No. 20-

IN THE

Supreme Court of the United States

50509 MARINE LLC, AMH GOVERNMENT SERVICES, LLC, *et al.*,

Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case is about the lower courts' failure to respect *stare decisis* and unambiguous legislation. This petition is made necessary because lower courts have now invented new federal common law to evade this Court's precedent set by *Chicago Title & Tr. Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120 (1937). The application of *Chicago Title* combined with the plain language of the relevant ERISA statutes required a result that both the district and circuit court found undesirable. Accordingly, the lower courts judicially altered the existing enforcement schemes contained within the "comprehensive and reticulated" ERISA legislation. Pet. App. 8a–13a, 23a–25a. These alterations are irreconcilable with state corporate law.

It is incontrovertible that under Illinois law, Liberty Lighting Co., Inc. ceased to exist and its stock was "destroyed" no later than 1997. Pet. App. 25a. *Chicago Title* teaches that federal courts are powerless to change that. 302 U.S. at 128–29. Yet both the district court and the Eleventh Circuit have now held that, "under ERISA" the corporation "still existed" and had stock that could be owned, voted, and controlled in 2012. (Pet. App. 2a, 23a–24a). Accordingly, the Question Presented is:

> Whether under *Chicago Title & Tr. Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120 (1937) and the Tenth Amendment to the United States Constitution, state law, not ERISA or federal common law, controls the questions of whether an Illinois corporation, that after a Chapter 7 bankruptcy liquidation

dissolved in 1992, and had its stock destroyed in 1997 (1) still existed in 2012; and (2) had stock that was still owned and "controlled" with "voting rights" by the corporation's 1992 shareholder in 2012?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1, Petitioners state the following:

Petitioners (defendants-appellants below) are 50509 Marine, LLC; American Marine Holdings, LLC; AMH Government Services, LLC; Baja Marine, Inc.; Bedford Materials Co., Inc.; Buffalo Power Electronics Center, Inc.; Donzi Marine, LLC; Fountain Dealers Factory Super Store, Inc.; Fountain Powerboat Industries, Inc.; Fountain Powerboats, LLC; Liberty Acquisition FPB, LLC; Liberty Analytical Corporation.; Liberty Associates, LC; Liberty Polyglas, Inc.; Liberty Properties at Bedford, LLC; Liberty Properties at Carey, LLC; Palmetto Park Financial, LLC; Pro-Line Boats, LLC; and Pro-Line of North Carolina, Inc.

Respondent is the Pension Benefit Guaranty Corporation (plaintiff-appellee below) ("PBGC").

RULE 29.6 STATEMENT

The Petitioners are the above-named entities. None of the Petitioner entities named to this proceeding is a publicly held company. No publicly held company owns 10% or more of their stock.

RELATED PROCEEDINGS

- *In re Buffalo Power Electronics Center, Inc.*, 21-11686-MAM, U.S. Bankruptcy Court for the Southern District of Florida. Petition for Bankruptcy filed February 22, 2021.

- *Pension Benefit Guaranty Corp. v. 20 SE 3rd St LLC, et al.,* 18-cv-81009, U.S. District Court for the Southern District of Florida. Judgment entered Nov. 22, 2019.

- *Pension Benefit Guaranty Corp. v. 50509 Marine, LLC, AMH Government Services, LLC, et al.* No. 19-14968, U.S. Court of Appeals for the Eleventh Circuit. Judgment Entered Nov. 24, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court to grant certiorari review of the November 24, 2020 decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The November 24, 2020 court of appeals opinion, Docket No. 19-14698 (Pet App. 1a) is published at 981 F.3d 927. The November 22, 2019 district court memorandum decision [D.E. 158] in Case No. 18-CV-81009 (S.D. Fla.) (Pet. App. 14a) is published at 424 F. Supp. 3d 1239.[1] It resulted in a final judgment [D.E. 163] entered on December 6, 2019.

JURISDICTION

Petitioners' appeal was timely taken to the court of appeals on December 11, 2019. [D.E. 164]. The judgment of the court of appeals was entered on November 24, 2020. (Pet. App. 1a). On January 21, 2021, the court of appeals denied Petitioners' timely petition for rehearing and rehearing en banc. (Pet. App. at 37a). On March 19, 2020, this Court extended the deadline for submission of Petitions for Writs of Certiorari to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (allowing review via "writ of certiorari granted upon the petition of any party to any civil or criminal case . . .").

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1. Citations abbreviated "D.E." refer to documents in the record of Case No. 18-CV-81009 (S.D. Fla.) by their docket entry ("ECF No.") number.

RELEVANT STATUTORY PROVISIONS

Although Petitioners believe there is no ambiguity, this matter may require the Court to construe 26 U.S.C. § 1563 ("Definitions and special rules") (Pet. App. 39a–57a); 29 U.S.C. § 1002(16)(A) and (B) (definitions of "Plan Administrator" and "Plan Sponsor") (Pet. App. 57a–58a); 29 U.S.C. 1301(a)(14) (Definition of "controlled group" and "common control") (Pet. App. 59a–61a); 26 C.F.R. § 1.414(b)–1(a) (Definition of "controlled group of corporations.") (Pet. App. 62a–63a); and 26 CFR § 1.414(c)-2 (defining "two or more trades or businesses under common control.") (Pet. App. 64a–72a).

INTRODUCTION

The lower courts disregarded the precedent set by *Chicago Title & Tr. Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120 (1937) and instead created new federal common law "under ERISA." The district court declared that "someone must bear the cost," without appropriately considering that ERISA already provides that insurer/guarantor PBGC would properly bear the cost. (Pet. App. 16a).

The lower courts held that despite its 1997 state-law extinction, Liberty Lighting Co., Inc. continued its existence "for purposes of ERISA." *Id.* 20a. Moreover, they determined that an Illinois corporation could continue to exist in perpetuity "under ERISA" regardless of what result Illinois law requires outside of the ERISA context. *Id.* 11a, n.2. Because it existed for ERISA purposes—Illinois law notwithstanding—the district court concluded that the corporation also still had stock

that was commonly owned with the Petitioners. *Id.* 20a. As a consequence, these Petitioners were all held to exist in a "controlled group" with Liberty Lighting Co., Inc. on July 31, 2012. *Id.* 27a–33a.

The non-existent former Illinois corporation, Liberty Lighting Co., Inc., was never a party to this dispute. *Id.* 24a–25a. Nonetheless, the district court found all the Petitioners liable for Liberty Lighting's alleged debts, jointly and severally. An appeal followed to the Eleventh Circuit.

In the Eleventh Circuit, Petitioners continued to observe that the non-existent corporation, Liberty Lighting Co., Inc., could not exist in a "controlled group" with the Petitioners in 2012 under the plain language of 26 U.S.C. 1563(a) and/or the applicable Treasury Reg. 1.414(c)-2. Furthermore, under the language of 26 U.S.C. 1563(a) and 26 CFR 1.414(c)-2, entities must have stock that was still actually owned by a common owner in order to be in a "controlled group." In order to be "owned" by somebody, a corporation must exist and have stock. That precondition to finding a controlled group was simply missing here. The alleged owner had no enforceable or usable legal ownership rights under state law. Petitioners argued, therefore, that it was erroneous for the courts to impute ownership and "voting rights" as liabilities under federal law "for purposes of ERISA." *See, e.g.,* 26 CFR 1.414(c)-2 (finding "control" requires looking at "voting rights").

On *de novo* review, a three-judge panel of the Eleventh Circuit affirmed the district court judgment. Pet. App. 1a. After acknowledging that this was "a difficult case," the

Court of Appeals reasoned that, "under ERISA," Liberty Lighting Co., Inc. still had a sufficient existence on July 31, 2012 to be the "federally defined" Plan Sponsor on that date, triggering strict ERISA "controlled group" liability for all of the Petitioners. *Id.* 2a ("existed" "under ERISA"), 5a ("difficult case"), 12a (finding that "Liberty remained the Plan's sponsor" and concluding that therefore the Petitioners are liable without providing analysis of whether there was sufficient common ownership to find a "Controlled Group").

The decision to disregard Illinois' own rules of corporate existence and ownership is in conflict with the decisions of this Court and other circuits. *See, e.g., Kamen v. Kemper Fin. Services, Inc.*, 500 U.S. 90, 98–99 (1991) ("'Corporations,' we emphasized, 'are creatures of state law' . . . and it is state law which is the font of corporate directors' powers."); *Burks v. Lasker*, 441 U.S. 471, 477–78 (1979) ("As we have said in the past, the first place one must look to determine the powers of corporate directors is in the relevant State's corporation law."); *Chicago Title & Tr. Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120 (1937); *In re Peer Manor Bldg. Corp.*, 134 F.2d 839, 840–41 (7th Cir. 1943) (relying on *Chicago Title*); *Freedman v. magicJack Vocaltec Ltd.*, 963 F.3d 1125, 1132 (11th Cir. 2020) ("corporate law is overwhelmingly the province of the states") (quoting *Marsh v. Rosenbloom*, 499 F.3d 165, 176 (2d Cir. 2007)).

Since at least the 1930s, federal courts have recognized that business corporations are solely creatures of state law, and that state law determines the existence, ownership, and rights of control of such corporations even when federal issues (such as the ability to file bankruptcy) are

at issue. *Chicago Title*, 302 U.S. 120. The decision below expands the power of the federal government to an area in which it has never before purported to exercise control.

STATEMENT OF THE CASE

Liberty Lighting Co., Inc. was the Plan Sponsor and Plan Administrator of a pension plan known as the "Liberty Lighting Co., Inc. Pension Plan for IBEW Employees" (hereafter the "Plan" or "Pension Plan"). Pet. App. 2a. Prior to the company's demise, administrative duties related to the Plan were dispatched by certain of Liberty Lighting's employees and/or third-party vendors. *See id.* 10a (coloring these "administrative duties" as acts taken by a "Plan Sponsor"). After the company's demise, much of the Plan's administrative duties were carried out by pension plan vendor "AON." *See* App. Initial Br. at 12–13 (Dec. 27, 2019) (11th. Cir. Docket No. 19-14698).

Due to the infiltration of Chinese-made electrical goods into Liberty Lighting's U.S. customer base, Liberty Lighting ran into financial trouble no later than 1990. *Id.* at 22.

Liberty Lighting Co., Inc. entered Chapter 7 bankruptcy, liquidated, and dissolved in the early 1990s. *Id.* All of its assets (and therefore any potential earning capacity) were surrendered to a secured creditor at that time. *Id.* Liberty Lighting was administratively dissolved by the State of Illinois in 1992. *Id.* Through these events, Mr. Wortley (who had recently bought the company in 1989) lost both legal and *de facto* control and ownership of the company; the company and its assets were in the hands of its secured creditors and the bankruptcy trustee.

In 1993, Mr. Wortley filed a personal bankruptcy. *Id.* at 23. That bankruptcy resulted in a discharge and then a Final Decree in 1998. *Id.* In that bankruptcy proceeding, all of Mr. Wortley's personal assets were listed on a schedule and surrendered to a bankruptcy trustee, including 100% of the ownership of Liberty Lighting. *Id.*

Meanwhile, by operation of Illinois law, Liberty Lighting ceased to exist and the stock was "destroyed" no later than 1997, at which point Liberty Lighting's dissolution and windup period terminated. *Shute v. Chambers*, 492 N.E.2d 528, 531 (Ill. App. 1st Dist. 1986) (dissolution "destroys" the stock of a corporation); *Mich. Ind. Condo. Ass'n v. Mich. Place, Ltd. Liab. Co.,* 8 N.E.3d 1246, 1256 (Ill. App. 1st Dist. 2014) (discussing legal effect of reaching the end of the windup period, and concluding "the corporation ceases to exist altogether after the grace period of five years"). As the district court correctly recognized, "federal law respects the rights of states to define corporate existence." Pet. App. at 25a.

Many years later, in 2018, PBGC sued Petitioners in the Southern District of Florida, creating Docket No. 19-14698. PBGC alleged that the Defendants were in a "controlled group" with non-party Liberty Lighting Co., Inc. as of July 31, 2012 when the Pension Plan terminated. PBGC therefore reasoned that Petitioners were strictly liable under sections 1306(a), 1307 and 1362(a) for pension benefits, premiums, interest, and penalties. (The particulars of those claims are not at issue here; only statutory "controlled group" liability *vel non*.)

PBGC initially justified the litigation by contending that "Liberty Lighting did not notify or otherwise inform

PBGC of its commencement of bankruptcy, the reduction in active Plan participants, its liquidation, or its dissolution (collectively, the 'Reportable Events') for over twenty years after it was required to . . . ." [D.E. 71 (Sec. Am. Compl.) at ¶ 69]. As the litigation progressed, even PBGC acknowledged that not only was this allegation irrelevant, nobody knows if it is actually true. [*See, e.g.,* D.E. 124 at 5–6; D.E. 140 at 8]. Too much time has passed.

In 1991, Liberty Lighting's owner turned the company over to a bankruptcy trustee and counsel for the bankrupt debtor. [*See* D.E. 71 (Sec. Am. Compl.) at ¶ 67]. At that point, the shareholder had no authority to act on behalf of the bankrupt entity. Moreover, the bankruptcy was subject to supervision by the United States Trustee, which is a division of the U.S. Department of Justice. The Petitioners are skeptical that PBGC remained ignorant of Liberty Lighting's failure for all of these years. When pressed, PBGC conceded that whether or not it received contemporaneous notice was irrelevant to PBGC's claims. [*See, e.g.,* D.E. 124 at 5–6; D.E. 140 at 8]. Nonetheless, PBGC's unproven, and inarguably irrelevant, suggestion of fault seemingly convinced the lower courts to make this a deciding factor. *See* Pet App. at 6a (the notice issue "looms large"); *id.* at 15a–16a, 25a ("an entity could dissolve [and] not notify [PBGC] . . . . That is exactly what is alleged to have happened in this case.").

PBGC's position required courts to accept that Liberty Lighting Co., Inc. actually existed and had stock that could be owned with voting rights in common with the Petitioners until the date of plan termination in July 31, 2012. *See* 26 U.S.C. 1563(a); 26 CFR 1.414(c)-2. But in reality, even though the Plan still existed in 2012,

the company had long ago been dissolved and its stock destroyed by Illinois law.

There is no dispute that Mr. Wortley continued to sign papers relating to the Plan's administration, notwithstanding the sponsor's dissolution, for many years. Various parties (such as AON, who was the vendor administering the Plan and sending checks to pensioners, and United Jersey Bank and its successors, who were the trustees for the Plan from at least 1989 until 2012 when the Plan terminated) represented to Mr. Wortley that failure to do so would result in Liberty Lighting's former employees not receiving their benefits. *See* Pet. App. 10a. (erroneously characterizing these activities as "Plan Sponsor" activities, rather than "Plan Administrator" activities). Wortley merely complied with the requests of these Plan professionals.

In 2012, PBGC contacted Mr. Wortley. PBGC sought Wortley's help to "terminate" the Plan through a settlement agreement without filing a federal lawsuit to establish "Plan Termination." *See* Pet. App. 3a.

Without objection from PBGC, Mr. Wortley signed the parties' final negotiated settlement agreement as the "putative president" of Liberty Lighting Co., Inc. Mr. Wortley used the term "putative" because he and his counsel had repeatedly represented to PBGC that the corporation no longer existed. *See* App. Initial Br. at 15–18 (Dec. 27, 2019) (11th. Cir. Docket No. 19-14698). PBGC accepted the settlement agreement signed by the "putative president", thus acknowledging the non-existence of Liberty Lighting Co., Inc., and ending the matter. *See* Pet. App. 3a ("Wortley and PBGC eventually agreed to a

settlement that represented Liberty as having dissolved in the '90s and the agreement contained language that Wortley believed established a final cutoff date for his remaining liability . . . .").

As discussed above, PBGC had justified its commencement of this litigation on the grounds that it was not notified of Liberty Lighting's 1991 bankruptcy. To that end, PBGC could have obtained the Liberty Lighting bankruptcy court file to conclusively prove its allegation that it was not served with notice of the bankruptcy when it was filed. In 2012 and 2013, Wortley even offered to bear the cost of having the entire bankruptcy file copied for PBGC. PBGC represented to Wortley, however, that obtaining the file was not necessary, and the bankruptcy court file was coincidentally destroyed by the National Archives while PBGC's lawsuit was pending below. *See* App. Initial Br. at 18–19, n.6 (Dec. 27, 2019) (11th. Cir. Docket No. 19-14698).

Petitioners moved for summary judgment. The gist of the summary judgment motion was that the named defendants could not have been in a "controlled group" with Liberty Lighting on July 31, 2012 because (1) Liberty Lighting did not exist after 1997 under the controlling Illinois state corporate laws; and (2) even if it existed, it could not have been actually owned by Mr. Wortley because his stock had been destroyed. [D.E. 112 at 4-9]. Therefore, under the plain terms of 26 U.S.C. 1563(a) and 26 CFR 1.414(c)-2, the Petitioners could not be in a controlled group with Liberty Lighting Co., Inc.

PBGC also moved for summary judgment. [D.E. 114]. In that motion, PBGC contended that the Petitioners were

in a "controlled group" as a matter of law with Liberty Lighting Co., Inc. as of July 31, 2012; and invited the district to make new federal common law adopting that position. *Id.* at 3, 10. The district court accepted the invitation, and gave Liberty Lighting Co., Inc. renewed existence "under ERISA" 15 years after Illinois law had permanently destroyed it. Pet. App. 23a–25a.

The district court granted summary judgment to PBGC and denied summary judgment sought by the Petitioners. *Id.* 35a. The district court agreed with the Petitioners that Liberty Lighting ceased to exist under state law. *Id.* 25a. The district court further agreed with the Petitioners that federal law defers to the states to define corporate existence. *Id.* ("Liberty Lighting ceased to exist under state law and federal law respects the rights of states to define corporate existence.").

Nevertheless, the district court made a "narrow" policy-based exception. *Id.* The district court declared that "someone must bear the cost." *Id.* 16a. As a result, it held that Liberty Lighting Co., Inc. continued its existence and wrote that "only for the purposes of a federal, ERISA-focused application . . . a state-law dissolution does not disturb an entity's federal, ERISA contributing sponsor designation." *Id.* 25a. Because the district court gave Liberty Lighting existence for "ERISA purposes" in 2012—Illinois law notwithstanding—the district court implicitly concluded that the corporation still had stock that could be owned or transferred, and it was still owned by Mr. Wortley in 2012. *See Id.*; 26 U.S.C. 1563(a); 26 CFR 1.414(c)-2. As a consequence, these Petitioners were deemed by the court to be in a controlled group with Liberty Lighting Co., Inc. as of July 31, 2012.

The district court decided that the expired Liberty Lighting stock was deemed 'abandoned' back to Mr. Wortley from his personal bankruptcy trustee in 1998. Pet. App. at 26a. Therefore, the district court held that Liberty Lighting was still owned by Mr. Wortley 14 years later as of July 31, 2012. As a consequence, all of the companies that he also owned on July 31, 2012 would be jointly and severally liable for the entire claimed pension premium liability, plus interest and penalties. *Id.* 28a–31a.

A final judgment resulted on December 6, 2019. [D.E. 163]. Petitioners' unsuccessful appeal to the court of appeals was timely filed on December 11, 2019. [D.E. 164]; Pet. App. at 1a.

In the Eleventh Circuit, Petitioners contended that a non-existent corporation under state law could not remain in a "controlled group" under 26 U.S.C. 1563(a) and/or the applicable Treasury Reg. 1.414(c)-2. Furthermore, 26 U.S.C. 1563(a) and 26 CFR 1.414(c)-2, clearly require the existence of stock. The stock has to be actually owned by a common owner in order to be in a "controlled group." Because Mr. Wortley had no enforceable or usable legal ownership rights over Liberty Lighting Co., Inc. under Illinois state law, nothing could actually be "abandoned" from the bankruptcy. The federal courts could not resurrect those rights and assign them to a former owner without violating *Chicago Title & Tr. Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120 (1937).

On *de novo* review, a three-judge panel of the Eleventh Circuit affirmed. Although this was a "a difficult case," the Court of Appeals believed Liberty Lighting Co., Inc., still had a sufficient existence on July 31, 2012 to

be the "federally defined" Plan Sponsor on that date, triggering strict ERISA "controlled group" liability for the Petitioners. Pet App. at 5a, 7a. Rehearing and rehearing *en banc* were denied. *Id.* at 37a-38a.

REASONS FOR GRANTING THE PETITION

Certiorari review is needed to restore the long-understood meaning of Amendment X of the United States Constitution and *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 127-28 (1937) (holding that "[h]ow long and upon what terms a state-created corporation may continue to exist is matter exclusively of state power. . . . And it hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state . . . ."). Creative justification and application of federal common law should not be used to evade this Court's mandated deference to state corporate laws.

The decisions below also conflict with this Court's repeated admonition that federal courts are not to create federal common law to materially alter existing, unambiguous federal statutes. Even when federal common law rules are authorized, they are to be filled by adopting state law principles absent clear congressional direction to the contrary.

This Court has repeatedly been required to reign in some federal courts' desires to "improve" upon the work of Congress and the common law by inventing new rules and remedies never approved by any legislature. *See, e.g., United States v. Bestfoods*, 524 U.S. 51, 63 (1998) (stating that "CERCLA is thus like many another congressional

enactment in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute," and "in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law[.]") (internal quotes omitted); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) ("The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards.").

The Court's intervention is required again. The decision below is part of a growing line of cases in which federal courts of appeals have adopted principles of liability that are hostile to business interests and far exceed anything actually enacted or contemplated by Congress's ERISA statutory scheme. *See, e.g., Pension Benefit Guar. Corp. v. Findlay Industries, Inc., et al.*, 902 F.3d 597, 609-13 (6th Cir. 2018) (when the facts of the case fell outside of ERISA's express statutory successor liability provisions, *i.e.*, 29 U.S.C. § 1369, the 6th Circuit created liability by applying federal common law successor liability), *petition for cert. dimissed sub nom.*, *September Ends Co. v. Pension Ben. Guar. Corp.*, 140 S. Ct. 16 (2019); *see also id.* at 618 (McKeague, J., concurring and dissenting) ("The [Defendant]s argue that 29 U.S.C. § 1369 enumerates the only circumstances where the PBGC can impose Termination Liability on the successor to a plan sponsor. The [Defendant]s are right."). The Court needs to signal that a reversal of this trend is required.

A. The Court should reaffirm *Chicago Title* and its delegation to the states of control over the existence and ownership of state-created entities.

Review is warranted so that the Question Presented may be addressed and answered in the affirmative. One important area of law traditionally regulated exclusively by the states has long been the existence, termination, and ownership of state-created business entities. Here, Illinois law exclusively controls the question of when Liberty Lighting Co., Inc. ceased to exist as a corporation, as well as the question of whether it had outstanding, issued stock capable of any private ownership and voting control.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U.S. Const. Amend X.

Only a state can determine whether a corporation that it has created exists or terminates. *See, e.g., Kamen v. Kemper Fin. Services, Inc.*, 500 U.S. 90, 98–99 (1991). Only a state can regulate who, if anyone, is entitled to own or control it. *Id.* A well-developed, stable body of state corporate law exists upon which American commerce depends and relies. *Id.* at 98 ("The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards."). Federal law, in turn, builds on state corporate law for various purposes. *See, e.g., id.* at 108

(reaffirming *Burks v. Lasker*, 441 U.S. 471 (1979)). The Internal Revenue Code, in particular, builds upon and relies on an existing body of state business organizations law. And ERISA explicitly relies on definitions in the Internal Revenue Code. *E.g.,* 29 U.S.C. § 1301(a)(14)(B) (ERISA definition and determination of a "controlled group" requires using the "regulations prescribed for similar purposes by the Secretary of the Treasury under subsections (b) and (c) of section 414 of Title 26[.]").

Accordingly, despite the seemingly limitless and ever-expanding regulatory power of the federal government, federal courts have historically been "powerless" to "resurrect a corporation which a state has put out of existence for all purposes." *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 128 (1937)). "A corporation can only exist under the express laws of the State by which it was created." As a result, "[h]ow long and upon what terms a state-created corporation may continue to exist is matter exclusively of state power. . . . And it hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state . . . .". *Id.* at 127-28. This rule was universally accepted, including by the Eleventh Circuit and this Court. It is a "widely accepted" and firmly established principle that "corporations . . . are creatures of state law[.]" *Freedman v. magicJack Vocaltec Ltd.*, 963 F.3d 1125, 1133 (11th Cir. 2020) (quoting *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991)).

This Court's decision in *Chicago Title* has never been overruled, modified or limited, but the decisions below have implicitly done so. In that *Chicago Title* decision, by coincidence, this Court specifically examined Illinois

corporate law. 302 U.S. at 121. *Chicago Title* teaches that Mr. Wortley, as the former shareholder or officer of a dissolved entity, *could not continue its existence or even hire a lawyer* for the entity, even if he had *wanted* to continue its existence for purposes of remaining an ERISA 'plan sponsor' or other corporate activity. *In re Peer Manor Bldg. Corp.*, 134 F.2d 839, 840 (7th Cir. 1943) (relying on *Chicago Title*).

Illinois is a jurisdiction that treats corporate dissolution the same as the death of a natural person after a certain windup period. *See* 19 Am. Jur., 2d Corporations § 2458 (2015) ("A corporation considered a person also can be considered living or dead, depending on whether it remains in operation or instead has been dissolved. Under some [state] statutes, *the dissolution of a corporation is, in legal effect, the same as the death of a natural person*.") (emphasis added; footnotes omitted) (citing *Michigan Indiana Condominium Ass'n v. Michigan Place, LLC*, 8 N.E.3d 1246 (App. Ct. 1st Dist. 2014), *appeal denied*, 20 N.E.3d 1256 (Ill. 2014). From the perspective of Illinois, a former stockholder like Mr. Wortley could not take *any* official action on behalf of the "dead" Liberty Lighting entity. *Id.* It follows that a federal court should not assign it a fictional ERISA Plan Sponsor existence. It could never impute ownership authority or control to a former owner, who was divested of such power, without encroaching on state law and violating the precedent of this Court's *Chicago Title* decision. *Peer Manor*, 134 F.2d at 841 ("The State of Illinois has the power of life and death over its corporations. It says the corporation is dead. We know of no [federal] rule of bankruptcy which has the power of resurrection.").

Illinois law itself remains completely clear. It has been consistent since the early 20th Century. *See* Ill. Jur. BUSINESS RELATIONSHIPS § 10:53 (2019) ("Dissolution of a corporation or a limited liability company terminates its existence."); *In re Segno Comms.* 264 B.R. 501, 508 (Bankr. N.D. Ill. 2001) ("The wind-up period is limited in Illinois to five years, after which the corporation ceases to exist."); *Mich. Ind. Condo. Ass'n v. Mich. Place, Ltd. Liab. Co.,* 8 N.E.3d 1246, 1256 (Ill. App. 1st Dist. 2014) (discussing legal effect of reaching the end of the windup period, and concluding "the corporation ceases to exist altogether after the grace period of five years"). Similarly, the Liberty Lighting Co., Inc. stock no longer existed. *In re Segno*, at 508 (Bankr. N.D. Ill. 2001) (giving Illinois statutes their "plain and ordinary meaning" and concluding: "The wind-up period is limited in Illinois to five years, after which the corporation ceases to exist."); *Shute v. Chambers*, 492 N.E.2d 528, 531 (Ill. App. 1st. Dist. 1986) (dissolution "destroys" the stock of a corporation).

Most recently, the Illinois Supreme Court restated and confirmed that "the five-year extension to a corporation's life granted by [805 Illinois Compiled Statutes 5/] section 12.80 establishes a fixed endpoint beyond which a corporation *ceases to exist*." *Pielet v. Pielet*, 978 N.E. 2d 1000, 1008 n.3 (Ill. 2012) (e.s.). Accordingly, from the perspective of the Illinois courts and the Illinois Secretary of State, Liberty Lighting in fact ceased to exist no later than the expiration of the five-year winding up period in 1997.

Moreover, even if Liberty Lighting Co., Inc. were deemed *arguendo* to retain some theoretical ongoing federal legal existence as a nominal Plan Sponsor for

purposes of ERISA, that is not the end of the "controlled group" inquiry. Mr. Wortley was still without legal authority to "control" or "own" any such entity after his stock was dissolved no later than 1997. As explained below, federal courts lacked authority to tell Mr. Wortley that he "owned" stock that he absolutely could not own, control, or transfer under Illinois law. *Peer Manor*, 134 F.2d at 840-41 (debtor corporation was no longer in existence; it had no power to exist for the purpose of being sued, to file an answer through counsel, or to carry out reorganization).

B. Federal courts are not free to rewrite a statute that relies on unambiguous definitions with "federal common law."

In Title 29, Congress specifically relied on concrete, non-controversial state law concepts like "ownership" and "stock." To define concepts like a "controlled group," it referred to definitions that existed in the Internal Revenue Code, Title 26. *See* 29 U.S.C. § 1301(a)(14); 26 U.S.C. §1563(a). For tax purposes, state law clearly exists and defines and describes who "owns" a corporation without ambiguity. State law also sets the parameters for lawful issuance and actual control of shares of stock in a corporation. State law also provides the backdrop for federal statutes like 26 U.S.C. § 1563 that rest upon state-defined concepts like "nonvoting stock," "treasury stock," "trusts," "estates," "spouse," "children" "grandchildren," and "parents." Congress has never tried to legislate these matters anew for the states. Moreover, as a matter of Congressional intent, there is no evidence that Congress ever *intended* to overwrite state corporate laws on ownership and control of state-created entities. There was never any need to reinvent an established body of reliable, workable law.

In the action below, PBGC's claims depended entirely upon the disputed premise that Joseph G. Wortley still owned at least 80% of Liberty Lighting Co., Inc.'s stock on July 31, 2012. This was simply not factually correct. Mr. Wortley did not own the company, or any shares of the stock. He had surrendered the stock to his bankruptcy estate. No later than 1997 (and while he was in bankruptcy), his surrendered stock was "destroyed" under Illinois law. When Mr. Wortley emerged from bankruptcy with a discharge in 1998, the stock could not be "abandoned" back to him because the stock was gone. Both the company and the stock were destroyed under the governing Illinois law. Nobody owned it in 1998, or in 2012.

Controlled group status depends on ownership *at the time of plan termination*. Pet. App. 21a, 27a (quoting 29 U.S.C. § 1362(a)). Here, Lighting's *stock* remained unowned and "destroyed" under state law and could not be *owned* by anybody, including Joseph Wortley, long before plan termination in 2012. *Shute v. Chambers*, 492 N.E.2d 528, 531 (Ill. App. 1st Dist. 1986) (dissolution "destroys" the stock of a corporation); *Horbach v. Kaczmarek*, 915 F. Supp. 18, 21 (N.D. Ill. 1996) ("When that five year 'wind-up' period expires, corporate property that has not been disposed of automatically passes to the shareholders."). Without issued, outstanding corporate stock under state law (and, significantly, legally recognizable voting interests associated with that stock and held under authority of state law by Mr. Wortley on July 31, 2012), Mr. Wortley lacked the legal right under state law to "control." There could be no ERISA "controlled group." 26 U.S.C. §1563(a) (determination of a controlled group requires looking at contemporaneous stock ownership and voting rights). Mr. Wortley's continued ownership

of a minimum of 80% of the corporate stock under state corporate law would be absolutely required to trigger the federal "controlled group" statute. *That required element was simply missing here from PBGC's case.*

Through the holding below, the Eleventh Circuit has now usurped Illinois' exclusive constitutional prerogative to define who *owns* and controls an Illinois-created corporation. *See Chicago Title & Tr. Co.*, 302 U.S. at 124–25 ("the federal government is powerless to resurrect a corporation"). Liberty Lighting Co., Inc. had no outstanding stock as of 2012 according to the only entity that ever allowed that stock to exist: Illinois. Because Illinois law alone, not federal law, speaks clearly to that issue, Liberty Lighting thereafter had no controlling stockholder, even if a federal agency desires to call it a "Plan Sponsor."

C. Certiorari review is warranted to restore the states' constitutional authority to determine and regulate the ownership and existence of their own state-created entities.

The Court should hear this case in order to restore uniformity of decisions with *Chicago Title* and the entire body of federal law that flowed from it. It should check ever-encroaching federal power against the states. If certiorari is granted, this Court can hold once and for all that federal ERISA laws do not trample any state's own long-established rules for the (1) existence *vel non* and (2) private ownership and governance and control of corporations, upon which critical American commercial interests rely every day.

The Court should halt the advance of invented "federal common law" at the expense of the states, congressional legislation, and the Tenth Amendment. Here, the new rule announced by the Eleventh Circuit would extend corporate life and impute stock ownership to otherwise-powerless, unwitting and helpless former owners in conflict with state law. To be owned, Liberty Lighting Co., Inc. needed to exist and have stock that could be owned. Under the plain meaning of 29 U.S.C. section 1563(a) and Treasury Regulation 1.414(c)-2, it is impossible for anyone to "own" 80% or more of a corporation that does not exist. Instead, upon collapse of the corporate form, any assets of the corporation are distributed to be owned thereafter by the shareholders individually. *See, e.g., Shute v. Chambers*, 492 N.E.2d 528, 531 (Ill. App. 1st Dist. 1986) (citing 3 Am. Jur. Corporations § 412, at 465 (1938)). But here, there were no assets. Everything was seized by the creditors.

D. The underlying policy justification to disregard state law, invent federal common law, and deem the Plan Sponsor to exist indefinitely despite state law depends on a flawed premise.

1. The decision exposes business owners to indefinite liabilities for an indefinite amount of time.

There are other logical and practical reasons to review the Eleventh Circuit's decision. It held that the Liberty Lighting ERISA Plan Sponsor continued to nominally exist and remained owned and controlled by its former shareholder beyond its dissolution for *twenty years* (from 1992 to 2012). As inherently extreme and unreasonable as that may sound, it is not even the outer limit of the

holding. Under the exact same reasoning, and that of the district court, a long-dissolved corporation could actually remain in ERISA limbo, and its former owners still deemed to own the stock in perpetuity, and for as long as no successor plan sponsor existed. That could be decades or even centuries. That is not a reasonable or predictable result. Rather, the result is needlessly hostile to business interests that rely on everyday state law concepts of "dissolution," "windup" and "ownership." In Illinois, for example, when a dissolution and windup period concludes after five years, business owners should have confidence that—absent specific statutory exceptions or intentional fraud—corporate existence is actually extinguished.

2. ERISA already contemplates the "missing Plan Sponsor" problem.

This Court has observed "repeatedly that ERISA is a 'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (quoting *Mertens v. Hewitt Associates,* 508 U.S. 248, 251 (1993) and *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980)). Therefore, this Court has "been especially 'reluctant to tamper with [the] enforcement scheme' embodied in the statute by extending remedies not specifically authorized by its text." *Id.* (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985)). This is because "ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* (internal quotes omitted). Outside of the ERISA

context, this Court has similarly cautioned courts not to "fashion new remedies that might upset carefully considered legislative programs." *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 97 (1981).

These rules restricting a federal court's power to make federal common law apply even if the policies underlying the statute seem to favor the requested remedy. "This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens v. Hewitt Associates,* 508 U.S. 248, 262 (1993). When analyzing the ERISA "statutory scheme as a whole: 'There is no congressional mandate to engage in legal gymnastics in order to guarantee pension plans at all costs.'" *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking, Inc.*, 857 F.2d 1107, 1109 (6th Cir. 1988) (quoting District Judge Wendell A. Miles). It was therefore inappropriate for PBGC to ask the courts to create new remedies to fit this case. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) ("We will not alter the text in order to satisfy the policy preferences of the Commissioner. These are battles that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch.").

Worse yet, the ultimate decision to override long-established state law with a "narrowly crafted" new federal common law rule rested on an erroneous and unnecessary policy justification that was premised on a confusion of ERISA's definitions. *See* Pet. App. 10a–11a. The Eleventh Circuit wrote that an ERISA Plan's "continuing

maintenance—can only have been undertaken by the *Plan's sponsor*." *Id.* 10a. Respectfully, that is not correct. ERISA relies on carefully defined terms arising from "a decade of congressional study." *Knudson*, 534 U.S. at 209. An ERISA "Plan *Administrator*" was responsible for continuing maintenance. *See* 29 U.S.C. § 1002(16)(A). As this case proves, a "Plan *Sponsor*," in contrast, is merely the founder and contributor for the Plan. *See* 29 U.S.C. § 1002(16)(B). A Plan Sponsor may stop functioning. A sole proprietor/Plan Sponsor may die. An entity sponsor may be dissolved (voluntarily or involuntarily), go into receivership, go bankrupt, or simply stop operating. Nothing can stop these normal events of business life.

That is why a "Plan Administrator" is still actually and legally responsible for maintaining the plan. Once the Panel Opinion commingled the defined terms "Plan Sponsor" with "Plan Administrator," these Petitioners were prejudiced.

Congress did not inadvertently leave room for ERISA to fall into chaos if a Plan suddenly lacked a Plan Sponsor. Rather, in the definition of "Plan Administrator," ERISA affirms that "in the case of a plan for which an administrator is not designated *and a plan sponsor cannot be identified*, [the Plan Administrator is] such other person as the Secretary [of Labor] may by regulation prescribe." 29 U.S.C. §1002(16)(A)(iii) (e.s.). Obviously, the default situation in which "a plan sponsor cannot be identified" was foreseen. The scheme created by Congress' choice of words in the statute did not need the federal court system's further assistance. A Plan Administrator, not the Plan Sponsor, exists to ensure continuity of plan operation.

If the Plan Administrator failed as a fiduciary, there are remedies, addressed below. If information is intentionally withheld or concealed from PBGC, there are very specific remedies. Those issues were never litigated or explored in this case; they were neither applicable nor relevant. This was a strict liability, Plan Sponsor "controlled group" case, *never* a claim asserted against a Plan Administrator or fiduciary for its alleged faults, failures or non-feasance. While the PBGC and the lower courts all offered suggestive commentary to justify their erroneous positions, actual fault was not litigated, because it was not relevant to the underlying claims.

Accordingly, ERISA is not "silent" when a Plan Sponsor ceases to exist. The statutory scheme does not fall apart. Congress considered the issue. There was no need to tamper with ERISA's enforcement scheme in this manner. If there were actually "uncertainty in ERISA law" then this same problem would be expected to have arisen repeatedly in the past. Over decades, Congress and the Secretary of Labor were authorized to address the continuity issue if it were a concern. Even the Eleventh Circuit agreed that "it is ERISA . . . that determines the identity of a plan's sponsor in a situation such as this."

In light of the foregoing, the Court should grant review. The Eleventh Circuit's decision should be quashed in favor of the plain language of the statute and with due deference to the state law that dictates the existence and ownership of corporations. There is no gap in ERISA that needed to be filled.

3. PBGC already has remedies to prevent a failure of succession of a Plan Sponsor that do not interfere with state corporate law.

ERISA already provides the PBGC with an extraordinary toolbox of remedies to prevent a failure of succession of a Plan Sponsor. The situation is referred to as a "controlled group breakup." *See Pension Benefit Guaranty Corp. v. FEL Corp.*, 798 F. Supp. 239 (D. N.J. 1992); *see also* PBGC.gov, *Risk Mitigation & Early Warning Program*, available at https://www.pbgc.gov/prac/risk-mitigation (using the term "controlled group breakup"). The Eleventh Circuit was incorrect when it concluded that "ERISA [does not] tell[] us what to do with pension liabilities when the sponsor of a plan has dissolved but the plan has continued to operate." (Pet App. 8a). Congress has directed PBGC exactly what to do. PBGC's "toolbox" includes:

i.) The ability to disregard transactions made to "evade" ERISA liabilities;[2]

ii.) Fiduciary duty lawsuits with alternate statutes of limitations;[3]

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2. 29 U.S.C. §1369(a); *PBGC v. White Consol. Indus.*, 215 F.3d 407 (3d Cir. 2000); *Pension Benefit Guar. Corp. v. Findlay Industries, Inc., et al.*, 902 F.3d 597 (6th Cir. 2018), *pet. for cert. dismissed sub nom. September Ends Co. v. Pension Ben. Guar. Corp.*, 140 S. Ct. 16 (2019).

3. 29 U.S.C. §1303(e)(6); *PBGC v. Mizrachi*, 363 F. Supp. 3d 342 (E.D.N.Y. 2019).

iii.) Extended statutes of limitations in cases of fraud and concealment;[4]

iv.) The ability to bring any and all state law causes of action;[5] and

v.) The benefit of hindsight and nearly unfettered deference when choosing a Date of Plan Termination.[6]

The real purpose of ERISA's Controlled Group provisions is to prevent a *Plan Sponsor* from "funneling its assets into other entities it owns" before going out of business. *See, e.g.,* (Pet App. 8a). That was never alleged to have happened here. Liberty Lighting simply went out of business, liquidated in a Chapter 7 bankruptcy, and was a dead and inactive entity for twenty years. No other co-owned entities are alleged to have taken on its assets or business. Mr. Wortley had no right to control or operate it, as the Seventh Circuit has previously held (applying Illinois law). *In re Peer Manor Bldg. Corp.*, 134 F.2d 839 (7th Cir. 1943) (relying on *Chicago Title*). Mr. Wortley could not even hire a lawyer to represent Liberty Lighting. *See id.* Accordingly, the corporate existence and stock ownership rules invented by the Eleventh Circuit

4. 29 U.S.C. §1303(e)(6)(B)-(C).

5. *PBGC v. The Renco Group*, 13-CV-621 RJS, 2015 WL 997712, (S.D.N.Y. Mar. 6, 2015).

6. *PBGC v. FEL Corp.*, 798 F. Supp. 239 (D.N.J. 1992); *PBGC v. Republic Tech. Int'l, Inc.*, 386 F.3d 659 (6th Cir. 2004); *PBGC v. Mize Co.*, 987 F.2d 1059 (4th Cir. 1993); *PBGC v. Durango-Ga. Paper Co.*, 2006 WL 3762085 (S.D. Ga. Dec. 20, 2006), *aff'd per curiam*, 251 Fed. Appx. 664 (11th Cir. Oct. 19, 2007).

for this case are not only offensive to state law, but also create a new ERISA remedy for a wrong that did not actually occur here.

CONCLUSION

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

Respectfully submitted,

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May 25, 2021

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED NOVEMBER 24, 2020

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14968

PENSION BENEFIT GUARANTY CORPORATION,

Plaintiff-Appellee,

versus

50509 MARINE LLC, AMH GOVERNMENT SERVICES, LLC, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida.

November 24, 2020, Decided
November 24, 2020, Filed

Before MARTIN, ROSENBAUM, and TALLMAN,* Circuit Judges.

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* The Honorable Richard C. Tallman, Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Appendix A

TALLMAN, Circuit Judge:

From the confluence of bankruptcy, employee benefits, and corporations law comes this most unusual case. The answer to a seemingly simple but surprisingly complex question controls our disposition: Did the Liberty Lighting Company exist in July 2012? Liberty was an Illinois corporation that went bankrupt and dissolved under state law in the 1990s. But if it nevertheless continued with the assistance of its sole stockholder owner as the sponsor of a pension plan under the federal Employee Retirement Income Security Act (ERISA), then federal law dictates that *other* companies owned by Liberty's owner may be held liable for the unfunded liability, which was paid by the government agency known as the Pension Benefit Guaranty Corporation (PBGC), when the plan ran out of funds. Those companies—the appellants in this action—protest that they cannot be considered owned in common with Liberty for the simple reason that Liberty ceased to exist long ago. We disagree. Concluding that, in the unusual circumstances of this case, Liberty still existed in 2012 sufficiently to act as the plan's sponsor under ERISA, we affirm the district court.

I

Joseph Wortley owned Liberty Lighting Co., Inc. ("Liberty"), a unionized electrical supply manufacturing company based near Chicago in the late 1980s. Prior to its ultimate dissolution, Liberty was the plan sponsor and administrator of the "Liberty Lighting Co., Inc. Pension Plan for IBEW Employees" (the "Plan") under Title

IV of ERISA, 29 U.S.C. § 1301 *et seq.* Liberty ran into financial trouble in the early '90s, entered bankruptcy and surrendered its assets to a creditor in 1992, and was thereafter administratively dissolved under state law. Wortley, Liberty's sole owner with 100% of the company's stock, soon followed with his own personal bankruptcy in 1993, from which he was discharged in 1998. As part of the bankruptcy proceedings, all of Wortley's assets were surrendered to a trustee, including his stock in Liberty. Meanwhile, Wortley continued to act as the Plan's administrator, signing papers on behalf of the Plan at the request of the Plan's actuary for years after Liberty's purported dissolution. These signatures were necessary to effect continuing payments to pensioners.

In 2012, as the Plan's funds ran low, the bank administering the Plan notified PBGC of the Plan's looming insolvency. PBGC, as the federal agency charged with protecting the retirement incomes of workers in private-sector defined benefit pension plans, contacted Wortley to reach a settlement regarding the unfunded remaining liability of the Plan. Wortley and PBGC eventually agreed to a settlement that represented Liberty as having dissolved in the '90s and the agreement contained language that Wortley believed established a final cutoff date for his remaining liability by conveying "any and all powers, authority, et[] cetera, that [Wortley] may have on behalf of Liberty [] and/or the Plan to PBGC" on July 31, 2012.

But six years later, PBGC brought suit against these 19 appellants ("the Companies") in the United States

District Court for the Southern District of Florida, alleging that they, as other companies owned by Wortley, were nonetheless part of a "controlled group" with Liberty, and therefore were still liable for Liberty's unpaid pension benefits, premiums, interest, and penalties under 29 U.S.C. §§ 1306(a)(7), 1307, and 1362(a). PBGC's theory of the case under ERISA is simple: with Liberty unable to meet its ERISA obligations to its former employees, Wortley's other companies must foot the bill. *See id.* § 1307(e)(2).

After denying the Companies' motion to dismiss, the district court granted summary judgment to PBGC on November 22, 2019. The court based its finding on several alternate grounds: (1) ERISA makes Liberty the contributing sponsor of the Plan, and no operation of state law can change that; (2) courts are authorized to make "federal common law" in pursuit of ERISA's scheme and goals, and finding that Liberty was the sponsor would further ERISA's central goal of protecting the interests of pension beneficiaries; and (3) Illinois law allows a dissolved company "to carry on in a manner necessary to wind up its affairs," so Liberty was able to continue in existence after ceasing business operations in order to meet its obligations under the Plan. The court reasoned that under the Companies' view of ERISA, "nobody was responsible for the pension plan," a result that "cannot be squared with ERISA as a whole," which "does not allow pension plans to exist in a state of limbo, devoid of any caretaker." Final judgment was entered on December 6, 2019, and the Companies timely appealed.

II

The district court had federal-question jurisdiction under 28 U.S.C. § 1331, and we have appellate jurisdiction under § 1291.

We review the granting of summary judgment de novo, viewing all facts in the light most favorable to the nonmoving party. *See Nesbitt v. Candler Cnty.*, 945 F.3d 1355, 1357 (11th Cir. 2020). Summary judgment is proper only "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).

III

This is, as the district court wrote in its summary-judgment order, "a difficult case." It comes down to what seems on the surface an easy question: On July 31, 2012, was Liberty the "contributing sponsor" of the "Liberty Lighting Co., Inc. Pension Plan for IBEW Employees" under Title IV of ERISA?[1] If it was—and if Joseph Wortley was its owner—then the companies sued by PBGC are responsible for the so-called termination liabilities: the Plan's shortfall, plus premiums, penalties, and interest associated with the Plan, totaling approximately $6.2 million. 29 U.S.C. §§ 1362(b), 1306(a), 1307(c), 1307(d).

1. The Companies do not deny that Liberty was the Plan's sponsor before Liberty's dissolution. And no one questions that Wortley owns the requisite percentage of the stock of the 19 companies seeking to avoid Liberty's unfunded pension plan liability.

But asking that seemingly easy question triggers several others: What was the effect of Liberty's 1992 bankruptcy on its status as the Plan's sponsor? Does it matter that Wortley—sometimes using Liberty letterhead—continued to sign the forms authorizing payment to the pensioners? If Liberty *wasn't* the Plan's sponsor, who was? Answering them is made more difficult by an important omission: the record does not show whether Liberty reported its bankruptcy, liquidation, and dissolution to PBGC, as it was required to do under ERISA. As a result, two decades passed between Liberty's filing for bankruptcy and the agreement that terminated the Plan. That delay, and the unfortunate destruction of the old bankruptcy court files under the judiciary's records retention policies, looms large as we search for answers and grapple with this case's unique circumstances.

A

We begin by noting that, while the district court provided three reasons for its decision, "we may affirm on any ground that finds support in the record." *Long v. Comm'r*, 772 F.3d 670, 675 (11th Cir. 2014) (citation omitted). Both ERISA and Illinois law provide relevant clues to solving the mystery of Liberty's existence and corporate demise.

1

Liberty was an Illinois corporation; Illinois corporations law thus lays the groundwork for its

corporate status. *See Freedman v. magicJack Vocaltec Ltd.*, 963 F.3d 1125, 1133 (11th Cir. 2020) ("[C]orporations . . . are creatures of state law . . . ." (quoting *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991))) . Dissolution "terminates [an Illinois corporation's] existence" and "a dissolved corporation shall not thereafter carry on any business," except wind-up and liquidation. 805 Ill. Comp. Stat. 5/12.30(a). At common law, a corporation could no longer sue or be sued after its dissolution. *See Henderson-Smith & Assocs., Inc. v. Nahamani Family Serv. Ctr.*, 323 Ill. App. 3d 15, 752 N.E.2d 33, 37, 256 Ill. Dec. 488 (Ill. App. Ct. 2001). But like most jurisdictions, Illinois has modified that rule by statute, allowing a corporation to live on for another five years beyond its dissolution. 805 Ill. Comp. Stat. 5/12.80. *See also Mich. Ind. Condo. Ass'n v. Mich. Place, LLC*, 2014 IL App (1st) 123764, 380 Ill. Dec. 704, 8 N.E.3d 1246, 1250 (Ill. App. Ct. 2014) ("Section 12.80 extends the life of the corporation after its dissolution so that suits which normally would have abated may be brought by and against the corporation." (cleaned up)).

The parties sharply disagree about section 12.80's effect on a corporation's ability to serve as a contributing sponsor under ERISA. The Companies maintain that a corporation ceases existence *for all purposes* after the five-year period, while PBGC argues the statutory death a corporation suffers five years after its dissolution affects only the company's ability to sue and be sued, and has no effect on its *federally defined* role as an ERISA contributing sponsor. The Companies rely heavily on dicta from Illinois state cases to support their position. *See, e.g.*,

Pielet v. Pielet, 2012 IL 112064, 978 N.E.2d 1000, 1008 n.3, 365 Ill. Dec. 497 (Ill. 2012) ("[T]he five-year extension to a corporation's life granted by section 12.80 establishes a fixed endpoint *beyond which a corporation ceases to exist*. After that point, it may no longer sue or be sued." (emphasis added)).

But Illinois courts have not always given section 12.80 such a rigid reading. *See, e.g.*, *Moore By and Through Moore v. Nick's Finer Foods, Inc.*, 121 Ill. App. 3d 923, 460 N.E.2d 420, 421, 77 Ill. Dec. 364 (Ill. App. Ct. 1984) (holding a dissolved corporation liable outside the then-two-year dissolution period and noting "that the two-year limitation on corporate survival is not absolute, and may be extended under certain circumstances"). *Moore* is flatly inconsistent with the Companies' construction of section 12.80. And besides, *Pielet*'s discussion of Illinois's corporate-survival statute is primarily focused on whether a dissolved corporation may *sue or be sued*. Whether or not Illinois law would allow Liberty to sue or be sued is not the question here; rather, we must ask instead whether Liberty had the capacity to serve as the Plan's ERISA sponsor up until 2012. That is a question of federal law, and one to which Illinois corporations law provides no answer.

B

Neither ERISA nor Illinois law tells us what to do with pension liabilities when the sponsor of a plan has dissolved but the plan has continued to operate. Where ERISA is silent, we are required "to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'"

Arnold v. Life Ins. Co. of N. Am., 894 F.2d 1566, 1567 (11th Cir. 1990) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989)). In deciding whether a rule should "become part of ERISA's common law," we must decide "whether the rule, if adopted, would further ERISA's scheme and goals," which are "(1) protection of the interests of employees and their beneficiaries in employee benefit plans . . . and (2) uniformity in the administration of employee benefit plans." *Horton v. Reliance Standard Life Ins. Co.*, 141 F.3d 1038, 1041 (11th Cir. 1998) (per curiam) (citations omitted). *See also Bd. of Trs. of W. Conf. of Teamsters Pension Tr. Fund v. H.F. Johnson Inc.*, 830 F.2d 1009, 1014 (9th Cir. 1987) (relying on Congress's command to use "Federal substantive law" to fill in statutory gaps).

Mindful that this power to create rules that fit ERISA's purposes is to be wielded carefully and narrowly, we exercise it here. 29 U.S.C. § 1307(e)(2) establishes liability for the "controlled group" of a plan sponsor—that is, other entities "under common control with" the sponsor. 29 U.S.C. § 1301(a)(14)(A). The purpose and effect of this provision is plain: the sponsor of a defunct pension plan cannot be allowed to funnel its assets into other entities it owns, and then leave PBGC holding the bag for the plan's continuing liabilities. If a sponsor is on the hook for unfunded pension liabilities, then every other entity sharing a specified percentage ownership interest in common (here through Wortley) is also on the hook, jointly and severally. 29 U.S.C. § 1307(e)(2); *see also Durango-Georgia Paper Co. v. H.G. Estate, LLC*, 739 F.3d 1263, 1266 (11th Cir. 2014) ("In the event that the contributing

sponsor can no longer pay benefits when they are due, the PBGC is authorized to terminate the plan . . . and to demand that the contributing sponsor and the members of the controlled group provide for the unfunded benefit liabilities." (internal citations omitted)). Joseph Wortley owned Liberty, and Joseph Wortley owns the Companies; there is no dispute about that.

Further, Wortley's actions on behalf of Liberty after its purported dissolution constitute strong evidence that Liberty continued to serve as the Plan's sponsor *de facto*, whatever its technical status under Illinois law. For years after its dissolution, Liberty—through Wortley—continued to authorize payments out of the Plan. Liberty played an active role in the Plan years after its bankruptcy; most notably, Wortley filed with the government and the bank that held the assets in 2002 and 2004 ERISA forms that identified Liberty as the Plan's sponsor. And Wortley sent a letter to the Plan's actuary on Liberty letterhead inquiring about benefit entitlements. These steps—necessary to the Plan's continuing maintenance—can only have been undertaken by the Plan's sponsor.

With all this in mind, we follow the Supreme Court's instruction to fill in ERISA's gaps with common-law rules, *see Firestone*, 489 U.S. at 109, and we hold that where the sponsor of an ERISA plan dissolves under state law but continues to authorize payments to beneficiaries and is not supplanted as the plan's sponsor by another entity, it remains the constructive sponsor such that other members of its controlled group may be held liable for the plan's termination liabilities. Under the narrow rule we craft

here, the Companies are liable to PBGC for the Plan's termination liabilities for the simple reason that Liberty persisted as the Plan's sponsor even as it dissolved as an Illinois corporation.

This rule "further[s] ERISA's scheme and goals" by "protecting . . . the interests of employees and their beneficiaries in employee benefit plans"—it ensures that a plan such as this does not go without a sponsor—and it promotes "uniformity in the administration of employee benefit plans" by clarifying that disparate state corporations laws are not the sole factor in determining a sponsor's identity. *Horton*, 141 F.3d at 1041. By contrast, giving credence to the Companies' overly broad view of Illinois law would mean leaving the government agency to pick up the Plan's tab rather than first exhausting any funds that might be kept in Wortley's other entities, and it would make the definition of sponsor entirely dependent on state laws that may differ widely on a corporation's post-dissolution status.[2]

The Companies claim that Liberty cannot have been the Plan's sponsor, but they provide no possible alternative

2. To be sure, we do not hold that ERISA *preempts* Illinois corporations law. *See Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261, 1275 (11th Cir. 2015) (the "presumption against preemption" means "the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress" (citation omitted) (alteration in original) (overruled on other grounds by *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017) (en banc))). Rather, we clarify that it is ERISA—not Illinois law—that determines the identity of a plan's sponsor in a situation such as this.

sponsor. PBGC insists that it was never notified at the time of Liberty's bankruptcy in 1992 that the company was dissolving so that it could lodge an appropriate claim as a creditor to the bankrupt corporate estate and make provision for protecting retirees' future benefit payments. The government agency has no record of any such communications and the bankruptcy court file that might contain the answer no longer exists. And the Companies point to no provision of ERISA that contemplates a plan without a sponsor—certainly, no provision that contemplates a plan continuing to operate and pay out pension benefits for twenty years after the purported dissolution of its sponsor while apparently failing to meet its notification requirements to PBGC. Ruling for the Companies would mean holding that an extant pension plan may be left without a sponsor for decades, which could have vast ripple effects across even unrelated provisions of ERISA. *See, e.g.*, 29 U.S.C. § 1082(c)(4)(A)(ii) (naming a plan's sponsor as one party that may perfect a security interest as part of a minimum-funding waiver); § 1083(c)(2)(D)(vi)(I) (requiring a plan's sponsor to use certain segment rates in determining waiver amortization installments). The implication that an ERISA plan may function without a sponsor risks chaos by muddying the meaning of these sections and others that depend on an ascertainable sponsor. We decline the Companies' invitation to create this uncertainty in ERISA law.

Because we craft this common-law rule to conclude that Liberty remained the Plan's sponsor until the execution of the 2012 agreement, we do not reach the parties' other arguments or the district court's other findings.

IV

We hold that—under the particular circumstances presented here, and mindful of ERISA's scheme and protectionist goals—the Companies owned by Joseph Wortley are liable for the Plan's termination liabilities notwithstanding Liberty's apparent dissolution under Illinois law. The judgment of the district court is

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED NOVEMBER 22, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-CV-81009-ROSENBERG/REINHART

PENSION BENEFIT GUARANTY CORPORATION,

Plaintiff,

v.

20 SE 3RD ST LLC, *et al*.,

Defendants.

November 22, 2019, Decided
November 22, 2019, Entered on Docket

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO THE AFFIRMATIVE DEFENSES, DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND DENYING DEFENDANTS' MOTION IN LIMINE

This matter is before the Court on Plaintiff's Motion for Partial Summary Judgment [DE 114], Defendants' Motion for Summary Judgment [DE 112], Plaintiff's

Motion for Summary Judgment as to Affirmative Defenses [DE 152], and Defendants' Motion in Limine [DE 116]. The Motions have been fully briefed. For the reasons set forth below, Plaintiff's Motions are granted and Defendants' Motions are denied.

I. BACKGROUND AND INTRODUCTION

This is a case about delay. When a company offers its employees a pension plan, certain federal requirements attach to the plan. One of those requirements is that in the event the company ceases to do business (or dissolves), the company must notify the Pension Benefit Guarantee Corporation—the Plaintiff in this case. Plaintiff is a government-sponsored agency that insures and administers pension plans for companies that have ceased to do business. In 1991, a company offering a pension plan—Liberty Lighting—began the process of liquidating and dissolving. Plaintiff brought this suit on the premise that Liberty Lighting never informed the Plaintiff of Liberty's dissolution. During the 1990s, Liberty Lighting finished its dissolution proceedings and the owner of Liberty Lighting, Mr. Joseph Wortley, went through a personal bankruptcy. During that time, and throughout the early 2000s, pensioners continued to collect pension payments, but the pension funds dwindled. Finally, in 2012, Plaintiff became aware of Liberty Lighting's dissolution in the 1990s. By the time Plaintiff learned of Liberty's dissolution, however, the funds in the pension were completely depleted. The Defendants before the Court are a collection of companies that Mr. Wortley owned when the pension plan terminated in 2012.

The delay in this case is extreme. Twenty-one years passed from the time Liberty Lighting began to dissolve to the time its pension fund was depleted. Although it is unclear whether Liberty Lighting notified Plaintiff of its dissolution, someone must bear the cost of the delay of Plaintiff's takeover of the pension. If Defendants prevail, the costs associated with the delayed wind-up of the Liberty pension will be borne by active companies in the marketplace that pay pension insurance premiums to Plaintiff. If Plaintiff prevails, the costs associated with the delayed wind-up will be borne by non-parties who had very little, if any, connection to Liberty Lighting, as well as Mr. Wortley who, from his perspective, attempted to put Liberty Lighting behind him via bankruptcy many years ago. In all candor to the parties, the Court has found this to be a difficult case. The Court does not believe that a delay of twenty-one years was contemplated when the applicable federal laws were enacted. Nonetheless, the Court ultimately concludes that federal law compels it to enter summary judgment in favor of the Plaintiff.

II. SUMMARY JUDGMENT 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). The existence of a factual dispute is not by itself sufficient grounds to defeat a motion for summary judgment; rather, "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is genuine if "a

reasonable trier of fact could return judgment for the non-moving party." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008) (citing *Anderson*, 477 U.S. at 247-48). A fact is material if "it would affect the outcome of the suit under the governing law." *Id.* (citing *Anderson*, 477 U.S. at 247-48).

In deciding a summary judgment motion, the Court views the facts in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *See Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006). The Court does not weigh conflicting evidence. *See Skop v. City of Atlanta*, 485 F.3d 1130, 1140 (11th Cir. 2007). Thus, upon discovering a genuine dispute of material fact, the Court must deny summary judgment. *See id.*

III. FACTS

In 1989, Liberty Lighting Company, Inc. became the sponsor and administrator of a pension plan. DE 115 at 1. That plan was subject to federal law and federal regulations: The Employee Retirement Income Security Act ("ERISA"). At some point between 1989 and 1991, Liberty Lighting experienced business problems significant enough to force it into bankruptcy. DE 113 at 2. After bankruptcy, Liberty Lighting was administratively dissolved by the State of Illinois in 1992. *Id.*

ERISA requires companies that maintain pensions to notify the Plaintiff if a pension plan is at risk for termination because Plaintiff administers pension plans

for companies that have ceased to do business. *See* 29 U.S.C. § 1302(a). A plan is at risk for termination if the company administering the plan enters bankruptcy or dissolves. *Id.* Although Liberty Lighting became bankrupt and dissolved, the parties dispute whether Liberty Lighting ever notified Plaintiff of the same. For its part, Plaintiff contends that Liberty Lighting never sent the required notice. DE 134-9. For their part, Defendants contend that "nobody . . . knows if this is actually true; too much time has passed." DE 113 at 3. In any event, it is undisputed that Liberty Lighting did not terminate its pension plan liability pursuant to ERISA or otherwise resolve its obligation to pass the administration of the plan to Plaintiff. Instead, time passed.

In 1993, the sole owner of Liberty Lighting, Mr. Wortley, filed for personal bankruptcy. DE 113 at 3. Mr. Wortley's assets (which were surrendered to the bankruptcy court) included Mr. Wortley's Liberty Lighting stock. *Id.* The bankruptcy court issued its final decree in 1998. *Id.* Mr. Wortley's Liberty Lighting stock was not sold during the bankruptcy and was instead "fully administered" property. DE 115 at 5.

During Mr. Wortley's bankruptcy and in the years that followed, various pension plan documents were executed by Liberty Lighting and Mr. Wortley. In 1994, Mr. Wortley executed an amendment to the plan on behalf of Liberty Lighting. *Id.* at 2.[1] In 2002, Mr. Wortley filed a

1. Although Defendants dispute the effective date of the amendment, Defendants do not dispute the date upon which the amendment was executed. DE 138 at 2.

Department of Labor pension plan benefit form on behalf of Liberty Lighting. *Id.* at 2-3. In 2003, Mr. Wortley sent a letter on Liberty Lighting letterhead to a consulting organization regarding the benefits of the pension plan. *Id.* In 2004, Liberty Lighting entered into an Investment Management Agreement with a bank to manage the assets of the pension plan. *Id.* at 3. That agreement was signed by Mr. Wortley. *Id.*

In 2012, the pension plan ran out of money and the bank administering the pension payments informed Plaintiff of the same. *See* DE 134-2; 134-9. After communications and negotiations between Plaintiff and Mr. Wortley, Liberty Lighting's pension plan was terminated and Plaintiff took over the administration of pension benefits. DE 115 at 3-4. The date of termination, an important date, was July 31, 2012. *Id.*

Plaintiff subsequently filed the suit before this Court. Plaintiff did not file suit against Liberty Lighting, a long-dissolved entity with no assets. Instead, Plaintiff filed suit against Mr. Wortley and against various companies in which Mr. Wortley held an ownership interest on the date of plan termination, July 31, 2012. Defendants filed a motion to dismiss, and the Court referred the motion to the Honorable Magistrate Judge Bruce E. Reinhart for a Report and Recommendation. Defendants argued that Liberty Lighting could not be responsible for the pension plan in 2012 because of its earlier dissolution. In his Report, Judge Reinhart disagreed. Judge Reinhart concluded that ERISA was silent on the impact of corporate dissolution, that it was the responsibility of the federal courts to create

common law on issues where ERISA was silent, and that the appropriate common law, consistent with the purposes of ERISA, was that Liberty Lighting's dissolution did *not* have the effect of removing Liberty Lighting from its status as the sponsor of an ERISA-governed pension plan. DE 86. This Court agreed and adopted Judge Reinhart's recommendation over Defendants' objections. DE 120. The parties subsequently briefed the cross motions for summary judgment before the Court, again arguing the legal significance of Liberty Lighting's dissolution. The issue is ripe for the Court's decision.

IV. LEGAL ANALYSIS AND DISCUSSION

Plaintiff has moved for partial summary judgment, arguing that it is entitled to judgment as a matter of law against some of the Defendants in this case.[2] Plaintiff's position is that ERISA imposes pension plan termination liability on the Defendant companies owned by Mr. Wortley on the day the pension plan was terminated in 2012. Defendants filed a cross motion for summary

2. The Defendants that are the subject of Plaintiff's Motion for Partial Summary Judgment are: Liberty Analytical Corp.; Bedford Materials Co., Inc.; Liberty Properties at Carey, LLC; Liberty Properties at Bedford, LLC; Buffalo Power Electronics Center, Inc.; Liberty Polyglas, Inc.; Liberty Associates, LC; 50509 Marine, LLC; AMH Government Services, LLC; American Marine Holdings, LLC; Baja Marine, Inc.; Donzi Marine, LLC; Fountain Dealers Factory Super Store, Inc.; Fountain Powerboat Industries, Inc.; Fountain Powerboats, LLC; Liberty Acquisition FPB, LLC; Palmetto Park Financial, LLC; Pro-Line Boats, LLC; and Pro-Line of North Carolina, Inc.

judgment, arguing that the same companies cannot be held liable as a matter of law.

When a pension plan is terminated, ERISA imposes liability on certain parties pursuant to 29 U.S.C. § 1362. The date ERISA utilizes to impose liability is the date of plan termination (here July 31, 2012),[3] and the parties that are subject to liability are **the contributing sponsor of the plan** or **a member of a contributing sponsor's controlled group**:

> In any case in which a single-employer plan is terminated in a distress termination under section 1341(c) of this title or a termination otherwise instituted by the corporation under section 1342 of this title, any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's controlled group shall incur liability under this section. The liability under this section of all such persons shall be joint and several.

§ 1362(a). It is undisputed that the contributing sponsor of the pension plan in this case was historically Liberty Lighting Company, Inc. DE 115 at 1. Liberty Lighting became the contributing sponsor as early as 1989. *Id.* What the parties dispute is: (**A**) whether Liberty Lighting could be considered the contributing sponsor as of the

3. The day before the date of termination is used in some calculations. 29 C.F.R. § 4007.13(g).

date of plan termination in 2012 and (**B**) the application of ERISA liability to "member[s] of [the] contributing sponsor's controlled group." Each dispute is considered in turn before the court turns to (**C**) Defendants' affirmative defenses and motion in limine.

A. Liberty Lighting's Role as the Pension Plan's Contributing Sponsor

There is no reasonable inference from the record evidence that any entity or person other than Liberty Lighting was ever the pension plan's contributing sponsor. Defendants admit that Liberty Lighting was the contributing sponsor in 1989. DE 138 at 2. There is no record evidence that Liberty Lighting ever transferred its responsibilities under the plan to some other entity or person, was otherwise relieved of its responsibilities, or somehow ceased to be the contributing sponsor. Instead, record evidence confirms Liberty Lighting's continuing role as the contributing sponsor. For example, Liberty Lighting executed documents in connection with the plan in 1994, 2002, 2003, 2004, and 2012. DE 11 at 2-4.

Defendants argue that Liberty Lighting's dissolution under state law had the effect of removing Liberty Lighting from the ambit of contributing sponsor liability under ERISA. It is undisputed that in 1992 Liberty Lighting was dissolved under Illinois law. DE 113 at 3. Defendants cite to no ERISA provision, federal law, or federal case for the proposition that a contributing sponsor can cease to be a contributing sponsor by operation of *state* law. And while it is true that federal law defers to the law

of the state of incorporation to assess matters of corporate existence,[4] Plaintiff does not seek any relief against Liberty Lighting. Liberty Lighting is not a Defendant in this case—Plaintiff does not seek final judgment against the company due to its status as the ERISA contributing sponsor. For these reasons, the Court concludes that (1) under the clear and unambiguous terms of ERISA Liberty Lighting was the contributing sponsor of the plan as of the date of plan termination in 2012 and (2) Defendants have provided no relevant legal authority to the contrary. Plaintiff's Motion for Partial Summary Judgment is therefore granted on this basis.

In the alternative, ERISA is silent on the issue of whether dissolution under state law can affect an entity's status as a contributing sponsor. As this Court concluded at the motion to dismiss stage, however, "the federal courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" *Arnold v. Life Ins. Co. of N. Am.*, 894 F.2d 1566, 1567 (11th Cir. 1990) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989)). In deciding whether to adopt a federal common law rule, a court "must examine whether the rule, if adopted, would further ERISA's scheme and goals." *Horton v. Reliance Standard Life Ins. Co.*, 141 F.3d 1038, 1041 (11th Cir. 1998). Here, ERISA's central goal is the protection of the interests of pension beneficiaries. *Id.* Applying these principles, this Court previously ruled "that the

4. *E.g., Chicago Title & Tr. Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 124-25, 58 S. Ct. 125, 82 L. Ed. 147 (1937).

dissolution of Liberty Lighting under state law did not terminate Liberty Lighting's status under ERISA as a contributing sponsor of the Plan, nor did it relieve Liberty Lighting of the obligations attendant to being a contributing sponsor." DE 86 at 14; DE 120. Upon review of the summary judgment record, the Court can see no reason to alter its position.[5]

Also in the alternative, the Court concludes that Illinois law does not bar this Court from finding that Liberty Lighting was the plan's contributing sponsor in 2012. Illinois dissolution law permits a dissolved company to carry on in a manner necessary to wind up its affairs and, pursuant to Liberty Lighting's termination of the plan in 2012, Liberty Lighting still had ERISA-based affairs that needed to be wound up in 2012. *See* 805 Ill. Comp. Stat. 5/12.30. Indeed, Mr. Wortley's execution of pension documents over the course of many years after Liberty Lighting's dissolution exemplifies the on-going need for Liberty Lighting to wind up its pension obligations. Somebody had to administer the pension, and there was no one else to do so. These alternative bases support granting Plaintiff's Motion for Partial Summary Judgment on the issue that Liberty Lighting could be considered the contributing sponsor as of the date of plan termination in 2012.

The Court's decision may be more difficult if Plaintiff had sought relief against Liberty Lighting as an entity.

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5. The Court adopts and incorporates herein the analysis and reasoning of Judge Reinhart that was adopted by this Court.

Liberty Lighting ceased to exist under state law and federal law respects the rights of states to define corporate existence. But here, the Court's decision is a narrow one. The Court holds only that for the purposes of a federal, ERISA-focused application of ERISA defined terms (such as a contributing sponsor), a state-law based dissolution does not disturb an entity's federal, ERISA contributing-sponsor designation. To hold otherwise would permit contributing sponsors to circumvent the requirements of ERISA. ERISA provides for the orderly termination of a contributing sponsor's liability, but if state law dissolution also terminated a sponsor's ERISA liability an entity could dissolve, not notify Plaintiff of the dissolution, and thereby avoid all ERISA-based liability. That is exactly what is alleged to have happened in this case.

Defendants' position also cannot be squared with ERISA as a whole. The ramification of Defendants' position is that *nobody* was responsible for the pension plan; not Liberty Lighting, because it dissolved; not Mr. Wortley, because he went through bankruptcy; and not Plaintiff, because it never took control of the plan.[6] But ERISA does not allow pension plans to exist in a state of limbo, devoid of any caretaker. A plan trustee's obligations are extinguished only when he or she resigns in accordance with the applicable plan provisions *and* makes arrangements—e.g., through the appointment of a successor—for the continued management of the plan.

6. Even if Liberty Lighting did send Plaintiff notice of its dissolution and the notice was somehow lost in transit, Liberty Lighting would still have had the burden to follow-up with Plaintiff to ensure that the plan was properly cared for.

Chambers v. Kaleidoscope, Inc. Profit Sharing Plan & Trust, 650 F. Supp. 359, 369 (N.D. Ga. 1986); *Pension Benefit Guaranty Corp. v. Greene*, 570 F. Supp. 1483 (W.D. Pa. 1983); *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629 (W.D. Wis. 1979). For all of the reasons set forth above, Liberty Lighting was the contributing sponsor of the pension plan on the date of plan termination, and Plaintiff's Motion for Partial Summary Judgment is granted on this basis.

The Bankruptcy of Liberty Lighting's Sole Owner

The Court addresses one other argument brought by Defendants that is not tied directly to Liberty Lighting. Defendants argue that the owner of Liberty Lighting's personal bankruptcy (Mr. Wortley) resulted in the stock of Liberty Lighting no longer being owned by Mr. Wortley in 1997. Thus, Defendants argue, there could be no ownership of Liberty Lighting, by Mr. Wortley, in 2012. That argument is without merit. Mr. Wortley's stock was officially abandoned by the bankruptcy trustee. DE 134 at 3; 115-16 at 4. Accordingly, the Liberty Lighting stock was returned to Mr. Wortley upon the conclusion of his bankruptcy. *See* 11 U.S.C. § 554; *In re Wright*, 566 B.R. 457, 462 (6th Cir. BAP 2017) ("The plain language of the statute unambiguously states that if an asset was property scheduled [as in the instant case] and not administered by the trustee [as in the instant case], upon closing the case, the asset is abandoned as a matter of law.").

Relatedly, Defendants contend that the stock was "destroyed" prior to the stock's post-bankruptcy return

to Mr. Wortley under Illinois law, but for this proposition Defendants rely upon a single case: *Shute v. Chambers*, 142 Ill. App. 3d 948, 953, 492 N.E.2d 528, 97 Ill. Dec. 92 (1986). *Shute*, however, simply alludes to the general proposition (citing a source from 1938) that after dissolution an entity will no longer possess assets—its assets will be distributed to creditors or stockholders.[7] Thus, the Court can see no basis to conclude that the stock was somehow "destroyed" and, as a result, was not returned to Mr. Wortley at the conclusion of his bankruptcy.

B. The ERISA Liability of the "Controlled Group"

The second main area of dispute between the parties is whether ERISA-based liability should attach to the Defendants under the "controlled group" provision. ERISA imposes pension plan termination liability not only upon the contributing sponsor of a plan, but also upon "member[s] of [the] contributing sponsor's controlled group" as of the date of plan termination. 29 U.S.C. § 1362. The controlled group is a defined term which means: "in connection with any person, a group consisting of such person and all other persons under common control with such person." § 1301(a)(14)(A). Common control is also a defined term, but the definition of common control is relegated to Treasury Regulations. § 1301(a)(14)(B).

7. *Shute* acknowledges that a dissolved corporation will continue to exist to wind-up its affairs. *Id. Shute* also arguably supports Plaintiff's position—not Defendants'; in *Shute*, the court permitted the suit to proceed over the defendant's dissolution defense, much like the instant case. *Id.* at 953-54. As in *Shute*, the instant case is not against the corporation that was dissolved.

Treasury Regulations in turn define different instances of common control. One such definition relevant to this case is that corporations are under common control if they are under common ownership. 29 C.F.R. § 4001.3(b)(2); 26 C.F.R. § 1.414(b)-1; 26 C.F.R. § 1.414(c). A second definition relevant to this case is that entities are under common control if they are under common ownership and are also "trades or businesses." 26 C.F.R. § 1.414(c)-1.[8] These regulations set the threshold for common ownership at no less than 80%. The undisputed owner of Liberty Lighting was at all times Mr. Wortley.[9] The Court therefore examines the record evidence of the Defendants in this case to determine whether those Defendants were

8. A contributing sponsor is automatically a part of the "controlled group" and thus, need not necessarily be a trade or business. 29 U.S.C. § 1301(a)(13)-(14) (stating that a controlled group means, in connection with any **contributing sponsor**, a group consisting of the contributing sponsor and all other persons under common control with the contributing sponsor).

9. Defendants admit that Mr. Wortley was the sole owner of Liberty Lighting prior to the company's bankruptcy, and Mr. Wortley disclosed in bankruptcy that he was the 100% owner of Liberty Lighting. As previously discussed, Defendants' contestation of the ownership issue is limited to the proposition that the dissolution of Liberty Lighting and the bankruptcy of Mr. Wortley had the effect of removing Mr. Wortley and Liberty Lighting from the ambit of ERISA liability. The Court has rejected both of those arguments. To be sure, Mr. Wortley's Liberty Lighting stock in 2012 would have been valueless, the company would have had no assets, and Liberty Lighting would have been unable, under Illinois law, to conduct any business (or to be sued), but under Illinois law a dissolved company may take any necessary action to wind-up its affairs. *See* 805 Ill. Comp. Stat. 5/12.30.

under common ownership with Mr. Wortley at the time of plan termination.

Liberty Analytical Corporation

Defendants have admitted that Liberty Analytical was an operating business on the date of plan termination, that it was a trade or business, and that it was entirely owned by Mr. Wortley. DE 138 at 4. Thus, Defendant Liberty Analytical was a member of the plan's contributing sponsor control group on the date of plan termination, and Plaintiff is entitled to partial summary judgment as to this Defendant.

Bedford Materials Company, Inc.

Defendants have admitted that Bedford Materials was an operating business on the date of plan termination, that it was a trade or business, and that it was at least 82% owned by Mr. Wortley. *Id.* Thus, Defendant Bedford Materials was a member of the plan's contributing sponsor control group on the date of plan termination, and Plaintiff is entitled to partial summary judgment as to this Defendant.

Liberty Properties at Carey and Liberty Properties at Bedford

Defendants have admitted that both of the aforementioned companies are entirely owned by Mr. Wortley and that, as of the date of plan termination, each of the companies owned real property occupied by another

member of the controlled group. *Id.* at 6-7. Courts have unanimously held that the leasing of property to a person under common control is a "trade or business."[10] Thus, both of the Liberty Property Defendants were members of the plan's contributing sponsor control group on the date of plan termination, and Plaintiff is entitled to partial summary judgment as to both Defendants.

Buffalo Power Electronics Center, Inc.

Defendants have admitted that Buffalo Power was an operating business on the date of plan termination, that it was a trade or business, and that it was entirely owned by Mr. Wortley. *Id.* at 7-8. Thus, Defendant Buffalo Power was a member of the plan's contributing sponsor control group on the date of plan termination, and Plaintiff is entitled to partial summary judgment as to this Defendant.

Liberty Polyglas, Inc.

Defendants have admitted that Liberty Polyglas was an operating business on the date of plan termination, that it was a trade or business, and that it was at owned by Mr. Wortley through marriage. *Id.* Thus, Defendant Liberty Polyglas was a member of the plan's contributing sponsor control group on the date of plan termination, and Plaintiff is entitled to partial summary judgment as to this Defendant.

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10. *E.g., Pension Benefit Guaranty Corp. v. Findlay*, 902 F.3d 597, 607 (6th Cir. 2018); *Cent. States Se. & Sw. Areas Pension Fund v. Messina Prods., LLC*, 706 F.3d 874, 882 (7th Cir. 2013).

Appendix B

Liberty Associates, LC

Defendants have admitted that Liberty Associates was an operating business on the date of plan termination, that it was a trade or business, and that it was entirely owned by Mr. Wortley. *Id.* at 8-9. Thus, Defendant Liberty Associates was a member of the plan's contributing sponsor control group on the date of plan termination, and Plaintiff is entitled to partial summary judgment as to this Defendant.

The Marine Companies

Defendants have admitted that a large list of companies in the maritime business (see docket entry 115 at page 9, the "Marine Companies") were operating businesses on the date of plan termination, that they were trades or businesses, and that they were entirely owned by Mr. Wortley. *Id.* Thus, the Marine Companies were members of the plan's contributing sponsor control group on the date of plan termination, and Plaintiff is entitled to partial summary judgment as to these Defendants.

Defendants' Policy-Based Argument in Defense of the Controlled Group Defendants

Defendants argue that it is unfair to hold parties liable in 2012 for events that occurred in the early 1990s—parties who had no connection to Liberty Lighting. In response, the Court discusses three points.

First, ERISA affixes the date of liability to the date of termination. Liberty Lighting and Mr. Wortley could have pursued termination of the plan in the 1990s, but neither one chose to do so, regardless of whether or not Liberty Lighting provided Plaintiff notice of Liberty's dissolution. Had Liberty Lighting taken the steps necessary to terminate the plan in parallel with state dissolution proceedings, its ERISA-based liability could have been resolved far, far earlier than 2012.

Second, ERISA affixes liability for common ownership at 80%. While other parties may be adversely affected in the present through their close affiliation with Mr. Wortley, the same could be said of any pension plan termination when a party is in a close partnership with an ERISA contributing-sponsor owner. In the abstract, events could have transpired differently in this case in a manner adverse to Plaintiff. Theoretically, Plaintiff's collectable recovery in 2012 could have been *less* than Plaintiff's collectable recovery in 1991 or 1992. In that situation, it may well have been Plaintiff's plea to the Court that it was unfair to limit its recovery to a controlled group in 2012.

Third and finally, ERISA imposes liability on controlled group members (even if it impacts minority-owner third parties) for a good reason. Controlled group liability ensures that employers "keep up their end of the deal" by preventing them from fractionalizing their assets and isolating them from the Plaintiff's reach. *Pension Benefit Guaranty Corp. v. Findlay Indus., Inc.*, 902 F.3d 597, 610 (6th Cir. 2018). Indeed, ensuring that employers

keep up their end of the deal is one of the core purposes of ERISA. *Id.*

In any event, ERISA is clear on these issues. ERISA chose the date to affix liability and ERISA chose the ownership threshold necessary to impact third parties. Defendants' policy-based arguments, therefore, are tantamount to an argument against the plain terms of ERISA itself.

C. Defendants' Affirmative Defenses and Motion in Limine

In Plaintiff's Motion for Partial Summary Judgment, Plaintiff did not address Defendants' affirmative defenses. Although Plaintiff did eventually address the defenses in its Reply, the Court concluded that such matters were better addressed through a motion, response, and reply. Accordingly, the Court permitted Plaintiff to file an additional motion for summary judgment specific to Defendants' affirmative defenses. Upon review of that motion, the Court concludes that the motion is granted.

Defendants assert a statute of limitations affirmative defense, but Defendants do not specify which sovereign's affirmative defense it intends to raise. If Defendants intended to reference Illinois law,[11] Plaintiff has not brought a claim under Illinois law, nor has Plaintiff sued Liberty Lighting, an Illinois corporation. If Defendants

11. Defendants' argument in its papers relies upon Illinois law.

intended to reference federal law, the statute of limitations for ERISA actions is six years and Plaintiff brought its action within six years. *See* 29 U.S.C. § 1303(e)(6); *Pension Benefit Guaranty Corp. v. Don's Trucking Co.*, 308 F. Supp. 2d 680, 682 (E.D. Va. 2003) (holding that pension termination liability accrues on the date of plan termination).

Defendants assert a "no duty to notify" affirmative defense, contending that the summary judgment Defendants had no duty to notify Plaintiff of Liberty Lighting's dissolution. That is irrelevant. Defendants' failure to notify Plaintiff is not an element of Plaintiff's claims or any defense thereto.

Defendants assert a "waiver" affirmative defense, but Defendants have premised that defense on the proposition that Plaintiff's suit was untimely. DE 136 at 16. That is incorrect. Plaintiff's suit was timely. Accordingly, this affirmative defense is also irrelevant.

Defendants filed a motion in limine, contending that the follow categories of evidence are irrelevant and should not be admitted at trial: (1) facts surrounding Liberty Lighting's dissolution and duty to notify Plaintiff of the same, (2) facts surrounding Liberty Lighting's bankruptcy, (3) facts pertaining to Mr. Wortley's execution of documents on Liberty Lighting's behalf and on behalf of the company pension, and (4) various other facts pertaining to the parties' dealings. Many of these facts were relevant enough to be referenced in this Order, and the remaining facts have at least enough potential

relevance that the Court should address objections to the same at trial. *See Garcia v. Scottsdale Ins. Co.*, No. 18-20509, 2019 U.S. Dist. LEXIS 57879, 2019 WL 1491872, at *1 (S.D. Fla. Apr. 4, 2019) (noting that motions in limine are disfavored and questions of admissibility should generally be dealt with at trial).

For the foregoing reasons, Defendants' Motion in Limine is denied and Plaintiff's Motion for Summary Judgment as to Defendants' Affirmative Defenses is granted.

V. CONCLUSION

For the foregoing reasons, Plaintiff is entitled to partial summary judgment against each of the Defendants referenced in footnote 2 of this Order. Nonetheless, Plaintiff's Motion is a Motion for Partial Summary Judgement and, as a result, the Court will not enter final judgment as to any Defendant (as requested by Plaintiff) at this time. It is **ORDERED AND ADJUDGED** that Plaintiff's Motion for Partial Summary Judgment [DE 114] is **GRANTED**. Defendants' cross Motion for Summary Judgment [DE 112] is **DENIED** for the same reasons Plaintiff's Motion is granted. Plaintiff's Motion for Summary Judgment on Defendants' Affirmative Defenses [DE 152] is **GRANTED**. Defendants' Motion in Limine [DE 116] is **DENIED WITHOUT PREJUDICE** for the objections to be re-raised, if necessary, at trial. The parties are **ORDERED** to file a notice informing the Court of the remaining issues in this case within three business days of the date of rendition of this Order.

DONE and ORDERED in Chambers, West Palm Beach, Florida, this 22nd day of November, 2019.

/s/ Robin L. Rosenberg
ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JANUARY 21, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14968-AA

PENSION BENEFIT GUARANTY CORPORATION,

Plaintiff-Appellee,

versus

20 SE 3RD ST LLC, *et al.*,

Defendants,

50509 MARINE LLC, AMH GOVERNMENT SERVICES, LLC, AMERICAN MARINE HOLDINGS, LLC, BAJA MARINE, INC., BEDFORD MATERIALS COMPANY, INC., BUFFALO POWER ELECTRONICS CENTER, INC., DONZI MARINE, LLC, FOUNTAIN DEALERS FACTORY SUPER STORE, INC., FOUNTAIN POWERBOAT INDUSTRIES, INC., FOUNTAIN POWERBOATS, LLC, LIBERTY ACQUISITIONS, FPB, LLC, LIBERTY ANALYTICAL CORPORATION, LIBERTY ASSOCIATES, LC, LIBERTY POLYGLASS, INC., LIBERTY PROPERTIES AT BEDFORD, LLC, LIBERTY PROPERTIES AT CAREY, LLC, LIBERTY PARK FINANCIAL, LLC,

Appendix C

PRO-LINE BOATS, LLC, PRO-LINE
OF NORTH CAROLINA, INC.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

**ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC**

BEFORE: MARTIN, ROSENBAUM, and TALLMAN,* Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

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* The Honorable Richard C. Tallman, Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

APPENDIX D — STATUTORY PROVISIONS

26 U.S.C.A. § 1563, I.R.C. § 1563

§ 1563. Definitions and special rules

(a) Controlled group of corporations.—For purposes of this part, the term "controlled group of corporations" means any group of—

> **(1) Parent-subsidiary controlled group.**—One or more chains of corporations connected through stock ownership with a common parent corporation if—
>
> > **(A)** stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned (within the meaning of subsection (d)(1)) by one or more of the other corporations; and
> >
> > **(B)** the common parent corporation owns (within the meaning of subsection (d)(1)) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.

(2) Brother-sister controlled group.—Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own (within the meaning of subsection (d)(2)) stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

(3) Combined group.—Three or more corporations each of which is a member of a group of corporations described in paragraph (1) or (2), and one of which—

(A) is a common parent corporation included in a group of corporations described in paragraph (1), and also

(B) is included in a group of corporations described in paragraph (2).

(4) Certain insurance companies.—Two or more insurance companies subject to taxation under section 801 which are members of a controlled group of corporations described in paragraph (1), (2), or (3). Such insurance companies shall be treated as a controlled group of corporations separate from any other corporations which are members of the controlled group of corporations described in paragraph (1), (2), or (3).

(b) Component member.—

(1) General rule.—For purposes of this part, a corporation is a component member of a controlled group of corporations on a December 31 of any taxable year (and with respect to the taxable year which includes such December 31) if such corporation—

(A) is a member of such controlled group of corporations on the December 31 included in such year and is not treated as an excluded member under paragraph (2), or

(B) is not a member of such controlled group of corporations on the December 31 included in such year but is treated as an additional member under paragraph (3).

(2) Excluded members.—A corporation which is a member of a controlled group of corporations on December 31 of any taxable year shall be treated as an excluded member of such group for the taxable year including such December 31 if such corporation—

(A) is a member of such group for less than one-half the number of days in such taxable year which precede such December 31,

(B) is exempt from taxation under section 501(a) (except a corporation which is subject to tax on its unrelated business taxable income under section 511) for such taxable year,

(C) is a foreign corporation subject to tax under section 881 for such taxable year,

(D) is an insurance company subject to taxation under section 801 (other than an insurance company which is a member of a controlled group described in subsection (a)(4)), or

(E) is a franchised corporation, as defined in subsection (f)(4).

(3) Additional members.—A corporation which—

(A) was a member of a controlled group of corporations at any time during a calendar year,

(B) is not a member of such group on December 31 of such calendar year, and

(C) is not described, with respect to such group, in subparagraph (B), (C), (D), or (E) of paragraph (2),

shall be treated as an additional member of such group on December 31 for its taxable year including such December 31 if it was a member of such group for one-half (or more) of the number of days in such taxable year which precede such December 31.

(4) Overlapping groups.—If a corporation is a component member of more than one controlled group of corporations with respect to any taxable year, such

corporation shall be treated as a component member of only one controlled group. The determination as to the group of which such corporation is a component member shall be made under regulations prescribed by the Secretary which are consistent with the purposes of this part.

(c) Certain stock excluded.—

(1) General rule.—For purposes of this part, the term "stock" does not include—

(A) nonvoting stock which is limited and preferred as to dividends,

(B) treasury stock, and

(C) stock which is treated as "excluded stock" under paragraph (2).

(2) Stock treated as "excluded stock".—

(A) Parent-subsidiary controlled group.—For purposes of subsection (a)(1), if a corporation (referred to in this paragraph as "parent corporation") owns (within the meaning of subsections (d)(1) and (e)(4)), 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock in another corporation (referred to in this paragraph as "subsidiary corporation"), the

following stock of the subsidiary corporation shall be treated as excluded stock—

> **(i)** stock in the subsidiary corporation held by a trust which is part of a plan of deferred compensation for the benefit of the employees of the parent corporation or the subsidiary corporation,
>
> **(ii)** stock in the subsidiary corporation owned by an individual (within the meaning of subsection (d)(2)) who is a principal stockholder or officer of the parent corporation. For purposes of this clause, the term "principal stockholder" of a corporation means an individual who owns (within the meaning of subsection (d)(2)) 5 percent or more of the total combined voting power of all classes of stock entitled to vote or 5 percent or more of the total value of shares of all classes of stock in such corporation,
>
> **(iii)** stock in the subsidiary corporation owned (within the meaning of subsection (d)(2)) by an employee of the subsidiary corporation if such stock is subject to conditions which run in favor of such parent (or subsidiary) corporation and which substantially

restrict or limit the employee's right (or if the employee constructively owns such stock, the direct owner's right) to dispose of such stock, or

(iv) stock in the subsidiary corporation owned (within the meaning of subsection (d)(2)) by an organization (other than the parent corporation) to which section 501 (relating to certain educational and charitable organizations which are exempt from tax) applies and which is controlled directly or indirectly by the parent corporation or subsidiary corporation, by an individual, estate, or trust that is a principal stockholder (within the meaning of clause (ii)) of the parent corporation, by an officer of the parent corporation, or by any combination thereof.

(B) Brother-sister controlled group.—For purposes of subsection (a)(2), if 5 or fewer persons who are individuals, estates, or trusts (referred to in this subparagraph as "common owners") own (within the meaning of subsection (d)(2)), 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock in a corporation, the following stock of such corporation shall be treated as excluded stock—

(i) stock in such corporation held by an employees' trust described in section 401(a) which is exempt from tax under section 501(a), if such trust is for the benefit of the employees of such corporation,

(ii) stock in such corporation owned (within the meaning of subsection (d)(2)) by an employee of the corporation if such stock is subject to conditions which run in favor of any of such common owners (or such corporation) and which substantially restrict or limit the employee's right (or if the employee constructively owns such stock, the direct owner's right) to dispose of such stock. If a condition which limits or restricts the employee's right (or the direct owner's right) to dispose of such stock also applies to the stock held by any of the common owners pursuant to a bona fide reciprocal stock purchase arrangement, such condition shall not be treated as one which restricts or limits the employee's right to dispose of such stock, or

(iii) stock in such corporation owned (within the meaning of subsection (d)(2)) by an organization to which section

501 (relating to certain educational and charitable organizations which are exempt from tax) applies and which is controlled directly or indirectly by such corporation, by an individual, estate, or trust that is a principal stockholder (within the meaning of subparagraph (A)(ii)) of such corporation, by an officer of such corporation, or by any combination thereof.

(d) Rules for determining stock ownership.—

(1) Parent-subsidiary controlled group.—For purposes of determining whether a corporation is a member of a parent- subsidiary controlled group of corporations (within the meaning of subsection (a)(1)), stock owned by a corporation means—

(A) stock owned directly by such corporation, and

(B) stock owned with the application of paragraphs (1), (2), and (3) of subsection (e).

(2) Brother-sister controlled group.—For purposes of determining whether a corporation is a member of a brother-sister controlled group of corporations (within the meaning of subsection (a)(2)), stock owned by a person who is an individual, estate, or trust means—

(A) stock owned directly by such person, and

(B) stock owned with the application of subsection (e).

(e) Constructive ownership.—

(1) Options.—If any person has an option to acquire stock, such stock shall be considered as owned by such person. For purposes of this paragraph, an option to acquire such an option, and each one of a series of such options, shall be considered as an option to acquire such stock.

(2) Attribution from partnerships.—Stock owned, directly or indirectly, by or for a partnership shall be considered as owned by any partner having an interest of 5 percent or more in either the capital or profits of the partnership in proportion to his interest in capital or profits, whichever such proportion is the greater.

(3) Attribution from estates or trusts.—

(A) Stock owned, directly or indirectly, by or for an estate or trust shall be considered as owned by any beneficiary who has an actuarial interest of 5 percent or more in such stock, to the extent of such actuarial interest. For purposes of this subparagraph, the actuarial interest of each beneficiary shall be determined by assuming the maximum exercise of discretion by the fiduciary in favor of such beneficiary and the

maximum use of such stock to satisfy his rights as a beneficiary.

(B) Stock owned, directly or indirectly, by or for any portion of a trust of which a person is considered the owner under subpart E of part I of subchapter J (relating to grantors and others treated as substantial owners) shall be considered as owned by such person.

(C) This paragraph shall not apply to stock owned by any employees' trust described in section 401(a) which is exempt from tax under section 501(a).

(4) Attribution from corporations.—Stock owned, directly or indirectly, by or for a corporation shall be considered as owned by any person who owns (within the meaning of subsection (d)) 5 percent or more in value of its stock in that proportion which the value of the stock which such person so owns bears to the value of all the stock in such corporation.

(5) Spouse.—An individual shall be considered as owning stock in a corporation owned, directly or indirectly, by or for his spouse (other than a spouse who is legally separated from the individual under a decree of divorce whether interlocutory or final, or a decree of separate maintenance), except in the case of a corporation with respect to which each of the following conditions is satisfied for its taxable year—

(A) The individual does not, at any time during such taxable year, own directly any stock in such corporation;

(B) The individual is not a director or employee and does not participate in the management of such corporation at any time during such taxable year;

(C) Not more than 50 percent of such corporation's gross income for such taxable year was derived from royalties, rents, dividends, interest, and annuities; and

(D) Such stock in such corporation is not, at any time during such taxable year, subject to conditions which substantially restrict or limit the spouse's right to dispose of such stock and which run in favor of the individual or his children who have not attained the age of 21 years.

(6) Children, grandchildren, parents, and grandparents.—

(A) Minor children.—An individual shall be considered as owning stock owned, directly or indirectly, by or for his children who have not attained the age of 21 years, and, if the individual has not attained the age of 21 years, the stock owned, directly or indirectly, by or for his parents.

(B) Adult children and grandchildren.—An individual who owns (within the meaning of subsection (d)(2), but without regard to this subparagraph) more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock in a corporation shall be considered as owning the stock in such corporation owned, directly or indirectly, by or for his parents, grandparents, grandchildren, and children who have attained the age of 21 years.

(C) Adopted child.—For purposes of this section, a legally adopted child of an individual shall be treated as a child of such individual by blood.

(f) Other definitions and rules.—

(1) Employee defined.—For purposes of this section the term "employee" has the same meaning such term is given by paragraphs (1) and (2) of section 3121(d).

(2) Operating rules.—

(A) In general.—Except as provided in subparagraph (B), stock constructively owned by a person by reason of the application of paragraph (1), (2), (3), (4), (5), or (6) of subsection (e) shall, for purposes of applying such paragraphs, be treated as actually owned by such person.

(B) Members of family.—Stock constructively owned by an individual by reason of the application of paragraph (5) or (6) of subsection (e) shall not be treated as owned by him for purposes of again applying such paragraphs in order to make another the constructive owner of such stock.

(3) Special rules.—For purposes of this section—

(A) If stock may be considered as owned by a person under subsection (e)(1) and under any other paragraph of subsection (e), it shall be considered as owned by him under subsection (e)(1).

(B) If stock is owned (within the meaning of subsection (d)) by two or more persons, such stock shall be considered as owned by the person whose ownership of such stock results in the corporation being a component member of a controlled group. If by reason of the preceding sentence, a corporation would (but for this sentence) become a component member of two controlled groups, it shall be treated as a component member of one controlled group. The determination as to the group of which such corporation is a component member shall be made under regulations prescribed by the Secretary which are consistent with the purposes of this part.

(C) If stock is owned by a person within the meaning of subsection (d) and such ownership results in the corporation being a component member of a controlled group, such stock shall not be treated as excluded stock under subsection (c) (2), if by reason of treating such stock as excluded stock the result is that such corporation is not a component member of a controlled group of corporations.

(4) Franchised corporation.—If—

(A) a parent corporation (as defined in subsection (c)(2)(A)), or a common owner (as defined in subsection (c)(2)(B)), of a corporation which is a member of a controlled group of corporations is under a duty (arising out of a written agreement) to sell stock of such corporation (referred to in this paragraph as "franchised corporation") which is franchised to sell the products of another member, or the common owner, of such controlled group;

(B) such stock is to be sold to an employee (or employees) of such franchised corporation pursuant to a bona fide plan designed to eliminate the stock ownership of the parent corporation or of the common owner in the franchised corporation;

(C) such plan—

(i) provides a reasonable selling price for such stock, and

(ii) requires that a portion of the employee's share of the profits of such corporation (whether received as compensation or as a dividend) be applied to the purchase of such stock (or the purchase of notes, bonds, debentures or other similar evidence of indebtedness of such franchised corporation held by such parent corporation or common owner);

(D) such employee (or employees) owns directly more than 20 percent of the total value of shares of all classes of stock in such franchised corporation;

(E) more than 50 percent of the inventory of such franchised corporation is acquired from members of the controlled group, the common owner, or both; and

(F) all of the conditions contained in subparagraphs (A), (B), (C), (D), and (E) have been met for one-half (or more) of the number of days preceding the December 31 included within the taxable year (or if the taxable year does not include December 31, the last day of such year) of the franchised corporation,

then such franchised corporation shall be treated as an excluded member of such group, under subsection (b)(2), for such taxable year.

(5) Brother-sister controlled group definition for provisions other than this part.—

(A) In general.—Except as specifically provided in an applicable provision, subsection (a)(2) shall be applied to an applicable provision as if it read as follows:

"**(2)** Brother-sister controlled group.—Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own (within the meaning of subsection (d)(2) stock possessing—

"**(A)** at least 80 percent of the total combined voting power of all classes of stock entitled to vote, or at least 80 percent of the total value of shares of all classes of stock, of each corporation, and

"**(B)** more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock

ownership is identical with respect to each such corporation."

(B) Applicable provision.—For purposes of this paragraph, an applicable provision is any provision of law (other than this part) which incorporates the definition of controlled group of corporations under subsection (a).

Appendix D

29 U.S.C.A. § 1002

§ 1002. Definitions

For purposes of this subchapter:

* * *

(16)(A) The term "administrator" means—

> **(i)** the person specifically so designated by the terms of the instrument under which the plan is operated;
>
> **(ii)** if an administrator is not so designated, the plan sponsor; or
>
> **(iii)** in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish

or maintain the plan, or (iv) in the case of a pooled employer plan, the pooled plan provider.

* * * *

Appendix D

29 U.S.C.A. § 1301

§ 1301. Definitions

(a) For purposes of this subchapter, the term—

* * *

(14) in the case of a single-employer plan—

(A) "controlled group" means, in connection with any person, a group consisting of such person and all other persons under common control with such person;

(B) the determination of whether two or more persons are under "common control" shall be made under regulations of the corporation which are consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under subsections (b) and (c) of section 414 of Title 26; and

(C)(i) notwithstanding any other provision of this subchapter, during any period in which an individual possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of an affected air carrier of which he was an accountable owner, whether through the ownership of voting securities, by contract, or otherwise,

the affected air carrier shall be considered to be under common control not only with those persons described in subparagraph (B), but also with all related persons; and

(ii) for purposes of this subparagraph, the term—

> **(I)** "affected air carrier" means an air carrier, as defined in section 40102(a)(2) of Title 49, that holds a certificate of public convenience and necessity under section 41102 of Title 49 for route number 147, as of November 12, 1991;
>
> **(II)** "related person" means any person which was under common control (as determined under subparagraph (B)) with an affected air carrier on October 10, 1991, or any successor to such related person;
>
> **(III)** "accountable owner" means any individual who on October 10, 1991, owned directly or indirectly through the application of section 318 of Title 26 more than 50 percent of the total voting power of the stock of an affected air carrier;

(IV) "successor" means any person that acquires, directly or indirectly through the application of section 318 of Title 26, more than 50 percent of the total voting power of the stock of a related person, more than 50 percent of the total value of the securities (as defined in section 1002(20) of this title) of the related person, more than 50 percent of the total value of the assets of the related person, or any person into which such related person shall be merged or consolidated; and

(V) "individual" means a living human being;

* * * *

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26 C.F.R. § 1.414(b)–1, Treas. Reg. § 1.414(b)–1

§ 1.414(b)–1 Controlled group of corporations.

(a) Definition of controlled group of corporations. For purposes of this section, the term "controlled group of corporations" has the same meaning as is assigned to the term in section 1563(a) and the regulations thereunder, except that (1) the term "controlled group of corporations" shall not include an "insurance group" described in section 1563(a)(4), and (2) section 1563(e)(3)(C) (relating to stock owned by certain employees' trusts) shall not apply. For purposes of this section, the term "members of a controlled group" means two or more corporations connected through stock ownership described in section 1563(a) (1), (2), or (3), whether or not such corporations are "component members of a controlled group" within the meaning of section 1563(b). Two or more corporations are members of a controlled group at any time such corporations meet the requirements of section 1563(a) (as modified by this paragraph). For purposes of this section, if a corporation is a member of more than one controlled group of corporations, such corporation shall be treated as a member of each controlled group.

(b) Single plan adopted by two or more members. If two or more members of a controlled group of corporations adopt a single plan for a plan year, then the minimum funding standard provided in section 412, the tax imposed by section 4971, and the applicable limitations provided by section 404(a) shall be determined as if such members were a single employer. In such a case, the amount of

such items and the allocable portion attributable to each member shall be determined in the manner provided in regulations under sections 412, 4971, and 404(a).

(c) Cross reference. For rules relating to the application of sections 401, 408(k), 410, 411, 415, and 416 with respect to two or more trades or businesses which are under common control, see section 414(c) and the regulations thereunder.

Appendix D

26 C.F.R. § 1.414(c)–2, Treas. Reg. § 1.414(c)–2

§ 1.414(c)–2 Two or more trades or businesses under common control.

(a) In general. For purposes of this section, the term "two or more trades or businesses under common control" means any group of trades or businesses which is either a "parent-subsidiary group of trades or businesses under common control" as defined in paragraph (b) of this section, a "brother-sister group of trades or businesses under common control" as defined in paragraph (c) of this section, or a "combined group of trades or businesses under common control" as defined in paragraph (d) of this section. For purposes of this section and §§ 1.414(c)–3 and 1.414(c)–4, the term "organization" means a sole proprietorship, a partnership (as defined in section 7701(a)(2)), a trust, an estate, or a corporation.

(b) Parent-subsidiary group of trades or businesses under common control—(1) In general. The term "parent-subsidiary group of trades or businesses under common control" means one or more chains of organizations conducting trades or businesses connected through ownership of a controlling interest with a common parent organization if—

> **(i)** A controlling interest in each of the organizations, except the common parent organization, is owned (directly and with the application of § 1.414(c)–4(b)(1), relating to options) by one or more of the other organizations; and

(ii) The common parent organization owns (directly and with the application of § 1.414(c)–4(b)(1), relating to options) a controlling interest in at least one of the other organizations, excluding, in computing such controlling interest, any direct ownership interest by such other organizations.

(2) Controlling interest defined—(i) Controlling interest. For purposes of paragraphs (b) and (c) of this section, the phrase "controlling interest" means:

(A) In the case of an organization which is a corporation, ownership of stock possessing at least 80 percent of total combined voting power of all classes of stock entitled to vote of such corporation or at least 80 percent of the total value of shares of all classes of stock of such corporation;

(B) In the case of an organization which is a trust or estate, ownership of an actuarial interest of at least 80 percent of such trust or estate;

(C) In the case of an organization which is a partnership, ownership of at least 80 percent of the profits interest or capital interest of such partnership; and

(D) In the case of an organization which is a sole proprietorship, ownership of such sole proprietorship.

(ii) Actuarial interest. For purposes of this section, the actuarial interest of each beneficiary of trust or estate shall be determined by assuming the maximum exercise of discretion by the fiduciary in favor of such beneficiary. The factors and methods prescribed in § 20.2031–7 or, for certain prior periods, § 20.2031–7A (Estate Tax Regulations) for use in ascertaining the value of an interest in property for estate tax purposes shall be used for purposes of this subdivision in determining a beneficiary's actuarial interest.

(c) Brother-sister group of trades or businesses under common control—(1) In general. The term "brother-sister group of trades or businesses under common control" means two or more organizations conducting trades or businesses if (i) the same five or fewer persons who are individuals, estates, or trusts own (directly and with the application of § 1.414(c)–4) a controlling interest in each organization, and (ii) taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such organization, such persons are in effective control of each organization. The five or fewer persons whose ownership is considered for purposes of the controlling interest requirement for each organization must be the same persons whose ownership is considered for purposes of the effective control requirement.

(2) Effective control defined. For purposes of this paragraph, persons are in "effective control" of an organization if—

(i) In the case of an organization which is a corporation, such persons own stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of such corporation;

(ii) In the case of an organization which is a trust or estate, such persons own an aggregate actuarial interest of more than 50 percent of such trust or estate;

(iii) In the case of an organization which is a partnership, such persons own an aggregate of more than 50 percent of the profits interest or capital interest of such partnership; and

(iv) In the case of an organization which is a sole proprietorship, one of such persons owns such sole proprietorship.

(d) Combined group of trades or businesses under common control. The term "combined group of trades or businesses under common control" means any group of three or more organizations, if (1) each such organization is a member of either a parent- subsidiary group of trades or businesses under common control or a brother-sister group of trades or businesses under common control, and (2) at least one such organization is the common parent organization of a parent-subsidiary group of trades or businesses under common control and is also a member of a brother-sister group of trades or businesses under common control.

(e) Examples. The definitions of parent-subsidiary group of trades or businesses under common control, brother-sister group of trades or businesses under common control, and combined group of trades or businesses under common control may be illustrated by the following examples.

Example 1. (a) The ABC partnership owns stock possessing 80 percent of the total combined voting power of all classes of stock entitled to voting of S corporation. ABC partnership is the common parent of a parent-subsidiary group of trades or businesses under common control consisting of the ABC partnership and S Corporation.

(b) Assume the same facts as in (a) and assume further that S owns 80 percent of the profits interest in the DEF Partnership. The ABC Partnership is the common parent of a parent-subsidiary group of trades or businesses under common control consisting of the ABC Partnership, S Corporation, and the DEF Partnership. The result would be the same if the ABC Partnership, rather than S, owned 80 percent of the profits interest in the DEF Partnership.

Example 2. L Corporation owns 80 percent of the only class of stock of T Corporation, and T, in turn, owns 40 percent of the capital interest in the GHI Partnership. L also owns 80 percent of the only class of stock of N Corporation and N, in turn, owns 40 percent of the capital interest in the GHI Partnership. L is the common parent of a parent-subsidiary group of trades or businesses under common control consisting of L Corporation, T Corporation, N Corporation, and the GHI Partnership.

Appendix D

Example 3. ABC Partnership owns 75 percent of the only class of stock of X and Y Corporations; X owns all the remaining stock of Y, and Y owns all the remaining stock of X. Since interorganization ownership is excluded (that is, treated as not outstanding) for purposes of determining whether ABC owns a controlling interest of at least one of the other organizations, ABC is treated as the owner of stock possessing 100 percent of the voting power and value of all classes of stock of X and of Y for purposes of paragraph (b)(1)(ii) of this section. Therefore, ABC is the common parent of a parent-subsidiary group of trades or businesses under common control consisting of the ABC Partnership, X Corporation, and Y Corporation.

Example 4. Unrelated individuals A, B, C, D, E, and F own an interest in sole proprietorship A, a capital interest in the GHI Partnership, and stock of corporations M, W, X, Y, and Z (each of which has only one class of stock outstanding) in the following proportions:

ORGANIZATIONS

Individuals	**A**	**GHI**	**M**	**W**	**X**	**Y**	**Z**
A	100%	50%	100%	60%	40%	20%	60%
B	—	40%	—	15%	40%	50%	30%
C	—	—	—	—	10%	10%	10%
D	—	—	—	25%	—	20%	—
E	—	10%	—	—	10%	—	—
	100%	100%	100%	100%	100%	100%	100%

Under these facts the following four brother-sister groups of trades or businesses under common control exist: GHI, X and Z; X, Y and Z; W and Y; A and M. In the case of GHI, X, and Z, for example, A and B together have effective control of each organization because their combined identical ownership of GHI, X and Z is greater than 50%. (A's identical ownership of GHI, X and Z is 40% because A owns at least a 40% interest in each organization. B's identical ownership of GHI, X and Z is 30% because B owns at least a 30% interest in each organization.) A and B (the persons whose ownership is considered for purposes of the effective control requirement) together own a controlling interest in each organization because they own at least 80% of the capital interest of partnership GHI and at least 80% of the total combined voting power of corporations X and Z. Therefore, GHI, X and Z comprise a brother-sister group of trades or businesses under common control. Y is not a member of this group because neither the effective control requirement nor the 80% controlling interest requirement are met. (The effective control requirement is not met because A's and B's combined identical ownership in GHI, X, Y and Z (20% for A and 30% for B) does not exceed 50%. The 80% controlling interest test is not met because A and B together only own 70% of the total combined voting power of the stock of Y.) A and M are not members of this group because B owns no interest in either organization and A's ownership of GHI, X and Z, considered alone, is less than 80%.

Example 5. The outstanding stock of corporations U and V, which have only one class of stock outstanding, is owned by the following unrelated individuals:

Appendix D

CORPORATIONS

Individuals	U (percent)	V (percent)
A	12	12
B	12	12
C	12	12
D	12	12
E	13	13
F	13	13
G	13	13
H	13	13
	100	100

Any group of five of the shareholders will own more than 50 percent of the stock in each corporation, in identical holdings. However, U and V are not members of a brother-sister group of trades or businesses under common control because at least 80 percent of the stock of each corporation is not owned by the same five or fewer persons.

Example 6. A, an individual, owns a controlling interest in ABC Partnership and DEF Partnership. ABC, in turn, owns a controlling interest in X Corporation. Since ABC, DEF, and X are each members of either a parent-subsidiary group or a brother- sister group of trades or businesses under common control, and ABC is the common parent of a parent-subsidiary group of trades or businesses under common control consisting of ABC and

X, and also a member of a brother-sister group of trades or businesses under common control consisting of ABC and DEF, ABC Partnership, DEF Partnership, and X Corporation are members of the same combined group of trades or businesses under common control.