v. NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND, Defendant/ Counter-Plaintiff.	)	CIVIL ACTION NO. 10-10921-DPW

MEMORANDUM & ORDER

March 28, 2016

This case addresses whether the plaintiffs – private equity funds, referred to herein as "Sun Fund III" and "Sun Fund IV" – may be held liable under the Multiemployer Pension Plan Amendments Act ("MPPAA") for the pro rata share of unfunded vested benefits owed to a multiemployer pension fund by a bankrupt company, Scott Brass, Inc. ("SBI"), that is owned by the funds. The plaintiffs seek a declaratory judgment that they are not liable for the payment of such withdrawal liability. The defendant has counter-claimed seeking a declaratory judgment that the private equity funds are jointly and severally liable for the amounts owed by Scott Brass Inc.

In September of 2011, the plaintiffs and defendant filed cross-motions for summary judgment. In September 2012, I granted the plaintiffs' motion for summary judgment and denied that of the defendant. On appeal, the First Circuit reversed in part, vacated in part, and affirmed in part my grant of summary judgment, and remanded the case to this court for further proceedings to answer two questions: (1) Whether Sun Capital Partners III, LP and Sun Capital Partners III QP, LP are engaged in "trade or business"; and (2) Whether the plaintiffs were under "common control" with Scott Brass, Inc. within the meaning of 29 U.S.C. § 1301(b)(1).

The facts relevant to this dispute have been described extensively in the two prior reported opinions in this litigation. *Sun Capital Partners III, LP* v. *New Eng. Teamsters & Trucking Indus. Pension Fund*, 903 F. Supp. 2d 107 (D. Mass. 2012), *Sun Capital Partners III, LP* v. *New Eng. Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129 (1st Cir. 2013). I will assume general familiarity with those opinions and discuss facts more specifically in connection with the remaining questions.[1]

For the sake of clarity, I provide a brief restatement of the entities involved.[2] Scott Brass, Inc. ("SBI"),

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[1] As discussed further below, the parties have made some clarifications, corrections, and additions to those facts relied upon by me and by the First Circuit in the evaluation of the previous motions for summary judgment.

[2] I have also attached a chart as Appendix A to provide a simplified illustration of the ownership and managerial roles of the several plaintiff related entities.

is the entity that incurred withdrawal liability under the MPPAA after it went bankrupt and ceased payments into the defendant Pension Fund. At the time of its bankruptcy, it was owned by Scott Brass Holding Corp., which in turn was owned by Sun Scott Brass, LLC. Sun Scott Brass, LLC was formed by Sun Fund III, which owned 30 percent of the LLC, and Sun Fund IV. which owned the other 70 percent. The two Sun Funds are investment funds and limited partnerships. Their general partners are Sun Capital Advisors III, LP and Sun Capital Advisors IV, LP, respectively, and those general partners each have a limited partner committee made up of Marc Leder and Rodger Krouse. Leder and Krouse are also the co-CEOs of Sun Capital Advisors, Inc., which advises the Sun Funds, structures their deals and provides management consulting and employees to the portfolio companies owned by the Funds. Additional detail is provided in the prior opinions and, as needed, in the opinion below; additionally, an organizational chart is provided as an appendix to this memorandum.

The parties have filed renewed cross-motions for summary judgment setting forth their positions on the questions posed by the First Circuit.

I. WHETHER THE SUN FUNDS ARE ENGAGED IN TRADE OR BUSINESS

The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") provides: "For purposes of this subchapter, under regulations prescribed by the

corporation, all 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).

In the previous appeal of this case, the First Circuit set forth the standard for determining whether an investor is a "trade or business" under the statute. The First Circuit stated that, under the MPPAA, "[t]o impose withdrawal liability on an organization other than the one obligated to the [pension] Fund, two conditions must be satisfied: 1) the organization must be under 'common control' with the obligated organization, and 2) the organization must be a trade or business." *Sun Capital*, 724 F.3d at 138 (quoting *McDougall* v. *Pioneer Ranch Ltd. P'ship*, 494 F.3d 571, 577 (7th Cir. 2007)).

The First Circuit explained that "[w]here the MPPAA issue is one of whether there is mere passive investment to defeat pension withdrawal liability, we are persuaded that some form of an 'investment plus' approach is appropriate when evaluating the 'trade or business' prong of § 1301(b)(1), depending on what the 'plus' is." *Sun Capital*, 724 F.3d at 141. Declining "to set forth general guidelines for what the 'plus' is," the First Circuit found it sufficient that "on the undisputed facts of this case, Sun Fund IV is a 'trade or business' for purposes of § 1301(b)(1)." *Id.* In reaching that determination, the First Circuit adopted a "very fact-specific approach . . . tak[ing] into account a number of factors [and] cautioning that none is dispositive in and of

itself." *Id.* Many of the factors leading to the determination that Sun Fund IV was engaged in trade and business are commonly established as to both Sun Fund IV and Sun Fund III:

> The Sun Funds make investments in portfolio companies with the principal purpose of making a profit . . . [T] he Sun Funds have also undertaken activities as to the SBI property. The Sun Funds' limited partnership agreements and private placement memos explain that the Funds are actively involved in the management and operation of the companies in which they invest . . . Each Sun Fund agreement states, for instance, that a "principal purpose" of the partnership is the "manag[ement] and supervisi[on]" of its investments. The agreements also give the general partner of each Sun Fund exclusive and wide-ranging management authority . . . the Sun Funds' controlling stake in SBI placed them and their affiliated entities in a position where they were intimately involved in the management and operation of the company . . . through a series of appointments, the Sun Funds were able to place SCAI employees in two of the three director positions at SBI, resulting in SCAI employees controlling the SBI board.

Sun Capital, 724 F.3d at 141-143. The First Circuit's determination that Sun Fund IV was a "trade or business" also relied on one characteristic that the court was unable to determine was also a characteristic of Sun Fund III:

> [T]he Sun Funds' active involvement in management under the agreements provided a direct economic benefit to at least Sun Fund IV that an ordinary, passive investor would not derive: an offset against the management fees it otherwise would have paid its general partner for managing the investment in SBI. Here, SBI made payments of more than $186,368.44 to Sun Fund IV's general partner, which were offset against the fees Sun Fund IV had to pay to its general partner. *Id.* at 143 (footnotes omitted).[3]

The First Circuit held that the sum of these "plus" factors satisfied the "investment-plus" test for the Sun Fund IV. However, because it was unable to determine whether Sun Fund III received a similar economic benefit in the form of an off-set of fees otherwise owed by Sun Fund III to its general partner, the First Circuit was unable to determine whether Sun Fund III was engaged in a "trade or business." The First Circuit left that issue to this court's determination: "We remand

[3] In its initial statement of facts in support of its motion for summary judgment, the Pension Fund stated that the amount of the management fees paid by Scott Brass, Inc. was $186,368.44 – a figure adopted by the First Circuit. In their response to the statement of facts, the Sun Funds denied the accuracy of the Pension Fund's assertion and stated that "the payments made by SBI were greater than $186,368.44." In response to the Pension Fund's supplemental statement of facts, the plaintiffs indicated that "Scott Brass, Inc. paid $664,027.78 in management fees to Sun Capital Partners Management IV, LLC." The defendant concedes that the $186,368.44 figure is inaccurate and that $664,027.78 is the correct figure. The difference in the figures is, nevertheless, immaterial to the resolution of this lawsuit.

the § 1301(b)(1) claim of liability to the district court to resolve whether Sun Fund III received any benefit from an offset from fees paid by SBI and for the district court to determine the issue of common control." *Id.* at 148-49.

On remand, the Sun Funds contend that the First Circuit, as well as this court in its previous summary judgment opinion, misstated relevant facts regarding the management fee offsets accruing to the Sun Funds as a result of the management of SBI. As they explain, "[i]n this case, Sun Fund III did receive an offset of the management fee owed to its GP from fees paid by SBI . . . Ironically, Sun Fund IV did not."

To sort out this state of affairs, I will set forth the facts as I now understand them to be and then analyze those facts under the rubric set forth by the First Circuit.

A. The Sun Fund III and Sun Fund IV Limited Partnership Agreements

Under the limited partnership agreements (the "LP Agreements") establishing Sun Fund III and Sun Fund IV,[4] all partners, including the general partners of each Fund (Sun Capital Advisors III, LP and Sun Capital Advisors IV, LP, respectively), are obligated to make contributions to the capital of the partnerships upon receiving a capital call. The amount of the

[4] The agreements setting up the funds appear identical in all relevant respects.

contributions required of the General Partners are determined based upon the pro rata share of each partner's commitments.(Jt. Ex. 12, § 5.1(a)-(b)).[5]

In addition to being obligated to make capital contributions to the Sun Funds, the General Partners are entitled to an annual management fee (the "Management Fee") from the Sun Funds, calculated as a percentage of the aggregate commitments or invested assets.(Jt. Ex. 12, § 5.1(a)-(b)).

Under 5.1(c) of the Sun Fund LP Agreements, the General Partners may elect to "waive" their management fees, generating what is termed in the LP Agreements a "Waived Fee Amount." These "Waived Fee Amounts" reduce the General Partners' obligation to contribute to future capital calls made by the Sun Funds. Section 3.1(a)(ii) of the Sun Fund agreement provides:

> [A]t such time as the General Partner delivers any Capital Call Notice, the General Partner's required Capital Contributions in respect of anticipated or actual Investments and/or expenses incurred directly in connection with the making, maintaining or disposing of such Investments, at the General Partner's election, shall be reduced by an amount designated by the General Partner up to the lesser of (A) the amount of Capital Contributions otherwise required to be made by the General

[5] Under the LP Agreement, the General Partner's Commitment is not less than 5% of the aggregate commitments of all the partners. (Jt. Ex. 12, "Commitment" Definition)

> Partner . . . or (B) the amount of any existing Unapplied Waived Fee amounts. . . .

In addition to waivers, the Management Fee owed by the Sun Funds to its General Partner may be reduced in a second way. Under Section 5.1(d) of the LP Agreement, after the application of Waived Fee Amounts under Section 5.1(c), the Management Fee is further reduced by "100% of any Directors Fees, 50% of any Corporate Services Fees, 50% of any Investment Banking Fees and 50% of any Net Fees" as well as by the aggregate amount of any "private placement fees" (the "Management Fee Offsets"). The Sun Funds have explained the function of this term of the limited partner agreements thus: "[T]he limited partners of the Sun Funds negotiated offsets of the management fees they owed the general partners of the Sun Funds for the payment of other fees to the general partners such as those covered under the Management Services Agreement [between Scott Brass Holding Corp and SCP Management IV, LLC.]." [Dkt. 149 Resp. No. 115].

When no Management Fees are owed or the amount of Management Fee Offsets is greater than the Management Fees owed (after taking into account any fee waivers elected by the General Partners), Management Fee Offset "carryforwards" are generated, which can be used to offset future Management Fees owed by the Sun Funds to their General Partners: In the event that the amount of Directors Fees, Corporate Services Fees, Investment Banking Fees, Net Fees or private place fees to be applied against the Management Fee exceeds the Management Fee for the immediately

succeeding six-month period, such excess shall be carried forward to reduce the Management Fee payable in the following six-month periods.

B. *The Sun Scott Brass Holding Corp. Management Agreement*

Scott Brass Holding Corp. and Sun Capital Partners Management IV, LLC ("SCP Management IV") (which is a subsidiary of Sun Capital Advisors IV, LP) entered into an agreement (the "Management Agreement") pursuant to which the latter would provide "management and consulting services regarding the business of [SBI]." The fees paid to SCP Management IV under this Management Agreement are offset against the Management Fees, or, if no Management Fees are presently owed, are carried forward as potential future offsets pursuant to Section 5.1(d) of the LP Agreements.

In addition, pursuant to Section 5.1(d) of the LP Agreements, the amounts paid to SCP Management IV are allocated pro rata between Sun Fund III and Sun Fund IV based upon their proportionate holdings in Sun Scott Brass, LLC – that is 70% to Sun Fund IV and 30% to Sun Fund III.

C. *The Payment of Management Fees, Offsets, and Waivers to Sun Fund III*

Scott Brass, Inc. paid $664,027.78 in management fees to SCP Management IV. As described above, 30%

of this amount is allocated as a potential Management Fee Offset or Carryforward to Sun Fund III and 70% is allocated to Sun Fund IV.

In each year from 2005 until 2012 (spanning from the time of the purchase of Scott Brass, Inc., in February 2007 until Scott Brass, Inc.'s bankruptcy in November 2008), Management Fees were owed by Sun Fund III to its general partner and, accordingly, the amount owed by Sun Fund III was reduced by the amount paid to SCP Management IV by Scott Brass Holding Corp. and allocated to Sun Fund III.

Therefore, as the Sun Funds have stated and in answer to the question posed by the First Circuit, Sun Fund III has received an economic benefit in the form of "an offset against the management fees it otherwise would have paid its general partner for managing the investment in SBI." *Sun Capital Partners*, 724 F.3d at 143. The "trade or business" prong of the test for liability under § 1301(b)(1) of the MPPAA is satisfied as to Sun Fund III.

D. The Payment of Management Fees, Offsets, and Waivers to and From Sun Fund IV

Although I have answered the first question posed by the First Circuit and am bound by the law of the case as determined by the First Circuit, *Ellis* v. *United States*, 313 F.3d 636, 646-48 (1st Cir. 2002), I feel obligated to evaluate the Sun Funds' contention that the First Circuit's holding that the "trade or business"

requirement has been satisfied as to Sun Fund IV was based upon an erroneous factual determination.

Scott Brass, Inc. was acquired by the Sun Funds in February of 2007 and entered bankruptcy (incurring withdrawal liability under the MPPAA) in November 2008. Although Sun Fund IV paid and owed management fees in 2005 and 2006, before the acquisition of Scott Brass, Inc., and in 2010, 2011, and 2012, after the date of the bankruptcy, the General Partner of Sun Fund IV waived its management fees for the years 2007 through 2009. Therefore, from 2007 through 2009, although fees were paid to SCP Management IV by Scott Brass Holding Corp., those fees did not benefit Sun Fund IV by reducing the Management Fees owed to its General Partner in those years. Instead, the SCP Management IV fees generated management offset "carryforwards" for potential use in the years after SBI entered bankruptcy.

The Sun Funds contend that these "carryforwards" do not constitute a "direct economic benefit" because they did not offset any management fees during the time that SBI was partially owned by Sun Fund IV prior to its bankruptcy and because they represent only a "contingent" benefit to that fund during the years after. For the reasons below, I believe that the Sun Funds' arguments offer too crabbed a view of the test articulated by the First Circuit.

1. <u>The "Carryforwards" Represent a "Benefit" to the Sun Funds</u>

The first, and I believe most pertinent, fact to be addressed is whether Sun Fund IV obtained some benefit from the management activities undertaken by SCP Management IV acting under the direction of Sun Capital Advisors IV, LP, which is Sun Fund IV's agent and general partner.

The notes to Sun Fund IV's financial statements describe the Management Fee Offset carryforwards as follows:

> In accordance with the Partnership Agreement, the Management Fees that have otherwise not been irrevocably waived shall be reduced for certain other payments made to the General Partner as defined in the Partnership Agreement and upon the occurrence of certain future events also as defined in the Partnership Agreement, including a portion of the amounts paid to the General Partner or its affiliates for Directors Fees, Corporate Services Fees, management fees and Investment Banking Fees (the "Management Fee Offset"). As of December 21, 2008, the Management Fee Offset carryforward was $58,748,506.[6]

[6] In their most recent supplement to their statement of facts, the Pension Fund has stated that as of December 31, 2013, the amount of the management fee offset carryforward for Sun Fund IV was $87,345,798. The Sun Funds have admitted the accuracy of this statement. Regardless, the precise magnitude of the carryforwards is irrelevant for present purposes.

The $58,748,506, some portion of which is attributable to the management of Scott Brass, Inc., represents a potential reduction in the future payment of management fees. Although contingent on uncertain future events and although the economic value of the carryforwards may be something less than the reported dollar figure of $58,748,506 (in order to reflect the uncertainty of realization), the potential to reduce future management fees by $58 million is a valuable asset accruing to Sun Fund IV.

In its briefing, the Pension Fund has suggested that the carryforwards are akin to gift certificates – redeemable in the future for reductions in Management Fees owed. The Sun Funds convincingly explain that this is wrong; the carryforward cannot be used in the present and may turn out to be valueless in the future. Given that explanation, the better analogy might be an out-of-the-money stock option or a lottery ticket.[7] Although the carryforwards promise neither an immediate payment nor a sure one, they represent a valuable asset which one might rationally pay some amount for – though rationally less than the amount of the potential future payout as a discount for the uncertainty. This value accrues to the Sun Funds at the time these carryforwards are received – and not only upon the

[7] The lottery ticket metaphor might be taken to suggest a low probability that the contingent benefit will be realized in the future. But the relevant characteristic of the comparison is not the relative probabilities; it is rather that the future value of the item – either lottery ticket or carryforward – is not currently known with precision, but, despite this, the present ownership of the opportunity for future enrichment is itself of some value.

realization of the reduction in management fees – and so Sun Fund IV received a valuable benefit because of the management activities undertaken by SCP Management IV before Scott Brass, Inc.'s bankruptcy.

The Sun Funds argue that the carryforwards do not satisfy the First Circuit's test because they do not constitute a "direct economic benefit," suggesting that this should be measured by whether they have an "impact on the financial performance or position of the Funds in the periods in which they accumulate." In a similar vein, the Sun Funds suggest that carryforwards should be tested against the "constructive receipt" or "economic benefit" doctrines that relate to the recognition of income for taxes purposes. *See Reed* v. *Commissioner*, 723 F.2d 138, 142 and 147 n.6 (1st Cir. 1983) ("[U]nder the constructive receipt doctrine, a taxpayer recognizes taxable income when he has an unqualified, vested right to receive immediate payment"; "economic benefit requires the actual receipt of property or the actual receipt of a right to receive property in the future, at which point, the doctrine asks whether the property or the right confers a present economic benefit with an ascertainable fair market value.") (citations omitted).

I do not believe that the First Circuit intended that the trade or business determination on remand be guided either by the accounting conventions adopted by the Sun Funds or by tax rules relating to the timing of the receipt of income. Although the First Circuit did use the terms "direct economic benefit" and "economic benefit," it did not do so consistently, as would suggest

their use as terms of art. Rather, the First Circuit variously described the offset of management fees as a "direct economic benefit," an "economic benefit," and simply as "a benefit." *See*, *e.g.*, *Sun Capital*, 724 F.3d at 143, 148. The question put to this court by the First Circuit was "whether Sun Fund III received *any benefit* from an offset from fees paid by SBI." *Id.* at 148-49. The First Circuit's opinion does not provide a basis for circumscribing the "investment plus" test such that it is satisfied by only those benefits which are functionally equivalent to immediately recognizable income.[8]

A less restricted test – evaluating whether the Sun Funds have received "any benefit" from the management of Scott Brass, Inc. – is also more consistent with the overall thrust of the First Circuit's opinion and the MPPAA. The MPPAA predicates liability upon an entity's involvement in "trade or business" and the First Circuit's opinion makes a distinction between engaging in "trade or business" and "mere passive investment," the latter of which "defeat[s] pension liability." *Id.* at 141. In determining whether an entity's receipt

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[8] More generally, the First Circuit made clear in its opinion that it did not intend to provide a definitive and exclusive account of what type of activities might satisfy its "investment plus" test for purposes of § 1301(b)(1). *See Sun Capital Partners III, LP* v. *New Eng. Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 141 (1st Cir. 2013). Thus, I do not conclude that this test can be satisfied only by an economic benefit to the Sun Funds which is precisely identical to that found by the First Circuit. Rather, the benefit received is one element that is incorporated as part of the First Circuit's "very fact-specific approach . . . tak[ing] into account a number of factors [and] cautioning that none is dispositive in and of itself." *Id.*

of benefits supports liability, the relevant distinction is not the kind or timing of the benefit, but between those benefits that "an ordinary, passive investor" would receive and those resulting from the Sun Funds' "active involvement in management." *Id.* at 143. The benefit described here – carryforwards with the potential to offset future management fees owed by the Sun Funds – are not available to an ordinary passive investor who does not engage in management activities. Cf. *McDougall* v. *Pioneer Ranch Ltd. P'ship*, 494 F.3d 571, 577-78 (7th Cir. 2007) (losses consistent with purpose of trade or business).

Finally, I am guided to this conclusion by another consideration. The "investment plus" analysis and the question of whether the Sun Funds received benefits from management activities are tests aimed to shed light on whether an entity is engaged in "trade or business." The tests suggested by the Sun Funds would introduce into this analysis considerations that are wholly divorced from this fundamental underlying issue. Under the Sun Funds' test, whether the Funds received an "economic benefit" would depend entirely upon acts of separate entities, the Funds' General Partners, and upon their decisions whether or not to waive Management Fees. That, in fact, is precisely the case here – both Sun Funds III and Sun Funds IV engaged in identical activities. However, those activities generated benefits in different forms because of the different decisions made by their respective General Partners. Similarly, the test proposed by the Funds injects what appears to be a largely arbitrary timing

dimension into the "trade or business" determination. If the bankruptcy had occurred later – during or after years in which Management Fees owed by the Funds were actually offset by the carryforward – but all other facts remained the same, the Sun Fund's test would be satisfied. I will not adopt the proposed test which makes the receipt of an "economic benefit" contingent on factors that are either arbitrary or irrelevant to the ultimate determination that I must make – whether the Sun Funds were engaged in trade or business.

The generation of Management Fee offset carryforwards is a valuable benefit that accrues to the Sun Funds as a result of the Sun Funds' management activities relating to Scott Brass, Inc. This is sufficient to satisfy the "investment plus" test articulated by the First Circuit. Therefore, the "trade or business" test in § 130(b)(1) is satisfied as to both Sun Fund III and Sun Fund IV.[9]

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[9] During the March 12, 2014 hearing, I speculated about the possibility that the Sun Funds might receive an economic benefit associated with the change in the timing of payments resulting from management fee waivers and offsets. After analyzing the timing issue, the parties have agreed that no such benefit accrued to the Funds.

In addition, the Pension Fund, somewhat belatedly, has raised the possibility that the potential for the "Special Profits Interest Giveback" described in Section 9.4(e) of the Funds' LP Agreements could constitute an economic benefit and satisfy the First Circuit's "investment plus" test. The Sun Funds have countered by asserting that, given Sun Fund IV's financial performance, there no longer is a possibility that this provision will come into play. In light of my disposition of the "trade or business" question on another ground, and the lack of factual development

II. WHETHER SUN FUND III AND SUN FUND IV ARE UNDER "COMMON CONTROL" WITH SCOTT BRASS, INC.

I next turn to the question whether the Sun Funds were under "common control" with Scott Brass, Inc. The Pension Benefit Guaranty Corporation has adopted regulations pertaining to the meaning of "common control." See 29 C.F.R. §§ 4001.2, 4001.3(a). The PBGC's regulations, in turn, employ the meaning of "common control" adopted under Section 414(c) of the Internal Revenue Code. 29 C.F.R. § 4001.3(a). Under those regulations, two or more "trades or businesses" are under common control if they are members of a "parent-subsidiary" group of trades or businesses, a "brother-sister" group of trades or businesses or a "combined group" of trades or businesses. 26 C.F.R. § 1.414(c)-2.

A "parent-subsidiary group" – the relevant category here – means "means one or more chains of organizations conducting trades or businesses connected through ownership of a controlling interest with a common parent organization if . . . controlling interest in each of the organizations, except the common parent organization, is owned . . . by one or more of the other organizations; and [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). A "controlling interest" is defined to mean 80% ownership. *Id.*

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related to the "Special Profits Interest Giveback" contention, I do not explore the effect of Section 9.4(e) of the LP Agreements.

The application of these rules to the first links in the organizational chain is uncontested. When it withdrew from the Pension Fund, Scott Brass, Inc. ownership was fully held by Scott Brass Holding Corporation. Scott Brass Holding Corporation, in turn, was fully owned by Sun Scott Brass, LLC. There is no argument that these entities would be considered to be under common control with Scott Brass, Inc. It is also uncontested that considered separately, Sun Fund IV's ownership stake in Sun Scott Brass, LLC is 70% and Sun Fund III's ownership stake is 30%. Both of these stakes separately fall below the necessary 80% threshold necessary to establish a "controlling interest" for purposes of MPPAA. Thus, in the absence of some mechanism by which the ownership interests of Sun Funds III and IV would be aggregated, withdrawal liability would not extend to the Plaintiff Funds themselves under these rules.

The Pension Fund's contention is that (1) Sun Funds III and IV formed a partnership or joint venture; (2) that the partnership or joint venture was engaged in a trade or business; and (3) that the partnership or joint venture is the ultimate parent of a parent-subsidiary group which includes Scott Brass, Inc., the directly obligated entity.

A. Statutory Background

The "primary goal" of ERISA, and of the MPPAA in particular, is "protecting employees' benefits." *Pension Ben. Guar. Corp.* v. *Ouimet Corp.*, 711 F.2d 1085,

1092 (1st Cir. 1983). To further this purpose, 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." *Bd. of Trustees of W. Conference of Teamsters Pension Trust Fund* v. *H.F. Johnson Inc*., 830 F.2d 1009, 1013 (9th Cir. 1987). *See also Mason & Dixon Tank Lines, Inc*. v. *Cent. States, Se. & Sw. Areas Pension Fund*, 852 F.2d 156, 159 (6th Cir. 1988) ("As the House and Senate Reports indicate, 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."); *UFCW Local One Pension Fund* v. *Enivel Properties, LLC*, 791 F.3d 369, 371 (2d Cir. 2015) ("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."). 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." *Sun Capital*, 724 F.3d at 138. Indeed, other business organizations under common control can share in withdrawal liability even if there is no "economic nexus" between the various organizations. *Cent. States, Se. & Sw. Areas Pension Fund* v. *Fulkerson*, 238 F.3d 891, 895 n.1 (7th Cir. 2001). The requirement of "common control," as further defined in the regulations, both expresses disregard of organizational

formalisms under the MPPAA and serves to limit the reach of withdrawal liability.

The regulations, in contrast, impose a "brightline" test for control based on ownership shares. *Pension Ben. Guar. Corp*. v. *E. Dayton Tool & Die Co*., 14 F.3d 1122, 1126 (6th Cir. 1994). Necessarily, these regulations assert an attention to organizational forms: in determining whether a particular organization is 80 percent owned by another, some reference to individual entities is required. It is not quite fully resolved whether this brightline ownership-based test is *always* determinative of common control, *see id.* (addressing whether "actual control" is sometimes relevant instead), but the parties agree that it governs this dispute.

The use of a brightline ownership-based test is in some tension with the purposive approach of the MPPAA. The statute anticipates disregarding business entity formalities and preventing responsible parties from contracting around withdrawal liability. As the First Circuit delicately stated, Congress "has not been explicit" in allowing investors in distressed companies to avoid ERISA withdrawal liability and "may prefer instead to rely on the usual pricing mechanism in the private market for assumption of risk." *Sun Capital*, 724 F.3d at 148.

In contrast, the 80 percent ownership rule appears to provide a roadmap for exactly how to contract around withdrawal liability. In this case, for example, the Funds forthrightly admit that an important

purpose in dividing ownership of portfolio companies between multiple funds is to keep ownership below 80 percent and avoid withdrawal liability. *Sun Capital*, 903 F. Supp.2d at 121. This tension is only heightened when LLCs are employed. The regulations look to ownership to determine control, but in LLCs (as with the LLCs used here) ownership can be divorced from effective managerial control. The statute requires that these regulations be "consistent and coextensive" with tax regulations, 29 U.S.C. § 1301(b), and arguably these tensions stem irremediably from differences between the goals of the MPPAA and the formalisms of the tax code. The difficulties of applying the current scheme suggest that the relevant political actors should consider whether their enactments can be better harmonized by statute and/or regulation.[10]

[10] No doubt due to these tensions, some courts look to both ownership and managerial control, if not as a matter of doctrinal analysis then at least as an atmospheric factor. *See*, *e.g.*, *Plumbers & Steamfitters Local No. 150 Pension Fund* v. *Custom Mech. CSRA, LLC*, No. CV 107-142, 2009 WL 3294793, at *4 (S.D. Ga. Oct. 13, 2009) (noting that firms were "both exclusively owned and completely controlled" by same three entities and looking at management structure in addition to ownership structure to determine "common control"); *Cent. States, Se. & Sw. Areas Pension Fund* v. *Skyland Leasing Co*., 691 F. Supp. 6, 11-12 (W.D. Mich. 1987) *aff'd sub nom*. *Cent. States, Se. & Sw. Areas Pension Fund* v. *Skyland Leasing*, 892 F.2d 1043 (6th Cir. 1990) ("In determining employer status, mechanical interpretation and application of the relevant provisions of the MPPAA must be avoided to ensure that the statutes' legislative purposes are achieved.")

B. The Relevance of the LLC

Both parties agree that Sun Fund III and Sun Fund IV formed a jointly controlled business entity. They disagree, however, about what form that jointly controlled entity has taken. The Sun Funds contend that this joint entity is fully and exclusively embodied in the limited liability corporation formed for the very purpose of investing in Scott Brass, Inc., that is, Sun Scott Brass, LLC. The Pension Fund, on the other hand, contends the record discloses the existence of a joint venture or partnership formed by the Sun Funds that is antecedent to the existence of Sun Scott Brass, LLC and sits above it in the Scott Brass ownership structure. If such a joint venture or partnership existed, it would have complete ownership of Sun Scott Brass, LLC, be commonly controlled with Scott Brass, Inc., and, if it is also a trade or business, pass withdrawal liability on to the Sun Funds as its partners.

The Sun Funds' preliminary argument is that the funds intentionally adopted the limited liability company form as the vehicle for their investment in Scott Brass, Inc. and this court should respect those organizational formalities as such. I find this argument insufficient. The MPPAA is a statute that allows for, and may in certain circumstances require, the disregard of such formalities. The question of organizational liability is not answered simply by resort to organizational forms, but must instead reflect the economic realities

of the business entities created by the Sun Funds for their acquisition of Scott Brass, Inc. [11]

Moreover, the Funds' withdrawal liability is a matter of federal substantive law under ERISA and the state law of business organizations is relevant only for guidance and as incorporated into federal law. *H.F. Johnson Inc*., 830 F.2d at 1014. Thus, in the closely-related area of tax law, where the same regulations and definitions are at issue,[12] courts have been clear that the choice of organizational form under state law is not determinative of treatment under federal law. Even where an express agreement is determinative under state law, "such an agreement is but one factor in determining whether a partnership exists for tax purposes." *Estate of Kahn* v. *Commissioner*, 499 F.2d 1186, 1189 (2d Cir. 1974). The many cases cited by Plaintiffs which suggest that certain organizational forms – whether LLCs or corporations – are per se incompatible with

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[11] In a related theme, the Sun Funds argue that they cannot be held to have created a joint venture to acquire Scott Brass because they specifically intended instead to form a limited liability company, as demonstrated by the organizational documents of Sun Scott Brass, LLC and the LP Agreements. The relevant intent, however, must be something more than an intent to realize the benefits of a given organizational form. Put simply, 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 or joint venture that owns the Scott Brass business.

[12] Of course, interpretations of tax provisions are not always applicable in the ERISA context, even for identical terms. *Sun Capital*, 724 F.3d at 144-45.

status as a partnership or joint venture all do so as a matter of state law and are not dispositive of the question of MPPAA withdrawal liability under federal law.[13]

Not only the general purpose of the MPPAA but also the facts of this case support looking past the Sun Funds' choice to employ the LLC structure in assessing their withdrawal liability. According to plaintiffs, Sun Scott Brass, LLC was a "passive holding company" for Scott Brass Holding Company. It had no employees and did not own or lease offices or equipment. In contrast, the First Circuit found that the Sun Funds were "intimately involved in the management and operation" of Scott Brass. *Sun Capital*, 724 F.3d at 142. The LLC 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. Under the MPPAA framework, which looks past the formal separation of entities, it is not clear why there should be any difference if the Sun Funds invest in Scott Brass, Inc. directly, invest

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[13] In my earlier opinion in this case, I discussed the applicability of state law "[i]n the absence of supervening federal authority." *Sun Capital*, 903 F.Supp.2d at 119. That discussion concerned the Funds liability as partners *apart* from statutory liability under the MPPAA, which had been addressed in a previous section. When applying state law, I held that the Sun Funds were not responsible for the withdrawal liability of Sun Scott Brass, LLC. *Id.* Contrary to plaintiff's suggestion, this was not a "'common control' argument." At the time, I wrote that "I do not reach, nor do I decide, the issue of 'common control'" under the MPPAA. *Id.*

through an intermediary holding company, or invest through both an intermediary holding company and an intermediary LLC. *Cf. Sun Capital*, 724 F.3d at 148 ("The various arrangements and entities meant precisely to shield the Sun Funds from liability may be viewed as an attempt to divvy up operations to avoid ERISA obligations.").

A determination to aggregate ownership interests across formally separate business entities is strengthened by a comparison to Sun Fund III. That Fund is actually two formally entities – Sun Capital Partners III, LP and Sun Capital Partners III QP, LP – which operate as "parallel funds." The two Sun Fund III parallel funds share a general partner and invest together at a fixed proportion. However, they have different limited partners and filed separate partnership tax returns. Both the Court of Appeals and I have treated these parallel funds as "one fund" given their close connection and general pattern of investing together in a fixed proportion. Sun Capital, 724 F.3d at 134 n.3. The plaintiff funds, without conceding that parallel funds are under common control for MPPAA purposes, have nevertheless proceeded to discuss their ownership interests in those two parallel funds as aggregated in their arguments.

That ownership interests sometimes can be aggregated across parallel funds illustrates why, as a general proposition, they sometimes can be aggregated across non-parallel funds. All the Sun Funds, whether parallel or not, were formally independent entities with separate owners but ultimately made their

investment and business decisions under the direction of Leder and Krouse. The most important difference between parallel and non-parallel funds is whether co-investments are made according to a fixed or variable ratio: a distinction that is functional rather than formal and, when dealing with joint ventures or partnerships of limited scope, is highly fact-sensitive. This is not to say that all parallel funds are partnerships, much less that all non-parallel funds are. Rather, the comparison of parallel and non-parallel funds reveals that the distinction proves relatively little. Organizational formalities do not resolve the questions of joint operation that tax law emphasizes in recognizing partnerships, whether those formalities delineate separate parallel or non-parallel funds. Consequently, I turn to the substance of the Sun Funds' relationship with each other and with Scott Brass to determine whether a partnership exists under federal law.

C. Federal Partnership Law

Whether a partnership or joint venture exists in this context between the Sun Funds is a matter of federal law. The Internal Revenue Code provides the relevant definition of a partnership:

> The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term 'partner' includes a

> member in such a syndicate, group, pool, joint venture, or organization.

26 U.S.C. § 7701(a)(2). The Supreme Court has interpreted this provision by providing a guide for how to determine the existence of a partnership for tax (and MPPAA) purposes.

> A partnership is generally said to be created when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits and losses. When the existence of an alleged partnership arrangement is challenged by outsiders, the question arises whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both. And their intention in this respect is a question of fact, to be determined from testimony disclosed by their agreement, considered as a whole, and by their conduct in execution of its provisions.

Commissioner v. Tower, 327 U.S. 280, 286-97 (1946). Subsequent cases have further elaborated the factors to which courts should turn in determining the existence of a partnership. In *Commissioner* v. *Culbertson*, the Supreme Court identified whether "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise" as the ultimate inquiry and required factfinders to look at "the agreement, the conduct of the parties in execution of its provisions, their statements, the

testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent" in determining that intent. *Commissioner* v. *Culbertson*, 337 U.S. 733, 742 (1949).

The Tax Court has pointed to a long list of factors as relevant in determining whether a partnership exists:

> The agreement of the parties and their conduct in executing its terms; the contributions, if any, which each party has made to the venture; the parties' control over income and capital and the right of each to make withdrawals; whether each party was a principal and coproprietor, sharing a mutual proprietary interest in the net profits and having an obligation to share losses, or whether one party was the agent or employee of the other, receiving for his services contingent compensation in the form of a percentage of income; whether business was conducted in the joint names of the parties; whether the parties filed Federal partnership returns or otherwise represented to respondent or to persons with whom they dealt that they were joint venturers; whether separate books of account were maintained for the venture; and whether the parties exercised mutual control over and assumed mutual responsibilities for the enterprise.

Luna v. *Commissioner*, 42 T.C. 1067, 1077-78 (1964).

A joint venture is similar to a partnership, but is "generally established for a single business venture . . . while a partnership is formed to carry on a business for profit over a long period of time." *Podell* v. *Commissioner*, 55 T.C. 429, 432 (1970). The *Luna* factors, and the ultimate inquiry into the parties' intent, is the same for joint ventures as for partnerships. *Luna*, 42 T.C. at 1077. Whether the Sun Funds formed what might be characterized as a joint venture with respect to Sun Brass or a partnership in which Sun Brass is one of several joint investments by the Funds is not material. I will continue my analysis through the partnership lens for discussion purposes.

D. Application of Partnership Factors

Applying the above-mentioned factors, it is clear that no partnership-in-fact exists between the Sun Funds that covers all their activities and investments. The Sun Funds are closely affiliated entities and part of the larger ecosystem of Sun Capital entities created and directed by Marc Leder and Rodger Krouse. *Sun Capital*, 724 F.3d at 133. Leder and Krouse, acting as the limited partner committees of the general partners of each Fund, retain substantial control over both Funds. *Id.* at 134-35. The Funds have identical language in their partnership agreements and are operated similarly. *Sun Capital*, 903 F.Supp.2d at 110.

Of course, individuals may create multiple businesses, using the same strategy, without necessarily putting all their enterprises into partnership with

each other. And looking superficially, there is nothing that evidences an intent that Sun Fund III and IV be joined together as a general rule. The Funds filed partnership tax returns and filed them separately. Sun Fund III and Sun Fund IV have separate financial statements, separate reports to their partners, separate bank accounts, largely non-overlapping sets of limited partners, and largely non-overlapping portfolios of companies in which they have invested. When they co-invested, as in Sun Scott Brass, LLC, their agreements disclaimed any intent to form a partnership or joint venture. The conventional theories of a general partnership – those that on the face reflect operational and institutional overlap between the Funds – are not evident here.

A more limited partnership or joint venture, however, is nevertheless to be found, based on the present record. The Sun Funds are not passive investors in Sun Scott Brass, LLC, brought together by happenstance, or coincidence. Rather, the Funds created Sun Scott Brass, LLC in order to invest in Scott Brass, Inc. Between 2005 and 2008, Sun Funds III and Sun Funds IV also coinvested in five other companies, using the same organizational structure. In each case, they expressly disclaimed any intent to form a partnership or joint venture, a fact that remains relevant – but not dispositive – as to whether a partnership-in – fact was created. More importantly, prior to entity formation and purchase, joint activity took place in order for the two Funds to decide to coinvest, and that activity was plainly intended to constitute a partnership-in-fact.

In its opinion in this case, the First Circuit observed that "It is the purpose of the Sun Funds to seek out potential portfolio companies that are in need of extensive intervention with respect to their management and operations," and that in this connection "[i]n 2006, the Sun Funds began to take steps to invest in SBI." *Sun Capital*, 724 F.3d at 142. I do not suggest that the court's description of the Sun Fund III and Sun Fund IV acting in concert as the "Sun Funds" in itself represents a prior judicial finding that a partnership existed. But the court's opinion shows how difficult it can be to speak sensibly of the business model of Sun Fund III and Sun Fund IV without describing them as acting together or in concert with respect to specific investments. The period of joint action evident in the First Circuit's observation covers at least the period before the Funds completed the acquisition of a portfolio company through an LLC and holding company and would appear to extend through the operation of those LLCs and portfolio companies.

Notably, the Funds made a conscious decision to split their ownership stake 70/30 for reasons that demonstrate the existence of a partnership. The Funds assert three motivations for this split: that Sun Fund III was nearing the end of its investment cycle while Sun Fund IV was earlier in its own cycle, a preference for income diversification, and a desire to keep each Fund below 80 percent ownership to avoid withdrawal liability. With the exception of income diversification, which two truly independent entities could also pursue in parallel but on their own, these goals are instinct

with coordination and show joint action. The record shows that the 70/30 split does not stem from two independent funds choosing, each for its own reasons, to invest at a certain level. Rather, these goals stem from top-down decisions to allocate responsibilities jointly. Entities set up with rolling and overlapping lifecycles and coordination during periods of transition offer advantages to the Sun Funds group as a whole, not just to each Fund. And the choice to organize Sun Scott Brass, LLC, so as to permit each of the Sun Funds coinvesting to remain under 80 percent ownership, is likewise a choice that shows an identity of interest and unity of decisionmaking between the Funds rather than independence and mere incidental contractual coordination. A separate entity which is perhaps best described as a partnership-in-fact chose to establish this ownership structure and did so to benefit the plaintiff Sun Funds jointly.

The two Funds were organizationally separate – and this remains important under *Culbertson* and *Luna* – but the record shows no meaningful evidence of actual independence in their relevant co-investments. The Funds have not indicated, for example, that they sometimes co-invested with each other but sometimes co-invested with other outside entities. Neither has evidence been adduced of disagreement between Sun Fund III and Sun Fund IV over how to operate the LLC, as might be expected from independent members actively managing and restructuring an industrial concern. The smooth coordination is indicative of a

partnership-in-fact sitting atop the LLC: a site of joining together and forming a community of interest.

Given the record before me, 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. The record is not clear on the precise scope of their partnership or joint venture – which portfolio companies were covered, the date on which the relevant partnership or joint venture was formed, and so forth – but it is clear beyond peradventure that a partnership-in-fact existed sufficient to aggregate the Funds' interests and place them under common control with Scott Brass, Inc.

The only other court to address "common control" in a similar organizational structure found the structure to be compatible with a partnership for MPPAA purposes. *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund* v. *Palladium Equity Partners, LLC*, 722 F. Supp. 2d 854 (E.D. Mich. 2010). To be sure, the *Palladium* court believed it required additional factfinding before it could reach a determination on the partnership issue, and the case settled before that factfinding could be completed, but a comparison to that case is instructive in understanding the legal framework to be employed.

In *Palladium*, a plaintiff pension fund sued three private equity funds over withdrawal liability under the MPPAA. The private equity funds, with disclaimers of any intent to form a partnership, had invested in

a group of industrial painting companies that had gone bankrupt and withdrawn from a multi-employer pension plan. *Id.* at 857. Together these three Palladium funds owned well over 80 percent of the bankrupt companies – enough for common control – but none individually owned more than 57 percent. *Id.* at 859. The court held that it could not determine whether the three funds were a joint venture or partnership as a matter of law and denied cross-motions for summary judgment. *Id.* at 867, 875.

There are many similarities between the Palladium funds and the Sun Funds, although the Palladium structure is at all points somewhat less complex. And put simply, the Palladium Funds observed most of the same organizational formalisms as the Sun Funds. But this was not enough to keep them from being a partnership under the statute. The Palladium court was clear that as a matter of law, partnership-in-fact and common control can be found even across formally fully independent entities.[14]

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[14] The Sun Funds contend that the Palladium facts presented stronger evidence for partnership than exists here and identify two important distinctions between this case and that one. I find neither distinction sufficient for the plaintiffs here to overcome summary judgment.

First, unlike the Sun Funds, the Palladium funds invested directly in the portfolio companies through the purchase of stock. They did not form an LLC in which they were members. I do not find this distinction of any great importance in the context of the MPPAA: it is the substance of the Funds' activities, not the number of entities they placed between themselves and the actual

In this case, the record clearly shows the Sun Funds, despite the lack of a permanently fixed co-investment ratio, joining together as a partnership to invest in and manage certain of their shared portfolio companies, in particular Scott Brass, Inc. I conclude the plaintiffs are under common control with Scott Brass, Inc.

E. Is the Partnership a Trade or Business?

Even where a partnership is recognized, it is not responsible for withdrawal liability unless it is a "trade or business." *Sun Capital*, 724 F.3d at 138. Whether an

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employees covered by unfunded pensions, that determines whether a partnership existed.

Second, the Palladium Funds were operated as "parallel funds." The limited partnership agreement of their shared General Partner stated that the funds were to invest proportionately in their investments. The Palladium Funds in essence provided the same investments to different investors. In contrast, Sun Fund III and Sun Fund IV were not parallel funds. Of the 43 LLCs in which Sun Fund III held an interest and the 52 LLCs in which Sun Fund IV did, only seven overlapped. There is no indication that those seven investments were made in fixed proportion. Clearly, Sun Fund III and Sun Fund IV operated more independently than parallel funds, including the funds in Palladium, and had they been operated as parallel funds, it would surely have further strengthened any finding of partnership.

But whether funds are parallel or not does not necessarily determine whether they are a partnership, though it might frequently prove relevant. While acting in parallel could be one way for private equity funds to form a partnership, it is not the only way. This is particularly true for partnerships or joint ventures with limited purposes; two funds which were operated separately could operate jointly for a period of time or with regard to a particular set of investments.

entity is a trade or business is a "very fact-specific" inquiry without any single dispositive factor. *Id.* at 141. Given the substantial overlap between the features of the Sun Funds which the First Circuit found to make them trades or businesses and the activities of what I find to be the partnership-in-fact between them, I find their partnership-in-fact to be a trade or business as a matter of law as well.

The Pension Fund points to the acts of the two Sun Funds as constituting the nature of the partnership, in the manner of DNA. But it is well-settled that whether a partnership is a "trade or business" must be resolved at the partnership level, not by looking at the partners. *See Brannen* v. *Commissioner*, 722 F.2d 695, 703 (11th Cir. 1984) (citing *Madison Gas & Electric Co*. v. *Commissioner*, 72 T.C. 521 (1974), *aff'd*, 633 F.2d 512 (7th Cir. 1980) and *Goodwin* v. *Commissioner*, 75 T.C. 424 (1980), *aff'd without published opinion*, 691 F.2d 490 (3d Cir. 1982)). Determining whether the partnership is a trade or business requires distinguishing between acts taken by the partnership and those taken by the partners acting alone.

For their part, the Sun Funds argue that the partnership could not be a trade or business because it would merely be a passive investor, the only purpose of which was to hold the Funds' investment in an LLC. They claim that because the Sun Funds were found to have been actively managing their portfolio companies – because they were trades or businesses – there was no active work left for the partnership to do. This argument, too, misunderstands the nature of the

partnership. A partnership exists because the Sun Funds carried on their individual trades and businesses together, as a factual matter. I did not recognize the existence of a partnership between the Sun Funds because, as the plaintiffs suggest, the Funds created a partnership "solely to enable the TPF to hold the Sun Funds liable and nothing more than that." In the absence of an express partnership agreement, it is the conduct of the Funds that gives rise to a partnership, and it is that conduct which shows the purposes of the partnership itself. A partnership is not the sum of all its partners' actions, as the Pension Fund would have it, but it is also not an empty box excluding all the acts of its partners, as the Sun Funds suggest. Whether a partnership is a trade or business is a finer-grained and more fact-specific inquiry than either party suggests.

It is clear from the undisputed facts that the plaintiffs' partnership-in-fact here is a trade or business under the First Circuit's analysis. Like the Sun Funds, the partnership's purpose is to make a profit, an important factor in determining "trade or business" status, although an insufficient one. *Sun Capital*, 724 F.3d at 141-42. Additionally, the partnership was involved in the active management of the portfolio companies that the First Circuit found critical. For example, the First Circuit found it important that the Sun Funds' purpose is "to seek out potential portfolio companies that are in need of extensive intervention" and that "restructuring and operating plans are developed for a target portfolio company even before it is acquired." *Id.*

at 142. This period of joint investigation and action prior to the formation of an LLC is central to the work of the partnership itself – it is an important piece of why I find a partnership-in-fact to exist – and so is highly indicative of that partnership being a trade or business. Likewise, the First Circuit noted that "the Sun Funds were able to place employees of Sun Capital Advisors, Inc. in two of the three director positions at Scott Brass, Inc., resulting in Sun Capital Advisors employees controlling the SBI board." *Id.* at 143. This indicates a joint effort to control Scott Brass, Inc., through Sun Capital Advisors, rather than independent efforts to exert control through, for example, one seat on the board for each Fund.

It is of course true, as the plaintiffs insist, that the partnership received no "direct economic benefit" on top of the benefits received by the Sun Funds. Since the partnership was not a formally constituted entity, it could not have done so. But this proves too much. It would suggest that no partnership recognized from actions rather than express agreements could be a trade or business, a conclusion at odds with the substantial body of law finding precisely such partnerships to be trades and businesses. *See*, *e.g.*, *Connors* v. *Ryan's Coal Co.*, 923 F.2d 1461, 1467 (11th Cir. 1991). The "direct economic benefit" factor addresses not whether the partnership itself retained the benefits of its activities, as opposed to passing them along to its partners, but rather whether its activities were intended to generate compensation that "an ordinary, passive investor would not derive." *Sun Capital*, 724 F.3d at 143. The

partnership's active management in pursuit of profits from restructuring was not mere passive investment but something more. For precisely the same reasons as the Sun Funds are trades or businesses, the partnership or joint venture formed between them is so as well.

Because the plaintiffs' partnership-in-fact is a trade or business and is in common control with Scott Brass, Inc., it is responsible for the withdrawal liability. As a result, the plaintiff Sun Funds are jointly and severally responsible for that liability as well.

III. CONCLUSION

For the reasons set forth more fully above, Plaintiffs' Renewed Motion for Summary Judgment, Dkt. No. 130, is DENIED, Defendant's Motion for Summary Judgment, Dkt. No. 82, is RECONSIDERED and now GRANTED, and the Clerk is directed to enter judgment for the Defendants.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

[Appendix Omitted]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

<table>
<tr><td>SUN CAPITAL PARTNERS III, LP, SUN CAPITAL PARTNERS III QP, LP, and SUN CAPITAL PARTNERS IV, LP,

Plaintiffs/
Counter-Defendants,

v.

NEW ENGLAND TEAMSTERS AND TRUCKING INDUSTRY PENSION FUND,

Defendant/
Counter-Plaintiff,

v.

SCOTT BRASS HOLDING CORP., and SUN SCOTT BRASS, LLC,

Third-Party Defendants.</td><td>CIVIL ACTION NO.
10-10921-DPW</td></tr>
</table>

FINAL JUDGMENT

March 28, 2016

In accordance with the Memorandum and Order issued this day under direction of the remand from the United States Court of Appeals for the First Circuit, *Sun Capital Partners III, L.P., et al* v. *New England Teamsters & Trucking Industry Pension Fund*, 724 F.3d 129 (1st Cir. 2013), *see also id*. at 132 n.1 (noting that while default judgment had entered against the third-

party defendants, defendant/counter plaintiff had abandoned its claims against those parties), judgment is granted to the Defendant/Counter-Plaintiff and it is HEREBY

DECLARED, ADJUDGED and DECREED:

That the plaintiffs Sun Capital Partners III, LP, Sun Capital Partners III QP, LP and Sun Capital Partners IV, LP are jointly and severally liable for the pro rata share of unfunded vested benefits owed to the defendant multiemployer pension fund by Sun Brass, Inc.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

Nos. 16-1376
19-1002

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

Plaintiffs, Appellants,

v.

NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND,

Defendant, Third Party Plaintiff, Appellee,

SCOTT BRASS HOLDING CORP.; SUN SCOTT BRASS, LLC,

Third Party Defendants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS,

[Hon. Douglas P. Woodlock, U.S. District Judge].

Howard, Chief Judge,
Torruela, Stahl, Lynch
Lipez, Thompson
Kayatta and Barron

Circuit Judges.

ORDER OF COURT

Entered: March 13, 2020

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Theodore Joel Folkman
Jeffrey S. Quinn
John F. Hartmann
John C. O'Quinn
Catherine M. Campbell
Renee J. Bushey
Melissa Ann Brennan
Craig T. Fessenden

Office of Chief Counsel
Internal Revenue Service
memorandum

Number: **201323015**
Release Date: 6/7/2013

CC:PSI:B03: Third Party Communication: None

POSTF-139044-12 Date of Communication: Not Applicable

UILC: 199.00-00, 761.01-00, 7701.02-02

date: February 21, 2013

to: Associate Area Counsel (, Group 2)
(Large Business & International)

from: James A. Quinn
Senior Counsel, Branch 3
(Passthroughs & Special Industries)

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subject: Whether Collaboration is a Partnership and Section 199 Consequences

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

A =

B =

C =

State =

Date 1 =

Date 2	=
Year 1	=
Year 2	=
Year 3	=
Product	=
a	=
b	=

ISSUES

1. Is the collaboration between A and B a partnership for federal tax purposes?

2. If the collaboration is a partnership, is it eligible to elect to be excluded from the application of subchapter K under § 761(a) of the Internal Revenue Code (Code) and § 1.761-2 of the Income Tax Regulations?

3. If the collaboration is a partnership and the partnership produces Product in whole or in significant part within the United States within the meaning of § 199(c)(4)(A)(i)(I), how does A claim the domestic production activities deduction under § 199 with respect to the gross receipts derived by the partnership from the sale of Product?

CONCLUSIONS

1. The collaboration is a partnership for federal tax purposes.

2. The collaboration is not eligible to elect to be excluded from the application of subchapter K under § 761(a) and § 1.761-2.

3. As a partner in C, A claims the § 199 deduction at the partner level under § 199(d)(1)(A) by including its allocable share of each item described in § 199(c)(1)(A) and (B) for its separate § 199 calculation. Section 1.199-5(b)(1) provides C should allocate A its allocable share, in accordance with §§ 702 and 704, of C's items (including items of income, gain, loss, and deduction), cost of goods sold allocated to such items of income, and gross receipts that are included in such items of income. Furthermore, under § 199(d)(1)(A)(iii) and § 1.199-5(b)(3), A's share of amounts described in § 1.199-2(e)(1) (Paragraph (e)(1) wages) of C for purposes of determining A's W-2 wage limitation under § 199(b)(1) equals A's allocable share of those wages.

FACTS

A, a State corporation, and B, a State corporation, entered into a written Collaboration Agreement ("Agreement") dated Date 1 (such arrangement between the two entities referred to herein as C), relating to the development and commercialization of Product.

In the Agreement, A granted to B rights to co-promote Product in the United States and Canada and to develop and market it in the rest of the world.[1]

A was responsible for the

and was

solely responsible for the

Until A received in Date 2, A bore all of the costs for development and obtaining Prior to the Agreement, A not only developed the

but also working that are critical to the

production of Product. A was responsible for the

Soon after signing the Agreement, A transferred to B

and transferred to B and provided

B, at its own expense, worked on

The parties charged all development costs incurred for development or marketing in the United States or Canada against the operating profits of the collaboration.

According to the Agreement, A and B each agree to collaborate diligently in the development of Product and to use commercially reasonable and diligent efforts to develop and bring Product to market in Each party

[1] The Agreement provides for the parties' arrangement in the This CCA only addresses the arrangement in

also agrees to collaborate in the commercialization of Product in the

in a manner to maximize operating profits, with B playing the primary role.

The Agreement establishes committees that are in charge of the management and finances of the collaboration, as well as the development and commercialization of Product. Each committee is comprised of representatives appointed in equal numbers by A and B.

In the United States and Canada, the parties share in the collaboration's profits and losses. A and B will share in the first $a in operating profits, % and %, respectively, then % and %, respectively, of operating profits in excess of $a. To the extent there is an operating loss, such loss is absorbed % by A and % by B.

Under the Agreement, A and B maintain complete and accurate records that are relevant to costs, expenses, sales, and payments. Both parties incur expenses, including

Each , A submits its records to B so B can calculate the collaboration's profits and losses. B subsequently determines if any true ups are necessary, and then typically pays A for its allocable share of profits and losses.

There are accruals and reserves that A and B jointly share.

This accrued expense was deducted for financial accounting purposes in arriving at the collaboration's profit in Year 3 and A's share of the profit was reduced by % of this expense.

A and B sell Product in under trademarks selected by the and owned jointly by A and B. All inventions made under the Agreement jointly by employees of A and B will be owned jointly by A and B. All documentary information, promotional materials, and oral presentations regarding the promotion of Product displayed the names and logos of A and B. Apart from these instances, the Agreement does not grant the right to use in any manner the name A, B or any other trade name or trademark of the other party, or of its affiliates in connection with the performance of the Agreement.

A and B did not file a Form 1065, U.S. Return of Partnership Income, for C for any taxable year or file a written election under § 761(a) of the Internal Revenue Code meeting the requirements in the regulations to elect out of subchapter K. Although the Agreement does not indicate A and B's intent on whether C should be treated as a partnership for federal tax purposes, side agreements included provisions that stated their intent that their relationship is not to be treated as a partnership, agency, employer-employee, or joint venture.

Although A initially treated amounts from B as royalty payments, A is now claiming the amounts from B should be included in A's calculation of qualified

production activities income under § 199(c)(1). A has not received information from C that would allow A to calculate the § 199 deduction separately.

LAW AND ANALYSIS

ISSUE 1:

Section 7701(a)(2) provides that the term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of title 26, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

Section 301.7701-1(a)(2) of the Procedure and Administration Regulations provides that a joint venture or other contractual arrangement may create a separate entity for federal tax purposes if the participants carry on a trade, business, financial operation, or venture and divide the profits therefrom. Section 301.7701-1(a)(2) also provides that a joint undertaking merely to share expenses does not create a separate entity for federal tax purposes. For example, if two more persons jointly construct a ditch merely to drain surface water from their properties, they have not created a separate entity for federal tax purposes.

Section 301.7701-1(b) provides that the classification of organizations that are recognized as separate entities is determined under §§ 301.7701-2, 301.7701-3,

and 301.7701-4 unless a provision of the Code provides otherwise.

Section 301.7701-2(c) provides that the term "partnership" means a business entity that is not a corporation under § 301.7701-3(b) and that has at least two members.

The Supreme Court in Commissioner v. Culbertson, 337 U.S. 733, 69 S.Ct. 1210, 93 L.Ed. 1659 (1949), provided the foundation for determining when a partnership exists for federal tax purposes. The Supreme Court stated that a partnership exists for federal tax purposes under the following circumstances:

> "considering all the facts- the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent- the parties in good faith and acting with a business purpose intend to join together in the present conduct of an enterprise."

The principles of Culbertson equally apply where the kind of partnership is an alleged joint venture. Luna v. Commissioner, 42 T.C. 1067, 1077, 1964 WL 1259 (1964). In Luna, the Tax Court provided the following list of factors, none of which is conclusive, which bear on the issue of whether a joint venture exists:

> "[1] The agreement of the parties and their conduct in executing its terms; [2] the contributions,

> if any, which each party has made to the venture; [3] the parties' control over income and capital and the right of each to make withdrawals; [4] whether each party was a principal and coproprietor, sharing a mutual proprietary interest in the net profits and having an obligation to share losses, or whether one party was the agent or employee of the other, receiving for his services contingent compensation in the form of a percentage of income; [5] whether business was conducted in the joint names of the parties; [6] whether the parties filed Federal partnership returns or otherwise represented to the [IRS] or to persons with whom they dealt that they were joint venturers; [7] whether separate books of account were maintained for the venture; and [8] whether the parties exercised mutual control over and assumed mutual responsibilities for the enterprise."

The regulations under §§ 301.7701-1 and 301.7701-2 require that in order for a joint venture to be considered a partnership, it must not be a corporation, must have at least two members, and cannot be a joint undertaking merely to share expenses. In this case, C is not a corporation described in § 301.7701-2(b). Additionally, if C were considered a partnership for federal tax purposes, it would be comprised of two members, A and B. Finally, A and B did not join together to merely share expenses, but used each other's unique know-how to make a profit from selling Product. Thus, C is eligible to be classified as a partnership for federal tax purposes.

However, A and B did not file a Form 1065 for the collaboration for any taxable year or file a written § 761(a) election meeting the requirements in the regulations to elect out of subchapter K; thus they did not formally indicate to the IRS that the collaboration is a partnership for federal tax purposes. Although the Agreement does not indicate A and B's intent on whether their collaboration should be treated as a partnership for federal tax purposes, side agreements included provisions that stated their intent that their relationship is not to be treated as a partnership, agency, employer-employee, or joint venture. Even if A and B intended not to be treated as a partnership, it will nevertheless be held to exist if the agreements and conduct of the parties plainly show the existence of such a relationship. Haley v. Commissioner, 203 F.2d 815 (5th Cir. 1953). As a result, we must analyze whether a partnership exists under the principles set forth in Culbertson and Luna. The Supreme Court in Culbertson held that the determination of whether two or more parties create a partnership looks at whether they in good faith and acting with a business purpose intended to join together in the present conduct of a business. The Tax Court in Luna elaborated on the Culbertson standard by identifying eight factors that aid in the determination of whether a partnership exists for federal tax purposes.

Five of the eight Luna factors support the conclusion that the joint venture is a partnership. First, A and B entered into the Agreement and have not deviated from its terms during the taxable years at issue.

Second, both parties contributed cash and services to the venture. A and while B helped with the development, marketing, and sale of the Third, A and B are sharing in the profits and losses of their operation. Although there is a royalty payment B pays A on sales of Product outside of the the Agreement provides profit and loss ratios for sales inside of the two countries. Fourth, both parties maintain records of their respective revenue and expenses. B combines A's amounts with its own to calculate the collaboration's profits and losses each quarter. Lastly, both parties exercised mutual control and assumed mutual responsibilities for the enterprise. Both parties had equal representation on the Committee, which determined how to manage the venture, and how to develop and commercialize Product.

The sixth Luna factor weighs against the conclusion that the collaboration is a partnership. C never filed any partnership returns. In addition, A has reported B's payments to it as royalty income, which is not representative of the parties treating their venture as a partnership.

Two of the Luna factors are neutral. Evidence regarding the third Luna factor is mixed because both parties had control of the income and the capital through the If either party had an issue with the accounting, it could bring the issue to the Because the consists of an equal number of representatives from A and B, it would presumably make an unbiased conclusion.

However, neither party had the right to make withdrawals because the parties did not share a bank account. Also, the Agreement was silent on whether A or B could make withdrawals.

The fifth Luna factor is also not conclusive. Documentary information, promotional materials, and oral presentations regarding the promotion of Product displayed the names and logos of A and B. The Agreement, however, provides that neither party has the right to use the name of the other in connection with performance of the Agreement. Further, there is no evidence A and B use the name, C, in their dealings with third parties. The Agreement uses C for identification purposes only and is not a legal entity.

In weighing the Luna factors, we do not treat any one factor as determinative, but we consider and weigh each factor in the overall determination of whether a joint venture exists. 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.

ISSUE 2:

Section 761(a) provides that under regulations the Secretary may, at the election of all the members of the unincorporated organization, exclude such organization from the application of all or part of subchapter K, if it is availed of for the joint production, extraction, or use of property, but not for the purposes of selling services or property produced or extracted, if the income of the members of the organization may be adequately determined without the computation of partnership taxable income.

Section 1.761-2(a)(1) provides that an unincorporated organization described in §§ 1.761-2(a)(2) or (3) may be excluded from the application of all or a part of the provisions of subchapter K. Such organization must be availed of (i) for investment purposes only and not for the active conduct of a business, or (ii) for the joint production, extraction, or use of property, but not for the purpose of selling services or property produced or extracted. The members of such organization must be able to compute their income without the necessity of computing partnership taxable income. Any syndicate, group, pool, or joint venture which is classifiable as an association, or any group operating under an agreement which creates an organization classifiable as an association, does not fall within these provisions.

Section 1.761-2(a)(2) provides that where the participants in the joint purchase, retention, sale, or exchange of investment property—(i) Own the property as coowners, (ii) Reserve the right separately to take or

dispose of their shares of any property acquired or retained, and (iii) Do not actively conduct business or irrevocably authorize some person or persons acting in a representative capacity to purchase, sell, or exchange such investment property, although each participant may delegate authority to purchase, sell, or exchange his share of any such investment property for the time being for his account, but not for a period of more than a year, then such group may be excluded from the application of the provisions of subchapter K under the rules set forth in § 1.761-2(b).

Section 1.761-2(a)(3) provides that where the participants in the joint production, extraction, or use of property—(i) Own the property as co-owners, either in fee or under lease or other form of contract granting exclusive operating rights, (ii) Reserve the right separately to take in kind or dispose of their shares of any property produced, extracted, or used, and (iii) Do not jointly sell services or the property produced or extracted, although each participant may delegate authority to sell his share of the property produced or extracted for the time being for his account, but not for a period of time in excess of the minimum needs of the industry, and in no event for more than one year, then such group may be excluded from the application of the provisions of subchapter K of the Code.

Section 1.761-2(b)(2)(ii) provides that if an unincorporated organization described in §§ 1.761-2(a)(1) and either (a)(2) or (a)(3) does not make the election provided in § 761(a) in the manner prescribed by § 1.761-2(b)(2)(i), it shall nevertheless be deemed to have made

the election if it can be shown from all the surrounding facts and circumstances that it was the intention of the members of such organization at the time of its formation to secure exclusion from all of subchapter K beginning with the first taxable year of the organization.

C is not the type of unincorporated organization described in § 1.761-2(a)(1) because it fails to meet the requirements of §§ 1.761-2(a)(2) and 1.761-2(a)(3). Under § 1.761-2(a)(2), electing out of subchapter K as an investment partnership requires the joint purchase, retention, sale or exchange of investment property. Although the regulation does not define "investment property," Product is not the type of property that would meet this requirement. See e.g., §§ 148(b)(2) (definition of "investment property" for purposes of § 148) and 1.148-1(e) (definition of "investment-type property"). Additionally, C is not an investing partnership because it actively conducts the business of producing and selling Product. C fails the requirements set forth in § 1.761-2(a)(3)[2] because A and B jointly sell Product. Even if A and B did not sell Product jointly, A allowed B to sell Product Thus, because it does not meet the requirements of §§ 1.761-2(a)(2) or 1.761-2(a)(3), C is not eligible to elect out of subchapter K under § 1.761-2(b)(1) or be deemed to have elected out of subchapter K under § 1.761-2(b)(2)(ii).

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[2] Historically, this rule only applied to oil and gas or mineral extraction activities; but it is available to other types of production ventures as well. See Rev. Rul. 68-344, 1968-1 C.B. 569 (participants co-owned power generating facilities).

ISSUE 3:

Under § 199(a), the domestic production activities deduction is determined by applying a percentage to the lesser of the taxpayer's qualified production activities income (QPAI) or taxable income (determined without regard to the § 199 deduction). The applicable percentage is 3 percent for taxable years beginning in 2005 and 2006, 6 percent for taxable years beginning in 2007 through 2009, and 9 percent for taxable years beginning after 2009.

Section 199(b)(1) limits the deduction for a taxable year to 50 percent of the W-2 wages paid by the taxpayer during the calendar year that ends in such taxable year. Section 199(b)(2)(B) provides that W-2 wages does not include any amount which is not properly allocable to domestic production gross receipts (DPGR).

Under § 199(c)(1), QPAI means an amount equal to the excess (if any) of (A) DPGR for the taxable year, over (B) the sum of (i) cost of goods sold (CGS) allocable to such DPGR, and (ii) other expenses, losses, or deductions, which are properly allocable to such DPGR.

Section 199(c)(4)(A) provides the term DPGR means the gross receipts of the taxpayer which are derived from (i) any lease, rental, license, sale, exchange, or other disposition of (I) qualifying production property (QPP) which was manufactured, produced, grown, or extracted (MPGE) by the taxpayer in whole or in significant part within the United States.

Section 199(d)(1)(A) provides that, in the case of a partnership or S corporation, (i) § 199 shall be applied at the partner or shareholder level, (ii) each partner or shareholder shall take into account such person's allocable share of each item described in § 199(c)(1)(A) or (B) (determined without regard to whether the items described in § 199(c)(1)(A) exceed the items described in § 199(c)(1)(B)), and (iii) each partner or shareholder shall be treated for purposes of § 199(b) as having W-2 wages for the taxable year in an amount equal to such person's allocable share of the W-2 wages of the partnership or S corporation for the taxable year (as determined under regulations prescribed by the Secretary).

Section 1.199-5(b)(1)(i) provides that the deduction with respect to the qualified production activities of the partnership allowable under §1.199-1(a) (§ 199 deduction) is determined at the partner level. As a result, each partner must compute its deduction separately. Each partner is allocated, in accordance with §§ 702 and 704, its share of partnership items (including items of income, gain, loss, and deduction), CGS allocated to such items of income, and gross receipts that are included in such items of income, even if the partner's share of CGS and other deductions and losses exceeds DPGR (as defined in § 1.199-3(a)). A partnership may specially allocate items of income, gain, loss, or deduction to its partners, subject to the rules of § 704(b) and the supporting regulations. To determine its § 199 deduction for the taxable year, a partner aggregates its distributive share of such items, to the extent they are not otherwise disallowed by the Code, with those items

it incurs outside the partnership (whether directly or indirectly) for purposes of allocating and apportioning deductions to DPGR and computing its QPAI (as defined in § 1.199-1(c)).

Section 1.199-5(b)(3) provides that, under § 199(d)(1)(A)(iii), a partner's share of Paragraph (e)(1) wages of a partnership for purposes of determining the partner's wage limitation under § 199(b)(1) (W-2 wage limitation) equals the partner's allocable share of those wages. The partnership must allocate the amount of Paragraph (e)(1) wages among the partners in the same manner it allocates wage expense among those partners. The partner must add its share of the Paragraph (e)(1) wages from the partnership to the partner's Paragraph (e)(1) wages from other sources, if any. The partner (other than a partner that itself is a partnership or S corporation) then must calculate its W-2 wages by determining the amount of the partner's total Paragraph (e)(1) wages properly allocable to DPGR. If the partner is a partnership or S corporation, the partner must allocate its Paragraph (e)(1) wages (including the Paragraph (e)(1) wages from a lower-tier partnership) among its partners or shareholders in the same manner it allocates wage expense among those partners or shareholders. See § 1.199-2(e)(2) for the computation of W-2 wages and for the proper allocation of any such wages to DPGR.

Assuming that C produced Product in whole or in significant part within the United States within the meaning of § 199(c)(4)(A)(i)(I), then § 199(d)(1)(A)(i) and § 1.199-5(b)(1) require A to determine its § 199

deduction at the partner level. A must compute its § 199 deduction separately from B. Section 199(d)(1)(A)(ii) provides that A must take into account its allocable share of each item described in § 199(c)(1)(A) and (B). Section 1.199-5(b)(1) provides that in accordance with §§ 702 and 704, C must allocate to A its share of partnership items (including items of income, gain, loss, and deduction), CGS allocated to such items of income, and gross receipts that are included in such items of income. Furthermore, under § 1.199-5(b)(3), A's share of Paragraph (e)(1) wages of C for purposes of determining A's wage limitation under § 199(b)(1) (W-2 wage limitation) equals A's allocable share of those wages. C must allocate the amount of Paragraph (e)(1) wages among the partners in the same manner it allocates wage expense among those partners. A must add its share of the Paragraph (e)(1) wages from C to A's Paragraph (e)(1) wages from other sources, if any. A then must calculate its W-2 wages by determining the amount of the partner's total Paragraph (e)(1) wages properly allocable to DPGR. Thus, because A has not received the specific information necessary for A to separately calculate its § 199 deduction, A and C (or A and B on behalf of C) must determine A's allocable partnership items under § 199(d)(1)(A)(ii) and § 1.199-5(b)(1) and (3) before A can claim the deduction.

SUMMARY

In sum, we conclude that the collaboration between A and B is a partnership for federal tax purposes.

Accordingly, C is treated as a partnership for all purposes of the Code, not just § 199. See, e.g., §§ 761(a) and 7701(a)(2). Furthermore, C is not eligible to elect or be deemed to elect to be excluded from the application of subchapter K under § 761(a) or § 1.761-2(b)(1) or (2)(ii). To claim the § 199 deduction with respect to Product, A must know its allocable share of partnership items. Therefore, A and C (or A and B on behalf of C) must determine A's allocable partnership items in accordance with § 199(d)(1)(A)(ii) and § 1.199-5(b)(1) and (3).

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Please call at if you have any further questions.

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26 U.S.C. § 414 – Definitions and special rules

(c)Employees of partnerships, proprietorships, etc., which are under common control

(1) In general

Except as provided in paragraph (2), for purposes of sections 401, 408(k), 408(p), 410, 411, 415, and 416, under regulations prescribed by the Secretary, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer. The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b).

29 U.S.C. § 1301 – Definitions

(b)(1) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all 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. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

26 C.F.R. § 1.414(c)-2 – Two or more trades or businesses under common control.

(a) In general. For purposes of this section, the term "two or more trades or businesses under common control" means any group of trades or businesses which is either a "parent-subsidiary group of trades or businesses under common control" as defined in paragraph (b) of this section, a "brother-sister group of trades or businesses under common control" as defined in paragraph of this section, or a "combined group of trades or businesses under common control" as defined in paragraph (d) of this section. For purposes of this section and §§ 1.414(c)-3 and 1.414(c)-4, the term

"organization" means a sole proprietorship, a partnership (as defined in section 7701(a)(2)), a trust, an estate, or a corporation.

(b) Parent-subsidiary group of trades or businesses under common control –

(1) In general. The term "parent-subsidiary group of trades or businesses under common control" means 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 (directly and with the application of § 1.414(c)-4(b)(1), relating to options) by one or more of the other organizations; and

(ii) The common parent organization owns (directly and with the application of § 1.414(c)-4(b)(1), relating to options) a controlling interest in at least one of the other organizations, excluding, in computing such controlling interest, any direct ownership interest by such other organizations.

29 C.F.R. § 4001.2 – Definitions

Controlled group means, in connection with any person, a group consisting of such person and all other persons under common control with such person, determined under § 4001.3 of this part. For purposes of determining the persons liable for contributions under

section 412(b)(2) of the Code or section 302(b)(2) of ERISA, or for premiums under section 4007(e)(2) of ERISA, a controlled group also includes any group treated as a single employer under section 414 (m) or (o) of the Code. Any reference to a plan's controlled group means all contributing sponsors of the plan and all members of each contributing sponsor's controlled group.

29 C.F.R. § 4001.3 – Trades or businesses under common control; controlled groups.

For purposes of title IV of ERISA:

(a) (1) The PBGC will determine that trades and businesses (whether or not incorporated) are under common control if they are "two or more trades or businesses under common control", as defined in regulations prescribed under section 414(c) of the Code.

(2) The PBGC will determine that all 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 shall be treated as a single employer.

(3) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of the Code.