Case No. _____

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re PENSION BENEFIT GUARANTY CORPORATION
Petitioner-Plaintiff

vs.

FINDLAY INDUSTRIES, INC., et al.
Respondents-Defendants

PLAINTIFF PENSION BENEFIT GUARANTY CORPORATION'S PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(b)

FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, TOLEDO DIVISION
CASE NO. 3:15-cv-01421

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CERTIFICATE AS TO CORPORATE DISCLOSURE STATEMENT

Petitioner Pension Benefit Guaranty Corporation ("PBGC") respectfully certifies that it is a federal government agency established under 29 U.S.C. § 1302. *See, e.g., Pension Benefit Guaranty Corp. v. Republic Technologies Int'l, LLC*, 386 F.3d 659, 661 (6th Cir. 2004). As a wholly owned government corporation, PBGC is not required to file a corporate disclosure statement. Fed. R. App. P. 26.1(a); *see* Circuit R. 26.1(a).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Pension Benefit Guaranty Corporation ("PBGC") is the United States government agency that administers the pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1301-1461 (2012 & Supp. II 2014) ("ERISA"). When an underfunded pension plan covered under Title IV terminates, PBGC ensures the timely and uninterrupted payment of statutorily guaranteed pension benefits to plan participants and their beneficiaries.[1] To enable PBGC to do this without imposing larger premiums on ongoing pension plans,[2] ERISA provides that the sponsor of a terminated single-employer plan and certain of its related entities are liable to PBGC for the plan's unfunded benefit liabilities as of the termination date, plus interest[3] ("UBL Claim"); and for termination premiums, plus interest and penalties[4] ("Premiums Claim", and with the UBL Claim, the "Termination Liabilities").

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1 29 U.S.C. § 1302(a)(2).

2 *See* 29 U.S.C. § 1302(a)(3).

3 29 U.S.C. § 1362(a)(1), (b)(1)(A).

4 29 U.S.C. §§ 1306(a)(7)(A), 1307(e); 29 C.F.R. § 4007.13(g).

PBGC brought this action to collect Termination Liabilities. Following motions to dismiss certain counts of PBGC's complaint, on September 9, 2016, the district court entered an Order Granting Motions to Dismiss[5] ("September Order"); and on December 29, 2016, a Memorandum Opinion and Order supplementing the September Order[6] ("December Order", and with the September Order, the "MJG Dismissal Orders"). On PBGC's motion, with the sole remaining defendant's agreement, the district court entered an Order Certifying Appeal and Staying Case, on March 10, 2017[7] ("Certification Order").

PBGC asks this Court to permit an interlocutory appeal of the MJG Dismissal Orders under 28 U.S.C. § 1292(b). All of the statutory requirements for interlocutory appeal are met, in that the MJG Dismissal Orders: (1) involve a controlling issue of law, (2) as to which there is substantial ground for difference of opinion; and (3) an immediate appeal may materially advance the ultimate termination of litigation.[8]

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5 Doc. 54. The "Doc." cites herein refer to docket numbers in the district court action, *PBGC v. Findlay Industries, Inc., et al.*, No. 3:15-cv-01421 (N.D. Ohio July 17, 2015).

6 Doc. 60.

7 Doc. 68. The MJG Dismissal Orders and the Certification Order are attached to this Petition as Exhibits 1 to 3, App. 1 to 13.

8 28 U.S.C. § 1292(b).

The MJG Dismissal Orders decide two controlling questions of law as to which there is a substantial ground for difference of opinion: (1) whether an organization leasing property to another organization under "common control" categorically is, or is conducting, a "trade or business," and thus in a "controlled group," and jointly and severally liable for Termination Liabilities, with its lessee;[9] and (2) whether a successor liability claim under federal common law ("Federal Successor Claim") applies to the Termination Liabilities, such that a person with notice of Termination Liabilities is liable for them, if there was "substantial continuity" between the sponsor of the terminated plan and that person. As discussed below, the district court decided both questions of law contrary to case law, weakening PBGC's ability to fulfill its statutory mission to collect Termination Liabilities.

Moreover, an immediate appeal should materially advance the ultimate termination of this litigation. Because the Certification Order stayed the proceedings in district court, if the controlling issues of law are resolved in PBGC's favor on appeal, the parties will conserve resources by conducting

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[9] ERISA and the regulations thereunder refer to "persons" under common control, while the Treasury regulations incorporated by those authorities refer to "organizations". Because the Defendants whose controlled group status is at issue commonly would be referred to as organizations, this Petition refers to them as such, except in describing provisions in ERISA and the regulations thereunder.

discovery, motion practice and trial on important issues once rather than twice. Additionally, an immediate appeal will expedite the ultimate resolution of PBGC's Federal Successor Claim, by which PBGC seeks to recover the Termination Liabilities, which it estimates to exceed $36 million, from two ongoing businesses.[10]

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant Findlay Industries, Inc. ("FII") sponsored the Findlay Industries, Inc. Pension Plan (the "Plan"),[11] which is covered under Title IV and thus subject to the insurance program administered by PBGC. FII ceased operations in June 2009. By agreement of December 20, 2012, between PBGC and FII as Plan administrator, the Plan terminated with a termination date of July 18, 2009, giving rise to Termination Liabilities.[12]

The Complaint named as Defendants: (1) FII; (2) the Philip D. Gardner Trust U/D January 20, 1987 ("PDG Trust 1987"), as a member of FII's "controlled group" (explained below); (3) the Philip D. Gardner Third Amended and Restated Trust U/D April 23, 2002 ("PDG Trust 2002"), as a member of FII's controlled

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10 December Order at 6-7.

11 December Order at 1.

12 *Id.* at 6.

group, and as a fraudulent transferee of FII, HG3, an Ohio Partnership ("HG3"), and the Estate of Philip D. Gardner ("PDG Estate"); (4) HG3, as a member of FII's controlled group; (5) the PDG Estate, as a partner of HG3; (6) Philip J. Gardner ("PJG"), as a partner of HG3, and as a fraudulent transferee of FII, the PDG Trust 1987, HG3, and the PDG Trust 2002; (7) the Philip J. Gardner Trust ("PJG Trust"), as a revocable trust settled by PJG, and as a fraudulent transferee of PJG; (8) September Ends Co. ("September"), as a successor to FII; (9) Back in Black Co. ("Black"), as a successor to FII; and (10) Michael J. Gardner ("MJG"), as a fraudulent transferee of the PDG Trust 1987, HG3, the PDG Estate, and the PDG Trust 2002.

Defendants FII, PDG Trust 2002, HG3, PDG Estate, PJG, and the PJG Trust (collectively, the "PJG Defendants") answered the Complaint. Defendants PDG Trust 1987 and MJG moved to dismiss Count III, which alleged that the PDG Trust 1987 was under common control with FII, and conducting a trade or business, and thus in FII's controlled group; and Count IX, which alleged fraudulent transfers of the PDG Trust 1987 to PJG and MJG, for failure to state a claim upon which relief can be granted.[13] Defendants September and Black (the

[13] *Id.* at 1-2. MJG died on December 10, 2015, and the executor of his estate, his widow Robin L. Gardner ("RLG", or the "MJG Estate", and with the PDG Trust 1987 and the Successors, the "MJG Defendants"), was substituted for him as a party.

"Successors") moved to dismiss Count XV, which alleged their liability for a Federal Successor Claim, also for failure to state a claim upon which relief can be granted.[14] PBGC filed memoranda in opposition to each of these motions.

The September Order granted both motions to dismiss, stating: PBGC had not pled facts necessary to establish the PDG Trust 1987 as a trade or business; the court would not apply the Federal Successor Claim to Termination Liabilities; and opinions supplementing the September Order would follow. With PBGC's consent, the MJG Defendants asked the court to delay issuance of the supplemental opinions, to facilitate settlement efforts. PBGC and the MJG Defendants were unable to reach a settlement. On October 5, 2016, all parties filed a Report of Parties' Planning Meeting ("Report"), indicating, *inter alia*, that after issuance of the opinions supplementing the September Order, PBGC might seek an immediate appeal.

The Report also requested mediation between PBGC and the PJG Defendants only. PBGC and the PJG Defendants reached a settlement, under which a Stipulation and Order of Dismissal of PJG Defendants was entered March 9, 2017 ("PJG Dismissal Order").

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14 *Id.* at 2.

On December 29, 2016, the district court issued the December Order, which reiterated the dismissal of Counts III, IX, and XV, and included the opinion promised in the September Order. The December Order relied on *Comm'r of Internal Revenue v. Groetzinger*,[15] which defined "trade or business" for the purpose of sections of the Internal Revenue Code that do not concern controlled groups, much less Title IV of ERISA.[16] The Order expressly declined to follow the rule adopted by all other courts considering the issue, that an entity leasing to another entity under common control is conducting, or is, a trade or business ("Categorical Rule").[17] The December Order also elaborated on the earlier holding that the Federal Successor Claim does not apply to Termination Liabilities.[18]

Notwithstanding the December Order, as discussed below, PBGC remains confident that the Categorical Rule should be followed here and that the Federal Successor Claim should be applied to the Termination Liabilities. PBGC filed a Motion to Amend and Certify Orders for Interlocutory Appeal, and for a Stay of Proceedings Pending Appeal ("Motion to Certify and Stay"). RLG, the only

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15 480 U.S. 23 (1987).

16 *Id.* at 24.

17 December Order at 4-6.

18 *Id.* at 7-9.

defendant still subject to undismissed claims ("Undismissed Claims"), filed a Memorandum in Support of the Motion to Certify and Stay. The Certification Order, granting the Motion to Certify and Stay, followed.

ARGUMENT

Appeal of the MJG Dismissal Orders under 28 U.S.C. § 1292(b) is warranted. The plaintiff, the sole remaining defendant, and the district court agree that all of the statutory requirements for interlocutory appeal of the MJG Dismissal Orders are met: (1) they involve not only one, but two, controlling questions of law, (2) on which there is substantial ground for difference of opinion; and (3) an immediate appeal may materially advance the ultimate termination of the litigation.[19]

A. TWO CONTROLLING QUESTIONS OF LAW ARE PRESENT.

A controlling question of law is one that could materially affect the outcome of the case.[20] The MJG Dismissal Orders involve two controlling questions of law:

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[19] *See* 28 U.S.C. § 1292(b). As the text of Section 1292(b) indicates, appellate jurisdiction applies to the order certified to the court of appeals, and is not tied to the particular question formulated by the district court. The appellate court may address any issue fairly included within the certified order, reducing the chance of a later appeal, because it is the order that is appealable, rather than only the controlling question of law identified by the district court. *Yamaha Motor Corp., U.S.A. v. Calhoun,* 516 U.S. 199, 205 (1996) (citations omitted).

[20] *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002).

(1) whether an organization leasing property to another organization under "common control" categorically is, or is conducting, a "trade or business;" and

(2) whether the Federal Successor Claim applies to Termination Liabilities.

1. Whether an organization leasing property to another organization under "common control" categorically is, or is conducting, a "trade or business," is a controlling question of law.

ERISA provides that upon termination of a PBGC-covered plan, the contributing sponsor of the plan and the other members of its "controlled group" are jointly and severally liable for Termination Liabilities.[21] A person's controlled group consists of the person and all other persons under common control with the person.[22] Persons are under common control if they are "two or more trades or businesses under common control," as defined in Treasury regulations under 26 U.S.C. § 414(c), incorporated into Title IV by reference.[23] The regulations specify when common control exists, based on certain levels of common ownership.[24]

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21 29 U.S.C. §§ 1307(e), 1362(a)(1).

22 29 U.S.C. § 1301(a)(14)(A); 29 C.F.R. § 4001.3(b)(1).

23 29 C.F.R. § 4001.3(b)(2).

24 Treas. Reg. § 1.414(c)-2.

"Trade or business" is not defined in section 414(c), the regulations thereunder, ERISA, or regulations under ERISA.[25] Prior to the MJG Dismissal Orders, final federal court decisions were unanimous in holding that an organization leasing to another organization under common control is categorically conducting a trade or business.[26]

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[25] *Central States, S.E. and S.W. Areas Pension Fund v. Ditello*, 974 F.2d 887, 889 (7th Cir. 1992); *Board of Trustees of the Ken Lusby Clerks & Lumber Handlers Pension Fund v. Piedmont Lumber & Mill Co.*, No. 13-cv-03898, 2015 WL 5461561, at *4 (N.D. Cal. Sept. 16, 2015); *Central States, S.E. and S.W. Areas Pension Fund v. Lloyd L. Sztanyo Trust*, 693 F. Supp. 531, 536 (E.D. Mich. 1988).

[26] *See, e.g.*, *Central States, S.E. and S.W. Areas Pension Fund v. SCOFBP, LLC*, 668 F.3d 873, 879 (7th Cir. 2011); *Vaughn v. Sexton*, 975 F.2d 498, 503 (8th Cir. 1992); *Board of Trustees of the Western Conf. of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892, 894-95 (9th Cir. 1988); *Trustees of the Laborers' District Council and Contractors' Pension Fund v. Massie*, No. 2:14-cv-102, 2015 WL 631481, at *3 (S.D. Ohio Feb. 13, 2015); *Board of Trustees of the Upper Peninsula Plumbers and Pipefitters' Pension Fund v. Jim Baril Plumbing & Heating, Inc.*, No. 1:12-CV-1302, 2014 WL 655486 (W.D. Mich. Feb. 20, 2014); *Nat'l Pension Plan of the UNITE HERE Workers Pension Fund v. Swan Finishing Co., Inc.*, No. 05 Civ. 6819, 2006 WL 1292780, at *4 (S.D.N.Y. May 11, 2006); *PBGC v. Don's Trucking Co., Inc.*, 309 F. Supp. 2d 827, 832 (E.D. Va. 2004); *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc.-Pension Fund v. Canny*, 900 F. Supp. 583, 590 (N.D.N.Y. 1995); *Lyons v. Raymond Rosen & Co., Inc.*, No. 93-1514, 1994 WL 129955, at *7 (E.D. Pa. April 12, 1994); *Central States, S.E. and S.W. Areas Pension Fund v. Rogers*, 843 F. Supp. 1135, 1142 (E.D. Mich. 1992), *aff'd* 14 F.3d 600 (6th Cir. 1993); *Trustees of the Amalgamated Ins. Fund v. Saltz*, 760 F. Supp. 55 (S.D. N.Y. 1991); *Lloyd L. Sztanyo Trust*, 693 F. Supp. at 537-38; *Teamsters Pension Trust Fund of Phila. and Vicinity v. Malone Realty Co.*, 82 B.R. 346, 350 (E.D. Pa. 1988); *Central States, S.E. and S.W. Areas Pension Fund v. Long*, 687 F. Supp. 298, 301 (E.D. Mich. 1987); *United Food and Commercial Workers Union v. Progressive Supermarkets*, 644 F. Supp. 633 (D.

Whether the Categorical Rule governs leasing of property to a commonly controlled organization is a question of law.[27] It is controlling. First, its resolution *would determine* whether the PDG Trust 1987 is subject to the Termination Liabilities, if (i) the district court's holding on that issue is upheld; or (ii) if it is reversed, and common control and leasing between the PDG Trust 1987 and FII ultimately are found to have been present in this case, as alleged by PBGC. While the PDG Trust 1987 does not appear to have any assets left, PBGC alleges that the transfer of its assets to MJG was fraudulent as to the PDG Trust 1987's debts to PBGC for the Termination Liabilities.

Second, the definition of "trades or businesses" will materially affect the Undismissed Claims. Although PBGC settled with HG3 and the PDG Trust 2002, their controlled group status remains at issue because PBGC alleges that transfers to MJG of assets of HG3, the PDG Estate (a general partner of HG3), and the PDG Trust 2002, were fraudulent as to those organizations' debts to PBGC for the Termination Liabilities, which depend on the PDG Trust 2002 or HG3 being in FII's controlled group.

N.J. 1986); *PBGC v. Center City Motors, Inc.*, 609 F. Supp. 409, 412 (S.D. Cal. 1984).

[27] *Central States, S.E. and S.W. Areas Pension Fund v. Nagy*, 714 F.3d 545, 550 (7th Cir. 2013).

The "trades or businesses" issue PBGC seeks to appeal *would determine* the controlled group status of the PDG Trust 2002, if (i) the district court's holding is upheld and the December Order's criteria for "trade or business" status ultimately are not found to have been present in this case; or (ii) if it is reversed and common control and leasing between the PDG Trust 2002 and FII ultimately are found to have been present, as alleged by PBGC.

Also, an opinion on the trade or business issue is likely to materially affect the determination of whether HG3 was in a controlled group with FII, by providing guidance as to whether HG3 was conducting a trade or business. PBGC alleges that HG3 was under common control with FII, while lending funds to FII, and leasing property to Bloomdale Plastics Company, a captive supplier of FII.

2. Whether the Federal Successor Claim applies to Termination Liabilities is a controlling question of law.

Courts have applied Federal Successor Claims to hold successors liable for debts of their predecessors arising under federal employment law, including ERISA, if the successor had notice of the predecessor's debt, and there was substantial continuity between the predecessor and the successor.[28] Whether this

[28] *Resilient Floor Covering Pension Trust Fund Bd. Of Trustees v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1092-93 (9th Cir. 2015); *Tsareff v. Manweb Services, Inc.*, 794 F.3d 841 (7th Cir. 2015); *Einhorn v. M.L. Ruberton Const. Co.*,

federal common law applies to single-employer pension plans in particular is a legal question. It is controlling because whether PBGC has a Federal Successor Claim *would determine* the liability of the Successors, if (i) the district court's holding that PBGC does not have a Federal Successor Claim is upheld on appeal; or (ii) if that holding is reversed, and notice and substantial continuity ultimately are found to be present in this case, as PBGC alleges.[29]

B. THERE ARE SUBSTANTIAL GROUNDS FOR A DIFFERENCE OF OPINION.

"Substantial grounds for a difference of opinion exist when (1) the issue is difficult and of first impression; (2) a difference of opinion exists within the controlling circuit; or (3) the circuits are split on the issue."[30]

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632 F.3d 89, 99 (3d Cir. 2011); *Schilling v. Interim Healthcare of the Upper Ohio Valley, Inc.*, No. 2:06-CV-487, 2008 WL 2355831 (S.D. Ohio June 9, 2008).

[29] December Order at 7. As the district court noted, PBGC also alleged that FII was unable to pay the Termination Liabilities. However, based on the authorities cited above applying the Federal Successor Claim in other ERISA contexts, PBGC does not believe that it needs to establish FII's inability to pay.

[30] *West Tenn. Chapter of Assoc. Builders & Contractors, Inc. v. City of Memphis*, 138 F. Supp. 2d 1015, 1019 (W.D. Tenn. 2000).

1. There are substantial grounds for a difference of opinion as to whether an organization leasing property to another organization under "common control" categorically is, or is conducting, a "trade or business."

As noted above, until the MJG Dismissal Orders, there was no difference of opinion – the Categorical Rule was universally applied by federal courts. While the Categorical Rule is not a binding precedent in this Circuit, this Court has signaled that it would follow it. This Court held that the primary purpose of applying the controlled group rules to ERISA "is to ensure that employers will not circumvent their ERISA and [Multiemployer Pension Plan Amendments Act] obligations by operating through separate entities."[31] That purpose has been cited by many of the courts applying the Categorical Rule.[32] Later, this Court issued an unpublished opinion affirming a district court's application of the Categorical

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[31] *Mason and Dixon Tank Lines, Inc. v. Central States, S.E. and S.W. Areas Pension Fund*, 852 F.2d 156, 159 (6th Cir. 1988), citing S. Rep. No. 383, 93rd Cong., 2d Sess. 43, reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4890, 4928; H.R. Rep. No. 807, 93rd Cong., 2d Sess. 50, reprinted in 1974 U.S. Code Cong. & Admin. News 4670, 4716.

[32] *See, e.g., Ditello*, 974 F.2d at 889-90; *Connors v. Ryan's Coal Co., Inc.*, 923 F.2d 1461, 1468 (11th Cir. 1991); *Board of Trustees, Sheet Metal Workers' Nat. Pension Fund v. Delaware Valley Sign Corp.*, 945 F. Supp. 2d 649, 654 (E.D. Va. 2013); *Swan Finishing Co.*, 2006 WL 1292780, at *4; *Lloyd L. Sztanyo Trust*, 693 F. Supp. at 537; *Malone Realty Co.*, 82 B.R. at 350; *Long*, 687 F. Supp. at 301; *Progressive Supermarkets*, 644 F. Supp. at 638; *Center City Motors*, 609 F. Supp. at 412.

Rule.[33] Moreover, as indicated above, the MJG Dismissal Orders conflict with all other case law within and without the Sixth Circuit.

The December Order did note the anti-fractionalization purpose of the Categorical Rule, but said that "the purpose of the rental activity was not to dissipate [FII's] assets. . . . This is evident from the timing, form, and scope of the trust, which was personal and not commercial."[34] This conclusion is based on a record consisting of the trust document and the First Amended Complaint.[35] The December Order cites the latter for the fact that the PDG Trust 1987 began leasing real property to FII "[i]n July 1993, six years after the trust's inception."[36] In fact, PBGC alleged that the leasing to FII began "no later than" July 1993.[37] Under the

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33 *Central States, S.E. and S.W. Areas Pension Fund v. Rogers*, 14 F.3d 600 (6th Cir. 1993), affirming *Rogers*, 843 F. Supp. 1135.

34 December Order at 5-6.

35 *Id.* at 5.

36 *Id.*

37 Doc. 3, ¶ 64. Thus, although the December Order noted that in reviewing the motion to dismiss, the district court must "construe the Complaint in the light most favorable" to PBGC, *id.* at 2 (emphasis added), it did the opposite.

Categorical Rule, the lessor's state of mind is irrelevant,[38] so mistakes in examining it are avoided.

The December Order also said the Categorical Rule didn't necessarily apply to single-employer plans. Other courts have applied the Categorical Rule to single-employer plans;[39] and until the December Order, none had refused to do so. The December Order provides no reason why the Categorical Rule should be applied to multiemployer plans and not single-employer plans.

2. There are substantial grounds for a difference of opinion as to whether the Federal Successor Claim applies to Termination Liabilities.

Whether the Federal Successor Claim applies to Termination Liabilities is an issue of first impression. Presumably it is a difficult issue, given that the district court dismissed the claim notwithstanding holdings by the Courts of Appeal for the Ninth and Seventh Circuits that multiemployer pension plans have Federal Successor Claims to collect the liability an employer incurs upon withdrawing

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[38] *See, e.g., Lloyd L. Sztanyo Trust*, 693 F. Supp. at 537 (relying solely on trust's leasing to withdrawing employers under common control to conclude trust was conducting trade or business for ERISA purposes).

[39] *Don's Trucking*, 309 F. Supp. 2d at 830-31 (applying Categorical Rule to UBL Claim, *i.e.* liability under 29 U.S.C. § 1362(b), which per 29 U.S.C. § 1362(a) applies only to single-employer plans); *Center City Motors*, 609 F. Supp. 409 (same).

from the plan ("Withdrawal Liability").[40] Multiemployer plan withdrawal liability is very similar to the Termination Liabilities, especially the UBL Claim, involving single employer plans like the one here. Multiemployer plan liability and the Termination Liabilities all arise under Title IV of ERISA,[41] and thus are liabilities only associated with defined benefit pension plans described in 29 U.S.C. § 1321(a).[42] The persons statutorily liable for Withdrawal Liability are almost identical to those statutorily liable for the UBL Claim, and very similar to those

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40 *Michael's Floor Covering, Inc.*, 801 F.3d 1079; *Tsareff,* 794 F.3d 841.

41 ERISA §§ 4006(a)(7), 4007, 29 U.S.C. §§ 1306(a)(7), 1307 (Premiums Claim); ERISA § 4062(a)(1), 29 U.S.C. § 1362(a)(1) (UBL Claim); ERISA § 4201, 29 U.S.C. § 1381 (Withdrawal Liability). (ERISA is codified at 29 U.S.C. §§ 1001-1461.)

42 29 U.S.C. § 1321(a) (describing plans covered by Title IV).

statutorily liable for the Premiums Claim.[43] And the basis for calculating Withdrawal Liability is very similar to the basis for calculating the UBL Claim.[44]

C. IMMEDIATE APPEAL WOULD MATERIALLY ADVANCE THE TERMINATION OF THE LITIGATION.

An appeal materially advances the termination of litigation if it is likely to save judicial resources and spare the litigants from unnecessary expense if the court's rulings are reversed.[45] Sixth Circuit courts have decided whether this element is met based in large part on the stage of the proceeding, *i.e.* finding that an appeal would materially advance the termination of the litigation when the case

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[43] The withdrawing "employer" is liable for Withdrawal Liability. 29 U.S.C. § 1381(a). All trades or businesses under common control, as defined based on common ownership in Treasury regulations under 26 U.S.C. § 414(c) and incorporated into Title IV by reference, 29 C.F.R. § 4001.3(a)(1), are treated as a single employer, 29 U.S.C. § 1301(b)(1). There are two statutory provisions subjecting persons outside the controlled group to the UBL Claim, 29 U.S.C. § 1369(a) and 29 U.S.C. § 1369(b). The former is very similar to 29 U.S.C. § 1392(c), which applies to Withdrawal Liability. The latter itself applies to Withdrawal Liability as described in 29 U.S.C. § 1398, which the district court overlooked, leading it to discount the case law applying the Federal Successor Claim to Withdrawal Liability. December Order at 8-9.

[44] The amount of an employer's Withdrawal Liability is the employer's share of unfunded vested benefits, *i.e.,* the value of the plan's vested benefits minus the value of the plan's assets. 29 U.S.C. §§ 1381(b)(1), 1393(c). A UBL Claim for a terminated Single-Employer Plan is likewise the value of the plan's benefits minus the value of the plan's assets. 29 U.S.C. §§ 1301(a)(18), 1362(b)(1)(A).

[45] *Deutsche Bank Nat. Trust Co. v. Weickert*, 638 F. Supp. 2d 826, 831 (N.D. Ohio 2009), citing *West Tenn. Chapter of Assoc. Builders & Contractors, Inc. v. City of Memphis*, 138 F. Supp. 2d 1015, 1019 (W.D. Tenn. 2000).

is "in the early stages of litigation,"[46] but that it would not on the eve of trial.[47] Here, the grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is a very early stage of litigation. Additionally, the district court stayed litigation on the Undismissed Claims with over seven weeks of discovery remaining under the schedule agreed upon by PBGC and RLG; and approximately eight months before the expected trial date.

1. Immediate appeal regarding whether an organization leasing property to another organization under "common control" categorically is, or is conducting, a "trade or business" would materially advance the termination of the litigation.

An immediate appeal and then reversal on the trade or business issue would save PBGC, the MJG Estate, and the district court – not to mention non-parties with relevant information – the time and expense of conducting discovery, motion

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[46] *Deutsche Bank*, 638 F. Supp. 2d at 831. *See also, e.g., City of Detroit v. Michigan*, No. 10-12427, 2013 WL 1340108 at *3 (E.D. Mich. Apr. 3, 2013) (case poised to enter damage discovery phase); *Newsome v. Young Supply Co.*, 873 F. Supp. 2d 872, 879 (E.D. Mich. 2012) (interlocutory appeal might avoid extensive discovery); *West Tenn. Chapter of Assoc. Builders & Contractors, Inc.*, 138 F. Supp. 2d at 1026 ("Parties have engaged in minimal discovery to this point.").

[47] *See, e.g., Wallace Sales & Consulting, LLC v. Tuopu North America, Ltd.*, No. 15-cv-10748, 2016 WL 6875889, at *4 (E.D. Mich. Nov. 22, 2016) (trial three weeks away); *Shannon v. State Farm Ins. Co.*, No. 14-cv-14153, 2016 WL 3031383, at *4 (E.D. Mich. May 27, 2016) (trial shortly after next business day); *Takacs v. Hahn Automotive Corp.*, No. C-3-95-404, 1999 WL 33117266, at *4 (S.D. Ohio Apr. 23, 1999) (trial date one month away).

practice, and a trial on the controlled group status of the PDG Trust 2002 and HG3 under the *Groetzinger* opinion. In *Groetzinger*, the Court held that "to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit."[48] Unless litigation of the Undismissed Claims is preceded by a reversal on the "trade or business" issue, the parties would need to conduct discovery, if not a trial, regarding the involvement and purposes of the PDG Trust 2002 and HG3 in activities in the previous decade that arguably do or do not rise to the level of a trade or business. Moreover, the parties are likely to litigate over the meaning of the *Groetzinger* definition.

As described above, the Categorical Rule is a simpler test. Under that test, there should be no doubt, and thus little or no discovery, as to whether the PDG Trust 2002 leased property to FII. While HG3's alleged activities do not fit the Categorical Rule exactly, they involved FII, so the same purpose of preventing fractionalization of plan sponsors' assets applies to them, and an appellate opinion emphasizing that purpose would strongly suggest application of a similar rule. Thus, reversal on the trade or business issue could permit summary judgment on the controlled group status of the PDG Trust 2002 and HG3, saving the judicial

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48 480 U.S. at 35.

resources and litigant expense required by a trial regarding that status.

While court resources can be conserved if a case settles before an appeal, this is not such a case. PBGC generally tries to resolve cases by settlement, and in this case, it tried to settle with the MJG Defendants, and did settle with the PJG Defendants. But the MJG Dismissal Orders' rejection of the Categorical Rule is contrary to PBGC's position on a significant issue that arises often with PBGC-covered plans, so PBGC is unlikely to enter into a settlement of Counts III and IX of the complaint unless and until that adverse holding is reversed.

2. Immediate appeal regarding whether the Federal Successor Claim applies to Termination Liabilities would materially advance the termination of the litigation.

Absent an immediate appeal of the MJG Dismissal Orders, PBGC will need to litigate the amounts of the Termination Liabilities as applied to the Undismissed Claims; and then again as to Count XV, if the dismissal of Count XV is reversed. This is true even if the Successors are in privity with the MJG Estate. As noted above, PBGC alleges that the Successors are liable for the Termination Liabilities, which it estimates to exceed $36 million. A judgment on the Undismissed Claims would be limited to the value of the property alleged to be transferred to MJG (predecessor of the MJG Estate) fraudulently, or as a subsequent transferee of a fraudulent transferee, which appears to be smaller than the Termination Liabilities by a factor of ten. Thus, resolution of the full amount of the Termination

Liabilities should not be considered "essential to the prior judgment," one of the elements of issue preclusion.[49]

And because the Termination Liabilities are roughly ten times the amount of the Undismissed Claims, material advancement of the ultimate resolution of Count XV is much more important than material advancement of the Undismissed Claims. Absent an immediate appeal, Count XV would not be tried until after the conclusion of the currently scheduled trial of the Undismissed Claims, and then a reversal by the Court of Appeals. And with the passage of time, documents relevant to Count XV might be lost or destroyed, memories of witnesses might erode, and the ability of the Successors to satisfy a judgment is at risk. Thus, PBGC's ability to litigate and collect on Count XV could be unfairly compromised if an immediate appeal is not granted.

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[49] *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,'" quoting *New Hampshire v. Maine,* 532 U.S. 742, 748-49 (2001)).

CONCLUSION

For these reasons, PBGC respectfully requests that the Court permit PBGC to appeal the MJG Dismissal Orders pursuant to 28 U.S.C. § 1292(b).

Date: March 20, 2017

Respectfully submitted,

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/s/Merrill D. Boone

Attorney for Pension Benefit Guaranty Corporation

Dated: March 20, 2017

CERTIFICATE OF SERVICE

I, Merrill D. Boone, certify that on March 20, 2017, a true and correct copy of Pension Benefit Guaranty Corporation's Petition for Permission to Appeal under 28 U.S.C. § 1292(b) was served by FedEx Priority Overnight on:

James D. Curphey, Esq. Porter, Wright, Morris & Arthur 41 South High Street, Suite 2900 Columbus, OH 43215	**Caroline H. Gentry, Esq.** Porter, Wright, Morris & Arthur - Dayton One South Main Street, Suite 1600 Dayton, OH 45402

/s/ Merrill D. Boone
Merrill D. Boone

APPENDIX

LIST OF EXHIBITS

PETITION
EXHIBIT 1

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

Pension Benefit Guaranty Corporation,	Case No. 3:15 CV 1421
Plaintiff,	ORDER GRANTING MOTIONS TO DISMISS
-vs-	JUDGE JACK ZOUHARY
Findlay Industries, et al.,	
Defendants.	

Pending before this Court is the Motion of Defendants PDG Trust 1987 and Michael J. Gardner to Dismiss Counts III and IX of the First Amended Complaint (Doc. 21). Plaintiff opposes (Doc. 37), and Defendants reply (Doc. 48).

This Court finds Plaintiff has not pled facts necessary to establish the Trust as a "trade or business." Counts III and IX are dismissed with prejudice.

Also pending before this Court is the Motion of Defendants September Ends Co. and Back in Black Co. to Dismiss Count XV of the First Amended Complaint (Doc. 22). Plaintiff opposes (Doc. 38), and Defendants reply (Doc. 43).

This Court finds Count XV is not grounded in the statute or on established federal common law, and this Court declines to create federal common law "to fill a gap" where none exists. Count XV is dismissed with prejudice.

In light of these holdings, Plaintiff's Motion for Oral Argument (Doc. 52) is denied as moot. This Court will supplement this Order with memorandum opinions further detailing the basis for these holdings. Counsel are reminded to submit a proposed revised Case Schedule. *See* Doc. 51.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

September 9, 2016

PETITION
EXHIBIT 2

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

Pension Benefit Guaranty Corporation,	Case No. 3:15 CV 1421
Plaintiff,	MEMORANDUM OPINION AND ORDER
-vs-	JUDGE JACK ZOUHARY
Findlay Industries, et al.,	
Defendants.	

INTRODUCTION

Defendant Findlay Industries, Inc. (Findlay) established a pension plan (Plan) in June 1964 (Doc. 3 at ¶ 26). Findlay remained the sponsor and administrator of the Plan from its inception until its termination effective July 2009 (*id.* at ¶¶ 28–29). Plaintiff Pension Benefit Guaranty Corporation (Pension Benefit) claims several Defendants are jointly and severally liable for the termination liabilities incurred by Findlay (*id.* at 2–3). Pension Benefit brings this action against Defendants under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), *as amended*, 29 U.S.C. §§ 1301-1461, and the Federal Debt Collection Procedures Act, 28 U.S.C. § 3001 *et seq.* (*id.* at 2).

Findlay and certain other Defendants have been dismissed (Minute Entry 11/22/16); the remaining Defendants move to dismiss selective claims. Pending are two Motions to Dismiss under Federal Civil Rule 12(b)(6). Defendant The Philip D. Gardner Inter Vivos Trust Agreement Dated January 20, 1987 (Trust 1987) moves to dismiss Counts III and IX of the First Amended Complaint

(Docs. 21, 37, 48). Defendants September Ends Co. (September Ends) and Back in Black Co. (Back in Black) move to dismiss Count XV (Docs. 22, 38, 43).

STANDARD OF REVIEW

An action may be dismissed if the complaint fails to state a claim upon which relief can be granted. Federal Civil Rule 12(b)(6). At this stage, this Court must accept all well-pled factual allegations as true and construe the Complaint in the light most favorable to Pension Benefit. *Haviland v. Metro. Life Ins. Co.*, 730 F.3d 563, 566–67 (6th Cir. 2013). Although the Complaint need not contain "detailed factual allegations," it does require more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, the Complaint will survive a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted). And "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

DISCUSSION

Counts III and IX

Trust 1987 moves to dismiss Counts III (Controlled Group Liability of PDG Trust 1987 under 29 U.S.C. §§ 1306, 1307, 1362) and IX (Fraudulent Transfers by HG3 under 28 U.S.C. §§ 3304, 3306, 3307) for failure to state a claim. The Estate of Michael Gardner also moves to dismiss those Counts (Docs. 33, 46–47).

Philip D. Gardner (Gardner) founded and owned Findlay until his death. In January 1987, Gardner established Trust 1987 (Doc. 21 at 4; Doc. 21-1 at 1).[1] Gardner donated two parcels of property to the trust (Doc. 21-1 at 1, Ex. A). The trustee was directed to "hold, manage and control the property comprising the Trust estate, collect the income therefrom, and . . . disburse the net income and distribute the corpus thereof" to provide for the "care, support, maintenance, and welfare" of Gardner's sisters (Doc. 21-1 at 1). Later, the funds were also to be used for the sisters' funeral expenses as the trustee saw fit (*id.* at 3). After the passing of the last sister, the balance of the trust was to be split between Gardner's two sons, Defendants Philip J. Gardner and Michael J. Gardner (Gardner sons) (*id.*). The Gardner sons served successively as trustees (Doc. 21-1 at 1, 4; Doc. 3 at ¶ 3). The trust was irrevocable (Doc. 21-1 at 8). Under the terms of the trust, the remaining real property, personal property and cash were transferred to the Gardner sons in 2014, following the death of the last sister (Doc. 3 at ¶¶ 138–40).

In Count III, Pension Benefit alleges Trust 1987 was "leasing a parcel of real property to [Findlay] from no later than July 1, 1993, through at least November 2009" (Doc. 3 at ¶ 64). Pension Benefit goes on to allege this lease "had a substantial economic nexus with [Findlay], such that including [Trust 1987] in [Findlay]'s controlled group would further the purpose of the controlled

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[1] While a court may not normally consider matters outside the pleadings without converting a motion to dismiss to a motion for summary judgment, "a court may consider . . . exhibits attached to defendant's motion to dismiss so long as they are referred to in the complaint and are central to the claims contained therein without converting the motion . . . ." *Rondigo, LLC v. Twp. of Richmond*, 641 F.3d 673, 681 (6th Cir. 2011). Here, Pension Benefit refers to Trust 1987, as well as its purpose and structure, in the First Amended Complaint (Doc. 3 at ¶¶ 59–64). The trust itself is central to Pension Benefit's claims. Accordingly, this Court will consider the trust documents in evaluating the motion to dismiss, without converting the motion to one for summary judgment. *See Rondigo*, 641 F.3d at 681.

group rules, preventing employers from limiting their responsibilities by fractionalizing into separate entities" (*id.* at ¶ 65; Doc. 37 at 11).

Under ERISA, when "a single-employer plan is terminated . . . by [Pension Benefit] . . . any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's controlled group shall incur liability . . . ." 29 U.S.C. § 1362(a). For single-employer plans, a controlled group consists of all persons under common control, including "two or more trades or businesses under common control." 29 C.F.R. § 4001.3(b)(1). The phrase "trades or businesses" is not defined by ERISA or the relevant regulations.

According to Pension Benefit, the "categorical rule is that leasing property to a plan sponsor who is under the common control of the property owner constitutes a 'trade or business'" for ERISA purposes (Doc. 37 at 11). Pension Benefit therefore concludes Trust 1987 is in Findlay's controlled group, making Trust 1987 jointly and severally liable for termination liabilities (*id.*; Doc. 3 at ¶¶ 66 & 68). Trust 1987 disputes both the "economic nexus" test referenced in the Complaint and the "categorical rule," instead relying on the test identified in *Commissioner v. Groetzinger*, 480 U.S. 23, 35 (1987). In *Groetzinger*, the Supreme Court held that to constitute a trade or business for tax purposes, a person must engage in an activity (1) for the primary purpose of income or profit, and (2) with continuity and regularity. *Id.* Under this standard, Trust 1987 argues Pension Benefit fails to plead facts necessary to establish the trust was a trade or business, and thus, Trust 1987 cannot be held liable for termination liabilities under ERISA (Doc. 21 at 7).

Neither the Supreme Court nor the Sixth Circuit has defined the term "trade or business" in the specific context of ERISA termination liability. Therefore, this Court "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language

accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). Merriam-Webster Dictionary defines "trade" as "the business or work in which one engages regularly" and "business" as "a usually commercial or mercantile activity engaged in as a means of livelihood." The Supreme Court's *Groetzinger* test embodies this ordinary, common-sense meaning of the words at issue. *Groetzinger*, 480 U.S. at 35.

Here, Gardner created Trust 1987 with the express purpose of providing for the care and eventual funeral expenses of his sisters (Doc. 21-1 at 1). In July 1993, six years after the trust's inception, the trust began leasing one of its parcels to Findlay (Doc. 3 at ¶ 64). The trust continued to lease the parcel to Findlay until November 2009 (*id.*). Thus, the trust operated according to its purpose, leasing part of its real property to generate money for the care of Gardner's sisters during their lifetimes. Thereafter, the balance of the trust was split between the Gardner sons as an inheritance (*id.* at ¶¶ 138–40). Nothing in these facts suggests the leasing activity rose to the level of a "trade or business" under the plain meaning of the phrase or under the *Groetzinger* test.

Pension Benefit would have this Court adopt an approach utilized by other Circuits, which recognize a "categorical rule" that leasing property to a withdrawing employer constitutes a trade or business. *See, e.g., Cent. States Se. and Sw. Areas Pension Fund v. Messina Prods., LLC*, 706 F.3d 874, 881 (7th Cir. 2013); *Bd. of Trs. of W. Conference of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892, 894 (9th Cir. 1988). This Court, however, declines to adopt the categorical rule in this case. The Circuits that have developed and applied the categorical rule did so in the context of the Multiemployer Pension Plan Amendments Act (MPPAA), which seeks to prevent employers from avoiding liability by fractionalizing into separate entities. *See, e.g., Messina Prods.*, 706 F.3d at 881–83 (contrasting *Messina* and other cases). As an initial matter, it is not clear that a single-

employer plan is governed by case law developed in the context of the MPPAA, which is a separate statutory scheme with its own legislative history and purpose. Moreover, in this case, although Trust 1987 rented property to Findlay (the withdrawing employer), the purpose of the rental activity was not to dissipate Findlay's assets or to profit Gardner. This is evident from the timing, form, and scope of the trust, which was personal not commercial. Where, as here, there is no possibility the rental activity was used to dissipate or fractionalize the employer's assets, there can be no controlled group liability. *See id.*, citing *Central States v. White*, 258 F.3d 636, 644 (7th Cir. 2001).

Pension Benefit maintains the allegations in the First Amended Complaint are sufficient, and it declines to amend to plead facts establishing Trust 1987 was a "trade or business" under *Groetzinger*. Accordingly, Count III, and Count IX which the parties agree cannot survive the dismissal of Count III, are dismissed with prejudice.

Count XV

Defendants September Ends and Back in Black move to dismiss Count XV of the First Amended Complaint for failure to state a claim under Federal Civil Rule 12(b)(6).

In December 2012, Pension Benefit and Findlay agreed to terminate the Plan effective July 2009 (Doc. 3 at ¶ 29). In May 2009, F I Asset Acquisition LLC (FIAA) purchased Findlay's equipment, inventory, and receivables associated with the Springfield and Molded Products plants (*id.* at ¶ 208). FIAA then transferred these purchases to Michael Gardner and his wholly-owned corporation Milstein, Jaffe & Goldman Inc. (*id.* at ¶ 209), which in turn transferred the assets to September Ends and Back in Black (*id.*). September Ends now operates the Springfield plant, and Back in Black operates the Molded Products plant (*id.* at ¶ 210).

Pension Benefit advances a claim of successor liability under federal common law against September Ends and Back in Black (*id.* at ¶ 211), alleging both are subject to the termination liabilities because: (1) they had notice of Findlay's termination liabilities; (2) Findlay was unable to pay the termination liabilities; and (3) there was "substantial continuity of operations" between Findlay and these two companies (*id.*).

September Ends and Back in Black argue that as asset purchasers they do not fall within the limited types of companies for which ERISA provides successor liability (Doc. 22 at 3). Under the relevant ERISA statutes, those who may be liable include the contributing sponsor, the plan administrator, and members of the contributing sponsor's controlled group. 29 U.S.C. §§ 1362(a) & 1307(e). September Ends and Back in Black fit none of these categories.

Congress empowered trustees to seek contributions to underfunded single-employer pension plans from a limited group of additional entities in the event of corporate reorganization. For example, if a reorganization results in a "mere change in identity, form, or place of organization," Pension Benefit may pursue the successor corporation. 29 U.S.C. § 1369(b)(1). Likewise, Pension Benefit may pursue a parent company when that company liquidates its subsidiary. *Id.* § 1369(b)(2). Finally, Pension Benefit may pursue the successor corporation that results from a merger, consolidation, or division. *Id.* § 1369(b)(3). It is undisputed that September Ends and Back in Black, as asset purchasers, do not fit these categories either.

With no statutory support, this leaves Pension Benefit to ask this Court to apply a federal common law doctrine of successor liability to this case (Doc. 38 at 14), citing *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1327 (7th Cir. 1990), and other cases.

"[W]here Congress has established an extensive regulatory network and has expressly announced its intention to occupy the field, courts do not lightly create additional rights under the rubric of federal common law." *DiGeronimo Aggregates, LLC v. Zemla*, 763 F.3d 506, 511 (6th Cir. 2014). This Court's authority to create federal common law with respect to ERISA "is restricted to instances in which (1) ERISA is silent or ambiguous; (2) there is an awkward gap in the statutory scheme; or (3) federal common law is essential to the promotion of fundamental ERISA policies." *Id.* Analyzing 29 U.S.C. §§ 1307(e), 1362(a), and 1369 under this standard, this Court concludes the creation of federal common law would be inappropriate here.

ERISA is neither silent nor ambiguous in terms of who may be pursued for termination liabilities. Rather, the Supreme Court recognizes ERISA as a "comprehensive and reticulated statute" based upon detailed findings made by Congress. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361–62 (1980). The statutory provisions at issue here clearly identify who may be pursued for monetary recovery: namely, the plan administrator, the contributing sponsor along with members of the sponsor's controlled group, as well as successor corporations which are essentially alter egos of their original corporations. 29 U.S.C. §§ 1362(a), 1307(e), & 1369(b). Nowhere in these provisions did Congress suggest, let alone endorse, successor liability for asset purchasers, leading this Court to conclude that Congress did not intend such entities to be included.

Further, there is no statutory gap for federal common law to fill. Pension Benefit describes in great detail the similarities between withdrawal liability for multiemployer plans and termination liability for single-employer plans (Doc. 38 at 19–23), arguing these similarities justify extending the federal common law doctrine from the first context to the second. But the statutory provisions governing multiemployer plans do not define the contours of successor liability, creating a gap.

Single-employer plans, on the other hand, are subject to 29 U.S.C. § 1369(b). The explicit language of that provision leaves no gap to fill.

Pension Benefit also argues that "ERISA provides that a nearly identical group of entities is liable for Withdrawal Liability [from multiemployer plans], and each of the several courts considering the issue has held that the Federal Successor Doctrine applies to Withdrawal Liability" (Doc. 38 at 31). Pension Benefit suggests that declining to apply the federal common law to single-employer plans would be inconsistent and create an "awkward gap" in the common law (*id.* at 32). Yet this argument ignores the many differences between single and multiemployer plans. The very point of the MPPAA was to create special provisions for multiemployer plans and to treat them differently. Further, Pension Benefit focuses on the wrong gap. The question is not whether a gap will be left in the federal common law by declining to apply it, but whether there exists in the first place a statutory gap that requires the creation of federal common law. *See DiGeronimo*, 763 F.3d at 511. For the reasons explained above, this Court finds no statutory gap.

Finally, the creation of federal common law here is not essential to the promotion of fundamental ERISA policies. *See Girl Scouts of Middle Tenn. v. Girls Scouts of the U.S.A.*, 770 F.3d 414, 420 (6th Cir. 2014). "The principal object of [ERISA] is to protect plan participants and beneficiaries." *Boggs v. Boggs*, 520 U.S. 833, 845 (1997). As Congress has established several categories of persons and entities which may be pursued for contributions to underfunded single-employer pension plans, Pension Benefit has avenues of redress to protect the pensions of vested employees. Adding more targets is not necessary to fulfill ERISA's policy of protecting plan participants.

Accordingly, this Court concludes that Count XV is not grounded in the statute or established federal common law. Because this Court declines to create federal common law "to fill a gap" where none exists, Count XV is dismissed with prejudice.

CONCLUSION

This Court grants the Motion to Dismiss Counts III and IX and the Motion to Dismiss Count XV. This Court schedules a Phone Status on **Friday, January 6, 2017 at 9:30 AM** to discuss the remaining Counts with counsel for the non-settling parties. At that time, counsel shall call the District Court conference line.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

December 29, 2016

PETITION EXHIBIT 3

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

Pension Benefit Guaranty Corporation,	Case No. 3:15 CV 1421
Plaintiff,	ORDER CERTIFYING APPEAL AND STAYING CASE
-vs-	JUDGE JACK ZOUHARY
Findlay Industries, et al.,	
Defendants.	

Without objection, Plaintiff's Motion to Amend and Certify Orders for Interlocutory Appeal, and for a Stay Pending Appeal (Doc. 64) is granted. This Court's September 9, 2016 and December 29, 2016 Orders (Docs. 54, 60) are amended to include the following statement, under 28 U.S.C. § 1292(b):

"This Order involves controlling questions of law as to which there are substantial grounds for differences of opinion, and an immediate appeal from the Order may materially advance the ultimate termination of the litigation."

Therefore, this Court certifies both Orders for immediate appeal to the United States Court of Appeals for the Sixth Circuit, under 28 U.S.C. § 1292(b). This case is stayed pending the outcome of the appeal and closed for statistical purposes.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

March 10, 2017