

**UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

PENSION BENEFIT GUARANTY CORPORATION,	)	
	)	
	)	Case No. 3:15-cv-01421
	)	
Plaintiff,	)	Judge David A. Katz
	)	
v.	)	
	)	
FINDLAY INDUSTRIES, INC., et al.,	)	
	)	
	)	
	)	
Defendants.	)	

**PLAINTIFF PENSION BENEFIT GUARANTY CORPORATION’S MEMORANDUM  
IN SUPPORT OF MOTION TO STRIKE AFFIRMATIVE DEFENSES ASSERTED BY  
DEFENDANTS FINDLAY INDUSTRIES, INC., PHILIP D. GARDNER THIRD  
AMENDED AND RESTATED TRUST DATED APRIL 23, 2002, HG3, ESTATE OF  
PHILIP D. GARDNER, PHILIP J. GARDNER, AND PHILIP J. GARDNER TRUST**

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Plaintiff Pension Benefit Guaranty Corporation ("PBGC") files this Memorandum in Support of its Motion to Strike Affirmative Defenses from the Answer filed by Defendants Findlay Industries, Inc., Philip D. Gardner Third Amended and Restated Trust dated April 23, 2002, HG3, Estate of Philip D. Gardner, Philip J. Gardner, and Philip J. Gardner Trust (collectively, the "PJG Defendants"). As explained below, part or all of each of the second, third, ninth, tenth, eleventh, thirteenth, and fourteenth Affirmative Defenses raised in the PJG Defendants' Answer are insufficient and should be stricken under Rule 12(f) of the Federal Rules of Civil Procedure.

## I. BACKGROUND

PBGC is a wholly owned United States government corporation established under 29 U.S.C. § 1302(a) to administer the pension plan termination insurance program created by Title IV of the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1301-1461 ("ERISA"). Among its missions, PBGC assures the timely payment of guaranteed pension benefits to participants in pension plans that terminate when covered by Title IV.

The Findlay Industries, Inc. Pension Plan (the "Plan") is covered by the pension plan termination insurance program established under Title IV. By agreement between PBGC and Findlay Industries, Inc., dated December 20, 2012, the Plan was terminated under 29 U.S.C. § 1342, with a termination date of July 18, 2009.

PBGC brings this action to collect from the PJG Defendants and others (1) the statutory liability arising under 29 U.S.C. § 1362 for unfunded benefit liabilities owed to PBGC as a result of termination of the Plan; and (2) the statutory liability arising under 29 U.S.C. §§ 1306 and 1307 for termination premiums owed to PBGC (collectively, the "Termination Liabilities"). PBGC also brings this action to recover from the PJG Defendants and others property fraudulently transferred to them by one or more of the Defendants, or the value thereof. PBGC commenced this action by filing a Complaint, which it has amended once. The PJG Defendants' Answer to the First Amended Complaint includes numerous Affirmative Defenses.

## II. ARGUMENT

### A. Standard of Review under Rule 12(f)

Federal Rule of Civil Procedure 12(f) permits this Court to strike any "insufficient" defense. Fed. R. Civ. P. 12(f). Courts have developed a three part test in examining the affirmative defenses subject to a motion to strike:

(1) the matter must be properly pleaded as an affirmative defense; (2) the matter must be adequately pleaded under the requirements of Federal Rules of Civil Procedure 8 and 9; and (3) the matter must withstand a Rule 12(b)(6) challenge.

*Williams v. Provident Inv. Counsel Inc.*, 279 F. Supp. 2d 894, 906 (N.D. Ohio 2003) (citations omitted).

While motions to strike are generally viewed with disfavor, the function of the motion is to “avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with” them early in the case. *Operating Engineers Local 324 Health Care Plan v. G & W Const. Co.*, 783 F.3d 1045, 1050 (6th Cir. 2015) (quoting *Kennedy v. City of Cleveland*, 797 F.2d 297, 305 (6th Cir. 1986)). A motion to strike should be granted if “it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense and are inferable from the pleadings.” *Operating Engineers*, 783 F.3d at 1050 (quoting *Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1400 (7th Cir. 1991)). Furthermore, such motions “should be granted where it is clear that the affirmative defense is irrelevant and frivolous and its removal from the case would avoid wasting unnecessary time and money litigating the invalid defense.” *SEC v. Gulf & Western Indust.*, 502 F. Supp. 343, 345 (D.D.C. 1980).

Here, the PJG Defendants have asserted a blanket laundry list of affirmative defenses. They generally have not identified which defense applies to which specific claim asserted by PBGC. Furthermore, they have not plead any facts in support of the affirmative defenses raised. Thus, the PJG Defendants have not provided PBGC with sufficient notice of the defenses against its claims. Moreover, part or all of each of the second, third, ninth, tenth, eleventh, thirteenth, and fourteenth Affirmative Defenses are legally insufficient. Striking part or all of each of the

second, third, ninth, tenth, eleventh, thirteenth, and fourteenth Affirmative Defenses will avoid the unnecessary expenditure of time and money that will arise from litigating them.

**B. PJG Defendants' Second Defense (Estoppel)**

The PJG Defendants assert the doctrine of estoppel as part of their second affirmative defense. (Answer, Affirmative Defense ¶ 2.) Equitable estoppel “requires a representation, to a party without knowledge of the facts and without the means to ascertain them, upon which the party asserting the estoppel justifiably relies in good faith to his detriment.” *Operating Engineers*, 783 F.3d 1045 at 1056 (citations omitted). However, the government “may not be estopped on the same terms as any other litigant.” *Heckler v. Cmty. Health Servs. Of Crawford County, Inc.*, 467 U.S. 51, 60 (1984). When asserting estoppel against the government, the defendant must show affirmative misconduct by the government. *Fed. Deposit Ins. Corp. v. AmTrust Fin. Corp.*, No. 1:10 CV 1298, 2011 WL 334976, at \*19 (N.D. Ohio Jan. 31, 2011), *aff'd sub nom., In re AmTrust Fin. Corp.*, 694 F.3d 741 (6th Cir. 2012); *see also PBGC v. White Consol. Indus.*, 72 F. Supp. 2d 547, 551 (W.D. Pa. 1999). Affirmative misconduct is more than mere error or negligence, and requires a calculated or intentional effort to mislead. *United States v. Skorepa*, No. 5:05 CV 750, 2005 WL 3634605, at \*6 (N.D. Ohio Dec. 20, 2005) (citing *Mich. Express, Inc. v. United States*, 374 F.3d 424, 427 (6th Cir.2004)).

The PJG Defendants have not alleged (1) that they were without knowledge of the facts and without the means to ascertain them; (2) that PBGC engaged in a calculated or intentional effort to mislead the PJG Defendants; or (3) that the PJG Defendants justifiably and in good faith relied on such alleged misrepresentation to their detriment. The Sixth Circuit held that based merely on the defendants' failure to allege the first of these three elements, the district court erred in not granting the plaintiffs' motion to strike the equitable estoppel defense. *Operating*

*Engineers*, 783 F.3d at 1056. It follows with even greater force that the PJG Defendants' defense of estoppel should be stricken.<sup>1</sup>

### **C. PJG Defendants' Third Defense (Laches)**

The PJG Defendants assert laches as part of their third affirmative defense. (Answer, Affirmative Defense ¶ 3.) Laches consists of two elements: (1) unreasonable delay in asserting one's rights; and (2) a resulting prejudice to the defending party. *Operating Engineers*, 783 F.3d at 1053. However, laches is not a valid defense against the government. *United States v. Mandycz*, 447 F.3d 951, 965 (6th Cir. 2006) (citing *United States v. Weintraub*, 613 F.2d 612, 618 (6th Cir. 1979)). The principle is "well established" in this country, based upon the important public policy of preserving public rights and revenues from the negligence of public officers. *Weintraub*, 613 F.2d at 618 (citing *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132-33 (1938)). Specifically, the defense of laches has been held to be unavailable against the government in an ERISA enforcement action brought by the Secretary of Labor against plan fiduciaries. *Chao*, 2006 WL 3751191, at \*2 (citing *First Bank System, Inc. v. Martin*, 782 F. Supp. 425, 426-27 (D.Minn.1991)). In *Chao*, the court observed that "nothing in the ERISA statute evidences a congressional intent for laches to apply." *Id.*

Apart from laches not being a valid defense against the United States, a laches defense would be invalid against PBGC's claims in this case, because statutes of limitations apply to all of PBGC's claims. *See* 28 U.S.C. § 3306(b) (applicable to PBGC's fraudulent transfer claims

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<sup>1</sup> The PJG Defendants assert the doctrine of waiver as the other part of their second affirmative defense. (Answer, Affirmative Defense ¶ 2.) Estoppel and waiver are equitable doctrines which should be treated as an ensemble when they arise from a common nucleus of operative fact. *Chao v. Chermak*, No. 105CV1935, 2006 WL 3751191, at \*3 (N.D. Ohio Dec. 18, 2006) (citations omitted). In this case, the PJG Defendants didn't allege any facts in support of either of these defenses, so PBGC is unable to discern whether they arise from a common nucleus of operative fact.

under 28 U.S.C. § 3304); 29 U.S.C. § 1303(e)(6) (applicable to PBGC's Termination Liability claims under 29 U.S.C. §§ 1306, 1307, 1362). The Sixth Circuit struck a laches defense to a multiemployer plan's claim for delinquent contributions for this reason, notwithstanding that it had to borrow a statute of limitations from state law. *Operating Engineers*, 783 F.3d at 1054-55 (citations omitted).

Litigating against a laches defense would be especially burdensome to PBGC. Because an element of laches is unreasonable delay, to support their laches defense, the PJG Defendants arguably would be allowed to require the production of all PBGC documents relevant to PBGC's work leading up to the filing of the complaint commencing this action, and depose all PBGC employees with knowledge relevant to that work. Given that the Termination Liabilities arise from termination, that work includes PBGC's investigation and consideration of whether to terminate the Plan, as well as PBGC's post-termination development of its claims.

Accordingly, this Court should strike the Affirmative Defense of laches from the PJG Defendants' Answer.

**D. PJG Defendant's Ninth Defense (Failure to Mitigate)**

The PJG Defendants assert failure to mitigate as their ninth affirmative defense. (Answer, Affirmative Defense ¶ 9.) PBGC is not aware of any case in which the United States has been held subject to a duty to mitigate damages under a non-contractual claim. *See Kobus v. United States*, 103 Fed. Cl. 575, 596-97 (2012). Nor is PBGC aware of any case in which recovery on any type of ERISA or fraudulent transfer claim has been reduced or denied because of the plaintiff's failure to mitigate damages. *See, e.g., Board of Trustees of the Plumbers, Pipefitters & Mechanical Equipment Service, Local Union No. 392 Pension Fund, et al. v. GM Mechanical, Inc.*, 1:11-cv-502, 2013 WL 6385734, \*3 (S.D. Ohio Dec. 6, 2013) (citing cases

questioning defense's applicability to ERISA). A United States Court of Appeals held that failure to mitigate is inapplicable even to claims under 29 U.S.C. § 1133, which does not provide any guidance as to damages. *Schleibaum v. Kmart Corp.*, 153 F.3d 496, 502-503 (7th Cir. 1998). It follows with even greater force that failure to mitigate is inapplicable to the Termination Liabilities, the amounts of which are strictly defined by ERISA. 29 U.S.C. §§ 1306(a)(7), 1362(b)(1).

Accordingly, mitigation is not a defense available to the PJG Defendants, and thus should be stricken. *C.f. United States v. Pretty Products, Inc.*, 780 F. Supp. 1488, 1502 (S.D. Ohio 1991) (striking defendant's mitigation defense to the Environmental Protection Agency's claim under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), holding that the CERCLA contained no provision requiring the government to mitigate its damages).

**E. PJG Defendants' Tenth Defense (No Breach of Duty)**

The PJG Defendants assert that one or more of them "breached no duty, contractual or otherwise, owed to Plaintiff." (Answer, Affirmative Defense ¶ 10.) However, breach of duty is not an element of any of PBGC's claims, thus its absence is no defense to those claims. *See* 28 U.S.C. § 3304; 29 U.S.C. §§ 1306, 1307, 1362. Accordingly, the absence of a breach of duty is not a defense available to the PJG Defendants, thus the PJG Defendants' tenth affirmative defense should be stricken.

**F. PJG Defendants' Eleventh Defense (No Proximate Cause)**

The PJG Defendants assert lack of proximate causation as their eleventh affirmative defense. (Answer, Affirmative Defense ¶ 11.) However, causation is not an element of any of PBGC's claims, thus lack of proximate causation is no defense to PBGC's claims. *See* 28 U.S.C.

§ 3304; 29 U.S.C. §§ 1306, 1307, 1362. Accordingly, causation is not a defense available to the PJG Defendants, thus the PJG Defendants' eleventh defense should be stricken.

**G. PJG Defendants' Thirteenth Defense (Ordinary Course Transfers)**

As their thirteenth affirmative defense, the PJG Defendants assert that "one or more of the alleged fraudulent transfers were made in the ordinary course of business." (Answer, Affirmative Defense ¶ 13.) However, that a transfer was made in the ordinary course of business is a defense only to fraudulent transfer claims under 28 U.S.C. § 3304(a)(2). *See* 28 U.S.C. § 3307(f). PBGC asserts fraudulent transfer claims under 28 U.S.C. § 3304(a)(1), (b)(1)(A), (b)(1)(B). PBGC does not assert any fraudulent transfer claims under 28 U.S.C. § 3304(a)(2). Accordingly, that "one or more of the alleged fraudulent transfers were made in the ordinary course of business" is not a defense available to the PJG Defendants, thus the PJG Defendants' thirteenth defense should be stricken.

**H. PJG Defendant's Fourteenth Defense (28 U.S.C. § 3308)**

As their fourteenth affirmative defense, the PJG Defendants assert that "PBGC's fraudulent transfer claims are subject to 28 U.S.C. § 3308." (Answer, Affirmative Defense ¶ 14.) Indeed, section 3308 does provide that the principles of law and equity apply to PBGC's fraudulent transfer claims. But section 3308 is not an affirmative defense; rather, it provides that affirmative defenses are available in accordance with the principles of law and equity.<sup>2</sup> By asserting section 3308 as an affirmative defense, the PJG Defendants effectively seek to reserve affirmative defenses that they have yet to assert. Such a reservation does not suffice to give plaintiff fair notice of the reserved defenses, so the PJG Defendants' fourteenth defense should

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<sup>2</sup> Because those defenses' applicability to PBGC's fraudulent transfer claims is governed by principles of law and equity, they are subject to the usual limitations discussed above with regard to particular affirmative defenses.

be stricken. *See, e.g., U.S. ex rel. Robinson-Hill v. Nurses' Registry and Home Health Corp.*, No. 5:08-145-KKC, 2013 WL 1187000, \*3 (E.D. Ky. Mar. 20, 2013) (party wishing to assert additional defenses should instead seek leave to amend its answer); *Paducah River Painting, Inc. v. McNational Inc.*, No. 5:11-CV-135-R, 2011 WL 5525938, \*5 (W.D. Ky. Nov. 14, 2011) (same).

### III. CONCLUSION

For the foregoing reasons, Plaintiff Pension Benefit Guaranty Corporation respectfully requests that the Court strike the PJG Defendants' second, third, ninth, tenth, eleventh, thirteenth, and fourteenth Affirmative Defenses as indicated above.

Respectfully submitted,

Dated: December 9, 2015

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