No. ________

IN THE

Supreme Court of the United States

THE NATIONAL RETIREMENT FUND, ET AL.,

Petitioners,

—v.—

METZ CULINARY MANAGEMENT, INC.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Employee Retirement Income Security Act ("ERISA") imposes withdrawal liability on employers that withdraw from underfunded multiemployer pension plans. Withdrawal liability is intended to address underfunding by requiring withdrawing employers to pay their allocable share of a plan's unfunded vested benefits. The underfunding problem has worsened dramatically, in large part, due to the 2007-to-2009 recession and the coronavirus pandemic. Section 4213 of ERISA governs an actuary's selection of assumptions to calculate withdrawal liability. It requires that the assumptions be the actuary's "best estimate of anticipated experience under the plan." Section 4211 of ERISA requires that withdrawal liability be calculated "as of" the last day of the plan year immediately prior to the year in which an employer withdrew (the "Measurement Date"). Neither Section 4213 nor Section 4211 of ERISA impose a deadline by which actuaries must select assumptions. The Second Circuit's decision, requiring actuaries to select assumptions on or before the Measurement Date, interferes with actuaries' selection of appropriate assumptions, placing multiemployer pension plans at risk of not collecting appropriate amounts of withdrawal liability.

The question presented is:

Whether ERISA prohibits multiemployer pension plan actuaries from selecting actuarial assumptions to calculate withdrawal liability, after the Measurement Date, even when such assumptions are based on their "best estimate of anticipated experience under the plan" and professional standards governing actuaries.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners the National Retirement Fund and the Board of Trustees of the National Retirement Fund, each on behalf of the Legacy Plan of the National Retirement Fund, state that they are not corporations, that they have no parent company, and that no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

CASES

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at: 946 F.3d 146 (2d Cir. 2020) and is reproduced at App. 1a-14a. The decision of the United States District Court for the Southern District of New York is reported at: Case No. 16-CV-2408-VEC, 2017 WL 1157156 (S.D.N.Y. Mar. 27, 2017) and is reproduced at App. 36a-68a.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its opinion at issue here on January 2, 2020. App. 1a-14a. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1391, Section 4211 of ERISA

29 U.S.C. § 1393, Section 4213 of ERISA

29 U.S.C. § 1394, Section 4214 of ERISA

STATEMENT OF THE CASE

A. THE PARTIES

Petitioners are the National Retirement Fund (the "Fund") and the Board of Trustees of the Fund (the "Trustees"). The Fund is a Taft-Hartley trust fund, established and maintained pursuant to Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5). App. 96a, ¶ 4. The Fund, through the Trustees of the Fund, sponsors and administers the Legacy Plan of the National Retirement Fund (the "Plan"). App. 97a, ¶ 5. Only the Trustees are empowered to amend the Plan. *See* App. 97a, ¶ 5; *see infra* pp. 12-13. The Plan is a multiemployer plan within the meaning of Section 3(37) of ERISA, 29 U.S.C. § 1002(37). App. 97a, ¶ 6. It is one of approximately 1,400 multiemployer pension plans nationwide, which collectively have approximately 10,000,000 participants. Pension Benefit Guaranty Corporation, Introduction to Multiemployer Plans, *available at* https://www.pbgc.gov/prac/multiemployer/introduction-to-multiemployer-plans (Apr. 22, 2020).

Respondent, Metz Culinary Management, Inc. ("Metz"), is an employer within the meaning of Section 3(5) of ERISA, 29 U.S.C. § 1002(5). App. 97a, ¶ 11. Metz was a contributing employer to the Plan until May 16, 2014 when it incurred a complete withdrawal from the Plan within the meaning of Section 4203(a) of ERISA, 29 U.S.C. § 1383(a). *See* App. 104a, ¶ 2.

B. THE FUND ACTUARY'S SELECTION OF AN INTEREST RATE ASSUMPTION FOR WITHDRAWAL LIABILITY PURPOSES AS OF DECEMBER 31, 2013

When an employer withdraws from a multiemployer pension plan, the employer is assessed withdrawal liability, the allocable share of the plan's unfunded vested benefits allocable to the employer. *See* Section 4201(b) of ERISA, 29 U.S.C. § 1381(b). ERISA requires that withdrawal liability be calculated as of the last day of the plan year immediately prior to the year in which the employer withdrew. *See* Section 4211 of ERISA, 29 U.S.C. § 1391. (The plan year in which the withdrawal occurs is the "Withdrawal Year.") The Fund's plan year for purposes of Section 4211 of ERISA is a calendar year (the "Plan Year"). App. 105a, ¶ 5.

A plan's actuary selects the assumptions used to calculate an employer's withdrawal liability. *See* Section 4213 of ERISA, 29 U.S.C. § 1393; *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 631-32 (1993). Prior to October 2013, an actuary from Buck Consultants ("Buck") served as the Plan's actuary. App. 105a, ¶ 7. As the Plan's actuary, the actuary from Buck selected an interest rate assumption of 7.25% for the December 31, 2012 Measurement Date (*i.e.*, for the purpose of calculating withdrawal liability for withdrawals occurring during the Fund's 2013 Plan Year). App. 105a, ¶ 8. In or around October 2013, however, the Fund selected a new actuary from Horizon Actuarial Services, LLC ("Horizon") to be the actuary for the Plan. App. 105a, ¶ 9; App. 134a. As a result of the Plan's change in the Plan's actuary, Buck did not select an interest rate assumption for the purposes of calculating withdrawal liability under the Plan for the December 31, 2013 Measurement Date. App. 98a, ¶ 16.

In June 2014, Horizon informed the Fund's trustees that, following an assessment, the Fund's actuary had selected certain interest rates used by the Pension Benefit Guaranty Corporation (the "PBGC," and such interest rates, the "PBGC Rates") for its interest rate assumption to calculate withdrawal liability for the December 31, 2013 Measurement Date (*i.e.*, the interest rate assumption used to calculate withdrawal liability for withdrawals from the Plan occurring during the 2014 Plan Year). App. 105a-106a, ¶ 10; App. 135a-137a.

C. METZ'S WITHDRAWAL LIABILITY

On or about June 16, 2014, the Fund sent Metz a notice and demand letter for the payment of withdrawal liability that Metz had incurred as a result of its withdrawal from the Fund on May 16, 2014. App. 104a, ¶ 3; App. 108a-120a. In this letter, the Fund assessed Metz withdrawal liability using the PBGC Rate that Horizon had selected. App. 108a-120a. On or about December 26, 2014, following the finalization of its withdrawal liability calculation, the Fund issued Metz a revised withdrawal liability assessment, also using the PBGC Rate Horizon had selected, in the amount of $997,734.00, payable in seventy quarterly installments of $17,814.85, plus a final installment in the amount of $16,233.36 (the "Fund's Assessment"). App. 104a-105a, ¶ 4; App. 121a-133a.

D. ARBITRATION PROCEEDINGS

On or about December 16, 2014, Metz commenced an arbitration against the Fund, captioned *Metz Culinary Management, Inc. v. National Retirement Fund*, AAA Case No. 01-14-0002-2075 (the "Arbitration"), by filing a demand for arbitration with the American Arbitration Association (the "AAA"). App. 99a, ¶ 22. In the Arbitration, Metz challenged the Fund's Assessment. *Id.* The AAA appointed Ira F. Jaffe, Esq. to serve as the Arbitrator (the "Arbitrator"). App. 99a, ¶ 23.

The Fund and Metz agreed that "a preliminary issue" was "the interest assumption used by the Fund to calculate [Metz']s withdrawal liability" and that such issue would be presented for ruling on the basis of "written stipulations and briefing." App. 70a. Other than documents requested by Metz (and produced by the Fund), no discovery occurred. App. 99a, ¶ 24. On April 15, 2015, the parties entered into a Joint Stipulation of Facts (the "Stipulation"), attaching certain documents, and submitted the Stipulation to the Arbitrator. *See* App. 103a-142a.

On February 22, 2016, the Arbitrator issued an interim award holding that the Fund's application of the PBGC Rates to calculate Metz's withdrawal liability was improper because the Fund had "retroactively" imposed the Horizon PBGC Rate with respect to withdrawals during the 2014 Plan Year (the "Interim Award"). App. 91a; App. 99a, ¶ 25. In the Interim Award, the Arbitrator did not make any factual findings. App. 50a; App.71a-74a. Rather, he recited some of the facts to which Metz and the Fund stipulated. *Id.*

In the Interim Award, the Arbitrator directed the Fund to recalculate Metz's withdrawal liability using the actuary from Buck's 7.25% interest rate assumption instead of the PBGC Rates used by the actuary from Horizon. App. 99a, ¶¶ 26-27. On March 7, 2016, the Fund provided Metz with a new calculation of Metz's withdrawal liability. App. 99a, ¶ 27.

On March 28, 2016, the Arbitrator issued a final award in the Arbitration (the "Final Award"). App. 93a-94a; App. 100a, ¶ 29. In the Final Award, the Arbitrator determined that no issues remained in the Arbitration "other than claims that only need to be decided should the holding contained in the Interim Award be reversed," and converted the Interim Award to a final award. App. 94a.

E. DISTRICT COURT PROCEEDINGS

On March 31, 2016, the Fund filed a Complaint (which it amended on April 21, 2016) with the District Court pursuant to Section 4221(b)(2) of ERISA, 29 U.S.C. § 1401(b)(2), seeking to modify and/or vacate the Final Award. App. 46a; App. 95a-102a. On May 4, 2016, Metz filed a Counterclaim with the District Court, seeking enforcement of the Final Award. (*See* Answers, Defenses And Counterclaim, ECF No. 16.) On March 27, 2017, the District Court vacated the Final Award. App. 67a. The District Court held that "Section 4213 [of ERISA] does not prohibit the retroactive application of actuarial assumptions within a given plan year." App. 65a. The District Court also said that Section 4214 of ERISA's prohibition on the retroactive application of plan rules or amendments did not have any applicability to this dispute. *See* App. 64a-65a.

F. THE SECOND CIRCUIT APPEAL

On April 25, 2017, Metz filed a notice of appeal with the District Court, commencing an appeal of the District Court's decision to the United States Court of Appeals for the Second Circuit (the "Second Circuit"). *See* App. 7a. On February 8, 2018, the Second Circuit held oral argument before Circuit Judges Livingston, Winter, and Chin. App. 15a. On January 2, 2020, the Second Circuit issued its opinion reversing and vacating the District Court's ruling. App. 1a-14a. For reasons described below, the Second Circuit held that the actuary from Horizon impermissibly set the interest rate assumption for withdrawal liability following the Measurement Date for withdrawals occurring in 2014, and that the Fund impermissibly "retroactively" applied that interest rate to employers, such as Metz, that withdrew from the Fund during the 2014 Plan Year. App. 12a.

REASONS FOR GRANTING THE PETITION

In 2018, the Staff of the Joint Committee on Taxation reported to the Joint Select Committee on the Solvency of Multiemployer Pension Plans that 94.4% of all multiemployer plans in the country are underfunded, and when looking at all plans together, they are underfunded by more than $495 billion dollars. Joint Comm. on Taxation, *Present Law Relating to Multiemployer Defined Benefit Plans*, JCX-30-18, p. 55 (Apr. 17, 2018). The Congressional Research Service has noted that "[s]ome experts refer to a multiemployer plan 'death spiral' as an increasing number of employers leave financially-troubled multiemployer plans in order to avoid larger future obligations to the plans." John J. Topoleski, Cong. Research Serv., R45311, Policy Options for Multiemployer Defined Benefit Pension Plans pp. 2-3 (2018). The PBGC's program for insuring pension benefits of multiemployer plans is projected to become insolvent in 2025. *See id.* at 5. A major recent contributing factor to the multiemployer plan crisis was the 2007-to-2009 recession. *See id.* at 14. Plan assets suffered large losses as a result of the accompanying stock market downturn and a decrease in the number of contributing employers. *See id.* The current coronavirus pandemic will further exacerbate the multiemployer plan funding issues by decreasing employer contributions and the investment return on plan assets.

Plan actuaries need to be able to select actuarial assumptions to calculate withdrawal liability, in accordance with Section 4213 of ERISA and actuarial practice, to reflect real world events that affect the financial condition of pension plans. The Second Circuit, however, ignored basic principles of statutory interpretation and misconstrued Supreme Court precedent. In doing so, the Second Circuit interfered with an actuary's ability to adjust actuarial assumptions according to their "best estimate," as required under Section 4213 of ERISA and consistent with actuarial standards of practice.

I. The Second Circuit Improperly Engaged in Judicial Lawmaking.

A. The Second Circuit disregarded basic principles of statutory interpretation.

The Second Circuit rewrote Section 4213 of ERISA to impose a requirement on actuaries to multiemployer pension plans that does not exist, ignoring a basic principle of statutory interpretation. Specifically, the Second Circuit imposed the limitations in Section 4214(a) of ERISA on the retroactive application of plan rules and amendments by plan sponsors (*i.e.*, multiemployer pension plan trustees) to actuaries selecting actuarial assumptions. Section 4213 of ERISA, not Section 4214, governs the selection of actuarial assumptions by multiemployer plan actuaries to calculate withdrawal liability. *See* 29 U.S.C. §§ 1393-94.

Section 4213 of ERISA does not limit the timing of the adoption and application of actuarial assumptions or impose any notice requirement. *See* 29 U.S.C. § 1393. The Second Circuit recognized this fact. App. 11a (stating that "Section 4213—unlike Section 4214—does not specifically address retroactivity . . . "). As a general principle of statutory interpretation, when Congress did not include language in a particular statutory provision where it could have—but included the language elsewhere in the same statute—then that language should not be imputed to the provision. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (providing "it is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal citations omitted); *see also Bates v. United States*, 522 U.S. 23, 29 (1997) (implying that the presumption that Congress purposely includes or excludes language in different provisions of a statute is strong when such provisions are "enacted at the same time"); *Russello v. United States*, 464 U.S. 16, 23 (1983) (interpreting consecutive subsections of a statute and concluding that the "differing language in the two subsections [does not] have the same meaning in each."). The Second Circuit's disregard of this basic principle of statutory interpretation sets a dangerous precedent for improper judicial lawmaking.

Section 4213 and Section 4214 of ERISA serve entirely different purposes and address different actors with different roles and responsibilities. Under Section 4213 of ERISA, a multiemployer pension plan's actuary is responsible for selecting the actuarial assumptions and methods used to calculate an employer's withdrawal liability. 29 U.S.C. § 1393. Withdrawal liability must be calculated "as of the last day of the plan year preceding the year during which the employer withdrew." *Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414, 418 (1995) (citing Section 4211 of ERISA, 29 U.S.C. § 1391). The "as of" requirement indicates that Congress recognized that the elements necessary to calculate an employer's withdrawal liability would not be available on the Measurement Date. The Supreme Court said the requirement was "one of administrative convenience" to allow the plan to use "figures that it must prepare in any event for [an annual] report required under ERISA . . . thereby avoiding the need to generate new figures tied to the date of actual withdrawal." *See id.* The Plan's participant data and investment results are the same as of the end of December 31, 2013 (the Measurement Date) and the beginning of January 1, 2014. The actuarial valuation Horizon did for filing with the Plan's annual report was completed after the Measurement Date. *See supra* p. 4.

Congress's recognition of the fact that the information required to calculate withdrawal liability may not be available until after the Measurement Date is also evident in the requirement that a plan assess withdrawal liability as soon as practicable. Sections 4211 and 4219 of ERISA, 29 U.S.C. §§ 1391, 1399. It is also supported by the fact that Section 101(l) of ERISA requires, upon written request from an employer, that a multiemployer plan provide the requesting employer with an estimate of the employer's withdrawal liability as if the employer withdrew in the year *prior* to the year in which the request was made. 29 U.S.C. § 1021(l). For example, an employer that requests a withdrawal liability estimate from a multiemployer plan (whose plan year is a calendar year) in 2014 would receive a withdrawal liability estimate for a withdrawal on December 31,

2013. *See id.* at (l)(1)(A). That estimated withdrawal liability would be calculated as of December 31, 2012—the last day of the plan year preceding the plan year in which the hypothetical withdrawal would occur. *See* Section 4211 of ERISA, 29 U.S.C. § 1391. A plan's obligation to provide employers with estimates of withdrawal liability under ERISA takes into account the fact that the information necessary for an accurate estimate is not always available before the Measurement Date. If this were not true, there would be no reason pension plans could not provide withdrawal liability estimates for a 2014 withdrawal using the assumptions in place as of December 31, 2013—not December 31, 2012.

By contrast, Section 4214 of ERISA does not address or apply to actuaries or actuarial assumptions. Instead, Section 4214 of ERISA prohibits the plan trustees from applying changes in withdrawal liability *rules* and plan *amendments* to contributing employers who withdrew before the adoption of such *rules* and *amendments*. 29 U.S.C. § 1394. Section 4214(b) of ERISA also requires a plan sponsor to provide employers and employee organizations with notice of the adoption of certain *rules* and *amendments*. 29 U.S.C. § 1394(b). By its express terms, Section 4214 of ERISA applies *only* to plan rules and amendments. 29 U.S.C. § 1394. It sets *no* restrictions or requirements on the adoption of *actuarial assumptions* used to calculate withdrawal liability. *See id.* In fact, the text of Section 4214 of ERISA makes no mention of actuarial assumptions whatsoever. *Id.*

Only plan trustees can adopt rules and amendments, plan actuaries cannot. As the Second Circuit acknowledged, ERISA does not define the phrase "plan rule or amendment." App. 11a (stating "Section 4214 does not define 'plan rules and amendments'"). The terms "rule" and "amendment" with respect to pension plans, however, are used repeatedly throughout Part I of Subtitle E of Title IV of ERISA (the Part to which Section 4214 of ERISA, 29 U.S.C. § 1394, applies).[1] Each of those provisions establishes that a "rule" or "amendment" is an action taken by the *plan sponsor* (*i.e.*, the trustees or plan administrator) of a multiemployer plan, not an assumption determined by the actuary. *See* Section 4001(a)(10) of ERISA, 29 U.S.C. § 1301(a)(10) (defining "plan sponsor" as "(A) the plan's joint board of trustees, or (B) if the plan has no joint board of trustees, the plan administrator"). The Fund has a board of trustees who have the authority to adopt rules or amendments. *See* App. 97a, ¶ 5; *see also* Section 4001(a)(10) of ERISA, 29 U.S.C. § 1301(a)(10). The Fund's actuary does not have that authority. *See id.* By contrast, Section 4213 of ERISA, which covers actuarial assumptions, does not refer to any "rule" or "amendment." *See* 29 U.S.C. § 1393. Section 4213 of ERISA also does not set a time period during which a plan must adopt actuarial assumptions. That period is limited, however, by the fact that ERISA requires that multiemployer plans assess withdrawal liability as soon as practicable, once an actuary makes their "best estimate" the actuarial

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[1] *See* Sections 4203(f), 4205(c)(1), 4205(d), 4207(b), 4208(e)(3), 4209(b), 4210(b)(2), 4211(c)(1), 4211(c)(4)(D), 4211(c)(5), 4211(d)(1), 4211(d)(2), 4219(c)(1)(C)(ii)(I), 4219(c)(3), 4219(c)(5), 4219(c)(7), 4223(b), and 4224 of ERISA, 29 U.S.C. §§ 1383(f), 1385(c)(1), 1385(d), 1387(b), 1388(e)(3), 1389(b), 1390(b)(2), 1391(c)(1), 1391(c)(4)(D), 1391(c)(5), 1391(d)(1), 1391(d)(2), 1399(c)(1)(C)(ii)(I), 1399(c)(1)(C)(iii), 1399(c)(3), 1399(c)(5), 1399(c)(7), 1403(b), 1404. Part I of Subtitle E of Title IV of ERISA comprises Sections 4201 through 4225 of ERISA, 29 U.S.C. §§ 1381-1405.

assumptions have been selected, and plans have a financial incentive to assess and collect withdrawal liability as soon as possible. Sections 4211 and 4219(b) of ERISA, 29 U.S.C. §§ 1391, 1399(b). Consequently, the Second Circuit did not need to manufacture a time limit by which actuaries needed to select actuarial assumptions for calculating withdrawal liability. Nevertheless, the Second Circuit concluded that limitations on retroactivity and notice provisions in Section 4214 of ERISA also applied to Section 4213 of ERISA. The Second Circuit's reliance on Section 4214 of ERISA's notice requirement is not only misguided, it conflicts with its ultimate holding. If, as the Second Circuit held, actuarial assumptions must be selected by the Measurement Date in all instances, then notice of retroactive application is irrelevant because *any* retroactive application, regardless of whether a plan gave notice, would be impermissible.

Congress was aware of its ability to set forth procedural and substantive restrictions throughout ERISA's withdrawal liability provisions and chose not to do so with respect to the time actuaries had to adopt actuarial assumptions to calculate withdrawal liability. The distinction in the formulation between Section 4213 of ERISA and Section 4214 of ERISA was intentional. This Court has held repeatedly that if Congress had intended for the same or similar restrictions and requirements in one section of a statute (*e.g.*, Section 4214) to apply to another section (*e.g.*, Section 4213), when the sub-sections appear next to each other and were adopted at the same time, Congress would have included the restriction in the second section by reference or otherwise. *See Barnhart*, 534 U.S. at 452 (2002); *Bates*, 522 U.S. at

30 (1997); *Russello* 464 U.S. at 23 (1983). Congress chose not to include such restrictions in Section 4213 of ERISA and chose not to include a cross-reference to Section 4214 of ERISA. The Second Circuit, however, ignored this principle and imputed the requirements of Section 4214 of ERISA to Section 4213.

B. The legislative history does not support the Second Circuit's ruling.

In addition to disregarding basic principles of statutory construction, the Second Circuit misinterpreted ERISA's legislative history. The relevant sections of ERISA's legislative history conflict with the Second Circuit's decision. See App. 10a-11a. The Second Circuit determined that the Fund's adoption of the Horizon actuary's interest rate assumption following the Measurement Date was impermissible because it would be inconsistent with "Congress's legislative intent" behind the Multiemployer Pension Plan Amendments Act of 1980 provisions of ERISA. *See* App. 11a. The legislative history on which the Second Circuit relied, however, comes exclusively from a subsection entitled "Plan Rules and Amendments." This subsection is about Section 4214 of ERISA, which concerns plan rules and amendments, not Section 4213 of ERISA, which concerns actuarial assumptions. H.R. Rep. No. 96-869, pt. 2 at 30. This portion of legislative history does not mention actuaries or actuarial assumptions, while other sections of the legislative history (which the Second Circuit did not mention) reference and discuss actuarial assumptions. *See id.* at 30-31 (explaining under a subsection entitled "[d]eterminations presumed correct," that a plan's determination of withdrawal liability is presumed correct unless an employer can demonstrate by a preponderance of the evidence that, *inter alia*, the actuarial assumptions used in determining its withdrawal liability were unreasonable in the aggregate).

The Second Circuit also relied on Section 4214 of ERISA's notice requirement, explaining that the notice requirement was intended "to protect employers from the retroactive application of *rules* relating to withdrawal liability." App. 10a (emphasis added). Neither Section 4214 of ERISA nor the legislative history relied upon by the Second Circuit suggest that Section 4214 of ERISA's notice requirement applies to Section 4213 of ERISA or the actuarial assumptions used to calculate withdrawal liability.

Contrary to the Second Circuit's assertion, the legislative history confirms Congress intended to limit the restrictions contained in Section 4214 of ERISA to "plan rules and amendments." A report to the Committee of the Whole House on the State of the Union contains a section explaining provisions with respect to Payment of Withdrawal Liability, H.R. Rep. No. 96-869, pt. 2, at 27-31 (1980). Subsection (4) of this section discussed the "Determination of Actuarial Assumptions, etc." *Id.* at 29. This subsection does not provide that withdrawal liability actuarial assumptions must be selected by the applicable Measurement Date or require that multiemployer plans give employers notice of new actuarial assumptions. *Id.* Reading this section of the legislative history together with the subsection cited by the Second Circuit on plan rules and amendments confirms Congress's intention that "actuarial assumptions" should be treated differently from "rules" or "amendments." *See id.* at 29-30. As discussed below in Section II, treating those topics differently is logical and consistent with actuarial standards of practice.

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In sum, the Second Circuit created, without any statutory basis and contrary to applicable legislative history, a limitation on the actuary's selection of actuarial assumptions that violates a basic principle of statutory interpretation. The Second Circuit's holding conflicts with both the text of ERISA and Congressional intent.

II. The Second Circuit's Ruling Prevents Actuaries and Arbitrators from Carrying Out Their Statutory Obligations Under ERISA.

The Second Circuit's misreading and misapplication of this Court's decision in *Concrete Pipe* sets a dangerous precedent that undermines the roles Congress established for actuaries and arbitrators under ERISA. The Second Circuit concluded that setting assumptions after the Measurement Date creates an opportunity for manipulation of the calculation of a withdrawing employer's withdrawal liability with bias towards a fund. The Second Circuit did not base its fear of manipulation or bias on any factual finding of bias by the arbitrator. Instead, the Second Circuit incorrectly relied on *Concrete Pipe* to presume, solely as a matter of law, that actuaries will be susceptible to influences of bias. This Court held the opposite in *Concrete Pipe*. The Second Circuit also asserted that its presumption of bias was supported by the Fund's use of different interest rates for withdrawal liability and minimum funding. No court or arbitrator has determined that a multiemployer pension plan may not, as a matter of law, use different interest rates for minimum funding and withdrawal liability purposes.[2]

The Second Circuit's proposed solution to the purported problem of bias and manipulation (which, as discussed below, does not exist) does not actually eliminate the issue, but instead interferes with an actuary's ability to make his or her "best estimate." The Second Circuit's decision also upends an arbitrator's fact-finding role under ERISA's dispute resolution mechanism and is contrary to the prevailing presumption under ERISA that a fund's determinations in calculating withdrawal liability are correct. Section 4221(a)(3) of ERISA, 29 U.S.C. § 1401(a)(3). All of these issues have far-reaching

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[2] *See*, *e.g.*, *Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 354-55 (7th Cir. 2012); *N.Y. Times Co. v. Newspaper & Mail Deliverers'-Publishers Pension Fund*, 303 F. Supp. 3d 236, 254-55 (S.D.N.Y. 2018); *Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund*, 331 F. Supp. 365, 368 (D.N.J. 2018); *Miller & Son Paving, Inc. v. Teamsters Pension Fund of Phil. & Vicinity*, Civil Action No. 15-4869, 2016 WL 4802752 (E.D. Pa. Sept. 14, 2016); *Structure Tone, Inc. v. N.Y.C. Dist. Council Carpenters Pension Fund*, AAA Case No. 01-16-0001-5514, 2017 WL 6034192 (Apr. 24, 2017); *Block Commc'ns, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, AAA Case No. 11 621 2637 09, 2013 WL 7017979, at *9-13 (Dec. 23, 2013); *Embassy Indus. v. Local 365 UA Pension Trust Fund*, AAA Case No. 13 621 01504 06, at *27 (2008); *Widoff's Modern Bakery v. Bakery & Confectionary Union & Indus. Int'l Pension Fund*, AAA Case No. 11 621 01198 06 (2007); *Sotheby's Inc. v. Local 814, IBT Pension Fund*, AAA Case No. 13 621 03393 (1994) (each holding that the rates do not need to be the same as a matter of law).

implications that adversely affect multiemployer pension plans nationwide.

In *Concrete Pipe*, this Court examined whether Section 4221(a)(3)(B) of ERISA violates an employer's constitutional Due Process rights. *Concrete Pipe*, 508 U.S. at 631-32. Section 4221(a)(3)(B) provides that the plan sponsor's determination of a plan's unfunded vested benefits is presumed correct unless an employer "shows by a preponderance of the evidence" that the "actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable." Section 4221(a)(3)(B) of ERISA, 29 U.S.C. § 1401(a)(3)(B). This Court held that Section 4221(a)(3)(B)'s presumption in favor of a plan sponsor's (*i.e.*, trustees) calculation of withdrawal liability does not violate an employer's Due Process rights, in part, because the actuarial assumptions and methods are "selected in the first instance not by the trustees, but by the plan actuary," and "actuaries are trained professionals subject to regulatory standards" who are "not, like the trustees, vulnerable to suggestions of bias or its appearance." *Concrete Pipe*, 508 U.S. at 632, 635-36.

This Court also said that, as a practical matter, "the technical nature of an actuary's assumptions and methods . . . limit the opportunity an actuary might otherwise have to act unfairly toward [a] withdrawing employer." *Concrete Pipe*, 508 U.S. at 632. Accordingly, as articulated in *Concrete Pipe*, a cornerstone of the constitutionality of the withdrawal liability dispute resolution process, including the statutory presumption in favor of pension funds, is the principle that actuaries—as independent professionals bound by professional standards of conduct (*i.e.*, the Actuarial Standards of Practice) and "methodology [that] is [the] subject of technical judgment within a recognized professional discipline"—are not susceptible to the bias that may guide plan trustees' decisions. *Id.* at 635.

A. The Second Circuit's decision interferes with an actuary's ability to make his or her "best estimate."

Actuarial independence is fundamental to this Court's holding in *Concrete Pipe* and to the constitutional framework of ERISA's dispute resolution process. The centerpiece of actuarial independence is an actuary's ability and responsibility to make his or her best estimate, as set forth in Section 4213 of ERISA and the Actuarial Standard of Practice No. 27 ("ASOP 27"). *See Concrete Pipe*, 508 U.S. at 635.

Section 4213 of ERISA requires plan actuaries to calculate withdrawal liability using "actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan or reasonable expectations) and which, in combination, offer the *actuary's best estimate* of anticipated experience under the plan" 29 U.S.C. § 1393(a)(1) (emphasis added). ASOP 27 provides, in relevant part: "[t]he economic assumptions selected to measure pension obligations should reflect the actuary's knowledge base as of the measurement date." Actuarial Standards Board, Doc. No. 145, *Actuarial Standard of Practice No. 27: Selection of Economic Assumptions for Measuring Pension Obligations* § 3.14.3 (Sept. 2007 rev. ed., Updated for Deviation Language Effective May 1, 2011), *available* *at* http://www.actuarialstandardsboard.org/wp-content/uploads/2014/10/asop027_145.pdf (last visited May 27, 2020).[3] An actuary's "knowledge base," as the term is used in ASOP 27, as of a given Measurement Date may include, among other things, participant demographics, plan assets, employer information, interest rates, collective bargaining agreements, contribution rates, economic and market data, retirement rates, mortality rates, investment strategies and outcomes, applicable laws, inflation rates, other assumptions, professional standards, expert opinions, methods, and plan provisions and rules. *See generally* ASOP 27 § 3 (providing guidance for the selection of actuarial assumptions).

All of this information may not be available until after the Measurement Date, which, as discussed above in Section I.A, is consistent with Section 101(l) of ERISA's withdrawal liability estimate requirements, which recognize that withdrawal liability estimates cannot be calculated in real time.

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[3] This version of ASOP 27 applies to Metz's withdrawal, which occurred in 2014 and was calculated as of a Measurement Date of December 31, 2013. *See* ASOP 27 § 1.4 ("This standard will be effective for any actuarial valuation with a measurement date on or after March 15, 2008."). The latest version of ASOP 27 does not apply to Metz's withdrawal liability. *See* Actuarial Standards Board, Doc. No. 172, *Actuarial Standard of Practice No. 27: Selection of Economic Assumptions for Measuring Pension Obligations* § 1.4 (Sept. 2013 rev. ed.) ("This standard will be effective for any actuarial work product with a *measurement date* on or after September 30, 2014."), *available at* http://www.actuarialstandardsboard.org/wp-content/uploads/2014/02/asop027_172.pdf (last visited May 27, 2020) (emphasis in original). The most recent version of ASOP 27 contains language that is similar to that in the version applicable to Metz. *See id.* § 3.5.5.

See supra pp. 11-12. As the District Court noted, the fact that an assumption is "as of" a Measurement Date does not mean that it needs to be determined on or before that same Measurement Date. *See* App. 58a-61a. In addition, ASOP 27 further provides that:

> [a]n actuary's best-estimate range with respect to a particular measurement of pension obligations may change from time to time due to changing conditions or emerging plan experience. . . . Even if assumptions are not changed, the actuary should be satisfied that each of the economic assumptions selected for a particular measurement complies with this standard.

ASOP 27 § Section 3.12. It would make no sense to require an actuary to use stale data or information with which the particular actuary disagrees. Doing so would also be contrary to the reasoning in *Concrete Pipe* that actuaries are independent professionals. Yet this is exactly what the Second Circuit did.

Central to an actuary's independence is his or her ability to identify relevant data and use that data to make informed determinations. The Second Circuit's decision, however, prevents an actuary from doing so. While ERISA requires that a plan's unfunded vested benefits be calculated "as of" the Measurement Date, ASOP 27 § 3.3 provides that "when identifying which types of economic assumptions to use for a specific measurement and when selecting those economic assumptions that will be used," the actuary should consider the "purpose and nature of the measurement." Accordingly, an actuary will need to determine what information is relevant to determining the assumptions. All of the information that an actuary deems relevant, however, may not be available until after the Measurement Date, and actuaries, therefore, may not have the requisite information to appropriately form their assumptions for a plan year prior to the Measurement Date. *See* App. 58a-61a. Metz's counsel conceded in oral argument before the Second Circuit that information necessary for an actuary to select proper actuarial assumptions for calculating withdrawal liability might not be available until after the Measurement Date, and agreed that "it makes sense that you would look at it" after the Measurement Date. *See* App. 21a.

If an actuary cannot select assumptions that reflect their best estimate on or before the applicable Measurement Date, Section 4213 of ERISA requires that the actuary wait until the actuary is able to do so. *See CPC Logistics*, 698 F.3d at 357. The use of assumptions that do not reflect the actuary's best estimate violates ERISA and can result in the invalidation of a withdrawal liability assessment. *See id.* (finding a violation of ERISA where a rate other than the actuary's best estimate was used and noting the importance of this best estimate requirement in "maintain[ing] the actuary's independence"). Accordingly, actuaries may, and oftentimes do, need to wait until after the Measurement Date to accumulate all of the necessary information to set their assumptions for calculating withdrawal liability. *See* App. 58a-61a. This ability to make decisions and assumptions based on data according to professional standards is a key part of an actuary's role.

According to the Second Circuit's decision, if an actuary does not set the assumptions by the

Measurement Date, then the previous assumptions carry over to the next year. App. 12a (holding "[a]bsent a change by a Fund's actuary before the Measurement Date, the existing assumptions and methods remain in effect [to calculate withdrawal liability]."). This conclusion, that the actuarial assumptions are invalid because of presumed bias unless selected before the Measurement Date, contradicts the prevailing presumption in ERISA withdrawal liability disputes—that a plan's determination of withdrawal liability is presumed correct. Section 4221(a)(3)(B) of ERISA, 29 U.S.C. § 1401(a)(3)(B). Requiring actuaries to select assumptions before the Measurement Date undermines the text and purpose of Section 4213 of ERISA, the foundation of this Court's reasoning in *Concrete Pipe*, and ASOP 27. As the District Court held, "[i]n no universe is carrying over assumptions from a prior plan year without *any* examination or analysis . . . an actuary's 'best estimate.'" App. 51a-52a (holding Section 4213 of ERISA "precludes" the passive roll over of actuarial assumptions from year to year and "Section 4213 does not allow stale assumptions from the preceding plan year to roll over automatically . . . .").

Furthermore, the need for an actuary to wait until after the Measurement Date to make his or her best estimate is magnified when the plan changes actuaries (as was the case here) because the new actuary must conduct his or her own diligence to make his or her best estimate. *See* ASOP 27 § 3. The legal issue in the present case is especially acute. The Fund switched actuaries from Buck to Horizon. To make his best estimate, the actuary from Horizon took time to study the data and familiarize himself with the plan. Despite the fact that the Horizon actuary was required to make his own best estimate, because the Horizon actuary did not set the interest rate assumption by the Measurement Date, the Second Circuit forced the Horizon actuary to adopt the Buck actuary's prior interest rate assumption for purposes of calculating 2014 withdrawals—an interest rate assumption that did not represent the Horizon actuary's best estimate.

The Second Circuit's decision has far-reaching and dangerous implications for multiemployer pension funds. Every multiemployer pension plan retains an actuary and may collect withdrawal liability. By interfering with actuaries' ability to make their best estimates and thereby act as independent and stabilizing forces, the Second Circuit has placed actuaries in an incredibly difficult, if not impossible, position in which they must choose between (i) following the Second Circuit's decision and violating their statutory and professional obligations, or (ii) adhering to the statute and ASOP 27 while disregarding the Second Circuit's decision. This Hobson's choice is fundamentally at odds with this Court's holding in *Concrete Pipe*.

B. The Second Circuit's assertion that, as a matter of law, actuaries may be susceptible to bias contradicts the premise underlying this Court's decision in Concrete Pipe.

The Second Circuit's decision is premised on the notion that plan actuaries are presumptively susceptible to bias and manipulation. The Second Circuit attempted to respond to such supposed actuarial bias and manipulation in its decision by mandating that actuaries set their assumptions by the Measurement Date (or use stale assumptions). App. 12a. Both this premise and the purported solution are deeply flawed.

With regard to the Second Circuit's premise, as discussed above, this Court held in *Concrete Pipe* that actuaries are not presumptively susceptible to bias. *See supra* pp. 17-20. Actuaries are independent professionals who are required to adhere to their own professional standards. Nevertheless, the Second Circuit held that permitting an actuary to set his or her actuarial assumptions following the Measurement Date "would create significant opportunity for manipulation and bias." App. 12a. In support of this finding, the Second Circuit accurately quoted *Concrete Pipe*, stating "the Supreme Court acknowledged that the actuary in that case was 'not, like the trustees, vulnerable to suggestions of bias or its appearance' because 'actuaries are trained professionals subject to regulatory standards.'" *See* App. 12a-13a. Despite doing so, the Second Circuit then reached a conclusion that was directly contradicted by the exact excerpt it quoted when the Second Circuit held that actuaries were presumptively susceptible to bias as a matter of law. *Id.* As discussed, aside from disregarding this Court's legal conclusion in *Concrete Pipe*, the Second Circuit reached its conclusion without articulating any colorable factual, legal or other justification. *See supra* pp. 17-20, 25; *infra* p. 30.

Even if actuaries were presumptively susceptible to bias, the Second Circuit's purported solution does not solve the issue. Creating a hard and fast deadline by which assumptions must be set does not fix the purported problem. Instead, it merely moves the time period for bias and manipulation to before the Measurement Date. For example, if a Measurement Date is December 31, then requiring that assumptions be set by December 31 rather than January 1 or January 2 provides no substantive safeguard against influences motivating bias and manipulation. A biased actuary would merely need to set his or her "biased" assumptions by December 31 to be in compliance with the Second Circuit's decision. In this case, the District Court recognized that setting a concrete date by which assumptions must be set would not impede manipulation. *See* App. 61a (explaining that "[a]n actuary who is simply bowing to pressure from a fund is violating her ERISA mandate, regardless of the date on which her interest rate assumptions are finalized").

In explaining its decision, the Second Circuit held that "interest rate assumptions cannot be altered daily and must have a degree of stability." App. 9a. No party in this case argued that interest rate assumptions could be changed daily. This justification is a red herring that misunderstands the issue. During oral argument before the Second Circuit, Judge Livingston asked whether the interest rate could be changed and applied retroactively if it had already been set in January or February of 2014. App. 27a-28a. Counsel for the Fund responded that it would be inappropriate for the actuary to change the interest rate later in the year if the actuary had already made his or her best estimate in January or February. *Id.* The Second Circuit's concern that actuaries could repeatedly change their assumptions—as frequently as daily—if they are not required to make assumptions by the Measurement Date is unmerited.

The Second Circuit incorrectly relied on *Concrete Pipe* to state that as a matter of law "[t]he opportunity for manipulation and bias is particularly great where funds use different interest rate assumptions for withdrawal liability and minimum funding purposes." App. 13a-14a. The facts in this case are undisputed, and there was no factual finding of bias on the part of the Fund's actuary. App. 8a-9a. More fundamentally, *Concrete Pipe* does not stand for the proposition that such use of different interest rates for different purposes establishes a presumption of bias as a matter of law. *Concrete Pipe*, 508 U.S. at 633. In *Concrete Pipe*, this Court stated that "[u]sing different assumptions [for different purposes] *could* very well be attacked as presumptively unreasonable . . . " but did not conclude that such use of different assumptions necessarily would be improper as a matter of law. *Id.* (emphasis added). This Court provided actuaries the opportunity to explain why it was appropriate and reasonable to use different interest rate assumptions for different purposes. *Id.* In fact, no court has held, and no arbitrator has ruled, as a matter of law, that multiemployer pension plans must always use the same interest rate for withdrawal liability and minimum funding purposes. *See supra* p. 18, n. 2. As Metz has conceded, subsequent to *Concrete Pipe*, [all] courts and arbitrators, including the arbitrator in the underlying arbitration, have ruled that multiemployer plans may, as a matter of law, use one interest rate assumption for ongoing funding purposes and another interest rate assumption for calculating withdrawal liability. *See* Brief for Appellant Metz Culinary Management, Inc., *The National Retirement Fund et al. v. Metz Culinary Management, Inc.*, 946 F.3d 146 (2d Cir. 2020) at 53 (citing *Embassy Indus. & Local*

365 UAW Pension Trust Fund, AAA Case No. 13 621 01504 06 (Jaffe, Arb. Mar. 4, 2008)).

C. The Second Circuit's decision usurps the role Congress reserved for arbitrators.

The Second Circuit's decision contravenes Congress's intent to have arbitrators be the fact-finders in withdrawal liability disputes. Section 4221(a)(1) of ERISA provides for mandatory arbitration of disputes between an employer and plan sponsor of the multiemployer plan arising out of a determination made pursuant to Sections 4201 through 4219 of ERISA. Section 4221(a)(1) of ERISA, 29 U.S.C. § 1401(a)(1). An arbitrator's ruling may then be appealed to the federal courts. Section 4221(b)(2) of ERISA, 29 U.S.C § 1401(b)(2). The federal court in such an appeal, however, must defer to the factual findings of the arbitrator, pursuant to Section 4221(c), which provides that "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." Section 4221(c) of ERISA, 29 U.S.C. § 1401(c). This clear error standard arises from the fact that Congress wanted arbitrators, with expertise and experience resolving often technical factual issues that arise in the withdrawal liability context, deciding factual issues. *See, e.g.*, *Sherwin-Williams Co. v. New York State Teamsters Conf. Pension and Retirement Fund*, 158 F.3d 387, 393 (6th Cir. 1998) ("[D]eference to the findings of the arbitrator is proper because the arbitrators chosen to resolve the complicated issue of withdrawal liability often have relevant expertise in the field of pension law which can contribute significantly to the accuracy of a decision."). There was no fact-finding here on the part of the arbitrator.

The Second Circuit's decision is based on its concern that the actuary may select an interest assumption after the Measurement Date that is biased. ERISA already contains a remedy to eliminate any bias that might occur. An employer in arbitration can challenge whether the actuarial assumptions are reasonable in the aggregate, are the actuary's best estimate, or were influenced improperly by the trustees. The employer can provide evidence in arbitration to attempt to show that the "bias" existed. The arbitrator can then make a factual determination based on the evidence. *See, e.g.*, *CPC Logistics,* 698 F.3d at 355-357.

The Second Circuit presumed, as a matter of law, that actuaries are susceptible to bias because (i) the Fund's actuary selected the interest rate assumption after the Measurement Date, and (ii) the Fund's actuary set different interest rate assumptions for withdrawal liability and minimum funding purposes. The arbitrator in this case, however, found no facts to support the conclusion of bias when the default under the law is that actuaries are not biased. App. 81a-92a. In fact, the arbitrator only made legal conclusions and did not make any factual conclusions. *See id.* As the Second Circuit acknowledged, the facts were undisputed. App. 8a. The Second Circuit's presumption was tantamount to a factual finding that the Horizon actuary was biased. The arbitrator made no finding to support such a conclusion. Congress deliberately empowered arbitrators to address the technical factual issues that frequently accompany withdrawal liability disputes. The Second Circuit, however, ignored Congress's intent when it engaged in what was tantamount to fact-finding by concluding, based on a presumption, that the actuary was prone to bias when the arbitrator made no such factual finding.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2017

Docket No. 17-1211-cv

THE NATIONAL RETIREMENT FUND,
EACH ON BEHALF OF THE LEGACY PLAN
OF THE NATIONAL RETIREMENT FUND, BOARD
OF TRUSTEES OF THE NATIONAL RETIREMENT
FUND, EACH ON BEHALF OF THE LEGACY PLAN
OF THE NATIONAL RETIREMENT FUND,

Plaintiffs-Counter-Defendants-Appellees,

—v.—

METZ CULINARY MANAGEMENT, INC.,

Defendant-Counter-Claimant-Appellant.

ARGUED: February 8, 2018

DECIDED: January 2, 2020

Before: WINTER, LIVINGSTON, and CHIN, Circuit Judges.

CERTIFIED COPY ISSUED ON 1/02/2020

Appeal from a judgment of the United States District Court for the Southern District of New York (Valerie Caproni, Judge), vacating an arbitration award. The award held that interest rate assumptions for purposes of withdrawal from a multiemployer pension plan liability are those in effect on the last day of the year preceding the employer's withdrawal. The district court held that interest rate assumptions may be determined after withdrawal and retroactively imposed. We disagree and vacate.

ROBERT LITVIN (Paisner Litvin LLP, on the brief), Bala Cynwyd, PA, for Defendant-Counter-Claimant-Appellant.

RONALD E. RICHMAN (Schulte Roth & Zabel LLP, on the brief), New York, New York, for Plaintiffs-Counter-Defendants-Appellees.

Robert R. Perry, Todd H. Girshon (Jackson Lewis P.C.), New York, New York, for Amicus Curiae Joseph Abboud Manufacturing Corp. and Waterford Hotel Group, Inc.

WINTER, Circuit Judge:

Metz Culinary Management, Inc., a contributing employer to the National Retirement Fund, appeals from Judge Caproni's decision vacating Arbitrator Ira F. Jaffe's award. His award held that appellees improperly calculated appellant's withdrawal liability based on interest rate assumptions adopted in 2014 after appellant withdrew from the Plan. The district court held that Section 4213 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1393, does not require actuaries to calculate withdrawal liability based on interest rate assumptions used prior to an employer's withdrawal from a plan. The district court further held that interest rate assumptions must be affirmatively reached and may not roll over automatically from the preceding plan year. For reasons stated below, we vacate the district court's judgment.

BACKGROUND

Appellees are a trust fund, established and maintained pursuant to Section 302(c)(5) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5), and its Board of Trustees ("Trustees"). The Fund — through its Trustees — sponsors and administers the Legacy Plan of the National Retirement Fund (the "Plan"), a multiemployer plan within the meaning of Section 3(37) of ERISA, 29 U.S.C. § 1002(37).

In multiemployer pension plans, several "employers pool contributions into a single fund that pays benefits to covered retirees who spent a certain amount of time working for one or more of the contributing employers." Trs. of The Local 138 Pension Tr. Fund v. F.W. Honerkamp Co., 692 F.3d 127, 129 (2d Cir. 2012). Appellant was an employer contributing to the Plan until May 16, 2014 when it effectuated a complete withdrawal from the Plan. See Section 4203(a) of ERISA, 29 U.S.C. § 1383(a).

When a plan is underfunded, an employer seeking to withdraw must pay its share of unfunded vested benefits ("UVBs"). See 29 U.S.C. § 1381(b)(1). UVBs are "calculated as the difference between the present value of vested benefits and the current value of the plan's assets." Pension Benefit Guar. Corp. V. R.A. Gray & Co., 467 U.S. 717, 725 (1984) (citing 29 U.S.C. §§ 1381, 1391). The Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA") sets forth rules for calculating a withdrawing employer's share of a plan's underfunding. Pursuant to the MPPAA, "[i]f an employer withdraws from a multiemployer plan . . . the employer is liable to the plan in the amount determined under this part to be the withdrawal liability." 29 U.S.C. § 1381(a). "Withdrawal liability is the withdrawing employer's proportionate share of the pension plan's unfunded vested benefits." Honerkamp, 692 F.3d at 130.

Pursuant to Section 4211 of ERISA, a plan may select one of four identified allocation methods or develop its own method for calculating UVBs, subject to approval by the Pension Benefit Guaranty Corporation ("PBGC"). 29 U.S.C. § 1391. Critical to the present dispute, Section 1391 of the MPPAA directs plans to calculate the withdrawal charge, not as of the date of withdrawal or sometime later, but as of the last day of the plan year preceding the year during which the employer withdrew. This date could be up to a year earlier. Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co., 513 U.S. 414, 417-18 (1995) (citing §§ 1391(b)(2)(A)(ii), (b)(2)(E)(i), (c)(2)(C)(i), (c)(3)(A), and (c)(4)(A)). The last day of the plan year preceding the year during which the employer withdraws is referred to as the "Measurement Date." Because appellant withdrew from the Plan on May 16, 2014, the applicable Measurement Date is December 31, 2013.

Of the many actuary assumptions necessary to calculate withdrawal liability, only the interest rate assumption is at issue in this matter. To determine an employer's withdrawal liability, a plan's actuary must estimate the present value of the plan's vested benefits and the interest rate necessary to discount the liability for future benefit payments. See Combs v. Classic Coal Corp., 931 F.2d 96, 98 (D.C. Cir. 1991). Because the interest rate assumption governs the estimate of a plan's growth from investments apart from employers' future contributions, increasing the interest rate assumption decreases an employer's withdrawal liability, and vice versa. See id. ERISA Section 4213(a) requires withdrawal liability to be based on "reasonable" actuarial assumptions and methods, "taking into account the experience of the plan and reasonable expectations," and to be "the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1).

Buck Consultants ("Buck") served as appellees' actuary for many years. In October 2013, appellees replaced Buck with Horizon Actuarial Services, LLC beginning in 2014. For several years before its termination as the Plan's actuary, Buck utilized a 7.25% interest rate assumption to determine the Fund's UVBs. The Plan's 2013 Form 5500 Schedule MB,[1] states that a 7.25% interest rate assumption remained in place in 2013 for purposes of determining UVBs. At a 7.25% interest

[1] A Form 5500 is an annual report, filed with the United States Department of Labor, for an employee benefit plan. Schedule MB is the portion of the Form 5500 that provides actuarial information for a defined benefit pension fund and is completed by the fund's actuary.

rate, appellant's withdrawal liability would have been $254,644.

In June 2014, however, Horizon informed the Trustees that the interest rate assumption for purposes of withdrawal liability was reduced from 7.25% to approximately 3.25%.[2] At a 3.25% interest rate, appellant's withdrawal liability was calculated to be $997,734. The Fund applied the revised interest rate to calculate appellant's withdrawal liability at the higher figure. Appellant then commenced the arbitration proceeding that led to this appeal.

The parties agreed that "a preliminary issue" relating to "the interest rate assumption used by the Fund to calculate [Metz's] withdrawal liability" would "be presented for ruling on the basis of written stipulations and briefing." App'x at 22-23.

On February 22, 2016, Arbitrator Jaffe issued an "Interim Award" holding that appellees' retroactive application of the PBGC rate to calculate appellant's withdrawal liability was improper. It stated:

> The Fund's assertion that the Fund Actuary had not made any interest rate assumption determination as of December

[2] The documents in the record reflecting this change relate only to withdrawal liability, and it appears that no change was made as to the assumed interest rate for other purposes. If so, the change increased the liability only for withdrawing employers while leaving the contributions of remaining employers unchanged. In view of our disposition of this matter and the lack of an explicit finding, this issue is not dispositive.

> 31, 2013, for purposes of calculating the Fund's [UVBs] for withdrawal liability is rejected. MPPAA requires that the assumptions and methods in effect on December 31, 2013, be used for calculating the Employer's withdrawal liability. Absent some change by the Fund actuaries, the existing assumptions and methods remained in place as of December 31, 2013.

App'x at 37.

Accordingly, the Recalculation of Withdrawal Liability reduced appellant's withdrawal liability from $997,734 to $254,644.

On March 31, 2016, appellees brought the present action pursuant to Section 4221(b)(2) of ERISA, 29 U.S.C. § 1401(b)(2), seeking to modify and/or vacate the arbitrator's Final Award. On May 4, 2016, appellant filed a counterclaim, seeking enforcement of the Final Award. On March 27, 2017, the district court vacated the Final Award, holding that "ERISA does not require actuaries to make withdrawal liability assumptions by the measurement date." App'x at 283, 289-90. According to the district court, "the withdrawal liability interest rate assumption <u>in effect</u> on the Measurement Date is not applicable to the upcoming plan year unless the actuary affirmatively determines that the assumption . . . is reasonable and her best estimate of anticipated experience under the plan as of the Measurement Date." App'x at 279 (emphasis in original).

On April 25, 2017, appellant timely appealed.

DISCUSSION

We review an arbitrator's legal conclusions made under Section 4221 of ERISA de novo. See HOP Energy, L.L.C. v. Local 553 Pension Fund, 678 F.3d 158, 160 (2d Cir. 2012). By contrast, factual findings made by an arbitrator enjoy a "presumption of correctness." See ERISA Section 4221(c), 29 U.S.C. § 1401(c) ("[T]here shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct."); Sigmund Cohn Corp. v. Dist. No. 15 Machinists Pension Fund, 804 F. Supp. 490, 493 (E.D.N.Y. 1992) ("Courts reviewing arbitration awards have consistently upheld the arbitrator's factual findings under section 4221(c)'s 'presumption of correctness.'").

The parties use copious amounts of ink in argument over what are the arbitrator's legal interpretations of the MPPAA and what are his factual findings. Much of this argumentation is irrelevant because the legal argument is decisive on the undisputed facts. That issue is whether, under the MPPAA, a fund may select an interest rate assumption after the Measurement Date and retroactively apply that assumption to withdrawal liability calculations. Appellant's withdrawal from the Plan on May 16, 2014 caused December 31, 2013 to be the Measurement Date. As a factual matter, it is not seriously contested that the interest assumption as of that date was 7.25%. Appellees selected the revised rate no earlier than June 2014, claiming that rate to be proper for the earlier Measurement Date.

As the arbitrator's award states, "there is no dispute that Horizon did not adopt the PBGC rates as the interest rate assumption for withdrawal liability purposes until some time in 2014," after the Measurement Date of December 31, 2013. App'x at 37. The arbitrator stated that the Fund's "decision to apply [a] changed assumption [rate] retroactively so as to increase the withdrawal liability assessed to [Metz] and other employers who withdrew from the Fund after December 31, 2013, was violative of MPPAA." App'x at 37. While the statement of the Fund's action is an undisputed factual finding, the legal conclusion is subject to de novo review.

ERISA and Congress's guidelines for calculating an employer's withdrawal liability, see Section 4213 of ERISA, 29 U.S.C. § 1393, are silent as to whether interest rate assumptions on the Measurement Date must be affirmatively adopted, or whether, absent an actuary's affirmative selection of a new assumption rate, the rate in effect during the previous plan year rolls over automatically. Although the district court held that "Section 4213 does not allow stale assumptions from the preceding plan year to roll over automatically," App'x at 278, there is no statutory or caselaw support for that proposition, and we do not agree with it. In the context of multiemployer pension plans, interest rate assumptions cannot be altered daily and must have a degree of stability. Nor, in that context, do interest rate assumptions remain open forever and subject to retroactive changes in later years. Indeed, the Plan itself used the 7.25% rate for several years and its annual reports to the government reflect the ongoing rollover.

Moreover, Section 4214 imposes a notice requirement on multiemployer funds for any plan rule or amendment with respect to withdrawal liability. The legislative history demonstrates that it was designed to protect employers from the retroactive application of rules relating to the calculation of withdrawal liability:

> There are several situations where plans, in the application of their own rules, either initially or by amendment, are permitted a wide degree of latitude in allocating and calculating withdrawal liability. In order to protect an employer from certain retroactive changes in a plan's rules, the bill [H.R. 3904] prohibits the retroactive application of a plan rule or amendment relating to withdrawal liability from applying to a withdrawal occurring before its date of adoption, unless the employer consents to its earlier application.
>
> The bill also requires that plan rules and amendments operate and be applied uniformly with respect to all employers except to the extent that lack of uniformity would be required to take into account employers' credit ratings.
>
> Under the bill, when a plan rule or amendment affects withdrawal liability, the plan sponsor is required to give notice of the adoption of the rule or amendment to all employers required to contribute to the plan and to all employee organizations representing employees covered by the plan.

H.R. Rep. No. 96-869, pt. 2 at 30.

Although Section 4214 does not define "plan rules and amendments" and Section 4213 — unlike Section 4214 — does not specifically address retroactivity, the retroactive selection of interest rate assumptions for purposes of withdrawal liability, as endorsed by the district court, is, therefore, inconsistent with Congress's legislative intent. Moreover, certain provisions of ERISA allow employers to request and receive notice of their estimated withdrawal liability prior to actually withdrawing from a fund. For example, Section 101 provides that "[t]he plan sponsor or administrator of a multiemployer plan shall, upon written request, furnish to any employer who has an obligation to contribute to the plan," a "[n]otice of potential withdrawal liability." 29 U.S.C. § 1021(l)(1). The plan administrator is also required to provide:

> (A) the estimated amount which would be the amount of such employer's withdrawal liability under part 1 of subtitle E of subchapter III if such employer withdrew on the last day of the plan year preceding the date of the request, and
>
> (B) an explanation of how such estimated liability amount was determined, including the actuarial assumptions and methods used to determine the value of the plan liabilities and assets, the data regarding employer contributions, unfunded vested benefits, annual changes in the plan's unfunded vested benefits, and the application of any relevant limitations on the estimated withdrawal liability.

29 U.S.C. § 1021(l)(1)(A), (B). Such provisions are of no value if retroactive changes in interest rates assumptions may be made at any time.

In considering the retroactive selection of interest rate assumptions, we conclude that the assumptions and methods used to calculate the interest rate assumption for purposes of withdrawal liability must be those in effect as of the Measurement Date.[3] Absent a change by a Fund's actuary before the Measurement Date, the existing assumptions and methods remain in effect. Were it otherwise, the selection of an interest rate assumption after the Measurement Date would create significant opportunity for manipulation and bias. Nothing would prevent trustees from attempting to pressure actuaries to assess greater withdrawal liability on recently withdrawn employers than would have been the case if the prior assumptions and methods actually in place on the Measurement Date were used. Actuaries unwilling to yield to trustees' preferred interest rate assumptions can be replaced by others less reticent.

In Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Tr., 508 U.S. 602,

[3] We are mindful of the district court's conviction that "[t]he Arbitrator incorrectly conflated" the terms "as of" and "in effect." App'x at 279. According to that court, "the withdrawal liability interest rate assumption in effect on the Measurement Date is not applicable to the upcoming plan year unless the actuary affirmatively determines that the assumption . . . is reasonable and her best estimate of anticipated experience under the plan as of the Measurement Date." App'x at 279 (emphasis in original). For the reasons stated in this opinion, however, we believe the district court's reasoning to be unpersuasive.

632 (1993), the Supreme Court acknowledged that the actuary in that case was "not, like the trustees, vulnerable to suggestions of bias or its appearance" because "actuaries are trained professionals subject to regulatory standards." The Court warned, however, that

> [u]sing different assumptions [for different purposes] could very well be attacked as presumptively unreasonable both in arbitration and on judicial review. . . .
>
> [This] view that the trustees are required to act in a reasonably consistent manner greatly limits their discretion, because the use of assumptions overly favorable to the fund in one context will tend to have offsetting unfavorable consequences in other contexts. For example, the use of assumptions (such as low interest rates) that would tend to increase the fund's unfunded vested liability for withdrawal liability purposes would also make it more difficult for the plan to meet the minimum funding requirements of § 1082.

Id. at 633 (second and third alterations in original) (quoting United Retail & Wholesale Emps. Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128, 146-47 (3d Cir. 1986) (Seitz, J., dissenting in part)).

The opportunity for manipulation and bias is particularly great where funds use different interest rate assumptions for withdrawal liability and minimum funding purposes. Indeed, Arbitrator Jaffe specifically acknowledged that "[t]his potential for bias to operate is particularly great if the changed assumptions and methods relate only to those used to calculate the [UVBs] of the fund for purposes of withdrawal liability and not for funding or other purposes (as appears to have been the case in this matter).” App’x at 39-40 (emphasis added); see Concrete Pipe, 508 U.S. at 633 n.19 (“we are aware of at least one case in which a plan sponsor exercised decisive influence over an actuary whose initial assumptions it disliked”) (citing Huber v. Casablanca Indus., Inc., 916 F.2d 85, 93 (3d Cir. 1990)). This appeal, therefore, illustrates the type of results that can be “attacked as presumptively unreasonable both in arbitration and on judicial review” of which Concrete Pipe warns. Concrete Pipe, 508 U.S. at 633.

CONCLUSION

We hold that interest rate assumptions for withdrawal liability purposes must be determined as of the last day of the year preceding the employer’s withdrawal from a multiemployer pension plan. Absent any change to the previous plan year’s assumption made by the Measurement Date, the interest rate assumption in place from the previous plan year will roll over automatically.

The judgment of the district court is vacated, and the case is remanded with directions to enter judgment for the appellant and to remand any remaining issues to Arbitrator Jaffe.

A True Copy
Catherine O’Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit
/s/ Catherine O’Hagan Wolfe

[SEAL]

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 17-1211

February 8, 2018

NATIONAL RETIREMENT FUND,

Appellant

—v.—

METZ CULINARY MANAGEMENT,

Appellees.

TRANSCRIPT OF ORAL ARGUMENT BEFORE THE HONORABLE DEBRA ANN LIVINGSTON, THE HONORABLE RALPH K. WINTER & THE HONORABLE DENNY CHIN, UNITED STATES CIRCUIT JUDGES

APPEARANCES:

For Appellant: RONALD RICHMAN, ESQ.
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Job No. NJ2828224

Page 2

INDEX

Page 3

PROCEEDINGS

Page 3, Line 2 through Page 12, Line 6

JUDGE LIVINGSTON: The next case on the calendar is National Retirement Fund v Metz Culinary Management.

MR. ROTH: May it please the Court, Yaakov Roth representing Metz Culinary Management.

Your Honors, to calculate withdrawal liability a plan actuary has to assess the sufficiency of the plan's current assets to pay benefits that will be owed by the plan in the future, ten, twenty, thirty years in the future. And so a key actuarial assumption, the one that actually makes the most difference to the end result is the time value of money; what is the interest rate or discount rate that we're going to use to translate these present values into future values or vice versa.

This fund for many years through 2013, through its actuaries as a firm called Buck, used the normative approach to answering that question, which is they looked at the anticipated investment experience of the plan over the long term and that's what they used to discount the benefits to present value. And that makes perfect sense because if the plan expects that $100 in its assets today will be worth $150 in ten years as a result of growth through investment, then an obligation to pay $150 in pension benefits in ten years should be valued at $100 today.

Page 4

And that's what Buck did, and they did that not only for withdrawal liability --

JUDGE CHIN: The key question here is whether you -- whether the fund can set the interest assumption after the measurement date?

MR. ROTH: The question is, is what is the assumption, which assumptions apply to the calculation. And --

JUDGE CHIN: Well, but the argument was that the fund couldn't make that calculation or pick the number after the key measurement date.

MR. ROTH: The argument is that they can't change --

JUDGE CHIN: Isn't that -- well, or they can't change it.

MR. ROTH: Change it. Yes. Right.

JUDGE CHIN: Well, that's how you frame it. The District Court --

MR. ROTH: Yes.

JUDGE CHIN: -- said the rate doesn't come the rate by inertia. It actually has to be set. So the District -- but aren't those legal questions subject to de novo review? That's really what I'm asking.

MR. ROTH: Okay. Yeah. There's a legal question and there's a factual question. The legal question

Page 5

is which day do you look to to determine which assumptions to apply, and then the factual question is what were the assumptions that were in place on that date. So I think there's both pieces to it here.

What I --

JUDGE LIVINGSTON: Well, there's no dispute or debate about the -- what the measurement date is, is there?

MR. ROTH: Right. There's no dispute that the measurement date is the last day of the 2013 plan year. And so our position is the assumptions that were in place, the plan's approach that was in place in 2013 is the approach that has to be used to calculate the unfunded vested benefits for purposes of Metz's withdrawal.

And I think it's clear from the Form 5500 document that the plan filed covering the 2013 plan year, and they filed it in 2014. So they filed it after the plan year had ended and they said in that report our interest rate assumption for 2013 is seven and a quarter percent, and that's because for all of 2013 the plan actuary was Buck and Buck's approach was to use the investment return assumption to discount the liabilities.

JUDGE LIVINGSTON: It was my -- and correct me if I'm misunderstanding, but I thought that that figure was referring to withdrawals that took place in 2013. We always -- we look backwards. So that --

Page 6

MR. ROTH: There's --

JUDGE LIVINGSTON: -- that document -- am I incorrect about that?

MR. ROTH: I think that that -- I think you are, Your Honor. The document says -- the document doesn't have any qualifications. It says the interest rate assumption we use, we use for fund -- minimum funding purposes which is this other set of rules under ERISA for withdrawal liability, for various other purposes is seven and a quarter percent.

Now it's true that calculations that Buck did within the 2013 year would have been done as 2012. But that doesn't change the fact that Buck's approach was we looked to the investment return assumption when we're trying to present value the benefit, the future benefits.

And that approach was in place throughout 2013 and it was not changed until Horizon, this new firm that took over for 2014, said essentially it was a policy matter. We -- we're going to do something different, something that is quite novel, actually, in this field which is we don't care what the plan is going to earn on its investments. Yeah, we agree they're going to earn seven and a quarter percent per year on average over the long term. We don't care. We're going to peg this --

JUDGE LIVINGSTON: This is arbitration, though, right? This issue --

Page 7

MR. ROTH: Well, I -- I think that's right.

There is -- and I think it's important for the court to understand, there is also this separate problem with what the fund did here which is even prospectively using the PBGC rates is unlawful.

JUDGE LIVINGSTON: But that would go to the substantive reasonableness question.

MR. ROTH: Not so much reasonableness. The statute requires that the assumptions be both reasonable and the best estimate of anticipated experience under the plan. This doesn't even purport to be anticipated experience under the plan. And you can look at the memo that Horizon wrote when it made this change. It has nothing to do with anticipated experience. The anticipated experience remains seven and a quarter percent growth.

What they said was we're going to use this essentially risk free, a three percent rate instead because we want to deter employers from withdrawing.

JUDGE LIVINGSTON: But in terms of what is before us today your argument, and help me if I'm misunderstanding it, but your argument is that they -- that it was impermissible for them in June to say we're changing the assumptions and methods. But the statute so far as I can tell is silent as to when the assumptions and you have to go -- you have to look backwards to the measurement date. But it's

silent as to when the assumptions and methods must be set for the preceding year.

MR. ROTH: Yeah. I think the legal question is what does it mean to do the calculation as of the measurement date, right? So the statute does say that. I think everyone agrees. The calculate -- the measurement has to be done as of the last day of the prior plan year.

And our position is just, okay, if you're looking at the last day of the prior plan year you want to look at the -- sort of the facts, the state of the world as it stood at that time and the assumptions that --

JUDGE CHIN: But sometimes the information with respect to the state of the world as of that date doesn't become available until later.

MR. ROTH: I agree with that, Your Honor. And --

JUDGE CHIN: So it makes sense that you would look at it later.

MR. ROTH: I agree with that, Your Honor.

JUDGE CHIN: As of --

MR. ROTH: Yeah. I don't disagree with that, Your Honor. You're looking back. You're trying to put yourself in the position you were in at that time. And it may be that things happened at the end of the year that you have to incorporate because you're trying to figure out, well, what

Page 9

was really the -- what were really the facts as of that date.

But with respect to this actuarial assumption, first of all, there was no change and we know that because the 5500 that was filed was filed in November of 2014, many months after the end of the plan year. And the actuaries didn't say, well, the rate was seven and a quarter until December 1st and then something happened and so we changed it. They said it's seven and a quarter percent for the entire year.

And so there's no issue here. The District Court was sort of focused on, well, what would happen if there were some development at the end of the year that would require revisiting the assumptions. But there was no such development here. And the 5500 makes that very clear. That's page 194 of the appendix. Again, this is filed after the fact. It's looking back and it's saying for the entirety of the plan year seven and a quarter percent is our approach.

And it wasn't until many months later when Horizon said, okay, we're -- starting in 2014 we are the plan actuaries. We want to do things differently. And that may be fine. It's actually not fine for the reason I said earlier.

But assuming that that's fine, it -- that has to be applied prospectively to withdrawals that occur in the subsequent plan year.

And to read the statute any other --

JUDGE CHIN: I would like to follow --

Page 10

MR. ROTH: Yes.

JUDGE CHIN: -- to follow up on Judge Livingston's question from earlier, when was the rate set? I mean, had Buck set the rate for the calculation that applied here; that is Metz's withdrawal?

MR. ROTH: Well, what Buck did was Buck said for 2013 we are the plan actuaries and this is our approach. Our approach is we want to figure out how much the plan is going to earn on its investments and we're going to use that.

JUDGE CHIN: Metz withdraws in May of 2014.

MR. ROTH: Right.

JUDGE CHIN: It's measurement date is 12/31/2013.

MR. ROTH: Correct.

JUDGE CHIN: And so it's the interest assumption rate as of that date.

MR. ROTH: Correct.

JUDGE CHIN: Had Buck set that date before --

MR. ROTH: Buck had set it before and Buck reaffirmed it after.

JUDGE CHIN: When did Buck set it before?

MR. ROTH: Oh, it was set --

JUDGE CHIN: Because that's not what my understanding of what the --

MR. ROTH: Oh.

Page 11

JUDGE CHIN: -- District Court is saying.

MR. ROTH: Yeah. So Buck -- I mean, the rate had not changed in many years. But Buck said it in November 2013 in the actuarial valuation that they published, and then they --

JUDGE CHIN: Buck made a setting in November 2013 what the rate will be as of December 31, 2013.

MR. ROTH: Well, let me add and then they reaffirmed in the 5500 which was filed in November of 2014 that this extended through the entirety of the plan year.

So what they were --

JUDGE CHIN: In essence, then, they're setting it in late 2014 as well.

MR. ROTH: Well, no, because they were saying that as of 2013, in other words, for the entirety of 2013 nothing changed, nothing happened that would cause us to change this assumption that had been in place for many years. And so I think it's important that the -- these two filings by Buck bookend the measurement date. Right. We have November 2013, the actuarial valuation says this is our approach. It's seven and a quarter. And then we have November 2014 when they're publishing this official filing that sets forth the plan assumptions and they say, you know, it's -- it was seven and a quarter for the entirety of the plan year.

So there's no argument that anything changed

Page 12

before the measurement date. And as a result if we're looking at the measurement date and that's the date where we want to fix the assumptions to ensure that we don't have retroactivity problems or due process problems, then seven and a quarter is the rate that has to be used.

Thank you, Your Honors.

Page 12, Line 7 through Page 19, Line 21

MR. RICHMAN: Good morning, Your Honors. Ronald Richman, Schulte, Roth & Zabel for the National Retirement Fund.

It is not correct to say that Buck set the rate for the measurement date of 12/31/13 as the District Court Judge recognized. In fact, if you look at the 5500 that was filed by Buck because they did the actuarial valuation for 2013 because it was a lot cheaper to do it that way, what they did is take the exact paragraph that appears in their actuarial valuation of 2013 on actuarial assumptions' interest, in fact all of the assumptions are exactly the same from -- that appear in the actuarial valuation in 2013 to the 5500. There was no change.

And if we look at the actuarial valuation that Buck did which it rendered in November of 2013 it -- and we look at the cover letter --

JUDGE CHIN: What page?

MR. RICHMAN: A-86 of the valuation. It is the first page. And that's dated November 2013. It's from the

Page 13

actuaries. It is to the Board of Trustees of the National Retirement Fund. And in the very first paragraph the -- Buck says, “The valuation results presented in this report are for the plan year beginning January 1, 2013. The unfunded vested benefits reported for withdrawal liability purposes are measured as of December 31, 2012,” which is -- obviously does not apply to the calculation for Metz’s withdrawal liability.

Then we go to 889, which is the actual first page of the report, and in the trustee’s summary, in the overview it says, “Are presented both for the determination of the contribution requirements and limits for the 2013 plan year and the determination of the plan’s unfunded vested liability as of December 31, 2012.”

The fifth paragraph on that page says, “For withdrawal liability purposes the unfunded vested benefit liability at December 31, 2012 was 1.5 billion versus 1.4 billion at the end of the prior year.” All focused on a measurement date of December 31st.

JUDGE LIVINGSTON: Well, the arbitrator said, and I think this is a quote from his opinion, “The fund’s assertion that the fund actuary had not made any interest rate assumption determination as of December 31st, 2013 is rejected.”

Now your argument is that that is not a factual conclusion?

Page 14

MR. RICHMAN: That is not a factual conclusion because the arbitrator's conclusion was a legal conclusion.

What the arbitrator said that absent an affirmative selection before the end of the year, before December 31st of 2013, that the old rate for 12/31/12 would roll over. I call it the roll over theory.

And so under the arbitrator's roll over theory the assumption used to calculate withdrawal liability for withdrawals occurring in 2014 must be adopted before 2014 --

JUDGE LIVINGSTON: Now I'm just making sure I understand this correctly. If -- let's assume -- and I understand this is not what -- what you say happened. But if the rate had been set in January or February, if the Horizon's predecessor had said, yes, we're still working here and this is the rate, it would have been improper in June to say we're going to have a new rate, to establish that in October and apply it retroactively.

MR. RICHMAN: As long as we're speaking about January and February of 2014 --

JUDGE LIVINGSTON: '14. Yes.

MR. RICHMAN: -- then, yes, that is correct. And the reason for that is simple, is that when we look at 4213 of the statute that sets -- that governs actuarial assumptions it talks -- it calls for the actuary's best estimate. And if the actuary makes the best estimate in

Page 15

January or February of 2014, that's as of a measurement date of 12/31/13, that's their best estimate and it would be inappropriate for the actuary to change that.

The --

JUDGE LIVINGSTON: And here the actuary took from appointment in October till the following fall to come up with a revised interest rate?

MR. RICHMAN: That is correct. And it did so, although it was a factual matter not before the arbitrator, it did so because it was a new actuary. When a new actuary comes into a multi-employer pension plan they have an obligation to look at what the old actuary did, look at the data and make their own assumptions.

And it also -- because of the data that comes into a pension plan, which is not only participant data that comes in that takes in many cases months. This is a plan with 400, about 425,000 participants, that it takes months for that data to come in.

And the other part has to do with the assets of a plan. This is a large plan and like many large plans it has investments in private equity and other private investments for which the value is actually not determined for some period of time.

So it does take a period and can take a significant period of time.

Page 16

However, there is an incentive for the plan to actually assess withdrawal liability as soon as it can because this -- as soon as you can assess withdrawal liability is as soon as you can collect it. You can't collect it without assessing it.

In addition, there is a section of ERISA, and that's 4219, which provides that the plan has an obligation to assess withdrawal liability as soon as practicable.

So it is not that the plan has any interest or the actuary has any interest in delaying the calculation. But they're supposed to get it right. And, in fact, in the District Court in oral argument the -- Metz's counsel agreed that the rates -- that there was a seven and a quarter rate in effect on 12/31/12 and that what the arbitrator concluded was that that rate just rolled over because no new rate was chosen.

And when we look at the statute, which as Your Honors know is a very comprehensive statute especially when it comes to withdrawal liability and you look at 4213 that sets actuarial assumptions, there is nothing in there that requires that the actuarial assumptions for withdrawal liability be set before the measurement date.

I am going to spend a little bit of time about the issue of, the second issue in the case and that is the request by Metz to have this case go --

Page 17

JUDGE WINTER: (Indiscernible).

MR. RICHMAN: Oh, I'm sorry.

JUDGE WINTER: No, I'm sorry (indiscernible). I've been talking and apparently you -- you guys can't hear me.

MR. RICHMAN: We can't. I'm sorry, Your Honor.

JUDGE WINTER: No. That's all right. Is there a drop dead date by which the actuary has to decide -- make -- make a decision as to the prior year's withdrawal liability?

MR. RICHMAN: There is not a per se drop dead date, except that the -- in 4219 of the statute provides that the fund has to assess withdrawal liability as soon as practicable. And obviously that would depend on the circumstances.

So there is not a specific date, but you -- you can't be in a position of assessing withdrawal liability and, therefore, the opportunity to collect it without actually having assumptions to calculate that liability.

With respect to the remand to the arbitrator issue, the arbitrator did not retain jurisdiction. That is apparent from the arbitrator's final award. And under the -- 4221(b) of ERISA the District Court has the ability to enforce, vacate, or modify the arbitrator's award.

Now Metz cites to three cases in their reply brief in which courts, one in this district, raised a question

Page 18

that they actually sent back to the arbitrator for additional information relating to the arbitrator's final award. And --

JUDGE LIVINGSTON: Help me understand the record. As I understand it the parties agreed that there would -- this preliminary issue would be addressed first, and agreed to that procedure. So when the arbitrator acted he wasn't thinking that he was resolving all potential issues in this arbitration.

MR. RICHMAN: Well, the -- at the beginning the parties agreed that this would be a preliminary issue. But you cannot appeal a preliminary decision of an arbitrator to the District Court. And Metz and the fund agreed that they wanted to have this appeal heard and they agreed and asked the arbitrator to make a final judgment.

And in making a final judgment, although the District Court could have if they needed some facts, and they didn't in this case, could have come back to the court and said -- I'm sorry, to the arbitrator and said, look, we need some additional facts here for us to make our decision here. But that was not necessary in this case. And so what happens is that the arbitrator no longer has jurisdiction.

Now the -- Metz can go back to the Triple A and start another arbitration. There --

JUDGE LIVINGSTON: You said that Section 1404(b)(3) of the statute says that a District Court treats an

Page 19

ERISA arbitration award the same way as an arbitration award under the FAA. And in the FAA context I think what you would say here is the arbitrator didn't exhaust his function. It was clear on the record that with the District Court's determination if that determination is upheld you remand back to the arbitrator.

MR. RICHMAN: Well, the arbitrator was asked that question by counsel for Metz about whether, in fact, he would retain jurisdiction. And that occurred before the final judgment came out. And the answer -- the arbitrator's answer is what it will be, meaning that he wasn't going to take a position with respect to that.

And if we look at the Hyle (ph) case in -- which is Second Circuit precedent and not under ERISA, this was a situation in which the -- it was unclear from the arbitrator's award about who the award was against. And the Court did not send the arbitration back to the arbitrator because it said it didn't have the ability to do that. What it did do, however, was send it back to the Triple A, the American Arbitration Association.

Thank you, Your Honors.

Page 19, Line 22 through Page 22, Line 19

MR. ROTH: Your Honors, just a couple of quick points.

First, I think it's very clear from the Form 5500 that Buck's assumption of seven and a quarter percent was

Page 20

for the entirety of the 2013 plan year, up to and including 1231. And so if we want to do the measurement as of 12/31/13, the assumption that was in place at that time was seven and a quarter percent.

And the motion that that was somehow limited to 2013 withdrawals as opposed to 2014 withdrawals I think just misunderstands the whole approach that Buck had which was we use one rate for everything. It is the rate that is drawn from our anticipated investment experience. And it -- we don't care whether it's 2013 or 2014. That's our approach.

And that approach was unquestionably in place for the entirety of the plan year.

And at worst, Your Honors, that is a factual question as to the scope and the nature of Buck's assumption. And the arbitrator, with decades of experience in this field, drawing on his -- the inferences from the documents and his understanding of the actuarial profession rejected the fund's argument which he characterized as a factual argument on page 30 of the appendix and then resolved it on page 37.

So --

JUDGE CHIN: But if his reasoning is the rolling over theory, then that becomes a legal question, doesn't it?

MR. ROTH: I don't think so because I think that was based on his understanding of how actuaries work and

Page 21

the way in which they do their job and the fact that, look, actuaries don't wake up every morning and reevaluate every assumption from first principals. They have an approach.

They apply it, and if something changes they revisit it. And I think he said that nothing happened that caused them to revisit it and, therefore, it remained in effect through 12/31/13.

If I could just quickly address the remand point, I just don't understand this argument. The -- yes, he issued a final judgment because he resolved a preliminary issue that resolved the case. But there were other preserved arguments and if the -- if -- I hope I've convinced you that -- to reinstate the order, but if I haven't --

JUDGE CHIN: And he was equivocal as to whether he was --

MR. ROTH: He wasn't --

JUDGE CHIN: -- going to hear it again.

MR. ROTH: He -- well, he was equivocal because the District Court didn't remand it back to him.

JUDGE CHIN: In the exchange he basically said it will be what it will be or something to that effect.

MR. ROTH: Well, I -- you know, I think he was not retaining jurisdiction because from his perspective he had finished with the case. But if and to the extent that this Court disagrees with his or rejects his initial reasoning,

Page 22

there are all these other arguments that have not been addressed by anyone that have to be addressed. And we can't just go and start a new arbitration because there are time limits that have long since expired.

And so it would be a -- I think a very problematic due process issue if those arguments somehow disappeared just because he didn't have to reach them the first go around.

So, again, I hope we've convinced you that the arbitrator's award should be reinstated on his own terms. But absent that, I think remand is the only appropriate disposition. There's no authority out there saying that remand is improper in this situation and we've cited numerous cases that have done it and, in fact, is very routine.

If there are no further questions, thank you very much.

JUDGE LIVINGSTON: Thank you, both. We'll take it under submission.

(Whereupon, this hearing concluded)

Page 23

CERTIFICATION

I, Sherri L. Breach, CERT*D-397, certified that the foregoing transcript is a true and accurate record of the proceedings.

/s/ Sherri L. Breach
Sherri L. Breach

AAERT Certified Electronic Reporter & Transcriber
CERT*D-397

Date: March 2, 2018

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[STAMP]
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DATE FILED: 3/27/17

16-CV-2408 (VEC)

THE NATIONAL RETIREMENT FUND
AND THE BOARD OF TRUSTEES OF
THE NATIONAL RETIREMENT FUND, each on
behalf of the Legacy Plan of the National
Retirement Fund,

Plaintiffs,

—v.—

METZ CULINARY MANAGEMENT, INC.,

Defendant.

MEMORANDUM OPINION & ORDER

VALERIE CAPRONI, United States District Judge:

Plaintiffs, the National Retirement Fund and the Board of Trustees of the National Retirement Fund (the "Trustees," and together with the National Retirement Fund, the "Fund"), each on behalf of the Legacy Plan of the National Retirement Fund ("the "Plan"), bring this action against the Defendant, Metz Culinary Management, Inc. ("Metz"), pursuant to Sections 4221(b)(2) and 4301 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1401(b)(2), 1451, to modify or vacate the arbitration award issued by Arbitrator Ira F. Jaffe in *Metz Culinary Management, Inc. and National Retirement Fund*, American Arbitration Association ("AAA") Case No. 01-14-0002-2075 (the "Arbitration") on March 28, 2016 (the "Final Award"). Metz has cross moved to confirm the Final Award. For the following reasons, the Fund's motion to vacate the Final Award is GRANTED, and Metz's motion to confirm the Final Award is DENIED.

BACKGROUND[1]

I. Statutory Background Regarding Withdrawal Liability

Among its several goals, ERISA "was designed to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by

[1] The Court cites to the parties' briefs as the following: the Fund's Memorandum of Law in Support of Motion to Vacate Or Modify the Arbitration Award (Dkt. 19) is "Pls. Mem.;" Metz's Memorandum of Law in Opposition to Plaintiffs' Motion to Vacate or Modify Arbitration Award

the termination of pension plans before sufficient funds have been accumulated in the plans." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 214 (1986) (quotation marks and citation omitted). "One type of pension plan regulated by ERISA is the multiemployer pension plan, in which multiple employers pool contributions into a single fund that pays benefits to covered retirees who spent a certain amount of time working for one or more of the contributing employers." *Trs. of Local 138 Pension Tr. Fund v. F.W. Honerkamp Co. Inc.*, 692 F.3d 127, 129 (2d Cir. 2012). Although multiemployer plans have many benefits, such as allowing employers to share the costs and risks inherent in the administration of pension plans, *id.*,

> [a] key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-

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And in Support of its Motion to Enforce Arbitration Award (Dkt. 33) is "Def. Opp.;" the Fund's Opposition to Defendant's Motion for Judgment on the Pleadings And Reply in Support of Plaintiffs' Motion to Vacate or Modify Arbitration Award (Dkt. 36) is "Pls. Reply;" and Metz's Reply Memorandum of Law in Further Support of its Motion to Enforce Arbitration Award (Dkt. 40) is "Def. Reply."

> decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

Id. (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 722 n. 2 (1984)).

In order to address this problem, Congress amended ERISA by enacting the Multiemployer Pension Plan Amendments Act of 1980 ("the MPPAA), Pub. L. No. 96–364, 94 Stat. 1208 (codified as amended in scattered sections of Titles 26 and 29 of the United States Code). *Id.* Pursuant to the MPPAA, "[i]f an employer withdraws from a multiemployer plan . . . the employer is liable to the plan in the amount determined under this part to be the withdrawal liability." 29 U.S.C. § 1381(a). "Withdrawal liability is the withdrawing employer's proportionate share of the pension plan's unfunded vested benefits." *Trs. of Local 138 Pension Tr. Fund v. F.W. Honerkamp Co. Inc.*, 692 F.3d at 130; *see also* 29 U.S.C. §§ 1381, 1391. Unfunded vested benefits are "calculated as the difference between the present value of vested benefits and the current value of the plan's assets." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. at 725 (citing 29 U.S.C. §§ 1381, 1391). In other words, unfunded vested benefits reflect a plan's underfunding in light of its commitment to pay benefits to plan participants in the future. The calculation of an employer's withdrawal liability thus requires the allocation of a plan's unfunded vested benefits among the plan's contributing employers. *Combs v. Classic Coal Corp.*, 931 F.2d 96, 98 (D.C. Cir. 1991). Section 4211 of ERISA allows a plan to choose one of four identified allocation methods or to develop its own method, subject to approval by the Pension Benefit Guaranty Corporation ("PBGC"). 29 U.S.C. § 1391. Withdrawal liability is required to be calculated "not as of the day of withdrawal, but as of the last day of the plan year preceding the year during which the employer withdrew." *Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414, 418 (1995) (citing 29 U.S.C. §§ 1391(b)(2)(A)(ii), (b)(2)(E)(i), (c)(2)(C)(i), (c)(3)(A), and (c)(4)(A)). The "last day of the plan year preceding the year during which the employer withdrew" will hereafter be referred to as "the Measurement Date."

In order to determine a withdrawing employer's withdrawal liability, the plan's actuary must first calculate the plan's unfunded vested benefits; to do so, the actuary must estimate the present value of the plan's vested benefits. *Combs v. Classic Coal Corp.*, 931 F.2d at 98. The actuary makes certain assumptions in order to estimate the present value of the plan's vested benefits, including the interest rate necessary to discount the liability for future benefit payments. *Id*; *Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727, 733 (4th Cir. 1990) (explaining that to "calculate the present value of the vested benefits that are to be paid out in the future," "[a]n interest rate, or rate of return, is applied in order to determine what present amount of investment will yield the future amounts required to satisfy those vested benefits"); *In re HNRC Dissolution Co.*, 396 B.R. 461, 473 (B.A.P. 6th Cir. 2008) ("The calculation of the 'present value' of vested benefits also requires the plan's actuary to discount the future stream of benefit payments at an appropriate interest."). Although there are many actuarial assumptions necessary to calculate withdrawal liability, only the interest rate assumption is at issue in this case. Relevant to this case, "[i]ncreasing the interest rate assumption decreases the employer's withdrawal liability"—and vice versa. *Combs v. Classic Coal Corp.*, 931 F.2d at 98; *see also Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d at 733. ERISA does not dictate the interest rate. Instead, ERISA Section 4213(a) requires withdrawal liability to be based on "reasonable" actuarial assumptions and methods, "taking into account the experience of the plan and reasonable expectations," and to be "the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a).[2]

II. Factual Background

A. The Parties

The Fund is a Taft-Harley trust fund, established and maintained pursuant to Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), with trustees equally divided between labor organizations currently and formerly affiliated with UNITED HERE and Workers United and employers that contribute to the Fund. Am. Compl. ¶ 4 (Dkt. 8). The Plan is a multiemployer plan within the meaning of Section 3(37) of ERISA, 29 U.S.C. § 1002(37). *Id.* ¶ 6.[3] Metz participated in the Fund as a

[2] Section 4213(a)(1) contemplated that PBGC may prescribe actuarial assumptions by regulation, but it has not done so to date. Pls. Mem. 9 n.8.

[3] As of January 1, 2013, the Plan had over 412,000 active, terminated, and retired participants. Sabatini Decl. Ex. A, at 6 (ECF pagination) (Dkt. 20-1). Prior to January 1, 2015, the Plan was known as the Pension Plan of the National Retirement Fund. Am. Compl. ¶ 7. The Fund, through its trustees,

contributing employer, meaning it made contributions to the Fund to provide pensions to its employees in accordance with the governing collective bargaining agreements. Answer to Am Compl. Ex. B ("Stip.") ¶ 2 (Dkt. 16-1).[4]

B. The Fund's Selection of an Interest Rate Assumption for Withdrawal Liability for Plan Years 2013 and 2014

The Fund's plan year begins on January 1 and ends on December 31 (the "Plan Year"). Am. Compl. ¶ 12. Accordingly, under the Plan, the Measurement Date for withdrawal liability for a given year is December 31 of the prior year. As of December 31, 2012, Buck Consultants ("Buck") was, and had been for years, the Fund's actuary. *Id.* ¶¶ 14-15; Stip. ¶ 7. Buck's interest rate assumption for the 2013 Plan Year for calculating withdrawal liability was 7.25%. Am. Compl. ¶ 15. Thus, the withdrawal liability for any employer that withdrew from the Plan during 2013 would be calculated using a discount rate of 7.25%.

In October 2013, the Fund selected Horizon Actuarial Services LLC ("Horizon") to replace Buck as the Fund's actuary. *Id.* ¶ 13. On June 5, 2014, Horizon informed the Fund's trustees that Horizon would use a PBGC rate as its interest rate assumption when it calculated withdrawal liability for Plan participants that withdrew on or after

sponsors and administers the Plan. *Id.* ¶ 5. The trustees are fiduciaries of the Fund and the Plan within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A). *Id.* ¶ 9.

[4] Metz is an employer within the meaning of Section 3(5) of ERISA, 29 U.S.C. § 1002(5); it is engaged in commerce, and its activities affect commerce within the meaning of Sections 3(11)-(12) of ERISA, 29 U.S.C.

January 1, 2014. *Id.* ¶ 18. On October 3, 2014, Horizon sent a memorandum to the Fund's trustees explaining its decision to select the PBGC's interest rate assumption and the impact of the change on withdrawal liability. Stip. ¶ 12; Litvin Decl. Ex. F (Dkt. 32-1). The PBGC rate selected by Horizon was 3% as applied to the first twenty years of unfunded vested benefits and 3.31% thereafter. Am. Compl. Ex. B ("Interim Award"), at 4 (Dkt. 8-2); Litvin Decl. Ex. F, at 1. Because the interest rate assumption decreased from Plan Year 2013 to Plan Year 2014, withdrawal liability for withdrawing employers increased from Plan Year 2013 to Plan Year 2014. It is undisputed that the Fund was in dire financial circumstances in the time frame relevant to this case, leading it to freeze the accrual of benefits as of December 31, 2013. Stip. ¶¶ 16-18. The Fund did not provide any advance written notice in Plan Year 2014 to contributing employers regarding the interest rate assumption change. *Id.* ¶ 19.

Although the Fund selected Horizon to replace Buck as its actuary in October 2013, Buck continued to perform some work for the Fund related to Plan Year 2013. Specifically, in November 2013, Buck completed and issued the Actuarial Valuation Report for the 2013 Plan Year. *Id.* ¶¶ 7, 13; Litvin Decl. Ex. G (Dkt. 32-2). On November 6, 2014, Buck completed and issued the Schedule MB for the Fund's Form 5500 for Plan Year 2013. Stip. ¶ 7; Litvin Decl. Ex. H (Dkt. 32-3).[5]

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[5] The Department of Labor, PBGC, and IRS require plan sponsors to submit Form 5500 to satisfy annual reporting requirements under ERISA and the Internal Revenue Code. Form 5500 Corner, IRS, https://www.irs.gov/retirement-plans/form-5500-corner (last visited March 23, 2017).

C. Metz's Withdrawal from the Plan

Metz withdrew from the Fund on May 16, 2014. Am. Compl. ¶ 17. That withdrawal triggered Metz's obligation to pay withdrawal liability, which would be calculated as of December 31, 2013. Def. Opp. 5. On June 16, 2014, the Fund sent Metz a notice and demand letter for the payment of withdrawal liability. Am. Compl. ¶ 19. In that letter, the Fund assessed Metz an estimated withdrawal liability of $954,821, payable in installments. *Id.* ¶ 20. On December 26, 2014, the Fund issued a revised withdrawal liability assessment to Metz for $997,734, payable in installments. *Id.* ¶ 21.

D. The Arbitration

On December 16, 2014, Metz filed a demand for arbitration against the Fund with the AAA in order to challenge the Fund's withdrawal liability assessment. *Id.* ¶ 22. The AAA appointed Ira F. Jaffe, Esq. (the "Arbitrator") to serve as arbitrator. *Id.* ¶ 23. The Fund and Metz agreed that the Arbitrator would resolve a preliminary issue regarding the interest rate assumption used by the Fund to calculate Metz's withdrawal liability and that he would do so based

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The Court may take judicial notice of this public information on the IRS's website pursuant to Federal Rule of Evidence 201. *See Fernandez v. Zoni Language Centers, Inc.*, No. 15-CV-6066 (PKC), 2016 WL 2903274, at *3 (S.D.N.Y. May 18, 2016) ("Courts may also take judicial notice of information contained on websites where 'the authenticity of the site has not been questioned.'" (quoting *Hotel Emps. & Rest. Emps. Union, Local 100 v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 549 (2d Cir. 2002))); *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 167 (S.D.N.Y. 2015) (taking judicial notice of information publicly available on an internet database) (citing cases).

solely on written stipulations and briefing. Interim Award 1-2. Accordingly, the parties did not conduct discovery except for limited document requests by Metz. Am. Compl. ¶24.

On February 22, 2016, the Arbitrator issued an Interim Award, holding that the Fund improperly used the PBGC rate to calculate Metz's withdrawal liability. *Id.* ¶ 25; Interim Award 20. According to the Arbitrator, because there was no evidence that Buck or Horizon took any action on or before the Measurement Date to change the interest rate assumption, the 7.25% interest rate assumption that indisputably had been in effect for Plan Year 2013 continued as the interest rate assumption for Plan Year 2014. Interim Award 15-16, 19. The Arbitrator explicitly rejected the Fund's position that the Fund's actuary had made no interest rate assumption as of December 31, 2013. *Id.* at 16. In doing so, the Arbitrator concluded that "[a]bsent some change by the Fund actuaries, the existing assumptions and method remained in place as of December 31, 2013." *Id.*[6] The Arbitrator then held that Horizon had improperly retroactively changed the withdrawal liability interest rate assumption in violation of ERISA and PBGC opinion letters. *Id.* at 11-16. The Arbitrator made clear that it would have been permissible for the actuary to have *calculated* unfunded vested benefits after the Measurement Date, but the actuary could only rely on assumptions and methods "that were actually adopted and in

6 *See also* Interim Award 17 ("In the absence of some action by the Fund Actuary changing the interest rate or other actuarial assumptions *prior to the end of a Plan Year*, the interest rate and assumptions that were in effect during that Plan Year continued unchanged.") (emphasis added).

effect as of December 31, 2013." *Id.* at 17. Because, according to the Arbitrator, the 7.25% withdrawal liability interest rate assumption was in effect as of the Measurement Date, the actuary was required to use that rate when calculating Metz's withdrawal liability. *Id.* at 15-17, 19.

In his Interim Award, the Arbitrator directed the Fund to recalculate Metz's withdrawal liability "using the assumptions and methods that were in effect as of December 31, 2013." *Id.* 19; Am. Compl. ¶ 26. On March 7, 2016, the Fund provided Metz an updated withdrawal liability assessment using the 7.25% withdrawal liability interest rate assumption from Plan Year 2013. Am. Compl. ¶ 27. The revised withdrawal liability assessment was approximately $250,000, *see* Answer to Am Compl., Ex. A, at 1 (Dkt. 16-1), and Metz did not object to the revised assessment, Am. Compl. ¶ 28. On March 28, 2016, the Arbitrator issued his Final Award, affirming the revised calculation and converting the Interim Award to a final award. *Id.* ¶¶ 29-30; *id.* Ex. A. On March 31, 2016, the Fund initiated this action in order to vacate or modify the Final Award.

DISCUSSION

The principal issue before this Court is whether the Arbitrator correctly decided that the Fund violated ERISA by selecting the interest rate assumption for withdrawal liability for the 2014 Plan Year after the Measurement Date. The Arbitrator reached his conclusion by reframing the issue. The Arbitrator did not ultimately conclude that the Fund violated ERISA because its actuary *selected* a withdrawal liability interest rate assumption for the

2014 Plan Year after the Measurement Date. Instead, the Arbitrator concluded that the Fund violated ERISA because its actuary *retroactively changed* the interest rate assumption for the 2014 Plan Year after the Measurement Date. The Arbitrator's conclusion hinged on his determination that the existing interest rate assumption for the 2013 Plan Year became the interest rate assumption for the 2014 Plan Year because the Fund's actuary did not affirmatively change the interest rate assumption by the Measurement Date.

The Court rejects the Arbitrator's premise as inconsistent with ERISA—the withdrawal liability interest rate assumption for the preceding plan year cannot become the interest rate assumption for the following plan year by inertia. Nor does ERISA prohibit a plan's actuary from selecting the withdrawal liability interest rate assumption after the Measurement Date. Accordingly, as explained more fully below, the Arbitrator's Final Award is vacated.

I. The Court Reviews the Arbitration Award *De Novo*

The parties dispute whether a *de novo* standard of review or a rebuttable presumption of correctness applies to resolve their cross motions to confirm and vacate the Final Award. In a dispute regarding withdrawal liability under ERISA, courts review *de novo* the legal conclusions of the arbitrator. *666 Drug, Inc. v. Tr. of 1199 SEIU Health Care Emps. Pension Fund*, 571 F. App'x 51, 52 (2d Cir. 2014) (per curiam); *HOP Energy, L.L.C. v. Local 553 Pension Fund*, 678 F.3d 158, 160 (2d Cir. 2012). As to the review of factual findings, ERISA, as amended by the

MPPAA, provides that "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401(c). The statutory framework does not expressly mandate a standard of review for mixed questions of law and fact. *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405, 1410 (7th Cir. 1989). The Second Circuit has not resolved the issue, but courts faced with the issue appear to adopt a clear error standard of review. *See 666 Drug, Inc. v. Tr. of 1199 SEIU Health Care Emps. Pension Fund*, No. 12 CIV. 1251 (PAE), 2013 WL 4042614, at *5 (S.D.N.Y. Aug. 8, 2013) (collecting cases), *aff'd,* 571 F. App'x 51 (2d Cir. 2014).

Metz argues that the Arbitrator's determination that the withdrawal liability interest rate assumption for Plan Year 2013 carried over as the interest rate assumption for Plan Year 2014 was a factual finding based on the parties' joint stipulation of facts.[7] Def. Opp. 11-15. The Fund argues that the Arbitrator made a legal determination when it decided that the existing assumptions continued from one plan year to the next absent a change by the actuary. Pls. Mem. 8. The Court agrees with the Fund; the Arbitrator made a legal determination, not a factual finding.

Whether the Fund's actuary affirmatively adopted a withdrawal liability interest rate assumption by

[7] Metz argues in the alternative that whether the 2013 Plan Year withdrawal liability interest rate assumption continued as the assumptive rate for the 2014 Plan Year is a mixed question of law and fact. Def. Opp. 13 n.8.

the Measurement Date for the 2014 Plan Year is a factual question. The parties do not dispute that factual issue—they (and the Arbitrator) agree that the actuary did not affirmatively adopt a withdrawal liability interest rate assumption by December 31, 2013 for the 2014 Plan Year.[8] Rather, they dispute whether, because the actuary did not affirmatively make assumptions on or before the Measurement Date for the 2014 Plan Year, the assumptions that were in place for the 2013 Plan Year became the actuarial assumptions for the 2014 Plan Year by default. Resolving this dispute requires a legal determination under ERISA; the answer to this question turns on the language of the statute. Specifically, whether withdrawal liability assumptions automatically carry over year-to-year in the absence of an actuary's affirmative adoption of different assumptions depends on what ERISA requires of actuaries when they select assumptions for withdrawal liability calculations for a given plan year.

The Arbitrator himself framed as a legal conclusion his determination that the 2013 Plan Year interest rate assumption carried over to the 2014 Plan Year. He based his conclusion on an interpretation of ERISA, as amended by the MPPAA. According to the Arbitrator, because the "MPPAA requires that the assumptions and methods in effect on December 31, 2013, be used for calculating the Employer's withdrawal liability," "[a]bsent some change by the Fund

[8] As discussed below in Section III, Metz appears to argue that certain documents suggest that Buck intended the 7.25% interest rate assumption for the 2013 Plan Year to apply to the 2014 Plan Year, although Metz does not go so far as to argue that Buck affirmatively adopted the 7.25% interest rate for the 2014 Plan Year.

actuaries, the existing assumptions and method remained in place as of December 31, 2013." Interim Award 16. Even Metz stated in its opening and reply briefs submitted to the Arbitrator that the issue before the Arbitrator was purely legal. Sabatini Decl. Ex. B, at 2 (Dkt. 37-4) ("The issue presented is a legal question of statutory interpretation. [T]his preliminary issue does not present any questions of fact or even mixed questions of fact and law"); *id.* Ex. C, at 1 (Dkt. 37-5) ("The legal issue presented is a dispositive legal issue in this arbitration proceeding. . . . This briefing is in the nature of a motion for summary judgment, under Rule 56 of the F.R.C.P., based on the material facts to which the parties have stipulated."). Moreover, because the parties stipulated to all the facts before the Arbitrator, the Arbitrator's conclusions were exclusively legal.[9] *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 75 (2d Cir. 2002) ("Because, as we have noted, the parties stipulated to all facts, the district court's conclusions are exclusively conclusions of law that are reviewed *de novo*."); *see also United Gen. Title Ins. Co. v. Karanasos*, No. 13-CV-7153 (JFB), 2014 WL 4388277, at *5 (E.D.N.Y. Sept. 5, 2014) (collecting cases).

Accordingly, only legal conclusions are before the Court, and the Court reviews them *de novo*.[10]

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[9] The parties filed some exhibits with the Arbitrator in support of their stipulated facts, but the Arbitrator did not appear to rely on those exhibits in concluding that the 2013 Plan Year interest rate assumption continued by default for the 2014 Plan Year. He neither cited nor referred to the exhibits in support of his conclusion (although he did refer to them in the background portion of the Interim Award).

[10] Even if the issue before the Court were a mixed question of law and fact, Metz would ultimately fare no better under a clear error standard of review.

II. Interest Rate Assumptions Do Not Automatically Carry over Year-to-Year under ERISA

The Arbitrator incorrectly held that under ERISA, when an actuary fails affirmatively to adopt assumptions for a given plan year to calculate withdrawal liability, the existing actuarial assumptions from the preceding plan year remain in place by default. ERISA Section 4213 precludes this approach.

As explained above, Section 4213 requires that actuaries calculate withdrawal liability based on "assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan . . . ." 29 U.S.C. § 1393(a)(1). Thus, to satisfy Section 4213, actuaries must take into account the full experience of the plan, develop reasonable expectations, and ultimately provide their *best* estimate of unfunded vested benefits in light of the plan's experience and the actuary's reasonable expectations. An actuary can only do so by incorporating data from the entirety of the most recent preceding plan year. In no universe is carrying over assumptions from a prior plan year without *any* examination or analysis as to their continued viability and reasonableness an actuary's "best estimate." Yet the Arbitrator concluded precisely that. An actuary may ultimately conclude that the prior plan year's assumptions continue to be reasonable in light of all of the available data, but she must affirmatively reach that conclusion in order for the assumptions to qualify as such. As addressed more fully below, there is no evidence here that any actuary analyzed and concluded that the 2013 Plan

Year assumptions as applied to the 2014 Plan Year were reasonable or were the actuary's best estimate, nor did the Arbitrator indicate that he was relying on any such evidence or making any such assumptions. A consequence of the Arbitrator's holding would be that actuarial assumptions would remain operative in perpetuity *sans* input from the actuary; this is entirely at odds with Section 4213. Section 4213 does not allow stale assumptions from the preceding plan year to roll over automatically—unlike wine, actuarial assumptions do not improve with age.

The Arbitrator's holding was also inconsistent with Section 4211 of ERISA. The Arbitrator reasoned that the 2013 Plan Year assumptions rolled over by default for the 2014 Plan Year because ERISA "requires that the assumptions and methods in effect on December 31, 2013, be used for calculating the Employer's withdrawal liability." Interim Award 16. But that interpretation misconstrues ERISA Section 4211. ERISA does not provide that withdrawal liability is to be calculated based on the assumptions and methods "in effect" on the Measurement Date, as the Arbitrator maintains. ERISA instead provides that withdrawal liability must be calculated based on the plan's unfunded vested benefits "as of" the Measurement Date. *See Milwaukee Brewery Workers' Pension Plan*, 513 U.S. at 418 (citing ERISA Section 4211, 29 U.S.C. §§ 1391(b)(2)(A)(ii), (b)(2)(E)(i), (c)(2)(C)(i), (c)(3)(A), and (c)(4)(A)).

"In effect" and "as of" are not the same. As the Fund explains, the 2013 Plan Year withdrawal liability interest rate assumption was in effect, i.e., in force,[11] on December 31, 2013, for the purpose of

[11] Oxford English Dictionary, https://en.oxforddictionaries.com/definition/in_effect (last visited March 23, 2017).

calculating withdrawal liability for any employer who withdrew anytime between January 1 and December 31, 2013. Pls. Mem. 9 n.7. The unfunded vested benefits amount (and the interest rate assumption necessary to calculate that amount) that was in effect on December 31, 2013, for withdrawals occurring during the 2013 Plan Year was, according to ERISA, required to be calculated *as of* December 31, 2012, meaning it incorporated data up through December 31, 2012. Similarly, ERISA requires the unfunded vested benefits amount (and the interest rate assumption necessary to calculate that amount) for the 2014 Plan Year to be calculated *as of* December 31, 2013, meaning it must incorporate data up through December 31, 2013. The unfunded vested benefits amount (and the interest rate assumption necessary to calculate that amount) applicable to the 2014 Plan Year would then go in effect starting on January 1, 2014. Accordingly, "in effect" is the in force date, while "as of" is the measurement date. The Arbitrator incorrectly conflated the two. As explained above, the withdrawal liability interest rate assumption *in effect* on the Measurement Date is not applicable to the upcoming plan year unless the actuary affirmatively determines that the assumption, in combination with her other assumptions, is reasonable and her best estimate of anticipated experience under the plan *as of* the Measurement Date.[12]

[12] The Arbitrator's holding that withdrawal liability assumptions continue to apply year after year until affirmatively changed by the actuary is also inconsistent with the professional standards governing actuaries. Because ERISA Section 4213 provides for a reasonableness standard, "it would make sense to judge the reasonableness of a method [or assumption]" and the timing of those decisions—"by reference to what the actuarial profession

III. There Is No Evidence that the Actuary Intended the 2013 Plan Year Withdrawal Liability Interest Rate Assumption to Apply to the 2014 Plan Year

Regardless of whether the Arbitrator's legal conclusion was correct that the 2013 Plan Year assumptions carried over by default to the 2014 Plan Year, Metz argues that the factual record supports a finding that the Fund (or at least its actuaries) initially intended the withdrawal liability interest rate assumption for the 2013 Plan Year to continue as an assumption for the 2014 Plan Year—an argument that Metz did not make during arbitration.

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considers to be within the scope of professional acceptability in making an unfunded liability calculation." *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 635 (1993). Actuarial Standard of Practice 27 ("ASOP 27") provides, in relevant part, that "[t]he economic assumptions selected to measure pension obligations should reflect the actuary's knowledge base as of the measurement date." Actuarial Standards Board, Doc. No. 145, *Actuarial Assumptions for Measuring Pension Obligations* § 3.14.3 (Sept. 2007 rev. ed., Updated for Deviation Language Effective May 1, 2011), *available at* http://www.actuarialstandardsboard.org/wp-content/uploads/2014/10/asop027_145.pdf (last visited March 12, 2017). (There is a more recent version of ASOP 27, but the version cited applies to Metz's withdrawal as it is "effective for any actuarial valuation with a measurement date on or after March 15, 2008." ASOP 27 § 1.4). It seems clear, then, that as a matter of professional standards, an actuary must consider data relevant to the experiences of the plan up through the Measurement Date in making her assumptions. The Court, however, makes no determination regarding whether, if an actuary has not yet selected her assumptions, she may in certain circumstances take into account events occurring after the Measurement Date in formulating her assumptions.

See Def. Opp. 15-16; Def. Reply 4-5.[13] Metz points to: (1) a particular stipulation of fact, (2) Buck's Actuarial Report for the 2013 Plan Year, (3) the October 3, 2014, memorandum from Horizon to the Fund's trustees, and (4) the Schedule MB for the Fund's Form 5500 for the 2013 Plan Year. The record does not support Metz's argument.

Metz contends that the Fund effectively conceded that the 2013 Plan Year assumptions remained operative rate for the 2014 Plan Year because the parties stipulated that the 2013 Plan Year interest rate assumption was still "in use" on December 31, 2013. Def. Opp. 15; Def. Reply 3 n.1. That was not, however, the fact to which the parties stipulated. The parties stipulated that "Buck Consultants had used a 7.25 percent interest rate in 2013 to calculate unfunded vested benefit liabilities and withdrawal liability," Stip. ¶ 8, which says nothing about what the actuary intended with respect to assumptions applicable to 2014 withdrawals.

Metz argues that Buck's Actuarial Report for the 2013 Plan Year, issued in November 2013, shows that Buck signaled that it viewed the 7.25% rate as appropriate throughout 2013; specifically, Metz points to a table in the report that lists the withdrawal liability interest rate as 7.25% for January 1, 2012 and January 1, 2013. Def. Opp. 16; Def. Reply 4-5 (citing Litvin Decl. Ex. G, at 15[14]).

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[13] Metz also advanced this argument during oral argument in this case. *See* Tr. 13:21-16:3, 24:25-26:4, 35: 21-37:11, 44:18-45:1, 45:17-20 (Dkt. 44).

[14] When citing to Exhibit G of the Litvin Declaration, the Court cites to the ECF pagination because the Exhibit includes more than one document, each with its own pagination.

Again, this evidence in no way indicates that Buck decided that the 7.25% rate would apply to 2014 (a period for which it was no longer the Fund's actuary). Moreover, Buck's letter to the Fund's trustees transmitting the Report states unequivocally that "[t]he unfunded vested benefits reported for withdrawal liability purposes are measured as of December 31, 2012," Litvin Decl. Ex. G, at 1, and numerous portions of the Report are consistent with that statement, *see id.* at 6, 7, 11, 23.

Metz also claims that because Horizon stated in its October 3, 2014 memorandum that it had decided "to change" the withdrawal liability interest assumption, Horizon understood that it was changing—i.e., revising—the 2014 Plan Year interest rate assumption as opposed to establishing it for the first time. Def. Mem. 16. Apart from the word "change," there is nothing in the memorandum to suggest that Horizon believed it was changing interest rate assumptions that were already in place for 2014. *See generally* Litvin Decl. Ex. F. A more logical reading of the memorandum is that Horizon is explaining that it is adopting a withdrawal liability interest rate assumption for 2014 that is different from the rate that Buck had used in previous years. Indeed, Horizon acknowledges in the memorandum that the Fund has "historically" used a 7.25% interest rate assumption, *id.* at 2, and thus seems to indicate that it is breaking with that historic practice for 2014.

Finally, somehow, according to Metz, because Buck signed the Schedule MB for the Form 5500 for the 2013 Plan Year in November 2014, and because the Schedule MB provides that 7.25% is the interest rate assumption for withdrawal liability, Buck must have believed that the 7.25% rate applied to the 2014 Plan Year. Def. Opp. 15; Def. Reply 4-5. Once again, there is nothing in the Schedule MB that indicates the information therein applies to 2014, even if the Form 5500 was filed in 2014. In contrast, the Form 5500 and Schedule MB are labeled "2013" at the top, and the heading states "for calendar plan year 2013." Litvin Decl. Ex. H, at 4.[15] It ultimately makes no sense to claim that the Schedule MB proves that, in November 2014, when Buck executed the Schedule MB, 7.25% was the interest rate assumption for the 2014 Plan Year because, by that time, Metz had already withdrawn from the Fund, and the Fund had already demanded that Metz pay withdrawal liability calculated in accordance with the lower PBGC interest rate assumption that Horizon had adopted.

In sum, based on ERISA, the Court rejects the Arbitrator's presumption that, absent an affirmative change by the Fund's actuaries, the 2013 Plan Year withdrawal liability interest rate assumption carried over to become the 2014 Plan Year assumption. The Court also rejects Metz's factual argument that the Fund had, in fact, adopted 7.25% as the interest rate assumption for the 2014 Plan Year. The remaining issue, therefore, is whether ERISA allows an actuary to select an interest rate assumption after the Measurement Date.

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[15] For clarity, when citing to Exhibit H of the Litvin Declaration, the Court cites to the ECF pagination.

IV. ERISA Does Not Require Actuaries to Make Withdrawal Liability Assumptions by the Measurement Date

A. ERISA Section 4213 Does Not Require Actuaries to Select Assumptions by the Measurement Date

Nothing in ERISA Section 4213, which requires that the assumptions in the aggregate represent the actuary's best estimate of anticipated experience under the plan, requires an actuary to select her assumptions by the Measurement Date. *See* 29 U.S.C. 1393(a)(1). ERISA Section 4213 is silent regarding the timing of an actuary's selection of her assumptions. As explained above, the requirement in ERISA Section 4211 that the actuary calculate unfunded vested benefits "as of the end of the last plan year" does not require the actuary to make her assumptions by the Measurement Date but only requires unfunded vested benefits to be *measured* as of that date. Indeed, Metz does not argue that Section 4213 itself requires actuaries to make their assumptions by the Measurement Date; Metz acknowledges that the statute is silent on the issue.

Considering just one hypothetical scenario illustrates the potential significant pitfalls of the Arbitrator's view of the law. If actuaries were required to select their withdrawal liability assumptions by the Measurement Date, in some instances at least, they would be unable to fulfill Section 4213's best estimate requirement. In order for an actuary to make her assumptions, she must first analyze data regarding the economy and financial markets, the fund's investments, and the plan's participants, among other things. To finalize her assumptions by the Measurement Date, she must do all of that analysis before she has a full year of data. If an economic or financial event took place between Christmas and New Year's Eve that would significantly affect the fund's future performance and its ability to meet its future liabilities, the actuary would not be able to take that data into account in formulating its assumptions because there would not be time to do so before the Measurement Date. If that were the case, the actuary's assumptions in the aggregate might be neither reasonable nor the actuary's best estimate of anticipated experience under the plan as of the Measurement Date, as required by Sections 4213 and 4211.

Moreover, it seems logical that even in a normal year (without any end-of-year financial surprises), the information necessary to make thoughtful withdrawal liability assumptions may not be entirely available before the end of the plan year, and an actuary needs time to collect, review, and synthesize that information after it is all available. It is thus easy—and reasonable— to imagine that an actuary may not be ready to state her assumptions by the Measurement Date. If the Arbitrator's rule were correct, this would be problematic for actuaries. On the one hand, ERISA Sections 4213 and 4211 would require them to make assumptions measured as of the last day of the preceding plan year that are reasonable and their best estimate. On the other hand, the Arbitrator's rule would require them to adopt assumptions by the Measurement Date. An actuary would unlikely be able to satisfy both requirements as it would be difficult for an actuary to make her best estimate without knowing all the relevant data as of the Measurement Date. In short, the Arbitrator's rule is inconsistent with the actuary's obligations under ERISA Section 4213.

Metz suggests that allowing actuaries to select their assumptions at any point during the plan year—instead of by the Measurement Date—invites abuse by funds and their actuaries. According to Metz, the Arbitrator was rightfully concerned about bias because allowing actuaries to select assumptions after the Measurement Date creates the opportunity for a plan's trustees to wait and see if there will be a significant number of withdrawing employers and, if so, then hire a new actuary who is willing to impose a more draconian interest rate assumption on withdrawing employers. Def. Opp. 23-25; Tr. 56:17-57:6, 57:17-22.

But the posited bias problem is not a function of the date on which the actuary sets the rate. *See* Tr. 57:7-16, 57:23-58:1. A fund's trustees, knowing that the fund is in a difficult financial situation, may at any time remove one actuary in favor of another actuary who appears to be more malleable. Indeed, in this case, Horizon was hired in the fall of 2013 and could have adopted the PBGC rate before the Measurement Date. If Horizon had done so, Metz would not be able to argue, as it does now, that the rate does not apply to it because the rate would have been adopted before December 31. Yet, Metz's concern about bias would remain. Under ERISA, a withdrawing employer's protection is (1) the professionalism of the actuary, *see Concrete Pipe & Prod. of California, Inc.*, 508 U.S. at 632 (1993) ("For a variety of reasons, this actuary is not, like the trustees, vulnerable to suggestions of bias or its appearance. Although plan sponsors employ them, actuaries are trained professionals subject to regulatory standards."), and (2) the actuary's statutory obligation to set the withdrawal liability based on reasonable assumptions that reflect the actuary's best estimate. An actuary who is simply bowing to pressure from a fund is violating her ERISA mandate, regardless of the date on which her interest rate assumptions are finalized.[16] Providing additional protections to employers, if warranted, is best left to Congress.

B. ERISA Section 4214 Only Applies to Plan Rules and Amendments, Not Actuarial Assumptions

Finally, Metz argues that Section 4214, which prohibits the retroactive application of plan rules or amendments to withdrawing employers, also applies to interest rate assumptions. *See* Def. Opp. 17-20. ERISA Section 4214 provides in full:

> (a) No plan rule or amendment adopted after January 31, 1981, under [ERISA Sections 4209 and 4211(c)] of this title may be applied without the employer's consent with respect to liability for a withdrawal or partial withdrawal which occurred before the date on which the rule or amendment was adopted.
>
> (b) All plan rules and amendments authorized under this part shall operate

[16] Whether Horizon's selection of the PBGC rate, in combination with its other assumptions, was reasonable and its best estimate is not before this Court. If Metz chooses to arbitrate the issue, a factual record can be developed that fleshes out Horizon's thought processes. If Metz has evidence to support its suggestion that Horizon bowed to pressure from the Fund, the Court is confident an arbitrator will be able to evaluate that evidence appropriately.

> and be applied uniformly with respect to each employer, except that special provisions may be made to take into account the creditworthiness of an employer. The plan sponsor shall give notice to all employers who have an obligation to contribute under the plan and to all employee organizations representing employees covered under the plan of any plan rules or amendments adopted pursuant to this section.

29 U.S.C. § 1394. Metz claims that because Section 4214(a) references Section 4211(c),[17] which addresses "Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount," 29 U.S.C. § 1391(c), and because the interest rate assumption is a critical factor in the withdrawal liability calculations, withdrawal liability assumptions "logically fit" as a plan rule or amendment under Section 4214. Def. Opp. 17-18. In addition, Metz contends that Section 4214(b) applies to interest rate assumptions because it incorporates Section 4213 when it states that it applies to "[a]ll plan rules and amendment authorized under this part." *Id.* at 19. Metz points to Section 4214's legislative history[18] as

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[17] Metz admits that Section 4209 is irrelevant because it addresses the role of the "*de minimis*" rule in calculating withdrawal liability, which does not apply here.

[18] Metz specifically quotes the following:

> There are several situations where plans, in the application of their own rules, either initially or by amendment, are permitted a wide degree of latitude in allocating and calculating withdrawal liability. In order

support, claiming that Congress intended it to be expansive and to bar the retroactive application not only of plan rules relating to withdrawal liability but also interest rate assumptions, which are "naturally include[d]" therein. *Id.* at 18.

None of Metz's arguments is persuasive. Although Section 4214 may reference other ERISA provisions relating to the calculation of withdrawal liability, nowhere in Section 4214 or the legislative history does it suggest that Section 4214 applies to actuarial assumptions. The statute and the legislative history exclusively use the terms "plan rule" or "amendment," and there is no language suggesting that those terms should be interpreted broadly to include actuarial assumptions. The statute does not define "rule" or "amendment," but the Court finds the Fund's explanation that a rule or amendment is something voted on by the trustees, s*ee* Tr. 53:11-19, is logical. Metz acknowledged in its opening brief to the Arbitrator that Horizon's adoption of the PBGC rate was not a *per se* plan rule or amendment, Sabatini Decl. Ex. B, at 10, and the parties do not dispute that the trustees did not vote to adopt Horizon's assumptions.

Metz argues that plan rules need not be exclusively plan document provisions, and because a fund's trustees are not wholly removed from the process of

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> to protect an employer from certain retroactive changes in a plan's rules, the bill prohibits the retroactive application of a plan rule or amendment relating to withdrawal liability from applying to a withdrawal occurring before its date of adoption, unless the employer consents to its earlier application.

H.R. Rep. No. 96-869, pt. 2, at 30 (1980).

selecting actuarial assumptions—namely, they have a fiduciary duty to ensure that actuarial assumptions are sound—the selection of an actuarial assumption is as much a "plan rule" as any other trustee action. Def. Reply. 6; Tr. 46:17-47:16. This approach, however, would effectively turn any trustee action into a plan rule or amendment. Metz advocates that even if the selection of the interest rate assumption is not actually a plan rule or amendment, Section 4214 should apply because Congress was concerned generally "about changes that take place after a withdrawal that could impact a[n] employer's withdrawal liability." Tr. 51: 6-11. But, there is nothing in the legislative history to suggest that Section 4214 should be generalized in this way. Congress's concern, as reflected in the statute's and the legislative history's exclusive reference to plan rules and amendments, was about retroactive plan rules and amendments having an impact on withdrawal liability. Accordingly, the Court is not persuaded that Section 4214's prohibition on retroactive application of plan rules or amendments has any applicability to this dispute.[19]

Moreover, the distinction between Section 4214—which explicitly prohibits the retroactive application of plan rules or amendments—and Section 4213—

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[19] The Court's analysis would be different if a plan rule or amendment provided for a specific interest rate assumption to be used. Because the trustees would have voted on that assumption as part of the plan, Section 4214 would presumably apply. *See, e.g., Allen v. W. Point-Pepperell, Inc.*, 908 F. Supp. 1209, 1213, 1222-23 (S.D.N.Y. 1995) (although Section 4214 did not apply because it was a single-employer plan, the terms of this plan dictated a specific numeric interest rate assumption).

which is silent as to the timing of the actuary's selection of withdrawal liability assumptions—further emphasizes that Section 4213 does not prohibit the retroactive application of actuarial assumptions within a given plan year, so long as they are made as of the appropriate Measurement Date. If Congress had wanted to preclude the retroactive application of assumptions within a given plan year, it could have done so explicitly, as it did in Section 4214 for plan rules and amendments.

C. ERISA Section 101(1) Is Consistent with the Interpretation that ERISA Does Not Require Actuaries to Select Assumptions by the Measurement Date

The Court is sympathetic to employers' concern, as described above, that if an actuary can select her assumptions at any point during a plan year and apply them retroactively to withdrawing employers, those employers may be unpleasantly surprised that their withdrawal liability is significantly more than expected. But ERISA Section 101(l) shows that this is already the case. ERISA Section 101(1) governs employer requests for withdrawal liability estimates in a multiemployer pension plan. The withdrawal liability estimate is measured as "if such employer withdrew on the last day of the plan year preceding the date of the request." 29 U.S.C. § 1021(l)(1)(A). Thus, under the Plan at issue here, on June 1, 2014, an employer's estimate of withdrawal liability would be calculated as if the employer withdrew on December 31, 2013, which, under ERISA Section 4211, would be calculated as of December 31, 2012—the last day of the plan year preceding the plan year in which the hypothetical withdrawal occurred.

Adopting the Arbitrator's rule that actuaries must choose assumptions by the Measurement Date would not improve employers' ability to gauge their expectations regarding withdrawal liability assessments; the estimates provided to them will always be lagging as they are statutorily required to be based on a prior year.

ERISA Section 101(l) also suggests that Congress understood that the assumptions necessary to calculate withdrawal liability may not be ready by the first day of the plan year, in contrast with the Arbitrator's holding. If the Arbitrator were correct that ERISA required actuaries to select their assumptions by the Measurement Date, there would have been no need for Congress to direct that withdrawal liability estimates be calculated as if the withdrawal occurred in the previous plan year. Likewise, Section 101(l) would not have needed to provide a 180-day window for a plan to give an estimate of withdrawal liability to an employer. *See* 29 U.S.C. § 102(l)(2)(A).

Accordingly, Section 101(l) only makes sense if there is no requirement that actuaries select all of their assumptions by the Measurement Date.[20]

[20] Metz and the Arbitrator point to PBGC Opinion Letters Nos. 90-2 (Apr. 20, 1990) and 94-5 (Sept. 27, 1994) and *Roofers Local No. 30 Combined Pension Fund v. D.A. Nolt, Inc.*, 719 F. Supp. 2d 530 (E.D. Pa. 2010), aff'd, 444 F. App'x 571 (3d Cir. 2011), for the proposition that an actuary cannot retroactively change a withdrawal liability interest rate assumption after it has been selected. Def. Opp. 14; Interim Award 12-14. Metz and the Arbitrator are correct, but that proposition is not instructive here.

Those sources go no further than to provide that withdrawal liability calculations made in a prior plan year may

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to vacate the arbitration award is GRANTED, and Defendant's motion to confirm the arbitration award is DENIED. The arbitration award is thus VACATED. The Court denies Metz's request to remand the case to arbitration because ERISA does not provide it with the authority to do so given that the Court has vacated an unambiguous award. *See* 29 U.S.C. § 1401(b); *Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368, 370 (2d Cir. 1999) (holding that "once arbitrators have finally decided the submitted issues, they are, in common-law parlance, 'functus officio,' meaning that their authority over those questions is ended" (citation omitted) and holding that a "district court can remand an award to the arbitrator for clarification when an award is ambiguous").

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not be retroactively revised in light of an error discovered after withdrawal liability has been calculated for a withdrawing employer. *See Roofers Local No. 30 Combined Pension Fund*, 719 F. Supp. 2d at 546-51 (confirming arbitration award and holding that a fund's attempt to retroactively increase unfunded vested benefits for prior plan years due to a later discovered mathematical error was not permitted under ERISA); PBGC Opinion Letter No. 90-2 ("If the trustees discover an error in the calculation of the plan's unfunded vested benefits for a prior plan year, the valuation for that prior year may not be changed retroactively."); PBGC Opinion Letter No. 94-5 ("In Opinion Letter 90-2, we were referring to errors relating to mistaken or varying data or actuarial assmptions, rather than errors that are purely mathematical or computational in nature."). But, that is not the scenario before this Court. At issue here is whether an actuary must choose her withdrawal liability assumptions by the Measurement Date or whether she may choose them after the Measurement Date. The sources cited by Metz and the Arbitrator do not touch on this question.

The Clerk of Court is respectfully directed to close docket entries 18 and 31 and to terminate the case.

SO ORDERED.

Date: March 27, 2017
New York, New York

/s/ Valerie Caproni
VALERIE CAPRONI
United States District Judge

Appendix D

AMERICAN ARBITRATION ASSOCIATION

AAA Case No. 01-14-0002-2075
Claim for Withdrawal Liability

In the Matter of Arbitration:
METZ CULINARY MANAGEMENT, INC.

—and—

NATIONAL RETIREMENT FUND

Before: Ira F. Jaffe, Esq., Impartial Arbitrator

APPEARANCES:

For the Employer:

Robert Pavlin, Esq.
(Paisner Litvin LLP)
Kevin M. Williams, Esq.
(Ford & Harrison LLP)

For the Fund:

Ronald E. Richman, Esq.
Frank P. Sabatini, Esq.
(Schulte Ross & Zabel LLP)

BACKGROUND

This arbitration arises pursuant to the Multiemployer Pension Plan Amendments Act ("MPPAA") amendments to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1380 et seq., and challenges an assessment by the National Retirement Fund ("NRF" or the "Fund") seeking withdrawal liability from Metz Culinary Management, Inc. ("Metz" or the "Employer") in the amount of $997,734 payable in 70 quarterly installments of $17,814.85, plus a final installment in the amount of $16,233.36. The Employer and the Fund (collectively the "Parties") agreed that a preliminary issue would be presented for ruling on the basis of written stipulations and briefing. The preliminary issue relates to the interest rate assumption used by the Fund to calculate the Employer's withdrawal liability.

For purposes of this preliminary ruling, a number of facts were stipulated to by the Parties. While all of the Stipulated Facts are incorporated herein by reference, this decision will summarize and restate those deemed most significant in terms of the ruling on the preliminary issue.

The Fund uses a modified version of the "rolling five" method for determining withdrawal liability. The preliminary issue relates to the interest rate used by the Fund to calculate the Employer's withdrawal liability with respect to the "pool" for 2013.

The Employer permanently withdrew from the Fund on or about May 16, 2014. As such, the amount of withdrawal liability that it owed to the

Fund was required to be calculated based upon the unfunded vested benefit liabilities ("UVBLs") of the Fund as of December 31, 2013 – the end of the Plan Year preceding that withdrawal.

The Fund utilized two interest rates to calculate the Employer's withdrawal liability. The funding interest rate of 7.25% was used to calculate the pools for Plan Years preceding 2013 (which for the Employer were the 2007, 2008, 2009, 2010, 2011, and 2012 Pools), but the interest rates used by the PBGC for mass withdrawals ("PBGC rates") were used to calculate the pool for the 2013 Plan Year. The change in the Fund's UVBLs for 2013 was $3,068,243,382 and the Employer's calculated share of that 2013 Pool amount was $877,824, or approximately 88% of the total withdrawal liability assessed to the Employer. There was no dispute that the large change in the Fund's UVBLs for 2013 was due in significant part to the change in interest rate assumption and that, if the 7.25% funding interest rate assumption had been used to calculate the 2013 Pool, then the Employer's withdrawal liability would have been significantly lower.

The stipulated facts regarding the interest rate assumption issue revealed that:

1) for a number of years, Buck Consultants ("Buck") served as the Plan Actuary;

2) on October 27, 2013, the Fund Trustees approved the appointment of Horizon, Inc. ("Horizon"), to serve as the Plan Actuary; an October 27, 2013 email from Jim Brubaker, Chairman of the Board of Trustees of the Fund, to Stan Goldfarb at Horizon Actuarial, confirmed the selection, but did not indicate the effective date of

that appointment or discuss details of the transition in terms of respective areas of responsibility from Buck to Horizon;

3) Buck continued to complete certain work for the Fund in the capacity as Plan Actuary even after October 27, 2013, and prepared the Schedule MB filed with the Form 5500 and the November 2013 Actuarial Valuation report that was prepared for the 2013 Plan Year; the 2013 Actuarial Valuation noted that the unfunded vested benefits reported for withdrawal liability purposes were measured as of December 31, 2012 and the valuation results presented were for the Plan Year beginning January 1, 2013;

4) Buck used the funding interest rate assumption, then 7.25%, both for funding purposes and for purposes of calculating UVBLs for use in assessing withdrawal liability under MPPAA; Buck used the 7.25% interest rate assumption in the preparation of the 2013 Actuarial Valuation; the 2013 Actuarial Valuation contained an Actuarial Certification by then Fund Actuary Stephen Siepman, FSA, EA., MAAA, of Buck Consultants, an Enrolled Actuary under ERISA, noting that the interest rate and mortality assumption were as prescribed under Internal Revenue Code Section 412(l)(7) and each of the other actuarial assumptions and methods used in the valuation was "reasonable (taking into account the experience of the Plan and reasonable expectations), and offer our best estimate of anticipated experience under the Plan";

5) at a Board of Trustees meeting held on June 5, 2014, Horizon reviewed various interest rate assumption scenarios for the Trustees; the

discussions regarding those scenarios were redacted, presumably on the basis of privilege; the minutes reflected, however, that following the redacted discussion Horizon informed the Trustees that, as Fund Actuary, they would use the PBGC interest rates to calculate withdrawal liability for all withdrawals that occurred on or after January 1, 2014; PBGC interest rates change monthly and are based on the rates insurance companies use to settle liabilities; as of December 31, 2013, the PBGC interest rates were 3.00% for the first 20 years and 3.31% thereafter;

6) Stan Goldfarb and Jonathan Feldman of Horizon Actuarial Services, LLC, wrote to the Fund Administrator and to Fund Counsel, by memorandum dated October 3, 2014, discussing the change in withdrawal liability interest rate assumption; a copy of the memorandum is attached to this decision as Appendix A; the reasonableness of the change in interest rate assumption is not presented as part of the preliminary issue for determination; and

7) there is no evidence as to the precise date when Horizon determined to change the interest rate assumption for the NRF for withdrawal liability purposes; the October 3, 2014 memorandum indicated that Horizon intended to use the new interest rate assumption with respect to the calculation of withdrawal liability for employers who withdrew on or after January 1, 2014; the redacted minutes from the June 5, 2014 Trustees meeting indicated that Horizon informed the Trustees at that meeting that Horizon had decided to use the PBGC rates for the calculation of

withdrawal liability; and the May 16, 2014 initial Demand letter in this case utilized an estimate of the 2013 pool that was clearly determined with use of either the PBGC rates or some other interest rate assumption that varied significantly from the 7.25% rate that was used by Buck and was in effect during 2013.

No evidence was introduced that reflected a decision by Buck or Horizon on or before December 31, 2013, to change to the use of the funding interest rate of 7.25% for purposes of calculating the Fund's UVBLs for withdrawal liability purposes as of December 31, 2013.

CONTENTIONS OF THE EMPLOYER

MPPAA required that the Fund calculate the Employer's withdrawal liability on the basis of the methods and assumptions in effect for the Fund as of December 31, 2013. By utilizing an interest rate assumption that was not adopted by the Fund Actuary until some time in 2014, the assessment was contrary to law and must be revised. The Employer seeks that the Fund be required to recalculate the withdrawal liability of the Employer using the 7.25% interest assumption that was in effect for the 2013 Plan Year. The effect of that recalculation alone is estimated to reduce the amount of withdrawal liability from approximately $1,000,000 to approximately $225,000 to $250,000.

The preliminary issue does not address the reasonableness of the Fund's assumptions including, but not limited to, the interest rate assumption. Rather, the sole question presented by the preliminary issue relates to the lawfulness of a retroactive change in the interest rate assumption to a Plan Year that ended prior to the adoption of that assumption to determine the withdrawal liability of an employer. Applicable guidance from the Pension Benefit Guaranty Corporation ("PBGC") and arbitrators and courts make clear that such retroactive changes are unlawful to the extent that they increase the withdrawal liability of a withdrawn employer.

The Fund and the new actuary, Horizon, did not change the interest rate assumption to determine the UVBLs of the Fund for purposes of calculating withdrawal liability until June 5, 2014, at the earliest, and more likely not until October 3, 2014. Applying that new interest rate assumption retroactively to December 31, 2013, violates MPPAA. In <u>Roofers Local No. 30 Combined Pension Fund</u> v. <u>D.A. Nolt, Inc.</u>, 719 F.Supp. 2d 530 (E.D. Pa. 2010), aff'd 444 Fed. Appx. 571 (3d Cir. 2011), the District Court and Court of Appeals upheld a determination by this Arbitrator [<u>D.A. Nolt and Roofers Local No. 30 Combined Fund</u>, AAA Case No. 14 621 00603 07 (2009) (Ira F. Jaffe, Arbitrator)] that a pension fund was statutorily precluded from increasing an employer's withdrawal liability by retroactively adjusting the UVBLs of the fund based upon discovery and correction of a programming error that had resulted in the alleged understatement of the UVBLs of the fund during the years relevant to the withdrawal liability assessment in that case. Relying upon two PBGC Opinion Letters, Opinion Letter No. 90-2 and Opinion Letter No. 94-5, the Arbitrator found that an after-the-fact change in the UVBLs that would increase the withdrawal liability of a withdrawn employer was precluded by MPPAA which required that the amount of liability be fixed on a "snap shot" basis as of the end of the plan year that preceded withdrawal without regard to future events.

The Fund's assertion in this case that the change in interest rate assumption is not retroactive is contrary to the views of the PBGC and that of the Arbitrator and the court in Nolt and should be rejected. This case is even more compelling than the situations presented in Nolt and in the cited PBGC Opinion Letters. There was no evidence of mistake or calculational error. Rather, there was simply a difference of actuarial opinion. This is different from correction of a calculational error that affects an individual employer's withdrawal liability which has been found to be the kind of situation that may be corrected by means of a revised assessment. The change in actuarial assumptions, including the interest rate assumption, affect the withdrawal liability of all of the Fund's employers and must be made prospectively. It is no different than a change in interest rate assumption that is based upon consideration of post-snap shot date changes in market interest rates or in the performance of fund assets or other subsequent fund experience that deviates significantly from projected or assumed results.

No changes were made by the Fund to its prior Actuarial Valuation Report or Form 5500 filed for 2013. The failure to have amended those documents to reflect the changed interest rate assumption is an additional reason relied upon by the Arbitrator and the courts in Nolt to find that the changed information may not be utilized retroactively to calculate the withdrawal liability of an employer.

Additionally, as held in Nolt, a decision by the Fund Trustees to use a different basis after the fact to assess withdrawal liability against one or more employers implicates concerns about their motivation that would render MPPAA's pay now, dispute later process subject to substantial due process objections. Metz recognizes that a change in interest rate assumption is not a plan rule or plan amendment, but the proscription on applying changed plan rules or plan amendments retroactively contained in Section 4214(a) of MPPAA, 29 U.S.C. §1394(a) is further evidence of Congressional intention that post-snap shot date changes not be used to increase retroactively an employer's withdrawal liability over the objection of that employer.

The Arbitrator is asked to issue an Interim Decision and Award on the preliminary issue finding that: 1) the NRF violated MPPAA when it applied the changed 2014 interest rate assumption to calculate Metz's withdrawal liability as of December 31, 2013; 2) the Fund should be directed to recalculate the withdrawal liability of the Employer using the 7.25% interest rate that was in effect on December 31, 2013, for the 2013 pool; and 3) the Fund should be directed to explain the reason why the 2013 pool amount increased from the estimated initial Demand to the revised Demand.

CONTENTIONS OF THE FUND

The Employer's position suffers from a fundamental flaw. The Fund Actuary did not change the interest rate assumption and apply it retroactively as claimed by the Employer. Rather, the Fund froze benefit accruals as of December 31, 2013 and changed Fund Actuaries in October 2013. Buck completed the Actuarial Valuation as of January 1, 2013 and calculated the liabilities in that report using the interest rates and assumptions in effect as of December 31, 2012.

There is nothing retroactive about a fund actuary adopting changed interest rate and other assumptions after the end of a plan year and applying those rates to the calculation of vested benefit liabilities measured as of the end of the preceding plan year. Because changes occur in participant data, plan participation, plan assets, plan provisions, or anticipated experience under the plan, on or before the end of the plan year preceding withdrawal, the plan actuary must wait until all of that information is available before determining those actuarial assumptions that represent the actuary's best estimate of anticipated experience under the plan. As a consequence of the need for current data upon which to base a change in assumptions, it is necessarily the case that the actuarial assumptions for a plan year, including a plan year that is the year prior to that in which a withdrawal occurs, will not be set until the following plan year.

In this case, the Fund Actuary selected the assumptions in 2014 that are used to calculate withdrawal liability for a withdrawal occurring in

2014 (which looks back to the UVBLs as of December 31, 2013). To hold otherwise would mean that an employer who withdraws from a multi-employer pension plan would have its withdrawal liability calculated as of assumptions that were last reviewed and selected as of the end of the second plan year preceding the year of withdrawal. The last time that the interest rate and other actuarial assumptions were reviewed and certified were those as of January 1, 2013, which are the same as those in effect on December 31, 2012.

Further, the Employer's approach would result in different assumptions being used for employers who withdrew early in the plan year from those who withdrew later in the plan year (which the interest rate assumptions for the end of the plan year preceding withdrawal would be set). Nothing in MPPAA provides for this difference in treatment.

The Employer's belief that Buck, as the Fund Actuary, established the interest rate assumption to be used in calculating UVBLs for withdrawal liability purposes as of December 31, 2013 is factually in error. Buck selected a 7.25% interest rate assumption for ongoing funding purposes as of January 1, 2013, and a 7.25% interest rate assumption to value UVBLs for withdrawal liability as of December 31, 2012, but never made any determination with respect to the interest rate as of December 31, 2013 that was to be used to calculate the UVBLs of the Fund for withdrawal liability purposes as of that date. As has been recognized by the Arbitrator and the courts, a fund actuary may select different interest rate assumptions for funding purposes and for withdrawal liability purposes without violating MPPAA. See, e.g., Embassy Industries and Local 365 UAW Pension Trust Fund, AAA Case No. 13 621 01504 06 (2008) (Ira F. Jaffe, Arbitrator). Thus, Buck's selection of an ongoing funding interest rate assumption for the 2013 Plan Year did not determine Horizon's selection of an interest rate assumption for withdrawal liability purposes. In fact, Actuarial Standard of Practice ("ASOP") No. 27 provides that: "The economic assumptions selected to measure pension obligations should reflect the actuary's knowledge base as of the measurement date." ASOP No. 27 further defines measurement date to mean the "date as of which the value of the pension obligation is determined."

ERISA Section 4213(a)(1) requires that the interest rates and other actuarial assumptions used to calculate withdrawal liability represent the "best estimate" of the Fund Actuary of anticipated future experience of the plan. The "best estimate" of the Fund Actuary, as of December 31, 2013, of the anticipated future experience of the plan, was that made by Horizon and are the PBGC rates, not the Fund's funding interest rate assumption. Horizon did not change or alter anything. Buck never made any best estimate of the interest rate assumption as of December 31, 2013, for purposes of calculating withdrawal liability. The first such assumption was that made by Horizon in 2014. Moreover, even if the Trustees wished to do so, they could not, consistent with MPPAA, select an interest rate assumption that varied from the Fund Actuary's best estimate of anticipated experience and there was no actuarial determination that a 7.25% interest rate assumption was the best estimate of either of the Fund Actuaries as of

December 31, 2013. CTDU Pension Fund v. CPC Logistics, Inc., No. 10 C 2314, 2011 U.S. Dist. LEXIS 87315 (N.D. Ill., Aug. 8, 2011), aff'd 698 F.3d 346 (7th Cir. 2012) (upholding arbitration award by this Arbitrator that invalidated the use by the Trustees of an interest rate assumption that differed from that which was the fund actuary's best estimate when calculating withdrawal liability).

For all of these reasons, the Fund's position on the preliminary issue should be upheld and the Employer's facial challenge to the use of the PBGC rates should be rejected.

DISCUSSION AND OPINION

After careful consideration, I find that the Employer's position on the preliminary issue is correct and that the Fund's use of the PBGC rates to calculate the UVBLs for 2013 violated MPPAA. A summary of the principal reasons for this holding as well as discussion of the appropriate relief follows.

There is no dispute that the Employer withdrew from the Fund in 2014. Accordingly, under MPPAA, the correct measurement date in this case for calculating the Employer's allocable share of UVBLs under the relevant method for calculating withdrawal liability is December 31, 2013 – the end of the Plan Year preceding the year of the Employer's withdrawal from the Fund. That liability has been described as a "snapshot" in the sense that events that occur post-December 31, 2013, may not affect that liability. Thus, if during the period after December 31, 2013, the performance of the Fund with respect to its assets turns out to be significantly less or significantly more than what was projected based upon the Fund's assumptions, that fact provides no basis to adjust the Employer's withdrawal liability. See, e.g., Combs v. Classic Coal Corporation, 931 F.2d 96 (D.C. Cir. 1991) (holding that, on review of the reasonableness of the selected fund actuarial assumptions, including the interest rate assumption, the subsequent actual returns experienced by the fund were irrelevant to whether the selected interest rate assumption satisfied the requirements of MPPAA, and reasoning that once liability is determined as of the snapshot date it does not change on the basis of subsequent experience). Similarly, if the actual Fund experience in other areas following the snap shot date deviate significantly from those that were assumed for that period based upon the assumptions in place on the snap shot date, then that actual future experience cannot provide a basis for changing or calculating differently the Fund's allocable UVBLs as of the snap shot measurement date.

In several Opinion Letters the PBGC has discussed its view that subsequently discovered evidence of error with respect to a prior plan year's UVBL determination may not be applied retroactively when calculating the withdrawal liability of an employer to the extent that doing so would increase the withdrawal liability of that employer. In PBGC Opinion Letter 90-2, the Corporation stated that:

> Fifth, we understand that for the 1988 plan year the plan's enrolled actuary has reallocated unfunded vested benefit liability from December 31, 1979 through December 31, 1987 on the basis of current

> information, some of which differs from that used in prior years by reasons of corrections to certain data, including contribution and controlled group data. You have asked whether this reallocation affects employers that have previously withdrawn, including those employers that have paid or are currently paying their withdrawal liability, and those who are still in the process of contesting their liability.
>
> . . . If the trustees discover an error in the calculation of the plan's unfunded vested benefits for a prior plan year, the valuation for that prior year may not be changed retroactively. Any necessary correction of the plan's unfunded vested benefit liability should be reflected in the valuation that revealed the earlier error or, if the error was not discovered in connection with a valuation, in the first valuation following the discovery. Any employer that withdraws in the plan year following the plan year to which the "corrected" valuation applies would be affected by the correction, by virtue of the operation of the statutory allocation methods.

In PBGC Opinion Letter 94-5, the Corporation responded to a request to clarify PBGC Opinion Letter 90-2 to address a situation in which "a computer program used to generate an actuarial valuation was flawed so that the valuation did not correctly reflect the plan's actuarial assumptions" and the "corrected calculations [achieved through corrected software] will result primarily in reduced assessments" and "the trustees do not intend to increase assessments even for the few employers whose withdrawal liability was understated because of the computer error." A question was also presented as to whether the trustees could refund withdrawal liability overpayment that resulted from the error even though the affected employer(s) did not, or could no longer, request review of the original assessment. The PBGC held that:

> In Opinion Letter 90-2, we were referring to errors relating to mistaken or varying date or actuarial assumptions, rather than errors that are purely mathematical or computational in nature. Moreover, we assumed that the Trustees were considering additional assessments for underpayments, rather than refunds for overpayments, based on these errors.

The PBGC then held in Opinion Letter 94-5 that: 1) a plan sponsor was not required to refund a withdrawal liability overpayment, but 2) such a course of action was not precluded by Title IV of ERISA so long as the refund did not violate the exclusive benefit rule or the restrictions on repayments contained in Title I of ERISA and the Internal Revenue Code.

In D.A. Nolt and Roofers Local No. 30 Combined Fund, AAA Case No. 14 621 00603 07 (2009) (Ira F. Jaffe, Arbitrator) these precedents were applied and it was found that MPPAA barred the application of assumptions that were changed by the plan actuary in the year of withdrawal and afterwards and applied retroactively so as to increase an employer's withdrawal liability. In Nolt, unlike the present case, there was no change in plan actuary from the year preceding withdrawal to the year in which withdrawal occurred. The arbitration award was appealed and affirmed by the courts. Roofers Local No. 30 Combined Pension Fund v. D.A. Nolt, Inc., 719 F. Supp. 2d 530 (E.D. Pa. 2010), aff'd 444 Fed. Appx. 571, 2011 U.S. App. LEXIS (3d Cir. 2011).

A similar challenge to a withdrawal liability calculation also was raised in Embassy Industries and Local 365 UAW Pension Trust Fund, AAA Case No. 13 621 01504 06 (2008) (Ira F. Jaffe, Arbitrator). In that case, while there was no change in fund actuary, there was a change in the interest rate assumption and several other assumptions, made effective January 1, 2005. The UVBL calculation relevant to the employer's withdrawal liability focused upon the fund's UVBLs as of December 31, 2004 – the end of the plan year preceding the employer's withdrawal from the fund. The fund actuary testified that there was no difference between the December 31 calculation of UVBLs from the prior year and the January 1 calculation of UVBLs from the immediately following year and asserted that the changed assumptions applied to the challenged withdrawal liability calculation; he noted that his "best estimate" on January 1 would be the same as his "best estimate" as of the prior day. The changes in assumptions (interest rate, mortality, and turnover) resulted in an increased withdrawal liability assessment for Embassy because the Fund's UVBLs as of December 31, 2004 were higher using the 2005 assumptions than would have been the case using the assumptions that were in effect on December 31, 2004. While the impact upon the withdrawal liability assessment attributable to the change in actuarial assumptions made little difference as a practical matter in the particular case in light of the Section 4219 payment schedule and 20-year cap, the objection to the use of the changed actuarial assumptions was sustained. In that case, I held that:

> A calculation of the UVBLs on December 31, 2004, should properly have been made with the assumptions that were in place effective December 31, 2004, instead of with changed assumptions that did not become effective until the beginning of the following plan year.

(Opinion at 30).

The IRS has also issued several rulings holding that pension plans may file revised Schedule Bs for the purpose of the retroactive correction of material data errors as to underlying facts (e.g., census data, asset amounts, plan provisions, etc.) which supported incorrect calculations made for Funding Standard Account purposes, but that retroactive changes based upon changed actuarial assumptions or methods were impermissible. See IRS Technical Advice Memorandum 8831003 (April 25, 1988); IRS Chief Counsel Advisory 200728001 (July 12, 2007); and IRS Private Letter Ruling 2006390003.

The scheme established under MPPAA for assessments of withdrawal liability allows for a number of methods that allocate to withdrawn employers the UVBLs of a fund as of the last day of the plan year preceding the plan year in which withdrawal occurs. In this case, there is no dispute that the withdrawal took place in 2014; that the plan year is a calendar year; and that the relevant measurement date for the 2013 pool was December 31, 2013. As of December 31, 2013, the record is unclear as to whether Buck or Horizon was serving as the Fund Actuary. Regardless, however, there was no evidence of any action taken by either Buck or Horizon on or before December 31, 2013 to change the interest rate assumption that was to be used for withdrawal liability purposes to value the Fund's UVBLs. While the record does not contain the precise date on which that assumption was changed, there is no dispute that Horizon did not adopt the PBGC rates as the interest rate assumption for withdrawal liability purposes until some time in 2014. The decision to apply that changed assumption retroactively so as to increase the withdrawal liability assessed to the Employer and other employers who withdrew from the Fund after December 31, 2013, was violative of MPPAA and the Employer's position in that regard with respect to the preliminary issue is sustained.

The Fund's assertion that the Fund Actuary had not made any interest rate assumption determination as of December 31, 2013, for purposes of calculating the Fund's UVBLs for withdrawal liability is rejected. MPPAA requires that the assumptions and methods in effect on December 31, 2013, be used for calculating the Employer's withdrawal liability. Absent some change by the Fund actuaries, the existing assumptions and method remained in place as of December 31, 2013.

The requirement that withdrawal liability be calculated based upon the actuarial methods and assumptions that were in place and in effect as of the end of the Plan Year preceding withdrawal was violated in this case by the Fund's use of later adopted actuarial assumptions and methods to calculate the withdrawal liability of the Employer. Although not necessary to the holding, it may not be amiss to note that adoption of the approach advocated by the Fund would also lead to serious questions being raised in many cases about whether the changed assumptions reflected the best estimate of the fund actuary as of the end of the Plan Year preceding withdrawal. The best evidence of the fund actuary's determination as to the appropriate actuarial assumptions to be used for the calculation of UVBLs and withdrawal liability are those assumptions that were actually in place and formally adopted as of that date. Any actuarial analysis at a later point in time could not properly ignore information that came to the actuary's attention after December 31, 2013, but prior to the time of making the new determination of assumptions and methods, including such matters as the withdrawal of the Employer (or others), changes in the Fund's assets due to actual investment performance, and changes (such as changes in demographics, withdrawals from the Fund, changes in the industry, or the results of collective bargaining) that may affect the stability of the Fund's contribution base or the projected future cost of providing vested benefits.

In the absence of some action by the Fund Actuary changing the interest rate or other actuarial assumptions prior to the end of a Plan

Year, the interest rate and assumptions that were in effect during that Plan Year continued unchanged. The actual calculation of UVBLs may take place after December 31, 2013, after the data for 2013 has been complete, but the assumptions and methods used to calculate those UVBLs for purposes of withdrawal liability must be those that were actually adopted and in effect as of December 31, 2013. Were it otherwise, the selection of assumptions and methods used for the calculation of withdrawal liability would create significant opportunity for bias and manipulation. Nothing would prevent funds, after learning of the withdrawal of one or more significant contributing employers, from attempting to influence actuaries to change methods or assumptions based upon the changes to the fund's contribution base associated with those withdrawals so that the UVBLs as of the end of the prior Plan Year would be greatly increased and the withdrawing employer(s) assessed greater withdrawal liability than would have been the case if the prior assumptions and methods actually in place as of the end of the prior Plan Year were used to determine the UVBLs of the fund as of the end of the prior Plan Year. Moreover, if the prior fund actuary expressed reticence to change those methods and assumptions (which represented the actuary's best estimate as of the prior Plan Year including the last day of that Plan Year), then the trustees of the fund could seek to potentially exercise influence over the selection of the interest rate and other assumptions and methods to serve the goal of maximizing the collection of withdrawal liability by seeking to replace the fund actuary and then, in the course of interviewing potential replacements, explaining the preference of the trustees for the use of different interest and other assumptions and methods that would result in a higher UVBL figure, hoping that such action may either cause the existing fund actuary to change assumptions and methods or alternatively lead to the hiring of a new actuary who would be willing to adopt the preferred changed assumptions and methods and apply them retroactively to the end of the prior Plan Year. The United States Supreme Court in Concrete Pipe and Products of Southern California v. Construction Laborers Pension Trust Fund for Southern California, 508 U.S. 602 (1993) in upholding the constitutionality of the Section 4221 review process, including the presumptions of correctness, noted that there was no showing that the assumptions and methods, including specifically the interest rate assumption, was "so manipulable as to create a significant opportunity for bias to operate." Id. at 633n.19 and accompanying text. The Court also cited to Huber v. Casablanca Industries, 916 F.2d 85 (3d Cir. 1990) upholding an arbitration award in which the plan actuary's use of revised methods and assumptions to calculate the relevant UVBLs were successfully questioned based, in part, upon the fact that the revised methods and assumptions were adopted to satisfy the stated preference of the plan trustees for the new methodology and assumptions. This potential for bias to operate is particularly great if the changed assumptions and methods relate only to those used to calculate the UVBLs of the fund for purposes of withdrawal liability and not for funding or other purposes (as appears to have been the case in this matter).

To the extent that the selection of assumptions and methods is a decision ultimately made by the Trustees, based upon the best estimate of the Fund Actuary, the record reflects no action in this case having been undertaken by the Trustees prior to December 31, 2013, to change the actuarial assumptions and methods used to calculate the Fund's UVBLs for withdrawal liability purposes.

In sum, I find that the Fund was required to use the actuarial assumptions and methods in effect as of the end of the Plan Year preceding withdrawal when calculating the pool for the Plan Year that preceded withdrawal and that the Fund's decision in this case to calculate that pool using changed assumptions and methods adopted after the end of the Plan Year preceding withdrawal violated MPPAA. The Fund is directed to recalculate the 2013 pool using the assumptions and methods that were in effect as of December 31, 2013.

After receipt of this interim ruling and the Fund's revised assessment calculation, the Parties are to advise whether there are remaining issues that require arbitral determination and a conference call will be held to address the appropriate procedures for finalizing the Award in this matter.

INTERIM AWARD

The Fund improperly calculated the 2013 pool and the Employer's allocable share of that pool when it used changed assumptions and methods adopted for the first time in 2014 to retroactively calculate the Fund's unfunded vested benefit liabilities as of December 31, 2013.

The Fund is directed to recalculate the 2013 pool using the assumptions and methods that were in effect as of December 31, 2013, and revise the withdrawal liability demand in this case to reflect that changed calculation.

The Parties are to contact the Arbitrator once the revised calculations have issued for the purpose of determining whether there remain additional issues that require arbitral determination, as well as to address the procedures (if no additional issues remain) by which this Interim Ruling is to be finalized.

February 22, 2016

/s/ Ira F. Jaffe, Esq.

Ira F. Jaffe, Esq.
Impartial Arbitrator

Appendix E

AMERICAN ARBITRATION ASSOCIATION

AAA Case No. 01-14-0002-2075
Claim for Withdrawal Liability

In the Matter of Arbitration:
METZ CULINARY MANAGEMENT, INC.

—and—

NATIONAL RETIREMENT FUND

Before: Ira F. Jaffe, Esq., Impartial Arbitrator

APPEARANCES:

For the Employer:

Robert Litvin, Esq.
(Paisner Litvin LLP)
Kevin M. Williams, Esq.
(Ford & Harrison LLP)

For the Fund:

Ronald E. Richman, Esq.
Frank P. Sabatini, Esq.
(Schulte Ross & Zabel LLP)

FINAL AWARD

The Employer has confirmed that, other than claims that only need to be decided should the holding contained in the Interim Award be reversed, there are no remaining issues for resolution in this arbitration and no objections to the March 7, 2016 Recalculation of Withdrawal Liability.

Accordingly, the February 22, 2016 Interim Award is hereby converted to a Final Award in this matter and the March 7, 2016 Recalculation of Withdrawal Liability for the Employer is affirmed.

March 28, 2016

/s/ Ira F. Jaffe, Esq.

Ira F. Jaffe, Esq.
Impartial Arbitrator

Appendix F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No.: 16-cv-2408 (VEC)

THE NATIONAL RETIREMENT FUND and THE BOARD OF TRUSTEES OF THE NATIONAL RETIREMENT FUND, each on behalf of the Legacy Plan of the National Retirement Fund,

Plaintiffs,

—against—

METZ CULINARY MANAGEMENT, INC.,

Defendant.

FIRST AMENDED COMPLAINT

Plaintiffs, the National Retirement Fund (the "Fund") and the Board of Trustees of the National Retirement Fund (the "Trustees"), each on behalf of the Legacy Plan of the National Retirement Fund (the "Plan"), by their attorneys Schulte Roth & Zabel LLP, as and for their first amended complaint against defendant, Metz Culinary Management, Inc. ("Metz"), respectfully allege as follows:

NATURE OF ACTION

1. The Fund and the Trustees bring this action pursuant to Sections 4221(b)(2) and 4301 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1401(b)(2), 1451, to modify and/or vacate the arbitration award issued by Arbitrator Ira F. Jaffe in Metz Culinary Management, Inc. and National Retirement Fund, AAA Case No. 01-14-0002-2075 (the "Arbitration"), on March 28, 2016 (the "Final Award"). A true and correct copy of the Final Award is attached hereto as Exhibit A.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to Sections 4221(b)(2), 4301(a), and 4301(c) of ERISA, 29 U.S.C. §§ 1401(b)(2), 1451(a), 1451(c).

3. Venue is properly laid in this Court pursuant to Sections 422l(b)(2) and 4301(d) of ERISA, 29 U.S.C. §§ 1401(b)(2), 145l(d), because the Fund and the Plan are administered in part in New York County, New York.

PARTIES

4. The Fund is a Taft-Hartley trust fund with trustees equally represented by labor organizations currently and formerly affiliated with UNITE HERE and Workers United and employers that contribute to the Fund. The Fund is established and maintained pursuant to Section 302(c)(5) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5).

5. The Fund, through its Trustees, sponsors and administers the Plan.

6. The Plan is a multiemployer plan within the meaning of Section 3(37) of ERISA, 29 U.S.C. § 1002(37).

7. Prior to January 1, 2015, the Plan was known as the Pension Plan of the National Retirement Fund.

8. The Fund is authorized to bring this action pursuant to Section 4221(b)(2) of ERISA, 29 U.S.C. § 1401(b)(2).

9. The Trustees are fiduciaries, within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), of the Fund and the Plan.

10. As fiduciaries of the Fund and the Plan, the Trustees are authorized to bring this action under Section 4301(a)(l) of ERISA, 29 U.S.C. § 1451(a)(l).

11. Metz is an employer within the meaning of Section 3(5) of ERISA, 29 U.S.C. § 1002(5), engaged in commerce and its activities affect commerce within the meaning of Sections 3(11) and 3(12) of ERISA, 29 U.S.C. §§ 1002(11), 1002(12).

FACTUAL BACKGROUND

12. The plan year for the Fund commenced on January 1 and ended on December 31 during the relevant period.

13. In or around October 2013, the Fund selected Horizon Actuarial Services, LLC ("Horizon") to be the actuary for the Fund.

14. Prior to the Fund's selection of Horizon as the actuary for the Fund, Buck Consultants ("Buck") served as actuary for the Fund.

15. Buck selected an interest rate assumption of 7.25% for the purposes of calculating withdrawal liability under the Plan as of December 31, 2012 (*i.e.,* for the purposes of calculating withdrawal liability for withdrawals occurring during the Fund's 2013 plan year) (the "Old Rate").

16. Buck did not select an interest rate assumption for the purposes of calculating withdrawal liability under the Plan as of December 31, 2013 (*i.e.,* for the purposes of calculating withdrawal liability for withdrawals occurring during the Fund's 2014 plan year).

17. Metz was a contributing employer to the Plan, through the Fund, until it incurred a complete withdrawal from the Plan within the meaning of Section 4203(a) of ERISA, 29 U.S.C. § 1383(a), on May 16, 2014 (the "Complete Withdrawal").

18. On June 5, 2014, Horizon informed the Trustees that Horizon would use certain interest rates used by the Pension Benefit Guaranty Corporation (the "PBGC Rates") for withdrawals from the Plan that occurred on or after January 1, 2014.

19. On or about June 16, 2014, the Fund sent Metz a notice and demand letter (the "Notice and Demand") for the payment of withdrawal liability.

20. In the Notice and Demand, the Fund assessed Metz withdrawal liability for the Complete Withdrawal in the estimated amount of $954,821, payable in 66 quarterly installments of $17,814.85, plus a final installment in the amount of$17,119.42.

21. On or about December 26, 2014, the Fund issued to Metz a revised withdrawal liability assessment for the Complete Withdrawal in the amount of $997,734, payable in 70 quarterly installments of $17,814.85, plus a final installment in the amount of $16,233.36 (the "Final Assessment").

ARBITRATION PROCEEDINGS

22. On or about December 16, 2014, Metz commenced the Arbitration challenging the Fund's assessment of Metz's withdrawal liability for the Complete Withdrawal by filing a demand for arbitration with the American Arbitration Association (the "AAA").

23. The AAA appointed Ira F. Jaffe, Esq. (the "Arbitrator") to serve as arbitrator in the Arbitration.

24. Except for limited document requests by Metz, and the Fund's responses to such document requests, no discovery was conducted in the Arbitration.

25. On February 22, 2016, the Arbitrator issued an interim award in which the Arbitrator held that the Fund's use of the PBGC Rates to calculate Metz's withdrawal liability was improper (the "Interim Award"). A true and correct copy of the Interim Award is attached hereto as Exhibit B.

26. In the Interim Award, the Arbitrator directed the Fund to recalculate Metz's withdrawal liability.

27. On March 7, 2016, the Fund provided Metz with a calculation of Metz's hypothetical withdrawal liability using the Old Rate instead of the PBGC Rates (the "Hypothetical Calculation").

28. Metz did not object to the Hypothetical Calculation.

29. On March 28, 2016, the Arbitrator issued the Final Award.

30. In the Final Award, the Arbitrator affirmed the Hypothetical Calculation, determined that no issues remained in the Arbitration “other than claims that only need to be · decided should the holding contained in the Interim Award be reversed,” and converted the Interim Award to a final award.

AS AND FOR PLAINTIFFS’ CLAIM AGAINST METZ

31. Plaintiffs repeat and reallege each and every allegation in Paragraphs 1 through 30 as if fully set forth herein.

32. The Arbitrator erred as a matter of law when he determined that, because Horizon selected the PBGC Rates as the interest rate assumption for the purposes of calculating withdrawal liability under the Plan as of December 31, 2013 (*i.e.,* for the purposes of calculating withdrawal liability for withdrawals occurring during the Fund’s 2014 plan year) after December 31, 2013 and after Metz withdrew from the Plan, the Fund could not use the PBGC Rates to calculate Metz’s withdrawal liability.

33. The Arbitrator erred as a matter of law when he determined that the Old Rate was still in effect on December 31, 2013.

34. The Arbitrator erred as a matter of law when he determined that the Old Rate applied to withdrawals from the Plan during the 2014 plan year.

35. The Arbitrator erred as a matter of law when he determined that a multiemployer plan may not apply an assumption for the calculation of withdrawal liability to an employer that withdrew before the plan's actuary selected that assumption.

36. The Arbitrator erred as a matter of law when he determined that *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 602 (1993), stands for the proposition that actuaries would be subject to bias and manipulation by plan trustees if an interest rate assumption could be applied to withdrawals occurring before the selection of that assumption.

37. The Arbitrator erred as a matter of law to the extent the Final Award and Interim Award are not based in ERISA or case law construing ERISA.

38. Such errors require that the Final Award be modified and/or vacated as a matter of law, that the Hypothetical Calculation be vacated, and that the Final Assessment be reinstated pursuant to Section 4221(b)(2) of ERISA, 29 U.S.C. § 1401(b)(2).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Modify and/or vacate the Final Award, vacate the Hypothetical Calculation, and uphold the Final Assessment.

B. Grant Plaintiffs their costs and attorney's fees in connection with this action.

C. Grant Plaintiffs such other and further relief as this Court deems appropriate.

Dated: April 21, 2016
New York, New York

SCHULTE ROTH & ZABEL LLP

By: /s/ Ronald E. Richman
Ronald E. Richman
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Attorneys for Plaintiffs

Appendix G

BEFORE THE
AMERICAN ARBITRATION ASSOCIATION

Case No. 01-14-0002-2075
Ira F. Jaffe, Esq.
Arbitrator

Metz Culinary Management, Inc.

—v.—

National Retirement Fund

JOINT STIPULATION OF FACTS

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Counsel for
National Retirement Fund

Dated: April 15, 2015

Pursuant to the March 5th, 2015 scheduling order, the parties, Metz Culinary Management, Inc. ("Metz") and the National Retirement Fund ("Fund"), hereby submit their Joint Stipulation of Facts relating to the preliminary issue in this arbitration concerning the lawfulness of the change in interest rate assumption in 2014 used to calculate the unfunded vested benefit liabilities for the plan year ending December 31, 2013 and the complete withdrawal liability of Metz. The parties reserve any objections on the grounds of relevance, materiality, and weight with respect to the stipulated facts.

1. The Fund is a multiemployer pension plan governed by ERISA, 29 U.S.C. § 1001 *et seq*. and the Multiemployer Pension Plan Amendments Acts of 1980 (MPPAA), 29 U.S.C. § 1381 *et seq*.

2. Metz was a contributing employer to the Fund and incurred a complete withdrawal on May 16, 2014.

3. The Fund first issued on June 16, 2014 a Notice and Demand for a complete withdrawal that occurred on May 16, 2014 in the estimated amount of $954,821, payable in 66 quarterly installments of $17,814.85, plus a final installment in the amount of $17,119.42. A true copy of the Notice and Demand is attached as **Exhibit A**.

4. Subsequently, the Fund issued a revised withdrawal liability assessment on December 26, 2014 in the amount of $997,734, payable in 70 quarterly installments of $17,814.85, plus a final installment in the amount of $16,233.36.

A true copy of the revised assessment is attached as **Exhibit B.**

5. The plan year for the Fund commences on January 1st and ends on December 31st.

6. The Fund uses a modified version of the rolling five method under ERISA for determining withdrawal liability. A true copy of the provisions of the Fund's Agreement and Declaration of Trust concerning the calculation of withdrawal liability with respect to the Legacy Plan of the National Retirement Fund is attached as **Exhibit C. (NRF-0034-0037)**

7. Buck Consultants was the Fund's actuary for the 2013 plan year and for a number of years prior to 2013. Horizon, Inc. was appointed in October 2013 to serve as the Fund's actuary. Buck Consultants, however, prepared the Schedule MB filed with the Form 5500 and the Actuarial Valuation Report for the plan year ending December 31, 2013.

8. Buck Consultants had used a 7.25 percent interest rate in 2013 to calculate unfunded vested benefit liabilities and withdrawal liability.

9. On October 17, 2013, the Fund selected Horizon, Inc. to be the new actuary for the Fund. A true copy of the email from Jim Brubaker to Stan Goldfarb of Horizon evidencing the selection is attached as **Exhibit D. (NFR-0001)**

10. At a Board of Trustees meeting held on June 5, 2014, Horizon, Inc. reviewed various interest rate assumption scenarios for the Trustees and informed the Trustees that the firm would use

interest rates used by the PBGC for mass withdrawals (the "PBGC Rates") for withdrawals that occurred on or after January 1, 2014. A true copy of the minutes of that Board of Trustees meeting, with redactions, is attached as **Exhibit E. (NRF-0002-0011)**

11. Horizon, Inc.'s use of the PBGC Rates represented a change to the withdrawal liability interest rate assumption used by Buck Consultants for the 2013 plan year.

12. In a letter dated October 3, 2014, from Horizon, Inc. to the Trustees, Horizon explained to the Fund the decision to make, reasons for and the impact of the change in interest rate assumption on vested benefit liabilities and withdrawal liability. A true copy of that letter is attached as **Exhibit F. (NRF-0012-0014)**

13. A true copy of the Actuarial Valuation Report, prepared by Buck Consultants, for the plan year ending December 31, 2013, is attached as **Exhibit G**.

14. A true copy of the amended Form 5500 for this Fund for the plan year ending December 31, 2013 is attached as **Exhibit H. (NRF-0723-0930)**

15. Horizon, Inc. did not prepare any Actuarial Valuation Report for the plan year ending December 31, 2013 or any Schedule MB filed with the Form 5500 for the plan year ending December 31, 2013.

16. The Fund is in critical status under Section 432(b)(2) of the Internal Revenue Code.

17. The Fund's plan sponsor has determined that based on reasonable actuarial assumptions and upon exhaustion of all reasonable measures, the Fund cannot reasonably be expected to emerge from critical status by the end of the rehabilitation period.
18. The Fund froze the accrual of benefits as of December 31, 2013.
19. No advance written notice was provided in 2014 by the Fund to the contributing employers about the interest rate change.

Exhibit A

NATIONAL RETIREMENT FUND
[LETTERHEAD]

June 16, 2014

Brian A Bufalino, Esquire
Metz Culinary Management
Two Woodland Drive
Dallas, PA 18612

RE: Metz Culinary Management d/b/a Cheyney Universtiy – ER#560094

Dear Mr. Bufalino:

The Board of Trustees of the National Retirement Fund (the "Fund") determined that Metz Culinary Management d/b/a Cheyney University, ER#560094 (hereinafter the "Employer") incurred a complete withdrawal from the Fund as of May 16th, 2014. Accordingly, the Employer is liable to the Fund for withdrawal liability pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

This letter supplies a notice of the Employer's liability resulting from a withdrawal from the National Retirement Fund. The Fund reserves the right to revise this assessment at any time due to new information that may alter the Employer's liability.

Attached is a copy of how the withdrawal liability was determined. ERISA provides that the amount of the withdrawal liability is to be paid in equal quarterly installments over the number of years necessary to amortize the amount of the liability in level annual payments calculated in accordance with Section 4219(c)(i)(1).

The estimated amount of withdrawal liability allocable to the Employer is $954,821.00 and payable in sixty six (66) quarterly installments of $17,814.85 plus a final installment in the amount of $17,119.42. Installments should be remitted to this office and made payable to the "National Retirement Fund." The first installment is due by July 1st, 2014. Upon completion of the final withdrawal liability calculation, you will be notified of the final assessment and revised payment schedule. Please feel free to contact the Fund with any questions.

Very truly yours,

RICHARD N. RUST
Fund Manager

Encl:
Cc: Ronald E Richman, Esquire
Jaimie Davis, Esquire
David Sapp, Esquire
Jonathan Feldman
Philadelphia Jt. Bd.

RNR/mb

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

NATIONAL RETIREMENT FUND
[LETTERHEAD]

June 16, 2014

2014 Estimated Withdrawal Liability
METZ CULINARY MANAGEMENT
Former HEREIU Employer Worksheet

Employer Numbers: 560094

A. Remaining Allocable Portion of 2007 Pool (HEREIU Sub-Pool)

1. December 31, 2007 amount .... $ 17,179.34

2. Portion remaining as of 12/31/2013 = 70% times A.1 .... $ 12,026.00

B. Remaining Allocable Portion of 2008 Pool

1. Total retirement contributions payable by your firm during plan years 2004 – 2008 .... $ 66,607.59

2. Total retirement contributions received by the Fund during same period for all employers reduced by contributions made by employers who withdrew prior to 12/31/2008....................... $ 462,442,162.00

3. which quotient .... .00014403

4. was then multiplied by the Change in the Fund's Unfunded Vested Benefits as of 12/31/2008 for all employers not withdrawn as of 12/31/2008........................... $ 926,815,395.00

5. Totaling... $ 133,489.22

6. Portion remaining as of 12/31/2013 = 75% times B.5 .... $ 100,117.00

C. Remaining Allocable Portion of 2009 Pool

1. Total retirement contributions payable by your firm during plan years 2005 – 2009 .... $ 80,496.32

2. Total retirement contributions received by the Fund during same period for all employers reduced by contributions made by employers who withdrew prior to 12/31/2009 .... $ 501,379,595.00

3. which quotient .... .00016055

4. was then multiplied by the Change in the Fund's Unfunded Vested Benefits as of 12/31/2009 for all employers not withdrawn as of 12/31/2009 .... $ 36,005,935.00

5. Totaling.. $ 5,780.75

6. Portion remaining as of 12/31/2013 = 80% times C.5 .... $ 4,625.00

D. Allocable Portion of 2013 Pool

1. Total retirement contributions payable by your firm during plan years 2009 – 2013 .... $ 171,561.52

2. Total estimated retirement contributions received by the Fund during same period for all employers reduced by estimated contributions made by employers who withdrew prior to 12/31/2013 .... $ 610,500,000.00

3. which quotient .... .00028102

4. was then multiplied by the estimated Change in the Fund's Unfunded Vested Benefits as of 12/31/2013 for all employers not withdrawn as of 12/31/2013 .... $ 2,971,200,000.00

5. Totaling .... $ 834,967.00

E. Proportional Share of the unamortized amount of Affected Benefits for plan year ending 12/31/2013

1. Total retirement contributions payable by your firm during plan years 2009 – 2013 .... $ 171,561.52

2. Total estimated retirement contributions received by the Fund during same period for all employers reduced by estimated contributions made by employers who withdrew prior to 12/31/2013 .... $ 610,500,000.00

3. which quotient .... .00028102

4. was multiplied by the unamortized amount of Affected Benefits [reduction of adjustable benefits during 2011] .... $ 10,981,152.00

5. Totaling .... $ 3,086.00

F. Allocable Share:

1. [A2 + B6 + C6 + D5 + E5] .... $ 954,821.00

2. *De minimis* reduction .... $ —

3. 2014 Estimated Withdrawal Liability .... $ 954,821.00

Employer Contributions:

2004	6,800.00
2005	8,154.00
2006	10,030.00
2007	10,650.00
2008	30,973.59
2009	20,688.73
2010	30,163.97
2011	30,963.28
2012	40,138.44
2013	49,607.10

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION PENSION FUND
Withdrawal liability for:
METZ AND ASOCIATES LTD.

Employer # 5600904

Initial Method 15
Old Fund # 520

Joined after 1993 Y

Initial Liability	Calc for 501 funds Rolling 5-Method	Sum for 505 funds (see second sheet)
1989	$0.00	
1990	$0.00	
1991	$0.00	
1992	$0.00	
1993	$0.00	
Sum of contributions	$0.00	
All Remaining Ers' Cont	$43,172,532.00	
UVB at merger	$51,364,800.00	
Employer's share	$0.00	$0.00
1st yr attributable UVB	$78,858,054.00	
Adjusted UVB	$39,044,046.00	
Employer's Share	$0.00	

		Rolling Five Year Contribution Totals			Liability Pools at 12/31/2007				Allocated
		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Year	Employer	Employer	All Employers	Pre-95 Employers	All Employers	Pre-95 Employers	All Employers	Pre-95 Employers	
Dec.31	Contributions Payable	5-year sum of contributions	5-year sum of contributions*	5-year sum of contributions*	Unamortized Portion	Unamortized Portion	Reallocated uncollectible amounts	Reallocated uncollectible amounts	= (1)/(2) x ((4) + (6))
1991	$0.00								
1992	$0.00								
1993	$0.00								
1994	$0.00								
1995	$0.00	$0	$52,441,426	$52,384,784	($9,496,151)	$6,103,135	$0	$125,348	$0.00
1996	$0.00	$0	$55,529,354	$54,253,073	($6,186,927)	$3,903,890	$0	$191,547	$0.00
1997	$0.00	$0	$60,258,877	$57,631,566	($7,215,465)	$8,667,245	$0	$1,291,348	$0.00
1998	$0.00	$0	$68,109,977	$62,552,707	($6,664,409)	$6,949,043	$0	$967,498	$0.00
1999	$0.00	$0	$78,932,041	$68,774,990	($4,462,016)	$6,871,017	$0	$1,535,938	$0.00
2000	$0.00	$0	$94,102,944	$80,134,958	$108,798	$24,519,514	$0	$1,380,973	$0.00
2001	$0.00	$0	$106,435,574	$90,434,527	$20,993,953	$13,497,039	$0	$376,621	$0.00
2002	$0.00	$0	$125,574,205	$105,316,957	$41,256,463	$17,340,510	$0	$1,463,318	$0.00
2003	$2,439.00	$2,439	$139,418,139	$116,918,282	($6,647,526)	$21,291,976	$0	$438,046	($132.95)
2004	$6,800.00	$9,239	$156,199,949	$131,274,271	($113,735)	$22,578,697	$0	$1,835,957	($6.82)
2005	$8,154.00	$17,393	$151,363,484	$133,176,139	$13,963,790	$23,182,352	$0	$731,870	$1,536.02
2006	$10,030.00	$27,423	$175,033,412	$140,805,533	$73,908,337	$23,006,268	$0	$3,917,933	$11,825,33
2007	$10,650.00	$38,073	$203,712,499	$158,603,198	$14,886,872	$34,334,751	$5,943,413	$10,289,327	$3,957.76

*Excludes contributions for those who withdrew in prior years.

$17,179.34

Liability allocated	Years since 1995	Pct Amortized	Allocated
$0	13	65%	$0.00
			$17,179.34

NATIONAL RETIREMENT FUND
[LETTERHEAD]

June 16, 2014

Development of Quarterly Payment
METZ CULINARY MANAGEMENT

Employer Numbers: 560094

Year	Contribution Base Units	Consecutive Three Year Average
2004	45,102.84	
2005	43,610.38	
2006	36,628.10	41,780.44
2007	28,387.50	36,208.66
2008	63,041.15	42,685.58
2009	35,736.43	42,388.36
2010	44,697.70	47,825.09
2011	40,238.60	40,224.24
2012	39,483.37	41,473.22
2013	40,350.67	40,024.21

1.)	Maximum Consecutive 3-Year Contribution Base Units Average for ten years before year in which withdrawal occurs	47,825.09
2.)	Maximum Contribution Rate for previous ten years including year in which withdrawal occurs	1.49
3.)	Required Annual Payment: (1) x (2)	$71,259.38
4.)	Quarterly Payment: Required Annual Payment / 4	$17,814.85

NATIONAL RETIREMENT FUND
[LETTERHEAD]

June 16, 2014

Amortization Schedule

EMPLOYER: METZ CULINARY MANAGEMENT

WDL AMOUNT	$ 954,821.00
QLY PAYMENT	$ 17,814.85
INTEREST	3.0%
No. of Years	16.5000000

	PYMT DATE	PAYMENT $	INTEREST	PRINCIPAL	BALANCE
					954,821.00
1	01-Jul-14	17,814.85	0.00	17.814.85	937,006.15
2	01-0ct-14	17,814.85	0.00	17.814.85	919,191.30
3	01-Jan-15	17,814.85	0.00	17,814.85	901,376.45
4	01-Apr-15	17,814.85	0.00	17,814.85	883,561.60
5	01-Jul-15	17,814.85	26,506.85	(8,692.00)	892,253.60
6	01-Oct-15	17,814.85	0.00	17,814.85	874,438.75
7	01-Jan-16	17,814.85	0.00	17,814.85	856,623.90
8	01-Apr-16	17,814.85	0.00	17,814.85	838,809.05
9	01-Jul-16	17,814.85	25.164.27	(7,349.42)	846,158.47

	PYMT DATE	PAYMENT $	INTEREST	PRINCIPAL	BALANCE
10	01-0ct-16	17,814.85	0.00	17,814.85	828,343.62
11	01-Jan-17	17,814.85	0.00	17,814.85	810,528.77
12	01-Apr-17	17,814.85	0.00	17,814.85	792,713.92
13	01-Jul-17	17,814.85	23,781.42	(5,966.57)	798,680.49
14	01-0ct-17	17,814.85	0.00	17,814.85	780,865.64
15	01-Jan-18	17,814.85	0.00	17,814.85	763,050.79
16	01-Apr-18	17,814.85	0.00	17,814.85	745,235.94
17	OI-Jul-18	17,814.85	22,357.08	(4,542.23)	749,778.17
18	01-0ct-18	17,814.85	0.00	17,814.85	731,963.32
19	01-Jan-19	17,814.85	0.00	17,814.85	714,148.47
20	01-Apr-19	17,814.8S	0.00	17,814.85	696,333.62
21	01-Jul-19	17,814.85	20,890.01	(3,075.16)	699,408.77
22	01-0ct-19	17,814.85	0.00	17,814.85	681,593.92
23	01-Jan-20	17,814.85	0.00	17,814.85	663,779.07
24	01-Apr-20	17,814.85	0.00	17,814.85	645,964.22
25	01-Jul-20	17,814.85	19,378.93	(1,564.08)	647,528.30
26	01-0ct-20	17,814.85	0.00	17,814.85	629,713.45
27	01-Jan-21	17,814.85	0.00	17,814.85	611,898.60
28	01-Apr-21	17,814.85	0.00	17,814.85	594,083.75

	PYMT DATE	PAYMENT $	INTEREST	PRINCIPAL	BALANCE
29	01-Jul-21	17,814.85	17,822.51	(7.66)	594,091.41
30	01-0ct-21	17,814.85	000	17,814.85	576,276.56
31	01-Jan-22	17,814.85	0.00	17,814.85	558,461.71
32	01-Apr-22	17,814.85	0.00	17,814.85	540,646.86
33	01-Jul-22	17,814.85	16,219.41	1,595.44	539,051.42
34	01-0ct-22	17,814.85	0.00	17,814.85	521,236.57
35	01-Jan-23	17,814.85	0.00	17,814.85	503,421.72
36	01-Apr-23	17,814.85	0.00	17,814.85	485,606.87
37	Ol-Jul-23	17,814.85	14,568.21	3,246.64	482,360.22
38	01-0ct-23	17,814.85	0.00	17,814.85	464,545.37
39	Ol-Jan-24	17,814.8S	0.00	17,814.85	446,730.52
40	01-Apr-24	17,814.8S	0.00	17,814.85	428,915.67
41	01-Jul-24	17,814.85	12,867.47	4,947.38	423,968.29
42	01-0ct-24	17,814.85	0.00	17,814.85	406,153.44
43	01-Jan-25	17,814.85	0.00	17,814.85	388,338.59
44	01-Apr-25	17,814.85	0.00	17,814.85	370,523.74
45	01-Jul-25	17,814.85	11,115.71	6,699.14	363,824.61
46	01-Oct-25	17,814.85	0.00	17,814.85	346,009.76
47	01-Jan-26	17,814,85	0.00	17,814.85	328,194.91

	PYMT DATE	PAYMENT $	INTEREST	PRINCIPAL	BALANCE
48	01-Apr-26	17,814.85	0.00	17,814.85	310,380.06
49	01-Jul-26	17,814.85	9,311.40	8,503.45	301,876.61
50	01-0ct-26	17,814,85	0.00	17,814.85	284,061.76
51	01-Jan-27	17,814.85	0.00	17,814.85	266,246.91
52	01-Apr-27	17,814.85	0.00	17,814.85	248,432.06
53	01-Jul-27	17,814.85	7,452.96	10,361.89	238,070.17
54	01-Oct-27	17,814.85	0.00	17,814.85	220,255.32
5S	01-Jan-28	17,814,85	0.00	17,814.85	202,440.47
56	01-Apr-28	17,814.85	0.00	17,814.85	184,625.62
57	01-Jul-28	17,814.85	5,538.77	12,276.08	172,349.54
58	01-0ct-28	17,814.85	0.00	17,814.85	154,534.69
59	01-Jan-29	17,814.85	0.00	17,814.85	136,719.84
60	01-Apr-29	17,814.85	000	17,814.85	118,904.99
61	01-Jul-29	17,814,85	l.567.15	14,247.70	104,657.29
62	01-Oct-29	17,814.85	0.00	17,814.85	86,842.44
63	01-Jan-30	17,814.85	0.00	17,814.85	69,027.59
64	01-Apr-30	17,814.85	0.00	17,814.85	51,212.74
65	01-Jul-30	17,814.85	1,536.38	16,278.47	34,934.27
66	01-0ct-30	17,814.85	0.00	17,814.85	17,119.42
67	01-Jan-31	17,119.42	0.00	17,119.42	–

Exhibit B

NATIONAL RETIREMENT FUND
[LETTERHEAD]

December 26, 2014

CERTIFIED MAIL R/R/R

Robert Litvin, Esquire
Paisner-Litvin, LLP
30 Rock Hill Road
Bala Cynwyd, PA 19004

RE: METZ CULINARY MANAGEMENT INC.

Dear Mr. Litvin:

The Board of Trustees of the National Retirement Fund (the "Fund") determined that Metz Culinary Management, Inc. incurred a complete withdrawal from the Fund on May 16th, 2014. The Fund sent an estimated withdrawal liability notification letter on June 16th, 2014. The Fund reserved the right to revise the total withdrawal liability amount and/or payment schedule at any time due to new information that may alter Metz Culinary Management's liability.

The finalization of the withdrawal liability has been calculated. Therefore, we must notify you of the revised calculation. The revised amount of withdrawal liability allocable to Metz Culinary Management, Inc. is $997,734.00. Accordingly, this constitutes notice and demand for payment of the revised withdrawal liability set forth below.

The estimated amount of withdrawal liability allocable to Metz Culinary Management, Inc. was payable in 66 (sixty six) quarterly installments of

$17,814.85 plus a final installment in the amount of $17,119.42. To date, the Fund has received 2 quarterly installments totaling $35,629.70. The revised withdrawal liability amount is now payable in 70 quarterly installments of $17,814.85 plus a final installment in the amount of $16,233.36. Your next installment is due on January 1st, 2015. Attached please find a copy of how the withdrawal liability was determined and the payment schedule.

Please feel free to contact the Fund with any questions.

Very truly yours,

RICHARD N. RUST
Fund Manager

Enc:

Cc: Ronald E Richman, Esquire
Frank Sabatini, Esquire
David Sapp, Esquire
Jonathan Feldman, FSA

RNR/mb

NATIONAL RETIREMENT FUND
[LETTERHEAD]

December 22, 2014

2014 Withdrawal Liability
METZ CULINARY MANAGEMENT
Former HEREIU Employer Worksheet

Employer Numbers: 560094

A. Remaining Allocable Portion of 2007 Pool (HEREIU Sub-Pool)

1. December 31, 2007 amount	$	17,179.34
2. Portion remaining as of 12/31/2013 = 70% times A.1	$	12,026.00

B. Remaining Allocable Portion of 2008 Pool

1. Total retirement contributions payable by your firm during plan years 2004 – 2008	$	66,607.59
2. Total retirement contributions received by the Fund during same period for all employers reduced by contributions made by employers who withdrew prior to 12/31/2008	$	462,442,162.00
3. which quotient		.00014403
4. was then multiplied by the Change in the Fund's Unfunded Vested Benefits as of 12/31/2008 for all employers not withdrawn as of 12/31/2008	$	926,815,395.00
5. Totaling	$	133,489.22

6. Portion remaining as of 12/31/2013 = 75% times B.5 .... $ 100,117.00

C. Remaining Allocable Portion of 2009 Pool

1. Total retirement contributions payable by your firm during plan years 2005 – 2009 .... $ 80,496.32

2. Total retirement contributions received by the Fund during same period for all employers reduced by contributions made by employers who withdrew prior to 12/31/2009 .... $ 501,379,595.00

3. which quotient .... .00016055

4. was then multiplied by the Change in the Fund's Unfunded Vested Benefits as of 12/31/2009 for all employers not withdrawn as of 12/31/2009 .... $ 36,005,935.00

5. Totaling.. $ 5,780.75

6. Portion remaining as of 12/31/2013 = 80% times C.5 .... $ 4,625.00

D. Allocable Portion of 2013 Pool

1. Total retirement contributions payable by your firm during plan years 2009 – 2013 .... $ 171,561.52

2. Total retirement contributions received by the Fund during same period for all employers reduced by contributions made by employers who withdrew prior to 12/31/2013 .... $ 599,663,583.00

3. which quotient .... .00028610

4. was then multiplied by the Change in the Fund's Unfunded Vested Benefits as of 12/31/2013 for all employers not withdrawn as of 12/31/2013 .... $ 3,068,243,382.00

5. Totaling .... $ 877,824.00

E. Proportional Share of the unamortized amount of Affected Benefits for plan year ending 12/31/2013

1. Total retirement contributions payable by your firm during plan years 2009 – 2013 .... $ 171,561.52

2. Total retirement contributions received by the Fund during same period for all employers reduced by contributions made by employers who withdrew prior to 12/31/2013 .... $ 599,663,583.00

3. which quotient .... .00028610

4. was multiplied by the unamortized amount of Affected Benefits (reduction of adjustable benefits during 2011) .... $ 10,981,152.00

5. Totaling .... $ 3,142.00

F. Allocable Share:

1. [A2 + B6 + C6 + D5 + E5] .... $ 997,734.00

2. *De minimis* reduction .... $ —

3. 2014 Estimated Withdrawal Liability .... $ 997,734.00

Employer Contributions:

2004	6,800.00
2005	8,154.00
2006	10,030.00
2007	10,650.00
2008	30,973.59
2009	20,688.73
2010	30,163.97
2011	30,963.28
2012	40,138.44
2013	49,607.10

NATIONAL RETIREMENT FUND
[LETTERHEAD]

December 22, 2014

Development of Quarterly Payment
METZ CULINARY MANAGEMENT

Employer Numbers: 560094

Year	Contribution Base Units	Consecutive Three Year Average
2004	45,102.84	
2005	43,610.38	
2006	36,628.10	41,780.44
2007	28,387.50	36,208.66
2008	63,041.15	42,685.58
2009	35,736.43	42,388.36
2010	44,697.70	47,825.09
2011	40,238.60	40,224.24
2012	39,483.37	41,473.22
2013	40,350.67	40,024.21

1.)	Maximum Consecutive 3-Year Contribution Base Units Average for ten years before year in which withdrawal occurs	47,825.09
2.)	Maximum Contribution Rate for previous ten years including year in which withdrawal occurs	1.49
3.)	Required Annual Payment: (1) x (2)	$71,259.38
4.)	Quarterly Payment: Required Annual Payment / 4	$17,814.85

NATIONAL RETIREMENT FUND
[LETTERHEAD]

December 22, 2014

Amortization Schedule

EMPLOYER: METZ CULINARY MANAGEMENT

WDL AMOUNT	$ 997,734.00	INTEREST	3.0%
QLY PAYMENT	$ 17,814.85	No. of Years	17.50

	PYMT DATE	PAYMENT $	INTEREST	PRINCIPAL	BALANCE AFTER PAYMENT
					997,734.00
1	01-Jul-14	17,814.85	0.00	17,814.85	979,919.15
2	01-0ct-14	17,814.85	0.00	17,814.85	962,104.30
3	01-Jan-15	17,814.85	0.00	17,814.85	944,289.45
4	01-Apr-15	17,814.85	0.00	17,814.85	926,474.60
5	01-Jul-15	17,814.85	27,794.24	(9,979.39)	936,453.99
6	01-Oct-15	17,814.85	0.00	17,814.85	918,639.14
7	01-Jan-16	17,814.85	0.00	17,814.85	900,824.29

	PYMT DATE	PAYMENT $	INTEREST	PRINCIPAL	BALANCE AFTER PAYMENT
8	01-Apr-16	17,814.85	0.00	17,814.85	883,009.44
9	01-Jul-16	17,814.85	26,490.28	(8,675.43)	891,684.87
10	01-Oct-16	17,814.85	0.00	17,814.85	873,870.02
11	01-Jan-17	17,814.85	0.00	17,814.85	856,055.17
12	01-Apr-17	17,814.85	0.00	17,814.85	838,240.32
13	01-Jul-17	17,814.85	25,147.21	(7,332.36)	845,572.68
14	01-Oct-17	17,814.85	0.00	17,814.85	827,757.83
15	01-Jan-18	17,814.85	0.00	17,814.85	809,942.98
16	01-Apr-18	17.814 85	0.00	17,814.85	792,128.13
17	01-Jul-18	17,814.85	23,763.84	(5.948.99)	798,077.12
18	01-Oct-18	17,814.85	0.00	17,814.85	780,262.27
19	01-Jan-19	17,814.85	0.00	17,814.85	762,447.42
20	01-Apr-19	17,814.85	0.00	17,814.85	744,632.57
21	01-Jul-19	17,814.85	22,338.98	(4,524.13)	749,156.70
22	01-Oct-19	17,814.85	0.00	17,814.85	731,341.85
23	01-Jan-20	17,814.85	0.00	17,814.85	713,527.00
24	01-Apr-20	17,814.85	0.00	17,814.85	695,712.15

	PYMT DATE	PAYMENT $	INTEREST	PRINCIPAL	BALANCE AFTER PAYMENT
25	01-Jul-20	17,814.85	20,871.36	(3.056.51)	698,768.67
26	01-Oct-20	17,814.85	0.00	17,814.85	680,953.82
27	01-Jan-21	17,814.85	0.00	17,814.85	663,138.97
28	01-Apr-21	17,814.85	0.00	17,814.85	645,324.12
29	01-Jul-21	17,814.85	19,359.72	(1,544.87)	646,868.99
30	01-Oct-21	17,814.85	0.00	17,814.85	629,054.14
31	01-Jan-22	17,814.85	0.00	17,814.85	611,239.29
32	01-Apr-22	17,814.85	0.00	17,814.85	593,424.44
33	01-Jul-22	17,814.85	17,802.73	12.12	593,412.32
34	01-Oct-22	17,814.85	0.00	17,814.85	575,597.47
35	01-Jan-23	17,814.85	0.00	17,814.85	557,782.62
36	01-Apr-23	17.814.85	0.00	17,814.85	539,967.77
37	01-Jul-23	17,814.85	16,199.03	1,615.82	538,351.96
38	01-Oct-23	17,814.85	0.00	17,814.85	520,537.11
39	01-Jan-24	17,814.85	0.00	17,814.85	502,722.26
40	01-Apr-24	17,814.85	0.00	17,814.85	484,907.41
41	01-Jul-24	17,814.85	14,547.22	3,267.63	481,639.78

	PYMT DATE	PAYMENT $	INTEREST	PRINCIPAL	BALANCE AFTER PAYMENT
42	01-Oct-24	17,814.85	0.00	17,814.85	463,824.93
43	01-Jan-25	17,814.85	0.00	17,814.85	446,010.08
44	01-Apr-25	17,814.85	0.00	17,814.85	428,195.23
45	01-Jul-25	17,814.85	12,845.86	4,968.99	423,226.24
46	01-Oct-25	17,814.85	0.00	17,814.85	405,411.39
47	01-Jan-26	17,814.85	0.00	17,814.85	387,596 54
48	01-Apr-26	17,814.85	0.00	17,814.85	369,781.69
49	01-Jul-26	17,814.85	11,093.45	6,721.40	363,060.29
50	01-Oct-26	17,814.85	0.00	17,814.85	345,245.44
51	01-Jan-27	17,814.85	0.00	17,814.85	327,430.59
52	01-Apr-27	17,814.85	0.00	17,814.85	309,615.74
53	01-Jul-27	17,814.85	9,288.47	8,526.38	301,089.36
54	01-Oct-27	17,814.85	0.00	17,814.85	283,274.51
55	01-Jan-28	17,814.85	0.00	17,814.85	265,459.66
56	01-Apr-28	17,814.85	0.00	17,814.85	247,644 81
57	01-Jul-28	17,814.85	7,429.34	10,385.51	237,259.30
58	01-Oct-28	17,814.85	0.00	17,814.85	219,444.45

	PYMT DATE	PAYMENT $	INTEREST	PRINCIPAL	BALANCE AFTER PAYMENT
59	01-Jan-29	17,814.85	0.00	17,814.85	201,629.60
60	01-Apr-29	17,814.85	0.00	17,814.85	183,814.75
61	01-Jul-29	17,814.85	5,514.44	12,300.41	171,514.34
62	01-Oct-29	17,814 85	0.00	17,814.85	153,699.49
63	01-Jan-30	17,814.85	0.00	17,814.85	135,884.64
64	01-Apr-30	17,814.85	0.00	17,814.85	118,069.79
65	01-Jul-30	17,814.85	3,542.09	14,272.76	103,797.04
66	01-Oct-30	17,814.85	0.00	17,814.85	85,982.19
67	01-Jan-31	17,814.85	0.00	17,814.85	68,167.34
68	01-Apr-31	17,814.85	0.00	17,814.85	50,352.49
69	01-Jul-31	17,814.85	1,510.57	16,304.28	34,048.21
70	01-Oct-31	17,814.85	0.00	17,814.85	16,233.36
71	01-Jan-32	16,233.36	0.00	16,233.36	–

Exhibit D

EMAIL

Rust, Richard

From:	Jim Brubaker <jbrubaker@carlisle-etcetera.com>
Sent:	Thursday October 17 2013 9:21 PM
To:	stan.goldfarb@horizonactuarial.com
Cc:	Rust,Richard; jwilhelm@unitehere.org; 'Julie Kelly' lfoxpjbunite@aol.com; michael.montelongo@sodexo.com; paul.ades@hilton.com; jwilhelm@unitehere.org
Subject:	Welcome and congratulations

Dear Stan,

As we discussed by phone, the National Retirement Fund Board approved Horizon's appointment as its actuary this afternoon.

As I described, we also approved Cheiron as consultants for the adjustable pension plan adoption and transition.

Your contact for the transition is Richard Rust. The next Trustees meeting is in NYC on February 6th, 2014. We look forward to along and successful relationship with you and Horizon.

Sincerely,

Jim Brubaker, CEO
Carlisle Etcetera LLC
423 West 55th Street, 3rd Floor
New York NY 10019
212-246-2555 ext 3566
www.carlislecollection.com
www.etcetera.com
Creating exceptional clothes to empower outstanding women

Exhibit E

NATIONAL RETIREMENT FUND
BOARD OF TRUSTEES

June 6, 2014

A meeting of the Board of Trustees of the National Retirement Fund was held on Thursday, June 5, 2014 at the Omni Providence Hotel located at One Exchange Street, Providence, RI.

Trustees Present:

Paul Ades
John Agnello
Noel Beasley
Richard Betty
William Biggerstaff
Harold Bock
Gary Bonadonna – on phone
James Brubaker – Chairman
James Claus
Donna DeCaprio
Richard Ellis - on phone
Enrique Fernandez
John Fowler
Lynne Fox
Bill Granfield
Tod Greenfield
Jean Hervey – on phone
Warren Heyman
Marvin Jones
Arnold Karr
Julie Kelly
Robert Kovacs
Wilfredo Larancuent
Peter Lindenmeyer
Desmond Massey
C. Robert McDevitt
Brian McGrath
David Melman
Richard Monje
Homi Patel
Warren Pepicelli
Harris Raynor
Edgar Romney
Richard Rumelt
Henry Tamarin
Steven Thomas
Cristina Vazquez
Timothy Weiler – on phone
John Wilhelm
Teresa Wood

Also Present:

Chris Bohner
Karen Bourget
William Josem Esq.
Fiona Liston

Jaimie Davis, Esq. – on phone
Ellen R. Dunkin, Esq.
Jonathan Feldman
John Fiore, Esq.
Stan Goldfarb
Richard Hudson
Ian Jones
Peter Jones
Paul Mallen
Joel Mueller
Ronald Richman, Esq.
Richard Rust
Victona Sartor
David Walsh
Tara Zanni

A quorum being present, the meeting was called to order by Chairman Brubaker at 9:25 AM/ET.

REST OF PAGE 2 REDACTED

PAGES 3, 4, AND 5 REDACTED

VII. ACTUARIAL UPDATE/ REHABILITATION PLAN

Jonathan Feldman and Stan Goldfarb from Horizon Actuarial gave the actuarial update, and referred to a report, a copy of which is annexed to the original of these minutes as Exhibit D. Mr. Feldman reported on the actuarial liability match from the prior actuary, Buck Consultants, which is required under the law and must be achieved within 5%, has now been completed and the match was within the acceptable limit. Mr. Feldman then discussed the margin, which is the expected contribution less the actuarial cost, within the Fund. Horizon compares that number with the expected contributions and if the costs are less than the contributions, there is a positive margin. He reported that there was positive margin in the Fund. Mr. Goldfarb then reviewed various different interest rate assumption scenarios for the Board.

REDACTED

Mr. Feldman informed the Trustees that effective for employer withdrawals occurring on or after January 1, 2014 the PBGC interest rates will be used to calculate withdrawal liability estimates and assessments. A discussion followed regarding the calculation of withdrawal liability.

REST OF PAGE 6 AND PAGES 7, 8 AND 9 REDACTED

BEGINNING OF PAGE 10 REDACTED

XVI. ADJOURNMENT

There being no further business before the Trustees upon motion duly made, seconded and unanimously carried, the meeting was adjourned at 12:15 pm ET.

/s/ Ellen R. Dunkin
Ellen R. Dunkin

Exhibit F

HORIZON ACTUARIAL SERVICES, LLC
[LETTERHEAD]

Memo

Date:	October 3, 2014
To:	Trustees of the National Retirement Fund
cc:	Richard Rust and Ron Richman
From:	Stan Goldfarb and Jonathan Feldman
Phone:	(240) 247-4512 and x4514
Subject:	**Withdrawal Liability Assumption Change**

By law, it is the actuary's responsibility to set the actuarial assumptions and methods used to determine withdrawal liability. After careful consideration, we have decided to change the withdrawal liability interest rate assumption for the Legacy Plan of the National Retirement Fund (the Plan) while the Plan is in the Red Zone. Starting in 2014, we are changing from the prior actuary's valuation interest rate of 7.25% to the interest rates used by the PBGC for mass withdrawals. Thus, employers who withdraw from the Plan in 2014 or later will be impacted by the interest rate change. This memo describes the impact of this change on withdrawal liability and the reasons for making the change. While this was a difficult decision to make, We feel it is actuarially correct, and in the best interest of the Plan, its participants, and participating employers.

Impact on Withdrawal Liability

Withdrawal liability is an allocation of the Plan's unfunded vested benefit liability (UVB) to withdrawing employers. The UVB of the Plan is calculated as of the last day of the Plan Year prior to the year of withdrawal and is equal to the present value of vested benefits (PVVB) minus the market value of assets. Thus, for an employer that withdraws from the Plan during 2014, withdrawal liability is calculated based on the Plan's UVB as of December 31, 2013. Please note that the Pension Protection Act of 2006 (PPA) requires the Plan's UVB to be determined as if adjustable benefits had not been reduced. in other words, PPA recognizes that a critical status (Red Zone) plan needs to be treated differently.

PBGC interest rates change monthly and are based on the rates insurance companies use to settle liabilities. As of December 31, 2013, the PBGC interest rates are 3.00% for the first 20 years and 3.31% beyond 20 years. As the interest rates used to calculate a liability decrease, the liability increases, and as the interest rates increase, the liability decreases.

The Plan's PVVB as of December 31, 2013, calculated using the PBGC interest rates described above, is roughly $6.4 billion versus roughly $3.8 billion calculated using 7.25% interest. This represents an increase of $2.6 billion, or 70%. The Plan's market value of assets as of December 31, 2013 is roughly $2.4 billion. Thus, the Plan's UVB as of December 31, 2013, calculated using PBGC interest rates, is roughly $4.0 billion versus roughly $1.4 billion calculated using 7.25% interest. This also represents an increase of $2.6 billion, but due to leveraging, the percentage increase to the UVB is 185%.

Reasons for Making the Change

Historically, the Plan has used the valuation interest rate assumption of 7.25% to determine the PVVB and this is a reasonable assumption for an ongoing, healthy plan. This presumes that for each employer that leaves the Plan, another employer will join, and having employers leave will not seriously hurt the Plan. However, given the information available to us at this time, the future of the Plan is not clear. For example:

- The active population has declined each year since the last big merger in 2007 (a decline of about 13%)
- The Plan is in the Red Zone and the Trustees have determined that they have taken all reasonable measures with regard to the Legacy Plan and that it will not recover within the legally designated rehabilitation period. With future benefit accruals going into the new Adjustable Plan, it is too soon to know how well the Legacy Plan's revised Rehabilitation Plan will work.
- As of January 1, 2014, the Plan's market value funded percentage calculated on an ongoing funding basis was 66% with an unfunded actuarial accrued liability (UAAL) of $1.2 billion. Starting on January l, 2015, every dollar contributed to the Legacy Plan will goes towards paying operating expenses and paying off the UAAL. It is vital that the Plan retain as many employers as possible to maintain its contribution base.

To put this last point in another perspective, for each dollar that is not received from a withdrawing employer, the remaining employers will collectively need to contribute an additional $1.00 to help pay the

Plan's operating expenses and pay off the unfunded liabilities, all for benefits earned in the past. Once an employer has withdrawn and been assessed, the Plan cannot go after additional money from that employer – there are no second chances.

Lastly, but also importantly, when an employer withdraws from a multiemployer pension plan, that employer transfers investment risk to the remaining employers. Thus, we think it is reasonable to use a lower interest rate assumption to account for the transfer of investment risk from withdrawing employers to continuing employers.

For an ongoing plan that provides benefit accruals, we would be concerned that this change may make it more difficult to get new employers to participate in the Plan. However, since the Legacy Plan will not accept new employers, we do not have this concern. New employers will go into the Adjustable Plan, which is designed to minimize the chance of withdrawal liability emerging.

Conclusion

It is our hope that the Rehabilitation Plan will work as expected and that the Plan will recover and all promised benefits will be paid when due. As discussed earlier, the withdrawal liability assumptions for a healthy ongoing plan typically differ from those where the plan's future is uncertain. Given that benefits will no longer accrue under the Plan, we don't think it is reasonable to use the interest rate assumption of an ongoing healthy plan for withdrawal liability purposes. Thus, the change to use PBGC interest rates for withdrawal liability purposes.

As actuaries to the Plan, our primary responsibility is to the wellbeing of the Plan and its participants, and we believe that making the change from the valuation interest rate assumption to PBGC interest rates for the determination of withdrawal liability makes the most sense at this time.