No. 19-

IN THE

Supreme Court of the United States

THE E-COMPANY, A DISSOLVED ILLINOIS CORPORATION, T&W EDMIER CORP., A DISSOLVED ILLINOIS CORPORATION, EDMIER CORP., AN ILLINOIS CORPORATION, K EDMIER & SONS, LLC, AN ILLINOIS LIMITED LIABILITY CORPORATION, THOMAS EDMIRE, INDIVIDUALLY, WILLIAM EDMIER, INDIVIDUALLY, LAKE STREET REALTY, INC., A DISSOLVED ILLINOIS CORPORATION AND E &E EQUIPMENT & LEASING, INC. AN ILLINOIS CORPORATION

Petitioners,

v.

TRUSTEES OF THE SUBURBAN TEAMSTERS OF NORTHERN ILLINOIS PENSION FUND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MERLE L. ROYCE II, ESQ.
Counsel of Record
135 South LaSalle Street,
Suite 4000
Chicago, Illinois 60603
(312) 553-1233
royce4law@gmail.com

289445

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The sponsor of a multiemployer pension fund issued a notice of withdrawal liability to contributing employers prior to a suit to collect the claim under the Employer Retirement Income Security Act ("ERISA"). Petitioners challenged the notice, claiming it violated their rights to due process under this Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Specifically, Petitioners claimed (a) the notice misstated control group liability and failed to apprise them of mandatory arbitration under ERISA, and (b) no notice was given the employers' co-owners from whom the plan sponsor sought recovery, even though the identities of the co-owners was known or easily ascertainable. The District Court found *Mullane* inapplicable and that the Seventh Circuit's decision in *Central States S.E. & S.W. Area Pension Fund v. Slotky*, 956 F.2d 1369, 1373 (7th Cir. 1992), provided the applicable due process standard, allowing it to review the control group issue where a party "has absolutely no reason to believe they might be members of a control group." It went on to find on the merits that the co-owners and other entities owned by them were liable. In affirming the District Court, the Seventh Circuit held that *Mullane* was limited to court cases, that Slotky provided an appropriate framework and standard and that Petitioners suffered no harm because they were found liable on the merits. Three questions are presented:

(1) Are *Mullane*'s due process standards limited to notice in lawsuits and Petitioners' objections to the plan sponsor notice of withdrawal liability unfounded?

(2) Is *Slotky* a reasonable substitute for the due process articulated by this Court in *Mullane*?

(3) Does the District Court's finding against the Petitioners on the merits obviate their right to due process?

PARTIES TO THE PROCEEDINGS

The parties in the proceedings below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

The E Company, T&W Edmier Corp., Lake Street Realty Inc. and E & E Equipment & Leasing, Inc. were all Illinois Corporations' which have been dissolved. None of these former corporations was owned by a parent corporation nor did any public corporation own a 10% interest in them.

Edmier Corp. is an Illinois Corporation owned by William Edmier. individually. K. Edmier & Sons LLC is an Illinois limited liability company which is individually owned The William Edmier Trust is an Illinois land trust, beneficially owned by William and Thomas Edmier.

STATEMENT OF RELATED PROCEEDINGS

The proceedings in the federal trial and appellate courts identified below are directly related to the above captioned case in this Court.

Trustees of the Suburban Teamsters of Northern Illinois Pension Fund v. The E Company,et. al, Case No. 1:15-cv-10323 (N.D. IL). The United States District Court for the Nothern District of Illinois entered final summary judgment in favor of respondent on liability on March 21, 2018 (App. C, 17 a) and a final judgment awarding respondent damages and other relief on May 9, 2018 (App. B. a).

Trustees of the Suburban Teamsters of Northern Illinois Pension Fund v. The E Company, et. al., Case No. 18-2273 (7th Cir.). The Court of Appeals for the Seventh Circuit entered judgement in this matter on January 29, 2019 (App. A, 1a). The Seventh Circuit denied Petitioners' request for rehearing with a suggestion for rehearing *en banc* on March 4, 2019 (App. D. 37a)

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Cited Authorities

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in *Trustees of the Suburban Teamsters of Northern Illinois Pension Fund v. The E Company, et. al.*, 914 F.3d 1027 (7th Cir. 2019) (App. A, 1a) The Seventh Circuit affirmed the March 21, 2018 decision of the United States District Court for the Northern District of Illinois which is reported in 2018 WL 142717 (N.D. Ill. 2018) (See App. A, 1a and App. C, 17a)

STATEMENT OF JURIDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) The Seventh Circuit's opinion was rendered entered on January 29, 2019. (App. A, 1a) The Court of Appeals denied a Petition for Rehearing With a Suggestion for Rehearing *En Banc* on March 4, 2019. (App. D, 37a) On May 28, 2019, Justice Kavanaugh extended the for filing a petition for certiorari to and including August 1, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Unites States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . .

Title 29 United States Code Sections 1301(b)(1):

> **(b)(1) . . .** For purposes of this subchapter, under regulations prescribed by the corporation, all

employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

Title 29 Unites States Code Sections 1399 (b) (1), (2):

(b)(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer—

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of-

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

Title 29 United States Code Section 1401 (a)(1):

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

> The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

Title 29 United states Code Section 1401(b)(1):

> **(b) (1)** If no arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

STATEMENT OF THE CASE

A. Introduction

The Trustees of the Suburban Teamsters of Northern Illinois ("the Trustees") are the plan sponsor of a multiemployer pension fund to which Petitioners T&W Edmier Corp ("T & W Corp.") and The E Company contributed. The Trustees obtained a summary judgement in the District Court of $858,319.52 for unpaid withdrawal liability, interest, liquidated damages and attorney fees against the E-Company, T & W Corp. and the "Edmier Control Group." This control group included Thomas and William Edmier ("the Edmiers"), the co-owners of T&W Corp. and the remaining Petitioners.

Withdrawal liability was added to the Employer Retirement Income Security Act (ERISA) to require a sponsor of a multiemployer pension plan to collect from a

withdrawing employer its 'proportionate share of the plan's "unfunded vested benefits."' *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 725 (1984) This assessment begins with the plan sponsor issuing a notice and demand for payment of the withdrawal liability to the employer as soon as "practicable after an employer's complete or partial withdrawal." 29 U.S.C. § 1399(b)(1).

Within 90 days of the notice, the employer may ask the plan sponsor to review the assessment. *Id.* at § 1399(b)(2). Thereafter, any dispute between the employer and the plan sponsor as to the determination of withdrawal liability must be resolved through arbitration. The arbitration proceedings must be initiated within 60 days of the plan sponsor's disposition of a request for review or 120 days of the employer's request for review. *Id.* at § 1401(a)(1). If arbitration is not initiated, the amounts demanded by the plan sponsor become due and payable and the plan sponsor can bring an action for collection. *Id.* at § 1401(b)(1) Liability extends to all trades and business which are under the common control with the employer. 29 U.S.C. § 1301(b) (1).

B. The Trustees' Notice To Petitioners

The Trustees issued their Notice of Withdrawal Liaibility to T&W Corp and E Company on April 30, 2015. (Dkt. # 48-1, Pl. Ex. 3 at 51)[1] This was two years after the companies' last contributions to the Pension Fund. (Dkt # 48 at ¶ 34) Several important things had occurred during this interim. The corporations had gone

1. Citations are to the record in the District Court by the docket number assigned to the documents.

out of business, been dissolved and their assets liquidated. The Trustees had also sued each of the corporations for monthly contributions in 2014, seeking in each suit to hold one of Edmiers jointly liable as an officer/owner, because the corporations had been dissolved or were no longer in good standing.

The Notice of Withdrawal Liability was mailed to the Edmier Corp., a dormant company which had never contributed to the Pension Fund, as well as to T&W Corp. and the E-Company. (Dkt # 48-1, Pl. Ex. 3 at 51) In addition, the Notice was also mailed to the former registered agent for T&W Corp. and The E Company (*Id.*), an attorney who subsequently represented Petitioners when the matter reached the Courts. The Notice was directed to only the corporations; none of the Edmiers were identified as someone who might be personally liable for the withdrawal liability. (*Id.)*

The only reference to control group liability in the Trustees' Notice was:

> This withdrawal liability is based only on the contributions made to T & W Edmier Corporation and The E Company. If there are other companies *under common control* with T & W Edmier Corporation and The E Company, *and if those companies have also contributed to the Pension Fund,* then the contribution history of those companies should be considered in calculating withdrawal liability. This has not been done for purposes of this calculation because the Pension Fund does not know what other employers, if any, should be aggregated

> with T & W Corporation and The E Company for purposes of withdrawal liability. (Emphasis Added) (Dkt. 48-1, Pl. Ex. 3 at 52)

The Notice did not set forth of any of the procedures and deadlines under ERISA for perfecting an objection, such as the right to seek a review within 60 days, the right to seek arbitration within 120 days or that a failure to seek arbitration resulted in forfeiture of any of rights to contest liability. Rather, it directed the recipients to "ERISA Section 4219 and 4221" for a description of the "rights that you may have in connection with this assessment of withdrawal liability." (Dkt. # 48-1, Pl. Ex. 3 at 52)

Although the Edmiers admitted seeing the Notice of Withdrawal Liability, they did not respond to it, allowing the assessment of liability against T&W Corp and the E Company to go unchallenged without a review or arbitration under ERISA.

C. The Proceeding Below

On November 15, 2015, the Trustees filed an initial Complaint in the District Court, seeking its enforce its claim for withdrawal liability only against The E Company, T&W Corp. and the Edmier Company. Eight months later, on July 28, 2016, the Trustees amended their Complaint to add Thomas Edmier individually and K. Edmier & Sons as part of the "Edmier Control Group." (Dkt. # 20 at ¶ 2-3) William Edmier and the remaining Petitioners were subsequently added to the suit as members of the Edmier Control Group under another amendment, a year later, on August 11, 2017. (Dkt. # 54 at ¶ 10)

The Trustees immediately moved for Summary Judgment against all Petitioners, after the last of the Complaint. (Dkt. # 47) They submitted that they had met "all the requirements under the law to give notice to the Edmier Defendants," since "notice to one employer within the control group is notice to all members of the control group." (Dkt. # 49 at 5) As a result, they maintained that, all the "Edmier Defendants" had "incurred withdrawal liability" and "waived" any defenses by not requesting arbitration. (*Id.*)

The Petitioners argued that due process required that the Trustees serve the Notice of Withdrawal Liability on William and Thomas Edmier personally rather than by constructive notice. Petitioners pointed out that the identities of the Edmiers were known to the Trustees as a result of the 2014 suits brought by the Trustees to collect the monthly contributions or could have been easily ascertained from the records of the Illinois Secretary of State. (Dkt. # 92 at 3-4) They also argued that the withdrawal notice was defective because it misstated the standards for vicarious liability under ERISA and failed to provide them with sufficient information make a timely appearance and objection under ERISA's procedures. (*Id.* at 4-7) Petitioners submitted that *Mullane v. Central Hanover Bank &Trust Co.,* 339 U.S. 386 (1950) established the constitutional standards supporting both of these objections. (*Id.* at 2)

The Trustees maintained that the controlling authority was the Seventh Circuit's decision in *Central States S.E.& S.W. Area Pension Fund v. Slotky,* 956 F.2d 1369, 1371 (7th Cir. 1992), in which constructive service had been sustained under ERISA. The Trustees also

argued that in addition to T&W Corp. and E Company, the Notice had been sent to their registered agent/attorney, who was obliged to explain control group liability to the Edmiers and the importance of preserving their defenses in arbitration. (Dkt. # 95 at 1-2)

The District Court granted the Fund's Motion for Summary Judgment. It found that the explanation of "common control" in the Trustees' Notice was not misleading, because it did not speak "one way or another to the issue" of joint and several liability of other companies under common control with T&W Corp and The E Company, but only indicated that the calculation of withdrawal liability might change, if other companies had contributed. (App. Ex. C at 26a, n.3) It observed that the objection "rings hollow in light of the fact that defendants' attorney received the notice and could have explained it. (*Id.* at 27a, n.4)

The District Court held that *Mullane* was inapplicable because it involved "pre-ERISA Supreme Court law" and that "the principles in *Slotky* account for procedural due process concerns and constitutes the governing law in the area." (App. Ex. C at 27a-28a, n. 5) It found that *Slotky* addressed 'notice and fairness concerns regarding "people who had absolute no reason to believe that they might be deemed members of a control group" and that "the requirements of due process [we]re met" in that case.' (*Id.*)

Nevertheless, the District Court went on to affirmatively find that "all but one of the defendants are members of a controlled group with one of the withdrawing employer defendants. (App. Ex. C. at 28, n.5) It concluded that, "This finding eliminates any concern with the lack of notice provided to these defendants." (*Id.*)

The Seventh Circuit that held that the District Court had correctly applied *Slotky,* which it characterized as "a narrow exception to the general rule" that a party charged with withdrawal liability forfeits its defenses by failing to arbitrate them, when the party "had absolutely no reason to believe they might be deemed to be a member of control group." (App. Ex. A. at 4a) "Relying on this framework," the Seventh Circuit found that the District Court had concluded that none of the Petitioners "had such a credible claim of surprise (at being a member of a control group) to sidestep ERISA's arbitration requirement." (*Id.* at 5a) It pointed out that "the district court went further and determined as factual matter that each of these defendants was a trade or business under common control with another party who received the notice of withdrawal liability." (*Id.*)

Without citation or explanation, the Court of Appeals held that the standards announced in *Mullane* for notice under the Due Process Clause are limited to service of process in lawsuits. (App. Ex. A at 6a) It found Petitioners' reliance on *Mullane* misplaced, stating, "In no way, shape or form did any due process violation occur here," because "the defendants who received – but chose to ignore – the notice . . . had every opportunity to arbitrate" and "as for the defendants who did not receive the notice . . . the district court provided them a full and fair opportunity to litigate their liability as members of the control group . . . . (*Id.* at 6a-7a)

REASONS FOR GRANTING THE PETITION

A review of this case is warranted because it demonstrates the unprecedented departures from the constitutional standards governing notice under the Due

Process Clause in which the Seventh Circuit has engaged. Although this Court has applied *Mullane* v. *Central Hanover Bank & Trust Co.*, 399 U.S. 306 (1950) repeatedly over the last seventy years, the Court of Appeals has broken with these precedents, endangering the procedural protections recognized by the Court in in several ways.

First, contrary to the language of *Mullane* and the actual decisions of this Court in several cases, the Seventh Circuit found that the established protections of the Due Process Clause recognized in *Mullane* are limited to service in law suits. The Court of Appeals neither cited any authority nor provided any rationale for its conclusion. Petitioners' own canvass of cases declining to apply *Mallane* has not revealed any precedent for the Seventh Circuit's holding. Thus, even though the Trustees' collection suit can properly be regarded as a continuation of the process which they instituted with their Notice of Withdraw Liability, neither the efficacy of the contents of that Notice nor the use of constructive service to notify persons who were known or reasonably ascertainable were reviewed under the Seventh Circuit's novel limitation.

Second, the decision of Court of Appeals in *Central States S.E. & S.W. Area Pension Fund v. Slotky*, 956 F.2d 1369, 1373 (7th Cir. 1992), promulgated a subjective test which invites courts to divine whether defendants " had absolutely no reason to believe that they might be deemed members of control group." This is an inappropriate substitute for the *Mallane test*, which balances the rights of persons under the Due Process Clause against governmental interests. Under this balancing test, the Courts to focused on such objective factors as the effectiveness of the notice and the burden on the

governmental purpose of the proceedings under the circumstances. 399 U.S. at 313-15. Further, the *Slotky* decision shifts the burden of proof to the recipient of the notice, undermining the duty of the government or a person or entity acting on its behalf which initiated the notice to adopt reasonable means designed to accomplish the purpose of informing the recipient of the risk of the loss of his property. (*Id.* at 315)

Third, the Court of Appeals found Petitioners had suffered no harm because the District Court had reviewed their membership in the alleged control group. This holding clashes with the standard of review applied by this Court in *Peralta v. Heights Medical Center*, 485 U.S. 80 (1988), which recognized that a judgment obtained by improper service in violation of due process under *Mullane* voids the judgment, regardless of whether the defendant can show a meritorious defense.

These departures from this Court's precedent are so numerous and so radically different from the existing principles of procedural due process established by this Court as to warrant review.

I. THE DECISION BELOW CONFLICTS WITH *MULLANE* AND OTHER AUTHORITY OF THIS COURT BASED ON ITS CONSTITUTIONAL STANDARDS

In *Mullane*, this Court announce the basic standard for notice under the Due Process Clause:

> An elementary and fundamental requirement of due process *is in any proceeding which is*

> *to be accorded finality* is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . The notice must be such a nature as reasonably convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. 339 U.S. at 314 (Citations Omitted) (Emphasis Added)

The phrase "in any proceeding which is to be accorded finality" negates the idea that the required notice is limited to service in a court proceeding. If the Court had been concerned with only court proceedings, it could have said so. Instead, its language indicates that it was concerned with causation and addressing any matter in which there was likely to be a default and of loss of property from a lack of notice or ineffective notice.

If there is any doubt that as to whether the *Mullane* standard is confined to notice in court proceeding, it is certainly resolved by the subsequent decisions of this Court. For instance, *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978) involved nothing more than a final notice by a municipally owned, utility to a customer that her service would be cut off, if she did not pay her bill. The Supreme Court found the notice defective under *Mullane*. *Id*. at 14. The notice was challenged in a civil rights suit by the customer, collaterally from any collection proceeding instituted by the municipality.

Similarly, *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) involved the failure of the county

governmental to provide notice of tax sale to the mortgagee of the property. While a notice had been sent to the property owner, the Court found notice to him, as well as notice by publication or posting, were not reasonably calculated to be effective when the mortgagee is known or reasonably ascertainable. *Id.* at 795-99. The tax sale occurred in a separate proceeding conducted independently from the law suit in which the notice issue was resolved, a suit to quiet title brought by the purchaser of the taxes. *Id.* at 793-95.

Jones v. Flowers, 547 U.S. 220 (2006), also involved a tax sale. The certified letters apprising the owner of the property of the sale were returned and after the sale occurred, the issue of the sufficiency of the notice was raised in a subsequent suit by the owner. *Id* at 223-25. The Court found that failure of the government to pursue other efforts to provide notice transgressed *Mullane*. *Id.* at 229.

Perhaps the most compelling example is *Tulsa Professional Collection Services v. Pope*, 485 U.S. 476 (1988). It involved a notice under a non-claim statute in a probate proceeding. The notice was intended to advise creditors of the deadline for filing their claims and its purpose was administrative; it did not necessarily lead to litigation if the creditor filed, but a failure to file automatically barred the claim. *Id.* at 479-81. Citing *Mennonite* and *Memphis, Light Gas and Water*, this Court found, 'It is not necessary for a proceeding to directly adjudicate the merits of a claim in order to '"adversely affect" a protected property interest.' *Id.* at 488. Accordingly, the Court remanded the case to determine if the creditor was known or reasonably ascertainable and constructive therefore prohibited under *Mullane*. *Id.* at 489

As these examples illustrate, *Mullane*'s standards are applicable to proceedings other than those involving service in law suits. Because of the failure of the employer to meet the arbitration deadline is fatal to defenses and establishes withdrawal liability, the assessment proceeding initiated by a notice of withdrawal liability are designed to be "accorded finality."

The Seventh Circuit offered no rational or explanation for its conclusion that *Mullane* was limited judicial proceedings. It is difficult to conceive one, since the same constitutional concerns with respect to deprivations of life, liberty and property without notice in judicial proceedings obviously pertains to the deprivations of those rights in less august proceeding which serve governmental interests, such as paying governmental fees, fines and assessments, complying with administration deadlines or mandatory arbitrations of property rights as required under as ERISA.

The Seventh Circuit appears to have maintained doubts about the legitimacy of Petitioner's objections, apparently believing Petitioners were hypercritical of ERISA's provisions.[2] Because of this implication and because its ruling necessarily foreclosed review of

2. The Court of Appeals described Petitioners' objections: "In their view, the Supreme Court's decision in *Mullane* . . . required the Pension Fund to serve notice . . . each of them and to explain the standard for control group liability in the notice." (App. A. at 6a) It treated objections as attack on the Statute, rather than procedural due process objections, proclaiming that: "No reading of *Mullane* . . . supports the view that ERISA's controlled group liability provisions and accompanying procedural framework . . . violate due process." (*Id.* at 6a)

their objections, Petitioners shall point out this Court's precedents supporting their due process claims.

To begin with, *Mullane* specifically sets the constitutional standard for the contents of a notice when it declared:

> The notice must be of such nature as reasonably to convey *the required information* . . . and must afford a reasonable time for those interested to make their appearance. 339 U.S. at 314. (Emphasis Added)

And, as pointed out in *Memphis Light, Gas and Water Division v. Craft,* 436 U.S. 1, 13-14 (1978), the notice must provide a person with more information than statement that a payment is overdue and the action which will be taken if payment is not made. The information must suffice "to apprise the affected individual of and permit adequate preparation for an impeding hearing." *Id.* at 14.

The Seventh Circuit's own precedent noted that the metes and bounds of "common control" under ERISA is not intuitive. See *Central States Southeast Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 792-94 (7th Cir. 1992) It is reasonable to conclude, therefore, that the required information to afford a recipient of a Notice of Withdrawal Liability would include some explanation of control group liability. Such information is necessary for the recipient's understanding of their risk losing their property and preparation for a hearing.

Furthermore, the whole concept that notice to one member is notice to all members upon which constructive

service under ERISA is predicated on is the belief that those who received the notice would know enough to pass it on to those who were not given notice. The importance of the contents of a notice of withdrawal liability is heighten, therefore, by the fact that the notice is the vehicle by which unnamed defendants are informed of their risk of vicarious liability.

The Notice which the Trustee sent to T&W Corp., the E Company and Edmier Corp. did not contain any information to let them know that other persons or entities were at risk. Rather, it was misleading in stating that "if other companies have also contributed to the Pension Fund, then the contribution history of those companies should also be considered in calculating withdrawal liability." This language could be reasonably read and was read by the Edmiers to mean a the control group consists of "other corporations that also contributed to the PensionFund." (Kevin Edmier Dep. at 21.2-12; Dkt. # 43-3; See, also William Edmier Dep. 13.2-14,14.6-22 ; Dkt. # 48-3)

The Seventh Circuit ignored the issue, apparently satisfied that a description of control group liability was not constitutional required or that the District Court had not found the Trustees' Notice misleading. The District Court construed Notice simply to mean that "withdrawal liability might change based on the contribution history of other companies under common control." (App. Ex. C. at 26a, n.3) The problem with this construction is that it divorces the language of the Notice from: (i) T&W Corp.'s and the E Company's actual relationship with the Pension Fund, (ii) from the purpose of the Statute and (iii) from the description of joint and several liability in the Statute.

The Fund's Administrator admitted that the only defendants to have contributed the Fund were T&W Corp. and the E Company. (Colin Dep. 21.3-14; Dkt. # 48-2) Since it was reasonable to assume the language served a purpose or it would not have been included in the letter if it did not, it was reasonable and natural for the Edmiers to believe that it the outlined liability under ERISA. Further, as pointed out in this Court's decision in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 725 (1984), the purpose of withdrawal liability is to capture the plan's "unfounded vested benefits," calculated as the difference between the present value of vested benefits and the current value of the plan's assets.' By definition, therefore, only the contribution history of T&W Corp. and The E-Company was relevant to that liability, even if they received money from other sources to cover those contributions, since employer's portion of the unfounded vested benefits covered employees remains the same.

The Statute itself provides that "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer." 29 U.S.C. § 1301(b)(1). If the Trustees had advised the Edmiers that liability extended to all "trades and businesses" which were under common control or that "all such trades and businesses" were regarded as "a single employer," they could have understood that liability didn't just extend to "other corporations" that had contributed to the Fund.

The District of Columbia Circuit's opinion in *Connors v. Incoal, Inc.*, 995 F.2d 245, 247 (D.C. Cir 1993), illustrates how easily the Trustees could have avoided the misleading

nature of the Notice. In *Connors*, the Notice specifically provided that "all members of a commonly-controlled group of trades and businesses are jointly and severally liable" for the payment of the withdrawal liability. *Id.* at 247.

The Trustees were also not forthcoming in advising the Petitioners with such necessary information as their rights to review and arbitration of the assessment of withdraw liability, the deadlines for exercising those remedies or the forfeiture of their defenses, if they failed to arbitrate. The Notice only directed them to "ERISA Sections 4219 and 4221" for a description of "the rights you may have." The reference to Sections 4219 and 4221 is to the provisions as they appeared in the bill in Congress which was introduced to amend of ERISA, rather than the provisions of the United States Code. One had to find the provisions in the original bill and trace them to the Code to ascertain one's rights. Both the District Court and the Seventh Circuit ignored this impediment even though it shows that the Trustees, especially when coupled with their failure to explain the joint and several of trades and businesses under common control, were not truly "desirous of actually informing" the recipients of this necessary information. *Mullane*, 339 U.S. at 315.

The identities of the Edmiers were known to the Trustees from the suits in which they sought to recover monthly contributions from them. Their identities could also be ascertained from the records of the Illinois Secretary of State. *Mullane* and its progeny hold that under such circumstances one cannot rely on theories of constructive notice. 399 U.S. at 318. See, also, *Walker v. City of Hutchison*, 352 U.S. 112, 116-17 (1956); *Schroder v.* City of New *York*, 371 U.S. 208, 210-13 (1962); *Greene*

v. *Lindsey*, 456 U.S. 444, 450-54 (1982); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798-99 (1983); *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 489-90 (1988). These decisions have repeatedly emphasized that constructive services is not reasonably calculated to reach those individual who can be informed directly. The Seventh Circuit's disposition of this matter, irreconcilably conflicts with this string of decisions by this Court.

II. THE SEVENTH CIRCUIT'S DECISION IN *SLOTKY* RELIED ON BELOW UNDERCUTS THE CONSTITUTIONAL STANDARDS ESTABLISHED BY *MULLANE*

Mullane sets forth an analytical framework in which "where the interest of the State is balanced against the individual interest sought to be protected" by the Due Process Clause under "all circumstances of the case." 339 U.S. at 314. See, also, *Jones v. Flowers*, 547 U.S. 220, 229 (2006); *Tulsa Professional Collection Service, Inc. v. Pope*, 485 U.S. 478, 484 (1988). This Court recognized that due process required the government, or a party acting on its behalf, to warn of defendant of the risk of a loss of life, liberty or property in proceeding brought by them. 339 U.S. at 314-15. In subsequent cases the Court has expanded this duty beyond simply the initiation of a proceeding to subsequent circumstances where it is known the original notice did not reach the intended recipient or is unlikely to reach them. See, *Jones v. Flowers*, 547 U.S. 220, 238 (2006) and *Greene v. Linsey*, 456 U.S. 444, 450-54 (1982). In requiring that the warning be "reasonably calculated . . . to appraise interested parties of the pendency of the action and afford them an opportunity to

present their objections," this Court established a test for the assessment of the effectiveness of the notice, which focused on such objective factors such as the method of service and the contents of the notice. These factors were balanced against the purported burden which the notice imposed on the governmental interest in the proceeding.

The *Slotky* decision, which the District Court concluded governed Petitioners' due process objections, is a radical and flawed substitute for the *Mullane* standard. It ignores or minimizes the government's duty under the Due Process Clause and departs from this Court's balancing test and concerns about the effectiveness of service and the contents of the notice. Instead, *Slotsky* promulgates a subjective test, coupled with extreme evidentiary standard – "absolutely no reason to believe they might be deemed members of a control group." 653 F.3d at 1373. The unfairness of this subjective standard is obvious, since it invites speculation about a defendant's collateral knowledge or information about the proceedings and risk of deprivation. Consequently, the efficacy of the notice is no longer of a central concern, if any, under *Slotky.*

The District Court's decision in this case provides an illustration of these flaws. It specifically noted that *Slotky* provided no test for the determination of the ineffectiveness of a notice other than the notion that the purported control group member must be as clueless an unsuspecting Easter Bunny (App. Ex. C. at 25a). The District Court further noted that:

> Even if not named in the notice, the *Slotky* court explained that "the statutory policy of encouraging prompt nonjudicial resolution of

> disputes" might require any defendant who "should know that he might very well be deemed a member of a control group" "to institute arbitration on penalty of losing all opportunity to contest his membership." 956 F.3d at 1373 (App. Ex. C. at 26a)

The District Court therefore concluded that certain petitioners "might be deemed to have been on constructive notice of potential liability and to waived any control group membership defense," because it was sent to the principal place of business that they had shared with T&W Corp. and E Company. (App. Ex. C. at 26a) It further concluded that the fact the former attorney/registered agent had received the notice "could support the conclusion that all the defendants should have been alerted to their potential liability" because he could have explained the notice to them. (*Id*. at 26a-27a)[3]

This invitation for speculation is compounded by *Slotky's* departure from the balancing test of *Mullane* and consideration of only the government's interest in

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3. Speculation as to such subjective matters such as credibility, knowledge or intent is insidious and inappropriate for summary judgment. E.g., *Reeves v. Sanderson Plumbing Products, Inc.*, 500 U.S. 133, 150 (2000); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596 (1986). It was particularly harmful here, since the Edmiers unrebutted deposition testimony was that they were misled by the Trustee's Notice. Furthermore, the only duty of the attorney/agent after the dissolution of T&W Corp. and E-Company was his duty as the registered agent to forward the notice to their former owners. There is no evidence he ever consulted with them about the Notice and it cannot be assumed that he had any knowledge its content was wrong before this suit.

"encouraging prompt nonjudicial resolutions of disputes." Under the balancing test a court was required to weigh the efficacy of the notice used by the governmental against feasibility of alternatives. If the impact of the alternative notice is not so great to unduly hinder the governmental interest then the alternative will be sustained. For example, this was precisely the balance which was struck in *Tulsa Professional Collection Service*, *supra*, 485 U.S. at 490, when it was argued personal notice under the non-claim statute would hinder probate proceedings.

The governmental interest in "encouraging prompt nonjudicial resolutions of disputes" is no different. Nor is the inclusion of an accurate description of joint and several liability under ERISA or a direct and transparent disclosure of ones rights to review and arbitration under the Statute. All that was required was a little care and some minor modification of the Trustees' letter. See, *Connors v. Incoal, Inc. supra*, 995 F.2d at 247. It would not have hindered a resolution of withdrawal liability during a review or through in arbitration to advise the Edmiers of their risk of liability or their rights under ERISA. If anything, such notice would have contributed to possibility of a non-judicial resolution and expedited the ultimate disposition of the Trustee's claim.

In promulgating its decision in *Slotky*, the Seventh Circuit did not pause to balance the government's interest against the individual interest sought to be protected by the Due Process Clause. It focus solely on protecting the government's interest. Nevertheless, it had the opportunity to correct this omission in this case and neglect to do so, even though Petitioners argued the same decisions of this Court which they argue in this Petition.

Instead, the Seventh Circuit approved the District Court's adoption of the *Slotky* and its conclusion that *Slotky* set the due process standard.

The Slotky decision departs from the constitutional precedents of this Court and presents a continuing source of confusion within the Seventh Circuit, if not elsewhere, of the principles procedural due process.

III. THE SEVENTH CIRCUIT'S REVIEW CONFLICTS WITH THIS COURT'S HOLDING IN *PERALTA*

The Seventh Circuit held that Petitioners suffered no harm because the District Court had "determined as factual matter that each of these defendants was a trade or business under common control with another party who received the notice of withdrawal liability." (App. A at 5a) It reasoned that any defect in the efficacy of service or the contents of the Trustee's Notice was obviated by this review on the merits. This approach ignores the primacy of notice in accordance with the Due Process Clause in our system of justice and conflicts with this Court's decision in *Peralta v. Heights Medical Center*, 485 U.S. 80 (1988).

Peralta involved the denial of a petition to review a default judgment which the defendant had sought to set aside because of invalid service. The petition was denied because defendant had not shown a meritorious defense as required by Texas law. This Court held that invalid service violates the Due Process Clause and voids a judgment, regardless of whether defendant could show a meritorious defense. It rejected the notion that a defendant had suffered no harm in the absence of meritorious defense, pointing out that a judgment has serious consequences and

if notified of suit, a defendant has the options of selling property, working out a settlement or simply paying the debt. 485 U.S. at 85. This Court specifically invoked *Mullane* and quoted its due process standard in reaching its decision. *Id,* at 84. It held that "wiping the slate clean" was the only effective means of restoring the defendant "to the position he would have occupied if due process of law had been accorded him in the first place." *Id.* at 87.

The teachings of *Peralta* are applicable in this suit. The Trustee delayed issuing their Notice of Withdrawal for two years after T&W Corp and E Company stopped contributing to the Pension Fund, despite the fact that ERISA directs plan sponsors to issue notices as soon as "practicable after an employer's complete or partial withdrawal. 29 U.S.C. §1399(b) (1). During this two year delay the Edmiers personally spent over $650,000 to cover obligations of T&W Corp. and E Company in an attempt to salvage the corporations. (Dkt. # 48-2 at 23) The Edmiers believe that the Trustees' delay in issuing the Notice was unreasonable, if not intentional. The Edmiers could have avoided spending a substantial portion of the $650,000 had the Notice been issued within a reasonable time after the corporations had ceased contributing to the Pension Fund. The District Court's review of merits of the Trustee's control group allegations does not address this injury, since under *Slotky* the District Court's authority is limited to adjudication of control group membership, not the Trustees' general administration of withdrawal liability. 956 F.2d at 1373.

Even ignoring the Trustees' delay, the failure to accord Petitioners due process led to the kind of injuries noted in *Peralta*. As pointed out previously, the Edmiers' identities were known to the Trustee or could have been

easily ascertained by them. Nothing would have been more likely to catch the Edmier's attention than seeing their names on the Notice. See, *Mullane*, 339 U.S. at 315. Likewise, clear and meaningful description of control group liability and a direct and transparent statement one's rights to review and arbitration under are ERISA are not burdensome tasks and are likely to compel the Edmiers to exercise their rights review and/or arbitration. Once in review or arbitration, the Edmier might reach a settlement or knowingly chose to default. Such a default would have saved the Edmiers as much as $ 219.000 of interest, penalties and attorney fees which were assessed by the District Court. (App. Ex. B at 10a-11a)

As in *Peralta*, this Court should repudiate the harmless error rule as a justification for the failure of a court to set aside judgment secured by invalid notice under the Due Process Clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Merle L. Royce II, Esq.
Counsel of Record
135 South LaSalle Street,
Suite 4000
Chicago, Illinois 60603
(312) 553-1233
royce4law@gmail.com

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JANUARY 29, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-2273

TRUSTEES OF THE SUBURBAN TEAMSTERS OF NORTHERN ILLINOIS PENSION FUND,

Plaintiff-Appellee,

v.

THE E COMPANY, A DISSOLVED ILLINOIS CORPORATION, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:15-cv-10323 — **Thomas M. Durkin**, *Judge.*

January 18, 2019, Argued
January 29, 2019, Decided

Before EASTERBROOK, BARRETT, and SCUDDER, *Circuit Judges.*

SCUDDER, *Circuit Judge.* Under the terms of a collective bargaining agreement, T&W Edmier

Corporation regularly contributed on behalf of its employees to the Suburban Teamsters of Northern Illinois Pension Fund. But in 2014 T&W ceased operations and cut off its pension contributions, prompting the Pension Fund to assess withdrawal liability of $640,900. The Pension Fund sought to collect payment by mailing a notice of the withdrawal liability to T&W and several affiliated entities, only to see their collection efforts ignored. The Trustees of the Pension Fund eventually sued to collect payment, and that action culminated in the district court ordering T&W, along with several other individuals and entities under common control, to pay the withdrawal liability. Now seeking to vacate the district court's judgment, T&W and the other defendants argue that their due process rights were violated when the Pension Fund initiated collection of the withdrawal liability by mailing notice to some but not all of them. Seeing no error, we affirm.

I

T&W Edmier Corporation operated a construction business in tandem with The E Company. T&W owned the construction equipment while The E Company hired and provided employees. Brothers Thomas and William Edmier each owned 50% of T&W. Kevin Edmier, William's son, owned and operated The E Company. Pursuant to the terms of a collective bargaining agreement with its employees, T&W participated in the Suburban Teamsters of Northern Illinois multi-employer pension plan, and, for its part, The E Company agreed to assume joint and several liability for T&W's obligations to the Pension Fund. In 2014, however, T&W and The E Company ceased operations, dissolved, and withdrew from the plan.

Appendix A

The Multiemployer Pension Plan Amendments to the Employee Retirement Income Security Act require a covered plan to assess withdrawal liability against a withdrawing employer. See 29 U.S.C. § 1396. Withdrawal liability, as its name implies, is designed to prevent shifting the financial burden of employees' vested pension benefits to other employers in the multi-employer plan. We explained these principles at some length in *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1371-72 (7th Cir. 1992).

Consistent with ERISA's mandate, the Pension Fund mailed a notice of withdrawal liability on April 30, 2015, a past due notice on August 17, 2015, and a default and acceleration notice on November 12, 2015. The notice went to T&W, The E Company, and the Edmier Corporation (another entity wholly owned by Thomas Edmier). Even more specifically, the Pension Fund sent the notice to the attention of Thomas, William, and Kevin Edmier, as well as attorney George Grumley, the registered agent of both T&W and The E Company. At their depositions, Thomas, William, and Kevin Edmier acknowledged receiving the notice.

The Pension Fund's notices went unanswered and, as a result, the Pension Fund's Trustees initiated a lawsuit in the district court. Ignoring the Pension Fund's requests for payment had significant legal consequences for the defendants. Congress has required that all disputes over withdrawal liability be resolved through arbitration, see 29 U.S.C. § 1401(a)(1), and an employer's failure to arbitrate means "the plan can then immediately file suit

to collect the entire amount of withdrawal liability, and in that proceeding the employer will have forfeited any defenses it could have presented to the arbitrator," *Nat'l Shopmen Pension Fund v. DISA Industries, Inc.*, 653 F.3d 573, 579 (7th Cir. 2011).

Our case law has recognized a narrow exception to this general rule of forfeiture for a party who "had absolutely no reason to believe that they might be deemed members of a controlled group" but is nonetheless sued and alleged to be liable for another party's withdrawal liability based on ERISA's "controlled group" provision. See *Slotky*, 956 F.2d at 1373. The controlled group provision imputes liability to all "trades or businesses" under "common control" with another party who is liable for the withdrawal liability. See 29 U.S.C. § 1301(b)(1). And our decision in *Slotky* allows unsuspecting defendants who are sued in district court but had no idea they might be liable as members of a controlled group to litigate that question—membership in a controlled group. See 956 F.2d at 1373.

Relying on this framework, the district court concluded that T&W, The E Company, and the Edmier Corporation had forfeited all defenses to liability, including the defense that they were not members of a controlled group, by failing to arbitrate after receiving the Pension Fund's notice of withdrawal liability. This outcome reflected a straightforward application of these defendants not complying with the clear arbitration mandate in 29 U.S.C. § 1301(b)(1).

As for each of the other defendants (Thomas, William, and Kevin Edmier; K. Edmier & Sons LLC; The William Edmier Trust; Lake Street Realty, Inc.; and E&E Equipment & Leasing), the district court explained that they too had likely forfeited all defenses as they were not the type of unsuspecting defendant contemplated in *Slotky*. Put differently, the district court reasoned that none of these defendants had such a credible claim of surprise (at being a member of a controlled group) to sidestep ERISA's arbitration requirement. Regardless, the district court went further and determined as a factual matter that each of these defendants was a trade or business under common control with another party who received the notice of withdrawal liability. This reasoning finds strong support in the record and resulted in the district court concluding that each of these defendants was liable under ERISA's controlled group provision.

In the end, the district court entered summary judgment for the Pension Fund's Trustees and ordered the defendants to pay the full $640,900 of withdrawal liability, plus interest, liquidated damages, attorneys' fees, and costs. As members of a controlled group, each of the defendants became jointly and severally liable for payment. See *Central States, Southeast and Southwest Areas Pension Fund v. Koder*, 969 F.2d 451, 452 (7th Cir. 1992) (citing 29 U.S.C. § 1301(b)(1)).

II

The defendants challenge the district court's judgment by arguing that the Pension Fund's notice of withdrawal

liability violated the Fifth Amendment's Due Process Clause. In their view, the Supreme Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) required the Pension Fund to serve the notice of withdrawal liability on each of them and to explain the standard for controlled group liability under ERISA in the notice. This contention misses the mark.

The defendants' reliance on *Mullane* is misplaced because all parties agree that judicial proceedings commenced in the district court with proper service of process (notice of the complaint) to each defendant. The due process standard announced in *Mullane*—a decision requiring sufficient notice of a pending judicial proceeding—was therefore satisfied. No reading of *Mullane*, however, supports the view that ERISA's controlled group liability provisions and accompanying procedural framework (in which a defendant forfeits certain defenses by failing to arbitrate) violate due process.

A related observation is in order. The defendants colloquially and imprecisely allege a violation of due process, time and again citing *Mullane*. In no way, shape, or form did any due process violation occur here. The defendants who received—but chose to ignore—the notice of withdrawal liability had every opportunity to arbitrate and yet failed to do so, resulting, by operation of ERISA, in a waiver of all defenses to withdrawal liability. No unfairness inheres in that outcome. And, as for the defendants who did not receive the notice of withdrawal

liability but nonetheless found themselves named in a federal lawsuit, the district court provided them a full and fair opportunity to litigate their liability as members of a controlled group. Nothing about the path those defendants traveled offends due process.

For these reasons, we AFFIRM.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION FILED MAY 9, 2018

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 15 C 10323

TRUSTEES OF THE SUBURBAN TEAMSTERS
OF NORTHERN ILLINOIS PENSION FUND,

Plaintiffs,

v.

THE E COMPANY, *et al.*,

Defendants.

Judge Thomas M. Durkin

Order

For the reasons explained below and as further set forth in the separate Order of Judgment, this Court grants plaintiff Trustees of the Suburban Teamsters of Northern Illinois Pension Fund's ("the Fund's") motion for attorney's fees [99] and awards the Fund a judgment in the amount of $858,319.52.

Appendix B

Background

On March 22, 2018, this Court granted the Fund's motion for summary judgment (R. 47) and instructed the Fund to file a petition setting forth its claimed interest, liquidated damages, attorneys' fees, and costs, along with a proposed order, on or before April 20, 2018. R. 98 at 7. On April 20, 2018, the Fund filed a motion for attorneys' fees (R. 99) along with a memorandum proving up damages for entry of final judgment (R. 100). Defendants The E Company, T & W Edmier Corp., Edmier Corp., K. Edmier & Sons, LLC, Thomas W. Edmier, William Edmier, The William Edmier Trust, Lake Street Realty, Inc., and E & E Equipment & Leasing, Inc. ("defendants") filed an objection on May 4, 2018. R. 102. On May 7, 2018, the Fund moved for leave to cite supplemental authority addressing an argument in defendants' objection. R. 103. This Court granted the Fund leave to file supplemental authority and has considered that authority in this ruling. R. 105. On May 8, 2018, defendants filed a surreply in support of their objection. R. 106.

Analysis

Once the Court awards a plan withdrawal liability under ERISA, defendants are jointly and severally liable not only for the full amount of withdrawal liability, but also interest, liquidated damages, attorneys' fees, and costs under 29 U.S.C. § 1132(g)(2). *See, e.g.*, *Cent. States S.E. & S.W. Areas Pension Fund v. Slotky,* 956 F.2d 1369, 1377 (7th Cir. 1992) (interest, liquidated damages, attorneys' fees, and costs properly added to withdrawal

liability under 29 U.S.C. § 1132(g)(2)). Section1132(g)(2) specifically provides:

> In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—(i) interest on the unpaid contributions, or (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant,
>
> and (E) such other legal or equitable relief as the court deems appropriate.

As set forth in this Court's summary judgment opinion, the amount of unpaid contributions in this case is $640,900. R. 98 at 17. In addition to that amount, the Fund calculates interest in the amount of $77,821.52, relying in support on an affidavit from the Fund administrator that explains the process of using the interest rates established by the Pension Benefit Guaranty Corporation (in accordance with

26 U.S.C. § 6621 and 29 U.S.C. § 1132(g)(2)) to calculate the amount of interest. R. 99-1 ¶¶ 4-7. The Fund also calculates liquidated damages in the amount of $64,090, which represents 10% of the delinquency pursuant to the terms of the Pension Trust Agreement and 29 U.S.C. § 1132(g)(2). *Id.* ¶ 8. Finally, the Fund calculates total attorneys' fees and costs from April 30, 2015 through March 2018 of $75,508, attaching an attorney affidavit setting forth in detail the work performed and the billing rate for that work (289 hours x $250 per hour = $72,346.13 of attorney time, plus $3,161.87 in itemized costs), as well as the billing records themselves. R. 99-2 ¶¶ 9-11; R. 99-3.

In response, defendants do not object to the reasonableness of the Fund's requested attorneys' fees and costs. And the Court finds that amount reasonable. The award of reasonable attorney's fees is a "mandatory add-on[ ] in (successful) suits" for "failure to satisfy withdrawal liability." *Slotky*, 956 F.2d at 1377. "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Anderson v. AB Painting & Sandblasting Inc.*, 578 F.3d 542, 544 (7th Cir. 2009). This Court finds that the $250 hourly rate charged in this case is in line with market rates approved for similar work. *E.g.*, *Bd. of Trustees of the Auto. Mechanics' Local No. 701 Union & Indus. Pension Fund v. 6516 Ogden Ave., LLC*, 170 F. Supp. 3d 1179, 1186 (N.D. Ill. 2016) (Dow, J.) ("$257.00 per hour" rate reasonable "to recover over $600,000 in unpaid ERISA liability"). And the Court finds the 289 hours spent reasonable in light of the relative complexity of this ERISA collection action, which

spanned the course of two and a half years and required the Fund's counsel to address control group liability issues involving a number of different defendant entities, as well as belated supplemental briefing on summary judgment raising new theories.

Defendants also do not object to the Fund's requested award of $77,821.52 in interest. 29 U.S.C. § 1132(g)(2)(B). Nor do defendants object to the method used by the Fund to calculate interest, which is the same method approved by other courts in this district. *E.g.*, *6516 Ogden Ave.*, 170 F. Supp. 2d at 1185-86.

Defendants object solely to the Fund's requested award of liquidated damages. They do not object to the Fund's calculation of the amount of liquidated damages, which is straightforward: 10% of the unpaid contributions, which amounts to $64,090. Instead, they focus on subsection (C) of the statute, which states that the Fund is entitled to "an amount equal to the greater of—(i) interest on the unpaid contributions, or (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A)." *Id.* Defendants maintain that under subsection (C), the Fund is entitled to interest *or* liquidated damages (whichever is greater), but not both.

The problem with defendants' argument is that it ignores subsection (B) of the statute. Subsection (B) makes clear that the Fund is entitled to "interest on the

unpaid contributions" no matter what. 29 U.S.C. § 1132(g)(2)(B). On top of the interest that the Fund is entitled to under subsection (B), subsection (C) entitles the Fund to the "greater of (i) interest on unpaid contributions (*i.e.*, *double interest*) and (ii) liquidated damages provided for in the plan." *E.g.*, *Trustees of the Chicago Painters & Decorators Pension, Health & Welfare & Deferred Sav. Plan Tr. Funds v. Darwan*, 2006 WL 897942, at *5 (N.D. Ill. Mar. 31, 2006) (Pallmeyer, J.), *aff'd sub nom. Trustees of Chicago Painters & Decorators Pension, Health & Welfare, & Deferred Sav. Plan Tr. Funds v. Royal Int'l Drywall & Decorating, Inc.*, 493 F.3d 782 (7th Cir. 2007) (emphasis added). The Seventh Circuit has expressly rejected the argument "that the legislature did not mean what it said when it mandated interest and double interest on unpaid contributions" in cases where interest is greater than liquidated damages. *Moriarty ex rel. Local Union No. 727, I.B.T. Pension Tr., & the Teamsters Local Union No. 727 Health & Welfare Tr. v. Svec*, 429 F.3d 710, 721 (7th Cir. 2005) (affirming "judgment of the district court requiring Svec to pay Moriarty interest and double interest totaling $51,628.10 on the unpaid contributions" under "29 U.S.C. § 1132(g)(2)(B), (C)").

Thus, courts routinely award interest under subsection (B) plus liquidated damages *or* double interest under subsection (C). *See, e.g.*, *id.*; *6516 Ogden Ave.*, 170 F. Supp. 2d at 1185-86 (awarding under subsection (B) "interest on . . . unpaid withdrawal liability" of $87,974.18, and under subsection (C), liquidated damages of "10% of the unpaid withdrawal liability" of $50,791.80); *Cent. States, Se. & Sw. Areas Pension Fund v. Allied Sys., Ltd.*, 795 F. Supp. 2d 740, 743 (N.D. Ill. 2011) ("[u]nder Section 1132(g)

(2), a plaintiff may seek the greater of double interest or single interest plus liquidated damages"; awarding single interest plus liquidated damages).

In this case, because the interest amount of $77,821.52 is greater than the liquidated damages amount of $64,090, the Fund would be entitled to an award of "double interest" if it had chosen to seek it. *E.g.*, *Darwan*, 2006 WL 897942, at *5. But because the Fund has chosen to request liquidated damages plus single interest instead of double interest, this Court will award what the Fund requests. *Operating Engineers Local 139 Health Benefit Fund v. Gustafson Const. Corp.*, 258 F.3d 645, 654 (7th Cir. 2001) ("fund was entitled to choose between double interest . . . and single interest plus liquidated damages")[1]

Finally, defendants argue that a liquidated damages award would be an unlawful penalty. This argument is foreclosed by Seventh Circuit precedent, which has upheld the lawfulness of the liquidated damages "penalty . . . imposed on employers [by 29 U.S.C. § 1132(g)(2)(C)(ii)] . . . that refuse to pay after receiving the notice of assessment." *Central States Pension Fund v. Lady*

1. Defendants' surreply implies that Section 1132(g)(2) changed between the Seventh Circuit's decision in *Gustafson* and today. Defendants say that Section 1132(g)(2) used to allow "an award of double interest penalty," whereas today it allows "statutory interest 'or' liquidated damages." R. 106 at 2. But the statute was the same then. It allowed for "interest . . . *plus* an amount equal to the greater of that interest or 'liquidated damages.'" *Gustfason*, 258 F.3d at 652 (emphasis added); *see also* 29 U.S.C. § 1132(g)(2) (1988) (same text as today).

Baltimore Foods, Inc., 960 F.2d 1339, 1347 (7th Cir. 1992); *see also Gustafson*, 258 F.3d at 654 ("As for applying the common law's doctrine making contract penalty clauses unenforceable to liquidated-damages provisions in ERISA plans, the doctrine obviously is not intended to apply to statutory penalties and if it did so apply, it would be preempted. . . . [S]ection 1132(g)(2) is a penalty statute."). The primary case on which defendants rely, *United Order of American Bricklayers & Stone Masons Union No. 1 v. Thorlief Larson & Sons, Inc.*, 519 F.2d 331 (7th Cir. 1975), predated these cases and dealt only with a contractual liquidated damages provision and not the statutory provision in 29 U.S.C. § 1132(g)(2)(C)(ii). *Id.* at 332, 336. Moreover, in *Thorlief*, the Seventh Circuit upheld a 10% contractual liquidated damages clause as reasonable. *See id.* at 336; *see also Painters Dist. Council No. 30 Pension Fund v. Matan's Painting & Decorating, Ltd.*, 1994 WL 243868, at *6 (N.D. Ill. June 2, 1994) (case relied on by defendants finding "$50.00 per month minimum liquidated damages provision [in collective bargaining agreement] . . . void as a penalty," but that "plaintiffs [we] re still entitled to liquidated damages under 29 U.S.C. § 1132(g)(2)(C)").

For the foregoing reasons and as set forth in the separate Order of Judgment, this Court grants the Fund's motion for attorney's fees [99] and awards the Fund final judgment in the amount of $858,319.52.

Appendix B

ENTERED:

/s/Thomas M. Durkin
Honorable Thomas M. Durkin
United States District Judge

Dated: May 9, 2018

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED MARCH 21, 2018

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 15 C 10323

TRUSTEES OF THE SUBURBAN TEAMSTERS OF NORTHERN ILLINOIS PENSION FUND,

Plaintiffs,

v.

THE E COMPANY, *et al.*,

Defendants.

March 21, 2018, Decided;
March 21, 2018, Filed

Honorable Thomas M. Durkin, United States District Judge.

MEMORANDUM OPINION & ORDER

Plaintiffs Trustees of the Suburban Teamsters of Northern Illinois Pension Fund ("the Fund") sued defendants The E Company, T & W Edmier Corp., Edmier Corp., K. Edmier & Sons, LLC, Thomas W. Edmier,

William Edmier, The William Edmier Trust, Lake Street Realty, Inc., and E & E Equipment & Leasing, Inc. ("defendants") to collect liability incurred under the Employee Retirement Income Security Act of 1974 ("ERISA") after The E Company and T & W Edmier withdrew from the Fund. The Fund seeks to hold all defendants—a group of closely-held entities and their owners—jointly and severally liable for The E Company and T & W Edmier's withdrawal liability.

Currently before the Court is the Fund's motion for summary judgment. R. 47. For the reasons that follow, the Court grants the Fund's motion.[1]

STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The Court considers the entire evidentiary record and must view all of the evidence and draw all reasonable inferences from that evidence in the light most favorable to the nonmovant. *Ball v. Kotter*, 723 F.3d 813, 821 (7th Cir. 2013). To defeat summary judgment, a nonmovant must produce more than "a mere scintilla of evidence" and

1. The Court also grants defendants' motion for an extension of time to file supplemental briefing (R. 84). This Court has considered that supplemental briefing in its ruling. The Court grants in part and denies in part the Fund's motion to strike defendants' supplemental statement of additional facts (R. 93).

come forward with "specific facts showing that there is a genuine issue for trial." *Harris N.A. v. Hershey*, 711 F.3d 794, 798 (7th Cir. 2013). Ultimately, summary judgment is warranted only if a reasonable jury could not return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

ANALYSIS

It is well-established that "[w]hen an employer participates in a multiemployer pension plan and then withdraws," not only can federal courts enter judgment against the employer for withdrawal liability, but they can "impose liability on owners and related businesses." *Cent. States Se. & Sw. Areas Pension Fund v. Messina Prod., LLC*, 706 F.3d 874, 877 (7th Cir. 2013). As shown below, based on straightforward application of ERISA principles, withdrawing employers The E Company and T & W Edmier's liability assessment is due and owing, and they have waived any defenses to that assessment by failing to arbitrate. Less straightforward is the issue of whether the other defendants are jointly and severally liable for that withdrawal liability. The Court first addresses the withdrawing employer defendants' liability, followed by the other defendants' joint and several liability.

A. Liability of Withdrawing Employers

ERISA, "as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), establishes withdrawal liability for employers leaving a multiemployer

pension plan." *Ind. Elec. Workers Pension Ben. Fund v. ManWeb Servs.*, 884 F.3d 770, 2018 U.S. App. LEXIS 6103, 2018 WL 1250471, at *1 (7th Cir. Mar. 12, 2018). "[A] complete withdrawal from a multiemployer plan occurs when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383.

Defendant T & W Edmier, a construction company, signed a collective bargaining agreement with the Fund, which The E Company adopted in a joint and several liability agreement. R. 72 (Ds' Resp. to Ps' L.R. 56.1 Statement[2]) ¶¶ 7-8, 36-37. Both T & W Edmier and The E

2. Defendants responded to numerous paragraphs in the Fund's Local Rule 56.1 Statement of Material Facts by stating "disputed" or by making a factual assertion without citing any evidence in support. These responses plainly violated the local rules, which obligated defendants to "includ[e], in the case of any disagreement, specific references to the affidavits, parts of the records, and other supporting materials relied on." L.R. 56.1(b)(3)(B). After the Fund highlighted this issue in its reply (R. 73 at 2), defendants' counsel admitted non-compliance and sought leave to file a supporting affidavit on or before November 28, 2017, which the Court granted. R. 78. But defendants never filed a supporting affidavit. The Court therefore deems admitted all facts set forth in the Fund's Local Rule 56.1 Statement. *See, e.g., Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 218-19 (7th Cir. 2015) ("When a responding party's statement fails to dispute the facts set forth in the moving party's statement in the manner dictated by the [local] rule, those facts are deemed admitted for purposes of the motion. The non-moving party's failure to admit or deny facts as presented in the moving party's statement or to cite to any admissible evidence to support facts presented in response by the non-moving party render the facts presented by

Company stopped making contributions to the Fund and closed operations in 2014. *Id.* ¶ 23. These facts constitute a complete withdrawal.

Under ERISA, an employer who completely withdraws "is liable to the plan in the amount determined . . . to be the withdrawal liability." 29 U.S.C. § 1381. If the employer does not pay, the plan can declare a default, and after giving notice of default, accelerate the full amount of withdrawal liability. 29 U.S.C. § 1399(c)(5).

The Fund assessed withdrawal liability of $640,900 against The E Company and T & W Edmier. R. 72 ¶¶ 21, 46. The Fund sent The E Company and T & W Edmier a notice of withdrawal liability on April 30, 2015, a past due notice on August 17, 2015, and a default notice and acceleration on November 12, 2015. *Id.* ¶¶ 41, 42, 44, 45. The companies never made any liability payments,

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the moving party as undisputed."); *McGuire v. United Parcel Serv.*, 152 F.3d 673, 675 (7th Cir. 1998) ("An answer that does not deny the allegations in the numbered paragraph with citations to supporting evidence in the record constitutes an admission.").

The Court also grants the Fund's motion to strike defendants' Supplemental Statement of Additional Facts (R. 91)—filed on March 9, 2018 after new counsel appeared for defendants in the case—to the extent that it attempts to contradict facts deemed admitted based on defendants' failure to respond properly to the Fund's Local Rule 56.1 Statement. Defendants waived their right to correct their prior response by failing to file a supporting affidavit when this Court authorized them to do so. The Court otherwise denies the Fund's motion to strike (R. 91), but finds that the facts presented in defendants' Supplemental Statement do not change its conclusions.

responded to the notices, raised any defense, or requested arbitration during the time permitted by ERISA, 29 U.S.C. § 1401. *Id.* ¶¶ 46-47.

T & W Edmier and The E Company claim they "were unable to pay due to the involuntary dissolution of T & W Edmier Corp. and The E Company," and that they stopped operating well before receiving the notice of withdrawal liability. R. 71 at 5. But ERISA is clear that such a dispute must be arbitrated. *See* 29 U.S.C. § 1401(a)(1) ("Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 [including withdrawal liability determinations under § 1399] of this title shall be resolved through arbitration."); *Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054, 1057 (7th Cir. 1988) ("[v]ery simply, § 1401(a)(1) requires arbitration of any dispute regarding a determination made under §§ 1381-1399").

Failure to arbitrate means that "the plan can then immediately file suit," as it has in this case, "to collect the entire amount of withdrawal liability, and in that proceeding the employer will have forfeited any defenses it could have presented to the arbitrator." *Nat'l Shopmen Pension Fund v. DISA Indus., Inc.*, 653 F.3d 573, 579 (7th Cir. 2011) (citing 29 U.S.C. § 1401(b)(1)); *accord Cent. States S.E. & S.W. Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1372 (7th Cir. 1992) ("fail[ure] to request arbitration" means "the amount of withdrawal liability assessed by the plan becomes due and owing and the plan can . . . sue to collect it"). Because The E Company and T & W Edmier

failed to arbitrate, the $640,900 withdrawal liability assessment is "due and owing" (*Slotky*, 956 F.2d at 1372), and defenses that could have been raised in arbitration are waived (*Nat'l Shopmen*, 653 F.3d at 579).

B. Joint and Several Liability of Other Defendants

"Not only the withdrawing employer" incurs withdrawal liability. *Messina*, 706 F.3d at 878. "Congress also provided that all 'trades or businesses' under 'common control' with the withdrawing employer are treated as a single entity for purposes of assessing and collecting withdrawal liability. Each trade or business found to be under common control is jointly and severally liable for any withdrawal liability of any other." *Id.* (quoting 29 U.S.C. § 1301(b)(1)). This is commonly referred to as "the controlled group provision." *Slotky*, 956 F.2d at 1372. The purpose of this provision is "to prevent businesses from shirking their ERISA obligations by fractionalizing operations into many separate entities." *Messina*, 706 F.3d at 878.

The Fund maintains that all defendants are part of a controlled group, and that they have waived any ability to challenge controlled group membership by failing to arbitrate. Defendants dispute that they are part of a controlled group, and cite older, out-of-circuit case law for the proposition that failure to arbitrate is not an absolute, jurisdictional bar to this Court deciding disputes regarding controlled group membership. R. 71 at 5-7.

Although defendants are correct that failure to arbitrate is not a jurisdictional bar to a district court's

adjudication of controlled group disputes (*Slotky*, 956 F.2d at 1373), defendants ignore and fail to apply the relevant Seventh Circuit precedent. In *Slotky*, the Seventh Circuit held that it is proper for federal district courts to determine "some disputes over membership in a controlled group" even if defendants failed to arbitrate. 956 F.2d at 1373. Although it declined to provide a definitive test, the *Slotky* court identified two circumstances where district courts can decide such disputes. The first is where the fund concedes that the district court can consider the controlled group issue, as was the case in *Slotky. Id.* The second is where "people who had absolutely no reason to believe that they might by deemed members of a controlled group [otherwise] would be foreclosed from litigating the issue in any forum because they never received notice of their potential liability." *Id.* The court provided the following example:

> [T]he plan could have sued the Easter Bunny and when the Bunny complained that he was not a trade or business under common control with [the withdrawing employer, the plan] could have replied that the Bunny had waived the argument by failing to demand arbitration within the statutory deadline. For of course [the withdrawing employer], never suspecting that the Easter Bunny might be a trade or business under common control with it, would not have forwarded the notice to the Bunny.

Id. at 1372-73.

This case does not involve the first circumstance identified in *Slotky*. Far from conceding that this Court may properly decide defendants' controlled group dispute, the Fund instead argues vehemently that defendants have forfeited that dispute through failure to arbitrate. Nor can any of the defendants in this case be deemed to be as unsuspecting of potential liability as the Easter Bunny in the second circumstance identified in *Slotky*.

But the *Slotky* court did not provide a definitive test to apply in less extreme cases. It seems clear under *Slotky* that a defendant who "received notice of . . . potential liability" has waived a dispute over controlled group membership by failing to arbitrate. *See id.; see also Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. El Paso CGP Co.*, 2005 U.S. Dist. LEXIS 24579, 2005 WL 2737072, at *7-8 (N.D. Ill. Oct. 18, 2005) (defendant receiving notice waives dispute over controlled group membership under *Slotky*). Three of the non-withdrawing-employer defendants—Thomas Edmier, William Edmier, and Edmier Corp.—are named in the notice of withdrawal liability. R. 95 at 10 (letter is addressed to "T & W Edmier Corporation and The E Company," "Edmier Corp.," "Attention: Thomas Edmier," "Attention: William Edmier," and "Attention: Kevin W. Edmier"). Defendants admit that the notice of withdrawal liability and the notice of default were both sent to defendant Edmier Corp. R. 96 (Pls' Resp. Ds' Additional Facts) ¶¶ 2, 7. But other defendants—K. Edmier & Sons, the William Edmier Trust, Lake Street Realty, and E & E Equiment & Leasing—are not named in the notice. R. 95 at 10.

Even if not actually named in the notice, the *Slotky* court explained that "the statutory policy of encouraging the prompt nonjudicial resolution of disputes" might require any defendant who "should know that he might very well be deemed a member of the controlled group" "to institute arbitration on penalty of losing all opportunity to contest his membership." 956 F.2d at 1373. Based on the fact that the notice of withdrawal liability was sent to the address where K. Edmier & Sons and Lake Street Realty had their principal places of business (R. 72 ¶¶ 11, 17, 27), they too might be deemed to have been on constructive notice of potential liability and to have waived any controlled group membership defense.[3] Moreover, the fact that counsel for defendants in this case, George Grumley, received the notice of withdrawal liability (*id.* ¶¶ 28, 41), could support the conclusion that all defendants

3. Defendants claim the following statement in the notice of withdrawal liability was misleading as to non-withdrawing-employer defendants' potential liability: "The withdrawal liability is based only on the contributions made by the T & W Edmier Corporation and The E Company. If there are companies under common control with T & W Edmier Corporation or The E Company and if those companies have also contributed to the Pension Fund, then the contribution history of those companies should be considered in calculating the withdrawal liability." R. 95 at 10. Defendants say they took these sentences to mean that potential liability of other entities was "predicated on whether they 'have also contributed to the fund.'" R. 92 at 8. That is not what these sentences say. Instead, they say that the withdrawal liability calculation might change based on the contribution history of other companies under common control. They do not speak one way or another to the issue of whether companies under common control might be held jointly and severally liable for the withdrawal liability already calculated for T & W Edmier and The E Company.

should have been alerted to their potential liability as controlled group members.[4]

In sum, the Court finds that at least Edmier Corp. has forfeited its controlled group membership dispute through failure to arbitrate because defendants admit that it received notice. R. 96 ¶¶ 2, 7. Thomas Edmier, and William Edmier, and the other non-withdrawing-employer defendants, likely forfeited their controlled group membership dispute through failure to arbitrate as well. But because the forfeiture issue is not clear cut,[5] the

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4. Defendants' complaint that the notice "fail[ed] to provide defendants an explanation of control group liability," which is not self-evident to laymen (R. 92 at 4-9), rings hollow in light of the fact that defendants' attorney received the notice and could have explained it to them.

5. Defendants filed a twelve-page "Supplemental Memorandum on the Issue of Procedural Due Process" (R. 92) arguing that finding a forfeiture based on failure to arbitrate violates principles of "procedural due process," which dictate "that a person may not have his rights or obligations determined in any proceeding for which he has not been afforded reasonable notice." R. 92 at 1-2. Defendants cite pre-ERISA Supreme Court law for the basic proposition that notice must be "reasonably calculated . . . to apprise interested parties of the pendency of the action." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). They argue that the non-withdrawing-employer defendants were "deprived . . . of fair warning" that they might be liable for withdrawal liability. R. 92 at 7.

The Court finds that the principles espoused in *Slotky* account for procedural due process concerns and constitute the governing law in this area. *See* 956 F.2d at 1372-73, 1375 (addressing notice and fairness concerns regarding "people who had absolutely

no reason to believe that they might be deemed members of a controlled group," and finding that "the requirements of due process [we]re met" in that case).

In any event, this Court goes on to find affirmatively that all but one of the defendants are members of a controlled group with one of the withdrawing-employer defendants. This finding eliminates any concern with the lack of notice provided to these defendants. As defendants concede, "courts have consistently held that notice to one employer within a control group is sufficient notice to all members in the control group." R. 71 at 13. "The controlled group provision allows a plan to deal exclusively with the defaulting employer known to the fund, while at the same time assuring [itself] that legal remedies can be maintained against all related entities in the control group." *Chicago Truck Drivers v. El Paso Co.*, 525 F.3d 591, 595-96 (7th Cir. 2008).

It is unclear whether defendants intend in their supplemental memorandum to mount a further procedural due process challenge to the controlled group provision in ERISA, 29 U.S.C. § 1301(b), which courts have relied on to find that notice to one controlled group member is "constructive notice to all other members." *E.g., El Paso*, 525 F.3d at 596. If defendants did intend to make such an argument, this Court joins other courts in rejecting it. *See, e.g., Bd. of Trustees of W. Conference of Teamsters Pension Tr. Fund v. H.F. Johnson Inc.*, 830 F.2d 1009, 1013 (9th Cir. 1987) (rejecting argument that "§ 1301(b) violates procedural requirements of the Due Process Clause" because "the requirement of common control in § 1301(b) assures that individuals and entities who may ultimately be held liable for withdrawal liability in fact have notice and an opportunity to contest the existence and extent of that liability"); *Cent. States, Se. & Sw. Areas Pension Fund v. Skyland Leasing Co.*, 691 F. Supp. 6, 13 (W.D. Mich. 1987), *aff'd sub nom. Cent. States, Se. & Sw. Areas Pension Fund v. Skyland Leasing*, 892 F.2d 1043 (6th Cir. 1990) ("Defendant's contention that Section 1301(b)(1) should be read to mean that all entities

Court will also address controlled group membership on the merits. *See Slotky*, 956 F.2d at 1373-74 (even though technically factual, controlled group membership is properly decided on summary judgment).

To be part of the same controlled group, individuals or entities must be (1) "trades or businesses" under (2) "common control" with the withdrawing employer. *Messina*, 706 F.3d at 878 (quoting 29 U.S.C. § 1301(b)(1)). The Court addresses each element in turn, first for the non-withdrawing-employer entity defendants, followed by the individual and trust defendants.

1. Trades or Businesses

Entity defendants. "The phrase 'trade or business' is not defined" in ERISA. *Id.* "To apply the term under the MPPAA, [the Seventh Circuit has] adopted the test adopted by the Supreme Court . . . in *Commissioner of Internal Revenue v. Groetzinger*, 480 U.S. 23, 35, 107 S. Ct. 980, 94 L. Ed. 2d 25 (1987). The '*Groetzinger* test' requires that for economic activity to be considered the operation of a trade or business the activity must be performed (1) for the primary purpose of income or profit; and (2) with continuity and regularity." *Messina*, 706 F.3d at 878.

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within the control group be afforded the same procedural due process rights as the withdrawn employer and given separate notice of withdrawal liability emasculates the concept of 'single employer.'"); *see also Slotky*, 956 F.2d at 1375 ("the requirements of due process are met" despite seeming harshness of rule "that notice to one member of a controlled group is notice to all").

Appendix C

Defendants' summary judgment response does not dispute that the non-withdrawing-employer entity defendants—Edmier Corp., K. Edmier & Sons, Lake Street Realty, and E & E Equipment & Leasing—qualified as trades or businesses. And although defendants claim in their response to the Fund's Local Rule 56.1 Statement that Edmier Corp., Lake Street Realty, and E & E Equipment & Leasing were never active in business (R. 72 ¶¶ 11, 14, 19), they do not cite any evidentiary support. The fact that these corporations were active in business is therefore deemed admitted. *See Curtis*, 807 F.3d at 218-19. And in any event, as the Seventh Circuit explained in *Messina*, "[i]t is highly unlikely that a formal for-profit business organization would not qualify as a trade or business under the *Groetzinger* test." 706 F.3d at 885.

Individual and trust defendants. As with the individual defendants in *Messina*, "[t]he Fund does not seek to hold [the individual and trust defendants] liable merely because of their ownership of or positions within [the employer-defendant], nor could it" under the *Groetzinger* test. *Id.* at 880. "Instead, the Fund seeks to hold [these defendants] liable for operating as a 'trade or business' as commercial and residential landlords." *Id.* The Seventh Circuit has held that "renting property to a withdrawing employer is 'categorically' a trade or business." *Id.* at 881 (citing *Central States, S.E. & S.W. Areas Pension Fund v. SCOFBP, LLC*, 668 F.3d 873 (7th Cir. 2011)). Specifically, permitting a withdrawing employer "to operate on the property [the individual defendants] owned without a formal written lease and

without paying rent for several years" constitutes a trade or business. *Id.*

Here, just as in *Messina*, defendants Thomas and William Edmier, individually and as trustees of defendant the William Edmier Trust, owned the premises at 249 W. Lake Street, Elmhurst, Illinois. R. 72 ¶¶ 9-10. As owners, these defendants permitted withdrawing employer T & W Edmier to "operate[ ] from that address without a lease and pa[y] no rent from 1986 until its closing in 2014." R. 72 ¶ 9. Thus, defendants Thomas and William Edmier and the William Edmier Trust's "rental activities satisf[y] the *Groetzinger* test" and qualify as a "trade or business." *Messina*, 706 F.3d at 884.

2. Common Control

Entity defendants. As the Fund correctly explains, defendants "are all interlocking enterprises of closely held corporations doing business with the withdrawal employer and owned or controlled by" the Edmier family. R. 49 at 11. The initial capital for all defendants was provided by William and Thomas Edmier's bank accounts. R. 72 ¶ 6. The non-withdrawing-employer defendants nevertheless dispute the element of common control.

"The [Pension Benefit Guarantee Corporation] has adopted the language set forth in Section 414(c) of the Internal Revenue Code, which identifies both 'parent-subsidiary' and 'brother-sister' organization groupings as forms of common control." *Cent. States, Se. & Sw. Areas Pension Fund v. SCOFBP, LLC*, 738 F. Supp. 2d 840, 846

(N.D. Ill. 2010), *aff'd*, 668 F.3d 873 (7th Cir. 2011) (citing 26 C.F.R. § 1.414(c)-2). "A 'brother-sister group' is one in which (1) 'five or fewer persons who are individuals, estates, or trusts' own a controlling interest (at least 80 percent of the stock [or the equivalent in non-corporations]) in two or more organizations and (2) the same persons maintain 'effective control' (at least 50 percent of the stock [or the equivalent in non-corporations]) over each organization." *Id.* But "a person's stock ownership is not taken into account for purposes of the 80% control test unless that person owns stock in each corporation of the putative brother-sister group." *Cent. State v. Wolk*, 2001 U.S. Dist. LEXIS 3531, 2001 WL 301145, at *4 (N.D. Ill. Mar. 28, 2001); 26 C.F.R. § 1.414(c)-2(c).

As an initial matter, the Court finds that the issue of ownership and control over the defendants—and in particular stock ownership—is not well briefed by either party. The Court takes defendants' failure to contest relevant facts about controlled group membership, including company ownership and control, or to provide evidentiary support for the counter-assertions in its responses to the Fund's factual statements, as admissions. *See Curtis*, 807 F.3d at 218-19.

The Court finds that two brother-sister controlled groups exist in this case. Two individuals—Thomas and William Edmier—own withdrawing-employer defendant T & W Edmier, as well as non-withdrawing-employer defendants Lake Street Realty and E & E Equipment & Leasing. *See* R. 72 ¶ 5 (prior to its dissolution, T & W Edmier was owned 50% by Thomas and 50% by William

Edmier); R. 72 ¶¶ 11, 14, 31 (Lake Street Realty and E & E Equipment & Leasing are owned and controlled by Thomas and William Edmier). Lake Street Realty, E & E Equipment & Leasing, and T & W Edmier thus make up one controlled group.

One individual—Kevin Edmier—owns and controls both withdrawing-employer defendant The E Company and non-withdrawing-employer defendant K. Edmier & Sons. R. 71 at 3 (defendants admit that "The E Company is owned by Kevin Edmier"); R. 72 ¶ 16 (Kevin Edmier is president of The E Company); (R. 71 at 3 & R. 72 ¶¶ 17, 26 ("Kevin Edmier is the only member" and shareholder of defendant "K. Edmier & Sons, LLC"). The E Company and K. Edmier & Sons thus make up another brother-sister controlled group.

Edmier Corp. does not appear to be part of either controlled group because William Edmier owns all of it (*see* R. 72 ¶¶ 18, 25), and William Edmier does not own 80% of either T & W Edmier or The E Company. *See Wolk*, 2001 U.S. Dist. LEXIS 3531, 2001 WL 301145, at *4 ("a person's stock ownership is not taken into account for purposes of the 80% control test unless that person owns stock in each corporation of the putative brother-sister group"); 26 C.F.R. § 1.414(c)-2 (Example 4). But, as set forth above, the Court finds that Edmier Corp. has forfeited its right to contest controlled group membership because it was named on the notice of withdrawal liability and notice of default.

Defendants further argue that these entities' activities need to have an economic nexus in order for them

to be under common control. As defendants themselves acknowledge (R. 71 at 11), however, the Seventh Circuit has expressly rejected this argument. The Seventh Circuit held in *Cent. States, Se. & Sw. Areas Pension Fund v. Fulkerson*, 238 F.3d 891, 895 (7th Cir. 2001), and "confirmed" in *Central States, S.E. & S.W. Areas Pension Fund v. White*, 258 F.3d 636, 641 (7th Cir. 2001), that "no such nexus is required in order to impose liability." *White*, 258 F.3d at 641.

Individual and trust defendants. Individual defendants Thomas and William Edmier own 100% of withdrawing-employer defendant T & W Edmier, and Thomas and William Edmier, individually and as trustees of the William Edmier Trust, own 100% of their rental activity associated with the property at 249 W. Lake Street, Elmhurst, Illinois. R. 72 ¶¶ 9-10, 29. This means that the leasing trade or business of Thomas and William Edmier and the William Edmier Trust is under "common control" with the trade and business of T & W Edmier as part of the T & W Edmier controlled group. *See, e.g., White*, 258 F.3d at 641 ("all of the stock of Jones Transfer, the entity incurring withdrawal liability, was owned by Trans Jones, 93.53% of the stock of which was owned by Mr. White," and "[s]ince the Whites owned 100% of their garage rental activity (*i.e.*, their home), the leasing activity and the Trans Jones Companies are under 'common control'"); *Cent. States Se. & Sw. Areas Pension Fund v. Miller*, 868 F. Supp. 995, 1000 (N.D. Ill. 1994) (brother-sister controlled group provision satisfied where couple "at the time they leased the house, had 100 percent ownership of Miller Brothers," and "also had 100 percent ownership of the real estate enterprise").

Appendix C

* * *

As trades or businesses under common control with one of the withdrawing-employer defendants, the Court finds that all defendants (except Edmier Corp., which was sent notice and has forfeited any controlled group challenge) satisfy the *Groetzinger* test. This means that "notice to one member of a controlled group [wa]s notice to all." *Slotky*, 956 F.2d at 1375. It means that these defendants have "waived the issues that are reserved for arbitration," *id.* at 1373, including arguments about ability to pay and sufficiency of notice set forth in their supplemental memorandum (R. 92). And it means that defendants are jointly and severally liable. *See, e.g., Messina*, 706 F.3d 878.

The Court therefore grants the Fund's motion for summary judgment. R. 47. Under ERISA, defendants are jointly and severally liable not only for the full amount of withdrawal liability ($640,900), but also interest, liquidated damages, attorneys' fees, and costs.[6]

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6. 29 U.S.C. § 1132(g)(2) ("In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—(A) the unpaid contributions, (B) interest on the unpaid contributions, (C) an amount equal to the greater of—(i) interest on the unpaid contributions, or (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A), [and] (D) reasonable attorney's fees and costs of the action, to be paid by the defendant."); *see also Slotky*, 956 F.2d at 1377 (interest, liquidated damages, attorneys' fees, and costs properly added to withdrawal liability under 29 U.S.C. § 1132(g)(2)).

Appendix C

CONCLUSION

For the foregoing reasons, the Court: (1) grants the Fund's motion for summary judgment (R. 47); (2) grants defendants' motion for extension of time to file supplemental briefing (R. 84); and (3) grants in part and denies in part the Fund's motion to strike defendants' supplemental statement of additional facts (R. 93). The Fund should file a petition setting forth its claimed interest, liquidated damages, attorneys' fees, and costs, along with a proposed order, on or before April 20, 2018. Defendants should file a response on or before May 4, 2018.

ENTERED:

/s/ Thomas M. Durkin
Honorable Thomas M. Durkin
United States District Judge

Dated: March 21, 2018

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO, ILLINOIS 60604, FILED MARCH 4, 2019

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 4, 2019

Before

FRANK H. EASTERBROOK, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-2273

TRUSTEES OF THE SUBURBAN TEAMSTERS OF NORTHERN ILLINOIS PENSION FUND,

Plaintiff-Appellee,

v.

THE E COMPANY, A DISSOLVED ILLINOIS CORPORATION, *et al.*,

Defendants-Appellants.

Appendix D

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 1:15-cv-10323

THOMAS M. DURKIN, *Judge*.

ORDER

Defendants-appellants filed a petition for rehearing and rehearing *en banc* on February 12, 2019. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing *en banc* is therefore DENIED.