Case No. 17-3520

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PENSION BENEFIT GUARANTY CORPORATION

vs.

FINDLAY INDUSTRIES, INC., et al.

BRIEF OF APPELLANT PENSION BENEFIT GUARANTY CORPORATION

ON INTERLOCUTORY APPEAL 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

Appellant Pension Benefit Guaranty Corporation ("PBGC") certifies that it is a federal government agency established under 29 U.S.C. § 1302. *See, e.g., PBGC 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).

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. The outcome of this appeal will (1) create precedents on issues important to PBGC's mission of protecting and encouraging the continuation of pension plans; and (2) dramatically affect PBGC's ability to collect its claims in this case, approximately $33 million in the aggregate. Given the importance of its appeal, PBGC respectfully requests oral argument to address any questions the Court may have about the facts and applicable law.

STATEMENT OF JURISDICTION

The district court has jurisdiction of this case under Title IV of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1301-1461 (2012 & Supp. II 2014) ("ERISA"). The specific jurisdictional provision is 29 U.S.C. § 1303(e). This Court has jurisdiction of this appeal under 28 U.S.C. § 1292(b). The district court certified its Order Granting Motions to Dismiss and its Memorandum Opinion and Order for interlocutory appeal. ("Order Certifying

Appeal and Staying Case," RE 68, Page ID # 695). This Court granted PBGC's petition for permission to appeal on May 17, 2017.

STATEMENT OF ISSUES

I. Whether the district court erred in holding, against the weight of authority, that an organization engaged in leasing real property to a second organization under "common control" with the first organization was not a "trade or business" liable to PBGC for a pension plan's unfunded benefit liabilities and for termination premiums.

II. Whether the district court erred in rejecting application of established federal common law successor liability doctrine to PBGC's claims for unfunded benefit liabilities and termination premiums.

STATEMENT OF THE CASE

PBGC is the United States government agency that administers the nation's pension plan termination insurance program under Title IV of ERISA ("Title IV"). 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. 29 U.S.C. § 1302(a)(2). To enable PBGC to do this without imposing larger premiums on ongoing pension plans, *see* 29 U.S.C. § 1302(a)(3), ERISA provides that the sponsor of a terminated single-employer plan and trades or businesses related to the sponsor by certain levels of common ownership – known as “controlled group members” – are jointly and severally liable to PBGC for the plan’s unfunded benefit liabilities as of the termination date, plus interest, 29 U.S.C. § 1362(a)(1), (b)(1)(A) (“UBL Claim”); and for termination premiums, plus interest and penalties, 29 U.S.C. §§ 1306(a)(7)(A), 1307(e); 29 C.F.R. § 4007.13(g) (“Premiums Claim,” and with the UBL Claim, the “Termination Liabilities”).

Defendant Findlay Industries, Inc. (“Findlay”) sponsored the Findlay Industries, Inc. Pension Plan (the “Plan”), which is covered under Title IV, and thus subject to the insurance program administered by PBGC (“First Amended Complaint,” RE 3, Page ID # 87). By agreement of December 20, 2012, between PBGC and Findlay as Plan administrator, the Plan terminated with a termination date of July 18, 2009, giving rise to Termination Liabilities. (*Id.)*

As of the Plan’s termination date, Defendants and brothers Philip J. Gardner (“Philip Gardner, Jr.”), and Michael J. Gardner (“Michael Gardner”) were the direct or indirect owners of all of Findlay’s stock. (*Id.* at Page ID # 90-91). Philip Gardner, Jr. was Findlay’s President and Chairman of the Board of Directors. (*Id.* at Page ID #83). Michael Gardner had been Findlay’s Chief Executive Officer and one of its Directors from 2008 - 2009. (*Id.* at Page ID #115).

Their father, Philip D. Gardner (“Philip Gardner, Sr.”), was the founder and owner of Findlay until his death. (“Motion to Dismiss Counts III and IX,” RE 21, Page ID # 168). On December 30 or 31, 1986, Findlay transferred two parcels of real estate to Philip Gardner, Sr.[1] Less than a month later he settled the Defendant Philip D. Gardner Trust U/D January 20, 1987 ("Gardner Trust 1987"), to which he immediately transferred the same two parcels of real estate. (The Philip D. Gardner Trust, Exhibit 1 to Motion to Dismiss Counts III and IX, RE 21, Page ID # 175-184). From no later than July 1, 1993, through at least November 2009, the Gardner Trust 1987 leased the parcel of real estate (which was almost all of the value of its assets) to Findlay. (First Amended Complaint, RE 3, Page ID # 92).[2] As of the Plan's termination date, 83.089% of the ownership of the Gardner Trust 1987 was attributable to Philip Gardner, Jr. and Michael Gardner, as its remainder

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[1] In its First Amended Complaint, PBGC did not allege this transfer since, as discussed below, it is not relevant under the case law, other than the Memorandum Opinion and Order from which PBGC appeals. Nor did PBGC seek to amend its complaint following the Memorandum Opinion and Order, since the district court dismissed Count III with prejudice, without giving PBGC leave to amend, as noted below.

[2] In its First Amended Complaint, PBGC did not allege the value of the property leased to Findlay by the Gardner Trust 1987 relative to its other assets, since, as discussed below, it is not relevant under the case law, other than the Memorandum Opinion and Order from which PBGC appeals. Nor did PBGC seek to amend its complaint following the Memorandum Opinion and Order, since the district court dismissed Count III with prejudice, without giving PBGC leave to amend, as noted below.

beneficiaries. (*Id.* at Page ID # 91-92). After the death of the last life beneficiary of the Gardner Trust 1987, Michael Gardner, as trustee, caused its remaining assets to be distributed to himself and Philip Gardner, Jr. (*Id.* at Page #83, 101-102).

By May 8, 2009, Michael Gardner was on notice of Findlay's potential Termination Liabilities. (*Id.* at Page ID # 115-116). As Chief Executive Officer, Director, and owner of Findlay, Michael Gardner had notice of Findlay financial statements that showed a "Pension Benefit Obligation" over many years and, specifically, in the amount of $18.3 million as of February 28, 2009. (*Id.* at Page ID #91, 115). Michael Gardner's correspondence also revealed knowledge of the pension plan liabilities. (*Id.* at Page ID #115-116).

From May 8, 2009 until his death, on December 10, 2015, Michael Gardner was the President of each of Defendants September Ends Co. ("September Ends") and Back in Black Co. ("Back in Black," and collectively with September Ends, the "Successors"); and the owner, with his minor sons, of all stock of the Successors. (*Id.* at Page ID # 114-115). On May 8, 2009, the Successors acquired substantially all of Findlay's assets for approximately $2.2 million in cash and $1.2 million in assumed trade debt. (*Id.* at Page ID # 114). From May 2009 through December 2013, the Successors net income was $11,924,725, over three times greater than the purchase price of Findlay's assets. (*Id.* at Page ID # 116). Because the Successors had notice of the potential Termination Liabilities, they presumably were reflected in a discounted purchase price. (*Id.*)

On July 17, 2015, PBGC brought this action, against Findlay and nine other Defendants, to collect Termination Liabilities. (*Id.*, Page ID # 81-121). As of June 30, 2015, the UBL Claim was $24,969,283 and the Premiums Claim was $8,624,187.61. (*Id.*, Page ID #88-90).[3]

Findlay, Philip Gardner, Jr., and four other Defendants (collectively, the "Philip Gardner Defendants") reached a settlement with PBGC, and the Philip Gardner Defendants were dismissed from the lawsuit. ("Stipulation and Order of Dismissal," RE 66, Page ID # 687-688).

The Appellees are the four Defendants who have not settled with PBGC: (1) the Gardner Trust 1987, alleged in Count III of PBGC's complaint to be subject to the Termination Liabilities as a member of Findlay's "controlled group"; (2) Robin L. Gardner ("Robin Gardner"),[4] Executor of the Estate of Michael

[3] Since June 30, 2015, additional penalties on the Premiums Claim accrued; and interest on the Termination Liabilities accrued and continues to accrue. (First Amended Complaint, RE 3, Page ID #88-90). The Termination Liabilities have been reduced by payments pursuant to a settlement with Defendants other than the Appellees, mentioned below. PBGC estimates that the current net amount of the Termination Liabilities is about $33 million.

[4] Robin Gardner was substituted for Michael Gardner as a party. ("Substitution Order," RE 47, Page ID # 496).

Gardner, alleged in Counts IX through XII to be a fraudulent transferee of other Defendants, including the Gardner Trust 1987;[5] (3) September Ends, alleged in Count XV to be subject to the Termination Liabilities as a successor under federal common law; and (4) Back in Black, also alleged in Count XV to be subject to the Termination Liabilities as a successor under federal common law. (First Amended Complaint, RE 3, Page ID # 90-92, 101-109, 114-119.)

Defendants Gardner Trust 1987 and Michael Gardner moved to dismiss Counts III and IX, for failure to state a claim upon which relief can be granted. (Motion to Dismiss Counts III and IX, RE 21, Page ID # 165-184). The Successors moved to dismiss Count XV, also for failure to state a claim upon which relief can be granted. ("Motion to Dismiss Count XV," RE 22, Page ID # 185-238). PBGC filed memoranda in opposition to each of these motions, ("Opposition to Motion to Dismiss Counts III and IX," RE 37, Page ID # 374-394; "Opposition to Motion to Dismiss Count XV," RE 38, Page ID # 398-431), to

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[5] Count IX alleges that Michael Gardner received property, from the Gardner Trust 1987, without the Gardner Trust 1987 receiving any value in return, while the Gardner Trust 1987 was insolvent. (First Amended Complaint, RE 3, Page ID # 101-102). Counts X through XII allege that Michael Gardner received property from certain of the Philip Gardner Defendants, without those Defendants receiving any value in return, while those Defendants believed or reasonably should have believed that they would incur debts beyond their ability to pay. (*Id.*, RE 3, Page ID # 103-109).

which the Appellees replied, ("Reply to Opposition to Motion to Dismiss Count XV," RE 43, Page ID # 461-484; "Reply to Opposition to Motion to Dismiss Counts III and IX," RE 48, Page ID # 497-511).

PBGC moved for oral argument on both motions to dismiss. ("Motion for Oral Argument," RE 52, Page ID # 522-523; RE 52-1, Page ID # 524-526; RE 52-2, Page ID # 527). On September 9, 2016, the district court entered an Order Granting Motions to Dismiss; dismissing Counts III, IX, and XV with prejudice; denying PBGC's Motion for Oral Argument as moot; and stating that opinions supplementing the order would follow. ("September Order," RE 54, Page ID # 531-532).

On December 29, 2016, the district court entered a Memorandum Opinion and Order, ("December Order," RE 60, Page ID # 619-628, and with the September Order, the "Dismissal Orders"), which reiterated the dismissal of Counts III, IX, and XV, with prejudice; and included the opinion promised in the September Order; but did not give PBGC leave to amend its complaint to conform to the law as stated in the opinion.[6] The December Order held that the Gardner Trust 1987 was not a trade or business and thus not in Findlay's controlled group

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[6] The December Order states that PBGC "declines" to amend its complaint to plead facts establishing that the *Groetzinger* Test is met, but the basis for that statement is unclear. (December Order, RE 60, Page ID # 624).

and that PBGC does not have a successor liability claim under federal common law.

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," RE 64, 64-1, 64-2, Page ID 668-685). Robin Gardner, the only Defendant still subject to undismissed claims, *i.e.* Counts X through XII, supported the Motion to Certify and Stay. ("Memorandum in Support of Motion to Certify and Stay," RE 67, Page ID # 691-694). The district court granted the Motion to Certify and Stay the following day. ("Certification Order," RE 68, Page ID # 695). PBGC petitioned for permission to appeal, and this Court granted the petition on May 17, 2017.

SUMMARY OF ARGUMENT

Courts have consistently held that for ERISA liability purposes, a person who is under common control with the plan sponsor, and who is leasing property to the plan sponsor, categorically constitutes a "trade or business" (the "Categorical Rule"). This rule furthers, as would its application here, ERISA's policy of preventing employers from fractionalizing their assets to shield them from Termination Liabilities. The Gardner Trust 1987 was under common control with plan sponsor Findlay, and leased property to Findlay, and thus categorically constitutes a trade or business liable for Termination Liabilities. The district court erroneously concluded to the contrary, stating that the legal standard for determining whether the Gardner Trust 1987 is a "trade or business" under ERISA is a test applied in *C.I.R. v. Groetzinger*, 480 U.S. 23, 27 (1987), under two sections of the Internal Revenue Code ("IRC") having no relation to ERISA. (December Order, RE 60, Page ID # 622-624). The Categorical Rule is the proper test when the plan sponsor leases property from a commonly-controlled organization, because it does not allow employers to protect assets from Termination Liabilities.

The district court also erroneously held that PBGC does not have a successor liability claim under federal common law. (December Order, RE 60, Page ID # 625-628). Courts in and outside the Sixth Circuit have held that such a claim does apply to ERISA and other federal statutes. In particular, it has been applied to ERISA claims against employers withdrawing from multiemployer pension plans – pension plans to which more than one employer contribute, under collective bargaining agreements, 29 U.S.C. § 1002(37)(A). These withdrawal liability claims are very similar to the UBL Claim, and similar to the Premiums Claim. Contrary to the December Order, successor liability under federal common law is not precluded by 29 U.S.C. § 1369(b); and its application to the Termination Liabilities is an appropriate application of the federal common law of ERISA.

ARGUMENT

I. <u>The district court erred by holding that the Gardner Trust 1987, which leased real property to the pension plan sponsor, was not a "trade or business" under common control with the sponsor, and jointly and severally liable under Title IV of ERISA, contrary to the views of every other court to consider the issue.</u>

A. <u>The standard of review is de novo.</u>

The district court granted the Motion to Dismiss Counts III and IX. This Court reviews *de novo* a district court's dismissal for failure to state a claim. *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678, 685 (2016) (citing *Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007)). The Court accepts the factual allegations in the plaintiff's complaint as true and construes the complaint in the light most favorable to the plaintiff. *Tyler*, 837 F.3d at 685 (citing *Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710, 716 (6th Cir. 2005)).

B. <u>A person is in a controlled group with the plan sponsor if the person is under common control and is a trade or business.</u>

When a single-employer plan terminates, the plan's sponsor and the members of its "controlled group" become jointly and severally liable for Termination Liabilities. 29 U.S.C. §§ 1307(e)(2) (Premiums Claim), 1362(a)(1), (b)(1)(A) (UBL Claim). PBGC alleges that the Gardner Trust 1987 is a member of

Findlay's controlled group and jointly and severally liable for Termination Liabilities.

"Controlled group" means, in connection with any person, a group consisting of such person and all other persons under common control with such person. 29 U.S.C. § 1301(a)(14)(A); 29 C.F.R. § 4001.3(b)(1). The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization. 29 U.S.C. §§ 1002(9), 1301(a)(20).

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. 29 C.F.R. § 4001.3(b)(2).[7] Those Treasury regulations ("Common Control Rules") indicate that trades or businesses are under common control if they have specified percentages of common ownership. Treas. Reg. § 1.414(c)-2.

Similarly, when an employer participating in a multiemployer plan withdraws from the plan, the withdrawing "employer" is liable ("Withdrawal Liability"). 29 U.S.C. § 1381(a). For this purpose, all "trades or businesses under

[7] For purposes of single-employer Plans, persons also are under common control if they are a "controlled group of corporations" as defined in Treasury regulations under 26 U.S.C. § 414(b), incorporated into Title IV by reference. *Id.*

common control," as defined in the Common Control Rules, are treated as a single employer. 29 U.S.C. § 1301(b)(1); 29 C.F.R. § 4001.3(a)(1).

Accordingly, for both single-employer plans and multiemployer plans, a person is in the plan sponsor's controlled group if: (1) the person is under "common control" with the plan sponsor; and (2) the person is a "trade or business." If these criteria are met, then the person is in the sponsor's controlled group, liable for any Termination Liabilities or Withdrawal Liability that has arisen with respect to the sponsor.

PBGC alleged that Findlay and the Gardner Trust 1987 are under common control. (First Amended Complaint, RE 3, Page ID # 85-87, 90-92.) PBGC also alleged that the Gardner Trust 1987 is a "trade or business." (*Id.*, RE 3, Page ID # 92).

C. The Categorical Rule governs "trade or business" status in this case.

"Trade or business" is not defined in section 414(c), the Common Control Rules, ERISA, or regulations under ERISA. *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.*, 132 F.Supp.3d 1175, 1181 (N.D.Cal. 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). Definitions of "trade or business" in the IRC vary from section to section, and courts have declined to adopt those definitions for ERISA purposes. *Ditello*, 974 F.2d at 889-90; *Lloyd L. Sztanyo Trust*, 693 F. Supp. at 536. As one court put it," a suggestion that courts should look anywhere in the Code for guidance is an invitation to massive confusion." *United Food and Commercial Workers Union v. Progressive Supermarkets*, 644 F. Supp. 633, 638 (D.N.J. 1986).

In the absence of clear guidance from statutory or regulatory authority, courts have held that the meaning of "trade or business" under ERISA should be interpreted in light of the purposes of ERISA. *Central States, SE and SW Areas Pension Fund v. SCOFBP, LLC*, 668 F.3d 873, 878 (7th Cir. 2011); *NYSA-ILA Pension Trust Fund v. Lykes Bros., Inc.*, No. 96 CIV. 5616, 1997 WL 458777, at *6 (S.D.N.Y. Aug. 11, 1997); *Lloyd L. Sztanyo Trust*, 693 F. Supp. at 536; *Teamsters Pension Trust Fund of Phila. and Vicinity v. Malone Realty Co.*, 82 B.R. 346, 350 (E.D. Pa. 1988); *Progressive Supermarkets*, 644 F. Supp. at 638; *PBGC v. Center City Motors, Inc.*, 609 F. Supp. 409, 411-12 (S.D. Cal. 1984).

This Court has observed that the purpose of applying the common control rules to ERISA "is to ensure that employers will not circumvent their ERISA and MPPAA obligations by operating through separate entities." *Mason and Dixon Tank Lines v. Central States, S.E. and S.W. Areas Pension Fund*, 852 F.2d 156, 159 (6th Cir. 1988) (citing S. REP. NO. 93-383 at 43, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4890, 4928; H.R. REP. NO. 93-807 at 50, *reprinted in* 1974

U.S.C.C.A.N. 4670, 4716).[8] *See also, e.g., Ditello*, 974 F.2d at 890; *Connors v. Ryan's Coal Co., Inc.*, 923 F.2d 1461, 1468 (11th Cir. 1991) (citing *Teamsters Pension Trust Fund--Board of Trustees of the Western Conf. v. Allyn Transportation Co.*, 832 F.2d 502, 507 (9th Cir. 1987)); *Board of Trustees, Sheet Metal Workers' Nat. Pension Fund v. Delaware Valley Sign Corp.*, 945 F. Supp. 2d 649, 654 (E.D. Va. 2013); *Nat'l Pension Plan of the UNITE HERE Workers Pension Fund v. Swan Finishing Co.*, No. 05 Civ. 6819, 2006 WL 1292780, at *4 (S.D.N.Y. May 11, 2006); *Lykes Bros*, 1997 WL 458777, at *6; *Lloyd L. Sztanyo Trust*, 693 F. Supp. at 537; *Malone Realty Co.*, 82 B.R. at 350; *Central States, S.E. and S.W. Areas Pension Fund v. Long*, 687 F. Supp. 298, 301 (E.D. Mich. 1987); *Progressive Supermarkets*, 644 F. Supp. at 638; *Center City Motors*, 609 F. Supp. at 412; *PBGC v. Ouimet Corp.*, 470 F. Supp. 945, 955 (D. Mass 1979).

Cognizant of ERISA's anti-"fractionalization" purpose (see, e.g., *Center City Motors*, 609 F. Supp. at 411-12), courts in and out of the Sixth Circuit have held that lessors under common control with their lessees are "trades or businesses" for the purposes of Withdrawal Liability or Termination Liabilities. *See, e.g., Central States, S.E. and S.W. Areas Pension Fund v. Messina Products, LLC*, 706 F.3d 874, 882-84 (7th Cir. 2013); *Vaughn v. Sexton*, 975 F.2d 498, 503

[8] MPPAA stands for the Multiemployer Pension Plan Amendments Act of 1980.

(8th Cir. 1992); *Board of Trustees of the Western Conf. of Teamsters Pension 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); *Swan Finishing*, 2006 WL 1292780, at *4; *PBGC v. Don's Trucking Co., Inc.*, 309 F. Supp. 2d 827, 831-32 (E.D. Va. 2004); *Board of Trustees of Trucking Employees of North Jersey Welfare 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.N.Y. 1992); *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; *Malone Realty Co.*, 82 B.R. at 350; *Long*, 687 F. Supp. at 301; *Progressive Supermarkets*, 644 F. Supp. 633. We are not aware of any case where a court has held that a lessor under common control with its lessee is not a "trade or business" under ERISA, without being reversed – other than, to date, this case.

Based on this unanimity, courts have concluded that "renting property to a withdrawing employer itself is categorically a trade or business." *Central States, S.E. and S.W. Areas Pension Fund v. Nagy*, 714 F.3d 545, 550-51 (7th Cir. 2013) (quoting *SCOFBP*, 668 F.3d at 879); *Delaware Valley Sign Corp.*, 945 F. Supp. 2d at 653 (quoting *Messina Products, LLC*, 706 F.3d at 881). And in one of the few cases defining "trade or business" in the context of Termination Liabilities, the court held that a partnership leasing property to the sponsor of a terminated plan under common control was a trade or business, noting that "federal courts ... have uniformly held that leasing property to a withdrawing employer is a 'trade or business' for purposes of section 1301(b)(1)." *Don's Trucking*, 309 F. Supp. 2d at 831 (quoting *Ditello*, 974 F.2d at 890).

D. **The *Groetzinger* Test does not govern "trade or business" status in the cases to which the Categorical Rule applies.**

Contrary to this unanimous case law, the December Order holds that the test for determining whether the Gardner Trust 1987 was a "trade or business" is whether the entity at issue "engaged in an activity (1) for the primary purpose of income or profit, and (2) with continuity and regularity" ("*Groetzinger* Test"). (December Order, RE 60, Page ID # 622-623). In *Groetzinger*[9], the Supreme Court applied this test to two of the fifty IRC sections where the phrase "trade or

[9] In *Groetzinger*, the respondent bet on greyhound races and spent 60 to 80 hours each week on gambling-related endeavors. The issue was whether a full-time gambler who makes wagers solely for his own account is engaged in a "trade or business" under the IRC such that he is allowed to deduct gambling losses from gross income. The court concluded that gambling may constitute a trade or business and, based on the facts presented, that the respondent was engaged in the trade or business of gambling such that he could deduct his gambling losses.

business" appears: sections 162(a) and 62(1) of the IRC of 1954, as amended, 26 U.S.C. §§ 162(a) and 62(1) (1976 ed. and Supp. V), which govern deduction of expenses of a "trade or business" for personal income tax purposes. *Groetzinger*, 480 U.S. at 27. It cautioned that this interpretation was "confined to the specific sections of the Code at issue here." *Id.* at n.8.

Notwithstanding the Supreme Court's warning, and that the sections interpreted in *Groetzinger* were unrelated to ERISA, *id.* at 24, some courts have applied the *Groetzinger* Test to define "trades or businesses" under ERISA. But they have done so consistently with the purpose of the common control rules, *i.e.*, either applying the *Groetzinger* Test to cases without an economic nexus other than ownership (*i.e.*, the test was not applied to persons leasing property to sponsors under common control), or harmonizing the two tests. They have not allowed businesses to avoid liability by dividing into separate entities.

For instance, the Seventh Circuit Court of Appeals applied the *Groetzinger* Test to shield persons leasing property to persons other than withdrawing employers (or persons under common control with withdrawing employers), from "trade or business" status and thus Withdrawal Liability. *Central States, SE and SW Areas Pension Fund v. White*, 258 F.3d 636, 641-45 (7th Cir. 2001); *Central States, SE and SW Areas Pension Fund v. Fulkerson*, 238 F.3d 891 (7th Cir. 2001). Three district court opinions in the Seventh Circuit cited these precedents in holding that the owners of a withdrawing employer could not be held liable for allowing the employer to operate on their property (in one case without a lease). *Board of Trustees of the Automobile Mechanics' Local No. 701 Union and Industry Welfare Fund v. Beland & Wiegers Enterprises, Inc.*, No. 13 CV 1611, 2014 WL 4175780 (N.D. Ill. Aug. 21, 2014); *Central States, SE and SW Areas Pension Fund v. Messina Trucking, Inc.*, 821 F. Supp. 2d 1000, 1007-09 (N.D. Ill. 2011); *Central States, SE and SW Areas Pension Fund v. Nagy Ready Mix*, No. 10 C 358, 2011 WL 3021524 (N.D. Ill. July 22, 2011) (but holding defendant liable on a separate basis).[10] Two of the holdings were reversed by the Court of Appeals, which stated that "leasing to a withdrawing employer itself is categorically a 'trade or business'." *Nagy*, 714 F.3d at 551 (quoting *SCOFBP*, 668 F.3d at 879); *Messina Products, LLC*, 706 F.3d at 882 (quoting *SCOFBP*, 668 F.3d at 879). For the same reason, the third was vacated on reconsideration. *Beland & Wiegers Enterprises*, 2014 WL 5475291 (N.D. Ill. Oct. 29, 2014).

In *Enivel Properties*, the Second Circuit followed *Fulkerson* and *White* in

[10] *Messina Trucking* incorrectly implied that the *Fulkerson* defendants leased property to the withdrawing employer. *Messina Trucking*, 821 F. Supp. 2d at 1008. In fact the tenant was a company owned by the defendants' sons, as the court had stated earlier in the opinion. *Messina Trucking*, 821 F. Supp. 2d at 1007, citing *Fulkerson*, 238 F.3d at 893. Adult children's interests in an organization are not attributable to their parents unless the parents own a majority of the organization. Treas. Reg. § 1.414(c)-4(b)(6).

applying the *Groetzinger* Test to shield a lessor under common control with the withdrawing employer from "trade or business" status and thus Withdrawal Liability. *UFCW Local One Pension Fund v. Enivel Properties, LLC*, 791 F.3d 369 (2d Cir. 2015). However, the lessee was not the withdrawing employer. In a recent decision, a district court in the Second Circuit had no trouble in ruling against a lessor based on that distinction, acknowledging *Enivel Properties*, but noting that "courts have 'uniformly' held that, when a company under common control leases its property 'to a *withdrawing employer*,' that act is sufficient to render the property owner 'a trade or business for purposes of section 1301(b)(1).'" *Trustees of the Local 813 Pension Trust Fund v. Frank Miceli Jr. Contracting, Inc.*, No. 13-CV-0198, 2016 WL 1275041, *6-7 (E.D. N.Y. March 31, 2016)(quoting *Swan Finishing*, 2006 WL 1292780, at *3).

In an Eighth Circuit case, the defendant-appellants argued that a trust was not a trade or business because its primary purpose was not income or profit, and its leasing activities were not continuous or regular. *Vaughn*, 975 F.2d at 502-03. The Court of Appeals opinion responded by citing numerous cases holding that lessors leasing to commonly controlled organizations were trades or businesses, *id.* at 503 (citations omitted), and affirming the summary judgment for the plaintiffs, *id.* at 503-04.

In a brief, unpublished opinion denying the appeal of an individual leasing property to the withdrawing employer that he owned, the Ninth Circuit cited a footnote in *Groetzinger* confining its construction of the phrase "trade or business" to the tax code provisions at issue. *Carpenters Pension Trust Fund for N. Calif. v. Lindquist*, 491 Fed. Appx. 830, 831 (9th Cir. 2012). With one exception, courts in the Ninth Circuit have declined to apply the *Groetzinger* Test to ERISA under any circumstances. *Piedmont Lumber & Mill Co.*, 2015 WL 5461561, at *5 (citing cases). In that one exceptional case, *Bakery and Confectionery Union and Industry Int'l Pension Fund v. Wilson*, No. C 09-00256, 2009 WL 1357409, at *2 (N.D. Cal. May 13, 2009), the district court summarily rejected the defendants' argument that they were not operating a trade or business because they failed to explain their position.

Without acknowledging any of the case law limiting application of the *Groetzinger* Test to its context, the district court justified its unlimited application to this ERISA case by stating that the *Groetzinger* Test embodies the "ordinary, common-sense meaning," found in the Merriam-Webster Dictionary. (December Order, RE 60, Page ID # 623). The district court stated that "trade" is "the business or work in which one engages regularly"; and "business" is "a usually commercial or mercantile activity engaged in as a means of livelihood." (*Id.*). The December Order said the court must assume that ordinary meaning of language "accurately expresses the legislative purpose." (*Id.*, Page ID # 622-623 (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009))).

The December Order ignores that statutory interpretation depends on the "specific context in which … language is used, and the broader context of the statute as a whole," as well as the language itself. *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The definitions of "trade" and "business" quoted in the December Order are insufficient in the context of ERISA. Initially, we note that any definition of "business" as "activity … as a means of livelihood" literally can't apply to non-living organizations such as corporations, partnerships, trusts, and estates. Yet such organizations are among those that could "conduct[] trades or businesses," under the Common Control Rules. Treas. Reg. § 1.414(c)-2(b)(1), (c)(1).

More important, the focus of the *Groetzinger* Test and Merriam-Webster definitions on "activity" is contrary to the context of the common control provisions of ERISA and the regulations thereunder, which were established "to ensure that employers will not circumvent their ERISA and MPPAA obligations by operating through separate entities." *Mason and Dixon Tank Lines*, 852 F.2d at 159. Such separate entities can be and often are passive, and courts, other than the district court in this case, have applied the Categorical Rule even when there is little or no activity on the part of the lessor. *See, e.g.*, *Nagy*, 714 F.3d at 547-48 (leasing activity is a trade or business notwithstanding tenant was responsible for utilities, insurance, taxes, maintenance, and repairs); *Carpenters Pension Trust Fund for N. Calif. v. Lindquist*, No. 10-3386, 2011 WL 2884850, at *6 (N.D. Cal. July 19, 2011) (that withdrawing employer took care of property is immaterial), *aff'd*, 491 Fed. Appx. 830; *Don's Trucking*, 309 F. Supp. 2d at n.7 (citing *Lloyd L. Sztanyo Trust*, 693 F. Supp. at 536-37) ("Although, as a tenant, Don's Trucking conducted many traditional landlord activities—such as paying for maintenance, repairs, utilities, and the mortgages—courts have held such 'passive' real estate leasing a trade or business, in order to prevent employers from limiting their responsibilities under ERISA by fractionalizing their business operations"); *Saltz*, 760 F. Supp. at 57 (withdrawing employer assumed responsibility for managing and maintaining property); *Malone Realty Co.*, 82 B.R. at 350 ("[b]y emphasizing the 'passivity' of Malone Realty, and thus its lack of an existence beyond its symbiotic relationship with Malone Transportation, defendants underscore the fact that Malone Realty owned real estate that otherwise would have been owned by the primary business entity, Malone Transportation."); *Center City Motors*, 609 F. Supp. at 411-12. Describing such a passive entity as a business does not stretch the meaning of "business," because it really is part of a business. *See, e.g., Malone Realty Co.*, 82 B.R. at 350 (Malone Realty considered a trade or business because it "owned real estate that otherwise would have been owned by the primary business entity, Malone Transportation."); *Center City Motors*, 609 F. Supp. at 412 (owners operated rental property proprietorship and sponsor as two separate parts of a single trade or business).

Finally, replacing the Categorical Rule with the *Groetzinger* Test would be extremely inefficient. It would replace a clear, simple test with one requiring substantial litigation over application of the law to the facts – *i.e.* how "continuous and regular" must an activity be to rise to a trade or business; and the point at which an activity's purpose becomes income or profit. Plaintiffs would feel obligated to learn as much as possible about the activity by taking a great abundance of discovery. And a bright line test best serves the prophylactic purpose of discouraging fractionalization in the first place.

E. **The Categorical Rule applies to single-employer plans as well as multiemployer plans.**

The district court did acknowledge that other Circuits recognize the Categorical Rule, but stated that it was applied to MPPAA, "which seeks to prevent employers from avoiding liability by fractionalizing into separate entities…. 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." (December Order, RE 60, Page ID # 623-624).

First, "[t]he normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986). This rule applies to regulations as well as statutes. *In re Strong*, 356 B.R. 121, 155 (E.D. Pa. 2004); *Unisys Corp. v. U.S.*, 30 Fed. Cl. 552 (1994). And it should apply with even greater force to the application of the same words – "trades or businesses" – in the <u>exact</u> <u>same</u> part of a regulation – Treas. Reg. § 1.414(c)-2 – to different types of defined benefit pension plans. Rather than follow this rule, the December Order relies on the definition in *Groetzinger*, applied to completely different and unrelated sections of the IRC, notwithstanding *Groetzinger's* explicit limitation of that definition to the sections it was considering.

Second, contrary to the December Order, as this Court stated long ago, the purpose of MPPAA is to disincentivize employer withdrawals from multiemployer plans, *Mason and Dixon Tank Lines*, 852 F.2d at 158, by providing, in the first section of MPPAA, that an employer withdrawing from a multiemployer plan incurs liability to the plan, 29 U.S.C. § 1381(a). The prevention of fractionalization to avoid Withdrawal Liability for multiemployer plans, by defining "employer" to include all trades or businesses under common control, is found in 29 U.S.C. § 1301(b)(1), which pre-dated MPPAA.

In acknowledging that "MPPAA" – really ERISA Title IV – "seeks to prevent employers from avoiding liability by fractionalizing into separate entities," the December Order implies that the Common Control Rules are applied to the Termination Liabilities for some other reason. The Common Control Rules are applicable to single-employer plans because of 29 U.S.C. § 1301(a)(14)(B), and 29 C.F.R. § 4001.3(b)(2); and applicable to multiemployer plans because of 29 U.S.C. § 1301(b)(1) and 29 C.F.R. § 4001.3(a)(1). But nothing in these (or any other) authorities suggests that the Common Control Rules are applied to the two types of plans for different reasons; or otherwise suggests that "trades or businesses" should be defined differently depending on the type of plan. Nor does the December Order offer an alternative reason for applying the Common Control Rules to single-employer plans. Other courts have inquired into the reason for applying the Common Control Rules to single-employer plans, and have held that the Common Control Rules are applied to single-employer plans for the same anti-fractionalization purpose, in defining leasing between organizations under common control as a trade or business. *Don's Trucking*, 309 F. Supp. 2d at n.7 (citing *Lloyd L. Sztanyo Trust*, 693 F. Supp. at 536-37); *Center City Motors*, 609 F. Supp. at 412 (citing S. REP. NO. 93-383 at 43, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4890, 4928; H. REP. NO. 93-807 at 50, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4716). *C.f. Ouimet*, 470 F. Supp. at 948-49, 955 (first rejecting argument that trust leasing property to person under common control was not trade or business, and later explaining that "[a]pplication of the controlled group liability theory . . . prevent[s] employers from using corporate segmentation as a shield from termination liability").[11]

F. <u>Under the Categorical Rule, plaintiffs need not prove intent to dissipate assets.</u>

Finally, the December Order implies that even if the Categorical Rule applies to single-employer plans generally, it doesn't apply in this case because the purpose of the Gardner Trust 1987's rental activity was not to dissipate Findlay's assets or to profit its settlor, Philip Gardner Sr. (December Order, RE 60, Page ID # 624). But engaging in an activity for the purpose of profit (or income) is a

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[11] *Ouimet* refers to the "employer" as subject to liability under section 1362, *i.e.* the UBL Claim. *Ouimet*, 470 F. Supp. at 948. Section 1362 originally provided that the "employer" was liable for the UBL Claim. *See* ERISA, Pub. L. No. 93-406, § 4062, 88 Stat. 1029 (1974). After the *Ouimet* decision, section 1362 was amended to provide that the contributing sponsor and all members of its controlled group are liable for the UBL Claim. *See Single Employer Pension Plan Amendments Act of 1986 (SEPPAA)*, enacted on April 7, 1986 as Title XI of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272. As stated in the House Report prior to the enactment of SEPPAA, "[t]his bill amends section [1362] to apply to single-employer plan distress terminations and terminations by the corporation. It makes explicit the current law provisions upheld in *Pension Benefit Guaranty Corporation v. Ouimet Corp.*, that the plan sponsor(s) (contributing sponsor(s) under the bill) and all members of its controlled group are liable under section [1362] and that all such persons are jointly and severally liable." H.R. REP. NO. 99-300, at 299 (1985), *reprinted in* 1986 U.S.C.C.A.N. 756, 950.

requirement of the Groetzinger Test, not of the Categorical Rule. *Groetzinger*, 480 U.S. at 27.

As noted above, preventing the fractionalization of a sponsor's or employer's assets is the reason that the common control rules were applied to ERISA, and that courts adopted the Categorical Rule to interpret the words "trade or business." But the Categorical Rule is that leasing between commonly-controlled organizations is a trade or business, period; no inquiry into the purpose of such leasing is required or even appropriate. At least one court has rejected an argument that intent to dissipate assets must be shown:

> The test, as outlined in *Ditello* and *SCOFBP*, does not require that the organization intend to fractionalize. Rather, any time a company leases property to a withdrawing employer, that alone constitutes a "trade or business" regardless of the company's intent. It is the fact that the economic relationship *could* be used to dissipate or factionalize assets that makes leasing property to a withdrawing employer a "trade or business." *Ditello*, 974 F.2d at 890; *Messina*, 706 F.3d at 883 ("the inescapable conclusion is that the Messinas' leasing activity...was a *means* to fractionalize Messina Trucking's assets"); *Central States, Southeast & Southwest Areas Pension Fund v. Mississippi Warehouse Corp.*, 853 F. Supp. 1053, 1058–59 (N.D.Ill.1994) ("a finding that an entity is a member of an ERISA controlled group does not depend on any attempted fraud by the controlling party").

Central States v. Sidney Truck & Storage, Inc., 182 F. Supp. 3d 855, 860 (N.D. Ill. 2016).[12]

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[12] The district court cites the Seventh Circuit opinion in *White* in support of its

And no matter what the intent is, the effect is egregious – PBGC would be unable to collect Termination Liabilities from a shell plan sponsor, yet commonly controlled organizations flush with assets can shield those assets from PBGC's claims. Congress intended that PBGC would serve as the insurer of last resort for pension plans and Congress intended that plan sponsors and their controlled group members would be required to pay promised benefits to plan participants, prior to draining PBGC's assets to do so. Following the Categorical Rule, and ensuring that employers cannot benefit from fractionalizing their assets, supports this congressional intent.

Like the *Groetzinger* Test, a requirement that PBGC or a multiemployer plan prove intent to fractionalize would unnecessarily complicate application of a straight-forward, prophylactic test, which could lead to inconsistent results. In addition, creating an intent-based test creates disputes of fact that can rarely be resolved on motion, requiring burdensome discovery — and not only in cases involving leasing, because, if such a requirement were implied, it logically should

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inquiry regarding intent: "[w]here, 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." (December Order, RE 60, Page ID # 624). But in *White*, there was no possibility of fractionalization because property was not being leased to the employer. *White*, 258 F.3d at 641-45. The court did not suggest that the plaintiff had to prove intent to dissipate assets.

be applied to all endeavors of commonly-controlled organizations. No such requirement should be implied.

Finally, contrary to the December Order, the facts of this case do suggest an intent to fractionalize, such that application of the Categorical Rule to this particular case supports ERISA's anti-fractionalization policy. The December Order asserts that the purpose of the Gardner Trust 1987 leasing property to Findlay "is evident from the timing, form, and scope of the trust," (December Order, RE 60, Page ID # 624). Regarding the timing of the trust, presumably the December Order means that the Gardner Trust 1987 began to lease property to Findlay in "July 1993, six years after the trust's inception." (*Id.*, Page ID # 623). But as the December Order itself noted, PBGC alleges that the Gardner Trust 1987 began leasing property to Findlay "no later than July 1, 1993." (*Id.*, Page ID # 621) (emphasis added). More important, while the December Order, citing the trust document, says that the trust property was donated by Philip Gardner Sr., (*id.)*, it says nothing about when and from whom Philip Gardner Sr. obtained the property. As noted above, PBGC would have alleged that he obtained it from Findlay, less than a month before he transferred it to the Gardner Trust 1987, had PBGC been on notice of the relevance of that fact before its claim was dismissed without leave to amend. As to the scope of the Gardner Trust 1987, the December Order says nothing about the value of the parcel leased to Findlay relative to the value of the remaining property of the Gardner Trust 1987. As noted above, PBGC would have alleged that the parcel being leased to Findlay accounted for almost all of the value of the assets of the Gardner Trust 1987, had PBGC been on notice of the relevance of that fact before its claim was dismissed without leave to amend.

In sum, the district court erred when it declined to follow the Categorical Rule that lessors under common control with their lessees are "trades or businesses" under ERISA. PBGC respectfully requests that the court reverse the district court's decision which relied upon the *Groetzinger* Test.

II. **The district court erred by holding that successor liability under federal common law does not apply to ERISA Title IV claims involving a single-employer plan. All courts considering the issue have applied federal common law to ERISA Title IV claims involving a multiemployer plan; multiemployer plan liability is similar to single-employer plan liability; and ERISA's policies are applicable to both plans.**

A. **The standard of review is de novo.**

The district court granted the Motion to Dismiss Count XV. This Court reviews *de novo* a district court's dismissal for failure to state a claim. *Tyler*, 837 F.3d at 685 (citing *Ass'n of Cleveland Fire Fighters*, 502 F.3d at 548). The Court accepts the factual allegations in the plaintiff's complaint as true and construes the complaint in the light most favorable to the plaintiff. *Tyler*, 837 F.3d at 685 (citing *Hill*, 409 F.3d at 716).

B. **<u>Under federal common law, successor liability depends on notice and continuity.</u>**

PBGC alleged that the Successors, who purchased substantial assets of plan sponsor Findlay, are subject to the Termination Liabilities under federal common law ("Federal Successor Doctrine"). The Federal Successor Doctrine, which has been applied to other provisions of ERISA and other federal statutes, provides that even a bona fide purchaser of assets is subject to liability of the seller "where the buyer had notice of the liability prior to the sale, and there exists sufficient evidence and continuity of operations between the buyer and seller." *Einhorn v. M.L. Ruberton Const. Co.*, 632 F.3d 89, 99 (3d Cir. 2011).

C. **<u>The district court erred when it declined to apply the Federal Successor Doctrine to PBGC's claim for Termination Liabilities.</u>**

Courts in and out of the Sixth Circuit have applied the Federal Successor Doctrine to ERISA and other federal labor and employment statutes. Recently, courts have applied the Federal Successor Doctrine to Withdrawal Liability for multiemployer plans, which is very similar to the Termination Liabilities for single-employer plans. This is the first case presenting the narrow issue of whether the Federal Successor Doctrine should be applied to the Termination Liabilities.

Applying the Federal Successor Doctrine to the Termination Liabilities is an entirely logical application of federal common law, which promotes ERISA's fundamental purposes. The district court justified its refusal to do so by misreading 29 U.S.C. § 1369(b); and, as with its holding that the Gardner Trust 1987 was not a trade or business, by making erroneous and irrelevant distinctions between single-employer and multiemployer plans. Meanwhile, the district court ignored both the similarities between the two types of the plans, and the one distinction indicating that applying the Federal Successor Doctrine to single-employer plans is at least as important as applying it to multiemployer plans.

1. Courts have applied the Federal Successor Doctrine to other ERISA claims and other federal labor and employment statutes.

Under the traditional common law of successor liability, ("Traditional Successor Doctrine"), an asset purchaser is not liable for the seller's debts unless at least one of the following exceptions has been met: (1) the purchaser assumes liability ("Assumption"); (2) the transaction amounts to a consolidation or merger ("Merger"); (3) the transaction is fraudulent and intended to provide an escape from liability ("Fraud"); or (4) the purchaser is a mere continuation of the seller ("Continuation"). *See, e.g., McCollum v. Life Ins. Co. of North America*, 495 Fed. Appx. 694, 705 (6th Cir. 2012) (citations omitted).

Federal courts have developed a federal common law successorship doctrine imposing liability upon successors beyond the traditional common law rule when necessary to protect important employment law policies. This Federal Successor Doctrine was first applied in labor-management relations law. In *Golden State*

Bottling, the Supreme Court upheld a ruling of the National Labor Relations Board ("NLRB") that an arms-length purchaser of a business, acquiring with knowledge that the seller's unfair labor practice set forth in the NLRB order remained unremedied, was liable as a successor under the National Labor Relations Act ("NLRA"). *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 174-85 (1973). The Supreme Court noted that since the successor must have notice before liability can be imposed, its potential liability for remedying the unfair labor practice can be reflected in the price it pays for the predecessor's business. *Id.* at 185.

The Sixth Circuit cited *Golden State Bottling* on this point with approval in *Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 553 (6th Cir. 2006). Here, PBGC alleges that such a discount is suggested by the disparity between the price the Successors paid for the Findlay assets and the subsequent income generated by those assets. (First Amended Complaint, RE 3, Page ID # 116).

Three Courts of Appeals and one court in the Sixth Circuit applied the Federal Successor Doctrine as set forth in *Golden State Bottling* to hold that successors with "substantial" or "sufficient" continuity with their predecessors, and notice that their predecessors owed contributions for multiemployer plans, would be liable for those contributions. *Einhorn*, 632 F.3d at 99; *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1329 (7th Cir. 1990); *Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc.*, 823

F.2d 289, 293-94 (9th Cir. 1987); *Bennett v. Gilbert*, No. 1: 97-CV-964, 1998 U.S. Dist. LEXIS 16804, at *4-6 (W.D. Mich. Sept. 17, 1998). Though these and similar cases involved ERISA plans, one might argue they are distinguishable from the instant case because the contributions were owed under a collective bargaining agreement ("CBA") as well as ERISA, and thus were within the Federal Successor Doctrine's labor law origins. But the Seventh Circuit, in *Artistic Furniture*, 920 F.2d at 1327-29, relied heavily on the policies underlying ERISA in applying the Federal Successor Doctrine to contributions liability. The court expressly referred to Withdrawal Liability and PBGC, thus implying that Federal Successor Doctrine should be applied to Withdrawal Liability and the Termination Liabilities.

Indeed, this Court has applied the Federal Successor Doctrine to claims that arise under federal employment statutes apart from a CBA. *Terco, Inc. v. Fed. Coal Mine Safety and Health Review Commission*, 839 F.2d 236 (6th Cir. 1987) (Federal Mine Safety and Health Act of 1977); *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1089-92 (6th Cir. 1974) (Title VII of the Civil Rights Act). This Court has declined to apply the Federal Successor Doctrine to claims not arising under federal statutes concerning labor, employment, or pensions. *Mickowski v. Visi-trak Worldwide, LLC*, 415 F.3d 501, 510 *et seq.* (6th Cir. 2005) (distinguishing cases that "arose in the context of labor law and pension litigation" from the enforcement of a patent judgment); *City Management Corp. v.*

U.S. Chemical Co., Inc., 43 F.3d 244, 253 (6th Cir. 1994) (state law, not *Golden State*, determines successor liability under CERCLA).

Likewise, courts in the Sixth Circuit have applied the Federal Successor Doctrine to claims for benefits under ERISA-governed health plans without any reference to a CBA. In one case, the court held that each of the elements of the Federal Successor Doctrine was present, granting summary judgment for the plaintiffs. *Schilling v. Interim Healthcare of the Upper Ohio Valley, Inc.*, No. 2:06-CV-487, 2008 WL 2355831 (S.D. Ohio June 9, 2008). In another, the court held that there was not substantial continuity between the plan sponsor and its successor. *Zawlocki v. Rama Tech LLC*, No. 03-60159, 2005 WL 3991756, at *1-5 (E.D. Mich. Dec. 9, 2005).

This Court applied the Traditional Successor Doctrine to an ERISA plan benefits claim, but noted that it did not need to reach the issue of the applicability of the Federal Successor Doctrine, since the plaintiff did not argue that the latter doctrine applied. *McCollum*, 495 Fed. Appx. at 705-06, n.12.[13] And another court in the Sixth Circuit rejected a "somewhat unclear" allegation of successor liability

[13] *See Local 109 Board of Trustees of the Operative Plasterers and Cement Masons Pension Fund v. All American Acoustic and Drywall, Inc.,* Case No. 5:15-cv-2361, 2016 WL 5232828, *4 (N.D. Ohio, Sept. 22, 2016) (confirming this reading of *McCollum*).

for the predecessor's failure to provide plan information under 29 U.S.C. § 1132(c)(1)(B), because the plaintiff failed to provide any authority for the application of successor liability to that section. *Jordan v. Tyson Foods, Inc.*, No. 3:06-0722, 2006 WL 3694556, at *4 (M.D. Tenn. Dec. 13, 2006).

PBGC is aware of only one other case in which a court was asked to apply the Federal Successor Doctrine to an ERISA claim and declined as a matter of law. That court was not in the Sixth Circuit; and that claim was for breach of fiduciary duties, and thus not similar to the Termination Liabilities. *In re Washington Mutual, Inc. Securities, Derivative & ERISA Litigation*, No. 2:08-md-1919, 2009 WL 3246994, at *14 (W.D. Wash. Oct. 5, 2009).

Most recently, and more crucial for this case, courts that have addressed the issue have uniformly held that the Federal Successor Doctrine applies to Withdrawal Liability for multiemployer plans. *See, e.g., Resilient Floor Covering Pension Trust Fund Bd. Of Trustees v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1093-95 (9th Cir. 2015); *Tsareff v. Manweb Services, Inc.*, 794 F.3d 841, 844-47 (7th Cir. 2015); *New York State Teamsters Conference Pension and Retirement Fund by Scalzo v. C&S Wholesale Grocers, Inc.*, No. 5:16-CV-84, 2017 WL 1628896, *3-5 (N.D. N.Y, May 1, 2017); *RP Baking LLC v. Bakery Drivers and Salesmen Local 194 and Industry Pension Fund*, No. 10-3819, 2011 WL 2912861, at *3 (D.N.J. July 18, 2011) (predicting holding of Third Circuit); *Central Penn. Teamsters Pension Fund v. Bear Distrib. Co., Inc.*, No. 07-CV-3554, 2009 WL 812224, at *8-9 (E.D. Pa. Mar. 26, 2009) (same). No reported case has ever held that it does not.

2. <u>29 U.S.C. § 1369(b) does not occupy the field as to successor liability.</u>

The district court suggests – without addressing any of PBGC's arguments to the contrary – that section 1369(b) provides a remedy to the exclusion of the Federal Successor Doctrine. (December Order, RE 60, Page ID # 625-627). In its entirety, section 1369(b) provides:

> (b) **Effect of corporate reorganization.** For purposes of this subtitle, the following rules apply in the case of certain corporate reorganizations:
>
> (1) Change of identity, form, etc. If a person ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the person to whom this subtitle applies.
>
> (2) Liquidation into parent corporation. If a person ceases to exist by reason of liquidation into a parent corporation, the parent corporation shall be treated as the person to whom this subtitle applies.
>
> (3) Merger, consolidation, or division. If a person ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the person to whom this subtitle applies.

Section 1369(b) concerns corporate reorganizations, as indicated by its heading; its introductory clause; the references to corporations in each of its three paragraphs; and the statutory provision that incorporates it into MPPAA, 29 U.S.C. § 1398(1)(A). In enacting section 1369(b), Congress merely confirmed the effect of corporate law on the enumerated types of reorganizations. *Centra Inc. v. Central States, SE and SW Areas Pension Fund*, 578 F.3d 592, 601 (7th Cir. 2009) (citing Jayne E. Zanglein & Susan J. Stabile, *ERISA Litigation* 1474 (3d ed. 2008)). In doing so, it twice used the phrase "successor corporation," for lack of a better phrase. That should not be mistaken for an intent to occupy the field as to successor liability.

In fact, the legislative history contradicts any intent for section 1369(b) to occupy the field. The heading of an early version of what is now section 1369(b) (formerly 1362(d)) was "Successor Liability." S. 1179, 93rd Cong. § 462(e) (1973), *reprinted in* ERISA Leg. History at 933; H.R. 2, 93rd Cong. § 462(e) (1973), *reprinted in* ERISA Leg. History at 3727. But the heading of section 1369(b) was changed to "Effect of Corporate Reorganization," supporting its narrow scope, and leaving it to the courts to decide whether to apply successor liability, and if so, which successor liability doctrine. *See Almendarez-Torres v. U.S.*, 523 U.S. 224, 234 (1998) ("the title of a statute and the heading of a section" are "tools available for the resolution of doubt about the meaning of a statute") (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)).

That section 1369(b) is not intended to occupy the field also can be inferred from the consequences of section 1369(b) occupying the field, which the district court ignores. The December Order avoids confronting the cases applying the Federal Successor Doctrine to Withdrawal Liability in part by taking it for granted that section 1369(b) does not apply to Withdrawal Liability. (December Order, RE 60, Page ID # 626-627, "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).").

However, section 1369(b) is applicable to Withdrawal Liability for multiemployer plans as well as to the UBL Claim for single-employer plans. The MPPAA provides that "an employer shall not be considered to have withdrawn from a [multiemployer] plan solely because" it ceases to exist by reason of one of the types or reorganizations listed in section 1369(b), and in such a case the parent or successor corporation(s) "shall be considered the original employer." 29 U.S.C. § 1398. Thus, while section 1369(b) protects the subsidiary or predecessor and the parent or successor by providing that the reorganization is not a withdrawal, it also indicates that the parent or successor would be subject to future Withdrawal Liability, just as it would be subject to a UBL Claim regarding a single-employer plan. *See, e.g. Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 857 F.2d 1107, 1109 (6th Cir. 1988) (after change in corporate structure, new employment entity will be deemed the original employer, such that it and its controlled group at the time of withdrawal will be responsible for Withdrawal Liability); *Centra Inc. v. Central States, SE and SW Areas Pension Fund*, 585 F. Supp. 2d 1017, 1021 (N.D. Ill. 2008) (successor became person to whom predecessor's potential withdrawal liability applied), *aff'd*, *Centra*, 578 F.3d 592.

Moreover, if section 1369(b) were intended to occupy the field, it would exclude not only the Federal Successor Doctrine, but also the Traditional Successor Doctrine, which is significantly broader than section 1369(b). First and foremost, while there are similarities between section 1369(b)(1) and Continuation; and between section 1369(b)(2) and (3) and Merger; nothing in section 1369(b) is similar to either of the remaining exceptions to non-liability under Traditional Successor Doctrine, Assumption or Fraud.

Second, each of section 1369(b)'s three subparagraphs apply only to successor or parent corporations, as distinct from partnerships or other business organizations. Courts asked to limit the Traditional Successor Doctrine to corporations have refused. *Case v. Paul Troester Maschinenfabrik*, 139 F. Supp. 2d 428, 432 (W.D.N.Y. 2001) (citations omitted); *Soo Line R. Co. v. B.J. Carney & Co.*, 797 F. Supp. 1472, 1483-84 (D. Minn. 1992) (partnership may become successor under Merger or Continuation).

Third, section 1369(b) applies only if the original corporation "ceases to exist." 29 U.S.C. § 1369(b)(1), (2), (3). Some courts have held that Traditional Successor Doctrine applies even if the seller remains "viable." *Bank of America, N.A. v. Corporex Companies, LLC*, 99 F. Supp. 3d 708, 716 (E.D. Ky. 2015)(citing *Excel Energy, Inc. v. Cannelton Sales Co.*, 337 Fed. Appx. 480, 486 (6th Cir.2009) (under Kentucky law)). Others have held that Traditional Successor Doctrine applies if the seller exists, but only if it is judgment-proof. *Ammend v. BioPort, Inc.*, 322 F. Supp. 2d 848, 866 (W.D. Mich. 2004). Still others have held that Traditional Successor Doctrine doesn't apply if the seller still exists. *In re Welding Fume Products Liability Litigation*, No. 1:03–cv–17000, 2010 WL 2403355, n.66 (N.D. Ohio, June 11, 2010) (erroneously stating that there are no cases to the contrary).

Thus, if section 1369(b) were found to occupy the field, Congress would have given PBGC, and multiemployer plans, a remedy that is *narrower* than that of every other creditor. The opposite conclusion was necessarily reached, expressly or implicitly, by each of the two courts of appeals, and each of the three district courts not bound by circuit precedents to hold that the Federal Successor Doctrine applies to Withdrawal Liability.[14] These courts' conclusions followed logically

[14] *Michael's Floor Covering, Inc.*, 801 F.3d at 1093-95; *Tsareff*, 794 F.3d at

from earlier decisions, left undisturbed by Congress, applying the Federal Successor Doctrine to other claims arising under ERISA, and other federal labor or employment statutes.

3. Successor liability applies to the Termination Liabilities.

In support of its refusal to apply the Federal Successor Doctrine, the December Order (December Order, RE 60, Page ID # 626-627) misapplied this Court's holding that courts' authority to create ERISA common law "is restricted to instances in which (i) ERISA is silent or ambiguous; (ii) there is an awkward gap in the statutory scheme; or (iii) federal common law is needed to promote fundamental ERISA policies." *DiGeronimo Aggregates, LLC v. Zemla*, 763 F.3d 506, 511 (6th Cir. 2014) (emphasis added) (citing *Local 6-0682 Intern. Union of Paper v. National Indus. Group Pension Plan*, 342 F.3d 606, 609 (6th Cir. 2003)). Under *DiGeronimo Aggregates*, courts may supplement ERISA with federal common law if any one or more of the three enumerated circumstances is present.

844-47; *C&S Wholesale Grocers*, 2017 WL 1628896, *3-5; *RP Baking*, 2011 WL 2912861, at *3; *Bear Distrib. Co.*, 2009 WL 812224, at *8-9. Another court, in the Sixth Circuit, said that based on the posture of the case before it, it didn't need to decide whether to apply the Traditional or the Federal Successor Doctrine to Withdrawal Liability; it didn't mention section 1369(b) as a third alternative. *All American Acoustic and Drywall*, 2016 WL 5232828 at *4.

Citing 29 U.S.C. §§ 1307(e), 1362(a), 1369(b), the December Order asserts that "ERISA is neither silent nor ambiguous in terms of who may be pursued for termination liabilities." (December Order, RE 60, Page ID # 626). But the Supreme Court has stated that "Congress is understood to legislate against a background of common-law adjudicatory principles…. Thus, where a common-law principle is well established … the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Federal Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citations omitted).

The common-law principle of successor liability is well established. *See, e.g., McCollum*, 495 Fed. Appx. at 705. Thus, following *Astoria*, common law successor liability should be applied to the Termination Liabilities unless a statutory purpose to the contrary is evident – rather than only if there are no provisions subjecting certain persons to the Termination Liabilities, as suggested by the district court. As explained above, the purpose of section 1369(b) is to confirm standard corporate law, not to occupy the field as to successor liability.

Consistent with *Astoria*, ERISA provisions specifying who is liable for certain claims have not prevented courts from adopting common law providing that other persons are liable for the same claims.

Under ERISA § 4201(a), 29 U.S.C. § 1381(a), only the "employer" is explicitly subject to Withdrawal Liability. Yet, as noted above, courts have applied the Federal Successor Doctrine to make successors subject to Withdrawal Liability. And at least one Court of Appeals has applied a federal common law alter ego test developed in labor law cases ("Federal Alter Ego Doctrine") to Withdrawal Liability. *The Retirement Plan of the UNITE HERE Nat'l Retirement Fund v. Kombassan Holding A.S.*, 629 F.3d 282 (2d Cir. 2010).

Similarly, under ERISA § 515, 29 U.S.C. § 1145, only the "employer" is explicitly liable for unpaid multiemployer plan contributions. Yet, as noted above, courts have applied the Federal Successor Doctrine to this liability. They also have applied the Federal Alter Ego Doctrine in that setting. *See, e.g., Flynn v. R.C. Tile,* 353 F.3d 953, 958 (D.C. Cir. 2004); *Mass. Carpenters Central Collection Agency v. Belmont Concrete Corp.*, 139 F.3d 304 (1st Cir. 1998); *Roofers Local 149 Security Trust Fund v. Duane Smelser Roofing Co.*, 285 F. Supp. 2d 936 (E.D. Mich. 2003).

Similarly, under ERISA §§ 405, 409, 29 U.S.C. §§ 1145, 1109, only fiduciaries are explicitly liable for breaches of fiduciary duty. Yet the Supreme Court held unanimously that an ERISA plan trustee could rely on the common law of trusts to obtain restitution from a non-fiduciary transferee of assets transferred in violation of ERISA § 406(a), 29 U.S.C. § 1106(a). *Harris Trust and Savings Bank* *v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000). Moreover, this Court followed others in holding that common law veil-piercing could be applied to breaches of fiduciary duty, though the district court had not erred in refusing to pierce the veil in the case before it. *Hamilton v. Carell*, 243 F.3d 992, 1003-04 (6th Cir. 2001) (citations omitted).

Thus, the common law of successor liability applies to the Termination Liabilities. For the reasons that follow, the Federal Successor Doctrine, and not the Traditional Successor Doctrine, should be applied to the Termination Liabilities.

4. **Federal Successor Doctrine should be applied to the Termination Liabilities.**

Although *DiGeronimo Aggregates* addresses *whether* to apply common law to ERISA, the second and third reasons it gives for doing so – closing an awkward gap in ERISA, and promoting fundamental ERISA policies – provide a useful framework for deciding *what* common law is to be applied. *See DiGeronimo Aggregates*, 763 F.3d at 511.

Here, applying the Federal Successor Doctrine would promote fundamental ERISA policies. Failing to apply it would leave an awkward gap in ERISA, as indicated by a comparison of single-employer plan Termination Liabilities with multiemployer plan Withdrawal Liability, to which the Federal Successor Doctrine already has been applied.

(a) <u>The similarities between the Termination Liabilities and Withdrawal Liability support application of the Federal Successor Doctrine to the Termination Liabilities.</u>

As stated above, all courts addressing the issue have held that the Federal Successor Doctrine applies to Withdrawal Liability. The similarities between Withdrawal Liability and Termination Liabilities support application of the Federal Successor Doctrine to the Termination Liabilities. Those similarities are found in key statutory provisions, which evidence a similar purpose, *i.e.* protecting defined benefit plans from the moral hazard of underfunding by giving the plan or PBGC a generous amount of time to pursue the employer and entities related by common ownership (whether described as the "employer" or the "controlled group") for their share of the pension plan's underfunding. The similarities between these key statutory provisions, and the shared purpose underlying them, indicate that the same federal common law should fill the gaps between the provisions applicable to the Termination Liabilities that has been applied to the gaps between the provisions applicable to Withdrawal Liability.

(1) **<u>The persons subject to the Termination Liabilities are very similar to the persons subject to Withdrawal Liability.</u>**

First and foremost, the persons statutorily liable for Withdrawal Liability are almost identical to those statutorily liable for the UBL Claim, and very similar to those statutorily liable for the Premiums Claim. Each of the liabilities is imposed on the organization participating in or sponsoring the plan; and upon other organizations conducting trades or businesses, if they meet the levels of common ownership with the first entity specified in the Common Control Rules; those levels are identical for both types of liabilities.

Two other statutory sources of liability exist for Withdrawal Liability and the UBL Claim. One is a single provision, 29 U.S.C. § 1369(b), which as discussed above, applies to both Withdrawal Liability and the UBL Claim.

The other is covered by separate but very similar provisions. "If a principal purpose of any transaction is to evade or avoid" Withdrawal Liability, then Withdrawal Liability "shall be determined and collected without regard to such transaction." 29 U.S.C. § 1392(c). And, "[i]f a principal purpose of any person in entering into any transaction is to evade" a UBL Claim to which such person otherwise would be subject, and the transaction is effective within five years before the plan's termination date, then the person and its controlled group are liable for the UBL Claim as if the person was a sponsor of the terminated plan on its termination date. 29 U.S.C. § 1369(a).

(2) **<u>The amount of the UBL Claim is very similar to the amount of Withdrawal Liability.</u>**

Second, the basis for calculating Withdrawal Liability is very similar to that for the UBL Claim. 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).

(3) **<u>The statute of limitations for the Termination Liabilities is very similar to the statute of limitations for Withdrawal Liability.</u>**

Third, although there are separate statutes of limitations for actions to collect Withdrawal Liability and Termination Liabilities, those provisions are almost indistinguishable. An action to collect Withdrawal Liability may not be brought after the later of (1) six years after the cause of action arose; (2) three years after the plaintiff acquired or should have acquired knowledge of the existence of the cause of action; or (3) in the case of fraud or concealment, six years after discovery of the existence of the cause of action. 29 U.S.C. § 1451(f). An action to collect the UBL Claim or the Premiums Claim may not be brought after the later of (1) six years after the cause of action arose; (2) three years after PBGC acquired or should have acquired knowledge of the existence of the cause of action; or (3) in the case of fraud or concealment, six years after PBGC acquired or should have acquired knowledge of the existence of the cause of action. 29 U.S.C. § 1303(e)(6).

(b) <u>The differences between the single-employer and multiemployer plans support application of the Federal Successor Doctrine to the Termination Liabilities.</u>

(1) <u>Most of the differences between multiemployer and single-employer plans are not relevant.</u>

The December Order alludes to "the many differences between single and multiemployer plans," as if that should carry the day. (December Order, RE 60, Page ID # 627). The December Order doesn't list any differences between the two types of plans, much less differences between the liabilities that arise from them. The Successors did list seven differences between the two types of plans. (Reply to Opposition to Motion to Dismiss Count XV, RE 43, Page ID # 470). But only one of the seven differences listed is particular to the liabilities under each type of plan, and it is a superficial difference, *i.e.* that the liabilities arise under different United States Code sections. (*Id.*).

(2) <u>The relevant difference between multiemployer and single-employer plans militates in favor of, not against, applying the Federal Successor Doctrine here.</u>

One distinction between single-employer plans and multiemployer plans indicates that applying the Federal Successor Doctrine to the former is at least as important as applying it to the latter. Multiemployer plans have two layers of backstops when a contributing employer fails – first the remaining employers who participate in the plan, and only secondly the PBGC. Single employer plans have only the PBGC as a backstop when the employer who is the plan sponsor fails. Thus, the consequences of limiting the reach of successor liability are likely to be more severe for single-employer plans.

c) **Applying the Federal Successor Doctrine to the Termination Liabilities would promote fundamental ERISA policies.**

The Seventh Circuit, the first appellate court to apply the Federal Successor Doctrine explicitly to ERISA, held that its application to contributions liability was needed to minimize the burden on non-withdrawing employers participating in multiemployer plans, and ultimately the burden on PBGC and employers paying PBGC premiums. *Artistic Furniture*, 920 F.2d at 1327-29. *See* 29 U.S.C. § 1302(a)(3) (one of three main purposes of Title IV is "to maintain premiums established by [PBGC] under section 1306 at the lowest level consistent with carrying out its obligations under [Title IV]."). This is because PBGC also guarantees benefits under insolvent multiemployer plans. 29 U.S.C. § 1322A(a). Application of the Federal Successor Doctrine to the Termination Liabilities also would relieve the burden on PBGC and employers paying PBGC premiums.

Other Courts of Appeal have agreed that the Federal Successor Doctrine should be applied to further ERISA's policies. *Michael's Floor Covering*, 801 F.3d at 1090 (doctrine strikes a "balance between the need to effectuate federal labor and employment… policies and the need… to facilitate the fluid transfer of corporate assets") (quoting *Artistic Furniture,* 920 F.2d at 1326); *M.L. Ruberton Const.*, 632 F.3d at 96 ("[w]e agree with the Seventh Circuit that the federal policies underlying ERISA . . . 'are no less important, and no less compel the imposition of successor liability than do the policies animating the NLRA, Title VII,' or the other statutes to which the doctrine has been extended.") (quoting *Artistic Furniture*, 920 F.2d at 1327).

Thus, the district court erred when it held that the Federal Successor Doctrine does not apply to the Termination Liabilities.

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CONCLUSION

For the foregoing reasons, the Court should reverse the Dismissal Orders, and remand the case for proceedings consistent with application of the Categorical Rule and the Federal Successor Doctrine.

Respectfully submitted,

Dated: July 10, 2017

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This is to certify that a copy of the attached **Brief of Appellant Pension Benefit Guaranty Corporation** was filed electronically on July 10, 2017, via the Court's CM/ECF system, which sent electronic notice to all other parties designated for notice in this case.

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