

1 HONORABLE RICHARD A. JONES
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9 UNITED STATES DISTRICT COURT
10 WESTERN DISTRICT OF WASHINGTON
11 AT SEATTLE

12 BOARD OF TRUSTEES OF THE
13 WESTERN METAL INDUSTRY
14 PENSION FUND,

15 Plaintiff,

16 v.

17 CENTRAL MACHINE WORKS,
18 INC., SOWAY, LLC, an Oregon
19 Limited Liability Company, and
20 SYLVIA AND PAUL SOWA, and
21 their marital community,

22 Defendants.

CASE NO. C14-00802 RAJ

ORDER

22 This matter comes before the court on the parties' cross-motions for summary
23 judgment. Dkt. ## 22, 27. Plaintiff is the Board of Trustees of Western Metal Industry
24 Pension Fund ("Fund"). The Fund is a collectively bargained, joint labor-management
25 trust fund, and it is a "pension benefit plan" as defined in the Employee Retirement
26 Income Security Act (ERISA). Dkt. # 22, at p. 4. The Board of Trustees administers the
27 plan and acts as the "plan sponsor," as defined by ERISA. *Id.*

1 Defendant Paul Sowa is the sole shareholder of Defendant Central Machine
2 Works, Inc. (“Central Machine”). *Id.* at 5.¹ Defendant Sylvia Sowa is married to Mr.
3 Sowa, and she is the trustor and sole trustee of the Sylvia M. Sowa Revocable Living
4 Trust (SSRL). *Id.* As of 2000, SSRL owns 100 percent of Defendant Soway, LLC
5 (“Soway”), an Oregon limited liability company created in March 1997. *Id.* Soway’s
6 sole purpose is to purchase the buildings and property of Central Machine and another
7 company, collect those rents, and pay loan and property taxes. *Id.* at 6.

8 Soway leased property to Central Machine from 1998 until approximately 2008,
9 and Central Machine paid rent to Soway during that lease period. *Id.* After 2008, Central
10 Machine continued to occupy the premises on a rent-free basis. *Id.* The parties agree that
11 Soway and Central Machine are under “common control,” as defined in ERISA at 29
12 U.S.C. § 1301(b)(1). Dkt. # 27, at p. 2. Soway’s only income consisted of the rental
13 payments it received from 1998 to 2008. Dkt. # 22, at p. 6.

14 Central Machine was an “employer,” as defined in ERISA at 29 U.S.C. § 1002(5).
15 *Id.* at 4. Central Machine told the Fund that it was going to close on June 30, 2013. Dkt.
16 # 23-1 (Rowe Decl., Ex. 1.). On June 12, 2013, in response to Central Machine’s
17 statement, the Fund sent notice to Central Machine that the Fund had an unfunded vested
18 benefit liability, and therefore any employers that withdrew from the Fund in 2013 would
19 be required to pay their proportionate share of the withdrawal liability. *Id.* Specifically,
20 Central Machine’s liability was \$1,172,000. Dkt. # 22, at p. 5. On June 30, 2013,
21 Central Machine ceased operations and completely withdrew from the Fund. *Id.* Central
22 Machine failed to make any payments to the Fund. *Id.* at 6.

23 On January 15, 2014, in accordance with ERISA provisions, the Fund sent a letter
24 to Central Machine demanding the outstanding liability amount. Dkt. # 23 (Rowe Decl.,
25 Ex. 2.). Machine Works did not cure the liability. Dkt. # 22, at p. 6. On May 29, 2014,
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27 ¹ Defendants do not contest the Fund’s statement of undisputed material facts. Dkt. # 27, at p. 3.

1 the Fund sued Machine Works for the total withdrawal liability. Dkt. # 1. On December
2 12, 2014, the Fund's counsel emailed counsel for defendants to warn that the Fund would
3 amend its complaint to add Paul and Sylvia Sowa and Soway to the lawsuit. Dkt. # 29
4 (McKenzie Decl., Ex. 1.). On December 15, 2014, the Fund added the additional
5 defendants to the lawsuit, claiming that the defendants are jointly and severally
6 responsible for the total withdrawal liability. Dkt. # 16.

7 The Fund does not seek to hold Sylvia or Paul Sowa or their marital community
8 personally liable for the withdrawal liability assessment. Dkt. # 28, at p. 2. Therefore,
9 the Court **GRANTS** summary judgment as to the individual defendants with regard to
10 claims related to payment of the withdrawal liability. Remaining for the Court to decide
11 is whether Soway was bound to arbitrate its dispute with regard to its employer status.
12 The Court finds that Soway was required to arbitrate this dispute, and due to its failure to
13 abide by ERISA's procedures, Soway is now liable for the total withdrawal liability. The
14 Court **GRANTS** the Fund's motion for summary judgment with respect to Soway and
15 **DENIES** Soway's motion for summary judgment.

16 **I. LEGAL STANDARD**

17 Summary judgment is appropriate if there is no genuine dispute as to any material
18 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
19 56(a). The moving party bears the initial burden of demonstrating the absence of a
20 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
21 Where the moving party will have the burden of proof at trial, it must affirmatively
22 demonstrate that no reasonable trier of fact could find other than for the moving party.
23 *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986). On an issue where the
24 nonmoving party will bear the burden of proof at trial, the moving party can prevail
25 merely by pointing out to the district court that there is an absence of evidence to support
26 the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325. If the moving party meets
27 the initial burden, the opposing party must set forth specific facts showing that there is a

1 genuine issue of fact for trial in order to defeat the motion. *Anderson v. Liberty Lobby,*
2 *Inc.*, 477 U.S. 242, 250 (1986). The court must view the evidence in the light most
3 favorable to the nonmoving party and draw all reasonable inferences in that party’s favor.
4 *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000).

5 II. ANALYSIS

6 A. Soway Is Bound by ERISA’s Arbitration Requirement.

7 Congress enacted ERISA to safeguard employees’ retirement benefits such that
8 upon retirement those employees actually receive their promised benefits. *Banner Indus.,*
9 *Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, No. 86 C 3046, 657 F. Supp. 875,
10 877 (N.D. Ill. 1987). Congress found that individual employers’ withdrawal from
11 multiemployer plans caused those left in the plan to inherit liabilities. *Id.* Realizing this
12 could result in the demise of multiemployer plans, Congress amended ERISA to require
13 withdrawing employers to pay a proportionate share of the unfunded vested benefit
14 liability at the time of the employer’s withdrawal. 29 U.S.C. § 1381 (Multiemployer
15 Pension Plan Amendments Act of 1980, or “MPPAA”).

16 Congress decided that certain ERISA disputes must be initially dealt with in
17 arbitration before moving through the judicial system. Congress was sure “that a
18 substantial portion of disputes could be promptly and efficiently resolved through
19 informal procedures” and therefore the plans and employers could avoid “lengthy, costly,
20 and complex litigation.” *Teamsters Pension Tr. Fund-Board of Trs. v. Allyn Transp. Co.*,
21 832 F.2d 502, 504-505 (9th Cir. 1987). Notably, ERISA’s arbitration requirement is a
22 strict one. *See, generally*, 29 U.S.C. §§ 1401, et seq. The statute requires employers and
23 plan sponsors to arbitrate any disputes concerning determinations made under 29 U.S.C.
24 §§ 1381-1399, and further requires the parties to initiate arbitration proceedings within
25 sixty days of a certain triggering event. *See* 29 U.S.C. § 1401(a)(1). If the parties do not
26 initiate arbitration within the time allotted, the employer is responsible for paying the
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1 entirety of the withdrawal liability, and the plan sponsor may sue for collection in the
2 state or federal courts. *See* 29 U.S.C. § 1401(b)(1).

3 The plain language of 29 U.S.C. § 1401(a)(1) indicates that disputes between
4 employers and plan sponsors are delegated to arbitrators rather than the courts. Although
5 the Ninth Circuit has not directly addressed this, many other courts have found that a
6 party who disputes its “employer” status is exempt from the arbitration provision because
7 this dispute would concern the arbitrator’s authority over the party. However, the courts
8 that find this way do so only when a party claims that it has never held “employer” status.
9 *See Rheem Mfg. Co. v. Cent. States Se. & Sw. Areas Pension Fund*, 63 F.3d 703, 705-706
10 (8th Cir. 1995) (agreeing with sister circuits that “the determination of whether an entity
11 ever became an employer under the MPPAA is an issue properly addressed by a district
12 court prior to arbitration.”) (emphasis added), *Teamsters Joint Council No. 83 v. Centra,*
13 *Inc.*, 947 F.2d 115, 123 (4th Cir. 1991) (finding that “as long as a withdrawing entity was
14 a part of the control group of an employer subject to the MPPAA at some point in time,
15 and where the issues in dispute fall under provisions explicitly designated for arbitration,
16 the arbitration procedure must be followed.”), *Pension Plan for Pension Tr. Fund v.*
17 *Galletti Concrete, Inc.*, No. CV 13-3176 SI, 2013 U.S. Dist. LEXIS 134367, *8-9 (N.D.
18 Cal. 2013) (“There is an exception to this rule: if the parties dispute whether an entity has
19 ceased to be an ‘employer’ under the MPPAA, rather than whether the entity has ever
20 become an employer, that dispute must be resolved in arbitration.”), *Trs. of Amalgamated*
21 *Ins. Fund v. Abraham Zion Corp.*, No. 85 Civ. 9148 (DNE), 686 F. Supp. 95, 97
22 (S.D.N.Y. 1988) (finding that ERISA’s arbitration provision is broad and concluding that
23 the defendant was required to take its issues of fact with regard to a control group
24 determination to arbitration.), *Banner Indus., Inc.*, 657 F. Supp. at 882 (“Put another way,
25 the issue of whether one *remains* an employer on the date of a withdrawal is not the same
26 issue as whether one *ever* became an ‘employer’ for purposes of ERISA generally and
27 MPPAA in particular. The latter is an issue for the court since its resolution determines

1 the arbitrator's authority over the dispute.”) (emphasis added). Otherwise, an employer
2 who ceases to hold such status is subject to arbitration to determine whether the change in
3 status was purposed to evade or avoid liability. 29 U.S.C. §§ 1391(c), 1401(a)(1); *see*
4 *also, generally, Banner Indus., Inc.*, 657 F. Supp. at 882-883.

5 Soway concedes that it may have been an employer prior to 2008, but ceased to be
6 an employer once Central Machine stopped paying rent. Dkt. # 27, at 2. Though Soway
7 admits to its “common control” with Central Machine, Soway takes issue with any
8 potential continued employer status because it claims that it is no longer a “trade or
9 business.” *Id.* at 4. To be sure, Soway cites to *Automotive Industries Pension Trust Fund*
10 *v. Tractor Equipment Sales, Inc.* (“TES”), for the proposition that Soway merely held an
11 investment and therefore was not an “employer.” No. 13-cv-03703-WHO, 73 F. Supp.
12 3d 1173 (N.D. Cal. 2014). If anything, *TES* only proves Soway’s concession that it was
13 at least an employer prior to 2008. *Id.* at 1187-1188 (“Property leases between two
14 commonly-controlled entities constitute a trade or business.”). Therefore, if Soway
15 thought that it no longer fell within the language of 29 U.S.C. 1301(b)(1), it needed to
16 dispute this using the channels that Congress provided in the statute. This is because
17 Soway was aware that it was, at least at one point in time, an employer under the statute.
18 Accordingly, within ninety days of the Fund’s notice of withdrawal liability, Soway was
19 required to request that the Fund review Soway’s liability and, if still unsatisfied, initiate
20 arbitration. 29 U.S.C. §§ 1399(b)(2), 1401(a)(1). Soway neither requested review nor
21 initiated arbitration.

22 Congress directly addressed this situation—where an employer allegedly ceases to
23 be an employer and contests its withdrawal liability—and determined that these parties
24 must bring their disputes in arbitration or face certain consequences. Accordingly,
25 Soway, having failed to request review or initiate arbitration within the statutory period,
26 is now liable for the full withdrawal liability. *See* 29 U.S.C. § 1401(b)(1).

1 **B. The Fund Gave Proper Notice to Soway Regarding the Withdrawal Liability.**

2 As soon as practicable after Central Machine’s complete withdrawal, the Fund was
3 required to notify Central Machine of its withdrawal liability, the schedule of payments,
4 and demand payment. *See* 29 U.S.C. § 1399(b)(1). ERISA is liberally construed, and
5 notice to one employer satisfies notice to the entire controlled group. *See Teamsters*
6 *Pension Tr. Fund-Board of Trs. v. Allyn Transp. Co.*, 832 F.2d at 507 (holding that
7 “notice to the withdrawing employer is notice to all members of the controlled group for
8 the purposes of 29 U.S.C. § 1399(b)(1).”); *see also Board of Trs. of the W. Conf. v. Salt*
9 *Creek Terminals, Inc.*, No. C85-2270R, 1986 U.S. Dist. LEXIS 29599, *7-10 (W.D.
10 Wash. 1986) (finding that “notice of default sent to one member of the group is
11 constructive notice to the other members” because Congress’s definition of “employer”
12 extended to the notice requirement in 29 U.S.C. § 1399(b)(1).). Accordingly, when the
13 Fund sent notice to Central Machine on June 12, 2013, that letter was sufficient to put all
14 companies within the control group on notice of the withdrawal liability.² As such,
15 Soway was on notice that it was liable for the withdrawal liability, and it had the
16 opportunity to request review of its status by the Fund, and subsequently to initiate
17 arbitration.

18 Even if the Fund’s June 12, 2013 letter was not sufficient notice, the Fund directly
19 notified Soway, through counsel, on December 12, 2014 with regard to the withdrawal
20 liability. Soway did not take any action to contest its employer status, neither through the
21 procedures dictated in ERISA nor through its court filings. Although Soway claims that
22 it never had the opportunity to seek arbitration, it did not actually do anything to dispute
23 the Fund’s determinations until December 7, 2015, in response to the Fund’s motion for
24 summary judgment. Soway, therefore, rested on its rights and now pays the
25 consequences as outlined in ERISA. *See Banner Indus., Inc.*, 657 F. Supp. at 884

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27 ² To be sure, Soway has never resisted that it is under common control with Central Machine.

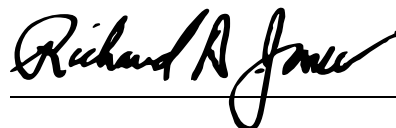
1 (finding that Banner did not rest on its rights because it did not wait “until the pension
2 plan filed a collection action against it, and then for the first time tried to assert its
3 defenses in court when it should have proceeded in arbitration.”). Specifically, Soway is
4 jointly and severally responsible for the withdrawal liability.

5 Soway claims that the Fund “should not be allowed now to claim that an issue it
6 raised for the first time in a pending lawsuit was instead required to be arbitrated.” Dkt. #
7 30, at p. 3. Ignoring for a moment that the Court finds Soway to be on notice as of June
8 12, 2013, or at least as of December 12, 2014, Soway does not offer any authority for its
9 contention that the Fund is precluded from acting as it did to add Soway to the lawsuit.
10 The Court is therefore not convinced that the Fund somehow waived the right to
11 arbitration by adding Soway to its Amended Complaint.

12 **III. CONCLUSION**

13 For the foregoing reasons, the Court **GRANTS** Plaintiff’s motion for summary
14 judgment (Dkt. # 22) requiring defendants Central Machine Works, Inc. and Soway,
15 LLC, jointly and severally, to pay the full amount of the employer withdrawal liability
16 assessed by Plaintiff in accordance with the relevant ERISA provisions. The Court
17 **DENIES** Defendant Soway, LLC’s motion for summary judgment (Dkt. # 27). The
18 Court **GRANTS** Defendants Paul and Sylvia Sowa’s motion for summary judgment
19 (Dkt. # 27) with regard to any personal liability for the withdrawal liability in accordance
20 with Plaintiff’s statement that it does not hold the individuals personally liable for that
21 assessment.

22 Dated this 19th day of July, 2016.

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26 The Honorable Richard A. Jones
27 United States District Judge