

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

TRILANTIC CAPITAL PARTNERS IV, L.P.
and TCP CLOTHESLINE SPV, L.L.C.,

Plaintiffs,

vs.

UNITED FOOD & COMMERCIAL
WORKERS INTERNATIONAL UNION-
INDUSTRY PENSION FUND; NEW
ENGLAND TEAMSTERS & TRUCKING
INDUSTRY PENSION FUND; NATIONAL
RETIREMENT FUND; and PENSION
BENEFIT GUARANTY CORPORATION,

Defendants.

Civ. No. _____

COMPLAINT

Plaintiffs Trilantic Capital Partners IV, L.P. (“Trilantic IV”) and TCP Clothesline SPV, LLC (“Clothesline SPV”), by and through their undersigned counsel, as and for their complaint against United Food & Commercial Workers International Union-Industry Pension Fund (“UFCW Fund”), New England Teamsters & Trucking Industry Pension Fund (“Teamsters Fund”), National Retirement Fund (“NRF” and, with the UFCW Fund and Teamsters Fund, the “Pension Funds”), and the Pension Benefit Guaranty Corporation (“PBGC”), allege as follows:

NATURE OF THIS ACTION

1. Trilantic IV, an investment fund that, for over eight years had an indirect ownership interest in non-party Angelica Corporation (“Angelica”), brings this action for declaratory judgment because the Pension Funds and the PBGC have wrongfully asserted that Trilantic IV is jointly and severally liable under federal law for certain of Angelica’s pension obligations.

2. When an employer completely withdraws from a multiemployer pension fund, it incurs “withdrawal liability” to the pension plan, the amount of which is determined by assumptions and formulae set forth in Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendment Act of 1980 (“MPPAA”), 29 U.S.C. § 1381 *et seq.*, and by regulations implementing those laws. ERISA imposes joint and several liability for that withdrawal liability on all “trades or businesses” under “common control” with the withdrawing employer. *See* 29 U.S.C. § 1301(b)(1).

3. Angelica (including its subsidiaries), which is a national medical laundry and linen management services company, contributed to a number of multiemployer pension plans, including the Pension Funds, and to one single-employer plan, the Angelica Corporation Pension Plan (the “AC Plan”).¹ On April 3, 2017, Angelica commenced a Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the Southern District of New York. As a result of that proceeding, its assets were sold and Angelica ceased making contributions to the Pension Funds, effecting a “complete withdrawal” within the meaning of 29 U.S.C. § 1383. The AC Plan was terminated.

4. The Pension Funds and the PBGC assert Trilantic IV is jointly and severally liable for Angelica’s unpaid withdrawal and termination liability under the theory that Trilantic IV is a “trade or business” under “common control” with Angelica. In a letter dated July 5, 2017, the UFCW Fund demanded Trilantic IV pay Angelica’s withdrawal liability in the claimed amount

¹ In addition to the Pension Funds, the other multiemployer pension plans in which Angelica participated are the Upstate New York Bakery Drivers and Industry Pension Fund, the Western Conference of Teamsters Pension Plan, and the Local 731, I.B. of T., Textile Maintenance and Laundry Craft Pension Fund (“IBT Fund”). These funds have not yet demanded that Trilantic IV or TCP Clothesline SPV, L.L.C., pay Angelica’s withdrawal liability. If any of these funds lodges a claim with Plaintiffs for Angelica’s withdrawal liability, Plaintiffs would move to amend this Complaint to add such fund(s) as defendants.

of \$7,163,547. Likewise, in a letter dated July 21, 2017, the Teamsters Fund demanded that Trilantic IV pay Angelica's withdrawal liability in the claimed amount of \$3,473,040. On August 9 and September 27, 2017, the NRF's counsel told Plaintiffs' counsel that the NRF intends to pursue withdrawal liability claims against Trilantic IV. And, in a letter dated August 10, 2017, the PBGC opined Trilantic IV was part of a "controlled group" with Angelica for purposes of Angelica's unfunded pension liabilities to the AC Plan.

5. The Pension Funds' and the PBGC's assertions that Plaintiffs have withdrawal liability because they are "trades or businesses" under "common control" with Angelica are baseless. Historically, courts have rejected the notion that ordinary investors or shareholders, whose only return is that of an investor, can qualify as "trades or businesses" under 29 U.S.C. § 1301(b)(1). *See, e.g., Higgins v. Commissioner*, 312 U.S. 212, 218 (1941); *Whipple v. Commissioner*, 373 U.S. 193, 202 (1963). Only one reported case from a United States Court of Appeals—*Sun Capital Partners III, L.P. v. New England Teamsters & Trucking Industry Pension Fund*, 724 F.3d 129 (1st Cir. 2013)—has even suggested a private equity fund can be subject to the "withdrawal liability" of its portfolio company, but that decision was based on unique circumstances that are not present here and that case, in any event, was wrongly decided.

6. Trilantic IV's relationship with Angelica shows it was not a part of a "trade or business" under "common control" with Angelica. Trilantic IV was a passive equity investor that did not manage or direct the day-to-day operations of Angelica in its role as equity holder, and it had no authority to hire or fire Angelica's employees, a right which was vested in Angelica's board of directors and CEO. While Trilantic IV had and exercised a right to appoint members of Angelica's board, Angelica's strategic vision and day-to-day operations were executed by individuals and entities that were not employees of Trilantic IV or its affiliates.

Trilantic IV had no management or monitoring agreement with Angelica. Clothesline SPV was a special purpose vehicle formed simply to hold Trilantic IV's investment; it had no operations or employees.

7. Like any passive investor, Trilantic IV stood to gain only if there was an appreciation in the value of its investment or if Angelica paid dividends to shareholders (neither of which happened at any time while Trilantic IV was an investor). Trilantic IV did not receive compensation, income, profit-sharing, or fees of any kind from Angelica.

8. Imposing withdrawal liability on a passive investor like Trilantic IV would be a radical expansion of what it means to be a "trade or business" under ERISA. It would also undermine the purposes of ERISA and the MPPAA to protect the financial stability of multiemployer pension plans. Private investment funds are a significant source of investment capital in the United States. If they can be held jointly and severally liable for withdrawal liability incurred by the separately-operated corporate entities in which they invest, those private investment funds will be much less likely to invest in such entities in the future. The decrease in private investment that would occur would, in turn, make it more likely that more businesses will struggle or fail, adversely impacting the financial stability of the multiemployer pension funds to which those businesses contribute.

9. An actual controversy exists because the Pension Funds and PBGC seek to assert withdrawal liability against Trilantic IV (and by extension, Clothesline SPV) and require them to arbitrate the amount of such liability under ERISA. Because the Pension Funds' and PBGC's attempts to impose withdrawal liability impair and interfere with Plaintiffs' rights, Plaintiffs seek a judicial determination that neither Trilantic IV nor Clothesline SPV was a "trade or business"

within the meaning of 29 U.S.C. § 1301(b)(1), and thus neither, jointly or severally, are liable for Angelica's withdrawal liability.

THE PARTIES

10. Trilantic IV, L.P., is a private investment fund that invests in various companies (known as "portfolio companies"), and is organized as a limited partnership under Delaware law.

11. TCP Clothesline SPV, L.L.C., is a special purpose vehicle of Trilantic IV formed specifically to hold Trilantic IV and its parallel funds' investment in Angelica and is organized as a limited liability company under Delaware law.

12. UFCW Fund is a multiemployer pension plan within the meaning of 29 U.S.C. § 1002(37)(A) and 29 U.S.C. § 1301(a)(3).

13. Teamsters Fund is a multiemployer pension plan within the meaning of 29 U.S.C. § 1002(37)(A) and 29 U.S.C. § 1301(a)(3).

14. NRF is a multiemployer pension plan within the meaning of 29 U.S.C. § 1002(37)(A) and 29 U.S.C. § 1301(a)(3).

15. The PBGC is a wholly-owned United States government corporation and agency of the United States government.

16. Non-party Angelica is incorporated in Missouri and headquartered in Georgia.

JURISDICTION

17. This Court has subject matter jurisdiction over the instant disputes pursuant to 28 U.S.C. § 1331, as this action arises under 29 U.S.C. §§ 1381-1383, 1399(c)(2), and 1451(a)(1) and (c).

18. This Court has personal jurisdiction over Defendants pursuant to 29 U.S.C. §§ 1303(f) and 1451(d).

19. This Court has authority to award the declaratory relief pursuant to 28 U.S.C. § 2201.

VENUE

20. Venue is proper in this District under 29 U.S.C. § 1451(d) and 28 U.S.C. § 1391(b) and (c).

LEGAL BACKGROUND

21. A multiemployer pension plan may assess “withdrawal liability” against an entity that effects a “complete withdrawal” from the plan. *See* 29 U.S.C. §§ 1381(a), 1381(b)(2), 1383(a)(2).

22. The assessed “withdrawal liability” is the withdrawing entity’s proportionate share of vested but unfunded pension liabilities, the amount of which is to be calculated according to actuarial assumptions and formulae set forth in the MPPAA and by implemented in regulations of the PBGC. *See, e.g.*, 29 U.S.C. §§ 1381(b)(1), 1391, 1393.

23. Under Title IV of ERISA, all “trades or businesses” that are under “common control” with the withdrawing or sponsoring entity on the date of withdrawal or termination are deemed to be “employer[s]” that are jointly and severally liable to the multiemployer plan for the withdrawal liability. 29 U.S.C. §§ 1301(a)(14)(A) & 1301(b)(1).

24. In the Second Circuit, whether an entity is an “employer” for purposes of withdrawal liability is “a threshold legal issue requiring judicial resolution, since an entity that is not an employer cannot, under MPPAA, be required to arbitrate [the amount of the liability].” *New York State Teamsters Conference Pension & Ret. Fund v. Express Servs., Inc.*, 426 F.3d 640, 645-46 (2d Cir. 2005).

25. While ERISA itself does not define what constitutes a “trade or business,” courts applying ERISA generally have held that even a controlling shareholder is not a “trade or business” if it does not participate regularly, actively, and continuously in the management and operations of the underlying entity. *See, e.g., Central States, Southeast & Southwest Areas*

Pension Fund v. White, 258 F.3d 636, 640 n.3 & 641-43 (7th Cir. 2001); *see also Central States, Southeast & Southwest Areas Pension Fund v. Fulkerson*, 238 F.3d 891, 895 (7th Cir. 2001).

26. Similarly, the Supreme Court and other federal appellate courts have held a passive investor is not a “trade or business” under the Internal Revenue Code’s use of that term. *See, e.g., Snyder v. Commissioner*, 295 U.S. 134 (1935); *Higgins v. Commissioner*, 312 U.S. 212 (1941); *Whipple v. Commissioner*, 373 U.S. 193 (1963); *Moller v. U.S.*, 721 F.2d 810 (Fed. Cir. 1983); *Spellman v. Commissioner*, 845 F.2d 148 (7th Cir. 1988); *Zink v. U.S.*, 929 F.2d 1015 (5th Cir. 1991); *LDL Research & Development II, Ltd. v. Commissioner*, 124 F.3d 1338 (10th Cir. 1997). These precedents are highly relevant because PBGC regulations borrow the IRS definition of “trade or business” for various purposes. *E.g.* 29 C.F.R. § 4001.3(a)(1) (“The PBGC will determine that trades and businesses (whether or not incorporated) are under common control if they are “two or more trades or businesses under common control”, as defined in regulations prescribed under section 414(c) of the [Internal Revenue] Code.”).

FACTUAL BACKGROUND

A. Trilantic IV Invests In Angelica

27. Formed in 2007, Trilantic IV, which was originally known as Lehman Brothers Merchant Banking Partners IV L.P., is a passive investment vehicle or private equity fund. Trilantic IV’s investment objective was (and remains) to achieve significant long-term capital appreciation by investing in a diversified group of established operating companies (“portfolio companies”) in partnership with the management teams of those enterprises, and by working with the management teams to grow the revenues, earnings, and cash flows of those portfolio companies. Trilantic IV does not look to invest in companies with failing management that it must replace; rather, it seeks to invest in companies that are already managed by executive teams in which Trilantic IV has confidence.

28. In carrying out its objectives, Trilantic IV invests in and/or provides funds to its portfolio companies. In all its investments, including its investment in Angelica, Trilantic IV exercises its shareholder rights, including the right to elect board members. But Trilantic does not manage or direct the day-to-day operations of its portfolio companies, including Angelica, except on an interim or emergency basis, such as when there is leadership turn over in the ordinary course.

29. In August 2008, Trilantic IV, through Clothesline SPV, purchased a majority of Angelica's equity for approximately \$130 million. Angelica was, and continues to be, a national leader in providing medical laundry and linen management services, supplying thousands of health care providers in dozens of states across the country. As of earlier in 2017, Angelica employed close to 4,000 employees, more than half of whom participate in labor unions. Trilantic IV believed Angelica was a business with substantial potential for growth. Between 2008 and 2012, Trilantic IV invested an additional \$15 million, which Angelica used to fund capital projects and for additional liquidity, making Trilantic IV's total investment \$145 million.

30. Plaintiffs did not participate in the operation or management of Angelica or any of its subsidiaries. Not one of Trilantic IV, Clothesline SPV, or Trilantic IV's general partners had any contractual relationship with Angelica and/or any of its subsidiaries regarding the provision of consulting, management, or other services. While, as the majority equity owner of Angelica, Trilantic IV did elect members of Angelica's board of directors, no employees or partners of Trilantic IV or its affiliates, including Clothesline SPV, served as an executive officer of Angelica or otherwise filled a management or employee position. Trilantic IV, as an equity investor, did not hire or fire any of Angelica's employees; this decision was vested in the board

of directors, which, during Trilantic IV's ownership of Angelica, always included members other than Trilantic IV designees.

31. The only benefits Plaintiffs stood to receive from its investment in Angelica stemmed from Trilantic IV's ownership of the majority of Angelica's equity through Clothesline SPV. Trilantic IV was never promised, nor did it ever receive, any type of management or monitoring fee or any fee offsets from Angelica. There was no possibility that Trilantic IV could earn additional monies from its connection to Angelica; it could only facilitate Angelica's growth and development and hope to eventually enjoy the fruits of its investment through a later disposition of the company.

32. Neither Trilantic IV nor Clothesline SPV was a participating employer in the Pension Funds and neither entered into any contracts or agreements with them, let alone a collective bargaining agreement.

B. Angelica Files for Bankruptcy

33. After Trilantic IV invested in Angelica through Clothesline SPV, Angelica's business struggled, due in large part to changes in the healthcare industry created by changes in federal law. Angelica's revenues declined steadily and substantially.

34. Starting in the middle of 2016, a major creditor of Angelica affiliated with the prominent investment firm Kohlberg Kravis Roberts ("KKR") began to influence significant control over Angelica. In 2016, KKR obtained the right to appoint two members to Angelica's board and, among other things, directed Angelica to replace its CFO without seeking the consent of the board. Later that year, Angelica established an Executive Committee to steer the company through a reorganization and conduct a process for the ultimate sale of the company. The Executive Committee included the two board members appointed by KKR and the CEO of Angelica, and did not include anyone associated with Trilantic IV. Throughout the first half of

2017, KKR representatives met and negotiated contracts with Angelica's customers and the unions, without involving the board or anyone associated with Trilantic IV. In addition, without the consent of the board, KKR notified the CEO that, upon KKR's acquisition of Angelica, the CEO would be replaced by an individual appointed by KKR; the new CEO assumed his duties on or around June 30, 2017.

35. KKR ultimately chose to reorganize Angelica's business through a Chapter 11 bankruptcy proceeding. Faced with the alternative of a complete liquidation of Angelica, the board, including the Trilantic IV board representatives, approved the bankruptcy proceeding filing and on April 3, 2017, Angelica commenced a proceeding under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. That proceeding paved the way for KKR to acquire substantially all of Angelica's assets pursuant to a June 2017 sale under Section 363 of the Bankruptcy Code. As part of the negotiations for the acquisition of Angelica's assets by KKR, KKR had the opportunity to assume all pension plan liabilities and ensure that Angelica did not withdraw from such Pension Plans, but it chose not to do so, and instead pursued settlements with the various plans, as discussed below. Trilantic IV board representatives disagreed with KKR's proposed bankruptcy plan, which included the cessation of contributions to the Pension Funds. Accordingly, the Trilantic IV board representatives abstained from the separate vote to approve KKR's proposed acquisition of Angelica. The bankruptcy plan was nonetheless confirmed by the Bankruptcy Court on August 31, 2017.

36. Due to Angelica's bankruptcy, Trilantic IV's investment (through Clothesline SPV) was a total loss. Trilantic IV never received any dividends, investment income, or payout from Angelica and it was forced to write off its entire \$145 million investment.

C. Angelica Withdraws From The Pension Funds

37. Once its bankruptcy proceeding began, Angelica stopped contributing to its multiemployer pension plans, including the Pension Funds. The sale of Angelica's assets in bankruptcy triggered a "complete withdrawal" by Angelica from the Pension Funds within the meaning of 29 U.S.C. § 1383. The AC Plan terminated.

38. On June 22, 2017, the UFCW Fund entered into a settlement with KKR, in which KKR agreed to pay \$500,000 and the UFCW Fund released KKR from all pension-related obligations related to Angelica's withdrawal from the UFCW Fund, including any claims based "on a successor liability theory, controlled-group basis or otherwise."

39. On June 19, 2017, the NRF entered into a Supplemental Pension Agreement Term Sheet with KKR (amended on June 22, 2017), which provides the parties will enter into a Supplemental Pension Agreement concerning legacy and prospective pension obligations and the NRF will not "assess against KKR and any KKR investment vehicle ... any withdrawal liability, delinquent contributions, accumulated funding deficiencies, or any other ERISA controlled-group liability."

D. The Pension Funds and PBGC Attempt to Assert Withdrawal and Termination Liability Against Trilantic IV

40. Even though UFCW Fund and NRF obtained partial payment of Angelica's pension obligations from KKR, and even though, upon information and belief, the Teamsters Fund and PBGC likely are in the process of negotiating similar settlements, the Pension Funds and PBGC assert Trilantic IV is responsible for Angelica's withdrawal and termination liabilities.

41. In a letter dated July 5, 2017, the UFCW Fund asserted Trilantic IV was a "trade[] or business[] under common control" with Angelica and thus owed the UFCW Fund \$7,163,547 in

withdrawal liability (the “UFCW Letter”). The UFCW Letter demanded quarterly installment payments of this sum, with the first payment of \$101,225 beginning on August 1, 2017.

42. Similarly, in a letter dated July 19, 2017, the Teamsters Fund asserted Angelica owed the Teamsters Fund \$3,473,040 in withdrawal liability (the “Teamsters Letter”). The Teamsters Letter demanded monthly installment payments of this sum with the first payment of \$14,471 beginning on September 19, 2017.

43. On August 9 and September 27, 2017, NRF’s counsel told Trilantic IV’s counsel that NRF intended to seek withdrawal liability directly from Trilantic IV.

44. In a letter dated August 10, 2017, the PBGC asserted Trilantic IV was part of a “controlled group” relationship with Angelica, and suggesting controlled group members were jointly and severally liable for Angelica’s single-employer plan’s unfunded benefit liabilities to the AC Plan.

CLAIM FOR RELIEF

(Declaratory Judgment)

45. Plaintiffs reassert and re-allege paragraphs 1-44 as though set forth fully herein.

46. An actual controversy currently exists between Plaintiffs and the Pension Funds and the PBGC over whether Trilantic IV (and by extension Clothesline SPV) is a “trade or business” within the meaning of the controlled group liability provisions of ERISA and MPPAA.

47. Trilantic IV is not a “trade or business” under those provisions because its investment activities are passive, similar to those that have repeatedly been found not to constitute a “trade or business” by numerous courts.

48. Clothesline SPV is not a “trade or business” under those provisions because its activities are passive and remote, and on behalf of beneficial owners such as Trilantic IV.

Plaintiffs are unaware of any authority holding that entities such as Clothesline SPV constitute “trades or businesses.”

49. Accordingly, pursuant to 28 U.S.C. § 2201, Plaintiffs request a declaration that (i) Trilantic IV and Clothesline SPV are neither “trades or businesses” under “common control” with Angelica within the meaning of 29 U.S.C. § 1301(b) nor “employers” for purposes of asserting “controlled group” liability; and (ii) no Plaintiff is liable for Angelica’s withdrawal and/or termination liability with respect to its ownership interests or facilitation of ownership interests in Angelica.

50. The requested declaratory judgment declaring the rights and responsibilities of the parties will resolve the current, actual controversies and is an appropriate exercise of this Court’s discretion under 28 U.S.C. § 2201.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

A. Pursuant to 28 U.S.C. § 2201, Plaintiffs request a declaration that (i) Trilantic IV and Clothesline SPV are neither “trades or businesses” under “common control” with Angelica within the meaning of 29 U.S.C. § 1301(b) nor “employers” for purposes of asserting “controlled group” liability; and (ii) no Plaintiff is liable for Angelica’s withdrawal and/or termination liability with respect to its ownership interests or facilitation of ownership interests in Angelica.

B. Pursuant to 29 U.S.C. § 1370(e) and 29 U.S.C. § 1451(f), an award of Plaintiffs’ attorneys’ fees and costs; and

C. Any and all other further relief to which Plaintiffs may be found entitled.

Dated: September 29, 2017

Respectfully submitted,

TRILANTIC CAPITAL PARTNERS IV, L.P.
and TCP CLOTHESLINE SPV, L.L.C.

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/s/ Jennifer Selendy

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