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OPINIONS AND ORDERS

REHEARING ORDER

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (OCTOBER 28, 2022)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GCIU-EMPLOYER RETIREMENT FUND; BOARD OF TRUSTEES OF THE GCIU EMPLOYER RETIREMENT FUND,

Plaintiffs-Appellants / Cross-Appellees,

v.

MNG ENTERPRISES, INC., DBA Digital First Media,

Defendant-Appellee / Cross-Appellant.

Nos. 21-55864, 21-55923

D.C. No. 2:21-cv-00061-PA-JEM

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted August 29, 2022
Pasadena, California

Before: Milan D. SMITH, JR. and Ryan D. NELSON, Circuit Judges, and Gershwin A. DRAIN,* District Judge.

Opinion by Judge R. Nelson

OPINION

R. NELSON, Circuit Judge:

The Multiemployer Pension Plan Amendments Act of 1980 imposes liability on employers who withdraw —partially or completely—from multiemployer pension funds. That liability assessment is based on "the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1). After a complete withdrawal, GCIU-Employer Retirement Fund's (GCIU) actuary calculated MNG Enterprise's (MNG) withdrawal liability using an interest rate published by the Pension Benefit Guaranty Corporation. The actuary also accounted for the contribution histories of two newspapers that MNG had acquired several years before its complete withdrawal.

On MNG's challenge, an arbitrator found (1) that MNG could not be assessed partial withdrawal liability following a complete withdrawal, (2) that it had shown the interest rate used was not the best estimate of the plan's experience, and (3) that GCIU properly included the newspapers' contribution histories. The district court affirmed the arbitrator's award, vacating and correcting only a typographical error on the interest rate. We partially affirm, partially vacate,

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* The Honorable Gershwin A. Drain, United States District Judge for the Eastern District of Michigan, sitting by designation.

and remand for the district court to decide whether successor liability would apply to MNG at the time of the asset sales.

I

A

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA) to ensure that pensions maintain sufficient funding to pay pensioners' benefits. 29 U.S.C. § 1001(a). ERISA's minimum funding standards require employers to contribute enough assets to pension plans to cover future liabilities. *See* 26 U.S.C. § 412(a). ERISA also provides for withdrawal liability. *See* 29 U.S.C. § 1364. Under the old rules, that liability did not kick in until the plan became insolvent—once it was insolvent, ERISA imposed liability on "any employer who had withdrawn from the plan during the previous five years" for their "fair share of the plan's underfunding." *Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414, 416 (1995).

Before the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), multiemployer pension plans faced special problems. For instance, employers participating in a multiemployer plan could withdraw without triggering the liability provisions. *See United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.*, 39 F.4th 730, 734 (D.C. Cir. 2022). As employers withdrew, the fund's assets shrank; in turn, the remaining employers had to contribute more to meet the minimum funding standards. *Id.* at 734–35. This created a vicious cycle: as soon as a plan was at risk for underfunding, employers would withdraw

and risk the possibility of later liability rather than take on the certainty of increased contributions in the meantime. *Milwaukee Brewery*, 513 U.S. at 416–17.

The MPPAA aimed to solve these problems by imposing withdrawal liability on employers when they withdrew from the plan rather than up to five years down the road. 29 U.S.C. § 1381(a). And that liability would cover "the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of the vested benefits and the current value of the plan's assets." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 217 (1986); *see also* 29 U.S.C. §§ 1381(b), 1391. Both complete and partial withdrawals trigger withdrawal liability. *See* 29 U.S.C. § 1381(a), 1383, 1385.

Pension plans now have rules explaining "how to determine a plan's total underfunding" and "how to determine an employer's fair share" of that underfunding. *Milwaukee Brewery*, 513 U.S. at 417–18. The MPPAA gives the plan sponsor initial responsibility to determine an employer's withdrawal liability. 29 U.S.C. § 1382(1). The plan actuary must use "actuarial 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." § 1393(a)(1). After determining the amount of liability, the plan must notify the employer "[a]s soon as practicable" and then collect the amount. §§ 1382(2)–(3), 1399(b)(1).

When an employer sells its assets and withdraws from the pension plan, it ordinarily incurs liability

for a complete withdrawal. *See* §§ 1381(a), 1383(a), 1384(a). The obligation to pay that liability usually remains with the selling employer. *Heavenly Hana LLC v. Hotel Union & Hotel Indus. of Haw. Pension Plan*, 891 F.3d 839, 842 (9th Cir. 2018). Under common law, courts have equitable discretion to hold the purchaser responsible for that liability. *See Resilient Floor Covering Pension Tr. Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1084 (9th Cir. 2015). The common-law rule creating successor liability applies when the purchaser is (1) a successor and (2) has notice of the liability. *Heavenly Hana*, 891 F.3d at 843 (citation omitted). Even so, as "the origins of successor liability are equitable," courts apply successor liability only "when it is fair to do so[.]" *Id.* at 847 (internal quotation marks omitted) (quoting *Resilient Floor*, 801 F.3d at 1091).

If a dispute arises as to the amount of withdrawal liability, ERISA and the MPPAA mandate arbitration. 29 U.S.C. § 1401(a). Any party may then appeal the arbitrator's award to the proper United States district court. § 1401(b)(2).

B

MNG, the named party in this appeal, includes two smaller controlled groups, MediaNews Group and California Newspaper Partnership Controlled Group. In 2013, California Newspaper completely withdrew from GCIU. In 2014, MediaNews did the same, ending MNG's contributions to GCIU. In 2018, GCIU assessed against MediaNews a 2014 complete withdrawal and two subsequent partial withdrawals

for 2014 and 2015.[1] The 2014 partial withdrawal liability totaled $8,650,737 and the 2015 partial withdrawal, $4,229,840.

Previously in 2006, MediaNews acquired the assets of the *Torrance Daily Breeze*. Meanwhile, in 2007, California Newspaper acquired the assets of the *Santa Cruz Sentinel*. Both newspapers previously participated in GCIU and stopped contributing before MNG acquired them. Nothing in the record suggests that GCIU assessed withdrawal liability against the *Daily Breeze* or the *Sentinel* when they withdrew.

In calculating MNG's withdrawal liability, the plan actuary used the Pension Benefit Guaranty Corporation's (PBGC) published rate, which was around 4%. The actuary testified that the PBGC rate is based on a settlement-type obligation and does not account for the future experience of the plan. Generally, using the PBGC rate results in a higher amount of withdrawal liability because it assumes a lower rate of growth. The actuary also included the contribution histories of the *Daily Breeze* and the *Sentinel* in calculating liability.

MNG contested the 2014 and 2015 partial withdrawals, the use of the PBGC interest rate, and the inclusion of the newspapers' contribution histories. The parties proceeded to arbitration.

The arbitrator first found that MNG could not be liable for the partial withdrawals that occurred after it completely withdrew from GCIU. He reasoned

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[1] GCIU also assessed partial withdrawal liability against MediaNews for 2012 and 2013, but those withdrawals are not in dispute.

that no partial withdrawals could occur following a complete withdrawal and that MNG had completely withdrawn by the reported dates of the partial withdrawals. Next, the arbitrator found that MNG had shown that the actuary relied on unreasonable assumptions in deciding the interest rate for the withdrawal liability because the PBGC rate disregarded the experience of the plan and the expected returns on assets. He instead directed GCIU to recalculate liability with a 7% interest rate. Finally, the arbitrator held that GCIU properly included the contribution histories of the newspapers acquired by MNG because MNG was a successor that had notice of the liabilities.

Both parties sought judicial review. The district court affirmed the award, except with respect to the interest rate. Instead of the arbitrator's 7% interest rate, the district court ordered an 8% interest rate because it believed the arbitrator made a typographical error. On appeal, GCIU contends that the district court erred in affirming the arbitrator's award as to partial-withdrawal liability and the PBGC interest rate. MNG would have us affirm the district court on those issues but asks us to reverse the inclusion of the newspapers' contribution histories.

II

Title 29, section 1401(b)(2) authorizes judicial review to "enforce, vacate, or modify the arbitrator's award" in an MPPAA dispute. *See Trs. of Amalgamated Ins. Fund v. Geltman Indus., Inc.*, 784 F.2d 926, 928 (9th Cir. 1986). We presume that "findings of fact made by the arbitrator were correct," unless rebutted "by a clear preponderance of the evidence." § 1401(c). We review conclusions of law de novo, *Geltman Indus.*,

784 F.2d at 928–29, and applications of equitable relief for abuse of discretion, *Metal Jeans, Inc. v. Metal Sport, Inc.*, 987 F.3d 1242, 1244 (9th Cir. 2021). The standard of review for MPPAA arbitrations is notably less deferential than under the Federal Arbitration Act. *See Bd. of Trs. of the W. States Off. & Pro. Emps. Pension Fund v. Welfare & Pension Admin. Serv., Inc.*, 24 F.4th 1278, 1283 n.4 (9th Cir. 2022); *Cent. States, Se. & Sw. Areas Pension Fund v. Nitehawk Exp., Inc.*, 223 F.3d 483, 488 n.2 (7th Cir. 2000).

III

A

The MPPAA defines two types of withdrawals, complete and partial. A complete withdrawal occurs when an employer "permanently ceases to have an obligation to contribute under the plan," § 1383(a)(1), or when the employer "permanently ceases all covered operations under the plan," § 1383(a)(2). A partial withdrawal occurs when there is "a 70-percent contribution decline" or "a partial cessation of the employer's contribution obligation." § 1385(a). Section 1385 also specifies that a partial withdrawal will be treated as occurring "on the last day of a plan year." *Id.* The MPPAA provides a formula for calculating the 70-percent contribution decline that depends on the employer's contributions in the past 8 years. *See* § 1385(b)(1).

MNG contends that a partial withdrawal cannot occur after a complete withdrawal. We agree.

When interpreting statutes, the court "give[s] effect to the unambiguous words Congress actually used." *GCIU-Emp. Ret. Fund v. Quad/Graphics, Inc.*,

909 F.3d 1214, 1218 (9th Cir. 2018) (quotation omitted). Whether the language is plain depends on context and the overall statutory scheme. *King v. Burwell*, 576 U.S. 473, 486 (2015).

As with all statutory interpretation questions, "[w]e begin with the statutory text, and end there as well if the text is unambiguous." *Connell v. Lima Corp.*, 988 F.3d 1089, 1097 (9th Cir. 2021) (cleaned up). The MPPAA is unambiguous that neither of the two forms of partial withdrawal could follow a complete withdrawal. First, a "70-percent contribution decline" would always follow a complete withdrawal, rendering the distinction between complete and partial withdrawal meaningless. And we presume that Congress did not intend any part of the statute to be "superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (cleaned up). Specifying two types of withdrawal would hardly make sense if a partial withdrawal always followed a complete one.

So too for the second form of partial withdrawal. There cannot be "a partial cessation of the employer's contribution obligation" following a complete withdrawal. § 1385(a)(2). This is because the statute defines a complete withdrawal as a "permanent[]" cessation (1) of any obligation to contribute or (2) of all covered operations under the plan. § 1383(a). One cannot partially cease something after completely ceasing it. *See Cent. States, Se. & Sw. Areas Pension Fund v. Robinson Cartage Co.*, 55 F.3d 1318, 1321 n.1 (7th Cir. 1995) ("Partial withdrawal occurs when a contributing employer has not completely withdrawn

from the Fund but has undergone a long term reduction in its contribution base.").

Moreover, dictionary definitions highlight the difference between "partial" and "complete." Black's Law Dictionary contrasts "partial" with complete: it defines "partial" as "[n]ot complete; of, relating to, or involving only a part rather than the whole." *Partial*, *Black's Law Dictionary* (11th ed. 2019). It follows then that a partial withdrawal cannot follow a complete one as nothing is left to be withdrawn after the whole is removed.

Neighboring provisions also bolster our interpretation. Section 1386 provides that if an employer incurs partial withdrawal liability in one year, "any withdrawal liability of that employer for a partial or complete withdrawal from that plan in a subsequent plan year shall be reduced by the amount of any partial withdrawal liability" from the previous year. 29 U.S.C. § 1386(b)(1). This contemplates a partial withdrawal followed by either a partial or complete withdrawal. Turning to § 1387, which provides for reduction of complete withdrawal liability, the two subsections cover only the scenario in which an employer completely withdraws and then "subsequently resumes covered operations" or "renews an obligation to contribute[.]" 29 U.S.C. § 1387. Unlike § 1386, § 1387 does not provide that partial withdrawal liability following a complete withdrawal would be reduced by the earlier complete withdrawal. That partial withdrawals cannot follow a complete withdrawal explains the difference between these sections.

The statutory text and context support our plain textual reading that a partial withdrawal cannot follow a complete withdrawal when the employer has

not otherwise resumed operations or contributions. Thus, GCIU could not assess MNG for two partial withdrawals following its complete withdrawal.

B

The parties also dispute the actuary's interest rate assumption. The MPPAA directs the plan actuary to determine withdrawal liability based on "actuarial 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." § 1393(a)(1).[2] These actuarial assumptions approximate factors such as the "mortality of covered employees, likelihood of benefits vesting, and importantly future interest rates." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers*

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[2] Section 1393(a)(2) permits the actuary to use "actuarial assumptions and methods set forth in the corporation's regulations," but neither party argues that the PBGC (*i.e.*, "the corporation") had any applicable regulations in place when this dispute arose. GCIU does, however, argue that the court should consider a recently proposed PBGC regulation as persuasive authority. *See* Actuarial Assumptions for Determining an Employer's Withdrawal Liability, 87 Fed. Reg. 62316 (Oct. 14, 2022) (to be codified at 29 C.F.R. pt. 4213). That proposed regulation does not help GCIU here. While the regulation, if enacted, would permit plans to use the PBGC rate when calculating withdrawal liability, the regulation expressly invokes the PBGC's authority under subsection (a)(2) of § 1393 when doing so. Here, by contrast, GCIU must justify its actuary's assumptions under subsection (a)(1)—which, as indicated by the disjunctive "or" in that provision, is a separate path with separate requirements. The PBGC's proposed regulation, therefore, has no bearing on the question presented here; nor do we express any view on the validity of the proposed regulation.

Pension Tr. for S. Cal., 508 U.S. 602, 610 (1993). The plan's actuary uses these assumptions to compare the projected future payouts with the expected performance and determine the unfunded benefits. *Id.*

Within this calculation, the interest rate assumption is "arguably the most important." *Id.* at 633; *see also United Mine Workers*, 39 F.4th at 738–39. A higher interest rate yields a higher projected growth, meaning "the fund will not need as many assets today to pay liabilities in the future." *Sofco Erectors, Inc. v. Trs. of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407, 419 (6th Cir. 2021). On the other hand, a lower interest rate requires more assets to pay off future liabilities, which in turn increases the underfunding amount and the withdrawal liability. *Id.*

GCIU's actuary used the PBGC interest rate to determine MNG's withdrawal liability. He testified that GCIU did not "take into consideration the future experience of the GCIU fund" or its "expected returns on the plan's funds as currently invested." The arbitrator concluded that the use of the PBGC rate did not comply with ERISA's requirements, and the district court agreed. We follow our sister circuits and interpret the statute to require that the actuary's assumptions and methods reflect the plan's characteristics. *United Mine Workers*, 39 F.4th at 738; *Sofco Erectors*, 15 F.4th at 422–23.

Though the statute appears to build in some leeway—using the term, "reasonable"—it specifies that these assumptions and methods must "tak[e] into account the experience of the plan and reasonable expectations" and "in combination, offer the actuary's best estimate of anticipated experience under the

plan." § 1393(a)(1). The "best estimate" language means that "the actuary must make assumptions based on the plan's particular characteristics when calculating withdrawal liability." *United Mine Workers*, 39 F.4th at 738. By ignoring the expected returns of the plan's assets and experience, the actuary's estimate fell short of the statutory "best estimate" standard because it was not tailored to the features of the plan. *See Sofco Erectors*, 15 F.4th at 421 ("While the actuary's true 'best estimate' deserves deference, it must be his 'best estimate of anticipated experience under the plan.'").

GCIU would have us hold that the district court erred in not considering the interest rate combined with other factors. In its view, the statute only requires the actuary's assumptions to be reasonable "in the aggregate" and to offer the best estimate "in combination" with other assumptions. So GCIU contends that the interest rate does not need to individually account for the plan's unique characteristics so long as the combination of assumptions and methods produces the best estimate of the plan's anticipated experience.

But we cannot ignore the statutory language directing the actuary to offer "the best estimate of anticipated experience *under the plan*." § 1393(a)(1) (emphasis added). While actuaries may reasonably disagree as to the exact interest rate that best accounts for the plan's experience and anticipated returns, "the discount rate assumption cannot be divorced from the plan's anticipated investment returns." *United Mine Workers*, 39 F.4th at 740. GCIU's actuary testified that the PBGC rate ignores the expected returns on the plan's assets. Because

that rate overlooks the plan's expected returns, it does not satisfy the "best estimate" standard.

Again, the statutory context supports our interpretation. When calculations need not account for plan experience, ERISA is clear. The minimum funding provision, for example, states that the interest rate "shall be . . . determined without taking into account the experience of the plan." 29 U.S.C. § 1084(c)(6)(E)(iii)(I). This bolsters our interpretation that the "best estimate" language requires a more tailored interest rate. *See United Mine Workers*, 39 F.4th at 738 (presumption of meaningful variation).

Our decision accords with *Citrus Valley Estates, Inc. v. Commissioner*, 49 F.3d 1410, 1414 (9th Cir. 1995). There, the Commissioner of Internal Revenue appealed a Tax Court judgment holding that the actuary may conservatively estimate actuarial assumptions in hopes of increasing initial plan funding. *Id.* at 1413. In the Commissioner's view, "best estimate" required a neutral assessment and the actuary's use of a conservative estimate was not neutral. *Id.* at 1414. We disagreed with the Commissioner and explained that "[t]he 'best estimate' language is 'principally designed to ensure that the chosen assumptions actually represent the actuary's own judgment rather than the dictates of plan administrators or sponsors.'" *Id.* (citation omitted). But we did not reach whether a "best estimate" had to account for the specific characteristics of a plan because that issue was not presented. Indeed, the *Citrus Valley* actuary arguably *did* account for the plan's particular features in his calculations. *See id.* at 1413 (Tax Court noted that

the plans were new and "lack[ed] credible experience," rendering conservative estimates more appropriate).[3]

We accordingly hold that the actuary's use of the PBGC rate—without considering the "experience of the plan and reasonable expectations"—did not satisfy the "best estimate" standard.[4]

C

Finally, the parties dispute whether the newspapers' contribution histories should be included. When a participating employer sells its assets, any of its liabilities, including for withdrawals, generally remain with the employer. *See Heavenly Hana*, 891 F.3d at 842. If, however, the purchaser is (1) a successor and (2) has notice of the withdrawal liability, then a court may use its equitable discretion to hold the purchaser liable. *Resilient Floor Covering*, 801 F.3d at 1084. A district court abuses its discretion in awarding equitable relief where it "base[s] its ruling on an erroneous view of the law" or "on a factual finding that was 'illogical, implausible, or without support in inferences that may be drawn from the record.'" *Teutscher v. Woodson*, 835 F.3d 936, 942 (9th Cir.

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[3] In its reply, GCI J argues for the first time that the district court erred in fixing the typographical error increasing the interest rate from 7% to 8%. "The court 'will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief.'" *Clark v. Time Warner Cable*, 523 F.3d 1110, 1116 (9th Cir. 2008) (quoting *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998)). Because GCI J failed to raise this argument earlier, we do not consider it.

[4] We express no view on an actuary's use of the PBGC rate as a starting point or a component in a blended rate.

2016) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262–63 (9th Cir. 2009) (en banc)).

MNG argues that the contribution histories of the *Daily Breeze* and the *Sentinel* should not have been included in calculating its withdrawal liability. GCIU assessed liability in 2018 for MNG's own withdrawals from the fund in 2013 and 2014. MNG acquired these newspapers more than a decade earlier in 2006 and 2007. The district court concluded MediaNews and California Newspaper were successors to the *Daily Breeze* and the *Sentinel*, respectively, and that both had notice of the potential liability.

We hold that the district court abused its discretion by not considering successor liability as of the asset sale dates in 2006 and 2007 and whether "it is fair" to impose this liability as of 2018. *Heavenly Hana*, 891 F.3d at 847. The record does not reflect whether GCIU determined MNG's liability with respect to the newspapers based on the total contribution as of MNG's complete withdrawal in 2014 or if GCIU determined that portion of liability based on the status of the asset sale dates in 2006 and 2007. Any withdrawal liability that the *Daily Breeze* or the *Sentinel* incurred would have existed at the time of the withdrawals, which occurred in 2006 and 2007. *See id.* at 843 ("The existence of unfunded vested benefit liabilities on the day of [employer's] withdrawal resulted in withdrawal liability for [employer] under the Act."). The date of those asset sales in 2006 and 2007, rather than 2014 when MNG completely withdrew, is the relevant date to determine whether MNG was a successor and whether the contribution histories should be equitably included. The district court must also consider whether "fairness could militate against

imposing successor liability" because this doctrine sounds in equity. *Resilient Floor*, 801 F.3d at 1091.

In reaching this conclusion, we express no opinion on whether successor liability should apply. We hold only that the asset sale dates in 2006 and 2007 are the relevant time periods to determine any liability and whether to include the contribution histories. We thus vacate and remand for the district court to determine in the first instance whether MNG has successor liability and if GCIU correctly applied the newspapers' contribution histories at the time of the asset sales.

IV

The district court correctly held that GCIU improperly assessed liability for partial withdrawals after MNG completely withdrew and that GCIU erred in using the PBGC rate. But the district court should have considered the applicability of successor liability, including contribution histories, at the time of the asset sales. We vacate and remand for consideration of that question.

AFFIRMED IN PART; VACATED IN PART; AND REMANDED.

APPENDIX B

CIVIL MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (JULY 8, 2021)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

GCIU-EMPLOYER RETIREMENT FUND, ET AL.

v.

MNG ENTERPRISES, INC.

Case No. CV 21-00061 PA (JEMx)

Date: July 8, 2021

Present: The Honorable PERCY ANDERSON, United States District Judge.

Proceedings: IN CHAMBERS COURT ORDER

Before the Court are cross motions to affirm in part and vacate in part an arbitrator's award. (Dkt. No. 24 (defendant MNG Enterprises, Inc.'s ("Defendant") Motion); Dkt No. 25 (plaintiffs GCIU-Employer Retirement Fund and Board of Trustees of the GCIU-Employer Retirement Fund's ("Plaintiffs") Motion). Both Plaintiffs and Defendant filed an Opposition (Dkt. No. 26 (Defendant's Opposition); Dkt. No. 27 (Plaintiffs' Opposition)), and both sides filed a Reply (Dkt. No. 28 (Defendant's Reply); Dkt. No. 29 (Plaintiffs'

Reply)). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds these motions appropriate for decision without oral argument.

I. Background

This case concerns employer withdrawal liability under the Employee Retirement Income Security Act of 1974 ("ERISA), and the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). The MPPAA imposes liability on employers that withdraw from multiemployer pension plans. Defendant initiated arbitration proceedings after the GCIU-Employer Retirement Fund (the "Fund") assessed withdrawal liability against employers MediaNews Controlled Group ("MNG Controlled Group") and the California Newspaper Partnership Controlled Group ("CNP Controlled Group").

On December 31, 2012, MNG Controlled Group partially withdrew from the Fund. MNG Controlled Group again partially withdrew from the Fund on December 31, 2013. In February of 2014, MNG Controlled Group permanently ceased contributing to the Fund. The Fund calculated Defendant's withdrawal liability and sought payment for MNG Controlled Group's withdrawals under the MPPAA. The Plan also assessed liability against CNP Controlled Group when CNP Controlled Group completely withdrew from the Fund in June of 2013.

On May 30, 2018, the Fund issued withdrawal liability assessments against MNG Controlled Group and CNP Controlled Group. The Fund's calculation included an assessment against MNG Controlled Group for a 2014 Complete Withdrawal that occurred in

February of 2014, as well as liability for alleged partial withdrawals that occurred on December 31, 2014, and December 31, 2015.[1]

In addition, the Fund assessed liability against MNG Controlled Group based on the Fund contribution history of the Daily Breeze. The Daily Breeze last contributed to the Fund in 2005 when it was owned by Copley Press, Inc. On December 15, 2006, the Hearst Corporation and Copley Press, Inc. entered into a Stock and Asset Purchase Agreement wherein Hearst acquired the stock of National Media, Inc. and other assets of Copley Press, Inc., including the Daily Breeze. Simultaneous to the acquisition of the Daily Breeze, Hearst transferred the Daily Breeze to MNG Controlled Group pursuant to a prior agreement between Hearst and MNG Controlled Group. The Fund included the Daily Breeze contribution history in the calculation of the MNG Controlled Group's withdrawal liability.

On October 27, 2006, the Community Newspaper Group, LLC purchased the assets of the Santa Cruz Sentinel, Inc., including the Santa Cruz Sentinel newspaper. In February of 2007, CNP Controlled Group acquired 100% of the membership interest in Community Newspaper Group, LLC. The Fund included the contribution history of the Santa Cruz Sentinel prior to October 27, 2006 in the withdrawal liability calculation for CNP Controlled Group.

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[1] The Fund also assessed withdrawal liability against MNG Controlled Group for the partial withdrawals that occurred on December 31, 2012 and December 31, 2013. However, those withdrawal assessments are not in dispute.

Finally, on January 1, 1982, the Fund's actuary adopted 7% as the interest rate used in calculating the Fund's Withdrawal Liability Rate against MNG Controlled Group and CNP Controlled Group. This rate was based on the Premium Benefit Guarantee Corporation ("PBGC") rate.

After receiving the Notice of Withdrawal Liability and Demand for Payment, Defendant, on behalf of MNG Controlled Group and CNP Controlled Group, challenged the liability assessments and methodologies used to calculate those liabilities in arbitration. Defendant challenged three parts of the liability assessment. First, Defendant challenged the Fund's assessment against MNG Controlled Group for the 2014 and 2015 partial withdrawals, alleging that partial withdrawals could not occur at these times because MNG Controlled Group completely withdrew from the plan in February of 2014. Second, Defendant challenged the Fund's assessments against MNG Controlled Group and CNP Controlled Group based on the Fund's inclusion of the contribution histories for the Daily Breeze and Santa Cruz Sentinel, arguing such inclusion was improper. Third, Defendant challenged the 7% interest rate utilized in both the MNG Controlled Group and CNP Controlled Group assessments by the Fund's actuary to calculate the Fund's Withdrawal Liability Rate.

Both parties now petition this Court to affirm and vacate opposing portions of the arbitrator's award.

II. Legal Standard

The MPPAA provides for mandatory arbitration of disputes over withdrawal liability. 29 U.S.C. § 1401(a). For purposes of an arbitration brought

under ERISA § 4221, the arbitrator must reverse the plan sponsor's factual determinations . . . when the contesting employer "shows by a preponderance of the evidence that the [plan sponsor's] determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A).

"Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action . . . in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award." 29 U.S.C. § 1401(b)(2). "In any proceeding under subsection (b), 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 arbitrator's conclusions of law are reviewed de novo." *Penn Cent. Corp. v. W. Conference of Teamsters Pension Trust Fund,* 75 F.3d 529, 533 (9th Cir. 1996).

III. Analysis

A. The Arbitrator Correctly Determined that the Fund Improperly Assessed Liability Against MNG Controlled Group for Alleged Partial Withdrawals that Occurred on December 31, 2014 and December 31, 2015

The parties first dispute whether MNG Controlled Group should have been assessed liability for alleged partial withdrawals that occurred on December 31, 2014 and December 31, 2015. MNG Controlled Group completely withdrew from the Fund in February of 2014. The Fund assessed MNG Controlled Group

$8,650,737 for a partial withdrawal in December of 2014, and $4,229,840 for a partial withdrawal in December of 2015. The parties disagree as to whether the assessments for these partial withdrawals can be made despite MNG Controlled Group's complete withdrawal in February of 2014. The arbitrator determined that MNG Controlled Group could not be assessed for partial withdrawals that occurred after the date of MNG Controlled Group's complete withdrawal.

A multiemployer pension plan "typically covers the employees of two or more unrelated companies, usually engaged in the same type of business in the same geographic area-in accordance with a collective bargaining agreement." *Heavenly Hana LLC v. Hotel Union & Hotel Industry of Hawaii Pension Plan,* 891 F.3d 839, 843 (9th Cir. 2018). "The employees' unions negotiate employer contributions to support the pension plan." *Id.* Such plans are "generally governed by the [MPPAA]. *Id.* (citing 29 U.S.C. § 1301(a)(3)). The MPPAA provided "a series of amendments to ERISA aimed at minimizing 'the adverse consequences that resulted when individual employers terminate[d] their participation in, or withdr[e]w from, multiemployer plans.'" *Id.* (quoting *Tsareff v. ManWeb Servs., Inc.,* 794 F.3d 841, 845 (7th Cir. 2015)).

The MPPAA states that "[i]f an employer withdraws from a multiemployer plan in a complete or partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability." *Penn Cent. Corp. v. Western Conference of Teamsters Pension Trust Fund,* 75 F.3d 529, 531 (9th Cir. 1996) (citing 29 U.S.C. § 1381)). Under the MPPAA, an assessment of withdrawal

liability "ensure[s] that employees and their beneficiaries [are not] deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *Id.* If withdrawal occurs, the employer is required to pay its share of the plan's unfunded liabilities which are attributable to that employer's participation. *See* 29 U.S.C. § 1381-1391.

A withdrawal can be either partial or complete. A "partial withdrawal" occurs when the "employers obligation to contribute to the plan ceases under some but not all, of the [collective bargaining agreements ("CBAs")] by which it is bound." *Id.* (citing 29 U.S.C. § 1385(a)(2)). A "complete withdrawal" occurs when the "employer's obligation to contribute to the plan ceases under all CBAs by which it is bound." *Id.* (citing 29 U.S.C. § 1383(a)). "After the fund determines that a complete or partial withdrawal has occurred, the trustee must calculate the appropriate withdrawal liability assessment, following the statutory scheme outlined in the MPPAA." *Robbins v. Pepsi-Cola Metropolitan Bottling Co.,* 636 F.Supp. 641, 647 (N.D. Ill. May 8, 1986).

Here, the Court finds the arbitrator correctly determined that a partial withdrawal cannot occur after a complete withdrawal. The partial withdrawal dates at issue for MNG Controlled Group occurred on December 31, 2014 and December 31, 2015. Both of these dates were after MNG Controlled Group's complete withdrawal, which occurred in February of 2014. No partial withdrawal can be imposed after a complete withdrawal. *See Central States, Southeast and Southwest Areas Pension Fund v. Robinson Cartage Co.,* 55 F.3d 1318, 1321 n. 1 (7th Cir. 1995) (emphasis

added) ("Partial withdrawal occurs when a contributing employer *has not completely withdrawn from the* Fund."); *General Electric Company v. BoilerMaker-Blacksmith National Pension Trust,* 19-2780, 2020 WL 2113209, at *1 (D. Kans. May 4, 2020) (same).

Thus, the Court affirms the arbitrator's finding that the Fund improperly assessed withdrawal liability against MNG Controlled Group for alleged partial withdrawals that occurred on December 31, 2014 and December 31, 2015.

B. The Arbitrator Correctly Determined that the Fund Properly Included the Contribution History of the Daily Breeze and the Santa Cruz Sentinel in Calculating MNG Controlled Group and CNP Controlled Group's Liability

The parties next dispute whether the arbitrator correctly found that the contribution history of the Daily Breeze and the Santa Cruz Sentinel were appropriately included in calculating the withdrawal liability for MNG Controlled Group and CNP Controlled Group.

If an employer participating in a multiemployer plan "sells its assets, the asset purchaser may be liable for the employer's withdrawal from a multiemployer plan." *Heavenly Hana LLC,* 891 F.3d at 842. The "successorship doctrine . . . holds legally responsible for obligations arising under federal labor and employment statutes businesses that are substantial continuations of entities with such obligations.'" *Id.* (citing *Resilient Floor Covering Pension Trust Fund Bd. of Trustees v. Michael's Floor Covering* 801 F.3d 1079, 1090 (9th Cir. 2015)).

Here, the Daily Breeze last contributed to the Fund in 2005. In December of 2006, Hearst transferred the Daily Breeze to MNG Controlled Group through an asset purchase agreement. The Fund included the Daily Breeze's contribution history in calculating MNG Controlled Group's withdrawal liability. Similarly, in February of 2007, CNP Controlled Group, acquired 100% of the membership interest in Community Newspaper Group, LLC, which included the Santa Cruz Sentinel. The Fund included the contribution history for the Santa Cruz Sentinel in calculating the withdrawal liability for CNP Controlled Group.

The Court finds the arbitrator correctly concluded that the Daily Breeze's contribution history should have been included in MNG Controlled Group's withdrawal liability calculation. In addition, the Court finds the arbitrator correctly concluded that the Santa Cruz Sentinel's contribution history should have been included in CNP Controlled Group's withdrawal liability calculation. *See Heavenly Hana LLC,* 891 F.3d at 848 (reversing district court, and finding successor was responsible for its predecessor's withdrawal liability where, ten days before the deal closed, the predecessor stopped contributing to the fund which resulted in withdrawal liability against the predecessor, finding "courts have indicated that because ERISA (and the MPPAA) are remedial statutes, they should be liberally construed in favor of protecting the participants in employee benefit plans.").

Thus, the Court affirms the arbitrator's finding that the contribution history of the Daily Breeze and the Santa Cruz Sentinel were properly included in calculating MNG Controlled Group and CNP Controlled Group's liability.

C. The Arbitrator Correctly Found that the Fund's Actuary Failed to Comply with ERISA in Selection a 7% Interest Rate to Determine the Fund's Withdrawal Liability

Finally, in arbitration Defendant challenged the 7% interest rate used by the Fund's actuary in determining the amount of the MNG Controlled Group's withdrawal liability. When calculating an employer's withdrawal liability, a Fund's actuary must first calculate the multiemployer pension plan's liabilities for vested benefits and compare these liabilities to the Fund's assets. This results in the Fund's "unfunded vested benefits" or "UVB." This calculation requires actuarial assumptions that are governed by ERISA. ERISA states:

> Withdrawal liability under this part shall be determined by each plan on the basis of actuarial 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).

The interest rate is used to determine the present value of such liability because those obligations are due in the future, and the Fund's current assets will earn a return on investments in the interim. Measuring the Fund's vested liabilities therefore requires an estimate of the rate of return that the plan will earn on its invested assets. *See Sofco Erectors, Inc. v. Trs. of Ohio Operating Eng'rs Pension Fund,*

19-cv-02238, 2020 WL 2541970, at *1 (S.D. Ohio May 19, 2020). The higher the interest rate at which the assets will grow, the smaller the vested liabilities, and the smaller the unfunded vested benefits and the employer's withdrawal liability will be. *Id.*

The arbitrator determined that Rex Barker, the Fund's actuary, failed to comply with ERISA when he used the Premium Benefit Guarantee Corporation ("PBGC") rate to determine Defendant's withdrawal liability. The Court agrees. Mr. Barker's deposition was taken on February 25, 2020. At his deposition, Mr. Barker testified that since December 31, 2011, the Fund has used the published PBGC interest rate to determine the Fund's Withdrawal Liability Rate. (*See* Barker Dep. at 24: 7-25.) He further testified that the Fund's use of the PBGC interest rate as its Withdrawal Liability Rate does not take into consideration reasonable future expectations of the Fund. (*Id.* at 27: 3-12.) ('And do do the PBGC rates reflect today what the plan expects to earn on its future investments? Not as they are currently vested."). Thus, Mr. Barker failed to comply with ERISA, which requires that withdrawal liability take into account the experience of the plan and reasonable expectations. *See Sofco Erectors,* 2020 WL 2541970, at *8 (finding fund's use of the "Segal Blend" interest rate to determine the amount of the plan's unfunded vested benefits was improper because the Segal Blend did not take into account the experience of the plan and reasonable expectations); *see also New York Times Company v. Newspaper and Mail Deliverers' Publishers' Pension Fund,* 303 F.Supp.3d 236, 255 (S.D.N.Y. 2018) (finding that "if 7.5% was the Fund actuary's 'best estimate,' it strains reason to see how the Segal

Blend, a 6.5% rate derived by blending the 7.5% 'best estimate' assumption with lower, no-risk PBGC bond rates, can be accepted as the anticipated plan experience.")

In addition, the Court agrees with Defendant that the actuary should have used an 8% interest rate, which was the actuary's "best estimate" of the Fund's minimum funding rate during the withdrawal years, *i.e.* the rate they anticipated the plan assets would grow. (*See* Dkt. No. 24 Ex. L at 96 (8% rate); Ex. M at 101 (same); Ex. N at 106 (same)).

CONCLUSION

For the reasons stated above, the Court affirms in part and vacates in part the arbitrator's decision.

The Court affirms the arbitrator's finding that the Fund improperly assessed withdrawal liability against MNG Controlled Group for alleged partial withdrawals that occurred on December 31, 2014 and December 31, 2015.

The Court affirms the arbitrator's finding that the Fund correctly included the contribution history of the Daily Breeze and the Santa Cruz Sentinel in calculating the MNG Controlled Group and CNP Controlled Group's liability.

The Court affirms the arbitrator's decision that the Fund's actuary failed to comply with ERISA when selecting assumptions for determining liabilities for MNG Controlled Group's withdrawal liability calculation.

The Court finds that the arbitrator made a transcription or typographic error in his conclusion

when he stated that the 7% interest rate for withdrawal liability determined by the Fund's actuary should be used. Instead, an 8% interest rate, which was the Fund's minimum funding rate during the withdrawal years, *i.e.* the rate they anticipated the plan assets would grow, should be used.

IT IS SO ORDERED.

APPENDIX B1

JOINT STIPULATION FOR ISSUANCE OF JUDGMENT (AUGUST 2, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

GCIU-EMPLOYER RETIREMENT FUND, ET AL.,

Plaintiffs/

Counter-Defendants,

v.

MNG ENTERPRISES, INC.,
D/B/A DIGITAL FIRST MEDIA,

Defendant/
Counter- Plaintiff.

Case No. 2:21-cv-00061-PA-JEM

JOINT REQUEST FOR ENTRY OF JUDGMENT

Plaintiffs/Counter-Defendants, GCIU-Employer Retirement Fund and the Board of Trustees of the GCIU-Employer Retirement Fund (collectively the "Plan"), and Defendant/Counter-Plaintiff MNG Enterprises, Inc. ("MNG Enterprises") hereby submit their Request for Entry of Judgment pursuant to Federal Rule of Civil Procedure 58(d) as follows:

1) On July 8, 2021, the Court issued a Minute Order Affirming in part and vacating in part the Arbitrator's Award in response to the Cross-Motions to affirm in part and vacate in part an arbitrator's award (*See* ECF Nos. 33, 25 & 24).

2) Pursuant to Federal Rule of Civil Procedure 58(d), Plaintiffs/Counter-Defendants and Defendant/Counter-Plaintiff respectfully request that judgment be entered in a separate document in accordance with the Court's Minute Order Issued on July 8, 2021 (ECF No. 33).

Respectfully Submitted,

KRAW LAW GROUP, APC

By: /s/ Michael Korda
MICHAEL KORDA
Counsel for the Plaintiffs / Counter-Defendants

Dated: August 2, 2021

AKIN GUMP STRAUSS HAUER & FELD LLP

By: /s/ Eric D. Field
ERIC D. FIELD
Counsel for the Defendant / Counter-Plaintiff

Dated: August 2, 2021

SIGNATURE ATTESTATION

The filer hereby attests that he obtained the consent of all signatories hereto to the execution of their electronic signatures and the filing of this document.

/s/ Michael J. Korda
Michael J. Korda

Date: August 2, 2021

APPENDIX B2

ENTRY OF JUDGMENT
(AUGUST 2, 2021)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GCIU-EMPLOYER RETIREMENT FUND, ET AL.

Plaintiffs,

v.

MNG ENTERPRISES, INC.,

Defendant.

Case No. CV 21-00061 PA (JEMx)

Present: The Honorable PERCY ANDERSON,
United States District Judge.

JUDGMENT

Pursuant to the Court's July 8, 2021 Order Affirming in Part and Vacating in Part the Arbitrator's Award (Dkt. No. 33), and the parties' Joint Request for Entry of Judgment (Dkt. No. 34), it is hereby Ordered, Adjudged, and Decreed that:

1. The Arbitrator's finding that the Fund improperly assessed withdrawal liability against MNG Controlled Group for alleged partial withdrawals that occurred on December 31, 2014 and December 31, 2015 is affirmed;

2. The Arbitrator's finding that the Fund correctly included the contribution history of the Daily Breeze and the Santa Cruz Sentinel in calculating the MNG Controlled Group and CNP Controlled Group's liability is affirmed;

3. The Arbitrator's finding that the Fund's actuary failed to comply with the Employee Retirement Income Security Act when selecting assumptions for determining liability for MNG Controlled Group's withdrawal liability calculation is affirmed; and

4. The Arbitrator made a transcription or typographical error in his conclusion when he stated that the 7% interest rate for withdrawal liability determined by the Fund's actuary should be used. An 8% interest rate should be used.

/s/ Percy Anderson
United States District Judge

Dated: August 2, 2021

APPENDIX C

ARBITRATION AWARD
(JANUARY 5, 2021)

AMERICAN ARBITRATION ASSOCIATION

MNG ENTERPRISES, INC.,
D/B/A DIGITAL FIRST MEDIA,

Claimant,

v.

GCIU-EMPLOYER RETIREMENT FUND,

Respondent.

No. 01-19-0000-3648

Before: Bruce E. MEYERSON, Arbitrator.

AWARD

An arbitration hearing was held in this matter on October 22, 2020. Both parties were represented by counsel. I have considered the argument of counsel, the evidence presented at the hearing, the parties' post-hearing submissions, including the parties' comments on the draft Award, and the entire record in this proceeding. Three issues are presented in this arbitration:

1. Whether the GCIU-Employer Retirement Fund (the "Fund)" may include in the withdrawal liability assessment for MNG Enter-

prises, Inc. ("MNG") assessments for 2014 and 2015 partial withdrawals.

2. Whether the Fund properly took into account the contribution history of the Torrance Daily Breeze and Santa Cruz Sentinel newspapers in the calculation of MNG's withdrawal liability

3. Whether the actuarial assumptions used by the Fund's actuary met the requirements of 29 U.S.C. § 1393(a),

DISCUSSION

1. Partial Withdrawals

MNG completely withdrew from the Fund in February 2014. The Fund has assessed MNG $8,650,737 for a 2014 partial withdrawal and $4,229,840 for a 2015 partial withdrawal. The parties disagree on whether the assessments for these partial withdrawals may be made despite MNG's complete withdrawal in February 2014.

The date of a partial withdrawal is determined on the last day of the plan year for which a plan finds the employer has partially withdrawn; however, there is a three-year testing period that immediately precedes that plan year. Because the three-year testing period commenced prior to the complete withdrawal from the Fund by MNG, the Fund contends it could properly assess partial withdrawal liability for the 2014 and 2015 partial withdrawals. Although the calculation of the assessment for a partial withdrawal is certainly a factual assessment, the question of whether a partial liability assessment can be imposed after a

complete withdrawal is a purely legal question to which I must "follow applicable law." *See* 29 C.F.R. § 4221.5 (a)(1). However, neither party has cited a case or other authority that definitively answers the question.

A partial withdrawal occurs when there is a 70% contribution decline for a given plan year. A 70% contribution decline occurs for a plan year if, during that year and the two years immediately preceding (the so-called "three-year testing period"), the employer's contributions do not exceed 30 percent of its contributions for the high base year. 29 U.S.C. §§ 1385(b)(1)(A) and 1385(b)(1)(B)(i). The contribution for the high base year is the average of the two high contribution years within the five plan years immediately preceding the beginning of the three-year testing period. *Id.* at § 1385(b)(1)(B)(ii). An employer is subject to partial withdrawal liability at the end of the third year of the three-year testing period. *Cent. States, Se. & Sw. Areas Pension Fund v. Robinson Cartage Co.,* 55 F.3d 1318, 1321 (7th Cir. 1995). Thus, with respect to the 2014 and 2015 partial withdrawals, MNG became subject to partial withdrawal liability as of December 31, 2014, and December 31, 2015. Because these dates followed MNG's complete withdrawal in February 2014, it contends it should not be subject to assessments for the partial withdrawals. I agree for the following reason.

A 70% partial withdrawal is measured on the last day of the plan year for which a pension plan determines whether the employer has partially withdrawn. *Caesars Entm't Corp. v. IUOE Local 68 Pension Fund,* 2018 WL 3000176, at *6 (D.N.J. June 15, 2018) December 31, 2014, and December 31, 2015, are the dates for which the 2014 and 2015 partial

withdrawals would be determined. Because those dates were after the February 2014 complete withdrawal by MNG, no partial withdrawal liability for the 2014 and 2015 partial withdrawals could be imposed. *See Cent. States, Se. & Sw. Areas Pension Fund v. Robinson Cartage Co.,* 55 F.3d at 1321 n.1 ("Partial withdrawal occurs when a contributing employer has not completely withdrawn from the Fund. . . . "); *see also Gen. Elec. Co. v. BoilerMaker-Blacksmith Nat'l Pension Tr.,* 2020 WL 2113209, at *1 (D. Kan. May 4, 2020).

2. Contribution History of the Torrance Daily Breeze and Santa Cruz Sentinel

A. Torrance Daily Breeze

MNG contends the Fund erred by including the contribution history of the Torrance Daily Breeze (the "Daily Breeze") in the calculation of its withdrawal liability payment. The Daily Breeze last contributed to the Fund in 2005. The following year in December, the Hearst Corporation acquired the assets of the Daily Breeze from Copley Press, Inc. ("Copley") in the Stock and Asset Purchase Agreement (the "Agreement").[1] Concurrently with that transaction, the assets of the Daily Breeze were transferred to Hearst Torrance Holdings, LLC, an entity owned by MediaNewsGroup, Inc., a part of the MNG Controlled Group. MNG argues the Daily Breeze's contribution history stayed with Copley because (1) Copley withdrew from the Fund before Hearst acquired the Daily

[1] Although Agreement provides for the sale of the stock of National Media, Inc to Hearst, the Agreement provides that as to the Daily Breeze, Hearst acquired the assets of that paper.

Breeze,[2] and (2) Hearst only acquired the assets of the Daily Breeze.

As to MNG's argument it should not assume the contribution history of the Daily Breeze because it only acquired the assets of that paper, MNG will have successor liability where it is a successor and has notice of any withdrawal liability. *Heavenly Hana LLC v. Hotel Union & Hotel Indus. of Haw. Pension Plan,* 891 F.3d 839 (9th Cir. 2018). Contrary to the argument of MNG that a determination of successorship is outside my "jurisdiction," in *Sofco Erectors, Inc. v. Trustees of Ohio, Operating Engineers Pension Fund,* 2020 WL 2541970, at *10 (May 19, 2020), the court affirmed a determination by the arbitrator that Sofco is "Old Sofco's successor employer with respect to its collective bargaining and employee benefit obligations." As MNG has offered no evidence the business of the Daily Breeze did not continue after the acquisition by Hearst,[3] it must be assumed from the record MNG is a successor to the Daily Breeze. As to the second element, the Fund is correct; MNG had notice of the potential withdrawal liability of the Daily Breeze as that is specifically referred to in the Agreement.

Finally, MNG points out the Agreement provided Copley was to retain all liabilities, including withdrawal liability, as it might pertain to the Daily Breeze's

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[2] There is no evidence in the record to support MNG's assertion Copley withdrew from the Fund before Hearst acquired the assets of the Daily Breeze.

[3] In its closing brief, MNG states the "record is void of any evidence on this issue." But as the burden is on MNG to disprove the Fund's determination, the lack of evidence militates against the position of MNG.

participation in the Fund. But the Fund correctly argues it was not a party to that Agreement, and therefore is not bound by its terms, The Fund is correct that "section 1392(c) imposes statutory liability for evasion or avoidance 'without regard' to the terms of the Agreement. *See Operating Eng'rs & Pension Tr. Fund v. W. Power & Equip. Corp.,* 2011 WL 2516775, at *4 (N.D. Cal. June 23, 2011).

Based on the record, I conclude MNG has successor liability with respect to its acquisition of the assets of the Torrance Daily Breeze.

B. Santa Cruz Sentinel

In October 2006, Community Newspaper Group, LLC bought the assets of a number of publications, including the Santa Cruz Sentinel (the "Sentinel"). In February 2007 these assets were sold to the California Newspaper Partnership. The parties have stipulated the California Newspaper Partnership is part of the MNG Controlled Group.

MNG's argument to exclude the contribution history of the Sentinel from the Fund's calculation of withdrawal liability is that the acquisition of the Sentinel by the California Newspaper Partnership was the result of an asset sale. But, as noted above, where there is continuity of operations between the seller and buyer, there will be successor liability, even in the case of an asset sale. *See New York State Teamsters Conference Pension & Ret. Fund v. C&S Wholesale Grocers, Inc.,* 448 F.Supp.3d 188, 193 (N.D.N.Y. 2020). And contrary to the argument of MNG, a determination of successorship is not outside my "jurisdiction." *Sofco Erectors, Inc. v. Trustees of Ohio, Operating Engineers Pension Fund,* 2020 WL

2541970, at *10. As MNG has offered no evidence the business of the Sentinel did not continue after its sale in 2006, the existence of the asset sale does not preclude the Fund from considering the Sentinel's contribution history in setting withdrawal liability for MNG.

And, unlike the situation involving the Daily Breeze, nothing in the record indicates that as part of the acquisition of the Sentinel by the Community Newspaper Group LLC, contribution history and withdrawal liability were not to be transferred. Thus, MNG's claim regarding the Sentinel is denied.

3. Actuarial Assumptions

ERISA requires that in calculating an employer's withdrawal liability, a plan's actuary must use "actuarial 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). The Fund presented the testimony of its actuary, Rex Barker, who explained that as the Fund's actuary, his employer, Milliman, has used the PBGC published rate for similar calculations for over eight years.[4] He testified the actuarial literature states it is reasonable to use the PBGC rate to determine withdrawal liability. Although no witness testified for MNG, it argues the PBGC rate does not

[4] The PBGC rate is published by the Pension Benefit Guaranty Corporation; it would be substantially less than 7%. https://www.pbgc.gov/prac/interest/monthly.

take into account the Fund's past experience or reasonable expectations about the future.

Mr. Barker testified for the past several years the funding rate he has used was 7%, although that rate is now under review.[5] According to Barker, the funding rate would typically look at the Fund's asset allocation along with capital market assumptions in order to determine what assets are expected to return over the long term, taking into account the asset classes and variability. On the other hand, Barker explained the PBGC rate is based on a "settlement-type obligation." He stated the PBGC rate does not take into consideration the future experience of the Fund. It is a rate an annuity insurer might use to price the annuity. By using the PBGC rate, instead of the funding rate, the employer's withdrawal liability assessment is greater. Thus, MNG objects to the use by the Fund of the PBGC rate.

Withdrawal liability is based on the calculation of a plan's unfunded vested benefits which is the value of vested benefits minus the value of plan assets. Interest rate assumptions are used in making this calculation. Under ERISA, a pension fund's interest rate is presumed reasonable unless the employer shows the actuarial assumptions were, in the aggregate, unreasonable, taking into account the experience of the plan and reasonable expectations. 29 U.S.C. § 1401(a)(3)(B). The Fund points out MNG presented no testimony to show that "Mr. Barker's UVB calcula-

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[5] In contrast to the 7% rate to which the actuary testified, in the current low interest rate environment, the PBGC rate could, in fact, meet the requirements of ERISA. However, that opinion was missing from the actuary's testimony.

tion would not have been acceptable to a reasonable actuary."

The Fund is, of course, correct, that the use of an interest rate for funding purposes can be different than the interest rate used for calculating withdrawal liability. And, the Fund is also correct, that it is the burden of the employer to disprove the actuary's methods and assumptions. *Concrete Pipes & Prods. v. Constr. Laborers Pension Trust,* 508 U.S. 602 (1993). As explained below, despite the fact MNG presented no actuarial witness of its own, it did meet its burden of proof through the testimony of the Fund's actuary. Nothing about this Award should be interpreted in the future as suggesting in any way an employer is relieved of its burden of disproving the determination of the Fund's actuary. My determination about the actuarial testimony is limited to the specific evidence presented in this case.

Three cases warrant discussion. MNG relies on *Sofco Erectors, Inc. v. Trustees of the Ohio, Operating Engineers, Pension Fund.* In that case, the funding rate used by the Pension Fund's actuary was 7.25%. However, for withdrawal liability, the actuary used the Segal Blend, a blend of the PBGC interest rate and long-term interest rates. The arbitrator applied the Segal Blend, but the district court reversed. The court stated that although the Segal Blend has been upheld by courts for many years, it ruled, nevertheless, an actuary must faithfully follow ERISA. Accordingly, the court directed the Pension Fund to "recalculate [the employer's] withdrawal liability based on the 7.25% interest rate the Fund uses for determining the Plan's funding levels." 2020 WL 2541970 at *10.

In *New York Times Co. v. Newspaper & Mail Deliverers'–Publishers' Pension Fund,* 303 F.Supp.3d 236 (S.D.N.Y. 2018), the Pension Fund used the Segal Blend—6.5% interest rate—in calculating withdrawal liability. In contrast, the funding rate testified to by the Pension Fund's actuary was 7.5%. The arbitrator found the use of the Segal Blend was reasonable. The district court reversed the arbitrator's decision concluding the arbitrator it did not follow the mandate of ERISA that the determination of withdrawal liability must take into account the experience of the plan and reasonable expectations, including experience under the plan.

The Fund, on the other hand, relies on *Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund,* 331 F.Supp.3d 365 (D.N.J. 2018). In that case, the UAW Pension Fund's actuary used the Segal Blend, which was lower than the funding rate of 7.5%. The arbitrator did not take issue with that determination finding it was not necessary for the actuary to use the same assumptions for funding and withdrawal liability calculations. The court held differences between the funding rate and rate for determining unfunded vested benefits "may permissibly justify, a different approach. Whether that disparity is justified in a *particular* case may raise a factual question; for present purposes, however, it is sufficient that the statute does not rule out such a disparity in *all* cases, as a matter of law." *Id.* at 388. On the record before it, the court held the employer did not overcome the presumption the actuary's best estimate supported the

use of the Segal Blend. The court found the evidence supported the arbitrator's determination.[6]

Congress created the statutory presumption in favor of withdrawal determinations because "[a]ctuarial valuations are based upon and reflect the experience of the plan, the professional judgment of the actuary, and the theories and expectations to which the actuary ascribes. *Combs v. Classic Coal Corp.,* 931 F.2d 96, 99 (D.C. Cir. 1991). But in this case, the Fund's actuary acknowledged he did not, in setting the withdrawal rate, give consideration to the experience of the Fund; thus, his actuarial determination "did not reflect the experience of the" Fund.

The Fund's actuary testified for the past eight years Milliman has used the PBGC published interest rate for the purpose of making withdrawal liability calculations for the Fund. He explained that we "look at UVB as a settlement-type obligation." The actuary acknowledged the PBGC rate does not take into account the future experience of the Fund nor does it take into account expected future returns on assets

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[6] The Fund also relies on *UMW 1974 Pension Plan v. Energy W. Mining Co.,* 464 F.Supp.3d 104 (D.D.C. 2020). In that case, the Pension Plan's actuary looked at the market rate for annuities to determine the withdrawal liability rate. The employer's expert testified the actuary's method was not the most appropriate one but was not unreasonable. For this reason, the arbitrator refused to find for the employer. On judicial review of an arbitral award, ERISA creates 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). Thus, the court upheld the arbitrator's determination. Although MNG has not presented its own expert, unlike the employer in the *UMW* case, MNG has not conceded Barker's opinion is "not unreasonable."

of the Fund and he acknowledged he did not consider an alternative to the PBGC rate in making his determination.

> Q: When PBGC is setting its PBGC rate does it take into consideration the future experience of the GCIU fund?
>
> A: No.
>
> * * *
>
> Q: In selecting that rate did you take into consideration your expected returns on the plan's assets as currently invested?
>
> A: No. It was similar to our current thought process that it was intended to be a proxy for a settlement-type liability.
>
> * * *
>
> Q: Did you give any consideration in your decision to adopt the PBGC rate to actually using the funding rate?
>
> A: So, no, I didn't give a lot of thought to getting back to an asset class, asset return assumption. . . .

Viewing the entirety of the actuary's testimony, I conclude the actuary's use of the PBGC rate, on this record, did not comply with the requirements of ERISA. Rather than evaluating the use of the funding rate, the actuary testified his employer, Milliman, used the PBGC in part, because that was the way it has been done for roughly the past eight years.[7]

[7] Mr. Barker did testify the use of the PBGC rate is recognized in the actuarial literature, although he did not explain how that translated into satisfying the requirements of ERISA.

Thus, by adopting the PBGC rate, and failing to take into account the experience of the Fund and reasonable expectations about the future, the use of the PBGC rate in this case, was contrary to ERISA.

ATTORNEY'S FEES AND COSTS

Each party shall bear its own attorneys' fees. I do not find MNG initiated this arbitration in bad faith or that either party engaged in dilatory, harassing, or other improper conduct during the course of the arbitration. 29 C.F.R. § 4221.10. The fees of the American Arbitration Association and the compensation of the Arbitrator shall be allocated as set forth below.

CONCLUSION

Accordingly,

1. The 2014 and 2015 partial withdrawals are vacated.

2. The Fund shall refund to MNG Enterprises, Inc. all payments made under the 2014 Partial Withdrawal and 2015 Partial Withdrawal schedule, with the statutorily required interest, or apply such amounts to the MNG Controlled Group's future payments;

3. The withdrawal liability assessments as to the Torrance Daily Breeze and the Santa Cruz Sentinel are affirmed.

5. The withdrawal liability assessments must be recalculated by using a withdrawal liability rate of 7%;

6. The Fund shall refund to MNG Enterprises, Inc. any overpayments resulting from the recalculation

of the assessments due to the use of the foregoing withdrawal liability interest rate;

7. The administrative fees and expenses of the American Arbitration Association totaling $20,363.83 shall be borne as incurred, and the compensation of the Arbitrator totaling $17,575.00 shall be borne as incurred.

8. Each party shall bear its own attorneys' fees; and

9. Any claim not expressly granted in this Award is denied.

Dated this 5th day of January, 2021.

/s/ Bruce E. Meyerson
Arbitrator

APPENDIX D

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING (DECEMBER 6, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GCIU-EMPLOYER RETIREMENT FUND;
BOARD OF TRUSTEES OF THE GCIU
EMPLOYER RETIREMENT FUND,

Plaintiffs-Appellants,

v.

MNG ENTERPRISES, INC.,
DBA Digital First Media,

Defendant-Appellee.

No. 21-55864

D.C. No. 2:21-cv-00061-PA-JEM
Central District of California, Los Angeles

GCIU-EMPLOYER RETIREMENT FUND;
BOARD OF TRUSTEES OF THE GCIU
EMPLOYER RETIREMENT FUND,

Plaintiffs- Appellees,

v.

MNG ENTERPRISES, INC.,
DBA Digital First Media,

Defendant- Appellant.

No. 21-55923

D.C. No. 2:21-cv-00061-PA-JEM

Before: M. SMITH, R. NELSON, Circuit Judges, and DRAIN,* District Judge.

ORDER

Judge M. Smith and Judge R. Nelson voted to deny the petition for rehearing en banc, and Judge Drain so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

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* The Honorable Gershwin A. Drain, United States District Judge for the Eastern District of Michigan, sitting by designation.