No.

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL'S FLOOR COVERING, INC.,

Petitioner,

v.

RESILIENT FLOOR COVERING PENSION FUND, AND BOARD OF TRUSTEES OF THE RESILIENT FLOOR COVERING PENSION FUND,

Respondents.

On Petition For Writ of Certiorari To The U.S. Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This Petition asks the Court to resolve a conflict in the circuits regarding important questions arising under the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. § 1381, *et seq*., which imposes so-called "withdrawal liability' on construction industry employers who terminate their participation in a covered fund, but only if such employers continue to perform work within the jurisdiction of the fund. The questions presented are:

1. Whether withdrawal liability can be imposed on an alleged successor to a defunct construction industry employer whose participation in a covered fund has terminated, where the defunct employer does not continue to perform work within the fund's jurisdiction and therefore under 29 U.S.C. § 1383 has incurred no withdrawal liability to pass on to any alleged successor.

2. Whether such withdrawal liability can be imposed on an alleged successor to a defunct employer in the absence of a finding that the successor purchased a substantial portion of the assets of the predecessor employer, as required by this Court in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), and in the MPPAA context by the Seventh Circuit and the Third Circuit, and the defunct employer has not maintained any financial or management interest in the alleged successor.

3. Whether the Ninth Circuit improperly departed from this Court's definition of labor

law "successorship," in conflict with many other circuits and with this Court's holding in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), by requiring the district court to give "special significance" to whether the alleged successor has generated significant "relative revenue" from common customers over and above the numerous other factors identified by this Court.

LIST OF PARTIES TO PROCEEDINGS IN THE COURTS BELOW AND CORPORATE DISCLOSURE STATEMENT

The Petitioner in this case is Michael's Floor Covering, Inc., which is not related to any other publicly held or publicly traded companies under Supreme Court Rule 29.6.

Respondents in this case are Resilient Floor Covering Pension Fund, and Board Of Trustees Of The Resilient Floor Covering Pension Fund.

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The ruling of the Ninth Circuit as to which the writ is being sought is reported as *Resilient Floor Covering Trust Fund v. Michael's Floor Covering, Inc.*, 801 F.3d 1079 (9th Cir. 2015). (App. 1a). A petition for rehearing was denied on December 7, 2015. (App. 38a). The Order of the district court which was reversed by the Ninth Circuit was reported with the same caption at 2012 U.S. Dist. LEXIS 188898 (Nov. 1, 2012). (App. 63a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The date of the judgment being appealed from the Ninth Circuit is September 11, 2015 and the order denying rehearing was issued on December 7, 2015. (App. 1a, 63a).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

Section 4201 of The Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. 1381(a), reads in pertinent part:

"If an employer withdraws from a multiemployer [pension] plan in a complete withdrawal . . . , then the employer is liable to the plan" for "withdrawal liability."

29 U.S.C. 1381(b) defines withdrawal liability as "the amount determined [under the statutory calculation method] . . . to be the allocable amount of

unfunded vested benefits" accrued at the time of withdrawal.

Section 4203(b) of MPPAA, 29 U.S.C. § 1383(b) creates a special rule for "employer[s] that have an obligation to contribute under a plan for work performed in the building and construction industry." *Id.* at (b)(1). Under 29 U.S.C. § 1383(b)(2), such employers are deemed to have withdrawal liability only if:

"(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer –

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption."

STATEMENT OF THE CASE

A. Facts As Found By The Appeals Court

Studer's Floor Covering, Inc. ("Studer's") was a construction industry employer that installed floor covering materials. (App. 4a, 40a). Studer's participated in the multi-employer pension plan administered by the Respondent Resilient Floor Covering Pension Trust Fund (the "Fund") until

Studer's dissolved in 2009. (App. 40a). It is undisputed that Studer's "ceased performing sales and installation of residential and commercial flooring products in December 2009 . . . and has not resumed that work since it ceased operations in December 2009." (App. 4a, 44a).

Following Studer's dissolution, Michael Haasl, a salesperson of Studer's, opened a flooring business of his own called Michael's Floor Covering, Inc. (the Petitioner or "Michael's"). (App. 40a). Michael's did not seek to buy, acquire, or merge with Studer's and Studer's ownership had no involvement with nor acquired any financial interest in Michael's. (App. 6a). After Studer's dissolved, Michael's negotiated a separate lease and started its business at Studer's location. But the district court's undisturbed finding was that Michael's "did not buy the business, he did not purchase the business's goodwill or customer lists, and he did not represent to Studer's customers that he was taking over Studer's business." (App. 5a).

Studer's sold most of its tools, equipment, and inventory at a publicly advertised liquidation sale. At that sale, Michael's purchased about 30% of Studer's tools, equipment and inventory. (App. 6a). The district court found that Michael's performs much the same work as Studer's, though Michael's added product lines to its showroom that Studer's had not carried. (App. 7a). Michael's employed eight installers during its first two years of operation. Five of these installers had worked for Studer's "at one time or another" in years past but were working elsewhere at the time of Studer's dissolution. (App.

7a). Only 80 of the 868 customers Michael's serviced in its first two years were former customers of Studer's. (App. 8a).

Michael's did not assume any obligations under Studer's collective bargaining agreement and was not requested to do so by the Local Union. (App. 58a). Nevertheless, in 2011 the Fund filed suit against Michael's for withdrawal liability allegedly incurred by Studer's in the amount of $2,291,014. (App. 40a-41a).

B. **Proceedings Before the District Court and Court of Appeals**

Upon cross motions for summary judgment and a bench trial on the issue of successorship, the district court issued findings of fact and conclusions of law on November 1, 2012. The court determined that Michael's was not a successor to Studer's and therefore not subject to withdrawal liability. Applying the factors set forth by this Court in *Fall River*, as applied by the Ninth Circuit in *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 463 (9th Cir. 1985), the district court concluded that the following factors weighed against a finding of successorship: lack of continuity of the workforces; different jobs under different working conditions; and different supervisors; and that other factors were neutral, such as similar machinery, equipment and methods of production and services and partial overlap in the customer base. (App. 59a). The district court specifically found that Michael's was not "essentially the same" as Studer's, and there was no finding of alter ego between the two companies or any sham transaction. (App. 60a).

On appeal the Ninth Circuit determined that it was called upon to answer two questions: (1) whether a successor can be liable for its predecessor's MPPAA withdrawal liability (thereby assuming that the predecessor had any such liability); and (2) whether the district court properly found Michael's not to be a successor to Studer's. (App. 3a).

As to the first question, the Ninth Circuit held that "a bona fide successor can be liable for its predecessor's MPPAA withdrawal liability, both in general and with regard to the special building and construction trade provisions in particular, so long as the successor had notice of the liability." (App. 26a-27a). The appeals court discussed but did not apply all of the criteria established by this Court for finding labor law successor liability in *Golden State Bottling*, specifically the requirement that the successor purchase substantially all of the assets of the predecessor company, which did not occur in this case. (App. 21a-22a).

Having found that a successor could be liable for its predecessor's MPPAA withdrawal liability, though without finding that Studer's had incurred any such liability, the Ninth Circuit proceeded to reverse the district court's finding that Michael's was not a successor to Studer's. (App. 35a). In this regard, the appeals court declared that the district court had applied an incorrect standard, notwithstanding the district court's reliance on this Court's test in *Fall River Dyeing*. (App. 35a). The Ninth Circuit held that the district court should instead have given "special significance" to the alleged commonality of customers between the minority of customers serviced by Michael's that had formerly been serviced by Studer's. (App. 27a). The appeals court placed greater weight on the "relative value" of the revenue generated by the common customers. (App. 31a). The appeals court further held that the district court misapplied the test as to commonality of employees because five of Michael's eight employees had "at one point or another" worked for Studer's. (App. 7a, 34a-35a).

The Ninth Circuit remanded to the district court with instructions to make a new determination as to successorship and withdrawal liability under the appeals court's newly announced standard. (App. 36a).

Michael's filed a petition for rehearing, which was denied by the Ninth Circuit on December 7, 2016. (App. 63a).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision creates a conflict among the circuits on an issue of great public importance under the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. § 1381-1453, amending the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq*. Specifically, the questions presented and circuit conflicts concern the extent to which withdrawal liability can be imposed on an alleged successor to a defunct construction industry employer who previously participated in a multiemployer pension plan; indeed whether *any* withdrawal liability can be found where the defunct employer has ceased operations entirely under Section 1383(b) of MPPAA, and its assets have been sold at auction.

I. This Court's Review Is Required To Resolve A Clear Conflict In The Circuits As To The Plain Language Of MPPAA's Construction Industry Exception To Withdrawal Liability.

Every other circuit to consider the question has held that before a successor can be found to be liable for withdrawal liability under MPPAA, there must first be a finding of liability on the part of the predecessor. *See Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1325 (7th Cir. 1990) (liability of predecessor was established by judgment entered two years prior to litigation regarding successor liability); *Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89, 95-96 (3d Cir. 2011) (successor liability found only as to predecessor's acknowledged delinquent ERISA fund contributions); *see also Bright Construction, Inc. v. Bright Construction, Inc.*, 2014 U.S. Dist. LEXIS 61621 (W.D. MO. May 5, 2014) (vacating award of arbitrator against alleged successor in the Eighth Circuit due to failure to first find that predecessor had incurred withdrawal liability under Section 1383(b)).

As noted above, Section 1383(b) of MPPAA sets unique criteria for imposing withdrawal liability on construction industry employers. No such liability arises unless such an employer continues to perform work in the jurisdiction of the collective bargaining agreement for which contributions were previously required, after ceasing participation in the plan. *Id.* at 1383(b)(2).

Neither the appeals court nor the district court made any finding that Studer's, the predecessor employer here, incurred any withdrawal liability by continuing to perform work after withdrawing from the plan and going out of business. It is also undisputed that Michael's, the alleged successor, is not an alter ego of Studer's and that Studer's ownership plays no role whatsoever in Michael's business.[1] There is as a result no basis for finding that Studer's ever incurred any withdrawal liability under the plain language of MPPAA.

The appeals court's sole attempt to explain why it was entitled to impose liability on an alleged successor without first finding the predecessor to have continued performing work covered by its collective bargaining agreement, appears almost as an afterthought in the opinion (App. 26a), as follows:

> "Like §1383(b), which imposes withdrawal liability on employers who cease contributing but continue working in the area, imposing traditional employment and labor law successor liability on employers who substantially continue the business of a construction in industry predecessor without contributing to the plan protects the viability of

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[1] Neither the appeals court nor the district court made any finding of an alter ego or sham status as between Studer's and Michael's in order to contend that Studer's somehow continued to perform work within the meaning of Section 1383(b). *Compare New England Mech., Inc. v. Laborers Local Union 294*, 909 F.2d 1339, 1343 (9th Cir. 1990), which the Ninth Circuit distinguished from the facts of this case. (App. 35a).

> pension funds in the face of a shrinking contribution base.

The foregoing analysis by the appeals court concedes that Section 1383(b) itself does not impose liability on a construction employer who does not continue working the area, but then departs from the plain language of the Act to impose "traditional employment and labor law successor liability" without any finding that the predecessor has incurred withdrawal liability under the Act (and without any supporting authority). The Ninth Circuit's departure from the statutory language of MPPAA and the required finding of predecessor liability is in direct conflict with other circuits and cannot be sustained.

Absent review and reversal by this Court, the appeals court's holding will be deeply destabilizing to the construction industry. Unionized contractors will be unable to retire, sell their assets, or otherwise cease operations for fear that at some future point an unrelated business entity will be deemed to have "continued" or "resumed" their business in such a way as to impose withdrawal liability on the retired contractor. At the same time, new contractors will be discouraged from entering the market vacated by the predecessor contractor for fear of an "out of nowhere" claim that the previous contractor's (previously nonexistent) liability will suddenly appear years later (as in this case) and be imposed on their business. This cannot be, and indeed is not, the law.

II. This Court's Review Is Also Required To Resolve A Clear Conflict In The Circuits As To The Standard For Imposing Successorship Liability Under *Golden State Bottling.*

In further conflict with the Seventh Circuit and the Third Circuit, and this Court's holding in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), the Ninth Circuit held that "a bona fide successor can be liable for its predecessor's MPPAA withdrawal liability, . . . so long as the successor had notice of the liability." (App. 27a). To the contrary, even if some sort of liability could be imposed under MPPAA as to the defunct employer in this case, this Court and other circuits have previously held that no such liability can be imposed on an alleged successor employer unless it is shown that the alleged successor is "a bona fide purchaser acquiring . . . the employing enterprise" by "substantially assum[ing] a predecessor's assets." *Golden State Bottling*, 414 U.S. at 184-5; *see also Upholsterers' International Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1326 (7th Cir. 1990); *Einhorn v. M.L. Ruberton Construction Co.*, 632 F.3d 89, 94 (3d Cir. 2011).

In the present case, it is undisputed that Michael's did not acquire all or any substantial part of Studer's business assets. Michael's therefore had no opportunity to protect itself from claims arising under Studer's collective bargaining agreement, such as by seeking indemnification from Studer's in a negotiated transaction. Studer's dissolved its business, and Michael's simply purchased some of

Studer's equipment at a public auction, as did other competitors.

Under such circumstances, no basis exists under *Golden State Bottling* or any other case to impose a predecessor's liability (if such existed) on an unsuspecting successor. No other circuit has so held, and the Ninth Circuit's deliberate omission of this essential requirement constitutes further grounds for granting review.

III. This Court's Review Is Further Required To Resolve A Clear Conflict In The Circuits As To The Ninth Circuit's New And Unworkable Standard For Finding Successorship.

In further conflict with the holdings of this Court and other circuits, the Ninth Circuit here established a new definition of successorship in the labor law context; one that conflicts with this Court's previous requirement that courts must examine a list of factors, with none entitled to special weight. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).[2] The Ninth Circuit unreasonably departed from the foregoing standard, holding instead that whether the alleged successor has the

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[2] As conceded by the Ninth Circuit (slip op. at 27), *Fall River Dyeing* determined "substantial successorship continuity" by examining, among other things, "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." 482 U.S. at 43.

"same body of customers" as its predecessor is of "special significance" when determining successorship for purposes of withdrawal liability under the MPPAA construction industry exception.

Forced to acknowledge that the Petitioner in this case did not in fact acquire the "same body of customers" of the defunct predecessor company, or even a majority of the predecessor's customers, the Ninth Circuit further altered the *Fall River* test. The Ninth Circuit held that successorship will be found upon a mere showing of a significant "relative amount of revenue generation" by the predecessor's former customers. (App. 31a). No other circuit has given this sort of primacy to a minority of common customers over and above such alternative factors as commonality of employees (not present here). *See, e.g., CitiSteel USA, Inc. v. NLRB*, 53 F.3d 350 (D.C. Cir. 1995); *Local 348-S, UFCW, AFL-CIO v. Meridian Management Corp.*, 583 F.3d 65 (2d Cir. 2009) (each of which follows the *Fall River* test without giving special weight to common customers of the predecessor).

The Ninth Circuit's novel "revenue generation" test ignores the undisputed fact that the defunct business owner here played no role in the ownership, management, or acquisition of customers by the alleged successor and had ceased doing any business within the jurisdiction of the plan, which again is supposed to be the undisputed statutory criterion for any withdrawal liability. The net result of the Ninth Circuit's holding is that withdrawal liability is being imposed on both a defunct construction business and an alleged successor in a manner that violates the plain language of MPPAA, as well as this Court's and other circuits' previously settled standards for successorship liability.

Again, the newly announced standard of the Ninth Circuit threatens the ability of construction contractors to safely retire from the industry without withdrawal liability and at the same time subjects innocent contractors to completely unanticipated liabilities that they have had no opportunity to negotiate about or protect against. Indeed, the Ninth Circuit's standard essentially punishes and discourages free market competition by threatening the most successful competitors with withdrawal liability if they acquire too much business that once belonged to an unrelated predecessor company. This conflict in the circuits thus presents issues of great public importance that can only be resolved by this Court's granting of this Petition.

CONCLUSION

The decision of the Court of Appeals directly conflicts with rulings of this Court and other circuits on issues of great public importance. For each of the reasons stated above, the Court should grant the writ of certiorari.

Respectfully submitted,

/s/Maurice Baskin

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESILIENT FLOOR COVERING PENSION TRUST FUND BOARD OF TRUSTEES; RESILIENT FLOOR COVERING PENSION TRUST FUND, Plaintiffs-Appellants, v. MICHAEL'S FLOOR COVERING, INC., Defendant-Appellee	No. 12-17675 D.C. No. 3:11-cv-05200- JSC OPINION

Appeal from the United States District Court for the Northern District of California

Jacqueline Scott Corley, Magistrate Judge, Presiding
Argued and Submitted
February 10, 2015—San Francisco, California

Filed September 11, 2015

Before: Richard A. Paez and Marsha S. Berzon, Circuit

Judges and David A. Ezra,* District Judge.
Opinion by Judge Berzon

* The Honorable David A. Ezra, District Judge for the U.S. District Court for the Western District of Texas, sitting by designation.

SUMMARY**

Labor Law

The panel reversed the district court's judgment, after a bench trial, holding that a construction industry employer was not subject to "withdrawal liability" under the Multiemployer Pension Plan Amendments Act.

The MPPAA amendments to the Employee Retirement Income Security Act provide that if an employer withdraws from a multiemployer pension plan, then it is liable to the plan for "withdrawal liability." There is an exception to withdrawal liability for a construction industry employer that ceases operations entirely for at least five years. Agreeing with the Seventh Circuit, the panel held that a bona fide successor employer in general, and a construction industry successor employer in particular, can be subject to MPPAA withdrawal liability, so long as the successor took over the business with notice of the liability. The panel held that the most important factor in assessing whether an employer is a successor for purposes of withdrawal liability is whether there was substantial continuity in the business operations between the predecessor and the successor, as determined in large part by whether the new employer has taken over the economically critical bulk of the prior employer's customer base.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the district court erred in weighing continuity of the workforce as the most important factor, and, moreover, applied an incorrect test to determine whether there was continuity of the workforce. The panel reversed and remanded for further proceedings applying the correct standards.

COUNSEL

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Robert B. Miller (argued), Kilmer, Voorhees & Laurick, PC, Portland, Oregon, for Defendant-Appellees.

OPINION

BERZON, Circuit Judge:

We decide in this case two related issues: (1) whether a successor employer, both generally and in the construction industry in particular, can be subject to withdrawal liability under the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. § 1381–1453, amendments to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*; and (2) if so, what factors are most relevant to determining whether a construction industry employer is a successor for purposes of imposing MPPAA withdrawal liability. We conclude that a construction industry successor employer can be subject to MPPAA withdrawal liability, so long as the successor took over the business with notice of the liability. We also hold that the most important factor in assessing whether an employer is a successor for purposes of imposing MPPAA withdrawal liability is whether there is substantial continuity in the business operations between the predecessor and the successor, as determined in large part by whether the new employer has taken over the economically critical bulk of the prior employer's customer base.

The district court, after a bench trial, held Defendant- Appellee Michael's Floor Covering, Inc. ("Michael's") not liable as a successor employer. In doing so, the district court weighed continuity of the workforce as the most important factor, and, moreover, applied an incorrect test to determine whether there was continuity of the workforce. We therefore reverse and remand for further proceedings applying the correct standards.

I.

A.

Studer's Floor Covering, Inc. ("Studer's") was a construction industry employer that sold and installed floor covering materials to commercial and residential customers. From the 1960s until it ceased doing business on December 31, 2009, Studer's operated out of a storefront and warehouse on Anderson Avenue in Vancouver, Washington. At the time of its closing, Studer's was a party to a collective bargaining agreement with the Linoleum, Carpet and Soft Tile Applicators Local Union No. 1236, pursuant to which Studer's made contributions to the Resilient Floor Covering Pension Trust Fund ("the Fund"), a multiemployer defined benefit pension plan covered by the MPPAA amendments to

ERISA. *See* 29 U.S.C. § 1002(37)(A).

Toward the end of 2009, the president and chairman of Studer's, Scott Studer, informed his sales staff that Studer's would close at the end of the year. Shortly after that announcement, one of those staff members, Michael Haasl, told Studer "that he intended to bid for projects for the sale and installation of floor covering materials for his own company," Michael's Floor Covering, LLC ("Michael's"). Haasl incorporated Michael's in October 2009.[1]

On November 30, 2009, while Studer's was still in operation, Michael's obtained a lease on the same storefront and warehouse Studer's had long occupied. That lease's term began on January 1, 2010, the day immediately after Studer's' lease terminated. Around the same time, Haasl purchased signs for

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[1] We note that the record in this case was sealed in the district court. Under this Court's rules, that sealing remains in effect on appeal unless we rule otherwise, which neither party in this case asked us to do. 9th Cir. R. 27-13. We note, however, that the sealing of several key documents, including Michael's' business plan, has somewhat hampered our ability fully to explain our ruling in this precedential opinion. Further, we have noticed an overall tendency recently for parties to request, and district courts to grant, the sealing of records in instances in which it is hard to see any significant privacy or trade secret justification.

We could, of course, request the parties to show cause as to why the record should not be unsealed in whole or in part. But that process would take time and effort away from the preparation of the opinion. We have therefore chosen instead to issue an opinion that does not contain all the facts in the record supporting it. Our need to choose between undesirable options suggests the need to reconsider record sealing practices both in the district courts and in this court the Michael's location very similar to those that Studer's used. Both spelled out the name "Michael's"/"Studer's" in red cursive, and "Floor Coverings" in black block capitals, on a white background. Additionally, at Michael's' request, Studer's gave its authorization to Quest, Studer's' telephone service provider, for Michael's to take over Studer's' business telephone numbers at the end of 2009.

Studer's sold most, though not all, of its tools, equipment, and inventory at a publicly advertised liquidation sale in the fall of 2009. At that sale, Michael's purchased about 30% of Studer's' tools, equipment and inventory.

According to Scott Studer, although "Studer's did not sell, give[,] or otherwise assign its customer lists or any portion of its customer information to Michael's[,] Mike Haasl knew the identity of many of Studer's['] customers and suppliers through his work over the course of 19 years as a salesman for Studer's." Michael's used those existing business relationships in developing its business.

The district court found that "Michael's performs much the same work as Studer's," though Michael's added product lines to its showroom that Studer's had not carried. For example, the purchasing manager for one major business customer of both Studer's and Michael's, New Tradition Homes, testified that Michael's was asked to "pick up where [Studer's] left off" and did; that "the type of work done" by Michael's and Studer's was "[t]he same"; and that there were no "differences in the type of work done by Michael's Floor Covering as opposed to what was done by Studer's Floor Covering." That same purchasing manager also reported that New Tradition Homes did not "put out a request for bids to replace Studer's." Although New Tradition Homes' "usual bid process" did involve competitive bidding from "a broader number of potential suppliers," it did not require bidding in this instance, because a "sales rep that [they] were very comfortable with was starting his business," referring to Haasl and Michael's. He also noted that there was only "[v]ery minimal" "disruption caused by the transition from Studer's to Michael's": "[m]ostly it was internal with our systems. We had to make sure that our purchase orders went out on one day to Studer's and then on the next day to Michael's Floor Coverings."

In Michael's' first two years of operation, it employed eight installers; otherwise, Michael's outsourced installation work to independent contractors. Of the eight employee installers, five had previously worked for Studer's at one time or another. Several of those installers stated that the range of work they did for Michael's was substantially similar to, although slightly broader than, the work they had previously done for Studer's.

The proportion of Studer's customers retained by Michael's depends on the mode of calculation used. The district court found that "many of Studer's['] customers became Michael's['] customers." The Fund asserts that Michael's obtained the bulk of its business during its start-up phase from Studer's' customers, largely business customers. For example, all but seven of Michael's' business customers in its first three months of operation had been Studer's' customers during Studer's last year of business.

Michael's counters that only 80 or so of the 868 customers Michael's served in its first two years were former Studer's clients; this head count includes both large commercial customers with repeat contracts for housing developments and apartment buildings, and individual homeowners, who are more likely to contract on a one-time basis and for fairly small jobs.

B.

The MPPAA amendments to ERISA provide, in part, that "[i]f an employer withdraws from a multiemployer [pension] plan in a complete withdrawal . . . , then the employer is liable to the plan" for "withdrawal liability." 29 U.S.C. § 1381(a).[2] Withdrawal liability "is the amount determined [under the statutory calculation method] . . . to be the allocable amount of unfunded vested benefits" accrued at the time of the employer's withdrawal. § 1381(b); *see also* § 1391. For "employer[s] that ha[ve] an obligation to contribute under a plan for work performed in the building and construction industry," however, there is no withdrawal liability if they cease operations entirely for at least five years. § 1383(b)(1). The dispute in this case concerns whether this construction industry exception applies here because Studer's permanently ceased performing work covered by the Fund, or whether, instead, it does not apply, because Michael's essentially took over the work Studer's would have done, yet did not make contributions to the Fund.

Taking the latter position, the Fund, believing

[2] Hereafter, all statutory references are to Chapter 29 of the United States Code unless otherwise indicated.

Michael's to be Studer's' successor, assessed withdrawal liability in the amount of $2,291,014.00 against Studer's and Michael's and sued Michael's to recover that amount. After discovery, the Fund and Michael's filed cross-motions for summary judgment. Michael's moved for summary judgment on the grounds that the Fund could not establish that Michael's was a successor of Studer's, and, even if Michael's were Studer's' successor, the Fund could not show Michael's was subject to its predecessor's withdrawal liability, for two reasons: first, Studer's had not itself continued business in the area; and second, Michael's did not have adequate notice of Studer's' liability. The Fund moved for partial summary judgment on the ground that Michael's was a successor to Studer's, so a statutory withdrawal triggering liability occurred when Michael's continued Studer's' business but failed to make contributions to the Fund.

At the hearing on the parties' cross-motions for summary judgment, the district court suggested that the parties consent to converting the motion to a bench trial on the successorship question only (that is, not on the question whether, if a successor, Michael's had sufficient notice of the liability). The parties orally agreed to a bench trial "on the record."

About two weeks after the summary judgment hearing, the Fund filed a motion for leave to supplement the record with additional invoices from Michael's and Studer's. The Fund noted that the possibility of a bench trial on the record was first raised at the summary judgment hearing, and explained that, "[h]aving given the matter consideration after the hearing," the Fund wished to supplement the record with these additional invoices. The Fund had previously included Studer's invoices from the last three months of 2009 and Michael's invoices from the first three months of 2010. "[F]or purposes of creating a more complete trial record," the Fund explained, it was seeking to submit Michael's' invoices for the remainder of 2010 and the entirety of 2011, and some additional Studer's invoices as well. Michael's opposed the motion on the grounds that (1) it was "premature" and (2) the evidence "lack[ed] relevance, materiality or probity" because there was no "basis for imposing withdrawal liability on Studer's," when Studer's did not continue work as Studer's after 2009.

The district court issued findings of fact and conclusions of law on November 1, 2012. It determined that Michael's was not a successor to Studer's and therefore not subject to withdrawal liability. Applying the multi-factor successorship test set forth in *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 463 (9th Cir. 1985), the district court concluded that, although Michael's used the same plant that Studer's had, the other factors either weighed against a finding of successorship (continuity of the workforce; whether the same jobs exist under the same working conditions; whether the same supervisors were employed) or were neutral (whether the same machinery, equipment, and methods of production are used; whether the same service is offered; and whether there was substantial continuity of the business). The district court characterized the inquiry as concerning whether the successor has "'basically the same owners and operators as . . . the predecessor employer,'" and that the "changes between predecessor and successor were technical in nature rather than a substantive change in the management.'" (quoting *New England Mech., Inc. v. Laborers Local Union 294*, 909 F.2d 1339, 1343 (9th Cir. 1990)). According to the district court, "[t]he question here is whether Michael's is 'essentially the same' as Studer's. . . . It is not."

The district court also denied the Fund's motion to supplement the record, because the Fund had not shown "good cause for the late filing," and because the "customer issue [wa]s not dispositive of the successor employer determination."

II.

"We review the district court's findings of fact after a bench trial for clear error." *OneBeacon Ins. Co. v. Haas Indus., Inc.*, 634 F.3d 1092, 1096 (9th Cir. 2011). "Questions of law and mixed questions of fact and law are reviewed de novo." *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 851 (9th Cir. 2014) (as amended). Additionally, "[w]e review for abuse of discretion a district court's denial of a motion to supplement the record." *E.E.O.C. v. Peabody W. Coal Co.*, 773 F.3d 977, 982 (9th Cir. 2014). A district court abuses its discretion where it applies the wrong legal standard or where its "application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 577 (1985)). Additionally, "'[i]f an exercise of discretion is based on an erroneous interpretation of the law, the ruling should be overturned.'" *Estate of*

Darulis v. Garate, 401 F.3d 1060, 1063 (9th Cir. 2005) (quoting *Miles v. California*, 320 F.3d 986, 988 (9th Cir. 2003)); see also *Conservation N.W. v. Sherman*, 715 F.3d 1181, 1185 (9th Cir. 2013).

III.

A.

ERISA, the federal comprehensive private employee benefits statute, includes provisions designed "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984). ERISA originally sought to accomplish this purpose by creating an insurance program for pension plans, administered by the Pension Benefit Guaranty Corporation ("PBGC"); the insurance program initially covered only single-employer plans, but was later extended to multiemployer plans. *See id.* at 720–22 (noting that the provision obligating the PBGC to pay benefits for single employer plans took effect immediately when ERISA was enacted in 1974 and that mandatory coverage of multiemployer pension plans was to take effect in 1978).

The MPPAA amendments to ERISA were prompted by Congress's realization that in some instances, ERISA as it stood did "not adequately protect [multiemployer pension] plans from the adverse consequences that resulted when individual employers terminate[d] their participation in, or withdr[e]w from, multiemployer plans." *Id.* at 722. The concern was that "a significant number of [multiemployer] plans were experiencing extreme financial hardship" as a result of individual employer withdrawals from the plans, which saddled the remaining employers with increased funding obligations. *Id.* at 721. These withdrawals caused a domino effect of cascading additional withdrawals that eventually "could have resulted in the termination of numerous plans." *Id.* Large numbers of plan terminations, in turn, could have jeopardized the entire PBGC insurance program once the provision extending coverage to multiemployer plans became effective. See *id.*

To address this dilemma, Congress enacted the MPPAA, which imposed "new rules under which a withdrawing employer would be required to pay whatever share of the plan's unfunded vested liabilities was attributable to that employer's participation," thereby protecting the financial health of the plan and safeguarding the PBGC insurance program. *Id.* at 723. The MPPAA amendments to ERISA make employers liable for unfunded vested benefits if they withdraw from a multiemployer plan. § 1381; *see also* § 1391. In general, a complete withdrawal triggers withdrawal liability where an employer "permanently ceases to have an obligation to contribute under the plan" or "permanently ceases all covered operations under the plan." § 1383(a).

But that general standard for withdrawal, and so for withdrawal liability, does not always apply. Central to this case is the special MPPAA rule for "employer[s] that ha[ve] an obligation to contribute under a plan for work performed in the building and construction industry." § 1383(b)(1). Under that rule, a complete withdrawal occurs only if:

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

§ 1383(b)(2). In other words, under § 1383(b), known as "the MPPAA construction industry exception," employers in that industry who entirely cease operations are not subject to the withdrawal liability that § 1381 would otherwise impose, unless they resume construction work within five years without also renewing their obligation to contribute to the plan. *See Carpenters Pension Trust Fund for N. Cal. v. Underground Constr. Co.*, 31 F.3d 776, 779 (9th Cir. 1994).

In enacting the MPPAA, Congress "recognized the transitory nature of contracts and employment in the building and construction industry." *Id.* at 778. The exception is rooted in the understanding that "[construction industry] employers [will] come and go[,] [but] as long as the base of construction projects in the area covered by the plan [continues] funding the plan's obligations, the plan is not threatened" by an individual employer's departure. *Id.* It is on this premise that § 1383(b) "aims to extract withdrawal contributions only from those employers who may threaten the plan by reducing the plan's contribution base," that is, those employers who continue to do work in the area covered by the plan without contributing to it. *Id.* The "contribution base" concept is thus at the core of the MPPAA construction industry withdrawal liability concept.

We have previously recognized the centrality of the contribution base in applying the construction industry exception to MPPAA withdrawal liability. In *H.C. Elliott, Inc. v. Carpenters Pension Trust Fund for Northern California*, 859 F.2d 808 (9th Cir. 1988), we observed that "[i]n the construction industry, the funding base of the plan is the construction projects in the area" where the plan is administered. *Id.* at 812 (quoting H.R. Rep. No. 96-869, 96th Cong., 2d Sess., pt. 1, at 75 (1980)). We noted further that "as long as contributions are made for whatever work is done in the area," there is no threat to the plan's future funding viability; if an individual employer withdraws and goes out of business, other employers who contribute to the pension plan on behalf of their employees will perform that work. *Id.* (quoting H.R. Rep. No. 96-869, at 75).

As we have also explained, "[t]he withdrawal of an[] employer from the plan *does* decrease the [funding] base . . . if the employer stays in the industry but goes non-union and ceases making payments to the plan." *Id.* (emphasis added). In that case, employers continue to undertake construction work without contributing to the plan. So, assuming a constant number of construction projects in a locale, the number of employee hours for which contributions are made will go down.

In short, because of concern about shrinking contribution bases, the § 1383(b) construction industry exception imposes withdrawal liability on employers who cease making payments to the plan while continuing to do business in the area.

B.

In the fields of labor and employment law, federal courts have developed a common-law doctrine of successorship liability that "provides an exception from the general rule that a purchaser of assets does not acquire a seller's liabilities." *Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995). The successorship doctrine extends to legal obligations arising under the National Labor Relations Act ("NLRA"), the Fair Labor Standards Act ("FLSA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the Family and Medical Leave Act ("FMLA"), among others. *See, e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) (NLRA); *Steinbach v. Hubbard*, 51 F.3d 843 (9th Cir. 1995) (FLSA); *Bates v. Pac. Maritime Ass'n*, 744 F.2d 705 (9th Cir. 1984) (Title VII); *Sullivan v. Dollar Tree Stores*, Inc., 623 F.3d 770, 780–81 (9th Cir. 2010) (recognizing regulations that incorporate common law successorship principles in defining successors-in-interest for purposes of FMLA liability).

Striking a "balance between the need to effectuate federal labor and employment . . . policies and the need . . . to facilitate the fluid transfer of corporate assets," the successorship doctrine, when applicable, holds legally responsible for obligations arising under federal labor and employment statutes businesses that are substantial continuations of entities with such obligations. *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1326 (7th Cir. 1990). "The inquiry [in these successorship cases] is [therefore] not merely whether the new employer is a 'successor' in the strict corporate-law sense of the term. The successorship inquiry in the labor-law context is much broader." *Sullivan*, 623 F.3d at 781.

"The primary question in [labor and employment] successorship cases is whether, under the totality of the circumstances, there is 'substantial continuity' between the old and new enterprise." *Haw. Carpenters Trust Funds v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289, 294 (9th Cir. 1987); *see also New England Mech., Inc. v. Laborers Local Union 294*, 909 F.2d 1339, 1342 (9th Cir. 1990); Steinbach, 51 F.3d at 846. To address whether the new business is the successor of an old business, we consider the following factors, which are "not . . . exhaustive":

> [Whether] there has been a substantial continuity of the same business operations[;] [whether] the new employer uses the same plant; [whether] the same or substantially the same work force is employed; [whether] the same jobs exist under the same working conditions; [whether] the same supervisors are employed; [whether] the same machinery, equipment, and methods of production are

> used; and [whether] the same product is manufactured or the same service [is] offered.

Jeffries Lithograph, 752 F.2d at 463 (quoting *Premium Foods, Inc.*, 260 N.L.R.B. 708, 714 (1982), *enforced* 709 F.2d 623 (9th Cir. 1983)) (last alteration in original); see also *Haw. Carpenters*, 823 F.2d at 294. Other cases have considered whether the body of customers is the same. *See, e.g., Fall River Dyeing*, 482 U.S. at 43.

"There is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer . . . may be a successor for some purposes and not for others." *Howard Johnson Co. v. Detroit Local Joint Exec. Bd., Hotel & Rest. Emps. & Bartenders Int'l Union, AFL-CIO*, 417 U.S. 249, 262 n. 9 (1974). "[D]ecisions on successorship must balance, inter alia, the national policies underlying the statute at issue and the interests of the affected parties," *Sullivan*, 623 F.3d at 782 (quoting *Steinbach*, 51 F.3d at 846) (alteration in original). "Because the origins of successor liability are equitable, fairness is a prime consideration in its application." *Id.* (Quoting *Criswell v. Delta Air Lines, Inc.*, 868 F.2d 1093, 1094 (9th Cir. 1989)). Thus, these decisions

> require[] analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc.

Id. (quoting *Howard Johnson*, 417 U.S. at 262 n.9). The individual successorship factors outlined in *Jeffries* are, accordingly, given greater or lesser weight depending on the statutory context.

Moreover, "in light of . . . the myriad factual circumstances and legal contexts in which [the employment law successorship issue] can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate." *Howard Johnson*, 417 U.S. at 256. Finally, as the successorship test is "more functional than formal," "the absence of one . . . factor" does not compel a particular conclusion. *Hawaii Carpenters*, 823 F.2d at 293, 294.

Depending on the statutory context and the type of claim, certain factors may warrant greater or lesser emphasis. For example, under § 8(a)(5) of the NLRA, which imposes on employers a duty to bargain in good faith with the chosen representative of their employees, the NLRB has determined "substantial continuity" with an emphasis on "the employees' perspective." *Fall River Dyeing*, 482 U.S. at 43. The reason for this emphasis is that a successor's § 8(a)(5) duty to bargain in good faith derives from the rebuttable presumption of majority support a union obtains once it has been certified as the unit's bargaining representative. *Id.* at 37–38. The majority presumption generally furthers the NLRA's "overriding policy" of "'industrial peace'" by "promot[ing] stability in collective-bargaining relationships." *Id.* at 38 (quoting *Terrell Machine Co.*, 173 N.L.R.B. 1480 (1969), *enf'd*, 427 F.2d 1088 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970)) (some internal quotation marks omitted) (alteration in original). Requiring a successor to bargain with the incumbent union even after a change in corporate structure assures employees that their choice of representative is not "subject to the vagaries of an enterprise's transformation," and so promotes industrial peace. *Id.* at 39–40. Further, "a mere change in ownership, without an essential change in working conditions, is not likely to change employees' attitudes toward union representation." *Jeffries Lithograph*, 752 F.2d at 463. Consequently, when determining whether a company is a successor with a duty to recognize and bargain with the incumbent union, "the touchstone remains whether there was an 'essential change in the business that could have affected employee attitudes toward representation.'" *Id.* at 464.

At the same time, in the collective bargaining context, a successor is only obligated to bargain when "the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor . . . [and indeed] intends to take advantage of the trained work force of its predecessor." *Fall River Dyeing*, 482 U.S. at 41. Thus limited, the doctrine safeguards employers' interest in being able to rearrange or sell their business for legitimate purposes. *Id.* Balancing these pertinent considerations, courts determine successorship in the context of the NLRA duty to bargain by examining, among other factors, "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers," *Fall River Dyeing*, 482 U.S. at 43, all while "keep[ing] in mind the question whether those employees who have been retained will understandably view their job situations as essentially unaltered." *Id.* (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1993)).

By contrast, in a different NLRA context—deciding whether to impose successor liability for a predecessor's unfair labor practices—the Supreme Court placed the emphasis on the employers' economic considerations, while continuing to take the employees' perspective into account. *Golden State Bottling* determined that a successor could be required to remedy its predecessor's unlawful discharge of an employee under §§ 8(a)(3) and (1) of the NLRA so long as (1) the successor had obtained substantial assets of the predecessor; (2) there were sufficient indicia of substantial continuity of business operations; and (3) the successor took over with notice of the unfair labor practice liability. 414 U.S. at 184–85. *Golden State Bottling* explained that the policies that allow employees to engage in protected concerted activity without incurring retribution support this approach where the predecessor entity engaged in unfair labor practices. "Avoidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed by § 7 of the [NLRA], . . . and protection for the victimized employee" were all "important policies" that would be undermined absent the imposition of successor liability for unfair labor practices. *Id.* at 185. Taking those policies into account, *Golden State Bottling* held that a successor employer is liable for remedying a predecessor's violation of its employees' organizational rights "[w]hen a new employer . . . has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations." *Id.* at 184. If successor liability were not imposed under those circumstances, "the successor may benefit from the unfair labor practices due to a continuing deterrent effect on union activities." *Id.*

Turning to fairness to employers, *Golden State Bottling* held that successor employers would be held liable only when they took over the business with notice of the liability. *Id.* at 185. With that protection, the liability could "be reflected in the price [it] pays for the [predecessor's] business" assets. *Id.* By focusing on the economic realities of the business transition, *Golden State Bottling* adapted the successorship doctrine to address a successor's liability for a predecessor's unfair labor practice.

The Title VII employment discrimination context provides another example of tailoring successorship factors. There, the "three principal factors [that] bear[] on the appropriateness of successor liability for employment discrimination [are]: (1) the continuity in operations and work force of the successor and predecessor employers, (2) the notice to the successor employer of its predecessor's legal obligation, and (3) the ability of the predecessor to provide adequate relief directly." *Bates*, 744 F.2d at 709–10. Imposing successor liability under those circumstances is fair, *Bates* held, even where the successor did not purchase or merge with the predecessor, because a successor "well aware" of its predecessor's liability is able to consider that information before deciding to continue the predecessor's business. *See id.* at 710. Where such notice is provided, the successor's "choice to take over [its predecessor's] operations informally through the hiring of its former employees and the purchase of some of its equipment, rather than through a more formal acquisition, [does] not shield it from successorship liability." *Id.*

In sum, the cases that have considered in various labor and employment law contexts whether an employer is a successor have tailored their analyses to the particular policy concerns underlying the applicable statute and to the particular claim. The successorship standards are flexible and must be tailored to the circumstances at hand.

C.

We have not previously decided whether a successor employer can be subject to MPPAA withdrawal liability.[3] We have, however, held, in a closely related context, that a successor can be liable for its predecessor's delinquent ERISA contributions. *See Trs. for Alaska Laborers–Constr. Indus. Health & Sec. Fund v. Ferrell*, 812 F.2d 512, 516 (9th Cir. 1987); *Hawaii Carpenters*, 823 F.2d at 293. Other circuits agree with that result. See *Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89, 98–99 (3d Cir. 2011); *Stotter Div. of Graduate Plastics Co. v. Dist.*

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[3] *Resilient Floor Covering Pension Fund v. M&M Installation*, Inc., 630 F.3d 848, 852 (9th Cir. 2010) assumed without deciding that a company could be held responsible for another entity's withdrawal liability under an alter ego theory. *M&M Installation* also noted that it was not presented with the question whether there were other ways in which a company could be responsible for another entity's ERISA withdrawal liability. *Id.* at 855.

65, UAW, AFL-CIO, 991 F.2d 997, 1002 (2d Cir. 1993); *Artistic Furniture*, 920 F.2d at 1327–29.

We see no reason why the successorship doctrine should not apply to MPPAA withdrawal liability just as it does to the obligation to make delinquent ERISA contributions. The primary reason for making a successor responsible for its predecessor's delinquent ERISA contributions is that, "[a]bsent the imposition of successor liability, present and future employer participants in the union pension plan will bear the burden of [the predecessor's] failure to pay its share," which will threaten the health of the plan while the successor reaps a windfall. *Artistic Furniture*, 920 F.2d at

1328. That rationale applies with equal, if not greater, force to a predecessor's MPPAA withdrawal liability. A primary purpose of ERISA is "to ensure that employees and their beneficiaries [a]re not . . . deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *R.A. Gray & Co.*, 467 U.S. at 722. The MPPAA's purpose is better to effectuate ERISA's purposes. By assessing proportional liability to individual employers who withdraw from a plan, the MPPAA avoids overburdening the remaining participating employers and increases the likelihood that multiemployer plans remain fully funded. *See id.* at 722–25.

Contrary to Michael's' submissions, "there is no underlying congressional policy here militating against the imposition of [successor] liability." *Golden State Bottling*, 414 U.S. at 181. Although

Michael's argues that ERISA § 1384, is in tension with application of the traditional employment law successorship doctrine to impose withdrawal liability on successors, that is not so. First, 28 U.S.C. § 1384 allows a contributing employer to avoid withdrawal liability where it sells its assets in "a bona fide, arm's-length sale" and the purchaser both takes on "an obligation to contribute to the plan . . . for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan," § 1384(a)(1), and provides a bond or other financial assurance sufficient to cover five years of contributions. If the purchaser withdraws from the plan within five years, the seller is subject to withdrawal liability along with the purchaser. § 1384(a)(1)(C). Although § 1384 establishes one circumstance in which an employer who might—but would not necessarily—otherwise fit into the successor category is *not* liable for withdrawal payments, it does not address whether the broader employment and labor law successorship doctrine applies where those stringent conditions are not met.

Nor does § 1392, which imposes withdrawal liability on an employer who engages in "any transaction" for which the "principal purpose . . . is to evade or avoid liability under [the MPPAA]," suggest any basis for holding the employment and labor law successor liability doctrine inapplicable to MPPAA withdrawal liability. Section 1392 is essentially punitive. It imposes withdrawal liability for "*any*" purposely evasive or devious transaction, regardless of the potential impact on the contribution base or on the employees covered by the pension plan. Given its punitive focus, § 1392 does not suggest any intention to displace the usual employment and labor law successorship doctrine, which is remedial rather than punitive and so focuses on objective factors, not on the employer's purpose in engaging in the transaction.

Finally, the narrow construction industry exception to MPPAA withdrawal liability is fully consistent with the generally applicable successorship doctrine. As explained above, the exception recognizes that, so long as a previously contributing construction employer ceases doing business at the time it withdraws, the funding will remain relatively constant. Where that occurs, other contributing employers are likely to pick up the construction projects that would previously have gone to the withdrawing employer. *H.C. Elliott*, 859 F.2d at 812. But "[t]he withdrawal of a[] [construction] employer from the plan *does* decrease the [funding] base . . . if the employer stays in the industry but goes non-union and ceases making payments to the plan." *Id.* (emphasis added). Then, contributions are not made for the construction jobs the employer is continuing to do in the area. *Id.* The same detrimental impact occurs where a successor business picks up the work the predecessor would have performed. Like § 1383(b), which imposes withdrawal liability on employers who cease contributing but continue working in the area, imposing traditional employment and labor law successor liability on employers who substantially continue the business of a construction industry predecessor without contributing to the plan protects the viability of pension funds in the face of a shrinking contribution base.

For all these reasons, we hold that a bona fide successor can be liable for its predecessor's MPPAA withdrawal liability, both in general and with regard to the special building and construction trade provisions in particular, so long as the successor had notice of the liability.[4]

D.

We now consider how the established successorship factors are to be weighed in the context of MPPAA withdrawal liability in the construction industry context. Keeping in mind the flexible successorship inquiry discussed above, "substantial continuity" is "the primary question," and so the most important consideration, in assessing whether an employer is a successor for purposes of imposing other labor law liabilities. *Id.*

Fall River Dyeing determined "substantial continuity" by examining, inter alia, "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new

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[4] The Seventh Circuit has so indicated as well. See *Chicago Truck Drivers*, 59 F.3d at 49; *see also Artistic Furniture*, 920 F.2d at 1327. No circuit has held otherwise. Several district courts have reached the same conclusion. S*ee, e.g., Cent. States, Se. & Sw. Areas Pension Fund v. Hayes*, 789 F. Supp. 1430, 1436 (N.D. Ill. 1992) (holding that a successor can be subject to predecessor's unpaid MPPAA withdrawal liability so long as there exists substantial continuity and notice); *Auto. Indus. Pension Trust Fund v. S. City Ford, Inc.*, No. C 11-04590 CW, 2012 WL 1232109 (N.D. Cal. Apr. 12, 2012) (same); *Trs. of Utah Carpenters' & Cement Masons' Pension Trust v. Daw, Inc.*, No. 2:07-CV-87 TC, 2009 WL 77856, at *3 (D. Utah Jan. 7, 2009) (same).

entity has the same production process, produces the same products, and basically has the same body of customers." 482 U.S. at 43. This definition of "substantial continuity" contains an element *Jeffries* did not expressly enumerate—whether the successor has "basically the same body of customers" as the predecessor. *Id.* But *Jeffries* was decided before *Fall River Dyeing*, and *Jeffries*' list of the pertinent factors was expressly "not . . . exhaustive." *Jeffries Lithograph*, 752 F.2d at 463. In the current context, we conclude, the "same body of customers" factor is of special significance when determining successorship for purposes of withdrawal liability under the MPPAA construction industry exception.

The consideration whether the successor deliberately takes over "basically the same body of customers," *Fall River Dyeing*, 482 U.S. at 43, dovetails more precisely than any other *Fall River Dyeing* or *Jeffries* factors with the underlying rationale for the construction industry exception to MPPAA withdrawal liability—that an employer's complete withdrawal and cessation of work usually does not harm the plan because other contributing employers will pick up the construction jobs (i.e. the customers) that would have gone to the withdrawing company. If, instead, an employer uses its insider knowledge to draw a great many of the predecessor's customers, and so can "pick up where [the predecessor] left off," doing "[t]he same" "type of work" as the predecessor, yet neither contributes to the pension plan nor pays withdrawal liability, the assumption that animates the construction industry exception collapses. Instead, the plan's contribution base is compromised, and the plan's financial stability threatened. For that reason, focusing the successorship inquiry on business retention through exploitation of the predecessor's contacts, public presentation, and good will effectuates the purposes of the MPPAA construction industry withdrawal provisions.

It is possible, of course, for a new employer to inherit a substantial portion of a prior employer's customer base without making any deliberate attempt to do so. Where that is the case, the entrepreneurial interests of putative successor employers predominate, just as they do in the NLRA successorship context when there is no intention "to take advantage of the trained work force of [their] predecessor[s]." *Fall River Dyeing*, 482 U.S. at 41. Where, however, the objective factors indicate that the new employer "ma[de] a conscious decision," *id.*, to take over the predecessor's customer base, the equitable origins of the successor liability doctrine support the conclussion that the successor must pay withdrawal liability.

Certain discrete factors, including whether "the new employer uses the same plant" and whether "the same product is manufactured or the same service [is] offered" are pertinent to determining whether the successor has in fact actively and successfully captured its predecessor's market share. *See Jeffries Lithograph*, 752 F.2d at 463 (alterations in original). The more closely the successor models itself on its predecessor—for example, by taking over its location and offering the same services as before—the more likely it will succeed in capturing its predecessor's customers. Where putative successors do not similarly rely on insider knowledge, similar public presentation, and deliberate continuity of business operations to corner their predecessor's market share, it cannot be said that they set out to capture the predecessor's customer base, and the successor doctrine does not apply.

The other *Jeffries* factors are more relevant to NLRA contexts than to the MPPAA withdrawal liability context. Although the composition of the workforce is of preeminent importance in successorship cases involving, for example, the duty to bargain under the NLRA, that factor is not of special relevance here. As we explained above, this factor is relevant to the duty to bargain because "a mere change of ownership, without an essential change in working conditions, is not likely to change employees' attitudes toward union representation." *Jeffries Lithograph*, 752 F.2d at 463. In light of the presumption of continued majority support, see *id.*, it is fair to require the successor to bargain with an incumbent union if it hires a majority of its workforce from its predecessor's employee base.

Here, by contrast, whether Michael's hired a majority of its workforce from Studer's' employee base is not especially informative in determining whether the premises underlying withdrawal liability in the construction industry apply. The funding base of the Plan is not the particular individuals employed, but, rather, the construction projects in the area. *See H.C. Elliott*, 859 F.2d at 812. Given the MPPAA's primary purpose of protecting the plan's funding base, the composition of the workforce factor may well, depending on the circumstances, deserve less weight than in the NLRA context.

Finally, whether "the same jobs exist under the same working conditions" may be quite informative as to whether customers will continue to hire the new contractor. Still, as that consideration has a different significance than in the NLRA context, the particular job similarities that are relevant may differ as well. Again, the focus in the MPPAA context must be on whether the successor is threatening the plan's funding base by successfully leveraging factors pertinent to obtaining its predecessor's market share.

E.

The district court did not properly identify or weigh the successorship factors as applicable to the MPPAA context.

First, and most significantly, the district court did not weigh market share capture as a prime consideration, and so did not make any finding as to whether Michael's had retained a significant portion of Studer's' business or body of customers. Instead, the district court viewed composition of the workforce as "perhaps the most crucial" factor.

The parties disagree about the significance of the number of Studer's customers captured by Michael's. The Fund asserts that the bulk of Michael's' revenue in its first quarter came from former Studer's clients, and, further, that by far most of Michael's' business customers in its first quarter had been Studer's' customers recently. The spotlight, maintains the Fund, should be on the relative amount of revenue generation by Studer's' former customers, rather than on a simple head count of all customers, including one-time customers. Michael's responds that only 81 of the 868 customers Michael's served in its first two years were former Studer's clients, and that Michael's ability to attract large numbers of individual customers is what matters for the successorship determination.

The Fund's approach is better aligned with the policies underlying the MPPAA withdrawal liability successorship analysis than Michael's. The customer base inquiry is critical in this context because it is pertinent to the statutory concern with continuity of contribution rates when business changes take place. Economically, a simple headcount of the number of customers does not synchronize with that concern. Instead, a measure of the billings on the jobs worked for continuing customers by the old and new companies is more useful, as pension fund contributions are usually made based on the total employee hours worked. *See, e.g., Bd. of Trustees of W. Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009, 1011 (9th Cir. 1987).[5]

The district court did find, however, that Michael's was able to retain many of Studer's' customers, in large part because of its "personal and business relationships" with large customers of Studer's. New Tradition Homes did not put out bids to other contractors after Studer's closed. Instead, New Tradition Homes gave its business to Michael's without further inquiry, because New Tradition

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[5] Individual, nonrepeat customers may also reflect a functional continuity of the customer base. Word-of-mouth or professional referrals of residential customers may recommend a successor business because of the transfer of reputation and goodwill. Such factors are also not captured by a simple customer headcount, but are likely to be hard to demonstrate other than anecdotally.

Homes knew Michael's' owner, Haasl, from his time as a salesman at Studer's. Michael's may also have been able to capture other Studer's customers, as the district court recognized, because Michael's "use[d] . . . the same location with the same telephone number and a similar looking sign," while offering virtually the same service. As they relate to a focus on purposeful takeover of the customer base, these considerations are significant, and point toward finding Michael's was a successor. The district court considered them, however, only as isolated, independent factors, and so did not find them weighty.

Moreover, by denying the Fund's motion to supplement the record in part because the "customer issue [wa]s not dispositive of the successor employer determination," the district court further undermined its consideration of customer base continuity. As we have explained, the "customer issue" could very well be "dispositive" of the successor employer determination. Substantial continuity, measured in large part by capture of Studer's share of the construction projects in the area, is a critical factor to consider in assessing successorship for purposes of imposing MPPAA withdrawal liability. Because the district court's "exercise of discretion [in denying the motion to supplement the record was] based on an erroneous interpretation of the law," it cannot stand. *Estate of Darulis*, 401 F.3d at 1063.

Further, in considering the "continuity of workforce" factor, the district court used an erroneous method of calculation. Its conclusion that there was no "continuity of the workforce" between

Studer's and Michael's rested on a determination that "Michael's did not employ a majority, or even a substantial portion of Studer's workforce." The district court also noted that "the majority of Michael's installation work is performed by independent contractors rather than employees," and concluded that this factor also weighed against finding continuity of the workforce.

The district court made two errors of law in its method of determining workforce continuity. First, the appropriate test for determining "continuity of the workforce" is whether "a majority of the new workforce once worked for the old employer," not whether the successor employs a majority of the predecessor's workforce. *Jeffries Lithograph*, 752 F.2d at 464; see also *Fall River Dyeing*, 482 U.S. at 46 n. 12 (noting that the NLRB, "with the approval of the Courts of Appeals," has adopted the interpretation that "work force continuity . . . turn[s] on whether a majority of the successor's employees were those of the predecessor"); *NLRB v. Advanced Stretchforming Int'l, Inc.*, 233 F.3d 1176, 1180 (9th Cir. 2000); *Williams Enters., Inc. v. NLRB*, 956 F.2d 1226, 1232 (D.C. Cir. 1992). Second, only employees in the "bargaining unit,"—that is, the installers actually employed by Michael's who are the individuals as to whom pension fund contributions would be due—should be included in the workforce continuity test. *See Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1188 (9th Cir. 2011) (stating, in context of duty to bargain, that whether there was continuity of the workforce is determined by examining employees within the relevant bargaining unit). If it had used the correct metrics, the district court might well have found there was workforce continuity here. It appears that five of Michael's eight employee installers had previously worked for Studer's. That some of these employees did not "move[] directly from Studer's to Michael's," is not dispositive; "a hiatus" between employers "is only one factor in the 'substantial continuity' calculus." *Fall River Dyeing*, 428 U.S. at 45.

Finally, the district court also stated that "the successor employer determination . . . involv[es] [a finding that the successor has] 'basically the same owners and operators as . . . the predecessor employer,'" and that the "changes between predecessor and successor were technical in nature rather than a substantive change in the management.'" (quoting *New England Mech.*, 909 F.2d at 1343). The reliance on *New England Mechanical* for these propositions was mistaken. *New England Mechanical* concerns the question whether a successor employer is so similar to its predecessor that it is bound by the *substantive* provisions of its predecessor's collective bargaining agreement with a union. 909 F.2d at 1343. Generally, although a successor may have a duty to bargain with an incumbent union, successors are not bound by the substantive contractual terms of their predecessors' collective bargaining agreements, to which they were not signatories. *Id.* at 1342; *see also Fall River Dyeing*, 482 U.S. at 40; *NLRB v. Burns Int'l Sec. Servs.*, Inc., 406 U.S. 272, 284 (1972). A successor may be bound by the terms of its predecessor's collective bargaining agreement if it has exhibited an intent to be bound, or if it is so closely related to the prior business that it is effectively an "alter ego" of that business. *New England Mech.*, 909 F.2d at 1342.

New England Mechanical thus did not disturb our general rule that "[t]he successorship inquiry in [other employment and] labor-law context[s] is much broader" than the "strict corporate-law sense of [successorship]." *Sullivan*, 623 F.3d at 781. The successorship test in the MPPAA context does not require that the changes between Studer's and Michael's be merely "technical in nature," nor does it require that both entities have "basically the same owners and operators." Instead, the district court must apply the *Jeffries/Fall River Dyeing* successorship factors, with special emphasis on substantial continuity as measured by customer retention.

IV.

The district court took an erroneously narrow view of the successorship inquiry, applied the successorship factors acontextually, miscalculated the continuity of the workforce factor, and imposed the unwarranted requirement that the change of ownership be merely "technical in nature." We therefore reverse and remand for application of the labor and employment law successorship factors as appropriately weighted for MPPAA construction industry withdrawal liability purposes, and to take additional evidence as necessary to decide the relevant factual issues.

REVERSED AND REMANDED.

RESILIENT FLOOR COVERING PENSION FUND, et al., Plaintiffs, v. MICHAEL'S FLOOR COVERING, INC., Defendant.

Case No.: 11-5200 JSC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2012 U.S. Dist. LEXIS 188898

November 1, 2012, Decided

November 1, 2012, Filed

SUBSEQUENT HISTORY: Reversed by, Remanded by *Resilient Floor Covering Pension Trust Fund Bd. of Trs. v. Michael's Floor Covering, Inc., 2015 U.S. App. LEXIS 16160 (9th Cir. Cal., Sept. 11, 2015)*

PRIOR HISTORY: *Resilient Floor Covering Pension Fund v. Michael's Floor Covering, Inc., 2012 U.S. Dist. LEXIS 104398 (N.D. Cal., July 26, 2012)*

COUNSEL: [*1] For Resilient Floor Covering Pension Trust Fund Board of Trustees, Resilient Floor Covering Pension Trust Fund, Plaintiffs, Counter-defendants: Donna Lynn Kirchner, George M. Kraw, Katherine Ann McDonough, Kraw & Kraw Law Group, Mountain View, CA; Robert Brian Miller, PRO HAC VICE, Kilmer, Voorhees and Laurick, PC, Portland, OR.

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JUDGES: JACQUELINE SCOTT CORLEY, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: JACQUELINE SCOTT CORLEY

OPINION

ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Dkt. No. 67), and PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (Dkt. No. 71)

Plaintiffs seek to hold Defendant Michael's Floor Covering, Inc. ("Michael's") responsible for ERISA withdrawal [*2] liability or, in the alternative, unpaid contributions, on the ground that Michael's is a successor to a now-closed flooring company. Pending before the Court are the parties' cross-motions for summary judgment: Plaintiffs' Motion for Partial Summary Judgment (Dkt. No. 71) and Defendant's Motion for Summary Judgment on all claims (Dkt. No. 67). The Court had the benefit of oral argument on September 13, 2012 and the parties filed supplemental letter briefs on September 18 and 20, 2012, respectively. (Dkt. Nos. 103 & 104.) At oral argument the parties stipulated to the Court making findings of fact, that is, conducting a bench trial, as to the question of whether Defendant is a successor employer. Based on the findings of fact set forth below the Court concludes that Michael's is not a successor employer and therefore is not liable for withdrawal liability or unpaid contributions.

BACKGROUND

Studer's Floor Covering, Inc. ("Studer's") performed building and construction industry work consisting of sales and installation of residential and commercial flooring products in and around the Vancouver, Washington and Portland, Oregon market from 1960 to 2009. (Dkt. No. 19 ¶¶ 5, 7.) Studer's shareholders [*3] dissolved the corporation in December 2009. (Dkt. No. 19 ¶ 8.) Prior to its dissolution, Studer's was a party to a Collective Bargaining Agreement ("CBA") with the Linoleum, Carpet and Soft Tile Applicators Local Union No. 1236, which is affiliated with District Council No. 5 of the International Union of Painters and Allied Trades, AFL-CIO ("IUPAT" or "Union"). (Dkt. No. 19 ¶ 6.) Pursuant to the CBA and section 515 of the Employee Retirement Income Security Act ("ERISA"), *29 U.S.C. § 1145*, Studer's made regular pension contributions to Plaintiff Resilient Floor Covering Pension Trust Fund ("Trust Fund") for all Studer's employees performing work covered under the CBA. (Dkt. No. 19 ¶ 7.) On or about January 6, 2010, Studer's sent formal notice of its dissolution to the Trust Fund, enclosing its final pension contribution under the CBA and advising that Studer's was no longer a contributing employer. (Dkt. Nos. 19 ¶ 12; 19-2 at 7.)

In October 2009, shortly before Studer's liquidation, Michael Haasl, who had been a salesman at Studer's for 19 years, incorporated Michael's Floor Covering, Inc. ("Michael's" or "Defendant"). (Dkt. No. 18 ¶ 20.) The day after Studer's closed, on January 1, [*4] 2010, Hassel opened Michael's in the location previously occupied by Studer's.

This suit arises out of the dissolution of Studer's and subsequent opening of Michael's. Plaintiffs, the Pension Trust Fund to which Studer's belonged, allege that Michael's is a successor to Studer's and that Michael's should be ordered to either pay withdrawal liability to Plaintiff Trust Fund or continue making monthly contributions, including those now allegedly delinquent, under the CBA. (Dkt. No. 32.) Studer's and Michael's both deny the existence of a successor relationship between the two companies. (Dkt. Nos. 18-19.) On August 4, 2011, the Fund sent notice to Studer's and Michael's, as Studer's successor, claiming withdrawal liability in the amount of $2,291,014. (Dkt. No. 19-1.) This action was filed on October 25, 2011. (Dkt. No. 1.)

Pending before the Court are cross-motions for summary judgment. Defendant moves for summary judgment arguing that Plaintiffs' claims fail as a matter of law because Plaintiffs cannot establish that Michael's is a substantial continuation (successor employer) of Studer's, and even if it were, Plaintiffs have not established liability for withdrawal liability or unpaid [*5] contributions. Plaintiffs' motion is effectively a cross-motion for partial summary judgment arguing that 1) Defendant is a successor employer of Studer's, and that 2) on January 1, 2010, a withdrawal occurred within the meaning of *29 U.S.C. § 1383(b)*.

LEGAL STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." *Fed. R. Civ. P. 56(c)*. An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is "material" only if it could affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The question is "whether a jury could reasonably find either that the [moving party] proved his case by the quality and quantity of evidence required by the governing law or that [the moving party] did not." *Id.*

The court cannot weigh the evidence before it on summary judgment. *See Nolan v. Heald College, 551 F.3d 1148, 1154 (9th Cir. 2009)* (it is improper to weigh evidence on summary judgment). In [*6] contrast, "[i]n a trial on the record, [unlike] on summary judgment, the judge can evaluate the persuasiveness of conflicting testimony and decide which is more likely true." *Kearney v. Standard Ins. Co., 175 F.3d 1084, 1095 (9th Cir. 1999)* (en banc). Because the successor employer inquiry involves a weighing of facts, the parties agreed on the record to effectively convert their motions for summary judgment to a bench trial on the successor employer question, but not on the issue of whether, if a successor employer, Defendant had notice of Studer's obligations.

DISCUSSION

ERISA was enacted in 1974 because Congress was concerned that employees covered by pension plans were being deprived of anticipated benefits because of employer underfunding of those plans. *Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361-62, 100 S. Ct. 1723, 64 L. Ed. 2d 354 (1980).* This case arises under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), *29 U.S.C. §§ 1381-1453*, which is an amendment to ERISA that requires employers withdrawing from multiemployer pension plans to pay the unfunded vested benefits attributable to the withdrawing employers' participation. *See Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 217, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986).* [*7] In the construction industry this obligation is imposed only on withdrawing employers who continue to perform the type of work covered by the agreement. *29 U.S.C. § 1383(b)(2).*

Beginning with cases arising under the National Labor Relations Act ("NLRA"), "federal courts have developed a federal common law successorship doctrine which now extends to almost every employment law statute." *Steinbach v. Hubbard, 51 F.3d 843, 845 (9th Cir. 1995)*; *see also Golden State Bottling Co. v. NLRB, 414 U.S. 168, 94 S. Ct. 414, 38*

L. Ed. 2d 388 (1973) (NLRA); *Criswell v. Delta Air Lines, Inc., 868 F.2d 1093 (9th Cir. 1989)* (Age Discrimination in Employment Act); *Trustees for Alaska Laborers-Construction Industry Health & Sec. Fund v. Ferrell, 812 F.2d 512 (9th Cir. 1987)* (ERISA); *Bates v. Pacific Maritime Ass'n, 744 F.2d 705 (9th Cir. 1984)* (Title VII); *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323 (7th Cir. 1990)* (MPPAA); *Musikiwamba v. ESSI, Inc., 760 F.2d 740 (7th Cir. 1985)* (*42 U.S.C. § 1981*).

The initial question here is whether Michael's is a successor employer to Studer's. If the Court resolves this question in the affirmative, then it must decide the issue of whether as a successor employer, [*8] Michael's is liable for unpaid contributions or withdrawal liability; however, if the Court finds that Michael's is not a successor, the inquiry extends no further.

A. The Successor Employer Determination

1. <u>Facts Relating to Successor Employer Determination</u>

Studer's began selling and installing floor covering materials in 1965. (Dkt. No. 19 ¶¶ 4-6.) Scott Studer was the president, secretary, treasurer, and chairman of Studer's. (Dkt. No. 19 ¶ 4.) Studer's was a party to a CBA with the Linoleum, Carpet and Soft Tile Applicators Local Union No. 1236, which is affiliated with District Council No. 5 of the Union. (Dkt. No. 19 ¶ 6.) Pursuant to the CBA and *section 515 of ERISA*, *29 U.S.C. § 1145*, Studer's made regular pension contributions to Plaintiff Trust Fund for all Studer's employees performing work covered under the CBA. (Dkt. No. 19 ¶ 7.) Studer's Flooring ceased operations on December 31, 2009. (Dkt. No. 19 ¶ 8.) On January 6, 2012, Studer's sent a letter to the Trust Fund informing the Fund that it would no longer work under the CBA, it had laid off all its installers, liquidated its assets, and it would no longer be making contributions to the Trust Fund. (Dkt. No. 19 ¶ 12.) Studer's [*9] also enclosed its contributions for December 2009. (*Id.*)

Michael's Floor Covering was incorporated in October 2009 by Michael Haasl, a former Studer's salesman. (Dkt. No. 18 ¶ 20.) It is not a signatory to the CBA and does not contribute to the Trust Fund. (Dkt. No. 18 ¶ 19.) Michael's began making bid proposals for projects at the time of incorporation, but the first installation was not performed until January 2010. (Dkt. No. 18 ¶ 26.) For bids it submitted in October 2009, Michael's used Michael and Yvette Haasl's home e-mail address, cell phone number and home street address for the proposals. (Dkt. No. 18 ¶ 26.) [1] Studer's sold most of its tools, equipment, and inventory at a publicly advertised liquidation sale in and after October 2009 through December 2009. (Dkt. No. 19 ¶ 33.) At this public auction Michael's purchased four of Studer's 30 vehicles and about 30% of Studer's equipment and supplies. (Dkt. Nos. 19 ¶ 33; 19-2, pp. 10-29.)

1. Haasl concedes, however, that on at least one bid proposal submitted in November 2009 he used Studer's address and phone number; he contends that he told them to use his cell and private email to contact him. *See* Dkt. No. 73-4, 31:15-34:20.

On January [*10] 1, 2010, Michael's Floor Covering, Inc., opened for business at 2200 NE Andresen Rd.--Studer's address until December 31, 2009. (Dkt. No. 18 ¶ 27.) Michael's used the same phone number as Studer's because at Michael's request Studer's contacted the phone company in November 2009 and authorized the transfer of its phone and fax numbers to Michael's effective January 1, 2010. (Dkt. No. 73-20, p. 6.) The font, color and spacing of Michael's showroom sign is similar to the Studer's sign. (Dkt. Nos. 73-11 & 73-12.)

When Michael's opened it had seven total employees. Of the seven employees, two had never worked for Studer's. (Dkt. No. 19 ¶ 26.) One last worked for Studer's in 1998 (12 years before Michael's incorporation). (Dkt. No. 18 ¶ 35.) Another last worked for Studer's in 2002, but then worked for a Studer's competitor until hired by Michael's in January 2010. (Dkt. No. 18 ¶35.) A third was laid off by Studer's in May 2009 and unemployed until he was hired by Michael's in January 2010. (Dkt. No. 69-5, 4:24-5:12.) Michael Haasl and Terri Coats (an order clerk in the front office) were the only two employees who went directly from employment with Studer's to employment with Michael's. [*11] (Dkt. No. 18 ¶ 35.) In February 2010, Michael's also hired Studer's former bookkeeper to work part-time. (Dkt. No. 18 ¶ 36.)

Michael's uses both its own employees and independent contractors for installation work. (Dkt. No. 18 ¶ 42.) As of July 2010, Michael's was using 19 installers; of these, seven were employees of Michael's and 12 were independent contractors. (*Id.*)

Of the seven full-time installers employed by Michael's at some point during 2010, only four had worked for Studer's at some point in the last two years and one within the last 12 years; again, none moved directly from Studer's to Michael's. (Dkt. No. 18 ¶ 35.) Defendant uses more independent contractors than employees as installers and there is not any evidence that any of Michael's 12 independent contractors were previously employed by Studer's. From January 2010 through November 2010 approximately two-thirds of the wages paid by Michael's was to independent contractors rather than employees. (Dkt. No. 101.)

Those employees who previously worked for Studer's testified that the work is similar between the two, although some indicated that they are able to perform a wider range of work at Michael's than they were permitted [*12] to perform at Studer's. (*See, e.g.*, Dkt. No. 73-3, 11:17-12:2; 17:13-21 (employee Michael Gabel testified that the parameters of his work for Michael's are somewhat greater because he can now do tile work and other piece work that he was not able to do while with Studer's); Dkt. No.73-9, 26:17-27:12 (employee Steven Van Soest testified that the work is mostly the same, although with Michael's he is able to "do more work" because they can do a broader range of work, pulling toilets, putting particle board flooring down, tearing apart decks and counterparts -- "more constructional-type work")). Whereas Studer's had a foreman, Michael's does not employ a foreperson or supervisor. (Dkt. Nos. 18 ¶ 38; 73-7, 17:10-22.) Michael Haasl performs all the tasks that were performed by the foreman at Studer's. (*Id.*)

Michael's did not purchase Studer's good will or its customer list. (Dkt. No. 19 ¶ 34.) Nonetheless, many of Studer's customers became Michael's customers. Plaintiffs contend that 95% of Defendant's first quarter revenues from "business customers" derived from former Studer's clients. (Dkt. No. 86-1.) Plaintiffs apparently characterize a customer as "business" if the customer's name sounds [*13] like a business rather than an individual. Defendant disputes that Plaintiffs' characterization of a client as a business customer is admissible and, in any event, contends that the distinction is not relevant; instead, Defendant offers evidence that of the 868 customers Michael's has served as of July 2012, only 81 were previously served by Studer's. (Dkt. Nos. 68 ¶ 4; 92-7.) Neither party has submitted evidence as to what percentage of Studer's clients with on-going flooring needs have used Michael's.

Michael's performs much the same work as Studer's, although Michael's remodeled the showroom and added over 20 product lines that Studer's had not previously sold. (Dkt. No. 18 ¶ 29.) Of the 313 vendors Michael's has used, 82 were previously used by Studer's. (Dkt. Nos. 68 at ¶ 5; 92-7.)

2. <u>Legal Framework Governing Successor Employer Determination</u>

There is no bright line rule for determining whether an employer is a successor employer under ERISA. "There is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others." *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Bd., Hotel and Restaurant Emp. and Bartenders Intern. Union, AFL-CIO, 417 U.S. 249, 264, n.9, 94 S. Ct. 2236, 41 L. Ed. 2d 46 (1974).* [*14] Indeed, "in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate." *Id. at 256.* In labor law actions, "the focus is on whether there is substantial continuity between the enterprises." *Fall River Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. 27, 43, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987)* (internal quotations and citations omitted).

In the Ninth Circuit, courts generally rely on a multi-factor test set forth in *NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 463-69 (9th Cir. 1985)* to determine whether an employer is a successor:

> [Whether] [1] there has been a substantial continuity of the same business operations; [2] the new employer uses the same plant; [3] the same or substantially the same work force is employed; [4] the same jobs exist under the same working conditions; [5] the same supervisors are employed; [6] the same machinery, equipment, and methods of production are used; [7] and the same product is manufactured or the same service [is] offered.

Id. at 463. "The absence of one *Jeffries* factor does [*15] not" mean that the defendant was not a successor. *Hawaii Carpenters Trust Funds v. Waiola*

Carpenter Shop, Inc., 823 F.2d 289, 294 (9th Cir. 1987). Rather, the Court must weigh all the factors based on the evidence in the record and determine whether in the specific circumstances of this case Michael's was a successor to Studer's such that it should be required to pay withdrawal liability or honor Studer's contracts with Plaintiffs.

3. <u>Application of the Successor Employer Factors in this Case</u>

A finding of successorship is contingent upon a finding that "[Michael's] was engaged in essentially the same business as [Studer's]." *Trustees for Alaska Laborers Fund v. Ferrell, 812 F.2d 512, 516 (9th Cir. 1987)*. In other words, the Court must decide whether under the "totality of the circumstances, there is 'substantial continuity' between the old and new enterprise." *Hawaii Carpenters Trust Funds, 823 F.2d at 294*. While *Jeffries* identified the "substantial continuity of the same business operations" as the first factor, the Court will address that factor last since it depends, at least in part, on an analysis of the other six factors.

a) New employer use of the same plant

Michael's indisputably [*16] utilizes the same show room and office location as Studer's. Michael's signed the lease for the property occupied by Studer's on December 8, 2009. (Dkt. No. 92-4.) Studer's lease ended on December 31, 2009 and Michael's commenced January 1, 2010. (Dkt. Nos. 18, ¶ 27; 19 ¶ 8.) Thus, the second factor, use of the same plant (which includes use of the same telephone and fax numbers), weighs in favor of a successor employer finding, although not to the same extent as if Michael's had taken over Studer's lease.

b) The same or substantially the same work force is employed

The factor regarding the composition of the workforce is perhaps the most crucial. The Ninth Circuit has held that "[t]he single most important factor here is that [the defendant] employed substantially the same work force as [the previous employer]. Continuity of work force is a major consideration in successorship cases." *Audit Services, Inc. v. Rolfson, 641 F.2d 757, 763 (9th Cir. 1981)*; *see also Ferrell, 812 F.2d at 516* (agreeing that "continuity of work force is a major consideration").

In *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Bd., Hotel & Rest. Emp. & Bartenders Int'l Union, AFL-CIO, 417 U.S. 249, 94 S. Ct. 2236, 41 L. Ed. 2d 46 (1974)*, [*17] for example, the Supreme Court concluded that there was "plainly no substantial continuity of identity in the work force" where "Howard Johnson decided to select and hire its own independent work force to commence its operation of the restaurant and motor lodge" and "hired only nine of the 53 former Grissom employees and none of the Grissom supervisors." *Id. at 259-60* (internal footnote omitted). In *Rolfson*, successorship was found where the successor employer "retained most or all of Rolfson Company's contingent of carpenters." *Rolfson, 641 F.2d at 763*; *see also N.L.R.B. v. Advanced Stretchforming Int'l, Inc., 233 F.3d 1176, 1180 (9th Cir. 2000)* (holding that where defendant "employed a majority of its workforce from Aero's former employees and carried on Aero's business essentially unchanged, [defendant] became a "successor" employer to Aero").

Michael's did not employ a majority, or even a substantial portion of Studer's workforce. Of the 14 installers Studer's employed during its last year of business, only four worked for Michael's in 2010 and none moved directly from Studer's to Michael's. Three had been unemployed for at least six months and one was hired from a competitor. (*Compare* [*18] Dkt. No. 19, ¶¶ 24-25 *with* Dkt. No. 18 ¶¶ 35-42.) Only two employees moved directly from Studer's to Michael's; both of whom were non-union. Of Michael's other five full-time employees when it commenced operations in January 2010, only one had worked for Studer's within the past year (and had been unemployed for six months before being hired by Studer's). Thus, well under a majority of employees were continuous from Studer's to Michael's. Further, the majority of Michael's installation work is performed by independent contractors rather than employees and there is no allegation that any of these independent contractors are former Studer's employees. Accordingly, the continuity of the workforce factor weighs against a finding of a successor relationship.

c) Whether the same jobs exist under the same working conditions

As discussed above, Michael's primarily relies upon independent contractors for installation work. The independent contractors are paid an agreed-upon price for installation work regardless of how long it takes them to do the job; this price includes any repair or follow-up work. (Dkt. No. 68 ¶ 6.) They are not paid from payroll and do not have taxes withheld. (*Id.*) The [*19] independent contractors must supply their own vehicle and tools and agree to indemnify Michael's for any damages. (Dkt. No. 68-4, p. 3.) The work the employee installers perform is similar to the work installers performed for Studer's, although two testified that they are now able to perform a broader range of work as non-union employees. (Dkt. Nos. 73-3, 17:13-21; 73-9 27:7-12.)

"In conducting the [successor employer] analysis, [the court] keeps in mind the question whether those employees who have been retained will understandably view their job situations as essentially unaltered. " *Fall River Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. 27, 43, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987)* (internal quotations and citations omitted). Here, no union employees went directly from Studer's to Michael's; however, on this issue, the Court has considered the testimony of Steve Van Soest who was hired by Michael's in January 2010 and last worked for Studer's in June 2009, Mike Gabel who was hired in April 2010 and last worked for Studer's in December 2009 (he was employed by another flooring company from January --March 2010), Noel Perkins who was hired in July 2010 and last worked for Studer's in December 2009, and Steve Wilkerson [*20] who was hired in July 2010 and last worked for Studer's in December 2009. (Dkt. No. 18 ¶¶ 35 & 42.)

When asked how working for the two employers is different Steve Van Soest testified that:

We do more work. As in, instead of going and -- because with Studer's we could not pull toilets,

> we could not pull sinks, because we are not a plumber. With Michael's, being that we're that way, we do pull sinks and toilets once in a while. We put in a lot more underlayment and stuff than we did with Studer's . . . We do a lot more stuff like that, like tear apart decks, put decks on, you know, countertops, and then put the formica over the new countertops. So we do a lot more constructional-type work in these houses with Michael's than we did with Studer's.

(Dkt. No. 73-9, 26:20-27:12.)

Noel Perkins described his positions for the two companies as very similar, although he noted that at Michael's he is paid every two weeks by direct deposit, rather than every week by check, he no longer receives his work assignments from a foreperson, and he travels to and from work in his personal vehicle rather than a company van. (Dkt. No. 73-7, 17:10-19:8.) Steve Wilkerson testified similarly. (Dkt. No. 73-10, 7:14-12:11.) [*21] Mike Gabel's testimony was similar, although he also noted that "the parameters of work are widened a little bit more. I'm not restricted to just what the union let's me do, such as tile setting." (Dkt. No. 73-3, 6:2-10:12,11:24-12:2.)

Accordingly, many aspects of the work between Studer's and Michael's are similar, although some basic structures to the working relationship changed; namely, mechanics of compensation, use of company vehicles, and work assignment and structure. The nature of the work also changed at least somewhat with the employees able to perform a broader range of work on particular jobs. Finally, that the majority of installer positions are independent contractor positions, rather than employee positions, and are governed by a different set of conditions is a substantive change in the working conditions. On balance, the Court finds that this factor weighs against a finding of successorship.

d) Whether the same supervisors are employed

Michael's does not employ a foreperson or supervisor. (Dkt. No. 18 ¶ 38.) Mike Haasl performs all the tasks that were performed by the foreman at Studer's, whereas at Studer's he was a salesman, not a supervisor. (*Id.*) Thus, this factor [*22] also weighs against a successor employer determination.

e) Whether the same machinery, equipment, and methods of production are used

Studer's sold most of its tools, equipment and inventory at a publicly advertised liquidation sale in and after October 2009 through December 2009. Michaels' purchased four of Studer's 30 vehicles and about 30% of Studer's equipment and supplies. (Dkt. No. 19 ¶ 33.) Accordingly, some of the same equipment and machinery is used, but not enough to make this factor weigh in favor of a successor employer determination, especially since the assets Michael's did obtain were purchased at a public auction rather than through a private agreement.

f) Whether the same service is offered

Michael's offers flooring services as did Studer's. (Dkt. Nos. 18 ¶ 3; 19 ¶ 5.) Two of the former Studer's employees who now work for Michael's testified that

Michael's performs a broader range of work than Studer's did. (Dkt. Nos. 73-3, 17:13-21; 73-9 27:7-12.) Further, Michael's remodeled the showroom after moving in and added over 20 product lines that Studer's had not previously sold. (Dkt. No. 18 ¶ 29.) Of the 313 vendors Michael's has used, 82 were used by Studer's. (Dkt. No. 68 [*23] at ¶ 5.) Thus, although Michael's is engaged in the flooring business, as was Studer's, Michael's does not offer the *exact same* service in light of the testimony that Michael's offers additional product lines and does a broader range of work at various construction sites. The Court finds that this factor is neutral.

g) Substantial continuity of business operations

Although it is undisputed that Michael's did not purchase Studer's business, good will or customer list, Plaintiffs argue that because a significant percentage of Michael's "business" customers were Studer's customers Michael's in fact relied upon Studer's good will when Michael's opened a nearly identical business in the same location, using the same telephone number; thus, Michael's is a substantial continuation of Studer's business operations. Even if the Court were to find that Michael's received substantial business because of its ties to Studer's, however, the Court still finds that there is not "substantial continuity between the old and new enterprise." *Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc., 823 F.2d 289, 294 (9th Cir. 1987).* In *Hawaii Carpenters Trust Funds*, for example, the court found substantial [*24] continuity because, among other things, the defendant purchased the business from the former owner, continued operations under the same name as the prior employer, and sent a letter to all the prior employer's customers stating that it was "under new management" and it appreciated the customers continuing "patronage" to conclude that defendant was a successor employer. *Id. at 291, 294.* Here, in contrast, Michael's did not purchase Studer's business and did not hold itself out to Studer's customers as a successor to Studer's. That in August 2011, Angie's List had an internet listing for Studer's (which had been closed for 18 months) which included Michael's contact information does not support a finding that Michael's represented itself as Studer's successor; there is nothing in the record that suggests the mistake was due to information provided to Angie's List by Michael's.

Similarly, while Michael's use of the same location with the same telephone number, and a similar looking sign (although with a completely unrelated name) undoubtedly contributed to Michael's obtaining some of Studer's clients, it is more likely that the customers that moved their business to Michael's did so because [*25] of their relationship with Michael's owner, a former Studer's salesperson. In other words, it is to be expected that Michael's would initially obtain its customers from its owner's contacts in the industry, contacts Michael Haasl made during his long tenure at Studer's as a salesperson. Michael's did not assume or purchase any contracts that Studer's had with any of its business clients. Nor did Michael's enter into an agreement to purchase Studer's assets or hire most of Studer's workforce. And those of Studer's assets which Michael's did purchase, were purchased at a public auction, and involved far less than a majority of the available assets. *See Trustees For Alaska Laborers-Constr. Indus. Health & Sec. Fund v. Ferrell, 812 F.2d 512, 516 (9th Cir. 1987)* (finding that the new venture formed by one of the two partners of the prior joint venture was engaged in essentially the same business where it continued to use the same name, maintained many of the same employees, and retained possession of equipment from the joint venture). And unlike *Ferrell*, in which there was an overlap in ownership between the previous employer and the defendant, *812 F.2d at 514*, no former owner of Studer's [*26] has any financial interest in Michael's. Accordingly, the Court finds that while the customer component of the business continuity analysis may favor Plaintiffs, [2] the remainder of the analysis does not.

2. On September 26, 2012, Plaintiffs filed a motion seeking leave to supplement the record with additional Michael's invoices from 2010 and 2011, and some additional Studer's invoices. (Dkt. No. 105.) Plaintiffs do not seek to augment the record with additional argument or analysis of the invoices; thus, it is unclear what Plaintiffs contend these invoices show. Defendant opposes this motion. (Dkt. No. 106.) Because Plaintiffs have not demonstrated good cause for the late filing, and because the Court finds that the customer issue is not dispositive of the successor employer determination, Plaintiffs' motion is denied.

4. <u>Successor Employer Determination</u>

The successor inquiry "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Fall River*

Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. 27, 43, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987). The Court has considered the facts of this case, applied them to the *Jeffries* factors, and concludes that, on balance, the factors weigh [*27] against a finding of successorship. "Because the origins of successor liability are equitable, fairness is a prime consideration in its application." *Sullivan v. Dollar Tree Stores, Inc., 623 F.3d 770, 782 (9th Cir. 2010)*; *see also Bates v. Pac. Mar. Ass'n, 744 F.2d 705, 710 (9th Cir. 1984)* (holding that "fairness and necessity are inherent considerations in successorship analysis"). Here, it would not be equitable to extend successor liability to Michael's. In other words, Michael's is not "essentially the same" as Studer's. *Dollar Tree, 623 F.3d at 782.*

The facts here are distinguishable from those in the cases upon which Plaintiffs rely. Defendant did not agree to purchase any of the assets of a prior company. *See Howard Johnson, 417 U.S. at 250*; *Hawaii Carpenters, 823 F.2d at 291*; *Jeffries Lithograph Co., 752 F.2d at 461*. Nor is there an overlap in ownership between the defendant and the prior business. *See Ferrell, 812 F.2d at 515.* Michael's did not publicly hold itself out as a successor company, *see Hawaii Carpenters, 823 F.2d at 291*; nor did it continue to contribute to the trust fund and behave as if it were still a party to the CBA and related agreements. *Id. at 291*; *Ferrell, 812 F.2d at 515*; [*28] *Rolfson, 641 F.2d at 759*). In *Ferrell* and *Hawaii Carpenter's* the Ninth Circuit described the successor employer determination as involving "basically the same owners and operators as had the predecessor employer. The changes between predecessor and successor were technical in nature rather than a substantive change in the management." *New England Mech., Inc. v. Laborers Local Union 294, 909 F.2d 1339, 1343 (9th Cir. 1990).* Here, in contrast, there was a substantive change in ownership between Studer's and Michael's.

Plaintiffs urge the Court to consider the policies behind the adoption of the MPPAA in conducting its successorship analysis. In other words, they contend that while the facts here might not be sufficient to support a finding of successorship in other circumstances, in the context of the MPPAA this Court must find Plaintiffs have met their burden. *See Sullivan, 623 F.3d at 781-83* (suggesting that in reaching the successor employer determination under the Family Medical Leave Act ("FMLA") the court should consider the policies behind the FMLA in addition to the traditional successorship factors).

The MPPAA was enacted to "to reduce the incentive for employers to terminate [*29] their affiliation with multiemployer pension plans. The MPPAA was intended to make it onerous and costly for them to withdraw." *H.C. Elliott v. Carpenters Pension Trust Fund for Northern California, 859 F.2d 808, 810 (9th Cir. 1988)citing* H.R. No. 96-869, 96th Cong., 2d Sess., pt. 1, at 67, reprinted in 1980 U.S. Code Cong. & Admin. News 2918, 2935. Employer withdrawal reduces the plans' contribution base and raises the contribution rate for the remaining employers to fund historical liabilities, including liabilities for employers no longer participating in the plans, which in turn, threatens the ongoing viability of pension plans. *Id. at 811*. Thus, the MPPAA "requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's unfunded vested benefits, calculated as the difference between the present value of the vested benefits and the current value of the plan's assets." *Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211, 217, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986)* (internal quotations and citations omitted). However, Congress provided an exception to the general rule of withdrawal [*30] liability for the construction industry such that withdrawal liability is only imposed where an employer's obligation to the fund ceased, but the employer continues performing covered work. *H.C. Elliott, 859 F.2d at 812.*

Plaintiffs argue that the strong federal policy of safeguarding employees' pensions that underlies ERISA mandates a finding of successorship here. They posit that the construction industry exception to withdrawal liability is premised upon the expectation that when one company goes out of business, its business (and its union employees) will be picked up by a different company that contributes to the trust funds; thus, the withdrawal does not jeopardize the viability of the fund. Here, however, Studer's business to some extent moved to Michael's--a non-union shop--and thus the policy justification for the withdrawal liability exception does not apply. Plaintiffs accordingly urge the Court to weigh the factors in favor of successor liability in light of these policies.

While the rationale for the exception to withdrawal liability might not be satisfied here, Congress did not limit the exception to only those situations where the customers and employees of the defunct business [*31] moved to a union company. The question here is whether Michael's is "essentially the same" as Studer's. *NLRB, 752 F.2d at 463*. It is not. Scott Studer decided to close his doors and go out of business after nearly 40-years in the flooring industry. One of his (non-union) employees decided to open his own flooring business. That employee did not buy the business, he did not purchase the business's goodwill or customer lists, and he did not represent to Studer's customers that he was taking over Studer's business. Instead, he opened his own flooring company, the Defendant Michael's Flooring, in the same location as Studer's, directly hiring only one Studer's employee other than himself. In sum, Studer's ceased operations and another unrelated entity formed. Plaintiffs' suggestion that the Court should nonetheless hold Michael's responsible for Studer's withdrawal or unpaid contributions because of the public policy animating the MPPAA is unsupported by the caselaw.

Having concluded that Michael's is not a successor employer to Studer's the Court's inquiry ends. There is no need to resolve the question of whether in the construction industry context a "successor employer" can be [*32] liable for the MPPAA withdrawal liability of a company which is no longer operating in the industry, or whether Defendant is entitled to summary judgment on the notice issue.

CONCLUSION

Based on the findings of fact and analysis set forth above, the Court concludes that Michael's is not a successor to Studer's such that it can be liable for MPPAA withdrawal liability or Studer's employee benefits contracts. Because the parties agreed to convert their cross motions for summary judgment on the successor employer issue to a bench trial, their motions for summary judgment are DENIED as moot. Instead, based on the summary judgment record, the Court finds that Michael's is not a successor to Studer's and therefore is entitled to judgment on all of Plaintiffs' claims.

This Order constitutes the findings of fact and conclusions of law required by Federal Rule of Civil Procedure 52 and disposes of Docket Nos. 67, 71, 105. As Defendant's counterclaims remain unresolved, the parties shall appear for a further case management conference at 1:30 p.m. on November 29, 2012.

IT IS SO ORDERED.

Dated: November 1, 2012

/s/ Jacqueline Scott Corley

JACQUELINE SCOTT CORLEY

UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESILIENT FLOOR COVERING PENSION TRUST FUND BOARD OF TRUSTEES and RESILIENT FLOOR COVERING PENSION TRUST FUND, Plaintiffs - Appellants, v. MICHAEL'S FLOOR COVERING, INC., Defendant – Appellee	No. 12-17675 D.C. No. 3:11-cv-05200-JSC Northern District of California, San Francisco ORDER

Before: PAEZ and BERZON, Circuit Judges and EZRA,[6] District Judge.

The motion for leave to file an amicus brief is GRANTED.

Judges Paez and Berzon have voted to deny the

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[6] The Honorable David A. Ezra, District Judge for the U.S. District Court for the Western District of Texas, sitting by designation.

petition for rehearing en banc and Judge Ezra so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellee's petition for rehearing en banc, filed October 26, 2015, is DENIED.

No further petitions for rehearing will be considered.