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REPORT OF THE SUBCOMMITTEE ON MULTIEMPLOYER PLAN WITHDRAWAL LIABILITY

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DISCLAIMER

The opinions of Mr. Perlin and Mr. Chatalian are theirs alone and do not reflect the views of the PBGC.

II. Determination and Assessment of Withdrawal Liability

B. Computation of Liability

1. Allocation Formulas

a. Presumptive Method

In *United Food & Commercial Workers Union-Employer Pension Fund v. Rubber Assocs., Inc.*, 812 F.3d 521 (6th Cir. 2016), the fund brought an action to enforce the arbitrator's award in its favor. The employer counterclaimed for equitable relief to reduce its assessed liability.

The employer argued that its liability should be calculated using the "direct attribution" method because its complete withdrawal was union-mandated, *i.e.*, it was the result of the union voluntarily disclaiming interest in continuing as the employee-representative after a breakdown in contract negotiations and an unresolved strike. The court upheld the lower court's decision denying the requested relief. The court explained that, unless fund trustees adopt an alternative calculation method, which had not here occurred, ERISA requires the use of the statutory "presumptive method." The court held that, under ERISA's comprehensive, unambiguous framework for calculating withdrawal liability, the court cannot create federal common law to create special withdrawal liability calculation rules to provide employers with equitable relief for instances of union-mandated withdrawals.

2. Actuarial Assumptions and Methods

In *Miller & Son Paving v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 2016 WL 4802752 (E.D. Pa., Sept. 14, 2016), the court upheld the fund's use of a blended interest rate to calculate withdrawal liability. The decision was based on the plan document, rather than Section 4213's provision describing the assumptions to be used (the actuary's best estimate). The fund's plan document required that the "same actuarial assumptions" used to determine minimum funding standards be used to calculate withdrawal liability. Although the fund previously had used a 7.5% interest rate for both purposes, in 2009, it began using a current liability rate—then 4.47%—in combination with the 7.5% rate for funding purposes, and a blended rate—7.5% for the funded portion of benefits, and at that time the 4.47% rate for unfunded benefits—for withdrawal liability, which had the effect of increasing the employer's withdrawal liability. The employer claimed this practice violated the plan document, because the blended rate used in the withdrawal liability assessment, although based on the individual rates used for funding, was not itself used by the fund for funding calculations. Reviewing the trustees' interpretation of the plan under an arbitrary and capricious standard, the court held that the plan language requiring the use of the same actuarial assumptions was ambiguous, and that the trustees' application of the blended rate for withdrawal liability purposes was a reasonable interpretation. The court accepted the argument that the use of the blended rate was not itself an actuarial assumption, but rather a particular method of applying the underlying rate assumptions. It also held that the trustees' goal of shoring up a financially unhealthy fund was a valid plan purpose, consistent with ERISA's goal of ensuring adequate assets to pay benefits.

3. Payment Schedule

In *Heavenly Hana LLC v. Hotel Union & Hotel Indus. of Hawaii Pension Plan*, 2016 WL 3208383 (N.D. Cal. June 10, 2016), a fund assessed withdrawal liability against an employer on the basis of successor liability (the employer purchased the assets of a former contributing employer). The employer made five quarterly withdrawal payments, before it obtained a declaratory judgment that it was not a successor because the purchaser had no notice of the withdrawal liability. The court ordered that the fund return the five payments. The employer brought action to recover interest on the withdrawal liability overpayments.

While PBGC regulations provide for interest on overpayments at either a PBGC-established rate or at a rate in the plan document, the fund argued PBGC's regulation was not applicable. The fund pointed out that the regulation refers to overpayments determined by a "plan sponsor" or an "arbitrator," not by a court. The court disagreed, noting that the outcome of the case should not differ where a court, rather than a plan sponsor or arbitrator, determined the appropriate rate.

For the overpayment rate, the plan document charged interest "at the prevailing market rate" but did not provide any more detail. The plan stated that any employer who failed to make any payment when due would be charged a 7% interest rate, and the employer's withdrawal liability schedule was determined at a 7% interest rate. The court found these facts sufficient to determine that the 7% rate was appropriate for refunding the employer's overpayments. Following PBGC regulations, the same rate would be applied to both pre- and post-judgment periods.

4. Pension Protection Act and Multiemployer Pension Reform Act Adjustments

In *American B.D. Co. v. Local 863 Int'l Bhd. of Teamsters Pension Plan*, 2016 WL 287081 (D.N.J., Jan. 22, 2016), the employer brought suit to challenge an arbitrator's award upholding the Fund's inclusion of the ten percent automatic surcharge under ERISA § 305(e)(7)(A) in determining the employer's annual withdrawal liability payments. The court granted the employer's unopposed motion for summary judgment on the basis of the Third Circuit's decision in *Board of Trustees of IBT Local 863 Pension Fund v. C & S Wholesale Grocers, Inc.*, 802 F.3d 534, 535 (2015).

D. Duty of Plan Sponsor to Provide Information

In *Elbeco Inc. v. Nat'l Ret. Fund*, 2016 WL 3902933, (E.D. Pa. July 19, 2016) during the collective bargaining process, a contributing employer requested a number of estimates of its withdrawal liability. In each instance, the fund's estimate of the employer's principal amount of withdrawal liability was approximately $1 million. For each estimate, the fund issued a disclaimer that the employer's actual withdrawal liability could be materially different.

When the employer ultimately withdrew, the fund issued a withdrawal liability assessment for over $3 million. The reason for the discrepancy was that the fund had changed actuaries, and the new actuary had lowered the interest rate assumption from 7.5% to 3%. In disputing the assessment, the employer claimed that the fund's failure to notify it that the interest rate was changing constituted common law fraud by omission and common law negligent misrepresentation by omission.

The court granted summary judgment in favor of the fund. The court noted that the employer's claims could only be sustained if the fund had a duty to disclose the change in interest rate assumption. The court found no such statutory duty under ERISA, and no relationship between the employer and the fund that would impose a duty to disclose the change under common law.

III. Definition of Withdrawal

B. Partial Withdrawal

In *Quad/Graphics, Inc. v. Graphic Communications Conf. of the Int'l Bhd of Teamsters*, 2016 WL 5720474 (N.D. Ill. Sept. 30, 2016), the employer challenged an arbitrator's finding as to the date of a partial withdrawal, and the fund brought a counterclaim challenging the arbitrator's finding that the employer was entitled to 100% credit for a prior partial withdrawal.

With regards to the date of the partial withdrawal, the covered employees' final day of work was in April 2009, and the employees received WARN pay in May 2009. The plan year end was April 30. The employer argued that the withdrawal took place during the plan year ending April 30, 2009 because that was when the covered work ended and was transferred, or in May 2009. The fund argued that the withdrawal is deemed to have occurred as of April 30, 2010 because of the WARN pay. The date of withdrawal was important because the employer's predecessor emerged from bankruptcy in July 2009. The arbitrator and the court agreed with the fund and fixed the withdrawal date at April 30, 2010.

With regards to the credit for the prior partial withdrawal, the fund argued that the employer should receive credit only for the portion of the withdrawal liability that the employer's predecessor actually paid in bankruptcy (*i.e.*, the portion of the liability that was not discharged). The employer argued that reducing the credit would render the employer liable for debts discharged in bankruptcy. The arbitrator found that the employer was entitled to full credit, regardless of what was paid in bankruptcy, and without regard to the "abatement or reduction" language in ERISA Section 4206(b)(1). The court enforced that award, finding that giving the employer less than full credit would impair federal bankruptcy law.

IV. Special Industry Provisions

A. Construction Industry

In *Laborers' Pension Fund v. W.R. Weis Company, Inc.*, 180 F. Supp. 3d 540 (N.D. Ill. 2016), the employer employed both laborers, for whom it contributed to the laborers' pension fund, and marble finishers, for whom it contributed to the bricklayers' pension fund. Some of the work performed by the laborers and marble finishers overlapped. The employer terminated the collective bargaining agreement requiring contributions to the laborers' pension fund and thereafter continued to employ marble finishers. At issue was whether the employer continued to perform work in the jurisdiction of the laborers' collective bargaining agreement of the type for which contributions were previously required, thereby incurring withdrawal liability under ERISA section 4203(b).

The district court upheld the arbitrator's ruling that "overlapping work was statutorily insufficient to create withdrawal liability." The arbitrator had noted that additional language in ERISA provides that withdrawal liability is created only if contributions were previously required for that work. So to determine whether an employer was previously required to make pension payments into the laborers' pension fund for work performed by marble finishers, the arbitrator had to look at the applicable collective bargaining agreements. The arbitrator noted the parties' historical course of dealing was not to require contributions to the laborers' pension fund for work performed by marble finishers. Therefore, subsequent work by marble finishers for which contributions to the laborers' pension fund had not been previously required did not create a complete withdrawal. The district court upheld the arbitrator's ruling because it was not clearly erroneous.

The arbitrator also held that the employer was entitled to the defense of equitable estoppel because the employer reasonably relied to its detriment on the laborers' pension fund's repeated written assurances that the employer owed no additional contributions to the laborers' fund for work performed by marble finishers. Having already upheld the award on other grounds, the district court did not reach this issue. However, the district court stated that it was not yet clear whether equitable estoppel was a valid defense to withdrawal liability. Because ERISA does not include any equitable defenses, federal courts can create federal common law only when it is consistent with the statute's purpose.

In *Stevens Engineers & Construction, Inc. v. Iron Workers Local 17 Pension Fund,* 2016 WL 4479486 (N.D. Ohio Aug. 26, 2016), the court granted the employer's motion for summary judgment to enforce the arbitrator's award finding that the employer did not effect a complete withdrawal pursuant to ERISA § 4203(b). At dispute in the arbitration was whether, within five years after the employer permanently ceased contributions, the employer performed Iron Workers work that previously required contributions to the fund. The employer engaged in construction work at various mill projects in the fund's jurisdiction that required the use of multiple trades. Although historically the employer was obligated to contribute to the fund, it eventually subcontracted out the Iron Workers work, but continued to directly perform work that required the use of other trades. The question posed to the arbitrator was whether Millwrights performed work on behalf of the employer that should have gone to the Iron Workers if the employer was still performing such work.

At the relevant pre-job, the Iron Workers contested the employer's assignment of work to the Millwrights that the Iron Workers claimed should have been assigned to the Iron Workers, either through the employer or its subcontractors. The Iron Workers, however, failed to follow through with the dispute and did not demand arbitration, as required in the event of jurisdictional disputes, and instead the fund assessed the employer withdrawal liability. The fund assessed on the basis that the employer was using Millwrights to perform Iron Workers work and, therefore, the employer was working in the jurisdiction of the Iron Workers collective bargaining agreement without contributing to the fund. It was undisputed that on two occasions the Millwrights inadvertently performed work that was intended to be performed by the employer's subcontractor who would have used Iron Workers. Upon learning of the incident, the employer immediately informed the Millwrights they were not to perform such work, and that the employer's subcontractor would perform all such work going forward.

In determining that the employer did not withdraw from the fund, the arbitrator concluded that the fund's assessment of withdrawal liability was clearly erroneous when the Iron Workers did not arbitrate over the work assigned to the Millwrights and failed to provide sufficient evidence that the work should have been assigned to the Iron Workers. The arbitrator also found that the two instances of Millwrights performing Iron Workers work that amounted to less than 20 hours of work, which was performed without the employer's direction or knowledge, did not constitute performing work in the jurisdiction of the Iron Workers after the permanent cessation of the obligation to contribute.

The court, in reviewing the arbitrator's conclusion, applied the "clearly erroneous" standard of review for questions of fact and mixed questions of fact and law, and the *de novo* standard of review for legal conclusions. Under these standards, the court determined that the arbitrator correctly defined the question he was engaged to resolve; carefully reviewed all of the documentary and testimonial evidence relevant to that question and did not err in declining to review events that had no relevance to that question; and, therefore, the court affirmed and enforced the arbitrator's decision.

VII. Constitutionality

B. Constitutional Challenges in the Lower Courts

In *Old Blast, Inc. v. Operating Engineers Local 324 Pension Fund*, 2016 WL 6407244 (6th Cir. Oct. 31, 2016), the Sixth Circuit affirmed a district court's dismissal of a lawsuit initiated by a withdrawn employer and the employer's sole shareholder challenging the fund's right to garnish payments made by the purchaser of the employer to satisfy an "unconstitutional" assessment of withdrawal liability. The court concluded that the shareholder of the withdrawn employer did not have standing to bring the lawsuit, as she did not allege a personal injury. The fact that the fund garnished payments to the employer affected the shareholder only indirectly, and thus, she suffered no harm "separate and distinct" from the employer. With respect to the employer's challenge to the withdrawal liability assessment, the court ruled that the challenge was barred by *res judicata* because, among other reasons, the employer had previously entered into a consent judgment with respect to the withdrawal liability owed, which was a final decision on the merits.

C. Trucking Industries

In *Freight Drivers Local 557 Pension Fund v. Penske Logistics LLC*, 2016 WL 3276985 (D. Md. June 15, 2016), a trucking industry employer filed for bankruptcy and subsequently ceased making contributions to the fund. The fund assessed withdrawal liability and the employer disputed the assessment on the grounds that it qualified for the trucking industry exception. The arbitrator ruled in favor of the employer and found that the trucking industry exception did apply.

The fund filed suit to overturn the arbitrator's decision, stating that (1) the employer's bond required under ERISA section 4203(d) did not meet the trucking industry exception, and (2) that the arbitrator's award was incorrect because the employer continued to perform work within the fund's geographic jurisdiction.

The court disagreed. The court found that the fund had not challenged the ERISA section 4203(d) bond in arbitration, so it could not assert the claim in the subsequent litigation. The court further noted that the trucking industry exception only states "jurisdiction," which does not necessarily mean geographic jurisdiction; and even if it did mean "geographic jurisdiction," the fund did not specify the applicable geographic jurisdiction).

VIII. Enforcement and Collection Disputes

A. Jurisdiction and Venue

In *Northwest Administrators v. Crown Disposal Co.*, 2016 WL 4734309 (W.D. Wash., Sept. 12, 2016), the court granted the employer's motion to transfer venue from the Western District of Washington, where the pension fund was administered, to the Central District of California, where the employer's work was performed and where most of the material witnesses lived. The court noted the requirements under 28 U.S.C. § 1404(a) that the transfer be (1) to any other district or division where it might have been brought, and (2) for the convenience of the parties and witnesses and in the interests of justice. Finding that the first factor was easily met, the court considered several factors relating to the convenience of the parties and witnesses. Specifically, the court noted that virtually all of the witnesses for defendant, and many officials from the local union, resided in California. With regard to the fund's argument that all its witnesses and documents were in Washington, the court noted that the documents could be transmitted electronically and the administrator could more easily travel to Los Angeles than all the employer's witnesses could travel to Seattle. The court acknowledged that the special venue provision under ERISA Section 502(e)(2), which permits an action to be brought where the plan is administered, weighed in favor of the plaintiff's choice of venue but found this interest was outweighed by the relative inconvenience to the defendant of having to litigate in a foreign venue. The court also found there was a public interest in having the case litigated "at home" where the underlying work was performed and where the claim originated.

B. Review Procedures

In *GCIU-Employer Retirement Fund v. Quad/Graphics, Inc.*, 2016 WL 4411480 (C.D. Cal., Aug. 16, 2016), the district court issued an order consolidating the competing complaints of the fund and the employer. The arbitrator had found in favor of the employer, determining that the employer had not partially withdrawn from the fund in 2010, but found in favor of the fund, concluding that the fund had calculated the employer's 2011 complete withdrawal liability correctly. Both parties filed complaints to enforce in part, and modify in part, the arbitrator's decision. With no objections from the parties, the court consolidated the two cases finding that the benefits of judicial convenience outweighed any risk of potential delay, confusion or prejudice caused by consolidation.

C. Arbitration of Withdrawal Liability Claims

1. Issues Subject to Arbitration

In *Dairy Employees Union Local No. 17 v. Vander Eyk Dairy*, 644 Fed. Appx. 733 (9th Cir. 2016), the defendant employer was held to have waived its right to contest withdrawal liability by failing to arbitrate. Although the employer had challenged the trust agreement's arbitration provision, the court determined that such challenge did not toll the time for seeking arbitration. According to the court, the employer had not shown how the arbitration provision in the trust agreement would render the arbitral process futile or cause it irreparable injury. The court therefore affirmed the lower court's grant of summary judgment against the employer.

In *National Retirement Fund v. Caesars Entertainment Corp.*, 2016 WL 2621068 (S.D.N.Y. May 5, 2016), an employer filed for bankruptcy and underwent a voluntary reorganization. The fund ceased to accept contributions from the employer and the members of its controlled group, triggering a withdrawal. The fund assessed withdrawal liability pursuant to ERISA, but the employer failed to pay. Soon after the first withdrawal liability payment was due, the employer and the fund entered into a "standstill agreement" that they filed with the bankruptcy court. The standstill agreement (1) tolled the deadline for the first payment until 30 days after the bankruptcy court entered an order, and (2) provided that in the interim, the employer would make contributions equal to what it would otherwise have been required to pay if the withdrawal had not occurred. The employer made contributions under the standstill agreement. When the employer did not make the withdrawal liability payment on time as provided under the original assessment, the fund sued to collect the withdrawal liability payment, interest, and liquidated damages.

The employer argued: (1) that the fund was estopped from claiming that the withdrawal liability was delinquent because the fund accepted the payments under the standstill agreement, and (2) that the standstill agreement payments created a dispute of fact as to how much of those payments should offset the scheduled withdrawal liability payments, such that the complaint should survive summary judgment.

The court dismissed the employer's arguments, noting that they needed to be arbitrated. Both of the issues—whether the fund was estopped or how the standstill agreement affects withdrawal liability payments—were questions related to withdrawal liability and therefore, must be decided in arbitration. The court noted that the arbitrator may decide the payment is not required, but until that time, the employer needed to make the withdrawal liability payments. The court awarded the fund with the unpaid principal, interest at 1% per month (as provided in the fund's collection policy), and liquidated damages.

In *Trustees of the Suburban Teamsters v. Bolingbrook Redi-Mix Co.*, 2016 WL 1258849 (N.D. Ill., Mar. 28, 2016), a pension plan alleged that five companies owned by five different members of a single family were jointly liable for costs associated with one company's withdrawal from the plan. The pension plan refused to answer defendants' discovery requests, stating that its responses were not required because, under MPPAA, the defendants had waived their defenses when they failed to arbitrate. The court analyzed a Northern District of Illinois rule stating if an employer fails to timely request arbitration, it waives any defenses to the fund's determination of withdrawal liability. The rule, the court explained, presupposed a determination that the dispute is with an "employer." Therefore, the court determined, the failure to initiate arbitration did not preclude judicial determination of whether a defendant is an employer. The court noted that disputes over whether an entity was ever a member of a controlled group, and thus an employer, is for a court to determine, while disputes over whether an employer ceased to be an employer is for the arbitrator to determine. The court held that the defendants were not precluded from contesting whether they were employers or alter egos. However, if the court found that all defendants were employers within the meaning of the MPPAA, defendants would have waived those issues that are reserved for arbitration. In light of this, defendants conceded that the plan should not respond to discovery that would invite a waiver.

In *Quad/Graphics, Inc. v. GCIU-Employer Retirement Fund*, 2016 WL 5121758 (E.D. Wisc., Sept. 20, 2016), the court found that an employer's challenge to a fund's assessment did not raise a live case or controversy where the fund prepared the assessment as part of a pending arbitration and did not demand that the employer make interim payments.

The employer disputed two separate assessments in arbitration -- an assessment for partial withdrawal liability in 2010 and an assessment for complete withdrawal liability in 2011. The arbitrator issued an "interim award," ordering the fund to rescind the partial withdrawal liability assessment and to revise the complete withdrawal liability assessment. While the arbitration was pending, the fund filed a pleading that contained a reassessment that the fund claimed was in compliance with the arbitrator's interim award. Unlike the earlier assessments, however, the fund did not include a demand for the employer to make interim payments in accordance with the reassessment.

The employer sought a declaratory judgment from the court providing that the reassessment was invalid and that the employer had no obligation to make interim payments on the reassessment. The fund moved to dismiss on the grounds that the employer's request for declaratory relief was not ripe because the fund had not demanded interim payments from the employer.

The court granted the fund's motion to dismiss, finding that the reassessment did not have a concrete effect on the employer's operations because the employer was not making interim payments under the reassessment. The court found that, while the fund could demand interim payments under the reassessment at some time in the future, there were no facts suggesting that the fund had plans to do so. Accordingly, the court held that the employer's request for declaratory relief was not ripe.

2. Initiation of Arbitration

In *Central States v. Bulk Transport Corp.*, 820 F.3d 884 (7th Cir. 2016), the court found that approval by the Pension Benefit Guaranty Corporation of a new fee schedule for the American

Arbitration Association was not required for the employer to be compelled to submit its withdrawal liability dispute to AAA arbitration, as required by the fund's rules.

In *In the Matter of the Arbitration Between Genz-Ryan Plumbing & Heating Co. and Sheet Metal Workers' Local 10*, 2016 WL 5107074 (D. Minn., Sept. 19, 2016), the court decided that a party seeking judicial review of an arbitrator's decision under MPPAA must file a complaint and serve process and cannot commence the action merely by filing a motion.

Following the fund's assessment of withdrawal liability, the employer commenced arbitration. The arbitrator ruled in favor of the employer, finding that the employer faced no liability. The fund sought judicial review of the arbitrator's ruling by filing a "Petition to Vacate" and serving it on the employer via first-class mail. The employer moved to dismiss, arguing that the fund could only seek judicial review under MPPAA by filing a complaint and serving process.

The court agreed with the employer that a party can commence judicial review of an arbitrator's ruling under MPPAA only by filing a complaint and serving process. In reaching its holding, the court found significant that MPPAA provides that a party seeking to challenge an arbitrator's ruling must file an "action," which the court interpreted as a civil action commenced by filing a complaint.

The court, however, denied the employer's motion to dismiss. While the fund filed a document entitled a "Petition to Vacate," the court found that it was technically a complaint because it gave notice of the fund's claim and the purported grounds for relief. The court held that the fund was still required to serve process, but the court gave the fund two weeks to do so.

In *Central States, Se. & Sw. Areas Pension Fund v. Port Huron Bldg. Supply Co.*, 2016 WL 611805 (N.D. Ill., Feb. 16, 2016), the court granted the fund's motion for summary judgment. The court acknowledged that the fund's notice and assessment of liability was internally inconsistent because it first indicated that the employer had experienced a complete withdrawal but then explained that the employer had experienced a partial withdrawal. The court ruled that inconsistency did not render the notice void, however, because the notice clearly stated the statutorily-prescribed elements: the amount of liability, a payment schedule, and a demand. Accordingly, the court held that the notice triggered the employer's statutory duty to arbitrate.

The court further ruled that equitable tolling of the time period for the employer to initiate arbitration was not warranted on the basis of the fund's failure to respond to the employer's request for review under ERISA § 4219. The court noted that ERISA § 4221(a) contemplates this circumstance by allowing the employer to initiate arbitration within a 60-day period after the earlier of 120 days after the request for review or the date that the response to the request for review is received. Tolling on the basis that no response to the request for review was received is, therefore, precluded. In failing to timely initiate arbitration, the employer waived its defenses to liability.

In *Steelworkers Pension Trust v. The Renco Group, Inc.*, 2016 WL 5173664 (W.D. Pa., Aug. 22, 2016), the magistrate recommended that the defendant's motion to dismiss the fund's complaint for withdrawal liability and to stay arbitration be granted. The fund filed a complaint to collect withdrawal liability against defendant—an owner of about 75% of a bankrupt former contributor to the fund—on the basis that defendant had divested itself of a portion of its ownership in the debtor-employer for a principal purpose of evading and avoiding withdrawal liability. The defendant filed an arbitration demand to challenge both the assessment and the fund's claim that defendant engaged in a transaction to evade and avoid withdrawal liability. In the fund's complaint, it asserted that an "evade and avoid" claim is not subject to arbitration, and that the defendant could not contest the calculation of withdrawal liability because it failed to timely request review or demand arbitration. The defendant moved to dismiss the fund's complaint. Defendant argued that the fund's "evade and avoid" claim was an action brought under ERISA §4212(c) and, therefore, was a determination under ERISA §§ 4201-4219, subject to arbitration under ERISA §4221. Defendant also argued that it had not failed to timely request review and demand arbitration because it never received notice of the withdrawal liability notice and demand. Defendant claimed that the proofs of claim that the fund filed in debtor's bankruptcy estate did not constitute notice to defendant because, at the time, defendant was not a member of debtor's controlled group.

In recommending that defendant's motion to dismiss be granted, the magistrate reasoned that because the defendant was part of the controlled group at some point in time, and because the fund's "evade and avoid" claims fell under one of ERISA's enumerated provisions requiring arbitration, the fund's "evade and avoid" claim in this matter must be arbitrated. Additionally, the magistrate found that the defendant had not received either actual or constructive notice of the fund's demand for withdrawal liability. The magistrate rejected the fund's argument that defendant had constructive notice based on other events that resulted from defendant's transaction to divest itself of a percentage of debtor employer, or from the claims filed in the debtor's bankruptcy. The court relied on the fact that the claims did not expressly name defendant, and that defendant was not a member of the controlled group at the time of the bankruptcy.

3. Consequences of a Failure to Initiate Arbitration in a Timely Manner

In *Board of Trustees of the Western Metal Industry Pension Fund v. Central Machine Works, Inc.*, 2016 WL 3906894 (W.D. Wash., Jul. 19, 2016), a contributing employer was part of a controlled group with an LLC. The LLC's sole purpose was to purchase the affiliated contributing employer's buildings and property, and lease them back for the employer's use. In 2008, the LLC stopped charging the employer rent, allowing the employer to continue its use rent-free. In 2013, the employer shut down its business, triggering a withdrawal from the fund.

The fund assessed withdrawal liability against the employer. The employer did not make any withdrawal payments and did not take any action to dispute the withdrawal liability. The fund sued the employer for the entire withdrawal liability and added the LLC as a defendant. In response, the LLC argued it was not a "trade or business" as that term is interpreted under ERISA, and therefore it was not subject to withdrawal liability.

The court held that the LLC had waived its defense that it did not constitute a trade or business because it had failed to arbitrate the issue. The court reasoned that when controlled group members concede that they were an "employer" at some point in time, the dispute must proceed under ERISA's arbitration scheme. If a party instead claims it was never an "employer," it would be exempt from ERISA's mandatory arbitration, because the issue would relate to the arbitrator's authority over the LLC. The LLC argued that it was not notified of the withdrawal liability until it was too late to dispute the issue under ERISA's arbitration timeline. However, the court rejected this claim, noting that if a single member of a controlled group is notified, the entire controlled group is deemed to be notified.

In *Joint Industry Board of the Electrical Industry v. Athena Light & Power*, 2016 WL 4742279 (E.D.N.Y. Sept. 11, 2016), the court granted summary judgment, and awarded attorneys' fees, interest, costs, and liquidated damages to the fund after the employer failed to request review or initiate arbitration of its withdrawal liability assessment. The employer claimed equitable tolling should excuse its failure to request arbitration, based on a phone conversation in which fund counsel allegedly told the employer it could disregard the fund's notice and demand letter. The court held, however, that an equitable tolling defense was unavailable because fund counsel did not prevent or delay the employer from initiating arbitration through a fraudulent act of concealment, and the employer failed to present the equitable tolling issue in court within the statutory time period for arbitration. Because the employer had failed to request arbitration and therefore waived its defenses, the court accepted the fund's withdrawal liability assessment without review, awarded liquidated damages and interest as determined under the fund's governing trust document, and awarded attorneys' fees, albeit at somewhat reduced rates for the partner and associate, based on prevailing rates in the district.

In *Ohio Carpenters Pension Fund v. Ramunno Builders*, 2016 WL 4729305 (N. D. Ohio, Sept. 12, 2016), the employer failed to initiate arbitration or request review, or to make interim payments, and was therefore in default and liable for liquidated damages, interest, attorneys' fees, and costs. The court rejected the employer's claim that it was unable to initiate arbitration while the fund's collection action was pending with the court. The court also rejected the employer's argument that it was entitled to an abatement of its withdrawal liability after it resumed contributions to the fund. Because the employer had failed to initiate arbitration, the court held, it had waived its right to contest the withdrawal liability assessment, and in any case, reduction under Section 4207 was not available because the employer had not made its required monthly withdrawal liability payments.

In *Local Union 513 Pension Fund v. Susie's Construction, Inc.*, 2016 WL 4036908 (E.D. Mo., Jul. 28, 2016), the court granted fund's motion for summary judgment to collect withdrawal liability against an employer that failed to request review or demand arbitration. The employer asserted a laches defense because the fund waited for 5½ years to issue a notice and demand for withdrawal liability payments and, therefore, failed to assess "as soon as practicable." The court held in favor of the fund reasoning that a laches defense must be raised in arbitration and the employer waived any laches defense when it failed to timely demand arbitration. Additionally, the court noted that even if the employer had not waived its laches defense, the employer failed to provide any evidence that the fund had not assessed withdrawal liability "as soon as practicable." Because ERISA does not define "as soon as practicable", the court did not conclude that 5½ years was not "as soon as practicable" in the absence of any evidence and in light of ERISA's six-year statute of limitations to file suit to collect a missed withdrawal liability payment under ERISA § 4301(f)(1).

In *Central States, Se. and Sw. Areas Pension Fund v. K&M Equipment, Inc.*, 2016 WL 4270215 (N.D. Ill., Aug. 15, 2016), the district court granted the fund's motion for summary judgment, and denied the employer's motion for summary judgment, finding that the employer had waived its right to arbitrate over the date of withdrawal when it failed to timely initiate arbitration. Prior to issuing its notice and demand for withdrawal liability against the employer, the fund had filed a counter-claim against the employer for the collection of allegedly delinquent contributions. The employer was a member of a trade association that had negotiated an industry-wide labor agreement. The trade association had filed a declaratory judgment action against the fund seeking a determination that the members of the trade association, including the employer, had withdrawn from the fund in 2011. The fund asserted that the withdrawal did not occur until 2012 and filed the aforementioned counter-claim against the members of the trade association—including the employer—to collect contributions that allegedly came due after the trade association's claimed withdrawal date. The Seventh Circuit found in favor of the trade association concluding that the withdrawal occurred in 2011 and that no contributions were due from the members after November 15, 2011.

In this case, the employer argued that its date to request review and demand arbitration was equitably tolled until the Seventh Circuit ruled in the pending declaratory judgment and collections action because the exact same issue raised in that case is what the employer was now disputing in its arbitration demand. The employer further argued that there was no prejudice to the fund because it was already aware of the disputed issue, and because the arbitrations of the other members of the trade association had all been stayed pending the Seventh Circuit's decision. Nonetheless, the district court rejected defendant's claim of equitable estoppel because the defendant could not show "extraordinary circumstances" that prevented the employer from timely demanding arbitration. Simply that the parties were already litigating the same issue was not sufficient to warrant equitable estoppel.

E. Default

In *Central States, Southeast and Southwest Areas Pension Fund v. National Concrete Products Co.*, 2016 WL 4366595 (N.D. Ill., Aug. 16, 2016), the court granted the fund's motion for summary judgment to collect the full amount of the assessed withdrawal liability under the fund's credit-risk default rule, notwithstanding the pending arbitration over the fund's partial and complete withdrawal liability assessments against the employer. The fund initially assessed the employer for a partial withdrawal due to a 70% decline in contribution base units. The employer requested review and then timely demanded arbitration, but failed to make its monthly interim payments during the arbitration. Subsequently, the employer ceased all operations and the fund assessed the employer complete withdrawal liability. Again, the employer requested review and timely demanded arbitration. The fund had adopted a rule under ERISA § 4219(c)(5)(B) that allowed the fund to demand full payment of a withdrawal liability assessment if there is an indication that the employer will be unable to pay its withdrawal liability when due. In this case, the employer had stopped all operations, and had failed to make interim payments that had already come due. Under the Seventh Circuit's decision in *Central States, Se. and Sw. Areas Pension Fund v. O'Neill Bros. Transfer & Storage Co.*, 620 F.3d 766, 768 (7th Cir. 2010), the fund was permitted to default the employer under its credit-risk rule notwithstanding the pending arbitration.

The employer argued that the cessation of its operations was not a basis for accelerating its withdrawal liability because a complete withdrawal due to the cessation of covered operations would then always cause a credit-risk default and contradicts ERISA's payment rule under § 4219(c)(1)(A). The court rejected this argument because the employer was confusing the cessation of *covered* operations and the cessation of *all* operations, the latter of which could create a basis for a credit-risk default, especially in light of the employer's prior failure to make interim payments. The court found the employer's catch-up payment of past due interim payments in response to the filing of this action as "too little, too late."

In *Trustees of the Local 813 Pension Trust Fund v. Frank Miceli Jr. Contracting, Inc.*, 2016 WL 5879612 (E.D.N.Y. Mar. 9, 2016), the employer completely and undisputedly withdrew from the fund. After failing to make the required withdrawal liability payments, and failing to request arbitration, the fund filed suit to collect the accelerated withdrawal liability. The employer's only argument was that the fund did not present proof of how the amount of withdrawal liability was calculated. The court concluded that by failing to respond, make interim payments, or request arbitration, the employer had waived its rights to contest either the assessment or the amount of withdrawal liability. The court therefore granted summary judgment in favor of the fund.

In *Service Employees Int. Union Nat. Ind. Pension Fund v. Scientific & Commercial Systems Corp.*, 2016 WL 5313006 (D.D.C. Sept. 22, 2016), the fund moved for summary judgment to recover an assessed withdrawal liability. The employer, which had not requested arbitration, contributed to the fund as a subcontractor. The contractor eventually terminated the subcontractor and took over the contributions to the fund. The fund nonetheless assessed withdrawal liability against the employer, which the employer refused to pay. The fund sought summary judgment for the outstanding withdrawal liability.

The court granted the fund's motion for summary judgment because the employer had not requested arbitration. The employer argued that the fund had waived MPPAA's arbitration-first rule. The court, however, found that an employer would have to request arbitration and be rebuffed in order to raise a waiver defense. The court also found that a party could waive a failure-to-arbitrate assertion by not raising it to the court early in the proceedings. However, in this case, the fund raised the issue from the beginning of the proceedings.

Despite finding that the fund was entitled to summary judgment because the employer failed to arbitrate, the court also addressed the employer's arguments against the assessment on the merits. First, the court found that the MPPAA provision that an employer shall not be considered to have withdrawn solely because the employer "ceases to exist by reason of . . . a change to an unincorporated form" did not apply because, while the contractor terminated the subcontractor employer, the employer did not "cease to exist." Second, the employer argued that the court should deny summary judgment because the contractor should ultimately be responsible for the liability. The court, however, found that the subcontractor would have to prevail on a cross-claim against the contractor to push the liability onto the contractor. Finally, the employer argued that it is unreasonable and a violation of due process to assess liability against a subcontractor when the employer's withdrawal did not harm the fund since the contractor took over the subcontractor's contributions. The court, however, found that placing liability on the shoulders of a withdrawing employer is acceptable even if the withdrawal ultimately did not result in harm to the fund.

In *Pace Industry Union-Mgmt. Pension Fund v. O.E. Clark Paper Box Co.*, 2016 WL 721428 (M.D. Tenn., Feb. 5, 2016), the employer filed a motion to compel arbitration and sought a dismissal or stay of the fund's collection action pending the outcome of the arbitration. The employer initially received a notice and demand from the fund in 2009. At that time, the employer requested review and then initiated arbitration under ERISA § 4221 and started making interim payments. The employer took no further steps to pursue arbitration, however, and it ceased all interim payments in 2012. The fund sent the employer a default notice demanding payment of the entire outstanding liability and later filed suit to collect.

The court found that the employer's 2009 arbitration demand was still pending notwithstanding the employer's failure to take any action on its arbitration demand for five and a half years. The court noted that the plan could have sought the designation of an arbitrator in federal court. Because arbitration had not concluded, the court ruled that, under ERISA and PBGC regulations, the fund could not declare the employer in default and demand the entire balance at that time. The court acknowledged that the fund's complaint also sought payment of the interim payments that had not been made since 2012, however, and ruled that the suit could proceed to that extent while the arbitration was pending.

In *Electrical Pension Trustees on behalf of Pension Plan No. 4 v. Dunning Electrical Svcs.*, 2016 WL 4530330 (N.D. Ill., Aug. 30, 2016), the court granted summary judgment to the employer where the fund sought to accelerate the employer's full withdrawal liability but had previously filed suit to accelerate only a portion of the liability. The employer had entered into a settlement agreement with the fund to pay approximately $1.4 million in withdrawal liability over the twenty-year payment schedule, without limiting the fund's ability to accelerate payments in the event of default. After the employer missed three quarterly payments, the fund notified the employer it was in default and payment would be accelerated if not cured within 60 days. However, when the employer subsequently filed a motion to enforce the settlement agreement, it sought only the missed payments, totaling $53,000. The court noted PBGC Regulation 4219.31(b)(2), which provides that, if a fund accelerates only a portion of the liability, the fund must establish a new payment schedule for the remaining amount. The court thus reasoned that the fund could not rely on its earlier default notice to accelerate the full amount of liability because its subsequent motion to enforce the settlement agreement in effect modified the acceleration by seeking only a portion of the withdrawal liability.

F. Collection of Payments Pending Arbitration

In *GCIU-Employer Ret. Fund v. Quad/Graphics, Inc.*, 2016 WL 1118208 (C.D. Cal., Mar. 22, 2016), an arbitrator issued an "Interim Award" determining that the defendant was not subject to partial withdrawal liability. When the defendant subsequently ceased making the interim payments required under ERISA, the fund argued that, because the award was not the arbitrator's final decision, the defendant was required to continue making interim payments. Defendant argued that because statutory interpretation is ultimately an Article III court's responsibility, the court had the power to effectively overrule the arbitrator's decision that the "Interim Award" was not a "final decision." The court rejected both arguments, holding that an arbitrator cannot reserve the issue of interim payments in an arbitration related to a withdrawal liability dispute. The court reasoned that the arbitrator did not reserve the issue of interim payments and that, to the extent the arbitrator did so, he acted "in excess of his authority." The court also emphasized the arbitrator's explanation that the interim award was an "intended but non-final resolution," concluding that it could not be interpreted as a final decision.

G. Collection Actions, Enforcement of Award, Interest, Liquidated Damages, and Attorney's Fees

In *Frye v. Youngs Excavating, Inc.*, 2016 WL 889730 (S.D. Ind., Feb. 16, 2016), the court granted the fund's December 9, 2015 motion for attorneys' fees, notwithstanding an earlier court order that such motion must be submitted by October 30. The fund provided sufficient evidence that it did not have actual notice of the prior order until it received the court's December 1 final judgment. The court reasoned that the employer was not prejudiced by the delay and the motion would have been timely under federal rules absent the order. The court then found that the fund had properly substantiated its fee request and that the request was reasonable.

In *Plumbers and Steamfitters Local No. 150 Pension Fund v. Muns Group*, 2016 WL 4499457 (S.D. Ga., Aug. 26, 2016), the court granted judgment on the pleadings to the fund after rejecting each of the affirmative defenses raised by the defendant, which acknowledged it was under common control with the withdrawn employer. The fund had accelerated the employer's withdrawal liability after its failure to make quarterly payments. Defendant first argued that the suit should be dismissed as seeking to enforce the judgment from an earlier case in which the fund sued for payment of only the employer's first withdrawal liability installment payment. The court disagreed, pointing out that the current case sought the entire amount of withdrawal liability, rather than the first installment, and was therefore a separate claim, not an action to enforce the claim from the earlier suit. The court similarly dismissed the defendant's *res judicata* and collateral estoppel defenses based on the earlier case, noting that the fund's claim for the accelerated withdrawal liability could not have been brought at the time the earlier case was filed, since at the time the fund had not yet declared the employer in default, and that the fund had not waived its right to pursue the accelerated amount by suing for the first installment. Finally, the court dismissed the defendant's claim that a labor dispute prevented it from making contributions to the fund during the period when the withdrawal occurred, because such defenses are waived if not raised in arbitration, and the employer had failed to initiate arbitration.

In *Irigaray Dairy v. Dairy Employees Union Local No. 17 Christian Labor Ass'n of the United States of Am. Pension Trust*, 2016 WL 866104 (E.D. Cal., Mar. 7, 2016), following a summary judgment ruling in favor of the fund holding that the withdrawal liability dispute should be subject to arbitration, the fund filed a motion for attorneys' fees contending that the fees were mandatory in such actions under 29 U.S.C. § 1132(g)(2). It alternatively asserted that they were entitled to attorneys' fees under 29 U.S.C. § 1451(e). Plaintiffs argued that, because they had not yet begun arbitration, the fund had not prevailed in the action for withdrawal liability. Plaintiffs alternatively argued that the action was for declaratory relief, not for collection of withdrawal liability. The court determined that, while relevant case law did not specifically address this type of issue, attorneys' fees in declaratory relief actions seemed "appropriate." The court reasoned that 1) other courts have authorized such fees based on diversity jurisdiction where state law provide for attorneys' fees, 2) the underlying dispute may be used to determine other issues, and 3) the Supreme Court had recently allowed attorneys' fees based on federal statutory fee-shifting statutes in declaratory relief actions based on federal question jurisdiction. Because Plaintiffs brought the declaratory relief action in response to an action based on federal question jurisdiction, the court applied the applicable attorneys' fees provisions relating to withdrawal liability actions. The court next considered the fund's argument that attorneys' fees were mandatory. The court determined that, based on the procedural history, the judgment "affected the behavior" of the parties and had thus resulted in a favorable judgment for the defendants resulting in eligibility for mandatory fees. While plaintiffs again insisted that there could not be a determination until after the arbitration took place, the court rejected their argument, stating that the fund could be separately entitled to fees for the arbitration proceeding as well as for the previous litigation.

In *Board of Trustees of the Ken Lusby Clerks & Lumber Handlers Pension Fund v. Piedmont Lumber*, 2016 WL 4446993 (N.D. Cal., Aug. 24, 2016), the court granted the fund's motion for attorney's fees and expenses under ERISA § 502(g)(1) on the fund's successful motion for summary judgment to collect withdrawal liability. The court noted that the Ninth Circuit had found that where "the plaintiffs prevailed completely on the sole issue in question, received the entire relief sought, and resolved a significant legal question, it is not necessary for the district court to engage in specific discussion of the *Hummell [v. S.E. Rykoff & Co.,* 634 F.2d 446, 453 (9th Cir. 1980)] factors." In this case, because the fund prevailed completely on the issue in question at summary judgment, and received the exact relief that it sought, it was entitled to attorney's fees.

In determining the amount of attorney's fees to award, the district court used the lodestar method which entails multiplying the number of hours reasonably expanded on the case by a reasonable hourly rate. The party seeking attorney's fees has the burden of documenting the hours and establishing the reasonableness of the rates. In determining the reasonableness of the rates, the court will consider the rates charged by other attorneys in the forum state practicing in the same field. The moving party must provide evidence, which can be in the form of award by other courts in the forum state in similar matters. In determining the reasonableness of the hours expanded, the court considers the length of the case, the complexity of the issues, and the actions of the non-moving party. The court may adjust the fees request upwards or downwards based on its analysis. In this case, the court found the rates and hours reasonable and granted the fund its requested fees.

I. Bankruptcy Issues

In *Quad/Graphics, Inc. v. Graphic Communications Conf. of the Int'l Bhd of Teamsters*, 2016 WL 5720474 (N.D. Ill. Sept. 30, 2016), the employer challenged an arbitrator's finding as to the date of a partial withdrawal, and the fund brought a counterclaim challenging the arbitrator's finding that the employer was entitled to 100% credit for a prior partial withdrawal.

With regards to the credit for the prior partial withdrawal, the fund argued that the employer should receive credit only for the portion of the withdrawal liability that the employer's predecessor actually paid in bankruptcy (*i.e.,* the portion of the liability that was not discharged). The employer argued that reducing the credit would render the employer liable for debts discharged in bankruptcy. The arbitrator found that the employer was entitled to full credit, regardless of what was paid in bankruptcy, and without regard to the "abatement or reduction" language in ERISA Section 4206(b)(1). The court enforced that award, finding that giving the employer less than full credit would impair federal bankruptcy law.

IX. Co-Employer Liability

A. Definition of "Employer"

In *Ceco Concrete Construction, LLC v. Centennial State Carpenters, LLC*, 821 F.3d 1250 (10th Cir. 2016), a construction industry employer's obligation to contribute under a collective bargaining agreement ceased in May 2010. Subsequently, in October 2010, the employer's parent corporation acquired a non-union construction company to perform the same type of work within the jurisdiction of the prior collective bargaining agreement. The employer argued that a withdrawal had not occurred because the controlled group member that performed the work was not a controlled group member as of the date of withdrawal. The Court of Appeals found that a withdrawal had occurred because, *inter alia,* (1) the definition of employer includes both present and future compositions of the common control group and (2) because the common control group must be determined when the common control group triggers a withdrawal, which occurs when covered work resumes within five years of ceasing to contribute to a pension plan and (3) because finding a withdrawal to have occurred was consistent with MPPAA's purpose of protecting participants.

In *Central States v. Sidney Truck and Storage, Inc.*, 2016 WL 1594967 (N.D. Ill., Apr. 21, 2016) the Court held that leasing property to a withdrawing employer categorically constitutes a "trade or business" for purposes of controlled group liability and granted the fund's motion for summary judgment.

In *Local 813 Pension Trust Fund v. Miceli Contracting*, 2016 WL 1275041 (E.D.N.Y. Mar. 31, 2016), the defendants argued, without citing any legal authority, that a business must have similar operations to be included in the employer's control group. The defendants argued that because one purported control group member was a recycling business as opposed to the employer's demolition business, it could not share in the employer's withdrawal liability as a matter of law. The district court rejected this argument, finding that whether an entity was a controlled group member depended only on whether the entity was under common control and whether the entity was engaged in a trade or business. The district court noted that there was no dispute that the defendant was under common control with the employer and that the defendant was a for-profit corporation engaged in the recycling business, so there was no reasonable dispute that it was a trade and business. Thus, the court found the defendant jointly and severally liable for withdrawal liability and rejected the defendant's attempt to create a third requirement that was not in the statute. The court also held that a real estate entity under common control which leased property to the withdrawn employer was a trade or business because 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."

In *Einhorn v. Penn Jersey Building Materials, Inc.,* 2016 WL 1259962 (D.N.J. Mar. 31, 2016), the court ruled that there were disputed questions of fact regarding whether an individual was a member of the employer's controlled group. The court noted that an individual can be a controlled group member if he engaged in an unincorporated trade or business separate from his activities as owner of the withdrawn employer. The court noted that there were disputed questions of whether the individual defendant engaged in a trade or business. While the defendant claimed that he did not engage in any activities on behalf of an unincorporated trade or business, there was evidence that he had engaged in a consulting business and that he had received rental income from a partnership. On the basis of this evidence, the court denied summary judgment.

Sun Capital III, LP v. New England Teamsters, 172 F. Supp. 3d 447 (D. Mass. 2016), is a decision on remand from the First Circuit. In a prior reported decision, *Sun Capital III, L.P. v. New England Teamsters*, 724 F. 3d 129 (1st Cir. 2013), the First Circuit set forth the standard for determining whether an investment fund and limited partnership was a trade or business for purposes of 29 U.S.C. § 1301(b), which imposes joint and several liability upon all trades or businesses under common control with a withdrawn employer. The First Circuit determined that the Sun Capital IV investment fund was a trade or business because, *inter alia*, its active involvement in management provided a direct economic benefit to itself that ordinary, passive management would not derive: an offset against management fees it would otherwise owe its general partner. The First Circuit could not determine on the record available whether the same fee offset arrangement existed for the Sun Capital III investment fund, so it remanded that issue to the district court. On remand, the district court determined that the same type of management fee offset existed with Sun Fund III and determined that it was a trade or business.

The district court also determined that Sun Fund III and Sun Fund IV were under common control with the withdrawn employer because they had formed a partnership and the partnership was the ultimate parent of a parent-subsidiary group which included the withdrawn employer. The defendants argued that Sun Fund III and Sun Fund IV were not a partnership because (1) limited liability companies cannot form a partnership under state law and (2) their agreements expressly disclaimed intent to form a partnership. In rejecting these arguments, the court found that withdrawal liability is a matter of federal substantive law, and the state law of business organizations is relevant only for guidance and as incorporated into federal law. Further, choice of organizational structure under state law is not determinative under federal law. Even where an express agreement is determinative under state law, such an agreement is but one factor in determining whether a partnership exists for federal law purposes. The district court determined that a partnership did exist because, prior to entity formation and purchase, joint activity took place in order for the two funds to co-invest and that activity was plainly intended to constitute a partnership in fact. The district court also found that the partnership was a trade or business because it was created to generate a profit, and it had an active role in the management of portfolio companies.

In *Call Henry, Inc. v. United States*, 125 Fed. Cl. 282 (2016), the court granted the government's motion to dismiss the plaintiff-employer's breach of contract action for failure to state a claim. The employer had asserted that, under the Service Contract Act ("SCA"), it was entitled to reimbursement for withdrawal liability incurred during the term of an SCA contract with NASA ("Contract"). In accordance with the SCA, the Contract incorporated the collective bargaining agreement ("CBA") between the employer and its employees' union. During the term of the Contract, the employees decertified their union, causing the employer to experience a complete withdrawal from the multiemployer pension fund and to incur withdrawal liability. The employer asserted that NASA was required to reimburse it for the assessed liability because the Contract provided that NASA would cover certain increases to wages and fringe benefits.

In dismissing the employer's claim, the court noted that the SCA was passed to protect employees, not contractors. It only incorporates the economic provisions of a CBA into a SCA-covered contract and doesn't bind the government to the CBA. Furthermore, the court held that withdrawal liability is a statutory debt imposed by ERISA on withdrawing employers, not a "fringe benefit" under the SCA for which the government provides reimbursement.

The court also rejected the employer's claim that NASA is an "employer" under Title IV of ERISA that was itself liable for the withdrawal liability. NASA is a federal agency, and the federal government is excluded from ERISA's definition of employer. Moreover, the court found that NASA was not an employer for purposes of withdrawal liability because it was not "one obligated to contribute to a plan for the benefit of plan participants" (*quoting Korea Shipping Corp. v. New York Shipping Ass'n-Longshoremen's Ass'n Pension Tr. Fund*, 850 F.2d 1531, 1537 (2d Cir. 1989). The court found that to be the case because NASA was not bound to the CBA and did not make contributions directly to the fund but rather reimbursed the employer for its contributions. The court found the reimbursement obligation was not the equivalent of an obligation to contribute to the fund.

B. Controlled Group Liability

In *Automotive Industries Pension Trust Fund v. Tractor Equipment Sales, Inc.*, 2016 WL 7422710 (9th Cir., Dec. 23, 2016) , the Ninth Circuit affirmed a district court's holding that the pension fund could not enforce withdrawal liability against three rental properties commonly owned by the owners of a withdrawn employer. The court held that the rental properties were not liable because they did not constitute a commonly-controlled trade or business, as set forth in 29 U.S.C. § 1301(b)(1), with the withdrawn employer. The Court reasoned that the rental properties lacked "a formal corporate structure, employees, or some sort of economic relationship with the withdrawing employer…." *Id.* at *1. The Court further noted that the owners of the rental properties: (i) devoted little time to properties, other than depositing rental income and performing minimal maintenance; and (ii) purchased the properties years before the withdrawal from the fund. For these reasons, the court concluded that the rental properties were not a trade or business because that "the nature of the real estate activity in this case [was] more akin to holding a [passive], long-term income-producing investment."

In *Bd. of Trustees of the Auto. Mechanics' Local No. 701 Union & Indus. Pension Fund v. 6516 Ogden Ave., LLC*, 170 F. Supp. 3d 1179 (N.D. Ill. 2016), two companies were held to be under common control and, because one company had already been determined to be responsible for withdrawal liability, so was the other. In this case, the sole member of one company was also the 100% owner of the other company. Two conditions had to be satisfied: 1) the organization was under common control with the obligated organization during the time the obligated organization incurred the withdrawal liability; and 2) it was a trade or business. For the first condition, the court determined that the companies were of the "brother-sister" group of trades or businesses because 1) the same five or fewer persons who are individuals, estates, or trusts owned a controlling interest in each organization; and 2) such persons are in effective control of each organization. Analyzing the second condition, the court noted that the defendant organization was formally recognized as an LLC, the owner spent several hours a month working on behalf of the defendant collecting rent, paying bills, and keeping corporate filings, and had leased properties to two entities, collected rent, and had claimed business deductions for several years for cleaning and maintenance, insurance, legal and professional fees, taxes, depreciation of real estate, office expenses, and supplies. Therefore, because the defendant and the company already held responsible for withdrawal liability were under common control and the defendant is a trade or business, the court concluded that the defendant was jointly and severally liable for the other company's liability.

In *Bd. of Trustees of The Sound Ret. Trust v. Summit Trading Co., Inc.*, 2016 WL 792696 (W.D. Wash., Feb. 29, 2016), defendants Gary, Greg, and Marilyn were principals of Summit Trading, which was subject to withdrawal liability, as well as Carlson Diversified, G.P. Marilyn argued that for her to be jointly and severally liable for the withdrawal liability, she must have been an employee and an "active," not simply "passive," general partner of Carlson Diversified. The court applied prior Ninth Circuit precedent holding that individual partner liability incurred by a partnership is governed by common law concerns. Applying this standard, the court held that a general partner of a partnership is individually liable for the withdrawal liability of the partnership, regardless of whether they are an "employee" of the partnership for tax purposes. The court denied Marilyn's motion to dismiss, rejecting her argument that she did not deliver personal services to Carlson Diversified.

In *Dairy Employees Union Local No. 17 Christian Labor Ass'n of the United States of Am. Pension Trust v. Poel*, 2016 WL 922549 (C.D. Cal., Mar. 10, 2016), defendant company ceased making contributions and was notified of its assessed withdrawal liability. The company first requested review of the determination and by letter requested arbitration. The pension plan denied the request for arbitration, stating that the company did not follow the correct procedure. The company subsequently withdrew its request for arbitration. According to the court, the pension plan must have satisfied three elements: 1) the fund was a multiemployer pension plan and defendant was an employer for the purposes of ERISA; 2) the fund notified the employer of its assessed liability; and 3) the employer failed to timely initiate arbitration. The company disputed that it was an employer, requesting the court to disregard prior admissions, pleadings, etc. that proved otherwise. The company theorized that the union was not certified to represent the company's employees pursuant to California Labor Code Section 1159 after 1985. The company argued that, because the union was decertified after 1985, it was not an employer subject to MPPAA after 1985 since it no longer had an obligation to contribute. The court rejected these arguments, stating that new legal theories were not a sufficient basis to seek reconsideration. The court further stated that, in any event, the dispute was to be resolved through arbitration. Because there was no genuine issue of material fact regarding whether the company was considered an employer, and because the company elected not to arbitrate, the court granted summary judgment in favor of the pension plan.

In *Trucking Employees of No. Jersey Welfare Fund, Inc.-Pension Fund v. 160 East 22nd Street Realty, LLC*, 2016 WL 4582046 (D.N.J. September 2, 2016), the fund asserted claims for withdrawal liability against thirty-nine entities related to the withdrawn contributing entity which had failed to pay its withdrawal liability. It brought claims based on direct liability against non-employers, control group liability, single employer/alter ego, the "evade or avoid" provision in ERISA § 4212(c), and "clawback liability." The court dismissed the direct claim for withdrawal liability against the related entities because it did not state the basis for a claim. The court dismissed the majority of the related entities as defendants under the common control claim, either because they were formed after the date of the withdrawal, and therefore could not be under common control with the withdrawn employer for withdrawal liability purposes, or because they did not share the same five or fewer owners with effective control. It permitted the common control claim to proceed against the remaining related entities, including two entities that would have been under common control but for a restructuring just prior to the withdrawal that plaintiffs alleged was designed to evade or avoid withdrawal liability. The court denied summary judgment on the single/employer alter ego claim, where there was sufficient evidence of common ownership, informal lending, and shared offices and equipment among several of the related entities for the claim to proceed. It dismissed without prejudice the "evade or avoid" claim because the fund, while pointing to the alleged manipulation of share percentages and fragmentation of the related entities, failed to allege specific facts to support the claim. Finally, it dismissed the fund's claim for "clawback" liability from business transactions between the original withdrawn employer and the related entities subsequent to the withdrawal, finding that no such cause of action exists under ERISA.

C. Shareholder, Director, or Officer Liability

In *Carpenters Pension Fund of Ill. v. Daniel E. Martinak Trust No. 1*, 2016 WL 7188158 (N.D. Ill., Dec. 10, 2016), the court held that the owner of a withdrawn employer to a multiemployer pension fund engaged in a fraudulent transfer, compelling the owner to turn over $41,000 in partial satisfaction of the fund's withdrawal liability judgment against the owner's company and his trust, which was determined to be a member of the company's controlled group for withdrawal liability purposes. The court concluded that the fund satisfied the three-pronged test to prove a fraudulent conveyance: *i.e.,* (1) the debtor transferred property for no consideration (2) while facing an existing debt, (3) leaving the debtor with insufficient assets to pay the debt." The Court reasoned that despite his awareness of the preexisting withdrawal liability debt to the fund, the owner proceeded to authorize a distribution from the trust to himself without any consideration to the trust. After the fraudulent transfer, the trust's account had a zero balance, resulting in the fund's inability to collect from the trust. As such, the fund proved all three elements of a fraudulent conveyance claim. Further, the court ordered the trust to pay the fund's legal fees and costs in recouping the fraudulent transfer.

D. Successor Employer Liability

In *Bd. of Trustees of Auto. Mechanics' Local No. 701 Union & Indus. Pension Fund v. Full Circle Grp., Inc.,* 826 F.3d 994 (7th Cir. 2016), a contributing employer (HMC) sold company assets to another entity (FCG). FCG was formed by the son of HMC's owner, employed some (but not only) HMC employees, and attempted to negotiate its own collective bargaining agreement with the union representing HMC employees. After the HMC and FCG sale, the union decertified and triggered a withdrawal for HMC. At the time of the withdrawal, HMC was insolvent.

The fund filed a lawsuit against FMC, claiming it was liable as HMC's successor. The district court granted summary judgment for FMC on the basis of lack of notice, holding that FMC was not aware of HMC's pension contributions or withdrawal liability before signing the asset acquisition, and even if FCG knew of the pension contributions, it was not aware of the withdrawal liability until HMC actually withdrew.

The appellate court disagreed. The appellate court recognized that a successor must have notice of the liability. However, the appellate court noted several facts that indicated that FMC may have been aware of the withdrawal liability: (1) FMC's owner knew about pension contributions on the closing date of the sale, (2) FMC had lawyers advising on the acquisition, and (3) most union pension plans are underfunded. In addition, the fact that withdrawal liability had not yet been assessed did not matter—it was sufficient for the buyer to be aware that the seller may be contingently responsible for withdrawal liability. The appellate court held that these facts were enough evidence to preclude summary judgment.

In *United Food & Commercial Workers Local 1546 Pension Fund v. Variety Meat Co.*, 2016 WL 3213402 (N.D. Ill., June 10, 2016) a contributing employer sold its business assets to a competitor. The fund assessed withdrawal liability against the purchaser on the basis of successor liability. The purchaser had moved into the space previously occupied by the seller, hired three of the seller's previous employees (in addition to hiring one of the seller's previous owners, although not hired in a managerial role), and acquired four new customers from the seller.

The fund asserted that the purchaser must have been aware of the withdrawal liability. The purchaser's owner knew the seller was affiliated with a union, the purchaser's owner had worked in the industry for a long time, and the purchaser did not enter any union contracts. In addition, the fund argued that if the purchaser had done adequate due diligence investigation into the seller, it would have discovered the fact of the withdrawal liability. The fund also asserted that a substantial continuity of the seller's business existed because the purchaser operated out of the same building, employed seller's owner and three other employees, offered the same jobs that seller offered, used seller's equipment, produced the same product, and serviced some of the same customers.

The court disagreed and granted summary judgment for the purchaser. The court found that the purchaser was not aware of the withdrawal liability. The fact that purchaser's owners knew the seller was affiliated with a union did not mean they knew about withdrawal liability. The court found that the purchaser had no obligation to conduct due diligence, even if it would have caused the purchaser to learn about the withdrawal liability. Although the purchaser employed one of the seller's former owners, that was not sufficient to deem the purchaser to be notified of the withdrawal liability, especially because the former owner was employed at the purchaser as a non-managerial employee and was not informed of the withdrawal liability until months after the asset sale occurred.

The court also held that there was no substantial continuity of operations between the seller and purchaser. While the purchaser used the same building and equipment to sell the same product in the same industry to some of the same customers, there was sufficient evidence to conclude that the businesses were distinct: (1) purchaser only hired four of seller's eleven employees, (2) those four employees were not a substantial portion of purchaser's workforce, (3) the companies were distinct in ownership and management, (4) purchaser did not complete seller's work orders or honor warranties on seller's past orders, (5) purchaser did not rely on the same advisors or registered agent as seller, (6) the assets and customers gained were exceedingly small relative to the inventory, equipment, and customers purchaser already had prior to the purchase.

In *Local 109 Bd. of Trs. of the Operative Plasterers & Cement Masons Pension Fund v. All American Acoustic & Drywall, Inc*., 2016 WL 5232828 (N.D. Ohio, Sept. 22, 2016), the court addressed the minimal pleading requirements for a fund's allegation that a defendant employer has withdrawal liability to the fund as a successor corporation. Following the dissolution of a corporation that was contributing to the fund, the fund notified the employer of a withdrawal liability assessment as a successor corporation to the defunct corporation. The employer did not request a review or demand arbitration. The fund filed a complaint alleging that the employer was in default. To support its allegation that the employer was a successor corporation, the fund included a letter that it had previously sent to the employer as an exhibit to the complaint. However, the fund's complaint did not set forth the facts in the letter that supported its allegation that the employer was a successor corporation. Rather, the fund simply incorporated the letter into its complaint by reference.

The employer moved to dismiss and for judgment on the pleadings on the basis of inadequate pleading under the Supreme Court's *Twombly* decision, and the fund counter-moved for judgment on the pleadings. The court dismissed the complaint, finding that the fund was required to identify and allege the specific facts in its letter that supported its successor corporation claim. However, the court dismissed the complaint without prejudice, allowing the fund an opportunity to amend.

In *Resilient Floor Covering Pension Trust Fund Board of Trustees v. Michael's Floor Covering, Inc*., 2016 WL 5407848 (N.D. Cal., Sept. 28, 2016), the court addressed the issue of what constitutes adequate notice of a liquidated predecessor's withdrawal liability to trigger withdrawal liability as a successor corporation.

A contributing employer in the flooring industry liquidated and notified the fund of its dissolution. One of the contributing employer's non-union salespersons subsequently started a new flooring company (the defendant employer) in the location previously occupied by the contributing employer. At the time the salesperson started the new business, he knew that the contributing employer was a union shop and that the contributing employer contributed to a pension plan. However, he did not know the type of pension. Nor did he understand the concept of withdrawal liability.

The fund sent a notice to the defendant employer claiming withdrawal liability as a successor to the defunct corporation. The defendant employer requested review, and the parties entered into an agreement that tolled the defendant employer's deadline to request arbitration. Shortly thereafter, the fund sought contributions, interim withdrawal liability payments and a declaration from the court that the defendant is a successor corporation liable for the contributing employer's withdrawal liability.

The defendant employer contended that the fund's request for declaratory relief was premature because an arbitrator had yet to establish liability. The court, however, rejected that contention because it found that the fund's notice to the defendant employer established a presumption of withdrawal liability that made it an appropriate time to seek declaratory relief.

The court then addressed the merits, finding that the defendant employer could not be liable to the fund unless the employer had notice of withdrawal liability prior to starting the business. The court found that the salesperson's awareness that the contributing employer was a union shop that contributed to a pension was not tantamount to knowledge of withdrawal liability. The court also found that the salesperson could not be found to have constructive notice of the withdrawal liability because he did not consult with an attorney prior to starting the new business, he was not related to the owners of the contributing employer, and he did not buy the contributing employer's business -- he simply opened a new business. Accordingly, the court found that the defendant employer was not a successor corporation because the salesperson who started the business did not have notice of the withdrawal liability.

In *Heavenly Hana LLC v. Hotel Union & Hotel Indus. of Haw. Pension Plan*, 2016 WL 524327 (N.D. Cal., Feb. 10, 2016), the court found that the plaintiff-purchaser was not liable for withdrawal liability under the successor liability doctrine. In reaching this conclusion, the court held that a purchaser's lack of due diligence does not satisfy the doctrine's notice requirement.

In this case, the seller had operated a hotel as to which it had a collective bargaining agreement requiring contributions to a multiemployer pension fund. Before the sale closed, the seller terminated all its employees, ceased contributing to the plan and made a complete withdrawal from the pension plan. After the sale, the purchaser staffed the hotel and recognized the union as the bargaining representative but did not assume the prior CBA.

The court held that it was the plan's burden to prove that the purchaser met the requirements for successor liability. The court weighed a number of factors and found that there was a continuity of business operations as between the seller and the purchaser. The purchaser operated a hotel out of the same facilities, most of the purchaser's employees had previously worked for the seller, and the purchaser also employed the same general manager and a few of the same supervisors.

The court found, however, that the purchaser was not liable as a successor because it had no actual knowledge that the plan had unfunded vested benefit liability at the time that it purchased the hotel. The plan argued that the purchaser had the ability to obtain plan documents, such as annual funding notices, and, if it had obtained these records, the purchaser would have had knowledge of the potential withdrawal liability. The court rejected this argument, reaffirming that actual knowledge of withdrawal liability – or at least actual knowledge of the factual basis for liability such as that the plan was underfunded – at the time of the purchase is necessary for a successor to be liable for its predecessor's withdrawal liability. The court held that a purchaser's lack of due diligence was not sufficient to establish liability because the standard for successor liability is not what the purchaser should have known but what the purchaser did know. The court further held that even if the standard were changed to what the purchaser reasonably should have known through an exercise of due diligence, the purchaser's actions in this case were reasonably diligent under the unsettled state of the law before the Ninth Circuit's "landmark decision" in *Resilient Floor Covering Pension Tr. Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079 (9th Cir. 2015).

X. THIRD PARTY CLAIMS

In *Einhorn v. Penn Jersey Building Materials, Inc.,* 2016 WL 1259962 (D.N.J. Mar. 31, 2016), the employer claimed that the union had promised in the collective bargaining agreement that there was no unfunded liability with regard to the fund and that there would be no withdrawal liability should the employer withdraw in the future. The employer later withdrew and incurred withdrawal liability. The employer then brought a claim against the union for breach of the collective bargaining agreement and indemnification. The district court held in favor of the union on summary judgment, finding that after the collective bargaining agreement's expiration, the employer and union were not in privity of contract at the time the employer withdrew from the plan.

In *Nitterhouse Concrete Prod., Inc. v. Glass Molders,* 2016 WL 827131 (M.D. Pa., Mar. 3, 2016), a district court denied a motion to dismiss an indemnification claim asserted against a union for withdrawal liability. The indemnification provision stated that the union would "indemnify and save harmless the Company from any claim or liability which may arise by reason of the existence of the Plan." The union argued that the indemnification provision, which was contained in a collective bargaining agreement ("CBA"), expired when the CBA expired and that the durational clause contained no language allowing the provision to remain in force after termination of the CBA. The union further relied on the contract interpretation principle that indemnity clauses must be strictly construed. The court rejected these arguments, reasoning that the provision "contemplated liability in connection with the Plan, not just the CBAs" and that such liability may arise after the expiration of the CBA. After calling attention to the fact that withdrawal liability could occur only after the CBAs expired, the court denied the union's motion to dismiss.