IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PENSION BENEFIT GUARANTY CORPORATION	)	Case No.: 1:13-cv-00266-SJD-KLL
	)	(Judge Dlott)
Plaintiff,	)	(Magistrate Judge Litkovitz)
v.	)	
UFORMA/SHELBY BUSINESS FORMS, INC., et al.	)	May 13, 2013
Defendants.	)	

RESPONSE AND OPPOSITION OF PLAINTIFF PENSION BENEFIT GUARANTY CORPORATION TO MOTION TO DISMISS OF DEFENDANTS 2840 SPROUSE DRIVE, 10001 ALLIANCE ROAD, 2322 CLIFTON AVENUE, SAMUEL L. PETERS, LLC AND PETERS OHIO, LLC

Plaintiff, Pension Benefit Guaranty Corporation ("PBGC"), a United States Government corporation and administrative agency, opposes the motion filed April 22, 2013, by five of 12 defendants to dismiss the complaint. Defendants' Motion to Dismiss misconstrues the Plaintiff's claims and sets up invalid "straw man" arguments that have no relevance.

In the complaint, plaintiff seeks to collect from trades and businesses under common control approximately $7 million in joint and several statutory liabilities that resulted from the termination of two pension plans under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1301-1461. Contrary to the defendants' assertions, plaintiff sued and served three moving defendants – namely 2840 Sprouse Drive, 10001 Alliance Road, 2322 Clifton Avenue – as unincorporated trades or businesses in the form of leasing activities pursuant to Title IV of ERISA. Those three defendants were properly sued and served

as trades or businesses – not as pieces of real property. The three defendants compound the mischaracterization they seek to create by labeling themselves as the "Property Movants." Those defendants shall be referred to herein as the "Leasing Activities Defendants." Because the Leasing Activities Defendants were owned and operated by defendant Trust of Samuel L. Peters (the "Trust"), Mr. Peters individually as trustee of the Trust is personally liable.[1] Mr. Peters was properly served on behalf of the Leasing Activities Defendants.

Defendants also wrongly assert that the statute of limitations has expired with respect to the three Leasing Activities Defendants and two other moving defendants, Samuel L. Peters, LLC and Peters Ohio, LLC (the "LLC Defendants," all together the "Moving Defendants").[2] All of these defendants were part of the Trust on March 31, 2006, in fact and according to representations made by Mr. Peters through his attorney. The Trust signed a tolling agreement. The action, which plaintiff filed on October 24, 2012, was well within the time agreed to under the tolling agreement.[3]

For the reasons discussed below, the Motion to Dismiss should be denied.

STATUTORY BACKGROUND

PBGC is a wholly owned United States government corporation established under 29 U.S.C. § 1302(a) to administer and enforce the pension plan termination insurance program established by Title IV of ERISA. When a pension plan covered by Title IV of ERISA

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[1] See Complaint ¶ 49. The Motion to Dismiss also is a back door effort on behalf of non-moving defendants Peters and the Trust to avoid personal or entity liability. Complaint ¶¶ 6, 11, 34-37, 49, 55, 58, 64.

[2] The LLC Defendants are successors to two of the Leasing Activities Defendants. Complaint ¶¶ 46, 47.

[3] Defendants Peters and the Trust are not parties to the Motion to Dismiss.

terminates without sufficient assets to pay benefits, PBGC pays the plan's unfunded benefits from PBGC's insurance funds, subject to certain statutory limitations.[4]

PBGC may institute proceedings to terminate a plan when it determines, *inter alia*, that the plan has not met statutory minimum funding requirements, will be unable to pay benefits when due, or that the plan must be terminated to protect the interests of plan participants.[5] In order to actually terminate a plan, PBGC may "apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated."[6] Alternatively, PBGC and the plan administrator may "agree that a plan should be terminated and agree to the appointment of a trustee without proceeding" through court.[7] The "termination date" of a plan is the "date established by the court" or, the date upon which PBGC and the plan administrator agree.[8]

Under 29 U.S.C. §§ 1306, 1307 and 1362, each person who is, as of the plan termination date, a contributing sponsor of a pension plan covered under Title IV of ERISA,[9] or a member of the contributing sponsor's controlled group,[10] incurs joint and several liability to PBGC for: (1) the total amount of the plan's unfunded benefit liabilities,[11] plus interest ("Employer

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4 *See* 29 U.S.C. §§ 1321, 1322, 1361.

5 29 U.S.C. § 1342(a)(1) and (3), 1342(c)(1).

6 29 U.S.C. § 1342(c)(1); *PBGC v. Republic Technologies Int'l, LLC*, 386 F.3d 659 (6th Cir. 2004).

7 *Id.*

8 29 U.S.C. § 1348(a)(3) and (4); *Republic Technologies, supra,* 386 F.3d at 660-61, 665.

9 29 U.S.C. § 1301(a)(13) (defining "contributing sponsor").

10 29 U.S.C. §§ 1301(a)(14) (defining "controlled group"), 1301(b).

11 29 U.S.C. § 1301(a)(18) and 29 C.F.R. § 4062.3(a) (defining "amount of unfunded benefit liabilities").

Liability"); (2) the total amount of unpaid pension insurance premiums ("Insurance Premiums")[12]; and (3) the total amount of termination premiums ("Termination Premiums").[13] All trades and businesses, whether or not incorporated, are treated as a single employer.[14]

If any person liable to PBGC under 29 U.S.C. § 1362 neglects or refuses to pay, after demand, the amount of such liability (including interest), a lien arises in favor of PBGC in the amount of such liability (including interest) upon all property and rights to property, whether real or personal, belonging to such person.[15] PBGC has authority to enforce the liens.[16]

DEFENDANT UFORMA AND ITS PENSION PLANS

Defendant Uforma is a Michigan corporation with its principal place of business located in Shelby, Ohio. Complaint ¶ 5. Effective June 4, 1979, Uforma established two pension plans to provide retirement benefits for certain of its employees: (1) the UFORMA/Shelby Business Forms, Inc. Hourly Employees' Retirement Plan (the "Hourly Plan"); and (2) the UFORMA/Shelby Business Forms, Inc. Salaried Employees' Retirement Plan (the "Salaried Plan") (collectively, the "Plans"). Complaint ¶¶ 1, 21, 22. Uforma was the administrator and contributing sponsor of both Plans, within the meaning of 29 U.S.C. § 1301(a)(1), (13). Complaint ¶ 23.

At all relevant times, the Plans have been single-employer pension plans[17] and have been

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[12] 29 U.S.C. § 1306(a).

[13] 29 U.S.C. § 1306(a)(7).

[14] 29 U.S.C. § 1301(b).

[15] 29 U.S.C. § 1368(a).

[16] *See* 29 U.S.C. § 1368(d)(1).

[17] 29 U.S.C. § 1301(a)(15) (defining "single-employer plan).

covered by the pension plan termination insurance program established under Title IV of ERISA.[18] Complaint ¶ 24.

On January 12, 2010, PBGC issued notices to Uforma of PBGC's determinations pursuant to 29 U.S.C. § 1342(a) and (c) that the Plans should be terminated. Complaint/Answer ¶ 25 (admitted); Exhibit 1, (notices of determinations).

By agreements between PBGC and Uforma entered into on April 15, 2010, the Plans were terminated under 29 U.S.C. §§ 1342 and 1348, with a termination date of March 31, 2006. Complaint/Answer ¶ 26 (admitted). Exhibit 2, attached hereto (Agreements for Appointment of Trustee and Termination of Plan) (the "Trusteeship Agreements"). Under the agreements, PBGC was appointed trustee of the Plans pursuant to 29 U.S.C. § 1342(c). *Id.*[19]

UFORMA'S CONTROLLED GROUP AND THE LEASING ACTIVITIES DEFENDANTS

On March 31, 2006, the Plans' "termination date," defendant Samuel L. Peters owned more than 80% of the stock of Uforma. Complaint ¶ 29. *See also* Docket #12 at pp. 13-14. At that time, the Trust defendant was under the control of Samuel L. Peters and he was the trustee and sole beneficiary. Complaint/Answer ¶¶ 11, 34 (admitted); Exhibit 3 attached hereto, Acknowledgment and Declaration of Trust, dated January 13, 1997.

In the complaint, PBGC alleges that as of March 31, 2006, either Samuel L. Peters or the Trust owned the three Leasing Activities Defendants and operated each of them as a trade or

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[18] *See* 29 U.S.C. § 1321(a).

[19] The Trusteeship Agreements were executed on behalf of Uforma as Plan Administrator of the Plans by Samuel L. Peters, President of Uforma. *Id.* As stated in the Trusteeship Agreements, on March 31, 2006, "Uforma ceased operations and terminated the employment of all its active participants."

business or sole proprietorship. Complaint ¶¶ 12-14, 35-37, 43-45, 49. In August 2010, Peters through his counsel admitted to PBGC that the Leasing Activities Defendants "are owned by the Trust of Samuel L. Peters." Peters' counsel explained that 2840 Sprouse Drive was a manufacturing facility partially utilized by defendant PrintSouth Corporation. He explained that 10001 Alliance Road was a distribution facility partially utilized by PrintSouth Corporation and had been utilized by defendant Miami Systems Corporation. Exhibit 4, letter, Robert Coletti, Esquire, to Stuart Bernsen, PBGC, August 12, 2010, at 2.

With respect to defendant 10001 Alliance Road, the chain of title shows that "Samuel L. Peters, Trustee" acquired it on December 29, 1995, and transferred it to Peters Ohio, LLC on December 2, 2010.[20] The complaint alleges that as a result of the transfer, defendant Samuel L. Peters, LLC became a successor to 10001 Alliance Road. Complaint ¶ 47; 29 U.S.C. § 1369(b)(1). Mr. Peters has declared that 10001 Alliance Road "is my business address."[21] Peters owns Peters Ohio, LLC. Exhibit 6, attached hereto.[22]

Concerning defendant 2840 Sprouse Drive, the chain of title shows that Samuel L. Peters, individually, acquired it on August 16, 1989, and transferred it to Samuel L. Peters, LLC on December 2, 2010.[23] The complaint alleges that as a result of the transfer, defendant Peters

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[20] Exhibit 5 attached hereto (title records for 10001 Alliance Road, Cincinnati, Ohio). *See also* Declaration of Samuel L. Peters, April 20, 2013, and Exhibit A thereto, attached to the Defendants' Motion to Dismiss (hereinafter "Peters Declaration Ex. A") (incomplete).

[21] Declaration of Samuel L. Peters, February 1, 2013, ¶ 7, at Docket #5-1.

[22] Exhibit 6, attached hereto (Stock Purchase Agreement by and among Print South Corporation, Samuel L. Peters, and Staples Contract & Commercial, Inc., Schedules 3.10(b) and 3.24, December 2010).

[23] Exhibit 7, attached hereto (title records for 2840 Sprouse Drive, Richmond, Virginia); Peters Declaration Ex. A (incomplete).

Ohio, LLC became a successor to 2840 Sprouse Drive. Complaint ¶ 46; 29 U.S.C. § 1369(b)(1). Peters owns Samuel L. Peters, LLC. Exhibit 6.

With respect to defendant 2322 Clifton Avenue, the chain of title shows that "Samuel L. Peters, Trustee" acquired it on August 1, 1986, and transferred it to RM Dixon Real Estate, LLC, on July 28, 2011.[24]

On his 2006 personal tax return, defendant Peters listed rental income from the Leasing Activities Defendants as "commercial rental" and "commercial building." He reported $266,314 rent received from 10001 Alliance Road and $120,000 from 2840 Sprouse Drive.[25]

In December 2010, when 10001 Alliance Road became Peters Ohio, LLC and 2840 Sprouse Drive became Samuel L. Peters, LLC, Mr. Peters entered into lease agreements with a subsidiary of Staples, Inc. The rental amounts payable to Mr. Peters' LLC's started at $13,333.33 per month for 10001 Alliance Road and $352,000 annually for 2840 Sprouse Drive.[26]

The complaint alleges that because Peters owned more than 80% of the stock of Uforma, and owned and controlled the other defendants, the defendants are trades and businesses under common control, are part of Uforma's controlled group, and are jointly and severally liable for liabilities claimed under Title IV of ERISA. Complaint ¶¶ 27-56. The complaint also alleges that Peters is personally liable because of the nature of the unincorporated controlled group members and due to his relationship to the Trust. Complaint ¶¶ 34-37, 42-49, 55.

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[24] Exhibit 8, attached hereto (title records for 2322 Clifton Avenue, Nashville, Tennessee).

[25] Exhibit 9, attached hereto (portions of Samuel L. Peters 2006 federal tax return, sanitized).

[26] Exhibit 10, attached hereto (Stock Purchase Agreement by and among Print South Corporation, Samuel L. Peters, and Staples Contract & Commercial, Inc., Sec. 8.8 (page 39) and leases (portions).

DEMAND AND REFUSAL TO PAY

On October 15, 2012, PBGC sent a letter to each of the defendants demanding payment of Employer Liability, unpaid Insurance Premiums, and Termination Premiums, plus accrued interest, by no later than October 19, 2012.[27] None of the Defendants has tendered payment.

ARGUMENT

I. THE MOVING DEFENDANTS CANNOT MEET THEIR BURDENS UNDER FEDERAL RULES OF CIVIL PROCEDURE 9(a) AND 12(b)(5) and (6) AND (c)

Defendants rely on Fed.R.Civ.P. 9(a), 12(b)(5), 12(b)(6) and 12(c) as the bases for the Motion to Dismiss. They do not meet their burdens under these rules on their face, or substantively.

Fed.R.Civ.P. Rule 9(a) provides that, generally, a plaintiff does not need to plead or allege that a defendant has the capacity to be sued. The moving defendants contend that the Motion to Dismiss is a method of raising the issue of capacity. However, the complaint clearly and specifically pleaded that the Leasing Activities Defendants were sued as trades or businesses.[28] Rule 9(a) does not provide a substantive basis for ruling on the Motion to Dismiss.

Fed.R.Civ.P. 12(b)(5) provides that a complaint may be dismissed for insufficient service of process. Plaintiff sued the Leasing Activities Defendants as unincorporated trades or businesses or sole proprietorships operated by Mr. Peters. These defendants admit that plaintiff did serve him. Motion to Dismiss at 10. Accordingly, the Leasing Activities Defendants were properly served.

Fed.R.Civ.P. 12(b)(6) provides for dismissal of a complaint that fails to state a claim

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[27] Exhibit 11 attached hereto (demand for payment letter).

[28] Complaint caption; complaint ¶¶ 12-14, 35-37, 43-45, 49.

upon which relief can be granted. A party moving to dismiss under Rule 12(b)(6) has a very heavy burden. "[I]t is axiomatic that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 553 (1985) (citations omitted). As described above on pages 1-8, *supra*, plaintiff has pleaded sufficient facts and provided evidence to demonstrate that the Leasing Activities Defendants and the LLC Defendants were trades or businesses under common control and are jointly and severally liable under Title IV of ERISA.

Fed.R.Civ.P. 12(c) provides for judgment on the pleadings. The discussion above concerning Fed.R.Civ.P. 12(b)(6) defeats the defendants' 12(c) argument.

To the extent that the Court considers matters outside the pleadings, then, as provided under Fed.R.Civ.P. 12(d), and treats Defendants' Motion to Dismiss as a motion for summary judgment under Fed.R.Civ.P. 56, then plaintiff respectfully requests the opportunity to provide additional evidence and to take discovery. Fed.R.Civ.P. 12(d), 56(d).

II. THE LEASING ACTIVITIES DEFENDANTS ARE UNINCORPORATED TRADES OR BUSINESSES THAT ARE SUBJECT TO SUIT AND SERVICE

Under 29 U.S.C. § 1301(b)(1), "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer." The controlled group rule makes all trades or businesses under common control jointly and severally responsible for liability under 29 U.S.C. §§ 1307 and 1362.[29] "[T]he primary purpose of the common control provision is to ensure that employers will not circumvent their ERISA . . . obligations by

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[29] *PBGC v. East Dayton Tool and Die Co.*, 14 F.3d 1122, 1126-27 (6th Cir. 1994).

operating through separate entities."[30]

Where an individual or proprietorship or other entity leases or rents or leases a building or commercial property, the rental or leasing activity constitutes a trade or business for purposes of controlled group liability under Title IV of ERISA.[31]

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[30] *Central States, Southeast & Southwest Areas Pension Fund v. Chatham Properties*, 929 F.2d 260 (6th Cir. 1991); *Mason & Dixon Tank Lines v. Central States, Southeast & Southwest Areas Pension Fund*, 852 F.2d 156, 159 (6th Cir. 1988); *Trustees of Laborers Dist. Council and Contractors Pension Fund of Ohio v. Excel Contracting, Inc.*, 2012 WL 4322572 at *2 n.1 unpublished; copy attached). *See also PBGC v. Don's Trucking Co.*, 309 F.Supp. 2d 827, 831 n.7 (E.D. Va. 2004), *aff'd*, *PBGC v. Beverly*, 404 F.3d 243 (4th Cir. 2005); *Central States, Southeast and Southwest Areas Pension Fund v. Messina Products, LLC*, 706 F.3d 874, 878 (7th Cir. 2013); *Central States, Southeast & Southwest Areas Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 794 (7th Cir. 1992).

[31] *Central States, Southeast and Southwest Areas Pension Fund v. Rogers*, 843 F.Supp. 1135 (E.D. Mich. 1992), *aff'd*, 14 F.3d 600 (6th Cir. 1993) (table) (unpublished opinion at 1993 WL 524092 (Dec. 16, 1993) (copy attached) (lessor of commercial property operated sole proprietorship constituting a "trade or business" for ERISA purposes; lessor was personally leasing property to two corporations and receiving rent); *Central States, Southeast and Southwest Areas Pension Fund v. Skyland Leasing*, 892 F.Supp. 1043 (E.D. Mich.1990), *aff'd*, 892 F.2d 1043 (6th Cir. 1993) (table) (unpublished opinion at 1990 WL 231 (Jan. 4, 1990) (copy attached) (partnership that leased trucks was trade or business for ERISA purposes)*; Central States Pension Fund v. Lloyd L. Sztanyo Trust,* 693 F.Supp. 531, 536-37 (E.D.Mich. 1988) (defendant who rented buildings to companies was trade or business for ERISA purposes). *See also Central States, Southeast and Southwest Areas Pension Fund v. Nagy*, __ F.3d __, 2013 WL 1706413 (7th Cir. Apr. 22, 2013) (copy attached) (owner's lease of real property to employer was categorically a trade or business for ERISA purposes); *Central States, Southeast and Southwest Areas Pension Fund v. Messina Products, LLC*, 706 F.3d 874 (7th Cir. 2013) (sporadic rental activity involving real property constituted engaging in trade or business under ERISA; individual owners leased real property and reported rental income on Schedule E of their federal tax returns); *Central States, Southeast and Southwest Areas Pension Fund v. SCOFBP, LLC*, 668 F.3d 873 (7th Cir. 2011) (leasing property to liable employer is trade or business under ERISA); *PBGC v. Don's Trucking Co.*, 309 F.Supp. 2d 827 (E.D. Va. 2004), *aff'd*, *PBGC v. Beverly*, 404 F.3d 243 (4th Cir. 2005) (leasing activity involving real property was trade or business under ERISA); *Central States, Southeast and Southwest Areas Pension Fund v. Ditello*, 974 F.2d 887 (7th Cir. 1992) (leasing of property qualified as trade or business under ERISA); *Central States, Southeast and Southwest Areas Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 794 (7th Cir. 1992) (leasing real estate is a trade or business under ERISA; sole proprietor's real estate activities rose to level of 'trade or business"; real estate activities were continuous, regular and designed to produce income); *Central States, etc. v. Slotky*, 956 F2d 1369, 1374 (7th Cir.

In the present case, defendant Peters, individually as trustee of the Trust, leased the real property to some of his other businesses. The Seventh Circuit has held, for example, that where individuals rented property called the "Auburn Road Property" and the "Merrill Road Properties" to generate rental income, reported that income on Schedule E of their federal tax returns, and deducted related expenses from the rental income, those individual persons were operating a trade or business for purposes of Title IV of ERISA, were proper parties, and were personally liable. *Messina Products, supra*, 706 F.3d 874, 879-884 (7th Cir. 2013). Here, as in *Messina Products* and the other cases cited, the Leasing Activities Defendants are properly treated as unincorporated trades or businesses under Title IV of ERISA.

"[T]he legal form of the disputed enterprise – be it a 'partnership,' 'corporation,' 'joint venture,' 'individual owner' or some other type of organization – is not dispositive of whether the enterprise is a 'trade or business.'"[32] However, "the form of organization affects who may be held liable, and the extent to which their assets can be reached." *Id.*

1992) (leasing buildings constitutes trade or business under ERISA); *PBGC v. Ctr. City Motors, Inc.*, 609 F.Supp. 409, 411 (S.D. Cal. 1984) (rental proprietorship that had leased property, under a net lease, to an entity that was under common control with the plan sponsor was not excluded from ERISA's definition of "trade or business" under 29 U.S.C. § 1301(b)); *Connors v. Hi-Heat Coal Co., Inc.*, 772 F.Supp. 1 (D.D.C.1991) (entity was "trade or business" subject to ERISA liability though it did no more than hold and lease equipment and it had no employees, where it had income and claimed income tax deductions for property depreciation); *Trustees of Amalgamated Ins. Fund v. Saltz*, 760 F.Supp. 55 (S.D.N.Y.1991) (controlling shareholders' net lease arrangement with corporation for property on which corporation's business was located constituted "trade or business" under ERISA); *Teamsters Pension Trust Fund of Phila. and Vicinity v. Malone Realty Co.*, 82 B.R. 346 (E.D. Pa. 1988) (informal entity that leased one piece of property was trade or business); *United Food and Commercial Workers Union v. Progressive Supermarkets*, 644 F.Supp. 633, 638-639 (D.N.J. 1986) (activity of providing net leases on property was trade or business).

[32] *Connors v. Incoal Inc.*, 995 F.2d 245 (D.C. Cir. 1993) (noting that the plain language of section 1301(b)(1) extends liability to all commonly controlled trades or businesses *whether or not incorporated*).

Where an individual or shareholder owns and leases or rents the property, the individual or shareholder by virtue of his leasing or rental activity becomes the unincorporated trade or business. Consequently, the individual or shareholder is the "person" who is personally liable under Title IV and has the capacity to be sued and served.[33] Thus, for example, "[a]n individual is personally liable when he holds the entire interest in an unincorporated 'trade or business' that is under common control" with a liable employer.[34] Where a trust leases real property and constitutes a trade or business, both the trust and the trustee personally are jointly and severally liable under ERISA.[35]

In this case, the Trust owned and through Mr. Peters as trustee conducted the activities of the Leasing Activities Defendants as of the Pension Plans' termination date. Mr. Peters and the Trust were properly sued and *served* on behalf of the Leasing Activities Defendants.

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[33] *Central States etc. v. Rogers, supra*, 843 F.Supp. 1135 (E.D. Mich.1992), *aff'd*, 14 F.3d 600 (6th Cir. 1993) (table) (unpublished opinion at 1993 WL 524092 (Dec. 16, 1993) (lessor of commercial property who operated sole proprietorship was personally liable under ERISA); *Nagy, supra*, __ F.3d __, 2013 WL 1706413 (7th Cir. Apr. 22, 2013) (individual owner who leased real property was liable as owner of leasing activity); *Messina Products, LLC*, *supra*, 706 F.3d 874 (7th Cir. 2013) (individual who owned property that was rented were personally liable under ERISA); *PBGC v. Don's Trucking Co.*, 309 F.Supp. 2d 827 (E.D. Va. 2004), *aff'd*, *PBGC v. Beverly*, 404 F.3d 243 (4th Cir. 2005) (individuals were jointly severally liable personally where they intended to act as a partnership and engaged in leasing activity); *Slotky*, *supra*, 956 F2d 1369, 1374 (7th Cir. 1992) (shareholder who leased buildings was himself a trade or business and was personally subject to liability under Title IV of ERISA); *Trustees of Amalgamated Ins. Fund v. Saltz*, 760 F.Supp. 55 (S.D.N.Y.1991) (shareholders' whose activity involved net lease arrangement were "trade or business" and were personally liable under ERISA).

[34] *Nagy, supra*, __ F.3d __, 2013 WL 1706413 (7th Cir. Apr. 22, 2013).

[35] *Vaughn v. Sexton*, 975 F.2d 498 (8th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993).

III. THE MOVING DEFENDANTS WERE TIMELY SUED

The suit was timely commenced against the Leasing Activities Defendants and the LLC Defendants based on the March 2012 tolling agreement and August 2012 amended tolling agreement[36] and the representations Mr. Peters' counsel had made to PBGC concerning the Leasing Activities Defendants. The tolling agreement, as amended, includes the Trust as a party and is signed by Mr. Peters on behalf of the Trust. Mr. Peters' counsel wrote to PBGC in August 2010 that the Leasing Activities Defendants "are owned by the Trust of Samuel L. Peters." Exhibit 4. In reliance, PBGC did not file suit in March 2012 against the Leasing Activities Defendants. Based on the tolling agreement, as amended, PBGC timely sued the Trust, including the Leasing Activities Defendants and the LLC Defendants as successors. Mr. Peters should not be allowed to assert a statute of limitations defense by recanting his prior statement representing that the Leasing Activities Defendants are part of the Trust.

In an excess of caution to fully put all possible defendants on notice of its claims, PBGC named the Leasing Activities Defendants and LLC Defendants in the complaint as well as the Trust. Even if the Court finds it proper to strike the Leasing Activities Defendants as a matter of

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[36] Exhibit 12, attached hereto (tolling agreements). *See also* Declaration of Samuel L. Peters, April 20, 2013, Exhibit B, attached to the Defendants' Motion to Dismiss (hereinafter "Peters Decl. Ex. B"). Since Peters Decl. Ex. B omits the last page of the amended tolling agreement containing his signature for the Trust, the complete tolling agreement and amended tolling agreement are attached hereto as Exhibit 12.

form, those defendants would remain in the case as part of the Trust as of the March 31, 2006 "date of termination" of the Plans.[37] As party to the tolling agreement, the Trust has no basis for seeking dismissal, and accordingly is not a party to the Motion to Dismiss.

CONCLUSION

For all the reasons stated above, the Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

Dated: May 13, 2013

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[37] *See* 29 U.S.C. § 1362(a): "any person who is, *on the termination date*, a contributing sponsor of the plan or a member of such contributing sponsor's controlled group shall incur liability under this section." (Emphasis added.)

CERTIFICATE OF SERVICE

I certify that the foregoing Response and Opposition of Plaintiff Pension Benefit Guaranty Corporation to Motion to Dismiss of Defendants 2840 Sprouse Drive, 10001 Alliance Road, 2322 Clifton Avenue, Samuel L. Peters, LLC and Peters Ohio, LLC was served electronically through the Court's ECF system on this 13th day of May 2013.

/s/ Stuart E. Bernsen
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Attorney