No. 23-1209

In the Supreme Court of the United States

M & K EMPLOYEE SOLUTIONS, LLC, ET AL., PETITIONERS

v.

TRUSTEES OF THE IAM NATIONAL PENSION FUND

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

JOINT APPENDIX

MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
(202) 739-3000
michael.kenneally@
morganlewis.com

Counsel of Record for Petitioners

JOHN E. ROBERTS
PROSKAUER ROSE LLP
One International Place
Boston, MA 02110
(617) 526-9813
jroberts@proskauer.com

Counsel of Record for Respondents

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[Dkt. 37-1]

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration

between

OHIO MAGNETICS, INC.

“Company”

- and -

IAM NATIONAL PENSION FUND

“Fund”

AAA No. 01-20-0000-1596

[Dated: March 9, 2021]

Re: Withdrawal Liability

APPEARANCES

FOR THE COMPANY

AKIN GUMP STRAUSS & HAUER, LLP

Eric D. Field, Esq., Of Counsel

Jon M. Chatalian, Esq., Of Counsel

FOR THE FUND

PROSKAUER ROSE, LLP

Anthony S. Cacace, Esq., Of Counsel

Neil V. Shah, Esq., Of Counsel

BEFORE: Martin F. Scheinman, Esq., Arbitrator

BACKGROUND

This case disputes the amount of withdrawal liability assessed against Ohio Magnetics, Inc. ("Company") after its June 30, 2018, withdrawal from the IAM National Pension Fund ("Fund"). The Company insists the assessment was based upon use of improper assumptions adopted after the statutory measurement date, and is overstated. It asks for an Award vacating the assessment and directing the Fund to recalculate the amount of its withdrawal liability and refund any overpayments resulting from the Company's improper assumptions.

The basic facts of this case are not in dispute. The Fund is an employee pension benefit plan and a multiemployer plan. It exists to provide retirement benefits to employees who performed covered work for employers that remitted contributions to the Fund in accordance with collective bargaining agreements with the International Association of Machinists and Aerospace Workers, AFL-CIO or with affiliated local or district lodges. The Fund is governed by a declaration of trust which designates its plan year as January 1 to December 31.

On December 31, 2016, the Fund was less than fully funded for the first time in several years. Its 2016 actuarial valuation showed unfunded vested benefits ("UVBs") of $448,099,164, which is the difference between actuarial value of assets and present value of vested benefits. In preparing this valuation, the Fund's Actuary, Cheiron, used actuarial value for its asset valuation method, and assumed a discount rate of 7.5% and an investment return of 7.5%.

On January 24, 2018, Cheiron met with the Fund trustees and reviewed how withdrawal liability is calculated. It discussed actuarial assumptions used in making the calculation, including the discount rate used to calculate UVBs, and the Fund's administrative expenses. Following discussion with the trustees, Cheiron changed its methods and assumptions used for calculating the withdrawal liability of employers who withdrew from the Fund during the 2018 Plan year, by a) changing its asset valuation method from actuarial value to market value, b) reducing the discount rate from 7.5% to 6.5%, and c) adding an expense load reflecting projected administrative expenses, to be initially set at 4% and automatically redetermined annually upon completion of the corresponding actuarial valuation.

Prior to June 30, 2018, the Company was a contributing employer to the Fund. On June 30, 2018, the Company permanently ceased to have an obligation to contribute pursuant to its labor agreement and thereby completely withdrew from the Fund. On April 2, 2019, the Fund notified the Company of its complete withdrawal and demanded payment of withdrawal liability in the amount of four hundred seventy seven thousand four hundred and seventy five ($477,475.00) dollars, payable in twenty eight (28) equal quarterly installments of $20,659.00, commencing June 1, 2019, and a final payment of $11,544.00.

The Fund's assessment was made as of December 31, 2017 (the last day of the plan year preceding the year of withdrawal). It set forth the Fund's calculation of the Company's allocated share of unfunded vested benefits as of December 31, 2017, using a 6.5%

discount rate to determine the Fund's vested benefit liabilities and by adding thereto an administrative expense load equal to 3.5% of the present value of those liabilities. The parties agree the said discount rate and administrative expense load were adopted on January 24, 2018, and are different from the methods and assumptions in force on December 31, 2017, when the assumed discount rate was 7.5% and no expense load for future administrative expenses was assumed.

On April 17, 2019, Cheiron published its actuarial valuation of the Fund for the 2017 Plan Year. In preparing this valuation, it used the market value method to value assets, applied a discount rate of 6.5%, and applied an administrative expense load equal to 3.5% of the present value of vested benefits. Cheiron's valuation determined the amount of unfunded vested benefits at the end of the Fund's 2017 Plan Year, in pertinent part, as follows:

Present Value of Vested Benefits:	$14,704,665,963.00
Future Administrative Expenses:	$514,663,309.00
Present Value of Vested Benefits With Administrative Expenses:	$15,219,329,272.00
Market Value of Assets:	$12,175,959,344.00
Unfunded Vested Benefits:	$3,043,369,928.00
Funded Ratio:	80.00%

Cheiron's valuation report also contained, inter alia, the following statement:

> … the total present value of vested benefits plus an estimate of future expenses is $15,219,329,272. The market value of assets is $12,175,959,344. Because the present value of vested benefits and expenses exceed the market

> value of assets, there is an unfunded liability for vested benefits as of December 31, 2017. Consequently, a participating employer who withdraws from the Fund during the plan year beginning January 1, 2018, may have a withdrawal liability which will be based on its allocated share of the unfunded vested benefits.

On June 10, 2019, the Company requested review of its April 2, 2019, assessment. On August 19, 2019, the Fund denied the Company's request for review.

On January 14, 2020, the Company timely commenced arbitration to challenge the Fund's assessment. Thereafter, I was selected as Arbitrator to hear and determine this dispute.

As of June 1, 2020, the Company had paid the Fund $103,295.00 in interim withdrawal liability payments.

On June 22, 2020, a preliminary conference was held, resulting in the parties' agreement to submit a stipulation of undisputed facts and to have the issues in this proceeding determined upon written submissions.

On August 27, 2020, the parties filed a stipulation of undisputed facts, with exhibits.

On September 29, 2020, the Company filed a brief, declaration and appendix, in support of its motion for summary judgment vacating the assessment and for related relief. On October 23, 2020, the Fund filed a brief in opposition to the Company's motion for summary judgment. On November 6, 2020, the Company filed a reply brief in further support of its motion for summary judgment. Upon my receipt of these papers, I declared the record closed.

DISCUSSION AND FINDINGS

<u>The Issues:</u>

The parties stipulated the following issues for my determination:

a. Whether, as a matter of law, the assessment overstates the Company's withdrawal liability because the Fund's Actuary, Cheiron, applied methods and assumptions adopted after December 31, 2017 for the Company's June 30, 2018, withdrawal (consisting of a 6.5% interest rate and an administrative expense load for future administrative expenses), rather than the methods and assumptions in effect on December 31, 2017 (consisting of a 7.5% interest rate and no administrative expense load for future administrative expenses)?

b. If the answer to (a) above is no, whether, as a matter of law, the assessment overstates the Company's withdrawal liability because Cheiron included in the calculation of the Company's withdrawal liability a component representing the Fund's future administrative expenses (i.e., the "administrative expense load")?

<u>Relevant Statutory Provisions</u>

<u>ERISA Sec. 4201, 29 U.S.C. Sec. 1381</u>: Withdrawal liability established; criteria and definitions.

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to

the plan in the amount determined under this part to be the withdrawal liability.

* * * * * * *

<u>ERISA §4213, 29 U.S.C. §1393</u>: Actuarial Assumptions.

(a) Use by plan actuary in determining unfunded vested benefits of a plan for computing withdrawal liability of employer.

The corporation may prescribe by regulation actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part. Withdrawal liability under this part shall be determined by each plan on the basis of —

(1) 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, or

(2) actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability.

* * * * * * *

<u>ERISA §4214, 29 U.S.C. §1394</u>: Application of plan amendments; exception.

(a) No plan rule or amendment adopted after January 31, 1981, under section 1389 or 1391(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 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.

* * * * * * *

ERISA §4221, 29 U.S.C. §1401:

(a) (1)

Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration....

* * * * * * *

(a)(3)(a):

For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination

shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(a)(3)(b):

In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

* * * * * * *

<u>Relevant Federal Regulations</u>

29 C.F.R. §4221.5 Powers and duties of the arbitrator.

(a) ***Arbitration hearing.*** **Except as otherwise provided in this part, the arbitrator shall conduct the arbitration hearing under §4221.6 in the same manner, and shall possess the same powers, as an arbitrator conducting a proceeding under title 9 of the United States Code.**

(1) ***Application of the law.*** **In reaching his or her decision, the arbitrator shall follow applicable law, as embodied in statutes, regulations, court decisions, interpretations of the**

agencies charged with the enforcement of ERISA, and other pertinent authorities.

* * * * * * *

Positions of the Parties

The Company argues its assessment is vastly overstated because the Fund used actuarial assumptions not yet adopted by the time of the measurement date, and because the Fund improperly added an estimate of future administrative expenses to the amount of its vested liabilities contrary to the definition of such liabilities set forth in the statute. It asks for an Award directing the Fund to recalculate the amount of its withdrawal liability using only assumptions in effect on the measurement date, and excluding the estimate of future expenses from the amount of the Fund's vested liabilities.

The Company points to the Court's ruling in *Metz* as supporting its position. It insists, there, the Second Circuit clearly held actuarial assumptions used to calculate withdrawal liability must be those in effect as of the measurement date. The Company alleges the Court also ruled assumptions existing on the measurement date remain in effect unless changed by the actuary before the measurement date. It claims in making these rulings, the Second Circuit focused upon legislative intent, and properly recognized changing actuarial assumptions after the measurement date would create significant opportunity for manipulation and bias.

The Company contends the Fund's argument Congress intended no prohibition against retroactive assumption changes because Section 4214 expressly bars such changes but Section 4213 does not, lacks merit. It maintains the same argument was considered and rejected in *Metz*. The Company asserts the Court in *Metz* acknowledged Section 4213's silence regarding retroactivity, but after reviewing legislative history, decided allowing retroactive assumptions would be contrary to Congress' intent to protect employers from retroactive application of rules relating to calculation of withdrawal liability.

In the Company's view, this dispute centers not on the reasonableness of Cheiron's assumptions, but on their legality. It argues the questions presented in this arbitration are matters of law and not fact. In this context, the Company asserts the deferential standard accorded to plan actuaries in making reasonable assumptions is inoperative because no presumptions of correctness attach to legal conclusions. Instead, the Company insists this dispute should be decided under law and relevant precedent, without any deference to the Plan Actuary or to the Fund. It emphasizes by federal regulation, an arbitrator is required to decide questions of law by following applicable statutes, court decisions, and interpretations of agencies charged with enforcement of the statutory scheme.

The Company claims *Metz* is the only circuit - level Court to directly address the issue of retroactive application of actuarial assumptions when calculating withdrawal liability under Section 4213. It contends the holding of *Metz* constitutes relevant precedent and requires the assessment be annulled and recalculated.

Beyond *Metz*, the Company points to opinions from the PBGC as supporting its position actuarial assumptions may not be retroactively changed after the measurement date so as to increase a withdrawing employer's liability. It claims PBGC Opinion Letters 94-5 and 90-2 establish the PBGC's view even mistaken actuarial assumptions may not be used retroactively if the effect is to retroactively increase an employer's withdrawal liability. The Company also relies upon a court decision in *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) and an arbitrator's decision in *Embassy Industries and Local 365 UAW Pension Trust Fund*, AAA Case No. 01-14-0002-2075), for its contention calculation of unfunded vested benefits for purposes of assessing withdrawal liability must be performed using assumptions and methods in place as of the measurement date, rather than changed assumptions adopted after the measurement date.

In the Company's view, the fact Cheiron changed its assumptions before the Company withdrew, and the short duration between measurement date and Cheiron's revision of its assumptions, are not relevant. It insists the central question is whether ERISA allows a plan to retroactively use assumptions adopted after the measurement date to increase an employer's withdrawal liability. The Company insists the holding of *Metz* clearly answers this question in the negative, by requiring plans use actuarial assumptions in effect on the measurement date for withdrawals occurring during the plan year immediately after the measurement date, and in its view, by requiring notice to contributing employers of any changes in assumptions before an employer withdraws. For these reasons, it maintains the Fund's use of the 6.5% discount rate, adopted by Cheiron after the measurement date, instead of the 7.5% discount rate in effect on the measurement date, was improper and increased the Company's liability amount, in contravention of the statutory scheme.[1]

For similar reasons, the Company argues Cheiron's retroactive application of an administrative expense load in calculating the amount of unfunded vested benefits was impermissible, under *Metz*, because no such assumed load was put into place until after the measurement date. In its view, the retroactive application of this expense load falls within the statute's proscription against retroactive changes in assumptions and methods as determined by *Metz*.

Beyond retroactivity, the Company maintains application of an administrative expense load is neither an authorized nor permitted adjustment when calculating the amount of unfunded vested benefits. It contends the UVB calculation may only be performed by subtracting the value of assets of the plan from the value of non-forfeitable benefits. The Company claims future administrative expenses of a plan are not non-forfeitable benefits and may not be included in a plan's

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[1] The Company claims Cheiron's retroactive use of the 6.5% interest rate and administrative expense load resulted in an amount of UVBs that was $1.2 billion more than had the 7.5% rate and no administrative expense load been used. It asserts its proportionate share of these UVBs, as assessed by the Fund, was vastly overstated and if re-determined using only those assumptions existing on the measurement date, there is "likely no assessment at all". (Company's brief, pages 5, 9).

benefit liabilities. It alleges Congress made no provision in the relevant statutes for future administrative expenses to be included in the withdrawal liability, calculations. Without Congressional authorization, the Company insists Cheiron was not permitted to use an administrative expense load in calculating the Fund's projected benefit liabilities as of the measurement date.

The Company urges the expense load assumed by Cheiron has no relationship to the actuary's best estimate of UVB's as of the measurement date and does not fall within the statutory definition of non - forfeitable vested benefits to be calculated under Section 4213. Therefore, it contends the load assumed by Cheiron for future administrative expenses following withdrawal should not have been assumed or applied.

In short, the Company insists its assessment is overstated and must be recalculated. It asks for an Award sustaining its claim, vacating the assessment and directing its recalculation based upon the 2017 assumptions and methods in effect on the measurement date, declaring invalid the Fund's inclusion of an expense load as a matter of law and directing recalculation of the Company's allocable UVB's without such expense load charge, refunding any overpayments resulting from improper use of the 2018 assumptions, including the expense load, in calculating the liability and installment amounts, with statutorily required interest, or applying such refunded amounts to the Company's future payments, and awarding to the Company all other appropriate relief, including 50% of the AAA initial filing fee.

The Fund, on the other hand, argues its assessment of withdrawal liability is presumed correct under the statutory scheme. It contends ERISA §4221(a)(3)(a) accords a presumption of correctness to determinations of withdrawal liability unless the contesting party demonstrates the determination was based upon methods or assumptions which in the aggregate were unreasonable or that the assessment was clearly erroneous. The Fund maintains ERISA §4221(a)(3)(b) also provides a presumption of correctness to a plan actuary's calculation of a plan's unfunded vested benefits for a given plan year, unless the contesting party shows the actuarial assumptions and methods used by the actuary were in the aggregate unreasonable (taking into account the experience of the plan and reasonable expectations), or the actuary made a significant error in applying the actuarial assumptions and methods. It alleges the foregoing standards are prescribed by statute and govern the analysis of its determination in this forum.

The Fund claims neither of these presumptions was rebutted by the Company. Therefore, it argues no basis exists for setting aside the Fund's withdrawal liability determination.

The Fund claims Cheiron's assumption of a 6.5% discount rate for its calculation as of the December 31, 2017, measurement date, was proper even though not adopted until January 24, 2018. It alleges Cheiron's retroactive assumption of such rate did not violate the statutory scheme and was reasonable.

The Fund maintains Section 4213 of ERISA controls this dispute and was not violated by assumption of the 6.5% interest rate. It claims this statute deals specifically with actuarial assumptions and standards to be followed in their selection. The Fund insists Section 4213 has no language barring the retroactive application of actuarial assumptions. It asserts Section 4213 requires only the assumptions chosen are reasonable and based upon available information and standards of the actuarial profession. In the Fund's view, Cheiron's assumption of the 6.5% discount rate meets this standard.

The Fund acknowledges Section 4214 of ERISA bars retroactive application of changes to a plan rule or amendment undertaken by a plan sponsor. However, it insists Cheiron is not a plan sponsor and its assumption of the 6.5% discount rate was not an action undertaken by the trustees, but instead was a step taken in furtherance of its statutory role as a plan actuary. The Fund alleges actuarial assumptions do not constitute a plan rule or amendment and fall outside the provisions of Section 4214 barring retroactive application of changes to plan rules or amendments. It maintains Section 4214 makes no reference to actuarial assumptions and contains no language demonstrating Congress intended to bring those assumptions within the reach of Section 4214.

By contrast, the Fund argues Section 4213 expressly applies to the actuary's selection of actuarial assumptions, prescribing the standards to be followed by the actuary. It contends Section 4213 sets forth no restriction on the retroactive application of such assumptions, and provides no obligation to notify a withdrawing employer of changes made to those assumptions.

In the Fund's view, these provisions demonstrate Congress gave deference to actuarial assumptions made by plan actuaries, as compared to plan rules and amendments adopted by plan sponsors and trustees. It claims Congress consciously excluded from Section 4213 the anti-retroactivity and notice provisions mandated for changes to plan rules and amendments under Section 4214, because actuaries enjoy status as trained professionals subject to regulatory standards, as opposed to plan sponsors or trustees who are vulnerable to suggestion of bias or appearance. The Fund points to a decision of the United States Supreme Court, *Concrete Pipe*, 508 U.S. at 632, as supporting this contention.

The Fund argues the Company's reliance upon *National Retirement Fund v. Metz Culinary Management*, 946 F.3d 146 (2d Cir., 2020) ("*Metz*"), is misplaced. It acknowledges the Court there ruled ERISA prohibits the retroactive application of actuarial assumptions adopted after the applicable measurement date. However, the Fund maintains *Metz* was wrongly decided upon unique facts not present, here, and is not binding in the District of Columbia, all of which deprives the ruling of persuasive force or support for the Company's position.

The Fund urges the reasoning of *Metz* is flawed and misconstrues the statutory scheme. It contends the Court erroneously applied the retroactivity bar of Section 4214 for plan rules and amendments adopted by a plan sponsor to a plan actuary's selection of assumptions made under Section 4213. It maintains the Court's reasoning ignored clear language differences between these two (2) sections and misapplied basic principles of statutory construction. In the Fund's view, Congress' inclusion of language barring retroactive changes in plan rules and amendments under Section 4214, while omitting language barring retroactive selection of assumptions by a plan actuary under Section 4213, supports a presumption Congress purposely intended not to bar retroactive actuarial assumptions in the calculation of withdrawal liability.

The Fund argues the Court in *Metz* mistakenly assumed requiring the actuary to adopt any changes in assumptions before the measurement date would protect employers against detrimental reliance upon liability estimates founded on assumptions no longer in effect. It alleges under the statutory scheme, such estimates are based upon assumed withdrawals made in the prior plan year and, therefore, carry an inherent risk the estimate will be based upon assumptions that may not apply to the calculation of its actual withdrawal liability. The Fund claims requiring any change in assumptions to be made before the measurement date would not insure a liability estimate has been prepared based upon the most current actuarial assumptions.

In this context, the Fund alleges Congress never intended to impose notice requirements or retroactivity prohibitions upon plan actuaries as a means of protecting employers against abuse or bias. Instead, it contends such protection is provided by the statutory requirement actuarial assumptions be chosen not by the trustees, who might be vulnerable to suggestions of bias, but by the plan actuary, who is a trained professional subject to regulatory standards.

The Fund also argues *Metz* is distinguishable on its facts. It alleges in *Metz*, the National Retirement Fund and its trustees improperly sought to increase the employer's withdrawal liability amount after the employer withdrew, by retroactively reducing the discount rate so as to increase the amount of liability assessable against the employer. The Fund suggests upon those facts, the Court determined retroactive assumption of a discount rate not earlier in use violated the statutory scheme. Even if the result in *Metz* could be rationalized upon those unique facts suggesting undue influence by those trustees, it claims such ruling is not persuasive here because decided upon materially different facts.

Unlike *Metz*, the Fund alleges Cheiron's change to a lower interest rate assumption was made before the Company withdrew, without any evidence in this record of undue influence from the trustees upon Cheiron to change its methods or assumptions so as to increase the Company's withdrawal liability.

In the Fund's view, the Company's claim is no more than an effort to reduce its fairly and reasonably allocated withdrawal liability using a timing technicality adopted by the Court after Cheiron changed its assumptions and the Fund assessed liability. It urges the Company's claim be denied.

The Fund argues no issue is presented as to whether the liability assessment should be set aside for lack of notice to the Company of the change in actuarial assumptions by Cheiron made after the measurement date. It contends the Company waived any right to challenge the assessment on this basis because it was not stipulated as an issue for my determination. On the merits, the Fund maintains plan actuaries or trustees have never been required to notify contributing employers each time an actuary adjusts the methods and assumptions used to calculate withdrawal liability. It urges even the Court in *Metz* did not hold actuarial assumptions to be plan rules or amendments subject to the notice requirements of Section 4214. In the Fund's view, the Court in *Metz* made an erroneous, but limited, ruling an actuary must make any change in assumptions by the measurement date. For all these reasons, the Fund insists the notice argument made by the Company also should be rejected.

The Fund maintains the Company's reliance upon various PBGC opinion letters and arbitration rulings is misplaced. It urges those letters and rulings are not on point and provide no support for any blanket rule prohibiting an actuary from changing interest rate assumptions after the measurement date.

The Fund alleges its Plan Actuary properly incorporated an administrative expense load in calculating the Company's share of unfunded vested benefits. It insists doing so met the reasonableness standard prescribed by Section 4213. The Fund maintains applying an administrative expense load recognizes the reality every dollar the Fund must pay for administrative expenses is not available to invest or pay for nonforfeitable plan benefits. In its view, not accounting for these expenses increases the risk a plan will be unable to recover underfunding associated with the withdrawing employer's workforce, causing the underfunding to be borne by the remaining contributing employers and beneficiaries.

The Fund claims the Company has not challenged the addition of an administrative expense load as unreasonable. Instead, it maintains the Company has asserted increasing the amount of vested benefits by a percentage attributable to projected administrative expenses is improper because such expenses do not qualify as non-forfeitable benefits within the meaning of Section 4213. According to the Fund, the Company's analysis exalts form over substance and ignores the need for an actuary to recognize future expenses in preparing his or her best estimate of a plan's unfunded vested benefits in compliance with his or her statutory and professional obligations. Regardless of whether such expenses are added to projected benefit obligations and then subtracted from projected assets, or are just subtracted from projected assets, the Fund insists the result is the same, namely, the total amount of unfunded vested benefits is increased by the amount of the plan's projected administrative expenses, thereby yielding the actuary's best estimate of the plan's unfunded vested benefits as required by the statute. It maintains for these reasons the Company has not demonstrated Cheiron's application of an administrative expense load was unreasonable or in violation of the statute.

In short, the Fund insists the Company's challenges to its withdrawal liability assessment lack merit. It asks an Award be issued in favor of the Fund rejecting the Company's claim.

Opinion

Certain preliminary comments are appropriate. As arbitrator, my role is to resolve this dispute, giving due regard to the laws and regulations governing pension funds, their purposes, and the interests they were enacted to protect. I am also commanded to determine this matter according to fair and equitable procedures. 29 U.S.C. Sec. 1401(a)(2).

At the outset, I take notice of the enormous role accorded plan actuaries under the statutory scheme. In particular, plan actuaries are vested with discretion to choose assumptions and methods for use in carrying out their statutory responsibility for determining the amount of a plan's unfunded vested benefits. ERISA §4213. The actuary's determination of UVBs is pivotal to the ultimate calculation of withdrawal liability, because by law, a withdrawn employer is liable for its proportionate share of the plan's UVBs, measured as of the last day of the plan year preceding the year of withdrawal. ERISA §§4201, 4211.

The system is designed for actuaries to make independent, non-political decisions using their professional judgment and skill. To that end, the statutes give actuaries wide discretion to do what is right in choosing assumptions and methods, so long as their choices are reasonable in the aggregate and offer the actuary's best estimate of anticipated experience under the plan. ERISA §4213, *supra*. I subscribe to the deference afforded to the Plan Actuary.

With these principles in mind, I turn to the dispute, here.

In this arbitration, I am called upon to decide two (2) narrow questions presented by the parties. The first is whether the assessment is overstated as a matter of law solely because Cheiron retroactively applied methods and assumptions adopted after the December 31, 2017, measurement date for the Company's June 30, 2018, withdrawal (consisting of a 6.5% interest rate and an administrative expense load for future administrative expenses), rather than the methods and assumptions existing on December 31, 2017 (consisting of a 7.5% interest rate and no administrative expense load for future administrative expenses). If the assessment is not overstated for these reasons as a matter of law, then a second question is presented whether the assessment is overstated because Cheiron applied a future administrative expense load to its calculation of UVBs. My jurisdiction extends only to these issues.

The gravamen of the first question is, I find, a dispute over timing, i.e., may changes in assumptions and methods that might otherwise fall within a plan actuary's discretion be made by the actuary after the measurement date and then applied retroactively to determine the plan's UVBs as of the measurement date? In answering this narrow question of law, my role as arbitrator is necessarily limited. Congress has enacted broad legislation in the area of multiemployer pension plans. Those laws, codified in ERISA and the MPPAA, have been authoritatively interpreted over a period of years by the Courts. On questions of law, my guideposts must be the laws as enacted by Congress, together with judicial precedents interpreting those laws. I am neither empowered nor inclined to disregard relevant statutory provisions. Nor do I find a compelling basis to reject the wisdom of the only federal appellate court which has addressed this issue.

Having carefully considered the parties' submissions and contentions, I find the ruling of the Second Circuit in *Metz* answers the narrow underlying timing question and establishes a bright line standard governing my determination. For the reasons set forth below, I conclude the *Metz* holding requires the Company's assessment be annulled and recalculated.

In *Metz*, the National Retirement Fund had used a discount rate of 7.25% for many years in calculating UVB's. When *Metz* withdrew on May 16, 2014, the measurement date for calculating its liability was, by law, December 31, 2013, at which time the plan was still using a discount rate of 7.25%. In or about June of 2014, after changing actuaries, the plan revised its discount rate to 3.25% and applied it retroactively to calculate *Metz's* liability as of the December 31, 2013, measurement date. The result was an increase in liability, from $254,644 had a 7.25% rate been used, to $997,734, using the 3.25% rate.

When *Metz* appealed to arbitration, the arbitrator held the plan's retroactive application of a lower discount rate, so as to increase the amount of withdrawal liability, violated the MPPAA. He ruled the MPPAA requires those assumptions and methods in place on the measurement date be used for calculating *Metz'*s withdrawal liability. The amount of liability was, therefore, recalculated from $997,734 to $254,644, using the 7.25% rate which existed on the measurement date.

Thereafter, the National Retirement Fund sued in federal district court to vacate the arbitrator's award.

On March 27, 2017, the district court vacated the arbitrator's award, finding no automatic rollover of existing assumptions on the measurement date unless the plan actuary affirmatively determines the assumption is reasonable and his or her best estimate of anticipated experience under the plan as of the measurement date.

On appeal, the Second Circuit vacated the holding of the district court and directed judgment in favor of the employer, remanding any remaining issues to the arbitrator. In doing so, the Second Circuit framed the question as follows:

> 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.

(*Metz*, 946 F.3d at 150)

The Second Circuit answered this question with the following ruling:

> 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. 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.

(*Id.*, at 151)

In announcing this rule, the Second Circuit concluded Congress enacted the statutory scheme with the intention of protecting employers from the retroactive application of rules relating to the calculation of withdrawal liability. It found the retroactive selection of interest rate assumptions to calculate Metz' liability was at odds with Congress' legislative intent. (*Id.*).

On its face, the Court's ruling in *Metz* is dispositive of the first issue presented for my determination. The Second Circuit has now established, as a matter of law, retroactive interest rate assumptions adopted after the measurement date are not authorized by the MPPAA. Therefore, giving due regard to the laws governing multiemployer pension plans, I find Cheiron's use of the 6.5% discount rate adopted after the measurement date, instead of the 7.5% discount rate that existed on the measurement date, was violative of the MPPAA.

I also find Cheiron's retroactive application of the 6.5% discount rate resulted in an overstated assessment of the Company's withdrawal liability. It is a mathematical fact using a lower discount rate to calculate the present value of unfunded vested benefits will produce a higher liability amount. Under the *Metz* rule, Cheiron was obligated to use the 7.5% discount rate existing on the measurement date. Had it done so, I find the Company's resulting liability amount would have been lower than the amount assessed using the 6.5% rate. Plainly, the Fund's retroactive assumption of the 6.5% rate resulted in an increase in the Company's withdrawal liability beyond what would have been assessed using the rate existing on the measurement date.[2]

In these proven circumstances, I find the Fund's April 2, 2019, assessment improperly applied a retroactive discount rate in calculating the Company's allocated share of UVB's and caused an overstated assessment of withdrawal liability as a matter of law. Therefore, I shall annul the assessment and direct its recalculation using the 7.5% discount rate that existed on the measurement date, December 31, 2017.

[2] In their stipulation of undisputed facts, the parties did not provide a recalculation of the Company's withdrawal liability using only the assumptions and methods existing on the measurement date. Nevertheless, I have concluded the Fund's assessment was overstated because a lower discount rate than existed on the measurement date was used, resulting in a higher present value of UVBs to be allocated. The retroactive addition of an administrative expense load to the UVBs also resulted in a higher present value of UVBs to be allocated. Since the Company's withdrawal liability is its proportionate share of the present value of the Fund's UVBs on the measurement date, these higher values caused the April 2, 2019, assessment of liability to be overstated.

I recognize the parties have made conflicting arguments for and against the Court's reasoning in *Metz*. Nevertheless, the fact remains the Second Circuit's holding establishes a bright line rule which definitively answers the central issue underlying the parties' dispute. It would be improper and lead to mischief were I to disregard it. Doing so would undermine the predictability needed for the Fund and its participating employers to properly govern their affairs.

To the extent the Fund argues *Metz* is not a binding precedent because the parties are not situated within the boundaries of the Second Circuit, I do not find that argument particularly persuasive. The Court's ruling is applicable to the issues in dispute and should be followed, especially because the PBGC has not opined otherwise.

I reject the Fund's contention its assessment is protected by the statutory presumptions of correctness. Plainly, those presumptions exist to place the burden upon the party challenging the assessment to demonstrate it was incorrectly made. In this case, however, it is conceded Cheiron calculated the present value of UVB's and the Company's allocated share of same, by retroactively applying a 6.5% discount rate adopted after the measurement date, instead of the 7.5% rate in place on the measurement date. Since doing so violated the MPPAA and resulted in an overstated assessment as a matter of law, I find the presumption of correctness is rebutted by the Plan Actuary's proven use of a retroactive discount rate assumption in violation of the statutory scheme.

I also reject the Fund's contention its assessment meets the standard of reasonableness prescribed by ERISA and should, therefore, be confirmed. Ordinarily, reasonableness is a question of fact for resolution by the arbitrator. Here, however, no issue is presented whether use of a 6.5% discount rate was reasonable in the abstract to arrive at the Actuary's best estimate of experience under the plan. Instead, the question submitted is one (1) of law, namely, whether the retroactive use of such rate, in place of the 7.5% rate existing on the measurement date, was permissible under the statutory scheme. Since *Metz* clearly holds the use of such retroactive rate to be impermissible as a matter of law, the Plan Actuary could not reasonably be allowed to apply it retroactively in carrying out its responsibilities under the statutory scheme.

I recognize the Fund contends the Second Circuit engaged in flawed statutory analysis by concluding Congress intended to bar retroactive interest rate assumptions made after the measurement date. It relies heavily upon Congress' exclusion from Section 4213 of any language prohibiting the retroactive choice of actuarial assumptions, while including language prohibiting retroactive plan rules or amendments under Section 4214 and requiring notice to employers before such plan rules or amendments are changed. Nevertheless, the fact remains the Court in *Metz* acknowledged the language differences between these provisions, yet still found by their enactment, Congress broadly intended to protect employers against retroactive changes in assumptions affecting the withdrawal liability calculation. In doing so, the Court emphasized the need for interest rate assumptions to have "a degree of stability" and not be "open forever and subject to retroactive changes in later years". (*Id*., at 150). It also concluded withdrawal liability estimates provided under the statutory scheme would be of little value if interest rate assumptions could be retroactively changed at any time. (*Id*., at 151). At this juncture, the Court's ruling stands as the highest federal court pronouncement on the question and precludes my ruling otherwise.

I also acknowledge the Fund's claim Congress purposely gave deference to professional actuaries in their selection of assumptions and methods, thereby alleviating any legislative concern over actuaries being pressured to select assumptions that might increase employer withdrawal liability amounts in order to satisfy their Fund clients. Suffice to say, the Court in *Metz* rejected this view and found allowing the actuary to choose an interest rate assumption after the measurement date would create opportunity for manipulation and expose the actuary to undue pressure from trustees desiring rates that would yield higher liability amounts. In explaining its rationale, the Court expressed concern "Actuaries unwilling to yield to trustees' preferred interest rate assumptions can be replaced by others less reticent". (*Id*., at 151).

Nor can I agree the facts of *Metz* are distinguishable. As in *Metz*, the Fund's assessment was determined using a lower discount rate adopted after the measurement date, resulting in a higher liability than would have occurred had the rate existing on the measurement date been utilized. Upon these material facts, I am convinced the *Metz* holding controls my determination of this dispute.

My conclusion is not altered by the fact Cheiron retroactively changed assumptions before the Company withdrew, nor by the fact the Company never asked for an estimate of its withdrawal liability. I find these facts immaterial under the bright line rule established by *Metz*. Nor is my determination changed by the lack of any evidence in this record Cheiron was influenced by Fund Trustees to choose a lower discount rate. Simply put, the *Metz* holding requires the plan actuary use those assumptions existing on the measurement date and prohibits retroactive use of later changes to withdrawal liability interest rate assumptions. Plainly, Cheiron's retroactive application of assumptions adopted after the measurement date violated the MPPAA and resulted in an overstated assessment at odds with the statutory scheme.

For similar reasons, while I doubt the Company's argument the Plan Actuary was not permitted to introduce an administrative expense load, I conclude Cheiron's use of an administrative expense load was not proper, here, solely because it was not in place on the measurement date. That is why it was improper and contributed to the assessment being overstated. The parties have stipulated Cheiron changed its methods and assumptions after the December 31, 2017, measurement date, by, *inter alia*, adding an expense load on January 24, 2018, for projected future administrative expenses. Since the new expense load did not exist on the measurement date, its retroactive application violated the MPPAA, as construed by the Court in *Metz*. The record establishes Cheiron's retroactive application of the expense load to its calculations caused a higher assessment of withdrawal liability than would otherwise have resulted had the calculation been made without application of the expense load.[3]

Finally, I reject the Company's assertion the Fund was obligated to give notice, before the Company's withdrawal, of changes in actuarial assumptions and methods used to compute withdrawal liability. I find no such obligation in the statutory scheme. Instead, I conclude Congress gave contributing employers a right to request an estimate of their potential withdrawal liability as of the last day of the plan year preceding the request, along with an explanation of how the estimate was determined, including the actuarial assumptions and methods used to value plan assets and liabilities, unfunded vested benefits, and other relevant data detailed in the statute. ERISA §101(L)(1)(A),(B). Once such request is made, the Plan is then required to provide the estimate and explanation within one hundred eighty (180) days of the employer's request. ERISA §101(1)(2)(A)(i). Plainly, I find these statutes place the onus upon the employer to request an estimate in the first instance, as a condition precedent to a plan's obligation to provide the requested information. Since the parties have stipulated no request for an estimate was made by the Company from April 16, 2015, through its withdrawal from the Fund on June 30, 2018, the Fund's duty to provide an estimate and explanation of assumptions

[3] Although the Court in *Metz* reviewed an interest rate assumption only and ruled such assumption may not be retroactively changed after the measurement date, I find the *Metz* rationale reasonably applies to an actuary's assumption of estimated future administrative expenses.

was not triggered, and no breach of these provisions occurred.

For all of the foregoing reasons, the two (2) issues submitted for my determination are disposed of as follows:

a. Whether, as a matter of law, the assessment overstates the Company's withdrawal liability because the Fund's actuary, Cheiron, applied methods and assumptions adopted after December 31, 2017 for the Company's June 30, 2018, withdrawal (consisting of a 6.5% interest rate and an administrative expense load for future administrative expenses), rather than the methods and assumptions in effect on December 31, 2017 (consisting of a 7.5% interest rate and no administrative expense load for future administrative expenses)?

I answer issue (a) in the affirmative and find the Fund's assessment overstates the Company's withdrawal liability because the Fund's Actuary, Cheiron, applied methods and assumptions adopted after December 31, 2017 for the Company's June 30, 2018, withdrawal (consisting of a 6.5% interest rate and an administrative expense load for future administrative expenses), rather than the methods and assumptions in effect on December 31, 2017 (consisting of a 7.5% interest rate and no administrative expense load for future administrative expenses).

b. If the answer to (a) above is no, whether, as a matter of law, the assessment overstates the Company's withdrawal liability because Cheiron included in the calculation of the Company's withdrawal liability a component representing the Fund's future administrative expenses (i.e., the "administrative expense load")?

In light of my determination under (a), the second issue is not decided. However, as indicated above, the power of the Plan Actuary is very broad.

As to remedy, I shall annul the April 2, 2019, assessment of the Company's withdrawal liability. The Fund shall redetermine the Company's withdrawal liability, using only those actuarial assumptions and methods existing on December 31, 2017 (7.5% discount rate, no expense load for future administrative expenses). All interim installment payments made to date by the Company shall be credited by the Fund toward the amount of withdrawal liability for which the Company is ultimately deemed responsible. Any resulting overpayment beyond the Company's total liability obligation shall be refunded to the Company, with interest at the rate(s) prescribed by federal regulation 29 C.F.R.§4219.31(d). The Company's other requests for remedies are rejected.

AWARD

1. The Fund's assessment overstates the Company's withdrawal liability because the Fund's Actuary, Cheiron, applied methods and assumptions adopted after December 31, 2017 for the Company's June 30, 2018, withdrawal (consisting of a 6.5% interest rate and an administrative expense load for future administrative expenses), rather than the methods and assumptions in effect on December 31, 2017 (con-

sisting of a 7.5% interest rate and no administrative expense load for future administrative expenses).

2. The April 2, 2019, assessment of the Company's withdrawal liability, is annulled.

3. The Fund shall re-determine the Company's withdrawal liability, using only those actuarial assumptions and methods existing on December 31, 2017 (7.5% discount rate, no expense load for future administrative expenses).

4. All interim installment payments made to date by the Company shall be credited by the Fund toward the amount of withdrawal liability for which the Company is ultimately deemed responsible. Any resulting overpayment beyond the Company's total liability obligation shall be refunded to the Company, with interest at the rate(s) prescribed by federal regulation 29 C.F.R.§4219.31(d).

5. The Company's other requests for remedies are rejected.

March 9, 2021

/s/ [Signature]
Martin F. Scheinman, Esq.
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

I, MARTAIN F. SCHEINMAN, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

March 9, 2021 /s/ [Signature]
Martin F. Scheinman, Esq.
Arbitrator

[Dkt. 37-2]

AMERICAN ARBITRATION ASSOCIATION

Phillips Liquidating Trust

v.

IAM National Pension Fund

Case No. 01-20-0000-1087

[Dated: July 26, 2021]

AWARD

Phillips Liquidating Trust, successor in interest to the Phillips Corporation d/b/a Equipco ("Phillips" or "the Company") has moved for summary judgment on the issues identified below, as permitted by the Scheduling Order dated March 6, 2020. Phillips and Respondent IAM National Pension Fund ("Fund") have stipulated to certain undisputed facts ("Stipulation") with accompanying Exhibits, and the issues have been fully briefed. The motion is now ripe for decision.

ISSUES

The parties have jointly described the issues presented by Phillips' motion as follows:

- Whether, as a matter of law, the Fund, when calculating the Company's withdrawal liability, wrongly failed to apply the interest rate in effect on the measurement date for the Company's May 1, 2018 withdrawal (consisting of a 7.5% interest rate that was in effect on December 31, 2017) and, instead, retroactively applied an interest rate of 6.5% that was adopted at some time after the December 31, 2017 measurement date?

- Whether, as a matter of law, the Fund could include, in the calculation of the Company's withdrawal liability, a component representing the Fund's future administrative expenses, which it referred to as the "administrative expense load"?

- Whether, as a matter of law, the Fund's actuary could use one interest rate for funding purposes and a different, lower one for withdrawal liability purposes?

[Stipulation, ¶ 32.][1]

FACTS

The Stipulation of Undisputed Facts dated May 8, 2020 is incorporated by reference in its entirety. The following discussion of the facts is based on the Stipulation.

Phillips was a party to certain collective bargaining agreements with the International Association of Machinists and Aerospace Workers ("IAM"), pursuant to which it was required to contribute to the Fund. The Company permanently ceased operating as of April 7, 2018, when it sold its assets to an unrelated third party and effected a complete withdrawal from the Fund within the meaning of 29 U.S.C. § 1383(a). Prior to its withdrawal, the Company requested and

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[1] The parties and their counsel are commended for their cooperation and professionalism in both the identification and the presentation of the issues.

the Fund provided an estimate of the Company's withdrawal liability for a complete withdrawal during the 2016 Plan Year. The amount of the estimate was $337,338. See Exhibit I.

By letter dated April 2, 2019, the Fund notified the Company that it had effected a complete withdrawal from the Fund within the meaning of 29 U.S.C. § 1383(a) as of May 1, 2018, and that its allocated share of the unfunded vested liabilities of the Fund was $2,013,028.00, payable in forty-one (41) quarterly installments of $66,944 and a final payment of $9,601.00, commencing on or before June 1, 2019 (the "Assessment"). See Exhibit J. On or about June 6, 2019, the Company remitted $2,013,028.00 to the Fund as payment in full for its outstanding withdrawal liability in accordance with 29 U.S.C. § 1399(c)(4). By letter dated August 7, 2019, the Company requested a review of the Assessment pursuant to 29 U.S.C. § 1399(b)(2)(A), which request the Fund denied by letter dated September 9, 2019, pursuant to 29 U.S.C. § 1399(b)(2)(B). On January 9, 2020, the Company timely commenced this arbitration proceeding.

The Fund is governed by an agreement and declaration of trust that was last restated as of May 15, 2014 (the "Trust Agreement") and whose Plan Year is January 1 to December 31. Exhibit A. Administrative expenses incurred in administering the Fund are paid using Fund assets. Article VII of the Trust Agreement provides that an employer who withdraws from the Plan in a complete or partial withdrawal is liable for withdrawal liability. Article VII, Section 5 of the Trust Agreement provides that "[w]ithdrawal liability shall be determined 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 Plan actuary's best estimate of anticipated experience under the Plan." Article VII, Section 6(a) of the Trust Agreement provides that the schedule of payments for an employer's withdrawal liability "shall provide for payment over the period of years necessary to amortize the total liability owed in level annual payments," and that the "interest rate used for determining the amortization period shall be the Plan's assumed rate of return for purposes of ERISA's minimum funding requirements for the Plan Year preceding the Plan Year of withdrawal."

Of particular importance to the issues presented in this arbitration, the Cheiron firm has served as the Fund's actuary since March 2014. In that role, Cheiron prepares actuarial valuations of Fund assets, calculates the amounts required for minimum funding purposes, and calculates an employer's withdrawal liability in the event of a complete or partial withdrawal from the Fund. Cheiron cannot prepare the actuarial valuation until after the end of the Plan Year.

On November 2, 2017, Cheiron issued the actuarial valuation for the Fund for the 2016 Plan Year (the "2016 Actuarial Valuation"). See Exhibit B. The 2016 Actuarial Valuation showed that, as of the end of the 2016 Plan Year, the Fund had unfunded vested liabilities ("UVBs") of $448,099,164, which is the difference between the Actuarial Value of Assets ($11,901,968,791) and the Present Value of Vested

Benefits ($12,350,067,955). The 2016 Actuarial Valuation stated that "a participating employer who withdraws from the Fund during the plan year beginning January 1, 2017, may have a withdrawal liability which will be based on its allocated share of the unfunded vested benefits." Exhibit B at 24. Cheiron utilized the following methods and assumptions in preparing the 2016 Actuarial Valuation:

- Asset Valuation Method: Actuarial Value of Assets
- Withdrawal Liability Discount Rate: 7.50%
- Assumed Rate of Return: 7.50%

(Id., App'x C, at 35, 38.)

On January 24, 2018, at a regularly-scheduled meeting of the Board of Trustees of the Fund, Cheiron provided a PowerPoint presentation to the Trustees regarding withdrawal liability. See Exhibit C. The minutes from that meeting state, in relevant part, that the Trustees "unanimously approved the following recommendations from the Fund's Actuary, Cheiron":

****

"• Asset Valuation Method - Market Value.

- Discount Rate for Withdrawal Liability purposes - Funding Discount Rate less 100 basis points. January 1, 2017 funding discount rate of 7.5% less 100 basis point yields 6.5% discount rate for withdrawal liability purposes.
- Expense Load - Include 4% expense load. Reflects projected administrative expenses on behalf

> of Fund populations, based on 2% inflationary increase and on valuation mortality assumption. Re- determine annually upon completion of the actuarial valuation."
>
> ****
>
> Upon questioning, [Cheiron] confirmed that all of changes to the withdrawal liability calculation and the actuarial assumptions are reasonable and defensible."

Exhibit D at 15.

Following the January 24, 2018 meeting, the Fund's actuary prepared withdrawal liability estimates for withdrawals occurring during the 2018 Plan Year using the methods and assumptions the actuary discussed and the Trustees approved at the January 24, 2018 meeting. On October 9, 2018, the Fund filed a Form 5500 for the Plan Year ending December 31, 2017, which included as an attachment excerpts from the 2016 Actuarial Valuation. Exhibit E. On December 15, 2018, the Fund adopted the IAM National Pension Fund Withdrawal Liability Policy ("Policy") which, by its terms, became effective January 1, 2019. Exhibit F. The Policy states, in part, as follows:

> **2. Calculation of Withdrawal Liability Amount**. The Employer Services Department in conjunction with the Fund's Actuary will determine the amount of withdrawal liability for each withdrawn employer according to the presumptive method as amended by the Fresh Start provision set forth in the Fund's Trust Agreement. The amount of withdrawal liability will also include an administrative expense load.

Exhibit F.

On April 17, 2019, Cheiron published the actuarial valuation for the Fund for the 2017 Plan Year (the "2017 Actuarial Valuation"). Exhibit G. The 2017 Actuarial Valuation stated that, as of the end of the 2017 Plan Year, the Fund had unfunded vested liabilities ("UVBs") of $3,043,369,928, which is the difference between the Market Value of Assets ($12,175,959,344) and the sum of the Present Value of Vested Benefits ($14,704,665,963) and Future Administrative Expenses ($514,663,309). The 2017 Actuarial Valuation stated that "a participating employer who withdraws from the Fund during the plan year beginning January 1, 2018, may have a withdrawal liability which will be based on its allocated share of the unfunded vested benefits." Exhibit G at 23.

Cheiron utilized the following methods and assumptions in preparing the 2017 Actuarial Valuation:

- Asset Valuation Method: Market Value of Assets
- Withdrawal Liability Discount Rate: 6.50%
- Administrative Expense Load: 3.5% of the Present Value of Vested Benefits
- Assumed Rate of Return: 7.50%

Exhibit G, App'x G, at 35, 38.

On October 11, 2019, the Fund filed a Form 5500 filing for the Plan Year ending December 31, 2018, which included as an attachment excerpts from the 2017 Actuarial Valuation. Exhibit H.

SUMMARY OF THE PARTIES' CONTENTIONS

The Company's Contentions:

The standard of review is *de novo* because the presumption in 29 U.S.C. § 1401(a) does not apply to questions of law.

The Fund was required to utilize the actuarial assumptions, including the interest rate, in effect on December 31, 2017 ("Measurement Date") in calculating withdrawal liability for Phillip's withdrawal during the calendar year 2018, rather than assumptions that were adopted after the Measurement Date. The Second Circuit's decision in *Nat'l Ret. Fund v. Metz Culinary Mgmt.*, 946 F.3d 146,148 (2d Cir. 2020), *cert. denied* October 5, 2020, is on point and should be followed. The arbitrator's decision in that case, as well as another case decided by the same arbitrator, also support that result. *Metz Culinary Mgmt., Inc. & Nat'l Ret. Fund*, AAA Case No. 01 14 0002 2075, *16 (Jaffe, Arb. Mar. 28, 2016); *Embassy Indus. & Local 365 UAW Pension Trust Fund*, AAA Case No. 13 621 01504 06 (Jaffe, Arb. Mar. 4, 2008). See also *Combs v. Classic Coal Corp.*, 931 F.2d 96 (D.C. Cir. 1991) (employer's withdrawal liability is "fixed" as of the end of the plan year before withdrawal, and subsequent changes to the UVB's are not relevant).

29 U.S.C. §1394 prohibits retroactive applications of interest rate assumptions and other plan rules relating to the calculation of withdrawal liability.

29 U.S.C. §1021(l) is consistent with requiring multiemployer plans to select assumptions by the applicable Measurement Date. Permitting multiem-

ployer plans to retroactively apply interest rate assumptions modified after the Measurement Date opens the door to manipulation and bias.

PBGC opposes, as expressed in opinion letters, retroactive modifications of actuarial assumptions and UVB calculations that increase an employer's withdrawal liability.

The Fund improperly included in its calculation of Phillips' withdrawal liability a component representing the Fund's future administrative expenses, referred to as an "Administrative Expense Load." ERISA limits a withdrawn employer's liability to its allocable share of Unfunded Vested Benefits, and does not authorize the assessment of additional costs such as future administrative expenses. ERISA prohibits the retroactive application of new Plan rules or amendments that increase an employer's withdrawal liability. Here, the Fund adopted the Withdrawal Liability Policy that included the administrative expense load in December 2018, effective January 1, 2019, well after the Measurement Date.

The Fund improperly used two different interest rate assumptions to calculate the same thing – the present value of vested benefits. ERISA requires the use of a single interest rate assumption that offers the actuary's "best estimate of anticipated experience under the plan" to calculate the present value of vested benefits for both withdrawal liability and minimum funding requirements. The Supreme Court in *Concrete Pipe* determined that the same "critical interest rate assumption" must be used in both the withdrawal liability and minimum funding contexts.

The Fund's Contentions:

The standard of review in this case is based on the presumption in 29 U.S.C. § 1401(a), and in particular the plan actuary's calculation of the Fund's UVB's "is presumed correct unless a party contesting the determination shows by a preponderance of the evidence that—(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods." Id. at § 1401(a)(3)(B); *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 635 (1993). The Company has failed to establish that there is anything unreasonable about the assumptions used by the Fund in this case.

There is no legal or statutory basis to challenge Cheiron's application of a 6.5% discount rate to calculate withdrawal liability in 2018. The *Metz* case is not binding in the District of Columbia and is relevant only insofar as it may serve as persuasive authority. *Metz* should be limited to its unique facts, and was based on flawed reasoning. In particular, the court in *Metz* erroneously applied the prohibition on retroactive plan rules or amendments in 29 U.S.C. § 1394 to actuarial assumptions, which are governed by 29 U.S.C. § 1393 and are reviewed deferentially because those assumptions are not selected by the plan's trustees but rather the plan's actuary. *Concrete Pipe*. Furthermore, the Second Circuit mistakenly assumed that requiring the actuary to adopt changes to actuarial assumptions before the applicable measurement date would protect employers from relying to their detriment on withdrawal liability estimates under 29 U.S.C. § 1021(l)(1)(A).

The other authorities relied on by the Company – PBGC Opinion Letters, arbitration decisions, and court cases – do not support its position on retroactive application of actuarial assumptions.

29 U.S.C. § 4213 does not require the actuary to use the same discount rate for withdrawal liability purposes as for minimum funding purposes. Further, the Company's reliance on dicta from the Supreme Court's decision in *Concrete Pipe* is misplaced; that decision does not require that the actuary use the same assumptions for both purposes. Moreover, statutory changes regulating actuarial assumptions enacted after *Concrete Pipe* underscore the differences between the assumptions used for minimum funding and for withdrawal liability.

The actuary was not barred from using an administrative expense load to calculate the Company's withdrawal liability.

DISCUSSION AND OPINION

After carefully considering the facts as set forth in the Stipulation and attached exhibits and the arguments of the parties as set forth in their respective briefs, I conclude that the Company's position on the first two issues is correct. In view of this disposition, it is not necessary to decide the third issue. For the reasons set forth below, the Company's Motion for Summary Judgment is granted.

Standard of Review

At this stage of the proceedings, the standard of review is *de novo*, because the Company contends that it is entitled to summary judgment as a matter of law. Generally, factual determinations made by a plan sponsor under 29 U.S.C. Sections 1381 through 1399 and 1405 are presumed correct unless the employer shows in arbitration "by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. §1401(a)(3)(A). Furthermore,

> In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—
>
> (i)the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or
>
> (ii)the plan's actuary made a significant error in applying the actuarial assumptions or methods.

Id. at §1401(a)(3)(B). However, these presumptions do not apply to questions of law. In *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), the Supreme Court held that, notwithstanding the presumption, fund trustees initially and the arbitrator upon review must "follow applicable law, as embodied in statutes, regulations, court decisions, interpretations of the agencies charged with the enforcement of the Act, and other pertinent authorities." *Id.* at 621 (quoting

PBGC regulation 29 C.F.R. § 4221.5(a)(1)). Accordingly, Phillips' challenges to the retroactive application of interest rate assumptions and the assessment of an administrative expense load are each subject to *de novo* review. The Fund's contention that the presumption in §1401(a)(3)(B) regarding actuarial assumptions and methods is applicable to the instant motion is erroneous.

1. The Fund Was Required to Use the Interest Rate in Effect on December 31, 2017 to Calculate Phillips' Withdrawal Liability.

As a matter of law, the Fund should have calculated the Company's withdrawal liability based on the 7.5% interest rate that was in effect on December 31, 2017, the measurement date for the Company's withdrawal, which occurred in calendar year 2018.

When an employer withdraws from a multiemployer pension fund, ERISA requires the fund to calculate the employer's withdrawal liability "not as of the day of the withdrawal, but *as of the last day of the plan year preceding the year which the employer withdrew.*" *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 418 (1995) (emphasis in original) (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 parties refer to "the last day of the plan year preceding the year during which the employer withdrew" as the "Measurement Date," although it is sometimes referred to as the "valuation date" or the "snap-shot date." In this case, the Measurement Date is December 31, 2017.

Phillips cites to authorities – judicial, arbitral, and PBGC guidance – that support its argument that the actuarial assumptions in effect on the Measurement Date govern the computation of withdrawal liability. The Fund attempts to distinguish these authorities, but it has cited no authority upholding the application of actuarial assumptions adopted after the Measurement Date. Rather, the Fund's entire defense on this issue is based on its assertion that the actuarial assumptions recommended by the plan actuary and adopted by the Fund's trustees after the Measurement Date were reasonable.[2]

Under 29 U.S.C. § 1394,

> (a) No plan rule or amendment adopted after January 31, 1981, under section 1389 or 1391(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.

Although this prohibition on retroactively applying withdrawal liability rules does not, by its terms, apply to actuarial assumptions, the Second Circuit, in *Nat'l Ret. Fund v. Metz Culinary Mgmt.*, 946 F.3d 146 (2d Cir. 2020), *cert. denied* October 5, 2020, held 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." 946 F.3d at 151. As the court noted in *Metz*, this is consistent with the legislative intent of the

[2] As noted in the discussion of the standard of review, the reasonableness of the post-Measurement Date changes to the actuarial assumptions is not before the Arbitrator at this stage of the proceedings.

Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Id. It is also fully consistent with the statutory scheme of MPPAA, as withdrawal liability is based on a "snap-shot" of the withdrawn employer's share of the unfunded liability as of the last day of the plan year before its withdrawal. *See also Combs v. Classic Coal Corp.*, 931 F.2d 96 (D.C. Cir. 1991) (employer's withdrawal liability is "fixed" as of the end of the plan year before withdrawal, and subsequent changes to the unfunded liabilities are not relevant).

The Second Circuit's decision in *Metz* is consistent with other authorities, including the underlying arbitration decision. In that case, Arbitrator Ira F. Jaffe held that "MPPAA requires that the assumptions and methods in effect on [the Measurement Date] be used for calculating the Employer's withdrawal liability." *Metz Culinary Mgmt., Inc. & Nat'l Ret. Fund*, AAA Case No. 01 14 0002 2075, *16 (Jaffe, Arb. Mar. 28, 2016). In ruling against the retroactive application of interest rate assumptions, Arbitrator Jaffe relied on his prior decision in *Embassy Indus. & Local 365 UAW Pension Trust Fund*, AAA Case No. 13 621 01504 06 (Jaffe, Arb. Mar. 4, 2008).

These arbitration decisions are fully consistent with guidance from the Pension Benefit Guaranty Corporation, the federal agency that administers MPPAA. In PBGC Opinion Letter 90-2 (Apr. 20, 1990), PBGC addressed whether a multiemployer pension fund could properly recalculate an employer's withdrawal liability based on corrections to plan data that changed the allocation of unfunded vested benefits ("UVBs") from the prior plan year. PBGC observed that MPPAA requires pension funds to base their withdrawal liability calculations on the value of UVBs for the plan year immediately preceding the employer's withdrawal from the plan, and concluded that "[i]f 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." Rather, "[a]ny necessary correction of the plan's unfunded vested benefits should be reflected . . . in the first valuation following the discovery." PBGC Op. Ltr. 90-2. Subsequently, in Opinion Letter 94-5 (Sept. 27, 1994), PBGC stated that an employer's withdrawal liability cannot be modified retroactively based on "errors relating to mistaken or varying data or actuarial assumptions."

In turn, PBGC Opinion Letters 90-2 and 94-5 formed the basis of the district court's opinion in *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), where the court rejected a fund's attempt to retroactively increase an employer's withdrawal liability based on changes to assumptions made after the Measurement Date. In *Nolt*, the employer withdrew in 2001 and received an initial assessment of withdrawal liability. Later, the fund recalculated the liability based on retroactive corrections it made to the UVBs for the 2000 plan year. Giving "considerable weight" to these PBGC Opinion Letters, the court held that the fund's attempt to retroactively increase the UVBs was improper, and that any correction would need to be included in the subsequent plan year.

Finally, two arbitration awards involving this Fund were decided against the Fund while the instant matter was pending. *See Ohio Magnetics, Inc. v. IAM National Pension Fund*, AAA Case No. 01-20-0000-1596 (Scheinman, Arb. March 9, 2021) and *Toyota Logistics Services, Inc. v. IAM National Pension Fund*, AAA Case No. 01-20-0000-0197 (Irvings, Arb. March 22, 2021). In summary, the judicial and arbitral case law, as well as PBGC guidance, are contrary to the Fund's position on this issue.

2. The Fund Retroactively Applied an Amendment to Its Rules to Include An Administrative Expense Load In Calculating Phillips' Withdrawal Liability In Violation of ERISA.

As a matter of law, the Fund improperly included an administrative expense load in calculating the Company's withdrawal liability. Like the change in interest rate, the administrative expense load was adopted by the Trustees after the measurement date for the Company's withdrawal liability. Therefore, for the reasons set forth above on Issue 1, the attempt to apply the expense load retroactively is contrary to MPPAA.

In addition, that attempt also contravenes 29 U.S.C. § 1394, which expressly forbids retroactive application of a plan's withdrawal liability rules. Here, the change in the rules, by its own terms, became effective January 1, 2019. Exhibit F. This effective date was well after the Measurement Date, and therefore may not be applied to Phillips.

AWARD

For the foregoing reasons, the Company's motion for summary judgment is granted as to issues 1 and 2.

Accordingly, the Fund is directed to recalculate Phillips' withdrawal liability using an interest rate of 7.5% and without any administrative expense load, consistent with the Fund's policies and practice as of the measurement date, December 31, 2017. The Fund is directed to refund to Phillips the difference between the Assessment and the amount recalculated in accordance with this Award. The Arbitrator will retain jurisdiction regarding any disputes over the recalculation of Phillips' withdrawal liability.

July 26, 2021
Bethesda, MD

/s/ [Signature]
Jeffrey B. Cohen
Arbitrator

[Dkt. 37-3]

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between

TOYOTA LOGISTICS SERVICES, INC.,

Petitioner

and

IAM NATIONAL PENSION FUND,

Respondent

AAA Case No. 01-20-0000-0197

[Dated: March 22, 2021]

Ruling on Motion for Partial Summary Judgment

The parties submitted this matter to arbitration pursuant to ERISA Section 4221(a)(1) and (2), 29 U.S.C. §1401(a)(1) and (2), and the Multi-employer Pension Plan Arbitration Rules for Withdrawal Liability of the American Arbitration Association. The parties executed a Stipulation of Undisputed Facts and agreed to have the following issue decided on the basis of those facts and briefs:

> Whether, as a matter of law, Cheiron wrongly applied a 6.50% discount rate adopted by Cheiron at the January 24, 2018 Trustees' meeting to calculate the Company's with-

> drawal liability, rather than the 7.50% discount rate that was previously in effect on December 31, 2017?

Briefs and reply briefs were received by February 26, 2021 from Randall McGeorge, Esq., Deborah S. Davidson, Esq., and Benjamin T. Kelly, Esq., on behalf of the Petitioner (the "Company") and from Anthony S. Cacace, Esq., and Neil V. Shah, Esq., on behalf of the Respondent (the "Fund" or "Plan").

BACKGROUND

Change in Discount Rate. The Fund is an employee pension benefit plan within the meaning of Section 3(2) and 502(d)(1) of ERISA (29 U.S.C. §§1002(2) and 1132(d)(1)) and a multi-employer plan within the meaning of Sections 3(37) and 515 of ERISA (29 U.S.C. §§1002(37) and 1145). The plan year is January 1 through December 31.

Cheiron has been employed as the Fund's actuary since March 2014. In that role it prepares actuarial valuations of Fund assets, calculates the amounts required for minimum funding purposes, and calculates a participating employer's withdrawal liability in the event of a complete or partial withdrawal from the Fund. The withdrawal liability calculations require the actuary to determine the unfunded vested benefits ("UVBs"), a computation governed by ERISA Section 4213 (29 U.S.C §1393), which provides in relevant part:

(a) USE BY PLAN ACTUARY IN DETERMINING UNFUNDED VESTED BENEFITS OF A PLAN FOR COMPUTING WITHDRAWAL LIABILITY OF EMPLOYER . . .Withdrawal liability under this part shall be determined by each plan on the basis of—

(1) 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, or

(2) actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability.

(b) FACTORS DETERMINATIVE OF UNFUNDED VESTED BENEFITS OF PLAN FOR COMPUTING WITHDRAWAL LIABILITY OF EMPLOYER In determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part, the plan actuary may—

(1) rely on the most recent complete actuarial valuation used for purposes of section 412 of title 26 and reasonable estimates for the interim years of the unfunded vested benefits, and

(2) in the absence of complete data, rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan.

The calculation of a withdrawn employer's share of the UVBs is described in ERISA Sections 4211(b)(2)(A)(ii) and (b)(2)(E)(i) (29 U.S.C. §1391 (b)(2)(A)(ii) and (b)(2)(E)(i))[1]:

> **(b) FACTORS DETERMINING COMPUTATION OF AMOUNT OF UNFUNDED VESTED BENEFITS ALLOCABLE TO EMPLOYER WITHDRAWN FROM PLAN**
>
> . . .
>
> (2) (A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending—
>
> (i) after such date, and
>
> (ii) before the plan year in which the withdrawal of the employer occurs.
>
> (E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of—
>
> (i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by
>
> . . .

[1] For ease of notation, statutory sections will henceforth be identified by their ERISA numeration.

On November 2, 2017, Cheiron published the actuarial valuation for the Fund for the 2016 Plan Year. The actuary used 7.50% as actuarial assumption for both the funding rate and the discount rate. The resulting calculation showed UVBs of $448,099,164, the first time in some years that the Plan was not fully funded.

The next regularly scheduled Trustees' meeting was on January 24, 2018. At that meeting Cheiron gave a presentation entirely in Executive Session that included a PowerPoint presentation. The actuaries explained the general concept of asset valuation and withdrawal liability and discussed alternative approaches. They modeled the effect of four different discount rate alternatives on the Fund's UVBs "as of 1/1/17": 7.5%, 7.0%, a blend rate based on 50% 7.5% and 50% based on PBGC rates, and the PBGC rates (2.34% and 2.63%). No mention was made in the PowerPoint of a 6.5% discount rate. Because the lower the discount rate the higher the UVBs, Cheiron chart showed the UVBs ranging from the $448 million using 7.5% to $13.8 billion if the PBGC rates were adopted. The presentation noted that "with input from the Trustees, Actuary determines asset valuation method and discount rate." There were no minutes taken of the Executive Session so there is no record of any discussion between the Cheiron representatives and the trustees. Minutes of the Board meeting reflect that the trustees returned from the Executive Session and voted to unanimously approve what was described as a series of recommendations of Cheiron, including

> **Discount Rate for Withdrawal Liability purposes** - Funding Discount Rate less 100 basis points. January 1, 2017 funding discount rate of 7.5% less 100 basis point yields 6.5% discount rate for withdrawal liability purposes.
>
> . . .
>
> Upon questioning, Mr. Kalwarski [of Cheiron] confirmed that all of changes to the withdrawal liability calculation and the actuarial assumptions are reasonable and defensible.

On April 17, 2019, Cheiron published the actuarial valuation for the 2017 Plan Year. It stated that as of the end of the 2017 Plan Year the Fund had UVBs of $3,043,369,928. This figure was calculated using the 6.5% discount rate that had been adopted by the Trustees on January 24, 2018.

<u>Company's Withdrawal and Assessment of Withdrawal Liability.</u> The Company had been a party to a collective bargaining agreement with the IAM that obligated the Company to make pension contributions on behalf of its bargaining unit employees. On September 13, 2018 the Company requested an estimate of its withdrawal liability in accordance with ERISA Section 101(l) (29 U.S.C. §1021(l))[2] This was

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[2] That section states in relevant part:

(1) IN GENERAL The 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 notice of—

(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 . . .

the first time the Company had requested a withdrawal liability estimate. The Fund provided the estimate on December 3, 2018 that indicated the Company would be liable for approximately $1,344,032 in withdrawal liability if it withdrew on or before December 31, 2018. This computation explicitly stated that it was based on the UVBs as of December 31, 2017, as calculated using the 6.5% discount rate. The Fund had not provided the Company any notice or information that the Trustees had contemplated a change in the discount rate nor that one had been adopted on January 24, 2018. The stipulated record does not include any information about effective dates of the underlying collective bargaining agreement that gave rise to the Company pension contribution obligation, but it is undisputed that the Company effected a complete withdrawal from the Fund as of December 29, 2018.

The Fund notified the Company by letter dated June 18, 2019 that the Company had effected a complete withdrawal as of December 29, 2018. It notified the Company that its allocated share of the UVBs as of December 31, 2017 was $1,289,384[3] and provided a payment schedule. The Company subsequently timely filed a request for review of the assessment, and when the Fund denied the request the Company filed a demand for arbitration. The parties agreed to submit this limited legal question for initial determi-

[3] The Company estimated in its brief that had a 7.5% discount rate been used it would have been assessed nearly $1 million less in withdrawal liability. Given the finding in this decision, the precise withdrawal liability will have to be recalculated by the actuary and that calculation will be subject to review by the Company and possibly the Arbitrator.

nation, with the express understanding that if the issue were resolved in the Fund's favor, the Company would have the opportunity to challenge whether the 6.5% discount rate represented the actuary's "best estimate of anticipated experience under the plan."

COMPANY POSITION

Pursuant to ERISA Section 4211, the Fund was required to calculate the Company's withdrawal liability as of the measurement date of December 31, 2017, the last day in the plan year preceding the year in which the Company completely withdrew. That day is to provide the snapshot view of the plan asset values and liabilities, based on the actuarial assumptions then in place. Any events that impact UVBs positively or negatively after that date cannot be considered. The requirement in ERISA Section 4213(a)(1) that withdrawal liability must be based on actuarial assumptions and methods that are, in the aggregate, reasonable and offer the actuary's best estimate of anticipated experience under the plan, does not modify the snapshot approach mandated by Section 4211. By definition, the Fund's use of a 6.5% discount rate adopted after December 31, 2017 and applied retroactively was unreasonable.

The prohibition against retroactive application of a change in a discount rate was clearly articulated by the Second Circuit, the only federal circuit to consider the issue, in *Natl. Ret. Fund On Behalf of Legacy Plan of Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.,* 946 F. 3d 146 (2d. Cir. 2020), *cert. denied sub nom. Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.,* 141 S.Ct. 246

(2020).[4] The Court's reference to the explicit bar on retroactive application of changes in plan rules and amendments by plan sponsors in Section 4214[5] as evidencing Congressional concern about retroactivity was valid. The court was not confused, in that it recognized Section 4213's mandate for an actuary does not contain a similar explicit bar on retroactivity, but still found the concern about retroactivity was manifest. The ability of a plan to retroactively change applicable actuarial assumptions was similarly rejected in *Roofers Local No. 30 Combined Pension Fund v. D.A. Nolt, Inc.,* 719 F. Supp. 2d. 530 (E.D. Pa. 2010), *aff'd* Fed. Appx. 571 (3rd Cir. 2011). Both *Metz* and *Nolt* affirmed arbitration decisions issued by Arbitrator Ira Jaffee, who ruled similarly in *Embassy Industries and Local 365 UAW Pension Trust Fund,* AAA

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[4] The ruling of the case was succinctly set forth in the concluding paragraph:

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. at 152

[5] This section provides in relevant part:

(a) No plan rule or amendment adopted after January 31, 1981, under section 1389 or 1391(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) . . . 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.

Case No. 13 621 01504 06 (2008). He cited as support PBGC Op. Ltr. 90-2 (Apr. 20, 1990) and 94-5 (Sept.27, 1994) for the principle that the valuation of UVBs cannot be changed retroactively.

The Fund has offered no judicial or arbitral support for the assertion that a plan may change an actuarial assumption used to calculate withdrawal liability after a measurement date and apply that change retroactively. Its reference to ERISA Section 4213(b)(1) is not persuasive. While that section states an actuary may "rely on the most recent complete actuarial valuation," the most appropriate reading of that section is that the actuary can rely on the most recent valuation completed before the measurement date. In this case, that would have been Cheiron's November 2, 2017 valuation that used a 7.5% discount rate.

The Fund's citation to dicta[6] in *Combs v. Classic Coal Corp.,* 931 F.2d 96 (D.C. Cir. 1991) does not support its position. *Combs* dealt with very different

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[6] The Court stated at 102:

Classic also argues that the district court erred in its conclusion that the arbitrator wrongly considered evidence gathered after Classic's withdrawal to find the assumptions used to calculate Classic's withdrawal liability unreasonable. We conclude, however, that the district court was correct in its determination. As the court noted, "this calculation is like a snapshot, in that it represents the actuary's 'best estimate' given the evidence then available." Memorandum and Order, supra, at 18 n. 10 (emphasis added). Although it was true that the Trustees considered reevaluating their interest rate assumptions, they had made no firm decisions to reevaluate at the time Classic withdrew from the Plans. The Trustees relied upon evidence "then available," i.e., available at the time of Classic's withdrawal, to calculate facts. There the employer's withdrawal liability was computed based on the 5.5% discount rate in effect on the measurement date, but the actuary subsequently increased the plan's discount rate to 6.5% prospectively. The employer brought suit claiming the actuary's use of the prior, lower rate was unreasonable, and the new higher rate should be retroactively applied, thereby reducing the employer's withdrawal liability. The Circuit court affirmed the District's court reversal of an arbitration award that held the actuary's use of the 5.5% was unreasonable on the basis of evidence that post-dated the employer's withdrawal.

Policy strongly supports the bright-line test articulated in *Metz.* In *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust,* 508 U.S. 602 (1993), the Supreme Court recognized the danger of manipulation of withdrawal liability and pressure on an actuary in instances where the funding and discount rates are different. The *Metz* decision expressly noted that such a risk would be even greater if trustees were able to retroactively change actuarial assumptions after the measurement date had passed. What occurred in this case illustrates that point. As of December 31, 2017, the funding and discount rates were both 7.5%. On January 24, 2018 Cheiron made a presentation to the

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Classic's liability. To require the Trustees to base their assumptions on information gathered after the fiscal year-end of the Plans would discourage actuarial updating. Once a withdrawn employer's liability is fixed, changes in the UVB are irrelevant to the inquiry regarding withdrawal liability. Just as an employer's liability is not increased if the plan suffers losses in the withdrawal year, the employer is not entitled to benefit from actuarial changes subsequent to its withdrawal.

trustees regarding the calculation of withdrawal liability, but because the discussion was conducted in executive session and no minutes were taken, it is impossible to know what was said and what the actuary truly recommended as a matter of professional judgment. The fact that the actuary never modeled or mentioned a 6.5% discount rate makes what transpired all the more suspect. Further, allowing a retroactive change in the discount rate might well be based on information and developments that became apparent after the measurement date, which would be impermissible. Additionally, allowing retroactive changes in the actuarial assumptions would defeat the protection afforded by the right of participating employers to get estimates of their withdrawal liability, an important tool that allows employers to make an informed business decision as to whether they want to negotiate their way out of plan participation.

FUND POSITION

Pursuant to ERISA Section 4221(a)(3)(A) and (B) (29 U.S.C. §1401(a)(3)(A) and (B))[7], substantial deference is to be accorded to the determinations of plan

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[7] These sections provide:

(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—

sponsors and even more to the actuary's calculation of UVBs done for the purpose of assessing withdrawal liability. Numerous court decisions have recognized that the actuary is an unbiased professional, not subject to the same potential pressures that might influence trustees. The Company has failed to meet the substantial burden of proving that the actuarial assumptions and methods utilized by Cheiron were unreasonable in the aggregate.

Cheiron properly used a 6.5% discount rate when it calculated the Company's withdrawal liability. That rate was adopted at the Trustees' Meeting of January 24, 2018, well in advance of the Company's complete withdrawal on December 29, 2018. The District of Columbia Circuit Court in *Combs* expressly ruled that it was not unreasonable for an actuary to rely upon evidence available at the time of an employer's withdrawal. Further, Cheiron was entitled under Section 4213(b)(1) to use the 6.5% discount rate when it computed the Company's withdrawal liability on June 18, 2019 because that was the rate published in the most recent actuarial valuation on April 17, 2019.

The Second Circuit's *Metz* decision does not compel a contrary finding. That decision is not binding in the District of Columbia and it should not be relied upon as persuasive authority. First, the facts in *Metz*

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

were particularly egregious and readily distinguishable from what occurred here. The fund in that case adopted a new and reduced discount rate, dropping from 7.25% to 3.25%, not only subsequent to the measurement date, but after the employer had already withdrawn. The change in the longstanding discount rate was made after the fund brought on a new actuary. The risk of abuse that concerned the court in that case was patent. In contrast, Cheiron, the longtime plan actuary, recommended a modest lowering of the discount rate from 7.5% to 6.5% a mere three weeks after the commencement of the new plan year and before there was any indication the Company was contemplating withdrawal. The Company sought a withdrawal liability estimate late in 2018 and the estimate accurately included the 6.5% discount rate. In any event, the right to an estimate provided in Section 101(l) is irrelevant since that estimate is based on the liability that would have existed if the employer had withdrawn in the year before asking for the estimate. After receipt of the estimate, the Company made the decision to withdraw, so it is clear the Company was not the target of the rate adjustment nor was it caught by surprise after it had already withdrawn.

Second, the Second Circuit acknowledged that Section 4213 does not expressly address retroactivity. Avoiding that reality, the court misconstrued legislative history in support of its ultimate conclusion. It relied on the explicit prohibition on retroactive plan rules or amendments by plan sponsors in Section 4214 to find a Congressional intent that the court read into Section 4213. Section 4213 contains so such explicit prohibition, nor is there a notice requirement, and the contrast of the language in the two contiguous sections is significant. The absence of a retroactivity bar or a notice requirement reflects the fact that Congress recognized that actuarial assumptions are determined by actuaries in their professional judgment, and the requirement that the assumptions be reasonable in the aggregate would be sufficient protection.

Given that there is no anti-retroactivity provision in Section 4213; and in light of the *Combs* ruling, which is binding precedent in the D.C. Circuit, that an actuary may properly rely on information available at the time of the employer's withdrawal, it is apparent that the actuary used actuarial assumptions that were not unreasonable when he calculated the Company's withdrawal liability.

OPINION

No Clear Evidence of Manipulation. The Fund is correct that the facts regarding the adoption of a lower discount rate in 2018, and the assessment of withdrawal liability against the Company were different than what occurred in *Metz*. Unlike in *Metz*, the trustees of the IAM Fund did not remove their longtime actuary and replace them with an actuary who proposed adopting a far lower discount rate. The decision to drop the discount rate from 7.5% to 6.5% was made just a few weeks into the new plan year, well before the Company requested a withdrawal liability estimate.

The Company cannot claim the estimate they received was improperly nullified by a subsequent adoption of a different discount rate. Under Section 101(l) a fund is required to provide an estimate as if the employer withdrew on the last day of the plan year preceding the date of the request. The last day of the plan year preceding the September 18, 2018 request for an estimate would have been December 31, 2017. Had the Company withdrawn then, the applicable measurement date for determining the actual withdrawal liability would have been December 31, 2016, when the discount rate was 7.5%. Assuming the actuary's recommendation were reasonable, the trustees could have properly accepted a recommendation to lower the discount rate to 6.5% any time between January 1 and December 31, 2017. In that circumstance the calculation of liability for a December 29, 2018 complete withdrawal using a 6.5% discount rate would have been unassailable, despite the fact that the estimate was understated. In reality, in this case the Fund provided an estimate that more accurately predicted what the eventual withdrawal liability assessment would be than was required by a strict application of Section 101(l). In any event, since the decision to withdraw came after the Company received the estimate, the Company cannot protest that the furtively Fund changed the discount rate after it had withdrawn.

Both *Concrete Pipe* and *Metz* address the concern about trustees putting pressure on actuaries to recommend actuarial assumptions that disadvantage withdrawing employers and benefit those employers that continue to participate. The Company pointed to a number of facts that raise similar concerns. Specifically, Cheiron made its presentation on January 24, 2018 entirely in an executive session, so the minutes of the Board meeting contain no documentation of the actual discussion that took place. The fact that the presentation as set forth in the PowerPoint slides did not even model a 6.5% discount rate raises legitimate questions as to whether that was the good faith recommendation of Cheiron or simply a decision made by the trustees that the actuary went along with. The conclusory statements about the trustees voting to accept Cheiron's recommendation and the actuary being asked if the assumptions were reasonable and defensible provide little guidance. Despite these indicia of disquiet, it must be stated that there is no basis for ruling that the 6.5% discount rate was substantially unreasonable and that question was not presented in this limited motion for summary judgment.

Retroactive Establishment of Discount Rate Unreasonable. The question that is properly presented is one of timing. Two facts are indisputable. First, the measurement date for calculating the UVBs, and hence the withdrawal liability of the Company following its complete withdrawal on December 29, 2018, was December 31, 2017. Second, on that day the discount rate in effect was 7.5%. Following the non-binding but persuasive precedents established by the Second Circuit in *Metz,* and by Arbitrator Jaffee in multiple arbitrations, the attempt by the actuary and trustees to adopt a lower discount rate after the measurement date, but to make it retroactive to the prior plan year, was unreasonable and improper.

The very essence of a fixed measurement date is that it establishes a bright line test. The applicable assumptions, market conditions, and the movement of employers into or out of the Fund are certain. If a Fund were free to alter the operative actuarial assumptions, particularly the discount rate that predominantly dictates the size of withdrawal liability, after the measurement date, the entire concept of a measurement date would be meaningless. The Fund's argument that when on June 18, 2019 it assessed the withdrawal liability that existed on December 31, 2017 it could rely on the April 17, 2019 complete actuarial valuation, which included the 6.5% rate, is not persuasive. Allowing the calculation of the UVBs and withdrawal liability calculation to be based on the actuarial valuation completed after the end of the year of withdrawal would guarantee that what the Fund termed the egregious facts found in *Metz* would be repeated for all assessments of withdrawal liability; namely, a new and possibly disadvantageous discount rate being adopted after an employer had already withdrawn A more cogent reading of Section 4213(b)(1), and one consistent with the concept of a fixed measurement date, is that a fund is permitted to use the most recent complete actuarial valuation that predated the measurement date. If there were no relatively recent complete valuation, a fund could use the most recent actuarial valuation that predated the measurement date, updated with reasonable estimates for the interim years between the most recent valuation and the measurement date. This section does not give a fund license to rely on changes in actuarial assumptions or other computational factors that occurred after the measurement date. The most recent actuarial valuation that the actuary and Fund should have relied on in this case was the one issued on November 2, 2017, which applied the then extant 7.5% discount rate.

The Fund's criticism of the *Metz* decision does not undermine its fundamental correctness. The court's reference to Section 4214 as evidencing a broader Congressional intent not to permit retroactive changes might be debated as an issue of general principles of statutory construction. It is not convincing to argue, however, that the absence of an anti-retroactivity provision in Section 4213 evidenced a Congressional countenance of retroactive changes in actuarial assumptions. Because the law established a fixed measurement date, there was no need to address retroactivity – the facts and assumptions that would form the basis for the withdrawal liability calculation were immutable after the measurement date.

The claim that the District of Columbia Court of Appeals established a different governing principle in *Combs*, and it was that Circuit Court decision that is applicable in this case, is incorrect. In *Combs,* the fund used the discount rate that was in effect on the measurement date to calculate the withdrawal liability of the employer. The fund did adopt a higher discount rate subsequently but declined to apply that change retroactive to the measurement date in the prior plan year. It was the employer who sought to compel the fund to apply the new rate retroactively. The court most definitely did not say the fund should have made the new rate effective to December 31 of the prior plan year and used it to the benefit of Classic Coal. To the contrary, the court wrote that "[o]nce a withdrawn employer's liability is fixed, changes in the UVB are irrelevant to the inquiry regarding withdrawal liability. Just as an employer's liability is not increased if the plan suffers losses in the withdrawal year, the employer is not entitled to benefits from actuarial changes subsequent to its withdrawal." In fairness, the last phrase creates some confusion. Consistent with its finding in the case, the final phrase should have been "in the withdrawal year" as opposed to "subsequent to its withdrawal." That would have given the "losses/actuarial changes" analysis a parallel construction. Despite the lack of precision in its language, it certainly cannot be said that in *Combs* the District of Columbia Circuit Court affirmatively ruled withdrawal liability may be calculated using an actuarial assumption adopted after the applicable measurement date.

The Fund argued that it would be unfair to apply the *Metz* holding that was issued in 2020 to a Fund action that occurred years earlier. It asserted that if it had been aware of the essence of the ruling in 2017, it could have moved up the Trustees meeting by a few weeks to the end of 2017, which would have made the 6.5% discount rate unquestionably applicable to the Company's December 2018 withdrawal. The Fund is effectively arguing that the *Metz* rationale should not be applied retroactively to bar the Fund from retroactively lowering the discount rate and thereby greatly increasing the Company's withdrawal liability. There is no need to engage in an analysis of competing claims of equity. The *Nolt* decision in 2010 should have alerted funds to the idea that retroactive changes in actuarial assumptions were on questionable legal grounds, as did the multiple arbitration decisions of Jaffee, a well-known and highly regarded arbitrator with extensive MPPAA experience. In contrast, the Fund could cite no court or arbitration cases that might have misled it into believing it was safe in changing the discount rate in January and have it apply to UVBs calculations effective the prior December 31.

AWARD

As a matter of law, Cheiron wrongly applied a 6.50% discount rate adopted by Cheiron at the January 24, 2018 Trustees' meeting to calculate the Company's withdrawal liability, rather than the 7.50% discount rate that was previously in effect on December 31, 2017. The Company's withdrawal liability shall be recalculated using the 7.50% discount rate. Jurisdiction is retained to resolve any remaining questions in this case.

/s/ [Signature]
Arbitrator

March 22, 2021

[Dkt. 37-4]

In the Matter of Arbitration:

EMBASSY INDUSTRIES

and

LOCAL 365 UAW PENSION TRUST FUND

AAA Case No. 13 621 01504 06

[Dated: March 4, 2008]

Withdrawal Liability

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

APPEARANCES:

For the Employer:

Jerrold F. Goldberg, Esq.
Cynthia A. Groszkiewicz, Director of Employee Benefits Services
(Greenberg Taurig)
Joe Molino, Chief Executive Officer

For the Fund:

William T. Josem, Esq.
(Cleary & Josem LLP)
Thomas J. Levy, Chief Actuary, The Segal Group, Inc.
Joshua Kaplan, Vice-President and Actuary, The Segal Group, Inc.
John F. Amaya, Fund Administrator

BACKGROUND

This case involves a challenge to the February 15, 2006 Notice of Demand for Withdrawal Liability by the Local 365 UAW Pension Fund ("Fund") seeking payment of $855,872.00 in withdrawal liability from Embassy Industries, Inc. ("Embassy" or "Employer"). In accord with Section 4219 of Employee Retirement Income Security Act, as amended ("ERISA" or "Act"), the amortization schedule provided for quarterly payments of $8,220.75 for 80 quarterly payments; due to the "20 year cap" provisions of the Act, the present value of the stream of mandated quarterly payments is far less than the total amount of withdrawal liability deemed due.

The Employer timely filed a Request for Review and a Demand for Arbitration. After discovery, an arbitration hearing was held on August 27, 2007. Post-hearing briefs were filed and the Parties agreed to extend the date for the issuance of the Opinion and Award in this matter.

There was no dispute that Embassy completely withdrew from the Fund. Nor was there any dispute as to the date of the complete withdrawal (December 2005).

The Employer's objections to the assessment in this case relate to the following:

1) its claim that the Fund's use of the Segal "blended" interest rate to calculate the Employer's withdrawal liability was an alternative method for which approval from the Pension Benefit Guaranty

Corporation ("PBGC") was required by virtue of Section 4211(c)(5) of the Act, but was neither sought nor granted;

2) its claim that the Fund's use of the Segal blended interest rate was improper and unreasonable even if it is not found to be an alternative method for which PBGC approval was statutorily required;

3) its objection to the Fund's use of the January 1, 2005 Actuarial Valuation to the extent that it inflated the Fund's unfunded vested benefit liabilities ("UVBLs") as a result of: a) including changes in actuarial assumptions (mortality and turnover) that were not effective until January 1, 2005; b) including changes in benefits and assets that took place during 2004 and post-dated the January 1, 2004 Actuarial Valuation; and c) including changes to the Funding Standard Account that increased the value of vested benefit liabilities ("VBLs") and decreased the value of assets based upon the 2005 withdrawals of Eagle Electric and Coastal (two other contributing employers); and

4) its objection to the Fund's initial response to the Employer's information request that no report was prepared in connection with the withdrawal liability assessment; the Employer took the position that the lack of any contemporaneous report precluded the assessment in this case; after arbitration was demanded, but prior to the hearing, an undated, unsigned Withdrawal Liability Report from the Fund's Actuary was provided to the Employer.

The details of these positions will be discussed below in somewhat greater detail.

The Standard of Review

Section 4221(a)(3) of ERISA, 29 U.S.C. §1401(a)(3), sets forth the applicable burden of proof in this case and provides in pertinent part that:

> (A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 through 4219 and section 4225 is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.
>
> (B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that --
>
> (i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or
>
> (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

The United States Supreme Court in Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 (1993) upheld the Act's arbitration provisions against due process challenge. The Court in Concrete Pipe recognized that the presumption of correctness did not apply to questions of law, noting that the Trustees initially and the Arbitrator upon review must follow applicable law, as embodied in statutes, regulations, court decisions, interpretations of the agencies charged with the enforcement of the Act, and other pertinent authorities. The Court further found the Section 4221(a)(3)(A) presumptions "incoherent" as a result of the use of mixed language of standards of trial and of review and held that Congressional objectives and constitutional due process requirements could be met by a construction that simply placed the burden upon the employer to disprove a challenged factual determination made by the Trustees by a preponderance of the record evidence.

In terms of review of the determinations made by the plan actuary, however, the Court stated that the Section 4221(a)(3)(B) presumptions work quite differently for a number of reasons, including the following: 1) actuaries are trained professionals, subject to regulatory standards, who are not subject vulnerable to suggestions of bias or its appearance; 2) the selection of assumptions and actuarial methods rested with the plan actuary's best estimate; 3) a heightened factual burden existed to establish that an independent prediction of the fund's actuary as to future facts or events was unreasonable, as distinct from challenges to the reasonableness of Trustee determinations of historical fact; 4) Congress stated a clear intention that actuarial assumptions be "independently determined by an actuary" and that it would be "inappropriate for an employer to substitute his judgment . . . for that of a qualified actuary" with respect to those assumptions; and 5) when speaking of the aggregate reasonableness of the assumptions and methods employed by the actuary in calculating the dollar liability figure, the Court stated that:

> First, of course, the statute does not speak in terms of disproving the reasonableness of the calculation of the employer's share of the unfunded liability, which would be the finding of future fact most obviously analogous to the findings of historical fact to which the §1401(a)(3)(A) presumption applies. Section 1401(a)(3)(B) speaks instead of the aggregate reasonableness of the assumptions and methods employed by the actuary in calculating the dollar liability figure. Because a "method" is not "accurate" or probably "true" within some range, "reasonable" must be understood here to refer to some different kind of judgment, one that it would make sense to apply to a review of methodology as well as of assumptions. Since the methodology is a subject of technical judgment within a recognized professional discipline, it would make sense to judge the reasonableness of a method by reference to what the actuarial profession considers to be within the scope of professional acceptability in making an unfunded liability calculation. Accordingly, an employer's burden to overcome the presumption in question (by proof by a preponderance of the evidence that the actuarial assumptions and methods were in the aggregate unreasonable) is simply a burden to show that the combination of methods and assumptions employed in the calculation would not have been acceptable to

> a reasonable actuary. In practical terms it is a burden to show something about standard actuarial practice, not about the accuracy of a predictive calculation, even though consonance with professional standards in making the calculation might justify confidence that its results are sound.
>
> . . . To be sure, the burden may not be so "mere" when one considers that actuarial practice has been described as more in the nature of an "actuarial art" than a science, . . . , and that the employer's burden covers "technical actuarial matters with respect to which there are often several equally 'correct' approaches . . . . But since imprecision inheres in the choice of actuarial methods and assumptions, the resulting difficulty is simply in the nature of the beast. . . .

(508 U.S. at 634-36) (citations omitted).

<u>The Disputed Calculation</u>

The "rolling five" or "one pool" method of calculating withdrawal liability is one of the methods specifically set forth in the Act itself. (Section 4211(c)(2)(C)) Article XII of the Plan document specifically notes adoption of this method. As one of the statutorily permitted alternative methods, no approval from the PBGC is needed for adoption of this method and no challenge to the use of this alternative method (as opposed to use of the Act's "presumptive method") was made herein.

Testimony and a Report on Employer Withdrawal Liability revealed that the withdrawal liability assessment in this case was calculated on the following basis:

1) the present value of vested benefits ("PVVB") of the Fund, for the year ended December 31, 2004, was calculated as:

$187,933,343, using the funding interest assumption of 7.5%

$247,819,930, using the PBGC single employer select and ultimate interest rates adjusted upward by 100 basis points (1%) (after adjustment, those rates were 4.80% for the first 20 years and an ultimate rate thereafter of 6.00%) and imposing an expense load only for that portion of the benefits that are matched by assets (the expense load was stated to be equal to that prescribed in Appendix C to 29 CFR Part 4044 of the PBGC Regulations);

2) an asset value, at market, of $166,475,121, based upon reports from the Fund's auditor;

3) a "blended" PVVB figure of $228,162,661, derived as follows:

> (i) based upon PVVB, calculated using the adjusted PBGC rates, the Fund was determined to be 67.175841% funded;
>
> (ii) that funding percentage is then multiplied by the PVVB, calculated using the adjusted PBGC rates;

(iii) the unfunded percentage (i.e., 32.824159%) is then multiplied by the PVVB, calculated using the Fund's funding interest assumption; and

(iv) the numbers derived in (ii) and (iii) are then added together and the "blended" PVVB figure of $228,162,661 is determined;

4) the UVBL figure was determined by subtracting $166,475,121 (market value of assets) from $228,162,161 (the blended PVVB value), yielding a UVBL figure of $61,687,540;

5) that UVBL figure was reduced by the value of outstanding collectibles as of December 31, 2004 ($982,579) to yield a net UVBL figure of $60,704,961;

6) the total contributions for 2000-04 were determined for both Embassy ($159,686) and the Fund as a whole (net of withdrawn employers) ($11,326,147);

7) the allocable percentage was then determined based upon Embassy's percentage of the Fund's overall contributions ($159,686 divided by $11,326,147 which was 1.4098881111%); and

8) the contribution percentage allocable to Embassy's share of the Fund's overall contributions in the five year period in question was then multiplied by the UVBL figure for the Fund as a whole, yielding $855,872 ($60,704,961 times 0.014098881111= $855,872).

The numbers used by the Plan Actuary in determining the withdrawal liability of the Employer were taken from the Fund's January 1, 2005 Actuarial Valuation (which was finalized on November 7, 2005). A number of changes took place with respect to Actuarial Present Value of Accumulated Plan Benefits ("PVAPB") from the January 1, 2004 Actuarial Valuation to the January 1, 2005 Actuarial Valuation. Notably, the PVAPB (the PVAPB included both vested and non-vested benefits) increased by $9,232,742 due to changes in actuarial assumptions which were effective January 1, 2005. The assumptions included changes to mortality assumptions and turnover assumptions. There were a number of other changes reflected in the January 1, 2005 Actuarial Valuation from the prior year's Actuarial Valuation, but those changes merely reflected changes due to the Fund's actual investment returns, benefit payouts, and benefit accruals in the intervening year. The Actuarial Valuation as of January 1, 2005, also noted the shutdowns of two significant contributing employers during 2005 – Eagle Electric and Coastal Oil, and the significant downward trend of active participants (1,451 as of December 31, 2003 to 1,179 as of December 31, 2004, with an additional loss in 2005 of 365 actives due to the Eagle Electric and Coastal Oil shutdowns; the loss of actives from Embassy was not referenced presumably because it was not known or because it was not deemed to have been as significant). The Actuarial Valuation took the Eagle Electric and Coastal Oil shutdowns into account for purposes of the Funding Standard Account calculations; there was no showing, however, that either of those shutdowns and resulting demands and collections of withdrawal liability post-2004 were taken into account or affected in any way the calculation of the UVBLs or the assets of the Fund as of December 31, 2004 (or even as of January 1, 2005).

The Employer noted that the Schedule B, Actuarial Information, to the 2004 Form 5500 filed with the Internal Revenue Service by the Fund on September 13, 2005, representing the Actuarial Valuation Date of January 1, 2004, listed the following:

Current value of assets (market)	$166,085,485
Actuarial value of assets for the Funding Standard Account	$183,820,347
Actuarial present value of vested Accumulated plan benefits	$179,352,284

Based upon the fact that the Actuarial Value of Assets exceeded the Actuarial Value of Benefits, as of January 1, 2004, the Employer asserted that the Fund was "fully funded" and that no withdrawal liability whatsoever could be assessed against the Employer for its December 2005 withdrawal. The Employer also challenged use of the numbers in the January 1, 2005 Actuarial Valuation based upon the fact that it included certain changes in data and assumptions that took place on January 1, 2005, thus rendering it an inaccurate snapshot of the funding status of the Fund on December 31, 2004. The Employer also asserted that the Fund was obligated to use the information reported in Schedule B to the Form 5500 for 2004, even if that data was as of January 1, 2004 – the first day of the 2004 Plan Year – rather than the end of that Plan Year.

According to the January 1, 2005 Actuarial Valuation, the market value of assets as of December 31, 2004, was $166,475,121; the actuarial value of assets as of December 31, 2004, was $174,125,424; and the actuarial accrued liability was $177,990,401, for an unfunded actuarial accrued liability of $3,864,977; the Actuarial Valuation noted further, however, that for purposes of determining the Fund's Scheduled Cost, the actuarial accrued liability was reduced by the present value of withdrawal liability paid and expected to be paid by Coastal Oil and Eagle Electric.

The January 1, 2005 Actuarial Valuation, Section 4, revealed that there was a change in assumptions as of January 1, 2005, that increased the Actuarial Present Value of Accumulated Plan Benefits in the amount of $9,232,743. These assumption changes consisted of: 1) changed mortality assumptions for health lives and for disabled lives; and 2) changed turnover assumptions. The Actuarial Valuation stated that the assumptions were modified to more closely reflect anticipated plan experience. The Fund Actuary also testified to that reason for the change in assumptions.

The Report on Employer Withdrawal Liability prepared by Segal in explanation of the assessment calculation noted that the mortality assumptions used in the calculation of the Employer's withdrawal liability in this case were those that were changed and effective as of January 1, 2005, not those which were effective on December 31, 2004.

Thomas D. Levy, Senior Vice-President and Chief Actuary, The Segal Company, also indicated that the withdrawal liability calculation in this case likely included in the vested benefits calculation the benefits for any individuals who became vested on January 1,

2005. There was no evidence as to whether any individuals, in fact, became vested on January 1, 2005.

Cynthia A. Groszkiewicz, Director of Employee Benefits Services, Greenberg Taurig, Associate, Society of Actuaries, Member, American Academy of Actuaries, Member and Qualified Plan Administrator, American Society of Pension Actuaries, and an Enrolled Actuary, was the expert actuary engaged by the Employer in this matter. She agreed that the appropriate date for valuing the UVBLs of the Fund for the withdrawal liability assessment in this case was December 31, 2004 – the last day of the plan year preceding the plan year in which the withdrawal occurred. She asserted that, in addition to the assumptions changes discussed above, there were changes in data during 2004 that she stated represented approximately an additional $3,000,000 in the value of VBLs (that valuation was based upon information in the January 1, 2005 Actuarial Valuation).

<u>The Interest Assumption – The Segal or Blended Method</u>

The Board of Trustees of the Fund adopted the Segal method at their October 29, 2002 meeting. The Minutes of that meeting revealed that, at the time, the value of the Fund was such that there were no UVBLs and no withdrawal liability.

As previously noted, The Segal Company serves as the Actuary for the Fund. Presently, Joshua Kaplan, FSA, MAAA, Enrolled Actuary, and a Vice-President of Segal, serves as the Enrolled Actuary for the Fund. At the time of the January 1, 2005 Actuarial Valuation, Alexander Sussman, FSA, MAAA, Enrolled Actuary, and a Senior Vice-President, Segal, was the principal actuary responsible for the Fund. Mr. Kaplan worked with Mr. Sussman on Fund matters and participated in the preparation of the Actuarial Valuation of January 1, 2005. Ms. Sussman is now retired. Mr. Kaplan testified at the arbitration in this matter. Testimony also was given at the arbitration by Mr. Levy and Ms. Groszkiewicz.

Section 4213(b)(1) of the Act contains language recognizing that plan actuaries may opt to utilize the funding assumptions of the plan in calculating the UVBLs of the plan for withdrawal liability purposes.

The Segal method utilizes two different interest rates when discounting the future value of VBLs to attain a present value of those liabilities for withdrawal liability purposes. Under the Segal method, also known as the "blended method," the market value of the "readily available assets" of the plan is first determined. Then the VBLs of the plan are calculated twice, once using the single employer termination annuity rates published by the PBGC ("PBGC rates") and a second time using the ongoing funding interest rate of the plan.

From the development of the Segal method of determining the interest assumption in the early 1980s until very recently, the effect of this approach has been to reduce the amount of employer withdrawal liability from the same calculation done with the plan's funding interest assumption. The VBL calculation prepared on the basis of PBGC interest rates historically has been significantly lower than the calculation prepared by using the plan's funding interest assumption since the PBGC interest rates have typically been higher than the funding interest rates used by most multiemployer plans. Given the fact that valuations are made of benefit payments that may occur over a 40 year period or longer, even relatively small differences in the interest assumption may produce significant changes in the present value of projected benefits costs. The PBGC rates are based upon terminating single employer pension plan assumptions and are derived from annuity rates available from insurance companies, whereas the funding interest rate includes an element of conservatism and reflects the nature of an ongoing, rather than a terminating plan.

Under the Segal method, the actuary next determines the percentage of UVBL (calculated using the PBGC rates, as adjusted to factor in more current mortality tables and administrative expenses) which can be "funded" using the market value of "readily available assets." To the extent that the VBL can be "funded" by readily available assets, the PBGC rates are used to calculate the VBL of the plan. In essence, the readily available assets are "matched" to the benefits that those assets could purchase using the interest rates applicable to terminating plans and the purchase of benefits in annuitized form are used. To the extent that such plan assets are not available, however, the remaining VBL is calculated using the plan's funding interest rate.

In 2004 and currently, the PBGC published interest rates have been very low (as viewed based upon historical norms). The net result is that the Segal blended method of determining the interest assumption in this case resulted in a higher withdrawal liability for the Employer than would have been the case if the Fund Actuary had used funding interest rates alone.

Mr. Levy testified that: 1) all of the Segal employed actuaries use the blended method of determining the interest rate assumption for withdrawal liability purposes and had done so since the passage of the Multiemployer Pension Plan Amendments Act; notwithstanding the motion of the Trustees in this case to authorize the use of the Segal blend, Mr. Levy testified that the blended method is not a matter that is left to the discretion of client fund trustees to accept or reject, but is a matter of actuarial best judgment; 2) in the early days after the Act's passage, funding interest rates were significantly lower than the termination interest rate assumptions; thus, when initially implemented, the Segal method resulted in lower withdrawal liability assessments than the other principal method recognized as reasonable – one that employed the ongoing plan funding interest rate assumption in calculating the UVBLs of the plan; 3) Segal currently serves as actuary for approximately 415 multiemployer pension plans which represent approximately 30% of the multiemployer pension plan universe and represent approximately 50% of the participants in multiemployer pension plans; 4) the rationale for the blended method remains sound even if at the time of the withdrawal in this case it produced higher withdrawal liability for the Employer; according to Mr. Levy, the rationale for the blended method is that one can only "settle" the obligation to provide vested benefits (under the snapshot required for calculating withdrawal liability) to the extent that the plan had assets on hand; the best proxy for the future assets available to pay those benefits is reflected in the funding interest assumption (which includes an expected equity premium); for unfunded portions of those VBLs, the most appropriate proxy was the PBGC rates, adjusted for expense assumptions (which are part of the overall plan assumptions for valuing the funded portion of VBLs); and 5) as a result of changes in the PBGC and plan funding interest rates over the years, Mr. Levy conceded that employer challenges shifted from how can the fund use funding rates for any part of the vested benefit liability determination (the position of many employers challenging withdrawal liability determinations in the 1980s and 1990s) to how can the fund use PBGC rates for any part of the vested benefit liability determination (the position of may employers challenging withdrawal liability determinations presently).

Mr. Levy also cited to Actuarial Standard of Practice No. 27, adopted in December 1996 by the Actuarial Standards Board, as support for the proposition that the Segal method is within accepted actuarial practice. ASP No. 27 states, in §3.6.4(b) that:

> 3.6.4 Multiple Investment Return Rates - The actuary may assume multiple investment return rates in lieu of a single investment return rate. Two examples are as follows:
>
> b. Obligations Covered by Designated Current Assets – one investment return rate is assumed for obligations covered by designated current plan assets on the measurement date, and a different investment return rate is assumed for the balance of the obligations and assets.

There was no dispute that the most commonly used interest rate for calculating employer withdrawal liability among those actuaries who do not use the Segal method is the plan's funding rate. While Section 4213(a)(2) of ERISA authorized the PBGC to develop regulations to determine actuarial assumptions and methods that may be used in the calculation of withdrawal liability as an alternative to those which "in the aggregate, are reasonable (taking in to 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" (Section 4213(a)(1) of ERISA), the PBGC has not promulgated any such regulations to date.

Ms. Groszkiewicz indicated that she was not testifying that the determination to use the blended interest rate was unreasonable or invalid and acknowledged that more than one set of assumptions may be reasonable for a given plan. Rather, she indicated that the Employer's objection to the use of the interest rate was that it constituted a method that was not one of the prescribed methods for calculating withdrawal liability contained in the Act. While use of the funding rate was permissible under the provisions of Section 4213 of the Act, Ms. Groszkiewicz acknowledged that use of those funding assumptions was not required, and she recognized that there was a difference of view among actuaries ("some do, some don't") in that regard.

Ms. Groszkiewicz further noted that there was a difference of opinion among actuaries as to whether market valuation or actuarial valuation of assets provides a sounder basis for valuation for purposes of determining employer withdrawal liability. She acknowledged that, at any given point in time, market valuation could be greater than actuarial valuation or vice-versa, depending upon recent investment history. She stated that, in the Pension Protection Act of 2006, Congress expressed a preference for the use of market valuation of assets on the single employer side.

Ms. Groszkiewicz acknowledged that the PBGC interest rates were "very low" and that those rates resulted in very high payments being demanded from withdrawing employers in single employer plan terminations.

<u>The Payment Schedule</u>

In accord with Section 4219 of the Act, the quarterly payments are calculated based upon the highest contribution rate (3%) and the highest consecutive three year average covered payroll ($1,096,108) (contributions to the plan are based not upon contribution base units, but a percentage of covered payroll), resulting in quarterly payments of $8,220.75.

There was no challenge to the calculation of the payment schedule or to the fact that the twenty year cap on payments contained in Section 4219 (c)(1)(B) significantly reduced the overall amount of withdrawal liability that the Employer will be required to pay to the Fund. Ms. Groszkiewicz testified that a "substantial" reduction in the amount of the withdrawal liability due from the Employer would be needed to impact the payment schedule as a result of the 20 year cap. She declined, however, to posit any particular present value number that the payment schedule represented. Mr. Kaplan testified that, discounting with the funding rate "more or less," the present value of the 20 year amortization schedule of payments demanded of the Employer was approximately $360,000.

The Employer noted that the Demand from the Fund contained dates for the quarterly payments that did not appear to comport with the Act. Although the Demand was dated February 15, 2006, it demanded subsequent payments on dates that the Employer asserted were incorrect under the Act. The Employer indicated at the arbitration that it was not asserting this error as part of the arbitration, other than as evidence of less than careful decision making by the Fund.

The Date of the Report of Withdrawal Liability

The Employer sought as part of its initial information request a copy of the calculation of the withdrawal liability and the supporting data including the actuarial report upon which the calculation was based. The Fund responded that no report of withdrawal liability was prepared and that Segal would not produce its work papers. The failure to produce a contemporaneous report, and the fact that the Report that was ultimately submitted into evidence was neither signed nor certified (as is the usual practice of Segal), led to the Employer questioning the legitimacy of the Report. Further, since the most recent Actuarial Valuation that was in effect as of December 31, 2004 was the January 1, 2004 Actuarial Valuation (which matched the information reported on the 2004 Schedule B), the Employer asserted that the January 1, 2004 information was the information that the

Fund was required to use in calculating the withdrawal liability of the Employer as of December 31, 2004.

CONTENTIONS OF THE EMPLOYER

The claim for withdrawal liability in this case is fatally flawed for a number of reasons. First, the Fund improperly used a method – the Segal method – for calculating the Fund's UVBLs that varied from those permitted by the Act and did not seek or obtain PBGC approval for that alternative method. The attempt to characterize this method as an assumption should be rejected. Even Segal itself described the blending process as one of the two main methodologies for calculating the value of a plan's UVBLs. Moreover, unlike other assumptions, the Segal method does not change from year to year. Whether reasonable or not, the Segal method is a method and, as such, could not be used to determine withdrawal liability under the Act without being approved by the PBGC. On that basis alone, the assessment must be nullified.

Second, the Fund violated the procedural requirements of the Act by not providing the Employer with the basis for the determination of withdrawal liability.

Third, the only documents that were in existence as of the date of withdrawal related to the January 1, 2004 Schedule B and Actuarial Valuation and, according to those documents, the plan was fully funded. This assertion was based upon a comparison of the actuarial value of assets and the actuarial value of VBLs for purposes of Section 412. The Plan Actuary certified those assumptions as reasonable for purposes of Section 412. It is improper to use a different set of assumptions as representative of the actuary's best estimate of future performance of the plan simply because the calculation is being done for purposes of calculating withdrawal liability.

Fourth, there were material errors in the calculation, particularly by: a) including changes in actuarial assumptions that were not effective until January 1, 2005 and increased the actuarial present value of vested benefits by $9,232,742; b) including changes reflective of the 2005 withdrawals of Eagle Electric and Coastal, which the Employer asserts increased the present value of VBLs by approximately $15,000,000; c) including a changed discount rate, effective January 1, 2005; and d) including in the participant data base information that post-dated January 1, 2004. Given these flaws, it would not be appropriate to attempt to adjust the calculation, but rather a finding must be entered that voids the assessment in its entirety as unreasonable and clearly erroneous.

The failure of the Fund Actuary to have prepared a report prior to the withdrawal liability assessment and the Fund's response to the Employer's information request precluded it from relying upon an unsigned, uncertified report. The 2004 Schedule B is the appropriate source of information to use for calculating the Employer's withdrawal liability in this case for several reasons. First, under ERISA, the valuation date may be any date in the plan year and need not be the last day of the plan year. Second, the calculation in this case was unreasonable and clearly erroneous because the Plan Actuary made a significant error in applying the assumptions and methods. By using the data in the January 1, 2005 Actuarial Valuation, he introduced into the analysis changes in both assumptions that did not take effect until after the end of the 2004 Plan Year, but also introduced changes in demographics that adversely affected the asset and liability values of the Fund in clear contravention of the Act. Third, the use of the Segal blended method, even if treated as an assumption, was unreasonable as applied in this case. (This argument which was articulated in the Employer's brief is not supported by the testimony of any actuary. In fact, as previously noted, Ms. Groszkiewicz testified that while she believed that the Segal method was not validly used due to the lack of PBGC approval, she did not assert that it was unreasonable.) The valuation of VBLs under the one-pool method using two different interest rates is not referenced or authorized by the Act and cannot be found reasonable. How can two different interest rate assumptions both be deemed the "best estimate" of the Plan Actuary? How can the valuation of the Fund's VBLs for withdrawal liability be calculated using two different interest rate assumptions? Further, use of the Segal method in this case leads to absurd results; given the fact that PBGC rates were lower than the ongoing funding assumption for interest, a plan that was 0% funded would have a much lower present value of vested benefits calculation than a plan that was 100% funded.

For all of these reasons, the withdrawal liability assessment should be found to have been imposed contrary to the Act and should be rescinded. The Fund should also directed to make the Employer whole for all interim payments, with interest.

CONTENTIONS OF THE FUND

The Employer bears a heavy burden under the Act and applicable case law. It must show, by a preponderance of the evidence, that the actuarial assumptions and methods used in the determination were unreasonable in the aggregate or that the Fund's actuary made a significant error in applying those actuarial assumptions or methods. No such showing was made in this case.

The Fund adopted the rolling five or one pool method of calculating withdrawal liability. This was one of the methods set forth in the Act. No application or approval by the PBGC was needed for the use of that method.

The Segal blended method is not a method for calculating withdrawal liability under the Act. Rather, it is an actuarial approach for determining an appropriate interest assumption. The blending of the interest rate provided for by that approach is both reasonable and valid. Mr. Levy explained that it attempts to match assets on hand with projected benefits. To the extent that this VBL can be "funded" by readily available assets, the funding rates are used to calculate the VBL of the plan. To the extent that such assets are not available, however, the remaining VBL is calculated using the PBGC funding interest rate, modified to reflect expense costs. While, historically, the Segal method of determining interest rates resulted in lower employer withdrawal liability than would result from the application of funding interest assumptions alone, the recent change in market interest rates provides no basis to invalidate the method's continued usage. As explained by Mr. Levy, the basic underpinnings of the method remain sound even when it increases, rather than decreases, the withdrawal liability calculation as compared to a calculation derived from use of the funding interest assumption.

The reliance by the Fund Actuary upon the January 1, 2005 Actuarial Valuation was sound. With very few exceptions, the January 1, 2005 information will equal the data that would have been applicable as of December 31, 2004 – one day earlier. Assumptions and methods that represented the best estimate of plan experience by the Plan Actuary as of January 1, 2005 will also represent the best estimate of anticipated plan experience by that same actuary as of December 31, 2004.

Even if the changed January 1, 2005 assumptions were ignored and the 2004 assumptions used instead, there would have been no effect upon the withdrawal liability determination in this case. The amount of each payment is determined in accord with Section 4219 of the Act and would be the same regardless of which set of assumptions were used. The net effect of the change in assumptions was only $9,232,742 – a sum that was insufficient to change Embassy's withdrawal liability since the remaining liability would still exceed the payments demanded due to the effect of the 20 year cap on withdrawal liability payments.

The Employer's argument that the Fund was required to obtain PBGC approval prior to being able to use the Segal blended method of determining interest rates for purposes of withdrawal liability assessments must be rejected. The Segal method is a well-known, widely used method of determining interest assumptions for purposes of calculating the prevent value of VBLs for withdrawal liability purposes. While Ms. Groszkiewicz was critical of that particular method, she acknowledged that: 1) she has never served as actuary to a multiemployer plan; 2) the Segal method cannot be deemed unreasonable and that reasonable actuaries can and do differ on its use; and 3) while a number of actuaries use the funding interest assumption for withdrawal liability purposes, others do not. Finally, Ms. Groszkiewicz acknowledged that, other than the interest assumption and other than the use of the calculations contained in the 2005 Actuarial Valuation, instead of the calculations contained in the 2004 Schedule B, there were no other actuarial issues raised in this arbitration.

In regard to the Segal blended method, one treatise noted that "there has not been one reported case where the use of the "blended approach" has been successfully attacked. Employee Benefits Law (Bureau of National Affairs) (1991) at 752. The use of the Segal method has been upheld in arbitrations as a reasonable method for calculating withdrawal liability. See, e.g., J.I. Denio, Inc. and Operating Engineers Pension Trust, 8 EBC 1978 (Slater 1987); Ells and Construction Laborers Pension Trust for Southern California, 5 EBC 1489 (Zimring 1984); and Joy Manufacturing Company and IAM National Pension Fund Benefit Plan A, 5 EBC 1129 (Hannan 1984).

Additionally, the PBGC in PBGC Opinion No. 86-24, 1986 PBGC LEXIS 5 (1986), recognized that:

You indicate that the plan has been computing unfunded vested benefits for withdrawal liability purposes using the PBGC's interest assumption for terminated trusteed single-employer plans and question whether this is appropriate, since these assumptions "are not for multiemployer plans and . . . generate lower liabilities," and since the assumptions are not the same as those used for purposes of section 412 of the Code. Section 4213(b) of ERISA states merely that:

> [i]n determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability . . . , the plan actuary may . . . rely upon the most recent complete actuarial valuation used for purposes of section 412 of the . . . Code . . . .

(Emphasis supplied.) This is a permissive, not a mandatory, provision. Thus, the fact that the assumptions used to compute withdrawal liability are not the same as those used under section 412 of the Code does not of itself make those assumptions improper.

Section 4213(a) of ERISA permits the PBGC to issue regulations prescribing actuarial assumptions to be used in calculating withdrawal liability. No such regulations have been issued. In the absence of such regulations, section 4213(a) requires simply that:

> [w]ithdrawal liability . . . 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 . . . .

Courts dealing with appeals from arbitration decisions have noted that the Act requires consideration of the reasonableness of actuarial assumptions and methods in the aggregate, not simply the interest assumption standing alone. See Combs v. Classic Coal Corporation, 1990 U.S. Dist. LEXIS 5802 (D.D.C. 1990) (overturning arbitration decision and reinstating withdrawal liability assessment; the arbitrator found that use of a particular interest assumption was unreasonable; in discussing the interest rate assumption, the District Court observed that there "are three schools of thought among actuaries with respect to the selection of interest rate assumptions" for withdrawal liability purposes: 1) the use of funding interest rate assumptions (which the court described as the "majority" view); 2) the "Grubbs" view (using PBGC single employer plan termination interest rates and which were found by the court to be in use in only a very few plans); and 3) the blended interest or Segal method; the district court, while recognizing that the interest assumption is very significant in the calculation of withdrawal liability, held that "one assumption, no matter how unreasonable, may not be deemed to render the assumptions unreasonable in the aggregate" and found that the arbitration award did not comport with the presumption of correctness set forth in the

Act; none of the grounds relied upon for invalidating the fund's choice of interest rate assumption – higher short-term returns and differences between the periods of time deemed relevant for withdrawal liability and funding purposes – were deemed sufficient to justify overturning the interest rate assumption as unreasonable; on appeal [931 F.2d 96 (D.C. Cir. 1999)], the Court of Appeals upheld the District Court's decision, reasoning that Congress understood that there may be a number of reasonable actuarial assumptions and, given the wide variation among actuarial opinions, the Act requires affirmance of any set of methods and assumptions that are reasonable in the aggregate, rather than compelling use of the "most reasonable" set of assumptions); and Board of Trustees, Michigan United Food and Commercial Workers Union v. Eberhard Food, Inc., 831 F.2d 1258 (6th Cir. 1987) (upholding a district court ruling that enforced an arbitration award that found that employer did not sustain its burden of establishing that use of the plan's funding interest rate was unreasonable; also rejecting an argument by the employer that the fund was obligated to purchase government bonds and apply the pay-out streams of those bonds to the VBLs).

Any challenge to the use of market rate valuation of plan assets in favor of actuarial asset valuation must be rejected. The Pension Protection Act of 2006 included provisions that reflect a Congressional preference for use of market value of assets for single employer pension plans and limit the ability of plans to smooth assets. Further, there was no dispute that for many plans that used smoothing, the actuarial value of assets exceeded the market value of assets in 2003-05 due to the 2000-01 decline in equity prices. In many prior years, however, use of a market value for assets resulted in higher asset values as the result of stock market performance well in excess of assumed performance. Nothing in the Fund's use of market valuation of assets was precluded by the Act or shown to be unreasonable. In fact, it has been recognized that there are multiple reasonable methods for valuing assets for withdrawal liability purposes. See, e.g., Masters, Mates & Pilots Pension Plan v. USX Corporation, 900 F2d 727, 733 (4th Cir. 1990) (upholding moving market average method of valuing assets as reasonable, but noting further that "[w]e cannot discern the approval of only one theory of valuation in the statutory scheme" and cannot espouse "one particular economic theory over another"). Even Ms. Groszkiewicz conceded that there were differences of approach among actuaries as to whether to use a market value or actuarial value of assets for determining UVBLs for withdrawal liability purposes. Once the Fund Actuary's choice is determined to be one consistent with the approach taken by other significant numbers of actuaries, it is perforce reasonable and must be sustained.

The Act makes clear that the snapshot of UVBLs that is made for the rolling five or one pool method is the amount of UVBLs for the Fund as of the last day of the plan year preceding withdrawal – i.e., as of December 31, 2004. There was nothing improper about taking into account the benefits paid out, the earnings on assets, the contributions, and the vested benefits accrued during calendar year 2004. The 2004 Schedule B, which was based upon the January 1, 2004 Actuarial Valuation and ignored 2004 changes, was not based upon a valid valuation date.

Mr. Kaplan testified that the best estimate of assumptions, as of January 1, 2005, were the same as the best estimate of assumptions as of the prior day. None of the data from 2005 were relied upon in the calculation of UVBLs that were part of the withdrawal liability calculation in this case. Even if these claims were somehow credited, however, they would not change the withdrawal liability in this case at all since the payment schedule would remain the same due to the means by which quarterly payments are determined and the effect of the 20-year cap.

The claim that the Fund was fully funded and that no withdrawal liability was due was based upon multiple erroneous assumptions. It assumed that an actuarial value of assets was required. It assumed that January 1, 2004 was the appropriate date for determining the UVBLs of the Fund. It also used a calculation of the Fund's accrued actuarial liability that was prepared for purposes of determining scheduled costs which has differing purposes and differing approaches than determining the present value of VBLs for purposes of withdrawal liability. Scheduled cost information is used for budgeting purposes.

The Employer's objection to the significant increase in withdrawal liability during 2004 also provides no basis to overturn the assessment in this case. As explained, however, by Mr. Kaplan, the increase was largely a function of the significant decline in PBGC interest rates from 2003 to 2004.

For all of these reasons, the assessment in this case should be upheld and the Employer's claims should be denied in their entirety.

DISCUSSION AND OPINION

After careful consideration of the entire record, I find that, with one exception noted below, the Employer's objections to the withdrawal liability assessment are unsupported by the preponderance of the record evidence and, accordingly, must be rejected. A summary of the principal reasons for this holding follows.

<u>The Segal Method is an Actuarial Method to Determine the Appropriate Interest Assumption Not a Method to Calculate Withdrawal Liability that Requires PBGC Approval</u>

Section 4211(c)(5) of the Act requires that plans submit for PBGC approval plan amendments that "adopt any other alternative method for determining an employer's allocable share of unfunded vested benefits." The Segal "method" is not such an alternative method.

Despite its description by The Segal Company as a "method," the blended method or Segal method is an actuarial method of determining the appropriate interest rate assumption for calculating the value of VBLs for purposes of withdrawal liability. It is not an alternative method for determining an employer's allocable share of unfunded vested benefits. The method for determining the allocable share of UVBLs for purposes of determining the withdrawal liability of the Employer in this case was the "rolling five" or "one pool" method set forth in Section 4211(c)(2)(C) of the Act and noted in Article XII of the Plan.

Sections 4213 and 4221 of the Act by their use of the term "actuarial assumptions and methods" recognize implicitly that there are actuarial methods which are different from the methods of determining allocable shares of UVBLs. The former are required by Section 4213 to be reasonable in the aggregate, after taking into account the experience of the plan and reasonable expectations and, in combination, must offer the actuary's best estimate of anticipated experience under the plan. The latter methods are, in essence, formulae designed to calculate the withdrawal liability that is due from the withdrawn employer, and if different from the statutorily defined methods, must be adopted by plan amendment and have the approval of the PBGC.

None of the courts or arbitrators who have reviewed assessments that were calculated with the use of interest rate assumptions derived by the Segal or blended method have held that they were invalid due to a lack of PBGC approval. There is no dispute that: 1) courts and arbitrators have uniformly rejected challenges to the Segal or blended method as unreasonable; 2) none of the funds for which Segal serves as the actuary has sought PBGC approval of the "method" and, in fact, there is no indication that any of those funds purported to adopt the Segal method, by means of a plan amendment; 3) none of those decisions opined that the determination of interest rates for purposes of determining the plan's overall UVBLs for withdrawal liability purposes was a matter that needed PBGC approval; and 4) the PBGC has not, to date, promulgated any regulations under Section

4213 or granted approval or disapproval of a particular interest assumption or the "method" by which that assumption was set by the plan's actuary.

The Employer's claim that the use of the Segal method was precluded by Section 4211(c)(5) of the Act is, therefore, rejected.

<u>The Actuarial Assumptions and Methods Were Not Shown to be Unreasonable</u>

The standards of proof and persuasion are set forth in Section 4221 of the Act and have been the subject of extensive discussion by the United States Supreme Court in <u>Concrete Pipe</u>, <u>supra</u>.

The Employer has the burden of establishing by a preponderance of the record evidence that the actuarial methods and assumptions employed by the Fund Actuary in calculating withdrawal liability are unreasonable in the aggregate, measured against standard actuarial practice. No such showing has been made in this case.

The expert actuary who testified on behalf of the Employer, Ms. Groszkiewicz, testified that she did not believe that the Segal method or the interest rate assumption was unreasonable or that the actuarial assumptions and methods were, in the aggregate, unreasonable. Mr. Kaplan and Mr. Levy both testified as to the basis for the Segal method. That method represents one of the commonly used actuarial methods for determining the interest rate applicable to valuing VBLs for withdrawal liability purposes. Its use is consistent not only with the general practice of the Segal Company, but appears to be supported by Actuarial Standard of Practice No. 27.

The assertion that it is improper to use different assumptions for withdrawal liability purposes than for ongoing funding purposes is rejected. The fact that a number of actuaries do so is sufficient to reject the claim that different assumptions are per se unreasonable or improper.

The use of the Segal method has been upheld uniformly by arbitrators and by courts. Any theoretical objections to its use noted by the Employer in this case cannot override the fact that it has been widely used for decades and continues to be widely used in a significant number of multiemployer plans.

The lack of any showing that any of the other assumptions were unreasonable further precludes any finding that the actuarial methods and assumptions in this case were unreasonable in the aggregate.

There was no evidence contradicting the testimony of Mr. Kaplan that the Segal method resulted in an interest rate assumption that, in combination with the other actuarial assumptions and methods, represented his best estimate of anticipated experience under the plan.

For all of these reasons, the claim that the actuarial methods and assumptions used in the determination of the Employer's withdrawal liability were unreasonable, in the aggregate, is rejected.

The Fund Was Required to Use the December 31, 2004 Asset Values, Liability Values, Benefit Data, and Assumptions

Section 4211(c)(3) of the Act requires that withdrawal liability for the one pool or rolling five method be based upon "the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonable be expected to be collected from employers withdrawing before such year." There is no question that the Employer withdrew in this case in December 2005; that the plan year is a calendar year; and that the end of the plan year preceding the year in which the Employer withdrew was December 31, 2004.

The Employer's argument that the Fund was required to use the data and assumptions recorded on the 2004 Form 5500 and accompanying Schedule B filed with the Internal Revenue Service is rejected. That Form, which was based upon a snapshot of the Fund as of January 1, 2004, focused upon a date that was the first day, rather than the last day, of the plan year preceding the year in which the Employer withdrew. The changes in the status of the Fund between January 1, 2004 and up to and including December 31, 2004, were properly considered by the Fund in connection with the withdrawal liability assessment in this case. The key for purposes of the data and assumptions is not when they were physically available for use by the plan actuary, but whether they properly represent the condition of the plan as of the snapshot date (in this case, December 31, 2004).

The Fund's reliance upon the January 1, 2005 Actuarial Valuation, however, also appears misplaced in this case. Although in many instances there will be no differences between the determination of a fund's UVBLs on first day of one plan year and the last day of the prior plan year, the Employer has shown in this case that significant changes in actuarial assumptions, including particularly the assumptions relative to mortality and turnover, were made as of January 1, 2005. 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. The effect of those changes in assumptions, according to the January 1, 2005 Actuarial Valuation upon the present value of accrued benefits (both vested and non-vested) was $9,232,742. The impact upon the present value of VBLs, therefore, should be somewhat less than that figure. While Mr. Kaplan testified that his best estimate of the mortality and turnover assumptions would have been the same as of December 31, 2004 as it was on January 1, 2005, the fact remains that he did not change the mortality and turnover assumptions until the 2005 plan year. Having continued the use of the prior mortality and turnover assumptions through the end of the 2004 plan year, he was obligated to use the 2004 assumptions when calculating the withdrawal liability that was allocable to the Employer.

The Employer also questioned whether the valuation of VBLs used for purposes of assessing withdrawal liability in this case included benefits that first accrued and/or became vested on January 1, 2005. While there was no identification of any such benefits, Mr. Kaplan conceded that if there were any such benefits, then they would have been included in his withdrawal liability calculation. Given the fact that the withdrawal liability in this case will be remanded for recomputation and a revised assessment issued, adjustments are also appropriate for any new data that became effective January 1, 2005, and which was included in the valuation made for purposes of determining the Employer's withdrawal liability of the Fund's UVBLs and/or the share of those liabilities allocated to the Employer.

The record failed to substantiate the Employer's assertion that the Eagle Electric and Coastal withdrawals affected the withdrawal liability calculation in this case. The changes noted in the January 1, 2005 Actuarial Valuation for those withdrawals related only to the Funding Standard Account calculations and were not shown to have been factored into the valuation of VBLs or the value of assets used to calculate the withdrawal liability calculation in this case.

In its post-hearing brief estimates, Fund Counsel recalculated the withdrawal liability of the Employer at $750,357, based upon a calculation that appears consistent with the Segal method and uses a revised weighting factor that discounted the value of VBLs by the full $9,232,742 figure. The Fund further argued that even if that Employer argument was credited, it would not change the amount of withdrawal liability that will actually be due from the Employer as a result of the impact of the 20 year Section 4219 cap.

While the bottom line conclusion that the payment schedule will remain the same is likely correct (the present value of 80 quarterly payments of $8,220.75 will be far less than $750,357 or any number close to that), no revised demand was issued and no actuarial testimony in support of this precise number was provided. While the error does not warrant voiding the withdrawal liability assessment and directing that the Fund return the interim payments made to date plus interest and require that the Fund then reissue a new withdrawal liability assessment, it is appropriate to direct that the Fund recalculate the withdrawal liability due in this case after excluding any post December 31, 2004 changes in assumptions and after excluding any post December 31, 2004 changes in the value of VBLs and promptly issue that recalculation to the Employer. Any objections to the revised assessment that are asserted to affect the payment schedule will be addressed expeditiously and jurisdiction will be retained for that purpose.

The Employer's Objections to the Withdrawal Liability Report Are Not Significant

The Employer's objections to the withdrawal liability report as unsigned and due to its not having been prepared contemporaneously or having been provided earlier to the Employer are of no significance in terms of the validity of the withdrawal liability assessment in this case. There is no obligation imposed upon the Fund or its actuary to prepare a report (as distinct from simply running the relevant calculations) prior to assessing withdrawal liability. The lack of signature on the report and the fact that it was prepared after the assessment and pursuant to a request by the Employer and a directive from the Arbitrator is of no moment. It represents nothing more than a written explanation of the process by which the Fund Actuary performed the calculations that were part of the assessment in this case. Whether or not signed and regardless of the date of its preparation does not affect the testimony of Mr. Kaplan as to how he determined the withdrawal liability of the Employer and does not change the amount of withdrawal liability that was assessed in this case.

The "Full Funding" Defense is Unavailable in this Case

The Employer's assertion that the Fund could not assert withdrawal liability because it was "fully funded" is rejected. There was no showing that the Fund was, in fact, fully funded. This assertion was grounded upon: 1) an actuarial valuation of benefit liabilities that was done using only funding assumptions; 2) an actuarial valuation of assets that ignored market value; and 3) a measurement or snapshot date that was at the beginning of the plan year preceding the plan year in which the Employer completely withdrew from the Fund.

The interest rate and appropriate date issues were previously discussed and need not be repeated at this juncture. The use of market value to determine asset value was conceded by Ms. Groszkiewicz to be reasonable and to be used by a significant number of actuaries. Moreover, market value seems a particularly appropriate measure of asset value for the purpose of determining if a plan is fully funded – i.e., if there are assets on hand sufficient to purchase or fully fund the vested benefit liabilities of the Fund.

A Recalculation of the Employer's Withdrawal Liability is Appropriate

As previously noted, there was no objection raised to the payment schedule in this case which appears to comport with Section 4219 of the Act.

The Employer's request that the withdrawal liability assessment be voided in its entirety as a result of the use of some incorrect actuarial assumptions regarding mortality and turnover is denied. In most cases, where an error is found to have been made in the calculation of withdrawal liability, but where withdrawal liability is due, the appropriate remedy is to direct a proper reassessment, not void the initial assessment in its entirety. This approach is particularly appropriate herein where the area that the assessment was found not to comport with law is unlikely to result in a sufficiently substantial reduction in the Employer's withdrawal liability to even impact upon the payment schedule as a result of the effect of the 20 year cap on withdrawal liability payments.

Nevertheless, the Employer is entitled to receive a corrected withdrawal liability assessment and the Fund is directed to promptly issue one. Jurisdiction will be retained to resolve any disputes that may arise regarding that revised assessment, including but not limited to, whether the revised assessment affects the payment schedule.

AWARD

The withdrawal liability assessment issued to the Employer by the Fund is contrary to Section 4211(c)(3) of the Act to the extent that the assessment was calculated using actuarial assumptions and data that were not in effect and were not applicable as of the last day of the plan year preceding the Employer's withdrawal (i.e., December 31, 2004). The Fund is directed to promptly recalculate the withdrawal liability of the Employer using the actuarial assumptions and data that were effective as of December 31, 2004.

In all other respects, the Employer's objections to the withdrawal liability assessment in this case are denied in their entirety.

Jurisdiction is retained to resolve any disputes concerning that recalculation, including whether the recalculation results in any change to the payment schedule.

Pursuant to Section 4221(a)(2) of the Act, responsibility for the fees and expenses of the arbitration, including the fees of the American Arbitration Association, is assessed on a joint and several basis.

March 4, 2008

/s/ [Signature]
Ira F. Jaffe, Esq.
Impartial Arbitrator

[Dkt. 37-6]

In the Matter of Arbitration:

METZ CULINARY MANAGEMENT, INC.

and

NATIONAL RETIREMENT FUND

AAA Case No. 01-14-0002-2075

[Dated: February 22, 2016]

Claim for Withdrawal Liability

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 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 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 (3d Cir. 2011), the District Court and Court of Appeals upheld a determination by this Arbitrator [D.A. Nolt and Roofers Local No. 30 Combined Fund, 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 multiemployer 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. <u>See</u>, <u>e.g.</u>, <u>Combs</u> v. <u>Classic Coal Corporation</u>, 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 <u>Concrete Pipe and Products of Southern California</u> v. <u>Construction Laborers Pension Trust Fund for Southern California</u>, 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/ [Signature]
Ira F. Jaffe, Esq.
Impartial Arbitrator

[Dkt. 37-8]

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

TRUSTEES of the IAM NATIONAL PENSION FUND,

Plaintiffs,

v.

OHIO MAGNETICS, INC.

Defendant.

Lead Case No.: 1:21-cv-00928-RDM

**Member Cases:
1:21-cv-00931-RDM
1:21-cv-02132-RDM**

This Filing Relates To: All Cases

[Filed: January 28, 2022]

DEFENDANTS' RESPONSE TO PLAINTIFFS' LOCAL RULE 7(h)(1) STATEMENT OF MATERIAL FACTS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants Ohio Magnetics, Inc. ("Ohio Magnetics"), Toyota Logistics Services, Inc. ("Toyota Logistics"), and Phillips Liquidating Trust ("Phillips") (collectively, "Defendants"), by and through their attorneys and pursuant to the Federal Rules of Civil Procedure and Local Rule 7(h)(1), hereby respond to the

Statement of Undisputed Material Facts submitted by the Trustees of the IAM National Pension Fund (the "Fund") in support of their motion for summary judgment (*see* Dkt. 34-2).

1. The IAM National Pension Plan (the "Plan") is an employee pension benefit plan within the meaning of §§ 3(2) and 502(d)(1) of ERISA (29 U.S.C. §§ 1002(2) and 1132(d)(1)), and a multi-employer plan within the meaning of §§ 3(37) and 515 of ERISA (29 U.S.C. §§ 1002(37) and 1145). (Ohio Magnetics Stip. ¶ 1; Toyota Logistics Stip. ¶ 1; Phillips Stip. ¶ 1.)

RESPONSE: Undisputed.

2. The Plan provides retirement benefits to employees who performed covered work for employers that remitted contributions to the Fund in accordance with collective bargaining agreements with the International Association of Machinists and Aerospace Workers, AFL-CIO or with affiliated local or district lodges. (Ohio Magnetics Stip. ¶ 2; Toyota Logistics Stip. ¶ 2; Phillips Stip. ¶ 3.)

RESPONSE: Undisputed.

3. The Plan's assets are held in the Fund, a jointly-administered, multi-employer, labor-management trust fund established and maintained pursuant to collective bargaining agreements in accordance with § 302(c)(5) of the Taft-Hartley Act (29 U.S.C. § 186(c)(5)). (Ohio Magnetics Stip. ¶ 3; Toyota Logistics Stip. ¶ 3; Phillips Stip. ¶ 2.)

RESPONSE: Undisputed.

4. The Fund is governed by an agreement and declaration of trust that was last restated as of May 15, 2014 (the "Trust Agreement"). The Fund's Plan Year runs from January 1 to December 31. (Ohio Magnetics Stip. ¶ 4; Toyota Logistics Stip. ¶ 4; Phillips Stip. ¶ 5.)

RESPONSE: Undisputed.

5. Pursuant to the Trust, withdrawal liability is to be calculated using the "presumptive" method set forth in ERISA § 4211(b) (29 U.S.C. § 1391(b)). (Ohio Magnetics Stip., Ex. A, Art. VII § 2; Toyota Logistics Stip., Ex. A, Art. VII § 2; Phillips Stip., Ex. A, Art. VII § 2.)

RESPONSE: Undisputed.

6. Pursuant to the Trust, "[w]ithdrawal liability shall be determined 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 Plan actuary's best estimate of anticipated experience under the Plan." (Ohio Magnetics Stip., Ex. A, Art. VII § 5; Toyota Logistics Stip., Ex. A, Art. VII § 5; Phillips Stip., Ex. A, Art. VII § 5.)

RESPONSE: Undisputed.

7. Cheiron has served as the Fund's actuary since March 2014. (Ohio Magnetics Stip. ¶ 10; Toyota Logistics Stip. ¶ 7; Phillips Stip. ¶ 9.)

RESPONSE: Undisputed.

8. In that role, Cheiron prepares actuarial valuations of Fund assets, calculates the amounts required for minimum funding purposes, and calculates an employer's withdrawal liability in the event of a complete or partial withdrawal from the Fund. (Ohio Magnetics Stip. ¶ 11; Toyota Logistics Stip. ¶ 8; Phillips Stip. ¶ 10.)

RESPONSE: Undisputed.

9. Cheiron cannot prepare the actuarial valuation until after the end of the Plan Year. (Ohio Magnetics Stip. ¶ 12; Toyota Logistics Stip. ¶ 9; Phillips Stip. ¶ 11.)

RESPONSE: Disputed. The Fund has stipulated that Cheiron cannot prepare an actuarial valuation until, at the earliest, after the financial markets have closed on the final business day of the corresponding Plan Year and the resulting closing values of the Plan's assets are calculated. (Toyota Logistics Stip. ¶ 9.)

10. On November 2, 2017, Cheiron published the actuarial valuation for the Fund for the 2016 Plan Year (the "2016 Actuarial Valuation"). (Ohio Magnetics Stip. ¶ 13; Toyota Logistics Stip. ¶ 10; Phillips Stip. ¶ 12.)

RESPONSE: Undisputed.

11. The 2016 Actuarial Valuation stated that, as of the end of the 2016 Plan Year, the Fund had unfunded vested benefits ("UVBs") of $448,099,164. The 2016 Plan Year was the first time in several years that the Fund had UVBs.

(Ohio Magnetics Stip. ¶ 14; Toyota Logistics Stip. ¶ 11; Phillips Stip. ¶ 13.)

RESPONSE: Undisputed.

12. Cheiron utilized the following methods and assumptions in preparing the 2016 Actuarial Valuation:

- **a. Asset Valuation Method: Actuarial Value of Assets**
- **b. Discount Rate: 7.50%**
- **c. Investment Return: 7.50%**

(Ohio Magnetics Stip. ¶ 15; Toyota Logistics Stip. ¶ 12 & Ex. B, App'x C at 35, 38; Phillips Stip. ¶ 14.)

RESPONSE: Undisputed.

13. On January 24, 2018, at a regularly-scheduled meeting of the Trustees, Cheiron reviewed with the Trustees how withdrawal liability is calculated and discussed with them the actuarial assumptions that are used to make those calculations. (Ohio Magnetics Stip. ¶ 16 & Ex. C; Toyota Logistics Stip. ¶ 14 & Ex. C; Phillips Stip. ¶ 15 & Ex. C.)

RESPONSE: Disputed in part. Undisputed that a regularly-scheduled Trustee meeting was held on January 24, 2018. Disputed that Cheiron "reviewed with the Trustees how withdrawal liability is calculated and discussed with them the actuarial assumptions that are used to make those calculations," as the minutes of the meeting indicate only that Cheiron presented to the Trustees a PowerPoint presentation. (Toyota Logistics Stip. ¶ 14-15 & Exs. C, D.)

14. Following the discussion with the Trustees, Cheiron changed the methods and assumptions used to calculate withdrawal liability for employers that effected a withdrawal from the Fund during the 2018 Plan Year as follows:

> **a. Asset Valuation Method: Changed from Actuarial Value of Assets to Market Value of Assets.**
>
> **b. Discount Rate: Reduced from 7.50% to 6.50%.**
>
> **c. Administrative Expense Load: Added an expense load reflecting projected administrative expenses.**

(Ohio Magnetics Stip. ¶ 18 & Ex. D; Toyota Logistics Stip. ¶ 17 & Ex. D; Phillips Stip. ¶ 16 & Ex. D.)

RESPONSE: Disputed in part. Undisputed that the Fund's Trustees' January 24, 2018 minutes state that the Trustees "unanimously approved the following recommendations from the Fund's Actuary, Cheiron:

- **Asset Valuation Method** - Market Value.
- **Discount Rate for Withdrawal Liability purposes** - Funding Discount Rate less 100 basis points. January 1, 2017 funding discount rate of 7.5% less 100 basis point yields 6.5% discount rate for withdrawal liability purposes.

- **Expense Load** - Include 4% expense load. Reflects projected administrative expenses on behalf of Fund populations, based on 2% inflationary increase and on valuation mortality assumption. Redetermine annually upon completion of the actuarial valuation."

(Phillips Stip. ¶ 16 and Ex. D.). Disputed that any discussion with the Trustees took place, as the January 24, 2018 meeting minutes do not record any such discussion. (Toyota Logistics Stip. ¶ 14 & Ex. D.) Also disputed that "Cheiron changed the methods and assumptions to calculate withdrawal liability," as the meeting minutes state that the Trustees, and not Cheiron, "approved" the listed assumptions. (Toyota Logistics Stip. ¶ 14 & Ex. D.)

15. Cheiron "confirmed that all of [the] changes to the withdrawal liability calculation and the actuarial assumptions are reasonable and defensible." (Ohio Magnetics Stip., Ex. D; Toyota Logistics Stip., Ex. D; Phillips Stip. ¶ 16 & Ex. D.)

RESPONSE: Undisputed.

16. On April 17, 2019, Cheiron published the actuarial valuation for the Fund for the 2017 Plan Year (the "2017 Actuarial Valuation"). (Ohio Magnetics Stip. ¶ 20; Toyota Logistics Stip. ¶ 18; Phillips Stip. ¶ 20.)

RESPONSE: Undisputed.

17. The 2017 Actuarial Valuation stated that, as of the end of the 2017 Plan Year, the Fund had UVBs of $3,043,369,928. The 2017 Actuarial Valu-

ation further stated that "a participating employer who withdraws from the Fund during the plan year beginning January 1, 2018, may have a withdrawal liability which will be based on its allocated share of the unfunded vested benefits." (Ohio Magnetics Stip. ¶ 21; Toyota Logistics Stip. ¶ 19; Phillips Stip. ¶ 21.)

RESPONSE: Undisputed.

18. Cheiron utilized the following methods and assumptions in preparing the 2017 Actuarial Valuation:

- **a. Asset Valuation Method: Market Value of Assets**
- **b. Withdrawal Liability Discount Rate: 6.50%**
- **c. Administrative Expense Load: 3.5% of the Present Value of Vested Benefits**

(Ohio Magnetics Stip. ¶ 22 & Ex. E, App'x C at 35, 38; Toyota Logistics Stip. ¶ 19 & Ex. E, App'x C at 35, 38; Phillips Stip. ¶ 22 & Ex. G, App'x C at 35, 38.)

RESPONSE: Undisputed.

19. Defendants Ohio Magnetics, Inc. ("Ohio Magnetics"), Toyota Logistics Services, Inc. ("Toyota Logistics"), and Phillips Liquidating Trust, as successor in interest to the Phillips Corporation, d/b/a Equipco ("Phillips") (collectively, the "Companies") were each a party to certain collective bargaining agreements, pursuant to which they were obligated to remit contributions to the Fund. (Ohio Magnetics Stip.

¶ 23; Toyota Logistics Stip. ¶ 20; Phillips Stip. ¶ 24.)

RESPONSE: Undisputed.

20. During the 2018 Plan Year, each of the Companies effected a complete withdrawal from the Fund within the meaning of ERISA § 4203(a) (29 U.S.C. § 1383(a))—Ohio Magnetics withdrew as of June 30, 2018; Toyota Logistics withdrew as of December 29, 2018; and Phillips withdrew as of April 7, 2018. (Ohio Magnetics Stip. ¶ 24; Toyota Logistics Stip. ¶ 23; Phillips Stip. ¶ 26.)

RESPONSE: Undisputed.

21. Prior to their respective withdrawals:

- **a. Ohio Magnetics did not request or receive documents, information, or a withdrawal liability estimate from the Fund pursuant to ERISA § 101(k) and (l) (29 U.S.C. § 1024(k) and (l)). (Ohio Magnetics Stip. ¶ 25.)**
- **b. On December 3, 2018, the Fund provided Toyota Logistics a withdrawal liability estimate based on the Fund's UVBs as of December 31, 2017, using the methods and assumptions adopted at the January 24, 2018 Trustees' meeting, including a 6.50% discount rate. (Toyota Logistics Stip. ¶ 21 & Ex. F.)**
- **c. On September 28, 2017, the Fund provided Phillips a withdrawal liability**

estimate for a complete withdrawal during the 2017 Plan Year. (Phillips Stip. ¶ 25 & Ex. I.)[1]

RESPONSE: Undisputed.

22. Following the Companies' respective withdrawals, the Fund assessed withdrawal liability in the following amounts: Ohio Magnetics $477,475; Toyota Logistics $1,289,384; and Phillips $2,013,028. Each calculation was prepared using the methods and assumptions adopted at the January 24, 2018 Trustees' meeting and set forth in the 2017 Actuarial Valuation. (Ohio Magnetics Stip. ¶ 26 & Ex. F; Toyota Logistics Stip. ¶ 24 & Ex. G; Phillips Stip. ¶ 28 & Ex. J.)

RESPONSE: Undisputed.

23. The Companies timely commenced separate arbitrations to challenge the respective withdrawal liability assessments. (Ohio Magnetics Stip. ¶ 29; Toyota Logistics Stip. ¶ 26; Phillips Stip. ¶ 31.)

RESPONSE: Undisputed.

24. The Trustees and the Companies agreed in each arbitration that the respective arbitrators would first resolve the following issue before addressing any other challenges to the

---

[1] **Paragraph 25 of the Phillips Stipulation contains a typographical error stating that the estimate was for a withdrawal occurring during the 2016 Plan Year. The supporting exhibit shows that the estimate was for a withdrawal occurring during the 2017 Plan Year.**

withdrawal liability calculations: whether Cheiron improperly applied assumptions adopted at the January 24, 2018 Trustees' meeting—specifically, the 6.50% discount rate and the administrative expense load—rather than the assumptions it had previously used to prepare the valuation of the Fund's UVBs for the 2016 Plan Year. (Ohio Magnetics Stip. ¶ 30; Toyota Logistics Stip. ¶ 27; Phillips Stip. ¶ 32.)

RESPONSE: Disputed in part. Undisputed that each of the Defendants and the Fund Trustees agreed that the arbitrator would resolve an issue before addressing any other challenges to the withdrawal liability calculations.

Dispute that the issue submitted to the arbitrator in each of the arbitrations was whether Cheiron improperly applied assumptions "it had previously used to prepare the valuation of the Fund's UVBs for the 2016 Plan Year."

In the *Ohio Magnetics* arbitration, the parties' Stipulation of Undisputed Facts provides that Ohio Magnetics and the Fund submitted to the arbitrator the following issues:

a. Whether, as a matter of law, the Assessment overstates the Company's withdrawal liability because the Fund's actuary, Cheiron, applied methods and assumptions adopted after December 31, 2017 for the Company's June 30, 2018 withdrawal (consisting of a 6.5% interest rate and an administrative expense load for future administrative expenses), rather than the methods and assumptions in effect on December 31, 2017(consisting of a 7.5% interest rate and no administrative expense load for future administrative expenses)?

b. If the answer to (a) above is "no," whether, as a matter of law, the Assessment overstates the Company's withdrawal liability because Cheiron included in the calculation of the Company's withdrawal liability a component representing the Fund's future administrative expenses (i.e., the "administrative expense load")?

(Ohio Magnetics Stip. ¶ 30.)

In the *Toyota Logistics* arbitration, the parties' Stipulation of Undisputed Facts provides that Toyota Logistics and the Fund submitted to the arbitrator the following issue:

> Whether, as a matter of law, Cheiron wrongly applied a 6.50% discount rate adopted by Cheiron at the January 24, 2018 Trustees' meeting to calculate the Company's withdrawal liability, rather than the 7.50% discount rate that was previously in effect on December 31, 2017.

(Toyota Logistics Stip. ¶ 27.)

In the *Phillips Liquidating* arbitration, the parties' Stipulation of Undisputed Facts provides that Phillips and the Fund submitted to the arbitrator the following issues:

a. Whether, as a matter of law, the Fund, when calculating the Company's withdrawal liability, wrongly failed to apply the interest rate in effect on the measurement date for the Company's May 1, 2018 withdrawal (consisting of a 7.5% interest rate that was in effect on December 31, 2017) and, instead, retroactively applied an interest rate of 6.5% that was adopted at some time after the December 31, 2017 measurement date?

b. Whether, as a matter of law, the Fund could include, in the calculation of the Company's withdrawal liability, a component representing the Fund's future administrative expenses, which it referred to as the "administrative expense load"?

c. Whether, as a matter of law, the Fund's actuary could use one interest rate for funding purposes and a different, lower one for withdrawal liability purposes?

(Phillips Liquidating Stip. ¶ 32.)

25. The arbitrators ruled in favor of the Companies on that issue and ordered the Fund to recalculate the Companies' withdrawal liability accordingly. (Ohio Magnetics Award; Toyota Logistics Award; Phillips Award.)

RESPONSE: Dispute Paragraph 25's reference to "that issue" to the extent it refers to the Fund's characterization in Paragraph 24 of the issue submitted to the arbitrator. Defendants hereby incorporate by reference their response to Paragraph 24. Otherwise undisputed.

Dated: January 28, 2022

/s/ *Randall C. McGeorge*
Randall C. McGeorge*
randy.mcgeorge@
morganlewis.com
MORGAN LEWIS &
BOCKIUS LLP
1 Oxford Centre, 32nd Floor
Pittsburgh, PA 15219
Telephone: (412) 560-7410

Deborah S. Davidson*
deborah.davidson@
morganlewis.com
110 N. Wacker Drive
Chicago, IL 60606-1511
Telephone: (312) 324-1000

Stephen Dixon
D.C. Bar No. 1034267
Benjamin Kelly*
D.C. Bar No. 1632617
stephen.dixon@
morganlewis.com
benjamin.kelly@
morganlewis.com
MORGAN, LEWIS &
BOCKIUS LLP
1111 Pennsylvania
Avenue, NW
Washington, DC 20004
Telephone: (202) 739-3000

Attorneys for Toyota Logistics Services, Inc.

Stacey Eisenstein
D.C. Bar No. 474699
Eric Field
seisenstein@
akingump.com
efield@akingump.com
AKIN GUMP STRAUSS
HAUER & FELD LLP
2001 K Street, NW
Washington, DC 20006
Telephone: (202) 887-4146

Attorneys for Ohio Magnetics, Inc.

David J. Laurent
DC Bar No. 358591
david.laurent@bipc.com
BUCHANAN INGERSOLL & ROONEY PC
Union Trust Building
501 Grant Street,
Suite 200
Pittsburgh, PA 15219
Telephone: (412) 562-1857
Telephone: (412) 572-1068

Attorney for Phillips Liquidating Trust

**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 28, 2022, I caused to be electronically filed **Defendants' Response to Plaintiffs' Local Rule 7(h)(1) Statement of Material Facts in Support of Their Motion for Summary Judgment** with the Clerk of the Court using the CM/ECF system, which sent notification such filing to the following:

Anthony S. Cacace, Esq.
Neil V. Shah, Esq.
Proskauer Rose, LLP
11 Times Square
New York, NY 10036
acace@proskauer.com
nsah@proskauer.com

John E. Roberts
Proskauer Rose, LLP
One International Place
Boston, MA 02110
jroberts@proskauer.com

Guy G. Brenner
Proskauer Rose, LLP
1001 Pennsylvania Avenue, NW
Suite 600 South
Washington, DC 20004
gbrenner@proskauer.com

/s/ Stephen Dixon
Stephen Dixon

[Dkt. 38-11]

AMERICAN ARBITRATION ASSOCIATION

Ohio Magnetics, Inc.,

Claimant,

v.

IAM National Pension Fund,

Respondent.

Case No.: 01-20-0000-1596

[Dated: August 27, 2020]

STIPULATION OF UNDISPUTED FACTS

Claimant Ohio Magnetics, Inc. (the "Company"), and Respondent, the IAM National Pension Fund (the "Fund"), by and through their undersigned counsel, hereby stipulate as follows solely for purposes of the above-captioned arbitration proceeding:

I. The IAM National Pension Plan

1. The IAM National Pension Plan (the "Plan") is an employee pension benefit plan within the meaning of Section 3(2) of ERISA (29 U.S.C. § 1002(2)), and a multi-employer plan within the meaning of Sections 3(37) and 4001(a)(3) of ERISA (29 U.S.C. §§ 1002(37) and 1301(a)(3)).

2. The Plan provides retirement benefits to employees who performed covered work for employers that remitted contributions to the Fund in accordance

with collective bargaining agreements with the International Association of Machinists and Aerospace Workers, AFL-CIO or with affiliated local or district lodges.

3. The Plan's assets are held in the Fund, a jointly-administered, multi-employer, labor-management trust fund established and maintained pursuant to collective bargaining agreements in accordance with Section 302(c)(5) of the Taft-Hartley Act (29 U.S.C. § 186(c)(5)).

4. The Fund is governed by an agreement and declaration of trust that was last restated as of May 15, 2014 (the "Trust Agreement") and whose Plan Year is January 1 to December 31. A true and correct copy of the Trust Agreement is attached as **Exhibit A**.

5. Administrative expenses incurred in administering the Plan and the Fund are paid using Fund assets.

6. In accordance with ERISA § 4201(a) (29 U.S.C. § 1381(a)), Article VII of the Trust Agreement provides that an employer who withdraws from the Plan in a complete or partial withdrawal is liable for withdrawal liability.

7. In accordance with ERISA § 4213(a)(1) (29 U.S.C. § 1393(a)(1)), Article VII, Section 5 of the Trust Agreement provides that "[w]ithdrawal liability shall be determined 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 Plan actuary's best estimate of anticipated experience under the Plan."

8. In accordance with ERISA § 4219(c)(1)(A)(i) (29 U.S.C. § 1399(c)(1)(A)(i)), Article VII, Section 6(a) of the Trust Agreement provides that the schedule of payments for an employer's withdrawal liability "shall provide for payment over the period of years necessary to amortize the total liability owed in level annual payments."

9. Article VII, Section 6(a) of the Trust Agreement also states that the "interest rate used for determining the amortization period shall be the Plan's assumed rate of return for purposes of ERISA's minimum funding requirements for the Plan Year preceding the Plan Year of withdrawal."

II. Methods and Assumptions Applicable to Employer Withdrawals

10. Cheiron has served as the Fund's actuary since March 2014.

11. In that role, Cheiron prepares actuarial valuations of Fund assets, calculates the amounts required for minimum funding purposes, and calculates an employer's withdrawal liability in the event of a complete or partial withdrawal from the Fund.

12. Cheiron cannot prepare the actuarial valuation until after the end of the Plan Year.

13. On November 2, 2017, Cheiron published the actuarial valuation for the Fund for the 2016 Plan Year (the "2016 Actuarial Valuation"), a true and correct copy of which is attached as **Exhibit B**.

14. The 2016 Actuarial Valuation showed that, as of the end of the 2016 Plan Year, the Fund had unfunded vested benefits ("UVBs") of $448,099,164, which is the difference between the Actuarial Value of Assets ($11,901,968,791) and the Present Value of Vested Benefits ($12,350,067,955). The 2016 Plan Year was the first time in several years that the Fund had UVBs. The 2016 Actuarial Valuation further stated that "a participating employer who withdraws from the Fund during the plan year beginning January 1, 2017, may have a withdrawal liability which will be based on its allocated share of the unfunded vested benefits." (*Id.* at 24.)

15. Cheiron utilized the following methods and assumptions in preparing the 2016 Actuarial Valuation:

a. Asset Valuation Method: Actuarial Value of Assets

b. Discount Rate: 7.50%

c. Investment Return: 7.50%

(*Id.*, App'x C, at 35, 38.)

16. On January 24, 2018, at a regularly-scheduled meeting of the Board of Trustees of the Fund (the "Board"), Cheiron reviewed with the Trustees how withdrawal liability is calculated and discussed with them the key actuarial assumptions that are used to make those calculations. A true and correct copy of Cheiron's PowerPoint presentation to the Trustees is attached as **Exhibit C**.

17. Among the assumptions discussed was the discount rate used to calculate UVBs and the Fund's administrative expenses.

18. Following the discussion with the Trustees, Cheiron changed as follows the methods and assumptions used to calculate withdrawal liability for employers that effected a withdrawal from the Fund during the 2018 Plan Year:

a. Asset Valuation Method: Changed from Actuarial Value of Assets to Market Value of Assets.

b. Discount Rate: Reduced from 7.50% to 6.50%.

c. Administrative Expense Load: Added an expense load reflecting projected administrative expenses. The rate would initially be set at 4% and automatically redetermined annually upon completion of the corresponding actuarial valuation.

A true and correct copy of relevant excerpts from the minutes of that meeting are attached as **Exhibit D**.

19. All requests for withdrawal liability estimates for withdrawals occurring during the 2018 Plan Year used the methods and assumptions that Cheiron adopted at the January 24, 2018 meeting.

20. On April 17, 2019, Cheiron published the actuarial valuation for the Fund for the 2017 Plan Year (the "2017 Actuarial Valuation"), a true and correct copy of which is attached as **Exhibit E**.

21. The 2017 Actuarial Valuation showed that, as of the end of the 2017 Plan Year, the Fund had unfunded vested liabilities ("UVBs") of $3,043,369,928, which equals the Market Value of Assets ($12,175,959,344) less Future Administrative Expenses ($514,663,309) and the Present Value of Vested Benefits ($14,704,665,963). The 2017 Actuarial Valuation further stated that "a participating employer who withdraws from the Fund during the plan year beginning January 1, 2018, may have a withdrawal liability which will be based on its allocated share of the unfunded vested benefits." (*Id.* at 23.)

22. Cheiron utilized the following methods and assumptions in preparing the 2017 Actuarial Valuation:

a. Asset Valuation Method: Market Value of Assets

b. Discount Rate: 6.50%

c. Administrative Expense Load: 3.5% of the Present Value of Vested Benefits

(*Id.*, App'x C, at 35, 38.)

III. The Cessation of the Company's Obligation to Contribute to the Fund

23. The Company was a party to certain collective bargaining agreements, pursuant to which it was obligated to remit contributions to the Fund on behalf of those of its employees who performed covered work.

24. The Company effected a complete withdrawal from the Fund within the meaning of ERISA § 4203(a) (29 U.S.C. § 1383(a)) as of June 30, 2018.

25. At no point between April 16, 2015 and June 30, 2018 did the Company request or receive documents, information, or a withdrawal liability estimate from the Fund pursuant to ERISA § 101(k) and (l) (29 U.S.C. § 1024(k) and (l)).

26. By letter dated April 2, 2019, the Fund notified the Company that it had effected a complete withdrawal from the Fund within the meaning of ERISA § 4203(a) (29 U.S.C. § 1383(a)) as of June 30, 2018, and that its allocated share of the UVBs of the Fund was $477,475.00, payable in twenty-eight (28) quarterly installments of $20,659.00 and a final payment of $11,544.00, commencing on or before June 1, 2019 (the "Assessment"). A true and correct copy of the Assessment is attached as **Exhibit F**.

27. By letter dated June 10, 2019, the Company requested a review of the Assessment pursuant to ERISA § 4219(b)(2)(A) (29 U.S.C. § 1399(b)(2)(A)), which request the Fund denied by letter dated August 19, 2019, pursuant to ERISA § 4219(b)(2)(B) (29 U.S.C. § 1399(b)(2)(B)).

28. As of June 1, 2020, the Company has paid the Fund $103,295.00 in interim withdrawal liability payments.

IV. Procedural History

29. On January 14, 2020, the Company timely commenced the above-captioned arbitration.

30. Pursuant to the July 17, 2020 schedule agreed to by the Parties and approved by the Arbitrator, the Parties intend to submit to the Arbitrator the following issues for resolution based solely on the facts set forth in this Stipulation:

a. Whether, as a matter of law, the Assessment overstates the Company's withdrawal liability because the Fund's actuary, Cheiron, applied methods and assumptions adopted after December 31, 2017 for the Company's June 30, 2018 withdrawal (consisting of a 6.5% interest rate and an administrative expense load for future administrative expenses), rather than the methods and assumptions in effect on December 31, 2017 (consisting of a 7.5% interest rate and no administrative expense load for future administrative expenses)?

b. If the answer to (a) above is "no," whether, as a matter of law, the Assessment overstates the Company's withdrawal liability because Cheiron included in the calculation of the Company's withdrawal liability a component representing the Fund's future administrative expenses (*i.e.*, the "administrative expense load")?

Dated: August 27, 2020

AKIN GUMP STRAUSS HAUER & FELD LLP

By: /s/ [Signature]
Eric Field

Robert S. Strauss Tower
2001 K Street, N.W.
Washington, D.C. 20006-1037
(202) 887-4146
efield@akingump.com

Jon Chatalian
Robert S. Strauss Tower
2001 K Street, N.W.
Washington, D.C. 20006-1037
(202) 887-4462
jchatalian@akingump.com

Counsel for the Company

Dated: August 27, 2020

PROSKAUER ROSE LLP

By: /s/ [Signature]
Anthony S. Cacace

Eleven Times Square
New York, NY 10036
(212) 969-3307
acacace@proskauer.com

Neil V. Shah
Eleven Times Square
New York, NY 10036
(212) 969-3028
nshah@proskauer.com

Counsel for the Fund

EXHIBIT C

I.A.M. National Pension Fund

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Withdrawal Liability Policy Discussion

January 24, 2018

Gene Kalwarski, FSA, MAAA, EA
Chris Mietlicki, ASA, MAAA, EA
Patrick Nelson, ASA, MAAA, EA

Discussion Points

- General Concept
- Current Policy & Options
- Key Provisions
  - Allocation Method (Trustees)
  - Asset Valuation Method (Actuary)
  - Discount Rate (Actuary)
  - Ancillary Benefits: QPSA Death and Disability (Trustees)
  - "Free Look" Rule (Trustees)
- De Minimis Rule – Impact on Fund
- Process for Reallocated Pools

General Concept

- Withdrawal Liability (WDL) is assessed against employers who no longer have an obligation to contribute to the Fund (also partial withdrawal exists)
- The WDL represents each employer's share of the Fund's total unfunded vested benefits (UVB)
- Withdrawing employer is generally capped by highest hourly contribution rate and contribution base units (e.g., hours) in the last 10 years, and annual payments limited to 20 years

Key Components of Withdrawal Liability

Provision	Options	Current Policy
• Allocation Method	• Presumptive • Modified Presumptive • Rolling Five • Direct Attribution • Hybrid	• Presumptive
• Asset Valuation Method	• Actuarial (smoothed) Value • Market Value	• Actuarial Value
• Discount Rate	• Valuation Discount Rate • PBGC rates • Blend of PBGC and valuation discount rate • Other (valuation rate less %)	• Valuation Discount Rate (7.5%)
• Ancillary Benefits (QPSA Death & Disability)	• Include • Exclude	• Exclude
• "Free Look" Rule	• Include • Exclude	• Include

Presumptive Method, UVB Pools

- Current allocation method
- UVB is split into pools, each written down over 20 years
- The amounts to be allocated are 100% of latest pool, 95% of prior pool, 90% of pool before that, etc.
- After first year, reallocation pools are created equal to uncollectible allocated withdrawal liability
- Pools are allocated to a withdrawing employer by the ratio of their contribution history to that of the whole plan prior to the establishment of the pool

Presumptive Method Illustration

SAMPLE EMPLOYER

Plan Year of Withdrawal: 2015

Plan Year Ending Dec. 31	5-Year Contribution History: Withdrawing Employer	5-Year Contribution History: Active Employers	Allocable and Reallocated UVBs	Employer's Share of UVB
2003	$ 521,644	$ 10,699,709	$ (1,983,443)	$ (96,699)
2004	520,151	11,512,628	511,773	23,122
2005	568,545	13,602,833	(961,438)	(40,184)
2006	615,743	16,397,335	13,567	509
2007	659,493	19,219,074	15,433	530
2008	750,676	23,775,420	24,478,792	772,884
2009	846,884	27,779,928	(6,333,072)	(193,067)
2010	891,051	31,209,846	1,355,462	38,699
2011	939,362	34,335,998	12,623,737	345,359
2012	1,003,906	36,812,109	(183,125)	(4,994)
2013	1,023,681	38,039,635	(3,019,073)	(81,246)
2014	1,025,754	38,439,836	6,445,453	171,995
				$ 936,908

Presumptive Method Pros and Cons

Pros

- No trustee decision required
- Provides some protection for new employers

Cons

- Complexity builds over time

Optional Allocation Methods

- All allocation methods result in same unfunded vested liability, and liability from bankrupt employers rolls onto remaining employers
- However, each method allocates the unfunded vested liability differently among employers

Modified Presumptive Method, UVB Pools

- Optional allocation method
- UVB is split into two pools, the first (initial) pool is written down over 20 years
- Second pool = total UVB less remaining balance of initial pool
- Pools are allocated to a withdrawing employer by the ratio of their contribution history to that of the whole plan prior to the establishment of the pool

Modified Presumptive Pros and Cons

Pros
- Less complex than Presumptive
- Provides some protection for new employers due to run-off of initial UVB

Cons
- Protection for new employers erodes over time as first pool is amortized to $0

Rolling Five

- Optional allocation method
- UVB is determined each year, and this is the only amount to be allocated
- UVB is allocated to a withdrawing employer by the ratio of their contribution history to that of the whole plan prior to the establishment of the pool

Rolling Five Pros and Cons

Pros

- Simplest method

Cons

- Little protection for new employers, after five (or up to 10) years, full exposure to UVB
- Favors declining employers over growing employers

Direct Attribution

- Optional allocation method
- Asset and liabilities are determined for each employer to create separate accounts
- Withdrawing employer is assessed balance in account (if assets are below liabilities)

Direct Attribution Pros and Cons

Pros

- Each employer gets own experience
- New employers shielded from existing UVB

Cons

- Very complicated to maintain separate accounts

Hybrid Allocation Method

- Optional allocation method
- May be difficult to attract new employers under current allocation method when UVBs exist
- Hybrid method treats new employers separately from existing employers
  - New employers are very unlikely to be faced with an allocation of the current UVB
  - Hybrid method can remove a significant disincentive for new employers to join the Fund
- Existing employers are not disadvantaged because their position under this new method is the same as before, or may be better
  - To the extent new employers join the Fund, existing employers may benefit from any margin in new employer contribution rates
  - Existing or returning employers may enter new employer pool subject to PBGC criteria in satisfying any accrued withdrawal liability

Hybrid Allocation Method

- In the event of a mass withdrawal, an employer will be assessed withdrawal liability based on its participation in any pools in which it ever participated
- Requires PBGC approval
  - The change in the withdrawal liability would reduce PBGC's exposure to potential insolvency

Actuary's Decisions

- With input from the Trustees, Actuary determines asset valuation method and discount rate

Asset Valuation Method

- Use Market Value (MVA) or Actuarial (smoothed) Value (AVA)?
- Using Market Value is more volatile than Actuarial Value
- If using AVA, in years when it exceeds MVA, greater incentive to withdraw (e.g., anti-selection)
- Final choice may depend on discount rate (e.g., if liabilities are valued at or near current market rates, MVA may be the only logical choice)
- Asset values as of 1/1/2017
  - Actuarial Value = $11.90 billion
  - Market Value = $11.04 billion

Discount Rate

- Options for discount rate
  - Valuation rate (Fund's current approach)
  - Market based rate (e.g., PBGC rates)
  - Blend of market and valuation rate
  - Other (e.g., valuation rate less a certain %)
- The more conservative the discount rate, the more protection given to on-going employers, but less desirable for new employers

Discount Rate & Asset Method Sensitivity

As of 1/1/2017 Liability Method	[Current Policy] Funding Valuation Rate	Funding Rate Less 50 bpts	PBGC Rates	
Discount Rate	**7.50%**	**7.00%**	**2.34% & 2.63%**	**Blended***
Vested Liability	$12,350,000,000	$13,092,000,000	$25,763,000,000	$19,057,000,000
Assets - Actuarial Value	$11,902,000,000	$11,902,000,000	$11,902,000,000	$11,902,000,000
Unfunded Vested Benefits (UVB)	**$448,000,000**	**$1,190,000,000**	**$13,861,000,000**	**$7,155,000,000**
UVB Increase from Current Policy	**n/a**	**$742,000,000**	**$13,413,000,000**	**$6,707,000,000**

Liability Method	Funding Valuation Rate	Funding Rate Less 50 bpts	PBGC Rates	
Discount Rate	**7.50%**	**7.00%**	**2.34% & 2.63%**	**Blended***
Vested Liability	$12,350,000,000	$13,092,000,000	$25,763,000,000	$19,057,000,000
Assets - Market Value	$11,044,000,000	$11,044,000,000	$11,044,000,000	$11,044,000,000
Unfunded Vested Benefits (UVB)	**$1,306,000,000**	**$2,048,000,000**	**$14,719,000,000**	**$8,013,000,000**
UVB Increase from Current Policy	**$858,000,000**	**$1,600,000,000**	**$14,271,000,000**	**$7,565,000,000**

* 50% funding rate, 50% PBGC rates.

Should QPSAs be Included in WL?

- Currently not included
- Prior to MPRA, PBGC deemed QPSAs forfeitable
- Under MPRA, QPSAs are guaranteed by the PBGC if the Fund becomes insolvent
  - However, MPRA did not change the definition of nonforfeitable for withdrawal liability calculations
- Case law supports both
- No formal guidance provided by PBGC post-MPRA
- Exposure is approximately $66 million

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January 24, 2018

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Should Disability Benefits be Included in WL?

- Currently not included
- In general, PBGC considers future disability benefits forfeitable
  - A nonforfeitable benefit is a benefit for which a participant has met all of the conditions to have a right to the benefit
  - Since an active member is not currently disabled, they are not eligible for a disability benefit
- Consistent with regulations
  - ERISA §4022A (Multiemployer Plan Benefits Guaranteed) and the PBGC Opinion Letter 89-5
  - MPRA did not change this view
- Exposure is approximately $119 million

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"Free Look" Rule

- New employers can withdraw from fund before five years (or other vesting period if shorter) and no withdrawal liability is due
  - Employer contributions must be less than 2% of total fund contributions
  - Employer cannot have previously participated in the plan
  - Fund assets must exceed eight times prior year's benefit payments at time of entry

De Minimis Rule – Impact on Fund

- An employer's share of UVB may be reduced by a $50,000 "deductible"
  - Deductible is reduced by $1 for each $1 that the UVB exceeds $100,000
  - Therefore a withdrawal liability assessment of $150,000 or more is not subject to any deductible
- The reduction in UVB is reallocated to on-going employers
- ERISA Section 4209 allows a fund to be amended to change the de minimis amount, however the language is not clear as to if the deductible can be decreased

De Minimis Rule – Impact on Fund

- Potential UVB reallocated to on-going employers due to De Minimis Rule is $18.9 million
  - Assumes all employers subject to the deductible withdraw in 2017

De Minimis Category	Number Of Employers*	Reallocated UVB	Average Reduction
1. Share of UVB less than $50,000	362	$8,045,000	$22,224
2. Share of UVB between $50,000 and $100,000	168	$8,400,000	$50,000
3. Share of UVB between $100,000 and $150,000	98	$2,550,000	$26,020
4. Share of UVB greater than $150,000	315	n/a	n/a
Totals	943	$18,995,000	

* On a Controlled Group basis.

- Total UVB as of January 1, 2017 is $448 million
  - De Minimis rule can result in approximately 4% of UVB being reallocated to on-going employers

Process for Reallocated Pools

- The following provisions can lead to a portion of UVB reallocated to on-going employers
  - De minimis Rule
  - 20-Year Cap
  - Uncollectible Amounts
- Who makes the determination as to when a reallocation occurs?
- When are the reallocation pools effective?

Disclaimer

In preparing our presentation, we relied on information (some oral and some written) supplied by the Fund Office. This information includes, but is not limited to, the plan provisions, employee data, and financial information. We performed an informal examination of the obvious characteristics of the data for reasonableness and consistency in accordance with Actuarial Standard of Practice No. 23.

The assumptions reflect our understanding of the likely future experience of the Fund and the assumptions taken individually represent our best estimate for the future experience of the Plan. The results of this presentation are dependent upon future experience conforming to these assumptions. To the extent that future experience deviates from the actuarial assumptions, the true cost of the Plan could vary from our results. For complete details on the data, assumptions and methods, please refer to the January 1, 2017 Actuarial Valuation Report.

To the best of our knowledge, this presentation and its contents have been prepared in accordance with generally recognized and accepted actuarial principles and practices which are consistent with the Code of Professional Conduct and applicable Actuarial Standards of Practice set out by the Actuarial Standards Board. Furthermore, as credentialed actuaries, we meet the Qualification Standards of the American Academy of Actuaries to render the opinion contained herein. This presentation does not address any contractual or legal issues. We are not attorneys, and our firm does not provide any legal services or advice.

This presentation was prepared solely for IAM National Pension Fund for the purposes described herein. Other users of this presentation are not intended users as defined in the Actuarial Standards of Practice, and Cheiron assumes no duty or liability to any other user.

Gene Kalwarski, FSA, MAAA, EA
Principal Consulting Actuary

Christopher Mietlicki, ASA, MAAA, EA
Consulting Actuary

EXHIBIT D

MINUTES TO THE BOARD OF TRUSTEES' MEETING
IAM NATIONAL PENSION FUND
January 24, 2018
Washington, DC

The meeting was called to order at 9:00 a.m. Those present were:

Employer Trustees:	Henry Eickelberg David Leib Chris Ross Justin Welner
Union Trustees:	Phillip Gruber Brian Bryant Rickey Wallace James Conigliaro
Also present were:	Carmen Eilio, State Street; Gene Kalwarski, Patrick Nelson, Chris Mietlicki, Cheiron, Fund Actuary; Derrick Strosnider, Calibre, Fund Auditor; John Granger & Trent Twaddle, Graystone Consulting, Fund Investment Consultant; Ryk Tierney, Executive Director; Raymond Goad, General Counsel; Michael Campbell, Director of Finance; David Cohn, Assistant General Counsel; Susan Walker, Pension Law Specialist;

Malikah Carpenter, Executive Assistant to the Executive Director

I. CALL TO ORDER

A quorum being present, the meeting was called to order.

A. Proxy Assignment

Mr. Tierney reported that Trustee Steve Jones provided advance written assignment of his proxy to Trustee Eickelberg for this meeting.

II. MINUTES

The proposed minutes of the (1) November 9, 2017 Audit Budget & Administrative Committee meeting, (2) November 9, 2017 Board of Trustees Meeting, and (3) December 14, 2017 Monthly Trustees call were presented. Mr. Tierney indicated that there were no additions, deletions, or changes to the minutes provided.

H. Withdrawal Liability Calculations and Assumptions

Gene Kalwarski, Chris Mietlicki, and Patrick Nelson, of Cheiron, were welcomed back into the meeting.

The Trustees moved the meeting into Executive Session.

The Trustees then returned from Executive Session and following discussion,

On MOTION made, seconded, and unanimously approved, the following

recommendations of the Fund's Actuary, Cheiron:

- **Allocation method** – Presumptive Method, reflecting fresh start provisions to wipe out prior pools when Unfunded Vested Benefits (UVB) is $0, as approved by the Pension Benefit Guaranty Corporation.
- **Asset Valuation Method** – Market Value.
- **Discount Rate for Withdrawal Liability purposes** – Funding Discount Rate less 100 basis points. January 1, 2017 funding discount rate of 7.5% less 100 basis point yields 6.5% discount rate for withdrawal liability purposes.
- **Expense Load** – Include 4% expense load. Reflects projected administrative expenses on behalf of Fund populations, based on 2% inflationary increase and on valuation mortality assumption. Redetermine annually upon completion of the actuarial valuation.
- **Ancillary Benefits** – include QPSA death benefit, exclude Disability benefit.
- **"Free Look" Rule** – Include in policy. Employer can withdraw from Fund before five years and

no withdrawal liability is due. Employer contributions must be less than 2% of total Fund contributions. Employers cannot have previously participated in the Fund. Fund assets must exceed eight times prior year's benefit at the time of entry.

- **De Minims Rule** – Include, share of UVB reduced by $50,000 deductible and deductible phased out if share of UVB is between $100,000 and $150,000.
- **Process for Reallocated Pools** – Benefit Fund Office to provide reallocated amounts due to de minims rule, 20-year cap, settlements, and uncollectability. Redetermine annually upon completion of actuarial valuation. Further consideration given for large employer bankruptcy.

Upon questioning, Mr. Kalwarski confirmed that all of changes to the withdrawal liability calculation and the actuarial assumptions are reasonable and defensible.

XII. ADJOURNMENT

There being no further business for the Trustees, the meeting was adjourned at 12:00 p.m.

These minutes were adopted at a Trustees' meeting held on April 18, 2018.

/s/ [Signature]	/s/ [Signature]
Union Co-Chairman	Employer Co-Chairman

EXHIBIT F

IAM NATIONAL
PENSION FUND

1300 Connecticut Avenue NW, Suite 300,
Washington DC 20036-1711

www.iamnpf.org 202-785-2658

April 2, 2019

Michael T. Clancey, Secretary & General Counsel
HBD Industries, Inc.
5200 Upper Metro Place, Suite 110
Dublin, OH 43017

RE: IAM National Pension Fund
Company Name: Ohio Magnetics, Inc.
Employer Code: MZ22
NOTICE AND DEMAND FOR PAYMENT OF WITHDRAWAL LIABILITY

Dear Mr. Clancey:

The Trustees of the IAM National Pension Fund ("Fund") have determined that your company has completely withdrawn from the Fund effective June 30, 2018. Under the Employee Retirement Income Security Act, as amended (ERISA) § 4203, a complete withdrawal occurs when an employer permanently ceases to have an obligation to contribute under the Fund or permanently ceases all covered operations under the Fund. Pursuant to ERISA § 4219, this letter is a formal Notice and Demand for payment of this withdrawal liability.

Under ERISA § 4201, an employer that completely withdraws from a multiemployer pension plan is liable for a portion of the plan's unfunded vested benefits ("UVB"). The company's portion is its withdrawal liability. The unmodified presumptive method as amended by the fresh start provision set forth in the Plan rules is used in determining a withdrawing employer's portion of the Fund's UVB. Applying this method, your company's withdrawal liability is **$477,475.00**.

PAYMENT INFORMATION

Your company's withdrawal liability of **$477,475.00** may be paid off in a lump sum or may be amortized over 28 quarterly installments of $**20,659.00**, plus a final payment of **$11,544.00**. Enclosed is a copy of the withdrawal liability calculation.

Payments must begin no later than 60 days after the date of this notice, notwithstanding any request for review or arbitration. ERISA § 4219(c)(2). Accordingly, your company's lump sum or first quarterly payment is due on or before **June 1, 2019**. Subsequent quarterly payments are due every three (3) months thereafter until the entire withdrawal liability plus interest is paid.

Please make all withdrawal liability payments by check payable to the "IAM National Pension Fund," and mail them to the following address:

IAM National Pension Fund
Attention: Kimberly Monnig, Controller
1300 Connecticut Ave., NW, Suite 300
Washington, D.C. 20036

Please be advised that your company's withdrawal liability and payment schedule as set forth above may be subject to adjustment due to, for example (without limitation), the finalization of the Fund's actuarial valuation for the plan year preceding the date of the company's withdrawal, the final results of an audit of the company's books and records that has been or may be conducted by the Fund, or any other pertinent information received concerning the company. If an adjustment to the company's withdrawal liability is made, the Fund will submit an amended withdrawal liability notice and payment schedule to your company.

REQUEST FOR REVIEW

If you disagree with this determination, your company has important procedural and substantive rights under ERISA. Under ERISA section 4219(b)(2)(A), your company may, within 90 days after receipt of this demand letter:

(a) request the Trustees to review any specific matter relating to the determination of your company's withdrawal liability or the schedule of payments;

(b) identify any inaccuracy in the determination of the unfunded vested benefits allocable to your company; or

(c) furnish any additional relevant information to the Fund.

Your company's request for review must be in writing and sent to the Fund office at the address listed above. Under ERISA § 4219(c)(2), however, even if a request for review is filed, a withdrawn employer *must* make

its withdrawal liability payments in accordance with the payment schedule.

ARBITRATION

ERISA § 4221 provides that if your company is not satisfied with the outcome of the review by the Fund, it may initiate arbitration of its dispute with the Fund concerning the determination of your company's withdrawal liability. Your company may only initiate arbitration within 60 days after the earlier of (a) the date of the Fund's response to your company's request for review (if any), or (b) 120 days after the date of your company's request for review by the Fund. Even if arbitration is requested, however, your company *must* make its withdrawal liability payments, in accordance with the payment schedule, during the pendency of the arbitration. *See* ERISA § 4221(d).

DEFAULT

The Fund will take legal action against your company if your company defaults in the scheduled payments. A default will occur if your company fails to make any withdrawal liability payment when due and then does not cure such failure within sixty (60) days after receiving written notice of such failure from the Fund. Additionally, the Trustees may declare default when the Fund receives notice of any circumstances indicating a substantial likelihood that the company will not be able to pay its withdrawal liability. In the event of a default, the Fund, at its option, may require immediate payment of the entire outstanding amount of your company's liability, plus accrued interest on the total outstanding liability from the due date of the first payment that was not timely made.

PERSONS LIABLE

Under ERISA § 4001(b), all trades or businesses under common control are treated as one employer. Thus, all members of a commonly-controlled group of trades and businesses are jointly and severally liable to the Fund for payment of withdrawal liability. This letter constitutes a notice and demand for payment of withdrawal liability from your company and all trades and businesses under common control with your company.

BANKRUPTCY

In the event your company is in liquidation or reorganization under any provision of Title 11 of the United States Code, this letter constitutes a notice of withdrawal liability, as provided under ERISA § 4219, but not a demand for payment. It does, nonetheless, constitute a Notice and Demand for Payment, pursuant to ERISA § 4219, on all general partners, if any, of your company and on all trades and businesses under common control with your company, if any.

CONCLUSION

We regret that circumstances led to your company's withdrawal from participation in the Fund. With cooperation, we can work toward the fulfillment of your company's continuing statutory obligation to the Fund.

You may contact the Fund Office in writing with questions regarding the above.

Sincerely,

/s/ [Signature]
Raymond Goad, Jr.

General Counsel
IAM National Benefit Funds Office

REG/tb

cc: Executive Director
Assistant General Counsel
Controller
Director, Education and Employer Services
Manager, Education and Employer Services
Tilden D. Wright, Jr., PR/DBR
James Conigliaro, GVP
Anthony S. Cacace, Outside Counsel, Proskauer Rose LLP

CERTIFIED RETURN RECEIPT REQUESTED
#7017 0660 0001 1384 6829

Exhibit 1

IAM NATIONAL PENSION FUND
Allocated Share of UVB Calculation for Ohio Magnetics, Inc.
For Withdrawals Between January 1, 2018 and December 31, 2018

	1	2	3	4	5	6	7
		5-Year Contribution History					
Plan Year Ending 12/31	Contributions by Ohio Magnetics, Inc.	Ohio Magnetics, Inc.	Total Fund Adjusted For Withdrawn Employers*	Allocation (2) + (3)	Unamortized Unfunded Vested Benefits*	Unamortized Reallocated Amounts	UVB and Reallocated Amounts Attributable to Ohio Magnetics, Inc. (4) x ((5) + (6))
2012	$63,896						
2013	64,224						
2014	62,826						
2015	61,408						
2016	49,005	$301,359	$1,815,571,396	0.0166%	$ 425,694,206	$ -0-	$ 70,659
2017	58,221	295,684	1,905,291,860	0.0155%	2,617,675,722	3,712,069	406,816

	Total UVB:	**$ 3,043,369,928**	**Employer's Share of UVB:**	**$ 477,475**
1	Employer Share of UVB and Reallocated Amounts (sum of column 7):			$477,475
2	De Minimis Reduction:			
	a. 0.75% X UVB (column 5, above):			$ 22,825,274
	b. Initial De Minimis Reduction: Lesser of (2.a) and $50,000:			50,000
	c. Adjustment to Initial Reduction: Employer's Total Allocated Share (1) minus $100,000; not less than zero:			377,475
	d. Line (2.b) minus (2.c), not less than zero:			-0-
3	**Employer's Allocated Share of UVB after De Minimis: [(1) - (2.d), not less than zero]**			**$ 477,475**

* *Underlying data provided by prior actuary for periods prior to 1/1/2014.*

Exhibit 2

IAM NATIONAL PENSION FUND
Allocated Share of UVB Calculation for Ohio Magnetics, Inc.
For Withdrawals Between January 1, 2018 and December 31, 2018

1. Contribution Base Units for the 10 years before the year of withdrawal

	Plan Year Ending Dec 31,	Base Units	3 Year Average
1	2008	67,558	
2	2009	50,008	
3	2010	42,371	53,312
4	2011	46,425	46,268
5	2012	44,739	44,512
6	2013	43,511	44,892
7	2014	41,150	43,133
8	2015	39,618	41,426
9	2016	31,616	37,461
10	2017	37,562	36,265
		Maximum	**53,312**

2. Calculation of Payment Schedule

a. Highest consecutive 3-year average of contribution base units for the 10-year period ending on 12/31/2017	53,312
b. Highest contribution rate in the 10-year period ending in the year of withdrawal	$ 1.55
c. Annual Payment	$ 82,634
d. Quarterly Payment	$\boxed{\$\ 20{,}659}$

e. Employer's Allocated Share of UVB after De Minimis	$477,475
f. Years to amortize withdrawal liability at 7.50%	7.1397
<u>Payment Schedule:</u>	
28 Quarterly Payments of	$ 20,659
1 Quarterly Payment of	$ 11,544

Exhibit 3

IAM NATIONAL PENSION FUND
Additional Information

Withdrawal Liability Method:	ERISA Section 4211(b) unmodified presumptive method, adjusted to include the fresh start provisions as approved by the PBGC
Date of Calculation:	12/31/2017 (i.e. the last day of the plan year preceding the year of withdrawal)

Valuation Assumptions for Unfunded Vested Liability purposes:

- discount rate of 6.50%
- expense load of 3.50%
- same demographic assumptions as used in the January 1, 2018 Actuarial Valuation

De Minimis Amounts:	lesser of $50,000 or 3/4 of 1% of the total plan unfunded vested liability

Unfunded Vested Liability as of 12/31/2017:

1	Present Value of Vested Benefits	$	15,219,329,272
2	Market Value of Assets	$	12,175,959,344
3	Unfunded Vested Benefits	$	3,043,369,928

[Dkt. 38-12]

AMERICAN ARBITRATION ASSOCIATION

Phillips Liquidating Trust, as successor in interest to the Phillips Corporation, d/b/a Equipco,

Petitioner,

v.

IAM National Pension Fund,

Respondent.

Case No.: 01-20-0000-1087

[Dated: May 8, 2020]

STIPULATION OF UNDISPUTED FACTS

Petitioner Phillips Liquidating Trust, as successor in interest to the Phillips Corporation d/b/a Equipco (the "Company"), and Respondent, the IAM National Pension Fund (the "Fund"), by and through their undersigned counsel, hereby stipulate as follows solely for purposes of the above-captioned arbitration proceeding:

I. The IAM National Pension Plan

1. The IAM National Pension Plan (the "Plan") is an employee pension benefit plan within the meaning of Sections 3(2) and 502(d)(1) of ERISA (29 U.S.C. §§ 1002(2) and 1132(d)(1)), and a multi-employer plan within the meaning of Sections 3(37) and 515 of ERISA (29 U.S.C. §§ 1002(37) and 1145).

2. The Plan's assets are held in the Fund, a jointly-administered, multi-employer, labor-management trust fund established and maintained pursuant to collective bargaining agreements in accordance with Section 302(c)(5) of the Taft-Hartley Act (29 U.S.C. § 186(c)(5)).

3. The Plan provides retirement benefits to employees who performed covered work for employers that remitted contributions to the Fund in accordance with collective bargaining agreements with the International Association of Machinists and Aerospace Workers, AFL-CIO or with affiliated local or district lodges.

4. Administrative expenses incurred in administering the Plan and the Fund are paid using Fund assets.

5. The Fund is governed by an agreement and declaration of trust that was last restated as of May 15, 2014 (the "Trust Agreement") and whose Plan Year is January 1 to December 31. A true and correct copy of the Trust Agreement is attached as **Exhibit A**.

6. In accordance with ERISA § 4201(a) (29 U.S.C. § 1381(a)), Article VII of the Trust Agreement provides that an employer who withdraws from the Plan in a complete or partial withdrawal is liable for withdrawal liability.

7. In accordance with ERISA § 4213(a)(1) (29 U.S.C. § 1393(a)(1)), Article VII, Section 5 of the Trust Agreement provides that "[w]ithdrawal liability shall be determined 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 Plan actuary's best estimate of anticipated experience under the Plan."

8. In accordance with ERISA § 4219(c)(1)(A)(i) (29 U.S.C. § 1399(c)(1)(A)(i)), Article VII, Section 6(a) of the Trust Agreement provides that the schedule of payments for an employer's withdrawal liability "shall provide for payment over the period of years necessary to amortize the total liability owed in level annual payments," and that the "interest rate used for determining the amortization period shall be the Plan's assumed rate of return for purposes of ERISA's minimum funding requirements for the Plan Year preceding the Plan Year of withdrawal."

II. Methods and Assumptions Applicable to Employer Withdrawals

9. Cheiron has served as the Fund's actuary since March 2014.

10. In that role, Cheiron prepares actuarial valuations of Fund assets, calculates the amounts required for minimum funding purposes, and calculates an employer's withdrawal liability in the event of a complete or partial withdrawal from the Fund.

11. Cheiron cannot prepare the actuarial valuation until after the end of the Plan Year.

12. On November 2, 2017, Cheiron published the actuarial valuation for the Fund for the 2016 Plan Year (the "2016 Actuarial Valuation"), a true and correct copy of which is attached as **Exhibit B**.

13. The 2016 Actuarial Valuation showed that, as of the end of the 2016 Plan Year, the Fund had unfunded vested liabilities ("UVBs") of $448,099,164, which is the difference between the Actuarial Value of Assets ($11,901,968,791) and the Present Value of Vested Benefits ($12,350,067,955). The 2016 Actuarial Valuation further stated that "a participating employer who withdraws from the Fund during the plan year beginning January 1, 2017, may have a withdrawal liability which will be based on its allocated share of the unfunded vested benefits." (*Id.* at 24.)

14. Cheiron utilized the following methods and assumptions in preparing the 2016 Actuarial Valuation:

a. Asset Valuation Method: Actuarial Value of Assets

b. Withdrawal Liability Discount Rate: 7.50%

c. Assumed Rate of Return: 7.50%

(*Id.*, App'x C, at 35, 38.)

15. On January 24, 2018, at a regularly-scheduled meeting of the Board of Trustees of the Fund (the "Board"), Cheiron provided a PowerPoint presentation to the Trustees regarding withdrawal liability, a true and correct copy of which is attached as **Exhibit C**.

16. A true and correct copy of part of the minutes from the Trustees' January 24, 2018 meeting are attached as **Exhibit D**. The attached minutes from that meeting state, in part, that the Trustees

"unanimously approved the following recommendations from the Fund's Actuary, Cheiron":

****

- **Asset Valuation Method** - Market Value.
- **Discount Rate for Withdrawal Liability purposes** - Funding Discount Rate less 100 basis points. January 1, 2017 funding discount rate of 7.5% less 100 basis point yields 6.5% discount rate for withdrawal liability purposes.
- **Expense Load** - Include 4% expense load. Reflects projected administrative expenses on behalf of Fund populations, based on 2% inflationary increase and on valuation mortality assumption. Re- determine annually upon completion of the actuarial valuation."

****

> Upon questioning, Mr. Kalwarski confirmed that all of changes to the withdrawal liability calculation and the actuarial assumptions are reasonable and defensible.

(*Id.* at 15.)

17. Following the January 24, 2018 meeting, the Fund's actuary prepared withdrawal liability estimates for withdrawals occurring during the 2018 Plan Year using the methods and assumptions the actuary discussed and the Trustees approved at the January 24, 2018 meeting.

18. On October 9, 2018, the Fund filed a Form 5500 for the Plan Year ending December 31, 2017, which included as an attachment excerpts from the 2016 Actuarial Valuation. Excerpts from the Fund's 2017 Form 5500 filing are attached as **Exhibit E**.

19. On December 15, 2018, the Fund adopted the IAM National Pension Fund Withdrawal Liability Policy (the "Withdrawal Liability Policy") which, by its terms, became effective January 1, 2019. A true and correct copy of the Withdrawal Liability Policy is attached as **Exhibit F**. The Policy states, in part, as follows:

> 2. **Calculation of Withdrawal Liability Amount**. The Employer Services Department in conjunction with the Fund's Actuary will determine the amount of withdrawal liability for each withdrawn employer according to the presumptive method as amended by the Fresh Start provision set forth in the Fund's Trust Agreement. The amount of withdrawal liability will also include an administrative expense load.

20. On April 17, 2019, Cheiron published the actuarial valuation for the Fund for the 2017 Plan Year (the "2017 Actuarial Valuation"), a true and correct copy of which is attached as **Exhibit G**.

21. The 2017 Actuarial Valuation stated that, as of the end of the 2017 Plan Year, the Fund had unfunded vested liabilities ("UVBs") of $3,043,369,928, which is the difference between the Market Value of Assets ($12,175,959,344) and the sum of the Present

Value of Vested Benefits ($14,704,665,963) and Future Administrative Expenses ($514,663,309). The 2017 Actuarial Valuation further stated that "a participating employer who withdraws from the Fund during the plan year beginning January 1, 2018, may have a withdrawal liability which will be based on its allocated share of the unfunded vested benefits." (*Id.* at 23.)

22. Cheiron utilized the following methods and assumptions in preparing the 2017 Actuarial Valuation:

a. Asset Valuation Method: Market Value of Assets

b. Withdrawal Liability Discount Rate: 6.50%

c. Administrative Expense Load: 3.5% of the Present Value of Vested Benefits

d. Assumed Rate of Return: 7.50%

(*Id.*, App'x G, at 35, 38.)

23. On October 11, 2019, the Fund filed a Form 5500 filing for the Plan Year ending December 31, 2018, which included as an attachment excerpts from the 2017 Actuarial Valuation. Excerpts from the Fund's 2018 Form 5500 filing are attached as **Exhibit H**.

III. The Cessation of the Company's Obligation to Contribute to the Fund

24. The Company was a party to certain collective bargaining agreements, pursuant to which it was

obligated to remit contributions to the Fund on behalf of those of its employees who performed covered work.

25. In response to the Company's request, on September 28, 2017, the Fund provided to the Company an estimate of the Company's withdrawal liability for a complete withdrawal during the 2016 Plan Year. A true and correct copy of the Fund's estimate is attached as **Exhibit I**.

26. The Company permanently ceased operating as of April 7, 2018, when it sold its assets to an unrelated third party and effected a complete withdrawal from the Fund within the meaning of ERISA § 4203(a) (29 U.S.C. § 1383(a)).

27. On June 7, 2018, the Company emailed the Fund a completed Withdrawal Liability Questionnaire.

28. By letter dated April 2, 2019, the Fund notified the Company that it had effected a complete withdrawal from the Fund within the meaning of ERISA § 4203(a) (29 U.S.C. § 1383(a)) as of May 1, 2018, and that its allocated share of the unfunded vested liabilities of the Fund was $2,013,028.00, payable in forty-one (41) quarterly installments of $66,944 and a final payment of $9,601.00, commencing on or before June 1, 2019 (the "Assessment"). A true and correct copy of the Assessment is attached as **Exhibit J**.

29. On or about June 6, 2019, the Company remitted $2,013,028.00 to the Fund as payment in full for its outstanding withdrawal liability in accordance with ERISA § 4219(c)(4) (29 U.S.C. § 1399(c)(4)).

30. By letter dated August 7, 2019, the Company requested a review of the Assessment pursuant to ERISA § 4219(b)(2)(A) (29 U.S.C. § 1399(b)(2)(A)), which request the Fund denied by letter dated September 9, 2019, pursuant to ERISA § 4219(b)(2)(B) (29 U.S.C. § 1399(b)(2)(B)).

IV. Procedural History

31. On January 9, 2019, the Company timely commenced the above-captioned arbitration.

32. Pursuant to the March 6, 2020 Preliminary Conference Order and the March 18, 2020 Joint Statement of Issues, the Parties intend to submit for resolution by the Arbitrator on the above-stipulated facts the following legal issues:

a. Whether, as a matter of law, the Fund, when calculating the Company's withdrawal liability, wrongly failed to apply the interest rate in effect on the measurement date for the Company's May 1, 2018 withdrawal (consisting of a 7.5% interest rate that was in effect on December 31, 2017) and, instead, retroactively applied an interest rate of 6.5% that was adopted at some time after the December 31, 2017 measurement date?

b. Whether, as a matter of law, the Fund could include, in the calculation of the Company's withdrawal liability, a component representing the Fund's future administrative expenses, which it referred to as the "administrative expense load"?

c. Whether, as a matter of law, the Fund's actuary could use one interest rate for funding purposes and a different, lower one for withdrawal liability purposes?

Dated: May 8, 2020

BUCHANAN INGERSOLL & ROONEY PC

/s/ [Signature]
David J. Laurent
William Lewis
Union Trust Building
501 Grant Street,
Suite 200
Pittsburgh, PA 15219
Telephone: (412) 562-8800
Facsimile: (412) 562-1041
David.Laurent@bipc.com
William.Lewis@bipc.com

Counsel for Phillips Liquidating Trust

Dated: May 8, 2020

PROSKAUER ROSE LLP

By: /s/ [Signature]
Anthony S. Cacace
Eleven Times Square
New York, NY 10036
(212) 969-3307
acacace@proskauer.com

Neil V. Shah
Eleven Times Square
New York, NY 10036
(212) 969-3028
nshah@proskauer.com

Counsel for the Fund

EXHIBIT I

IAM NATIONAL
PENSION FUND

1300 Connecticut Avenue NW, Suite 300,
Washington DC 20036-1711

www.iamnpf.org 202-785-2658

September 28, 2017

John T. Vukson, Director
Phillips Corporation (d/b/a Equipco)
Phillips Industrial Park
1889 Mayview Road
Bridgeville, PA 15017-0000

RE: IAM National Pension Fund
Company Name: Phillips Corporation
Employer Codes: E089
<u>ESTIMATE FOR WITHDRAWALS DURING 2017</u>

Dear Mr. Vukson:

You have requested an estimate of your company's potential withdrawal liability to the I.A.M. National Pension Fund ("Fund") under the Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364 if a withdrawal occurs from the Fund. We have received your company's payment for the requested estimate.

Under the modified presumptive method of the Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364, your company's estimated withdrawal liability has been calculated as a percentage of the

Fund's total unfunded vested obligation as of December 31, 2016. Your company's potential withdrawal liability is calculated as follows:

	(1)	(2)	(3)
Plan Year Ending 12/31	Unamortized balance of unfunded vested benefits (and change thereto after the first year)	Your percentage of total adjusted plan contributions for for five years ending on date shown	Your share of unfunded vested benefits = (1) x (2)
2016	\$498,812,163	0.0676%	\$337,338

From your initial liability in column (3), a deductible of \$0 (calculated under ERISA §4209(a)) is subtracted, leaving a balance due of \$337,338.

This withdrawal liability estimate is based on the information in the Fund Office at this time. Please be aware that the IAM National Pension Fund conducts payroll audits of all contributing employers, and your company's actual withdrawal liability to the Plan could be different if the payroll audit identifies different information. **Further, the unamortized balance of unfunded vested benefits will not be final until the Actuarial Valuation is complete in approximately October of this year.**

Also be aware that, under ERISA § 4001(b), all trades or businesses under common control are treated as one employer. All members of a commonly-controlled group of trades and businesses would be jointly and severally liable to the Fund for payment of withdrawal liability.

We hope that circumstances will not lead to your company's withdrawal from participation in the IAM National Pension Fund. Please contact the Fund Office in writing with questions regarding the above.

Sincerely,

/s/ [Signature]
Eunice Dietz
Manager
Education and Employer Services

cc: James Conigliaro, GVP
Robert Miller, DBR
Executive Director
General Counsel
Manager, Legal Services
Controller

CERTIFIED RETURN RECEIPT REQUESTED
#7015 0640 0003 3331 0114

EXHIBIT J

IAM NATIONAL
PENSION FUND

1300 Connecticut Avenue NW, Suite 300,
Washington DC 20036-1711

www.iamnpf.org 202-785-2658

April 2, 2019

John T. Vukson, Director
Phillips Corporation (D/B/A Equipco)
Phillips Industrial Park
1889 Mayview Road
Bridgeville, PA 15017

RE: IAM National Pension Fund
Company Name: Phillips Corporation (D/B/A Equipco)
Employer Code: E089
NOTICE AND DEMAND FOR PAYMENT OF WITHDRAWAL LIABILITY

Dear Mr. Vukson:

The Trustees of the IAM National Pension Fund ("Fund") have determined that your company has completely withdrawn from the Fund effective May 1, 2018. Under the Employee Retirement Income Security Act, as amended (ERISA) § 4203, a complete withdrawal occurs when an employer permanently ceases to have an obligation to contribute under the Fund or permanently ceases all covered operations under the

Fund. Pursuant to ERISA § 4219, this letter is a formal Notice and Demand for payment of this withdrawal liability.

Under ERISA § 4201, an employer that completely withdraws from a multiemployer pension plan is liable for a portion of the plan's unfunded vested benefits ("UVB"). The company's portion is its withdrawal liability. The unmodified presumptive method as amended by the fresh start provision set forth in the Plan rules is used in determining a withdrawing employer's portion of the Fund's UVB. Applying this method, your company's withdrawal liability is **$2,013,028.00**.

PAYMENT INFORMATION

Your company's withdrawal liability of **$2,013,028.00** may be paid off in a lump sum or may be amortized over 41 quarterly installments of **$66,944.00**, plus a final payment of **$9,601.00**. Enclosed is a copy of the withdrawal liability calculation.

Payments must begin no later than 60 days after the date of this notice, notwithstanding any request for review or arbitration. ERISA § 4219(c)(2). Accordingly, your company's lump sum or first quarterly payment is due on or before **June 1, 2019**. Subsequent quarterly payments are due every three (3) months thereafter until the entire withdrawal liability plus interest is paid.

Please make all withdrawal liability payments by check payable to the "IAM National Pension Fund," and mail them to the following address:

IAM National Pension Fund
Attention: Kimberly Monnig, Controller
1300 Connecticut Ave., NW, Suite 300
Washington, D.C. 20036

Please be advised that your company's withdrawal liability and payment schedule as set forth above may be subject to adjustment due to, for example (without limitation), the finalization of the Fund's actuarial valuation for the plan year preceding the date of the company's withdrawal, the final results of an audit of the company's books and records that has been or may be conducted by the Fund, or any other pertinent information received concerning the company. If an adjustment to the company's withdrawal liability is made, the Fund will submit an amended withdrawal liability notice and payment schedule to your company.

REQUEST FOR REVIEW

If you disagree with this determination, your company has important procedural and substantive rights under ERISA. Under ERISA section 4219(b)(2)(A), your company may, within 90 days after receipt of this demand letter:

(a) request the Trustees to review any specific matter relating to the determination of your company's withdrawal liability or the schedule of payments;

(b) identify any inaccuracy in the determination of the unfunded vested benefits allocable to your company; or

(c) furnish any additional relevant information to the Fund.

Your company's request for review must be in writing and sent to the Fund office at the address listed above. Under ERISA § 4219(c)(2), however, even if a request for review is filed, a withdrawn employer *must* make its withdrawal liability payments in accordance with the payment schedule.

ARBITRATION

ERISA § 4221 provides that if your company is not satisfied with the outcome of the review by the Fund, it may initiate arbitration of its dispute with the Fund concerning the determination of your company's withdrawal liability. Your company may only initiate arbitration within 60 days after the earlier of (a) the date of the Fund's response to your company's request for review (if any), or (b) 120 days after the date of your company's request for review by the Fund. Even if arbitration is requested, however, your company *must* make its withdrawal liability payments, in accordance with the payment schedule, during the pendency of the arbitration. *See* ERISA § 4221(d).

DEFAULT

The Fund will take legal action against your company if your company defaults in the scheduled payments. A default will occur if your company fails to make any withdrawal liability payment when due and then does not cure such failure within sixty (60) days after receiving written notice of such failure from the Fund. Additionally, the Trustees may declare default when the Fund receives notice of any circumstances indicating a substantial likelihood that the company will not be able to pay its withdrawal liability. In the event of a default, the Fund, at its option, may require immediate payment of the entire outstanding amount of your company's liability, plus accrued interest on the total outstanding liability from the due date of the first payment that was not timely made.

PERSONS LIABLE

Under ERISA § 4001(b), all trades or businesses under common control are treated as one employer. Thus, all members of a commonly-controlled group of trades and businesses are jointly and severally liable to the Fund for payment of withdrawal liability. This letter constitutes a notice and demand for payment of withdrawal liability from your company and all trades and businesses under common control with your company.

BANKRUPTCY

In the event your company is in liquidation or reorganization under any provision of Title 11 of the United States Code, this letter constitutes a notice of withdrawal liability, as provided under ERISA § 4219, but not a demand for payment. It does, nonetheless, constitute a Notice and Demand for Payment, pursuant to ERISA § 4219, on all general partners, if any, of your company and on all trades and businesses under common control with your company, if any.

CONCLUSION

We regret that circumstances led to your company's withdrawal from participation in the Fund. With cooperation, we can work toward the fulfillment of your company's continuing statutory obligation to the Fund.

You may contact the Fund Office in writing with questions regarding the above.

Sincerely,

/s/ [Signature]
Raymond Goad, Jr.
General Counsel
IAM National Benefit Funds Office

REG/tb

cc: Executive Director
Assistant General Counsel
Controller
Director, Education and Employer Services
Manager, Education and Employer Services
Robert Miller, DBR
James Conigliaro, GVP
Anthony S. Cacace, Outside Counsel, Proskauer Rose LLP

CERTIFIED RETURN RECEIPT REQUESTED
#7017 0660 0001 1384 6782

Exhibit 1

IAM NATIONAL PENSION FUND
Allocated Share of UVB Calculation for Equipco Division Phillips Corporation
For Withdrawals Between January 1, 2018 and December 31, 2018

	1	2	3	4	5	6	7
		5-Year Contribution History					
Plan Year Ending 12/31	Contributions by Equipco Division Phillips Corporation	Equipco Division Phillips Corporation	Total Fund Adjusted For Withdrawn Employers *	Allocation (2) ÷ (3)	Unamortized Unfunded Vested Benefits *	Unamortized Reallocated Amounts	UVB and Reallocated Amounts Attributable to Equipco Division Phillips Corporation (4) x ((5) + (6))
2012	$ 232,540						
2013	248,547						
2014	250,640						
2015	243,438						
2016	252,956	$1,228,120	$1,815,571,396	0.0676%	$ 425,694,206	$ -0-	$ 287,955

2017	258,246	1,253,827	1,905,291,860	0.0658%	2,617,675,722	3,712,069	1,725,073
				Total UVB:	**$3,043,369,928**	**Employer's Share of UVB:**	**$ 2,013,028**

1 Employer Share of UVB and Reallocated Amounts (sum of column 7): $ 2,013,028

2 De Minimis Reduction:

a. 0.75% X UVB (column 5, above): $22,825,274

b. Initial De Minimis Reduction: Lesser of (2.a) and $50,000: 50,000

c. Adjustment to Initial Reduction: Employer's Total Allocated Share (1) minus $100,000; not less than zero: 1,913,028

d. Line (2.b) minus (2.c), not less than zero: -0-

3 Employer's Allocated Share of UVB after De Minimis: [(1) - (2.d), not less than zero] $ 2,013,028

* *Underlying data provided by prior actuary for periods prior to 1/1/2014.*

Exhibit 2

IAM NATIONAL PENSION FUND
Allocated Share of UVB Calculation for
Equipco Division Phillips Corporation
For Withdrawals Between January 1, 2018 and December 31, 2018

1. Contribution Base Units for the 10 years before the year of withdrawal

	Plan Year Ending Dec 31,	Base Units	3 Year Average
1	2008	13,377	
2	2009	10,695	
3	2010	11,309	11,794
4	2011	11,253	11,086
5	2012	12,045	11,536
6	2013	12,615	11,971
7	2014	12,532	12,397
8	2015	11,721	12,289
9	2016	12,105	12,119
10	2017	12,121	11,982
		Maximum	**12,397**

2. Calculation of Payment Schedule

a. Highest consecutive 3-year average of contribution base units for the 10-year period ending on 12/31/2017	12,397
b. Highest contribution rate in the 10-year period ending in the year of withdrawal	$ 21.60
c. Annual Payment	$ 267,775
d. Quarterly Payment	$\boxed{\$\ 66{,}944}$

e. Employer's Allocated Share of UVB after De Minimis	$2,013,028
f. Years to amortize withdrawal liability at 7.50%	10.2859

<u>Payment Schedule:</u>

41 Quarterly Payments of	$ 66,944
1 Quarterly Payment of	$ 9,601

Exhibit 3

IAM NATIONAL PENSION FUND
Additional Information

Withdrawal Liability Method:	ERISA Section 4211(b) unmodified presumptive method, adjusted to include the fresh start provisions as approved by the PBGC
Date of Calculation:	12/31/2017 (i.e. the last day of the plan year preceding the year of withdrawal)

Valuation Assumptions for Unfunded Vested Liability purposes:

- discount rate of 6.50%
- expense load of 3.50%
- same demographic assumptions as used in the January 1, 2018 Actuarial Valuation

De Minimis Amounts:	lesser of \$50,000 or ¾ of 1% of the total plan unfunded vested liability

Unfunded Vested Liability as of 12/31/2017:

1	Present Value of Vested Benefits	$	15,219,329,272
2	Market Value of Assets	$	12,175,959,344
3	Unfunded Vested Benefits	$	3,043,369,928

[Dkt. 38-13]

AMERICAN ARBITRATION ASSOCIATION

Toyota Logistics Services, Inc.,

Petitioner,

v.

IAM National Pension Fund,

Respondent.

Case No.: 01-20-0000-0197

[Dated: December 10, 2020]

<u>STIPULATION OF UNDISPUTED FACTS</u>

Petitioner Toyota Logistics Services, Inc. (the "Company"), and Respondent, the IAM National Pension Fund (the "Fund"), by and through their undersigned counsel, hereby stipulate as follows solely for purposes of the above-captioned arbitration proceeding:

I. The IAM National Pension Plan

1. The IAM National Pension Plan (the "Plan") is an employee pension benefit plan within the meaning of Sections 3(2) and 502(d)(1) of ERISA (29 U.S.C. §§ 1002(2) and 1132(d)(1)), and a multi-employer plan within the meaning of Sections 3(37) and 515 of ERISA (29 U.S.C. §§ 1002(37) and 1145).

2. The Plan provides retirement benefits to employees who performed covered work for employers

that remitted contributions to the Fund in accordance with collective bargaining agreements with the International Association of Machinists and Aerospace Workers, AFL-CIO or with affiliated local or district lodges.

3. The Plan's assets are held in the Fund, a jointly-administered, multi-employer, labor-management trust fund established and maintained pursuant to collective bargaining agreements in accordance with Section 302(c)(5) of the Taft-Hartley Act (29 U.S.C. § 186(c)(5)).

4. The Fund is governed by an agreement and declaration of trust that was last restated as of May 15, 2014 (the "Trust Agreement") and whose Plan Year is January 1 to December 31. A true and correct copy of the Trust Agreement is attached as **Exhibit A**.

5. In accordance with ERISA § 4201(a) (29 U.S.C. § 1381(a)), Article VII of the Trust Agreement provides that an employer who withdraws from the Plan in a complete or partial withdrawal is liable for withdrawal liability.

6. In accordance with ERISA § 4213(a)(1) (29 U.S.C. § 1393(a)(1)), Article VII, Section 5 of the Trust Agreement provides that "[w]ithdrawal liability shall be determined 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 Plan actuary's best estimate of anticipated experience under the Plan."

II. Methods and Assumptions Applicable to Employer Withdrawals

7. Cheiron has served as the Fund's actuary since March 2014.

8. In that role, Cheiron prepares actuarial valuations of Fund assets, calculates the amounts required for minimum funding purposes, and calculates an employer's withdrawal liability in the event of a complete or partial withdrawal from the Fund.

9. Cheiron cannot prepare an actuarial valuation until, at the earliest, after the financial markets have closed on the final business day of the corresponding Plan Year and the resulting closing values of the Plan's assets are calculated.

10. On November 2, 2017, Cheiron published the actuarial valuation for the Fund for the 2016 Plan Year (the "2016 Actuarial Valuation"), a true and correct copy of which is attached as **Exhibit B**.

11. The 2016 Actuarial Valuation stated that, as of the end of the 2016 Plan Year, the Fund had unfunded vested benefits ("UVBs") of $448,099,164. The 2016 Plan Year was the first time in several years that the Fund had UVBs.

12. Cheiron utilized a 7.50% discount rate and investment return assumption, along with various other methods and assumptions, in preparing the 2016 Actuarial Valuation. (*Id.*, App'x C, at 35, 38.)

13. As of December 31, 2017, the Board of Trustees of the Fund (the "Trustees") had not adopted (and Cheiron had not previously recommended) any change

in the 7.5% discount rate used to calculate withdrawal liability.

14. The minutes produced by the Fund for the regularly-scheduled Trustees' meeting on January 24, 2018 indicate that Cheiron presented to the Trustees a PowerPoint presentation, a true and correct copy of which is attached as **Exhibit C**.

15. The PowerPoint presentation explained the general concept of withdrawal liability, modeled various discount rate and other actuarial methods and assumptions on the Fund's UVBs, and explained that "[w]ith input from the Trustees, Actuary determines asset valuation method and discount rate." (Ex. C at 17.)

16. In the PowerPoint Presentation, Cheiron modeled the impact that four different interest rate alternatives would have on the Fund's UVBs: a 7.5% rate, a 7% rate, a blended rate (50% based upon a 7.5% rate and 50% based on PBGC rates), and PBGC rates (2.34% and 2.63%). Cheiron did not model a 6.5% discount rate.

17. The January 24, 2018 meeting minutes indicate that the Trustees unanimously approved Cheiron's recommendations to change various methods and assumptions used to calculate withdrawal liability, including a "January 1, 2017 funding discount rate of 7.5% less 100 basis points." A copy of relevant excerpts from the minutes of that meeting are attached as **Exhibit D**.

18. On April 17, 2019, Cheiron published the actuarial valuation for the Fund for the 2017 Plan

Year (the "2017 Actuarial Valuation"), a true and correct copy of which is attached as **Exhibit E**.

19. The 2017 Actuarial Valuation stated that, as of the end of the 2017 Plan Year, the Fund had UVBs of $3,043,369,928, which was an increase from the $448,099,164 in UVBs as of the prior 2016 Plan Year. Notwithstanding that the decision to lower the discount rate for withdrawal liability purposes was not adopted on or before December 31, 2017, Cheiron utilized the 6.50% discount rate that it adopted at the January 24, 2018 Trustees' meeting and a 7.50% investment return assumption, along with various other methods and assumptions, in preparing the 2017 Actuarial Valuation. (*Id.*, App'x C, at 35, 38-39.) The 2017 Actuarial Valuation further stated that "a participating employer who withdraws from the Fund during the plan year beginning January 1, 2018, may have a withdrawal liability which will be based on its allocated share of the unfunded vested benefits." (*Id.* at 23.)

III. The Cessation of the Company's Obligation to Contribute to the Fund

20. The Company was a party to certain collective bargaining agreements, pursuant to which it was obligated to remit contributions to the Fund on behalf of those of its employees who performed covered work.

21. On or about September 13, 2018, the Company requested an estimate of its withdrawal liability in accordance with ERISA § 101(l) (29 U.S.C. § 1021(l)), which, the Fund provided to the Company on or about December 3, 2018, a true and correct copy of which is attached as **Exhibit F**. As set forth in the Estimate, Cheiron estimated that the Company would

be liable for approximately $1,344,032 in withdrawal liability if it effected a complete withdrawal from the Fund on or before December 31, 2018, which was based on the Fund's estimate of UVBs as of December 31, 2017. Cheiron used a 6.50% discount rate, the rate that was adopted at the January 24, 2018 Trustee's meeting, to prepare the Estimate, among various other methods and assumptions.

22. Other than with respect to the Estimate, at no other point between January 1, 2016 and December 29, 2018 did either: (i) the Company request documents, information, or a withdrawal liability estimate from the Fund pursuant to ERISA § 101(k) and (l) (29 U.S.C. § 1024(k) and (l)), or (ii) the Fund provide the Company any notice, documents, or information relating to a change or a potential change by Cheiron to the discount rate used to calculate UVBs for withdrawal liability purposes.

23. The Company effected a complete withdrawal from the Fund within the meaning of ERISA § 4203(a) (29 U.S.C. § 1383(a)) as of December 29, 2018.

24. By letter dated June 18, 2019, the Fund notified the Company that it had effected a complete withdrawal from the Fund within the meaning of ERISA § 4203(a) (29 U.S.C. § 1383(a)) as of December 29, 2018, and that its allocated share of the UVBs as of December 31, 2017 was $1,289,384.00, payable in twenty-eight (28) quarterly installments of $56,244.00 and a final payment of $13,945.00, commencing on or before August 13, 2019 (the "Assessment"). Cheiron calculated the Assessment using the UVBs and methods and assumptions set forth in the 2017 Actuarial

Valuation. A true and correct copy of the Assessment is attached as **Exhibit G**.

25. By letter dated September 11, 2019, the Company requested a review of the Assessment pursuant to ERISA § 4219(b)(2)(A) (29 U.S.C. § 1399(b)(2)(A)), which request the Fund denied by letter dated November 5, 2019, pursuant to ERISA § 4219(b)(2)(B) (29 U.S.C. § 1399(b)(2)(B)).

IV. Procedural History

26. On January 2, 2020, the Company timely commenced the above-captioned arbitration.

27. Pursuant to the September 28, 2020 schedule agreed to by the Parties, the Parties intend to submit to the Arbitrator the following issue for resolution based solely on the facts set forth in this Stipulation: Whether, as a matter of law, Cheiron wrongly applied a 6.50% discount rate adopted by Cheiron at the January 24, 2018 Trustees' meeting to calculate the Company' s withdrawal liability, rather than the 7.50% discount rate that was previously in effect on December 31, 2017.

28. Pursuant to the September 28, 2020 schedule agreed to by the Parties, the Parties agreed that if the above issue is resolved in the Fund's favor (either pursuant to the present arbitration or to a subsequent appeal), the Company shall have an opportunity to challenge whether the 6.50% discount rate constituted Cheiron's "best estimate of anticipated experience under the plan" within the meaning of ERISA § 4213(a)(1) (29 U.S.C. § 1393(a)(1)), and no other issue.

Dated: December 10, 2020

MORGAN, LEWIS & BOCKIUS LLP

By: ***/s/ Randall McGeorge***
Randall McGeorge
One Oxford Centre,
Thirty-Second Floor
Pittsburgh, PA 15219-6401
(412) 560-7410
randy.mcgeorge@
morganlewis.com

Deborah S. Davidson
77 West Wacker Driver
Chicago, IL 60601-5094
(312) 324-1159
deborah.davidson@
morganlewis.com

Benjamin T. Kelly
1111 Pennsylvania Avenue, NW
Washington, DC 20004-2541
(202) 739-5948
benjamin.kelly@
morganlewis.com

Counsel for the Company

Dated: December 10, 2020

PROSKAUER ROSE LLP

By: ***/s/ Anthony S. Cacace***
Anthony S. Cacace
Eleven Times Square
New York, NY 10036

(212) 969-3307
acacace@proskauer.com

Neil V. Shah
Eleven Times Square
New York, NY 10036
(212) 969-3028
nshah@proskauer.com

Counsel for the Fund

EXHIBIT G

IAM National
Pension Fund

1300 Connecticut Avenue NW, Suite 300,
Washington DC 20036-1711

iamnpf.org 202-785-2658

June 18, 2019

Audie Freeman, National Logistics Manager
Toyota Logistics Services, Inc.
785 Edison Avenue
Long Beach, CA 90813-2657

RE: IAM National Pension Fund
Company Name: Toyota Logistics Services, Inc.
Employer Code: V039
NOTICE AND DEMAND FOR PAYMENT OF WITHDRAWAL LIABILITY

Dear Mr./Ms. Freeman:

The Trustees of the IAM National Pension Fund ("Fund") have determined that your company has completely withdrawn from the Fund effective December 29, 2018. Under the Employee Retirement Income Security Act, as amended (ERISA) § 4203, a complete withdrawal occurs when an employer permanently ceases to have an obligation to contribute under the Fund or permanently ceases all covered operations under the Fund. Pursuant to ERISA § 4219, this letter is a formal Notice and Demand for payment of this withdrawal liability.

Under ERISA § 4201, an employer that completely withdraws from a multiemployer pension plan is liable for a portion of the plan's unfunded vested benefits ("UVB"). The company's portion is its withdrawal liability. The unmodified presumptive method as amended by the fresh start provision set forth in the Plan rules is used in determining a withdrawing employer's portion of the Fund's UVB. Applying this method, your company's withdrawal liability is **$1,289,384.00**.

PAYMENT INFORMATION

Your company's withdrawal liability of **$1,289,384.00** may be paid off in a lump sum or may be amortized over 28 quarterly installments of **$56,244.00**, plus a final payment of **$13,945.00**. Enclosed is a copy of the withdrawal liability calculation.

Payments must begin no later than 60 days after the date of this notice, notwithstanding any request for review or arbitration. ERISA § 4219(c)(2). Accordingly, your company's lump sum or first quarterly payment is due on or before **August 13, 2019**. Subsequent quarterly payments are due every three (3) months thereafter until the entire withdrawal liability plus interest is paid.

Please make all withdrawal liability payments by check payable to the "IAM National Pension Fund," and mail them to the following address:

IAM National Pension Fund
Attention: Kimberly Monnig, Controller
1300 Connecticut Ave., NW, Suite 300
Washington, D.C. 20036

Please be advised that your company's withdrawal liability and payment schedule as set forth above may be subject to adjustment due to, for example (without limitation), the finalization of the Fund's actuarial valuation for the plan year preceding the date of the company's withdrawal, the final results of an audit of the company's books and records that has been or may be conducted by the Fund, or any other pertinent information received concerning the company. If an adjustment to the company's withdrawal liability is made, the Fund will submit an amended withdrawal liability notice and payment schedule to your company.

<u>REQUEST FOR REVIEW</u>

If you disagree with this determination, your company has important procedural and substantive rights under ERISA. Under ERISA section 4219(b)(2)(A), your company may, within 90 days after receipt of this demand letter:

(a) request the Trustees to review any specific matter relating to the determination of your company's withdrawal liability or the schedule of payments;

(b) identify any inaccuracy in the determination of the unfunded vested benefits allocable to your company; or

(c) furnish any additional relevant information to the Fund.

Your company's request for review must be in writing and sent to the Fund office at the address listed above. Under ERISA § 4219(c)(2), however, even if a request for review is filed, a withdrawn employer *must* make

its withdrawal liability payments in accordance with the payment schedule.

ARBITRATION

ERISA § 4221 provides that if your company is not satisfied with the outcome of the review by the Fund, it may initiate arbitration of its dispute with the Fund concerning the determination of your company's withdrawal liability. Your company may only initiate arbitration within 60 days after the earlier of (a) the date of the Fund's response to your company's request for review (if any), or (b) 120 days after the date of your company's request for review by the Fund. Even if arbitration is requested, however, your company *must* make its withdrawal liability payments, in accordance with the payment schedule, during the pendency of the arbitration. *See* ERISA § 4221(d).

DEFAULT

The Fund will take legal action against your company if your company defaults in the scheduled payments. A default will occur if your company fails to make any withdrawal liability payment when due and then does not cure such failure within sixty (60) days after receiving written notice of such failure from the Fund. Additionally, the Trustees may declare default when the Fund receives notice of any circumstances indicating a substantial likelihood that the company will not be able to pay its withdrawal liability. In the event of a default, the Fund, at its option, may require immediate payment of the entire outstanding amount of your company's liability, plus accrued interest on the total outstanding liability from the due date of the first payment that was not timely made.

PERSONS LIABLE

Under ERISA § 4001(b), all trades or businesses under common control are treated as one employer. Thus, all members of a commonly-controlled group of trades and businesses are jointly and severally liable to the Fund for payment of withdrawal liability. This letter constitutes a notice and demand for payment of withdrawal liability from your company and all trades and businesses under common control with your company.

BANKRUPTCY

In the event your company is in liquidation or reorganization under any provision of Title 11 of the United States Code, this letter constitutes a notice of withdrawal liability, as provided under ERISA § 4219, but not a demand for payment. It does, nonetheless, constitute a Notice and Demand for Payment, pursuant to ERISA § 4219, on all general partners, if any, of your company and on all trades and businesses under common control with your company, if any.

CONCLUSION

We regret that circumstances led to your company's withdrawal from participation in the Fund. With cooperation, we can work toward the fulfillment of your company's continuing statutory obligation to the Fund.

You may contact the Fund Office in writing with questions regarding the above.

Sincerely,

/s/ [Signature]
Raymond Goad, Jr.

General Counsel
IAM National Benefit Funds Office

REG/tb

cc: Executive Director
Assistant General Counsel
Controller
Director, Education and Employer Services
Manager, Education and Employer Services
James H. Beno, DBR
Gary R. Allen, GVP
Randy McGeorge, Morgan Lewis & Bockius LLP
Anthony S. Cacace, Proskauer Rose LLP

CERTIFIED RETURN RECEIPT REQUESTED #7006 2150 0000 7296 3129

Exhibit 1

IAM NATIONAL PENSION FUND
Allocated Share of UVB Calculation for Toyota Logistics Services, Inc.
For Withdrawals Between January 1, 2018 and December 31, 2018

	1	2	3	4	5	6	7
		5-Year Contribution History					
Plan Year Ending 12/31	Contributions by Toyota Logistics Services, Inc.	Toyota Logistics Services, Inc.	Total Fund Adjusted For Withdrawn Employers *	Allocation (2) ÷ (3)	Unamortized Unfunded Vested Benefits *	Unamortized Reallocated Amounts	UVB and Reallocated Amounts Attributable to Toyota Logistics Services, Inc. (4) x ((5) + (6))
2012	$ 144,464						
2013	151,414						
2014	143,530						
2015	154,985						
2016	178,947	$ 773,339	$1,815,571,396	0.0426%	$ 425,694,206	$ -0-	$ 181,324
2017	176,491	805,366	1,905,291,860	0.0423%	2,617,675,722	3,712,069	1,108,060

Total UVB:	**$3,043,369,928**	**Employer's Share of UVB:**	**$1,289,384**

1	Employer Share of UVB and Reallocated Amounts (sum of column 7):	$ 1,289,384
2	De Minimis Reduction:	
	a. 0.75% X UVB (column 5, above):	$ 22,825,274
	b. Initial De Minimis Reduction: Lesser of (2.a) and $50,000:	50,000
	c. Adjustment to Initial Reduction: Employer's Total Allocated Share (1) minus $100,000; not less than zero:	1,189,384
	d. Line (2.b) minus (2.c), not less than zero:	-0-
3	**Employer's Allocated Share of UVB after De Minimis: [(1) - (2.d), not less than zero]**	**$ 1,289,384**

* *Underlying data provided by prior actuary for periods prior to 1/1/2014.*

Exhibit 2

IAM NATIONAL PENSION FUND
Allocated Share of UVB Calculation for Toyota Logistics Services, Inc.
For Withdrawals Between January 1, 2018 and December 31, 2018

1. Contribution Base Units for the 10 years before the year of withdrawal

	Plan Year Ending Dec 31,	Base Units	3 Year Average
1	2008	29,563	
2	2009	27,324	
3	2010	28,008	28,299
4	2011	23,082	26,138
5	2012	24,807	25,299
6	2013	24,544	24,144
7	2014	22,023	23,791
8	2015	22,425	22,997
9	2016	24,145	22,864
10	2017	22,976	23,182
		Maximum	**28,299**

2. Calculation of Payment Schedule

a. Highest consecutive 3-year average of contribution base units for the 10-year period ending on 12/31/2017	28,299
b. Highest contribution rate in the 10-year period ending in the year of withdrawal	$ 7.95
c. Annual Payment	$ 224,977
d. Quarterly Payment	$\boxed{\$\ 56{,}244}$

e. Employer's Allocated Share of UVB after De Minimis	$1,289,384
f. Years to amortize withdrawal liability at 7.50%	7.0620
<u>Payment Schedule:</u>	
28 Quarterly Payments of	$ 56,244
1 Quarterly Payment of	$ 13,945

Exhibit 3

IAM NATIONAL PENSION FUND
Additional Information

Withdrawal Liability Method:	ERISA Section 4211(b) unmodified presumptive method, adjusted to include the fresh start provisions as approved by the PBGC
Date of Calculation:	12/31/2017 (i.e. the last day of the plan year preceding the year of withdrawal)

Valuation Assumptions for Unfunded Vested Liability purposes:

- discount rate of 6.50%
- expense load of 3.50%
- same demographic assumptions as used in the January 1, 2018 Actuarial Valuation

De Minimis Amounts:	lesser of \$50,000 or ¾ of 1% of the total plan unfunded vested liability

Unfunded Vested Liability as of 12/31/2017:

1	Present Value of Vested Benefits	\$	15,219,329,272
2	Market Value of Assets	\$	12,175,959,344
3	Unfunded Vested Benefits	\$	3,043,369,928

[Dkt. 39-1]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRUSTEES of the IAM NATIONAL PENSION FUND,

Plaintiffs,

- against -

OHIO MAGNETICS, INC.,

Defendant.

Lead Case No.: 1:21-cv-00928-RDM

Member Cases:
1:21-cv-00931-RDM
1:21-cv-02132-RDM

This Filing Relates To: All Cases

[Filed: February 25, 2022]

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF ADDITIONAL MATERIAL FACTS

Pursuant to Local Rule 7(h)(1), Plaintiffs, the Trustees (the "Trustees") of the IAM National Pension Fund (the "Fund"), submit this response to Defendants' Statement of Additional Material Facts (the "Statement") (ECF No. 37-9). Plaintiffs' response is based exclusively on the arbitration records that are attached as exhibits to Plaintiffs' complaints and which are referred to as follows: (i) the "Ohio Magnetics Stip." and the "Ohio Magnetics Award" (Case No. 1:21-cv-00928, ECF No. 4, Exs. 1 and 2); (ii) the "Toyota Logistics Stip." and the "Toyota Logistics Award" (Case No. 1:21-cv-00931, ECF No. 1, Exs. 1 and 2); and (iii) the "Phillips Stip." and the "Phillips Award" (Case No. 1:21-cv-02132, ECF No. 1, Exs. 1 and 2).

1. As of December 31, 2017, neither the Fund nor its actuary, Cherion, had changed the 7.5% discount rate assumption that was used in the Fund's November 2, 2017 Actuarial Valuation for the 2016 Plan Year to calculate withdrawal liability. (Toyota Logistics Stip. ¶ 13; Phillips Stip. ⁋⁋ 12 - 16.)

RESPONSE: Undisputed.

2. As of December 31, 2017, the Fund did not use an expense load assumption to calculate withdrawal liability. (Toyota Logistics Stip., Ex. B.)

RESPONSE: Undisputed.

3. The minutes of a January 24, 2018 meeting of the Fund's Board of Trustees state that Cheiron modeled for the Trustees the impact that four alternative discount rates would have on Fund unfunded vested benefits ("UVBs"), as well as the impact those discount rates would have on employer participation. (Toyota Logistics Stip. ¶ 16 & Ex. C; Phillips Stip., Ex. C.)

RESPONSE: Disputed. The minutes for the January 24, 2018 Trustees' meeting do not state that

Cheiron modeled the impact of any discount rates on the Fund's UVBs or on employer participation. (Ohio Magnetics Stip., Ex. D; Toyota Logistics Stip., Ex. D; Phillips Stip., Ex. D.)

4. The PowerPoint presented at the January 24, 2018 Board of Trustees meeting stated: "The more conservative the discount rate, the more protection given to ongoing employers, but less desirable for new employers." (Toyota Logistics Stip., Ex. C; Phillips Stip., Ex. C.)

RESPONSE: Undisputed.

5. Neither the PowerPoint presentation nor the minutes of the Fund's January 24, 2018 Board of Trustees meeting indicate that Cheiron modeled the impact of a 6.5% discount rate. (Toyota Logistics Stip. Ex. C, D; Phillips Stip., Ex. C, D.)

RESPONSE: Undisputed.

6. Neither the PowerPoint presentation nor the minutes of the Fund's January 24, 2018 Board of Trustees meeting indicate that Cheiron modeled the impact of an expense load assumption. (Toyota Logistics Stip. Ex. C, D; Phillips Stip., Ex. C, D.)

RESPONSE: Disputed. The minutes for the January 24, 2018 Trustees' meeting state that Cheiron had decided to adopt a 4% expense load assumption "based on 2% inflation increase and on valuation mortality assumption." (Ohio Magnetics Stip., Ex. D; Toyota Logistics Stip., Ex. D; Phillips Stip., Ex. D.)

7. The minutes of the Fund's January 24, 2018 Board of Trustees do not include any substantive discussion of the discount rate or expense load assumption. (Toyota Logistics Stip. Ex. D; Phillips Stip., Ex. D.)

RESPONSE: Disputed. The minutes for the January 24, 2018 Trustees' meeting state that Cheiron: (i) changed the discount rate to 6.5%, with an explanation at how it arrived at that rate, and (ii) adopted an expense load assumption, initially set at 4% and to be determined annually, which "[r]eflects projected administrative expenses on behalf of Fund populations, based on 2% inflationary increase and on valuation mortality assumption." (Ohio Magnetics Stip., Ex. D; Toyota Logistics Stip., Ex. D; Phillips Stip., Ex. D.)

8. The Fund calculated Defendants' withdrawal liability using the actuarial assumptions it adopted at the January 24, 2018 Board of Trustees. (Toyota Logistics Stip. ¶ 24 & Ex. G; Phillips Stip. Ex. J.)

RESPONSE: Disputed. Cheiron, not the Trustees, calculated Defendants' withdrawal liability using the actuarial assumptions Cheiron, not the Trustees, adopted at the January 24, 2018 Trustees' meeting. (Ohio Magnetics Stip. ¶¶ 11, 18 & Ex. F; Toyota Logistics Stip. ¶¶ 8, 17 & Ex. G; Phillips Stip. ¶¶ 10, 16 & Ex. J.)

[Dkt. 47]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRUSTEES OF THE IAM NATIONAL PENSION FUND,

Plaintiffs,

v.

OHIO MAGNETICS, INC., *et al.*,

Defendants.

Civil Action No. 21-928 (RDM)

Consolidated Cases:
No. 21-00931 (RDM)
No. 21-02132 (RDM)

[Filed: February 6, 2023]

ORDER

For the reasons provided in the Court's Memorandum Opinion, Dkt. 46, it is **ORDERED** that Plaintiffs' motion for summary judgment, Dkt. 34, is **GRANTED** and Defendants' cross-motion for summary judgment, Dkt. 38, is **DENIED**.

It is further **ORDERED** that the Arbitration Award issued by Arbitrator Martin F. Scheinman on March 9, 2021, in the matter styled *Ohio Magnetics, Inc. v. IAM National Pension Fund*, AAA Case No. 01-20-0000-1596, is **VACATED**.

It is further **ORDERED** that the Arbitration Award issued by Arbitrator Mark L. Irvings on March 22, 2021, in the matter styled *Toyota Logistics Services, Inc. v. IAM National Pension Fund*, AAA Case No. 01-20-0000-0197, is **VACATED**.

It is further **ORDERED** that the Arbitration Award issued by Arbitrator Jeffrey B. Cohen on July 26, 2021, in the matter styled *Phillips Liquidating Trust v. IAM National Pension Fund*, AAA Case No. 01-20-0000-1087, is **VACATED**.

It is further **ORDERED** that these cases are **REMANDED** to their respective arbitrators (1) to determine whether the Fund's actuary selected the disputed interest rate and expense load assumptions based only on information that was available as of the measurement date, and (2) to resolve any further challenges Defendants have to their assessed withdrawal liability.

This Order constitutes a final judgment of the Court within the meaning of Rule 58(a) of the Federal Rules of Civil Procedure. The Deputy Clerk of Court is directed to terminate the case.

SO ORDERED.

/s/ Randolph D. Moss
RANDOLPH D. MOSS
United States District Judge

Date: February 6, 2023

[Dkt. 1-1]

AMERICAN ARBITRATION ASSOCIATION

M & K EMPLOYEE SOLUTIONS, LLC,

Petitioner,

v.

IAM NATIONAL PENSION FUND,

Respondent.

Case No.: 01-19-0004-1350

[Dated: February 25, 2021]

STIPULATION

Petitioner M & K Employee Solutions, LLC ("M&K Employee Solutions") and Respondent, the IAM National Pension Fund (the "Fund"), by and through their undersigned counsel, hereby stipulate as follows:

1. Pursuant to the agreement of the Parties, the Parties shall submit to the Arbitrator pursuant to the schedule set forth in Paragraph 2 below the following issues for resolution based in whole or in part on the facts set forth in a set of stipulated facts agreed to by the Parties (the "Stipulation"):

   a. Whether it was a violation of ERISA, as amended, for the discount rate to be changed after the December 31, 2017 measurement date; and

b. Whether the "free-look" exception (ERISA § 4210, 29 U.S.C. § 1390) is available to M&K Employee Solutions and requires a recalculation of its withdrawal liability.

2. The Parties agree to the following briefing schedule on the issues set forth in Paragraph 1(a)-(b) above:

a. Petitioner to file moving brief: March 15, 2021

b. Respondent to file opposition: April 12, 2021

c. Petitioner to file reply: May 3, 2021

3. The Parties agree that, following the Arbitrator's resolution of the issues set forth in Paragraphs 1(a)-(b), M&K Employee Solutions shall have an opportunity to challenge the assumptions, method, and manner in which the Fund calculated its withdrawal liability.

4. Nothing in this Stipulation is intended to waive the right of either party to seek attorneys' fees and costs in accordance with the statute.

Dated: February 25, 2021

SCOPELITIS, GARVIN, LIGHT, HANSON, & FEARY, P.C.

By: ***/s/ Donald J. Vogel***
Donald J. Vogel

30 West Monroe Street,
Suite 1600
Chicago, Illinois 60603

(312) 255-7178
dvogel@scopelitis.com

Counsel for M&K Employee Solutions, LLC

Dated: February 25, 2021

PROSKAUER ROSE LLP

By: ***/s/ Anthony S. Cacace***
Anthony S. Cacace

Neil V. Shah
Eleven Times Square
New York, NY 10036
(212) 969-3000
acacace@proskauer.com
nshah@proskauer.com

Counsel for the Fund

[Dkt. 1-2]

AMERICAN ARBITRATION ASSOCIATION

M & K EMPLOYEE SOLUTIONS, LLC,

Petitioner,

v.

IAM NATIONAL PENSION FUND,

Respondent.

Case No.: 01-19-0004-1350

[Dated: February 25, 2021]

STIPULATION OF UNDISPUTED FACTS

Petitioner M & K Employee Solutions, LLC ("M&K Employee Solutions") and Respondent, the IAM National Pension Fund (the "Fund"), by and through their undersigned counsel, hereby stipulate as follows:

I. The IAM National Pension Plan

1. The IAM National Pension Plan (the "Plan") is an employee pension benefit plan within the meaning of Sections 3(2) and 502(d)(1) of ERISA (29 U.S.C. §§ 1002(2) and 1132(d)(1)), and a multi-employer plan within the meaning of Sections 3(37) and 515 of ERISA (29 U.S.C. §§ 1002(37) and 1145).

2. The Plan provides retirement benefits to employees who performed covered work for employers

that remitted contributions to the Fund in accordance with collective bargaining agreements with the International Association of Machinists and Aerospace Workers, AFL-CIO (or with affiliated local or district lodges).

3. The Plan's assets are held in the Fund, a jointly-administered, multi-employer, labor-management trust fund established and maintained pursuant to collective bargaining agreements in accordance with Section 302(c)(5) of the Taft-Hartley Act (29 U.S.C. § 186(c)(5)).

4. The Fund is governed by an agreement and declaration of trust that was last restated as of May 15, 2014 (the "Trust Agreement") and whose Plan Year is January 1 to December 31. A true and correct copy of the Trust Agreement is attached as **Exhibit A**.

5. In accordance with ERISA § 4201(a) (29 U.S.C. § 1381(a)), Article VII, Section I,of the Trust Agreement provides that an employer that withdraws from the Plan in a complete or partial withdrawal is liable for withdrawal liability.

6. In accordance with ERISA § 4213(a)(1) (29 U.S.C. § 1393(a)(1)), Article VII, Section 5 of the Trust Agreement states "[w]ithdrawal liability shall be determined 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 Plan actuary's best estimate of anticipated experience under the Plan."

7. In accordance with ERISA § 4210 (29 U.S.C. § 1390), the Trustees have adopted the "free-look" exception in Article VII, Section 14 of the Trust Agreement. The exception is available to an "Employer" that: (i) had an obligation to contribute to the Fund for no more than five (5) years after the commencement of its obligation to contribute to the Fund, and (ii) satisfies various other criteria that the Parties agree have been satisfied in this matter.

8. Article VII, Section 17(a) of the Trust Agreement states: "For purposes of this Article, all corporations, trades or businesses that are under common control, as defined in regulations of the Pension Benefit Guaranty Corporation (PBGC) are considered a single Employer, and the entity resulting from a change in business form described in Section 4218(1) of ERISA is considered to be the original Employer."

II. Methods and Assumptions Applicable to Employer Withdrawals

9. Cheiron has served as the Fund's actuary since March 2014.

10. In that role, Cheiron prepares actuarial valuations of Fund assets, calculates the amounts required for minimum funding purposes, and calculates an employer's withdrawal liability in the event of a complete or partial withdrawal from the Fund.

11. Cheiron does not prepare the actuarial valuation for the prior Plan Year until after the end of that Plan Year. The Fund's Plan Year is based on a calendar year, running from January 1 to December 31.

12. On November 2, 2017, Cheiron produced the actuarial valuation for the Fund for the 2016 Plan Year (the "2016 Actuarial Valuation"), a true and correct copy of which is attached as **Exhibit B**.

13. The 2016 Actuarial Valuation showed that, as of the end of the 2016 Plan Year, the Fund had unfunded vested liabilities ("UVBs") of $448,099,164. The 2016 Plan Year was the first time in several years that the Fund had UVBs.

14. Cheiron utilized a 7.50% discount rate and investment return assumption, along with various other methods and assumptions, in preparing the 2016 Actuarial Valuation. (*Id.*, App'x C, at 35, 38.)

15. On January 24, 2018, at a meeting of the Board of Trustees of the Fund (the "Board"), Cheiron reviewed with the Trustees how withdrawal liability is calculated and discussed with them the key actuarial assumptions that are used to make those calculations. A true and correct copy of Cheiron's PowerPoint presentation to the Trustees is attached as **Exhibit C**.

16. Among the assumptions discussed was the discount rate used to calculate unfunded vested benefits.

17. Following the discussion with the Trustees, Cheiron changed various methods and assumptions used to calculate withdrawal liability for employers that effected a withdrawal from the Fund during the 2018 Plan Year, including reducing the discount rate from 7.50% to 6.50%. A true and correct copy of excerpts from the minutes of that meeting are attached as **Exhibit D**.

18. All requests by M&K Employee Solutions for withdrawal liability estimates and calculations for withdrawals occurring during the 2018 Plan Year used the methods and assumptions Cheiron adopted at the January 24, 2018 meeting.

19. On April 17, 2019, Cheiron produced the actuarial valuation for the Fund for the 2017 Plan Year (the "2017 Actuarial Valuation"), a true and correct copy of which is attached as **Exhibit E**.

20. The 2017 Actuarial Valuation showed that, as of the end of the 2017 Plan Year, the Fund had UVBs of $3,043,369,928.

21. Cheiron utilized a 6.50% discount rate and a 7.50% investment return assumption, along with various other methods and assumptions, in preparing the 2017 Actuarial Valuation. (*Id.*, App'x C, at 35, 38-39.)

III. The Cessation of M&K Employee Solutions' Obligation to Contribute to the Fund

22. M&K Employee Solutions, M & K Employee Solutions, LLC-Alsip ("M&K Employees Alsip"), M & K Employee Solutions, LLC-Joliet ("M&K Employees Joliet"), and M & K Employee Solutions, LLC-Summit ("M&K Employees Summit") are for-profit Illinois limited liability companies.

23. From October 1, 2012 through and including December 31, 2018, M&K Employees Solutions and M&K Employees Alsip, Joliet, and Summit constituted a trade or business under common control and a single employer within the meaning of ERISA § 4001(b)(1) (29 U.S.C. § 1301(b)(1)).

24. M&K Employees Alsip, Joliet, and Summit were parties to separate collective bargaining agreements with the Automobile Mechanics' Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO (the "Union"), pursuant to which each of them was obligated to remit contributions to the Fund on behalf of their respective employees who performed covered work.

25. The obligation to contribute to the Fund commenced on October 1, 2012, and was later memorialized in separate collective bargaining agreements between the Union and each of M&K Employees Alsip, Joliet, and Summit.

26. Those agreements were renegotiated and extended on several occasions, for M&K Employees Alsip through December 31, 2018, for M&K Employees Joliet through May 18, 2018, and for M&K Employees Summit through September 30, 2020.

27. A true and correct copy of the collective bargaining agreement between M&K Employees Alsip and the Union for the period September 1, 2014 through August 31, 2018 is attached as **Exhibit F**, and a true and correct copy of the Extension Agreement extending the terms of the collective bargaining agreement until December 31, 2018 is attached as **Exhibit G**.

28. A true and correct copy of the collective bargaining agreement between M&K Employees Joliet and the Union for the period February 1, 2014 through May 18, 2018 is attached as **Exhibit H**.

29. A true and correct copy of the collective bargaining agreement between M&K Employees Summit

and the Union for the period May 19, 2013 through May 18, 2017 is attached as **Exhibit I**, a true and correct copy of the Extension Agreement extending the terms of the collective bargaining agreement until June 30, 2017 is attached as **Exhibit J**, and a true and correct copy of the renegotiated collective bargaining agreement between M&K Employees Summit and the Union for the period July 31, 2017 through September 30, 2020 is attached as **Exhibit K**.

30. M&K Alsip, Joliet, and Summit continued to make contributions to the Fund until each company permanently ceased to have an obligation to contribute to the Fund as of the following dates:

a. M&K Employees Joliet's obligation permanently ceased effective **March 31, 2017**, when bargaining unit employees voted to decertify their representation by the Union.

b. M&K Employees Summit's obligation permanently ceased effective **July 31, 2017**, after M&K Employees Summit and the Union negotiated a collective bargaining agreement that no longer required contributions to be remitted to the Fund.

c. M&K Employees Alsip's obligation permanently ceased effective **December 31, 2018**, when it terminated its collective bargaining agreement.

31. On June 26, 2018, the Fund provided M&K Employee Solutions a withdrawal liability estimate showing that a complete withdrawal during the 2018

Plan Year would be calculated using the new 6.5% discount rate, and calculated the "[e]stimated years to amortize withdrawal liability at 7.5%." A true and correct copy of the withdrawal liability estimate is attached as **Exhibit L**.

32. Also on June 26, 2018, the Fund notified M&K Employee Solutions that it partially withdrew from the Fund during the 2017 Plan Year and was liable for $611,110 in partial withdrawal liability. A true and correct copy of the partial withdrawal liability assessment is attached as **Exhibit M**. On January 22, 2019, the Fund withdrew, without prejudice, the partial withdrawal liability assessment.

33. By letter dated June 14, 2019, the Fund notified M&K Employee Solutions that its allocated share of the unfunded vested liabilities of the Fund was $6,158,482.00, payable in twenty (20) quarterly installments of $352,721.00 and a final payment of $31,709.00, commencing on or before August 13, 2019 (the "Assessment"). A true and correct copy of the Assessment is attached as **Exhibit N**.

IV. Procedural History

34. By letter dated September 10, 2019, M&K Employee Solutions timely requested a review of the Assessment pursuant to ERISA § 4219(b)(2)(A) (29 U.S.C. § 1399(b)(2)(A)), which the Fund denied by letter dated October 18, 2019, pursuant to ERISA § 4219(b)(2)(B) (29 U.S.C. § 1399(b)(2)(B)).

35. On November 20, 2019, M&K Employee Solutions timely commenced the above-captioned arbitration.

Dated: February 25, 2021

SCOPELITIS, GARVIN, LIGHT, HANSON, & FEARY, P.C.

By: ***/s/ Donald J. Vogel***
Donald J. Vogel

30 West Monroe Street,
Suite 1600
Chicago, Illinois 60603
(312) 255-7178
dvogel@scopelitis.com

Counsel for M&K Employee Solutions, LLC

Dated: February 25, 2021

PROSKAUER ROSE LLP

By: ***/s/ Anthony S. Cacace***
Anthony S. Cacace

Neil V. Shah
Eleven Times Square
New York, NY 10036
(212) 969-3000
acacace@proskauer.com
nshah@proskauer.com

Counsel for the Fund

EXHIBIT N

IAM NATIONAL PENSION FUND

1300 Connecticut Avenue NW, Suite 300
Washington DC 20036-1711

www.iamnpf.org 202-785-2658

June 14, 2019

Laura Schneider, Human Resources Coordinator
M & K Employee Solutions, LLC
7900 Bulldog Drive
Summit, IL 60501

RE: IAM National Pension Fund
Company Name: M & K Employee Solutions
Employer Code: M01B, M02B, M17B
NOTICE AND DEMAND FOR PAYMENT OF WITHDRAWAL LIABILITY

Dear Ms. Schneider:

The Trustees of the IAM National Pension Fund ("Fund") have determined that your company has completely withdrawn from the Fund effective December 31, 2018. Under the Employee Retirement Income Security Act, as amended (ERISA) § 4203, a complete withdrawal occurs when an employer permanently ceases to have an obligation to contribute under the Fund or permanently ceases all covered operations under the Fund. Pursuant to ERISA § 4219, this letter is a formal Notice and Demand for payment of this withdrawal liability.

Under ERISA § 4201, an employer that completely withdraws from a multiemployer pension plan is liable for a portion of the plan's unfunded vested benefits ("UVB"). The company's portion is its withdrawal liability. The unmodified presumptive method as amended by the fresh start provision set forth in the Plan rules is used in determining a withdrawing employer's portion of the Fund's UVB. Applying this method, your company's withdrawal liability is **$6,158,482.00**.

PAYMENT INFORMATION

Your company's withdrawal liability of **$6,158,482.00** may be paid off in a lump sum or may be amortized over 20 quarterly installments of **$352,721.00**, plus a final payment of **$31,709.00**. Enclosed is a copy of the withdrawal liability calculation.

Payments must begin no later than 60 days after the date of this notice, notwithstanding any request for review or arbitration. ERISA § 4219(c)(2). Accordingly, your company's lump sum or first quarterly payment is due on or before **August 13, 2019**. Subsequent quarterly payments are due every three (3) months thereafter until the entire withdrawal liability plus interest is paid.

Please make all withdrawal liability payments by check payable to the "IAM National Pension Fund," and mail them to the following address:

IAM National Pension Fund
Attention: Kimberly Monnig, Controller
1300 Connecticut Ave., NW, Suite 300
Washington, D.C. 20036

Please be advised that your company's withdrawal liability and payment schedule as set forth above may be subject to adjustment due to, for example (without limitation), the finalization of the Fund's actuarial valuation for the plan year preceding the date of the company's withdrawal, the final results of an audit of the company's books and records that has been or may be conducted by the Fund, or any other pertinent information received concerning the company. If an adjustment to the company's withdrawal liability is made, the Fund will submit an amended withdrawal liability notice and payment schedule to your company.

REQUEST FOR REVIEW

If you disagree with this determination, your company has important procedural and substantive rights under ERISA. Under ERISA section 4219(b)(2)(A), your company may, within 90 days after receipt of this demand letter:

(a) request the Trustees to review any specific matter relating to the determination of your company's withdrawal liability or the schedule of payments;

(b) identify any inaccuracy in the determination of the unfunded vested benefits allocable to your company; or

(c) furnish any additional relevant information to the Fund.

Your company's request for review must be in writing and sent to the Fund office at the address listed above. Under ERISA § 4219(c)(2), however, even if a request for review is filed, a withdrawn employer *must* make

its withdrawal liability payments in accordance with the payment schedule.

ARBITRATION

ERISA § 4221 provides that if your company is not satisfied with the outcome of the review by the Fund, it may initiate arbitration of its dispute with the Fund concerning the determination of your company's withdrawal liability. Your company may only initiate arbitration within 60 days after the earlier of (a) the date of the Fund's response to your company's request for review (if any), or (b) 120 days after the date of your company's request for review by the Fund. Even if arbitration is requested, however, your company *must* make its withdrawal liability payments, in accordance with the payment schedule, during the pendency of the arbitration. *See* ERISA § 4221(d).

DEFAULT

The Fund will take legal action against your company if your company defaults in the scheduled payments. A default will occur if your company fails to make any withdrawal liability payment when due and then does not cure such failure within sixty (60) days after receiving written notice of such failure from the Fund. Additionally, the Trustees may declare default when the Fund receives notice of any circumstances indicating a substantial likelihood that the company will not be able to pay its withdrawal liability. In the event of a default, the Fund, at its option, may require immediate payment of the entire outstanding amount of your company's liability, plus accrued interest on the total outstanding liability from the due date of the first payment that was not timely made.

PERSONS LIABLE

Under ERISA § 4001(b), all trades or businesses under common control are treated as one employer. Thus, all members of a commonly-controlled group of trades and businesses are jointly and severally liable to the Fund for payment of withdrawal liability. This letter constitutes a notice and demand for payment of withdrawal liability from your company and all trades and businesses under common control with your company.

BANKRUPTCY

In the event your company is in liquidation or reorganization under any provision of Title 11 of the United States Code, this letter constitutes a notice of withdrawal liability, as provided under ERISA § 4219, but not a demand for payment. It does, nonetheless, constitute a Notice and Demand for Payment, pursuant to ERISA § 4219, on all general partners, if any, of your company and on all trades and businesses under common control with your company, if any.

CONCLUSION

We regret that circumstances led to your company's withdrawal from participation in the Fund. With cooperation, we can work toward the fulfillment of your company's continuing statutory obligation to the Fund.

You may contact the Fund Office in writing with questions regarding the above.

Sincerely,

/s/ [Signature]
Raymond Goad, Jr.
General Counsel
IAM National Benefit Funds Office

REG/tb

cc: Executive Director
Assistant General Counsel
Controller
Director, Education and Employer Services
Manager, Education and Employer Services
Samuel Cicinelli, DBR
Steve Galloway, GVP
Donald J. Vogel, Scopelitis Garvin, Light, Hanson & Feary
Anthony S. Cacace, Outside Counsel, Proskauer Rose LLP

CERTIFIED RETURN RECEIPT REQUESTED #7006 2150 0000 7296 2696

Exhibit 1

IAM NATIONAL PENSION FUND
Allocated Share of UVB Calculation for M&K Employee Solutions
For Withdrawals Between January 1, 2018 and December 31, 2018

	1	2	3	4	5	6	7
		5-Year Contribution History					
Plan Year Ending 12/31	Contributions by M&K Employee Solutions	M&K Employee Solutions	Total Fund Adjusted For Withdrawn Employers *	Allocation (2) + (3)	Unamortized Unfunded Vested Benefits *	Unamortized Reallocated Amounts	UVB and Reallocated Amounts Attributable to M&K Employee Solutions (4) x ((5) + (6))
2012	$ 134,524						
2013	563,851						
2014	677,495						
2015	977,948						
2016	966,361	$ 3,320,179	$1,815,571,396	0.1829%	$ 425,694,206	$ -0-	$ 778,477
2017	724,671	3,910,325	1,905,291,860	0.2052%	2,617,675,722	3,712,069	5,380,005

Total UVB:	$ 3,043,369,928	Employer's Share of UVB:	$ 6,158,482

1	Employer Share of UVB and Reallocated Amounts (sum of column 7):	$ 6,158,482
2	De Minimis Reduction:	
	a. 0.75% X UVB (column 5, above):	$22,825,274
	b. Initial De Minimis Reduction: Lesser of (2.a) and $50,000:	50,000
	c. Adjustment to Initial Reduction: Employer's Total Allocated Share (1) minus $100,000; not less than zero:	6,058,482
	d. Line (2.b) minus (2.c), not less than zero:	-0-
3	Employer's Allocated Share of UVB after De Minimis: [(1) – (2.d), not less than zero]	$ 6,158,482

* *Underlying data provided by prior actuary for periods prior to 1/1/2014.*

Exhibit 2

IAM NATIONAL PENSION FUND
Allocated Share of UVB Calculation for M&K Employee Solutions
For Withdrawals Between January 1, 2018 and December 31, 2018

1. Contribution Base Units for the 10 years before the year of withdrawal

	Plan Year Ending Dec 31,	**Base Units**	**3 Year Average**
1	2008	0	
2	2009	0	
3	2010	0	0
4	2011	0	0
5	2012	76,871	25,624
6	2013	309,519	128,797
7	2014	336,865	241,085
8	2015	361,790	336,058
9	2016	359,507	352,721
10	2017	241,103	320,800
		Maximum	**352,721**

2. Calculation of Payment Schedule

a. Highest consecutive 3-year average of contribution base units for the 10-year period ending on 12/31/2017	352,721
b. Highest contribution rate in the 10-year period ending in the year of withdrawal	$ 4.00
c. Annual Payment	$1,410,884
d. Quarterly Payment	$ 352,721

e. Employer's Allocated Share of UVB after De Minimis	$6,158,482
f. Years to amortize withdrawal liability at 7.50%	5.0225
<u>Payment Schedule:</u>	
20 Quarterly Payments of	$ 352,721
1 Quarterly Payment of	$ 31,709

Exhibit 3

IAM NATIONAL PENSION FUND
Additional Information

Withdrawal Liability Method:	ERISA Section 4211(b) unmodified presumptive method, adjusted to include the fresh start provisions as approved by the PBGC
Date of Calculation:	12/31/2017 (i.e. the last day of the plan year preceding the year of withdrawal)

Valuation Assumptions for Unfunded Vested Liability purposes:

- discount rate of 6.50%
- expense load of 3.50%
- same demographic assumptions as used in the January 1, 2018 Actuarial Valuation

De Minimis Amounts:	lesser of $50,000 or ¾ of 1% of the total plan unfunded vested liability

Unfunded Vested Liability as of 12/31/2017:

1	Present Value of Vested Benefits	$	15,219,329,272
2	Market Value of Assets	$	12,175,959,344
3	Unfunded Vested Benefits	$	3,043,369,928

EXHIBIT 3

[Doc. 1-3]

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration

Between

M & K EMPLOYEE SOLUTIONS, LLC,

“Petitioner”

- and -

IAM NATIONAL PENSION FUND,

“Respondent”

Docket #01-19-0004-1350

[Dated: July 13, 2021]

Re: Withdrawal Liability

APPEARANCES

For the Petitioner:

SCOPELITIS, GARVIN, LIGHT,
HANSON & FEARY, P.C.
Donald J. Vogel, Esq.

For the Respondent:

PROSKAUER ROSE, LLP
Anthony S. Cacace, Esq.
Neil V. Shah, Esq.

BACKGROUND

This case arises under the American Arbitration Association's Multi-Employer Pension Plan Arbitration Rules. It involves M & K's Motion for Partial Summary Judgment against the IAM National Pension Fund ("Respondent" or "Fund") seeking a ruling that the Fund improperly calculated withdrawal liability by altering actuarial assumptions after-the-fact and applying them retroactively. M & K also seeks a ruling that the Fund improperly failed to apply the "free look" exception to an earlier withdrawal, rendering the current withdrawal liability assessment improper.

The basic facts here have been stipulated by counsel for the parties in a document dated February 25, 2021. They may be summarized as follows:

I. <u>The IAM National Pension Plan</u>

The IAM National Pension Plan (the "Plan") is a plan within the meaning of Sections 3(2) and 502(d)(1) of ERISA (29 U.S.C. Sections 1002(2) and 1132(d)(1). It is a multi-employer plan within the meaning of Sections 3(37) and 515 of ERISA (29 U.S.C. Sections 1002 (37) and 1145).

The Plan provides retirement benefits to employees who performed covered work for employers that remitted contributions to the Fund pursuant to collective bargaining agreements with the International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM") or with its affiliated local or district lodges.

The Plan's assets are held in the Fund, which is a jointly-administered, multi-employer, labor-management trust fund established and maintained pursuant to collective bargaining agreements in accordance with Section 302(c)(5) of the Taft Hartley Act (29 U.S.C. Section 186(c)(5).)

An agreement and declaration of trust which was last restated as of May 15, 2004 governs the Fund. The Fund's Plan Year is defined as January 1 to December 31.

An employer that withdraws from the Plan in a complete or partial withdrawal is liable for withdrawal liability in accordance with ERISA Section 4201(a) (29 U.S.C. Section 1381(a) and Article VII, Section 1 of the Plan's Trust Agreement.

In accordance with ERISA Section 4213(a) (29 U.S.C. Section 1393(a)(i), Article VII, Section 5 of the Trust Agreement states that "[w]ithdrawal liability shall be determined 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 Plan actuary's best estimate of anticipated experience under the Plan."

The Trustees, in accordance with ERISA (29 U.S.C. Sec. 1390), have adopted the "free look" exception set forth in Article VII, Section 14 of the Trust Agreement. The exception is available to an "Employer" that: (i) had an obligation to contribute to the Fund for no more than five (5) years after the commencement of its obligation to contribute to the Fund, and (ii) satisfies various other criteria which the parties agree have been satisfied in this matter.

Article VII, Section 17(a) of the Trust Agreement states: "For purposes of this Article, all corporations, trades or businesses that are under common control, as defined in regulations of the Pension Benefit Guaranty Corporation (PBGC) are considered a single Employer, and the entity resulting from a change of business form described in Section 4218(l) of ERISA is considered to be the original Employer."

II. Methods and Assumptions Applicable to Employer Withdrawals

Since March 2014, Cheiron has served as the Fund's actuary. In fulfilling that role, Cheiron prepares actuarial valuations of Fund assets, calculates the amounts required for minimum funding purposes, and calculates an employer's withdrawal liability in the event the employer completely or partially withdraws from the Fund.

Cheiron does not prepare the actuarial valuation for the prior Plan Year until after the end of that Plan Year (which is December 31st). (The Fund's Plan Year is the calendar year starting on January 1st and ending on December 31st.)

On November 2, 2017 Cheiron produced the actuarial valuation for the Fund for the 2016 Plan Year (the "2016 Actuarial Valuation"). It showed that as of the end of the 2016 Plan Year, the Fund had unfunded vested liabilities ("UVBs") of $448,099,164. The Plan Year was the first time in several years that the Fund had UVBs.

Cheiron used a 7.50% discount rate and investment return assumption, along with various other methods and assumption, in preparing the 2016 Actuarial Valuation.

At the January 24, 2018 meeting of the Fund's Board of Trustees, Cheiron reviewed how withdrawal liability is calculated and explained to the Board of Trustees the key actuarial assumptions used to make those calculations. Among the assumptions discussed was the discount rate used to calculate unfunded vested benefits.

Following the January 24, 2018 meeting, Cheiron changed various methods of assumptions used to calculate withdrawal liability for employers that effected a withdrawal from the Fund during the 2018 Plan Year (i.e., between January 1, 2018 and December 31, 2018.) Of particular relevance here is that Cheiron reduced the discount rate from 7.50% to 6.50%.

On April 17, 2019, Cheiron produced the actuarial valuation for the Fund for the 2017 Plan Year. The 2017 Actuarial Valuation showed that as of the end of the 2017 Plan Year (i.e., December 31, 2017), the Fund had UVBs of $3,043,369,928. In preparing the 2017 Actuarial Valuation, Cheiron utilized a 6.50% discount rate and a 7.50% investment return assumption, along with various other methods and assumptions.

III. Cessation of M & K Employee Solutions' Obligation to Contribute to the Fund

M & K Employee Solutions; M & K Employee Solutions, LLC-Alsip, M & K Employees Solutions, LLC-Jolet and M & K Employee Solutions, LLC-Summit are all for-profit Illinois limited liability companies.

From October 1, 2012 through December 31, 2018, M & K Employees Solutions and M & K Employees

Alsip, Joliet and Summit constituted a trade or business under common control and single employer within the meaning of ERISA Section 4001(b)(i) (29 U.S.C. Sec. 1301(b)(i).

M & K Employees Alsip, Joliet and Summit were parties to separate collective bargaining agreements with Local 701, IAM. Pursuant to those collective bargaining agreements, each was obligated to remit contributions to the Fund on behalf of their respective employees who performed covered work. The obligation to contribute to the Fund began on October 1, 2012, and was later memorialized in separate collective bargaining agreements between Local 701, IAM and each of M & K Employees Alsip, Joliet and Summit. Those collective bargaining agreements were renegotiated and extended on several occasions for M & K Employees Alsip through December 31, 2018, for M & K Employees Joliet through May 18, 2018, and for M & K Employees Summit through September 30, 2020.

M & K Alsip, Joliet and Summit continued to make contributions to the Fund until each of them permanently ceased to have an obligation to contribute to the Fund. The M & K Employees Joliet's obligation permanently ceased effective March 31, 2017 when its bargaining unit employees voted to decertify their representation by Local 701, IAM. M & K Employees Summit obligation permanently ceased effective July 31, 2017, after it negotiated a collective bargaining agreement with Local 701, IAM that no longer required contributions to be remitted to the Fund. M & K Employees Alsip obligation permanently ceased effective December 31, 2018 when it terminated its collective bargaining agreement with Local 701, IAM.

On June 26, 2018, the Fund provided M & K Employee Solutions with a withdrawal liability estimate showing that a complete withdrawal during the 2018 Plan Year would be calculated using the new 6.5% discount rate, and calculated that the "[e]stimated years to amortize withdrawal liability at 7.5%."*

In a second letter (dated June 26, 2018), the Fund also notified M & K Employee Solutions that it partially withdrew from the Fund during the 2017 Plan Year and was liable for $611,110 in partial withdrawal liability. On January 22, 2019, the Fund withdrew without prejudice the partial withdrawal liability assessment.

On June 14, 2019, the Fund advised M & K Employee Solutions that its allocated share of UVB was revised to $6,158,482, payable commencing on August 13, 2019 in 20 quarterly installments of $352,721 and a final payment of $31,709.

IV. Procedural History

On September 10, 2019, M & K Employee Solutions timely requested a review of the Fund's assessment. The Fund, on October 18, 2019, denied the request.

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* The Fund's June 26, 2018 letter to M & K Employee Solutions stated that its "net allocated share of UVB is estimated to be $5,829,629...[and] to discharge this liability would require eighteen quarterly installments of $351,793, plus a final payment of $315,470." (See Tab 4, Ex. L.)

On November 20, 2019, M & K Employee Solutions timely commenced this arbitration proceeding.

Following a series of conference calls and Zoom meetings, the parties agreed to prepare a stipulation of facts and a briefing schedule. Briefs were received on May 5, 2021.

On May 7, 2021, the Fund (through its counsel) wrote to request a stay of any decision regarding M & K Employee Solutions' motion for Partial Summary Judgment. Its request, simply stayed, was based upon M & K Employee Solutions' reliance in its brief upon a decision by the Second Circuit Court of Appeals in the <u>National Retirement Fund v. Metz Culinary Management, Inc.</u> case, 946 F.3d 146 (2d Cir. 2020). It also objected to M & K Employee Solutions' reliance upon two arbitration awards which, it asserts, have no precedential, res judicata or collateral estoppel effect.

M & K Employee Solutions (through its counsel) responded to the request for a stay on May 11, 2021.

On May 17, 2021, I issued a ruling in which I denied the Fund's request for a stay. No useful purpose would be served in detailing the reasons for my conclusion.

The case, then, is ripe for adjudication.

V. <u>The Issues</u>

M & K Solutions asserts that it is entitled to a recalculation of the Fund's withdrawal liability assessment against it, and that the Fund's assessment is inaccurate in that the Fund failed to make the "free look" defense – which removes the contributions pertaining to employees located at the Summit and Jolet facilities resulting from their 2017 withdrawal – available to it.

The parties have stipulated that two issues are properly before me:

> One, was it a violation of ERISA, as amended, for the discount rate to be changed after the December 31, 2017 measurement date; and
>
> Two, was the "free look" exception in ERISA (Section 4210, 29 U.S.C. Section 1390) available to M & K Employee Solutions and, if so, does that require a calculation of its withdrawal liability.*

VI. The Discount Rate

A. M & K's Position

M & K Employee Solutions raises the following arguments:

First, it argues it is entitled to summary judgment in its favor. It recognizes that under ERISA Section 4121(a)(3) A the Fund's determination of the amount of withdrawal liability is presumed correct unless the party contesting it shows by the preponderance of the evidence that it was unreasonable or clearly erroneous. It summits that it meets that burden.

Its core argument is that the Fund cannot retroactively alter the assumptions used for calculating

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* I have slightly modified the statement of the issues for purposes of clarity. My editing does not alter the sense of the parties' stipulation. I shall deal with these issues separately.

withdrawal liability. Here, it stresses, the Fund decided to use a lower discount rate it adopted after the measurement date – which had the effect of substantially increasing the amount of its assessed withdrawal liability.

That specific issue was recently addressed in National Retirement Fund v. Metz Culinary Mgt., Inc., 946 F.3d 146 (CA 2 2020). ("Metz"). The Second Circuit unequivocally concluded 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. Absent a change by the Fund's actuary before the Measurement Date, the existing assumptions and methods remain in effect."

The Court's ruling specifically rejected the plan actuary's decision to use a lower discount rate adopted after the measurement date, which substantially increased the employer's withdrawal liability. That, M & K Employee Solutions stresses, is exactly what happened here. Under Metz, the Fund was not free to do so.

The Fund, M & K Employee Solutions argues, was legally obligated to rely on the methods and assumptions in place as of the December 31, 2017 Measurement Date, which automatically rolled over absent a change by the Fund in advance of that date.

Metz, M & K Employee Solutions notes, was a matter of first impression. It is "good law." The U.S. Supreme Court denied National Retirement Funds' appeal for review, 141 S. Ct. 246 (October 5, 2020). It should be followed here.

M & K asks that it be granted partial summary judgment and that an order be issued which requires the Fund to recalculate withdrawal liability using the methods and assumptions in effect on the December 31, 2017 Measurement Date.

B. The Fund's Position

The Fund asks that M & K Employee Solution's request for summary judgment be denied. It asks that an award be issued sustaining its withdrawal liability assessment. It flatly rejects M & K;s principal argument that withdrawal liability should be recalculated using the 7,5% discount rate on the December 31, 2017 measurement date, rather than the 6.5% discount rate its actuary adopted three weeks after which was communicated to M & K over six months prior to its withdrawal as of December 31, 2018. Moreover, it adds, M & K failed to identify any statutory, regulatory or binding case law requiring the actuary to adopt its actuarial assumptions by the year end measurement date. ERISA Section 4213 – the only statute that governs the actuary's methods and assumptions – is silent as to timing.

The Fund recognizes M & K's heavy reliance upon the Second Circuit's ruling. It submits is not binding here. It takes issue with the Second Circuit's reasoning. It accuses it of improperly conflating the statutory provisions in ERISA Section 4214 (which prevent multi-employer fund trustees from retroactively amending a benefit plain's terms) with those governing the actuarial assumptions adopted by fund actuaries in ERISA Section 4213 to calculate withdrawal liability.

The Fund suggests the court in Metz fashioned its ruling to rectify an unfair result based upon the "egregious unique" set of facts in that case. Metz, it believes, should be limited to its "unique and extreme" facts.

In any event, the Fund argues, Metz is not binding in the District of Columbia where this arbitration is venued. It should have no persuasive authority here. For the facts in this case are markedly distinguishable. And, further, the Court's ruling was "premised on a series of fundamentally mistaken assumptions regarding the applicable statutory framework and a unique set of extreme facts."

The Fund notes that the D.C. Circuit has held that an actuary is entitled to rely upon evidence available up to and including the date of an employer's withdrawal. Combs v. Classic Coal Co., 931 F.2d 96 (D.C. Circuit 1991). The Second Circuit never considered Combs, which it argues is binding here. Accordingly, Metz's per se rule should be rejected.

In addition to its failure to grapple with the provisions of ERISA Section 4213 (b)(i) and the binding decision in Combs, the Metz decision is "contrary to the applicable legislative history. The Fund contends the Second Circuit improperly relied upon the legislative history of Section 4214 to impose a legal prohibition on the retroactive application of actuarial assumptions under Section 4213. (See Brief, pp. 10-14.)

Moreover, it argues, neither Metz nor any statute, regulation or case law requires an actuary or fund to affirmatively notify an employer of changes to the actuarial methods and assumptions used to calculate withdrawal liability. Nor has M & K identified any evidence establishing that the Fund's actuary (Cheiron) relied on changes to the Plan's funding outlook in the 24 days following the end of the prior Plan Year on December 31, 2017. The plain fact is that every part of the withdrawal liability calculation takes place after the applicable measurement date.

In any event, the Fund argues that to apply a standard the Second Circuit adopted only in 2020 would be inequitable. For neither Cheiron nor the Trustees had any reason to accelerate by three weeks their regularly scheduled January 2, 2018 meeting so that any changed assumptions would be applied to employer withdrawals during the 2018 Plan Year. M & K's effort to reduce its "fairly and reasonably allocated liability" based on a 24 days timing technicality should be rejected. That is especially the case since M & K fails to point to any evidence that it would have changed its decision to withdraw if Cheiron had decided to lower the discount rate on December 31, 2017. The Second Circuit's ruling in <u>Metz</u> may have stretched the reading of the statute to arrive at a fair resolution in that case, it is not justified on the facts presented here.

Finally, the Fund contends that the arbitration decisions issued in <u>Ohio Magnetics</u> and <u>Toyota Logistics Services</u> in March 2021 – each of which concluded Cheiron should have used the methods and assumptions in effect on the December 31, 2017 Measurement Date to calculate withdrawal liability – have no precedential value or <u>res judicata</u> effect. The Fund has moved to vacate them in the D.C. District Court. <u>Res judicata</u> applies only where there is final judgment on the merits of a case from which no timely appeal has been made. See Jacobson v. Fireman's Fund Ins. Co., 111 F.3d 2d (CA 2 1997).

For all of the foregoing reasons, the Fund asks that M & K's Motion for Partial Summary Judgment be denied.

C. M & K's Reply

Pursuant to the parties' February 25 2021 Stipulation Document, M & K was given leave to file a Reply to the Fund's brief. The Fund was not given an opportunity to do so.*

M & K reiterates its central legal argument: that a pension fund cannot retroactively alter the assumptions used for calculating withdrawal liability. It relies upon the Second Circuit's ruling in Metz, cited above. No other circuit, it notes, has held differently. Metz, therefore, is the law of the land.

Yet, it argues, what the Fund did with regard to its assessment of M & K's withdrawal liability is what the Second Circuit said it could not do. That is, retroactively alter the interest rate assumptions used to calculate withdrawal liability. The result was a miscalculation of several million dollars.

Given the fact that the Fund's several arguments in support of its action have been completely rejected by the Second Circuit and two separate arbitrations, M & K argues I should follow suit. It stresses that there are no distinguishing facts between the Fund's

* In its May 7, 2021 letter seeking a stay of a decision in this case – which I denied – the Fund raises several arguments which could be considered a sur-rebuttal. I have given those arguments no consideration.

invalid assessment and the retroactive assessments declared invalid in Metz and the Toyota Logistics and Ohio Magnetics arbitration cases.

M & K notes that the Fund seeks to rely upon Combs v. Classic Coal Corp., 289 U.S. App. D.C. 251 (1991) in support of its position. Its reliance is misplaced. For in Combs, the Fund did not seek to apply a retroactive change after the measurement date to calculate withdrawal liability. It used the discount rate that was in effect on the measurement date.

Metz, M & K argues, must govern the outcome here. For there is no legal authority in the D.C. Circuit or elsewhere that would support such a different result. The fact that the parties are not situated within the boundaries of the Second Circuit is irrelevant.

M & K dismisses the Fund's attempt to distinguish Metz as "disingenuous." Metz did not present any "unique" or "extreme" facts. Nor is there any reason to believe there was "undue influence" exerted on the actuary by the Trustees.

Finally, M & K opines that allowing the Fund to improperly manipulate withdrawal liability would contradict ERISA and applicable federal law. It would also result in a substantial windfall to the Fund, to which it is not entitled.

D. Opinion

The core question here is whether the Fund improperly established an interest rate assumption to calculate M & K's withdrawal liability after the Plan's December 32017 Measurement Date and applied it retroactively.

The proper starting point for an analysis of that question is, of course, the Multi-employer Pension Plan Amendments Act of 1980 ("MPPAA").

It is clear that an employer participant in a multi-employer plan which seeks to withdraw from the plan is, if the Plan is underfunded, liable for its share of the Plan's unfunded vested benefits ("UVBs"). That is referred to as the employer's withdrawal liability. Under MPPAA, a Fund's determination of withdrawal liability is presumed to be correct unless an employer contesting it can establish that it was unreasonable or clearly erroneous.

The Fund's assessment of M & K's withdrawal liability was made as of December 31, 2017, the last day of the Plan Year preceding the year of M & K's withdrawal. Its actuary used a 6.5% discount rate to determine M & K's UVB liability – a rate it adopted in 2018 and applied retroactively.

In my judgment, that was clearly unreasonable. It is reasonable, of course, to adopt a modified interest rate assumption and to apply it prospectively. It simply is not reasonable to adopt a modified interest rate assumption and apply it retroactively.

The proper interest rate assumption to have applied, I am convinced, to the one <u>in</u> <u>effect</u> on December 31, 2017, i.e., the 2017 Measurement Date.

This conclusion is fully supported by Section 1391 of the MPPAA. As I read that section, withdrawal liability is to be calculated as of the end of the plan year preceding the plan year in which the employer withdraws. The last day of the plan year preceding the year employer withdraws is referred to as the "measurement date."

Section 1391 is clearly controlling here. It sets the standard which the parties are obliged to apply.

The Fund's action, I am convinced, has no statutory support. It clearly contradicted Section 1391.

Nor do I find any judicial support for the Fund's position. On the contrary, there is strong legal precedent supporting M & K's position – and my conclusion. I refer, of course, to the Second Circuit's January 2, 2020 decision in the Metz case. The Court there was asked to review a District Court ruling which vacated an award issued by Arbitrator Ira Jaffe. Jaffe unequivocally had held that "...under MPPAA, the correct measuring date...for calculating withdrawal liability is...the end of the Plan Year preceding the year of the Employer's withdrawal" from a Fund. (That is, the "Measurement Date.") Jaffe noted that the PBGC had clearly opined that even evidence of error with respect to a prior plan's UVB determination discovered after a measurement date may not be applied retroactively when calculating an employer's withdrawal liability. (PBGC Opinion Letter 90-2).

Jaffe also relied upon a precedent established in D.A. Nolt and Roofers Local No. 30 Combined Fund, where he had ruled MPPAA barred the application of assumptions that were changed by [a] plan actuary in the year of withdrawal and applied retroactively so as to increase an employer's withdrawal liability. His decision, he noted, had been appealed and affirmed by the courts. Roofers Local 30 Combined Pension Fund v. D.A. Nolt, Inc., 719 F. Supp. 2d 530 (E.D. Pa. 2010), affirmed 444 Fed 571 (3d Cir. 2011).

Jaffe also noted the IRS had issued rulings that retroactive changes based upon actuarial assumptions were impermissible.

In Metz, the Second Circuit held that "Section 1391 of the MPPAA directs plans to calculate [a] 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."

The Court concluded 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. Absent a change by a Fund's actuary before the Measurement Date, the existing assumptions and methods remain in effect." (Emphasis mine.)

The Court's clear conclusion – which was, I note, unanimous – reads:

> 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 Second Circuit is the only federal appellate court which has spoken to the issue at bar. It is clearly controlling. It is, for all practical purposes, the law of the land. (The U.S. Supreme Court declined to review it.) It would be presumptuous of me to ignore it, let alone disagree with it.

The Fund, to be sure, raises questions as to the correctness of the Metz decision. Whatever the merit of its arguments, they cannot change the result. The law, at least for now, is settled. I, no less than the Fund, am bound by the Metz ruling.

I note the Fund also argues Metz should not be treated as a binding precedent because the parties are not situated within the Second Circuit's geographical jurisdiction. I am not persuaded by that argument. The Metz ruling is clear and unambiguous. It was issued by one of the most respected courts in the country. It should not be ignored based on the domicile of the parties.

In any event, if the D.C. District Court opts to disagree with the Metz ruling in its review of the arbitration decisions in Toyota Logistics and Ohio Magnetics, the Fund will have another bite at the apple before the D.C. Circuit Court of Appeals. Unless that Court issues a conflicting ruling, Metz stands as settled law on the issue.

The Fund suggests, I note, that the Second Circuit somehow was seeking to right a perceived wrong. That is sheer conjecture. In any event, any "wrong" was previously righted by Arbitrator Jaffe. Metz simply reinstated his award.

I would be remiss if I did not comment on the Fund's effort to rely upon the Combs decision as precedent. In my judgment, Combs is inappropriate. It simply is not on point.

In Combs, the Fund used the discount rate in effect as of the measurement date to calculate the employer's withdrawal liability. It later adopted a higher discount rate (which, if applied, would lower the employer's withdrawal liability). The Fund rejected the employer's request to apply the new (higher) discount rate retroactively.

Combs, in my view, does not support the Fund's position here. Rather, I believe it weakens it.

In Combs, the court did not allow an employer to secure a retroactive application of a new discount rate. In Metz, the court refused to allow the Fund to apply a new discount rate retroactively. The lessor of both is that a change in discount rate cannot be applied retroactively. The applicable rate is the one in effect on the measurement date.

Finally, there are the arbitration decisions issued in Toyota Leasing and Ohio Magnetics to consider. Both were decided by distinguished arbitrators. Both clearly concluded that the Metz decision is controlling in their case. Those decisions do not carry precedential weight. They simply are not res judicata. The doctrine of stare decisis is not applicable in arbitrations involving separate parties.

I have not relied upon them in reaching my conclusion here. The fact my finding that Metz is controlling parallels the conclusion reached by Arbitrator M. Irving and M. Scheinman is a coincidence, nothing more.

E. Relief

In view of the above ruling – the essence of which is that the Fund improperly failed to calculate M &

K's withdrawal liability using the assumptions and methods in effect on the December 31, 2017 Measurement Date – I grant M & K's motion for partial summary judgment and order the Fund to annul its assessment of withdrawal liability and recalculate it using the methods and assumptions in effect on the December 31, 2017 Measurement Date.

Jurisdiction is retained to resolve any dispute arising from the application of the foregoing order.

VII. <u>The "Free Look"</u>

A. <u>M & K's Position</u>

M & K argues that M & K Joliet and M & K Summit should have been excluded by the Fund in calculating the amount of M & K's withdrawal liability due to ERISA's "Five Year Free Look."

M & K relies upon Section 4210 of ERISA in support of that position.

Under Section 4210, it notes, new employers, under certain conditions, can contribute to a multi-employer plan for a short period of time and withdraw without penalty. An employer is entitled to the "free look" based upon the following:

> (a) an employer who withdraws from a plan in complete or partial withdrawal is not liable to the plan if the employer.
>
> (1) first had an obligation to contribute to the plan after September 26, 1980;
>
> (2) had an obligation to contribute to the plan for no more than the lesser of –

A. 6 consecutive plan years preceding the date on which the employer withdraws, or

B. The number of years required for vesting under the plan,

(3) Was required to make contributions to the plan for each such plan year in an amount equal to less than 2 percent of the sum of all employer contributions made to the plan for each such year; and

(4) Has never avoided withdrawal liability because of the application of this section with respect to the plan.

The undisputed fact is that in 2017 M & K permanently ceased contributing to the Fund on behalf of bargaining unit employees at its Joliet and Summit locations. It had been making contributions on behalf of Joliet-based employees from October 1, 2012 to March 31, 2017. It had been making contribution on behalf of Summit-based employees from October 1, 2012 to July 31, 2017. In short, it had been making contributions at both locations for less than five years. It was, accordingly, entitled to the five year "free look."

The Fund's objection to the "free look" is based upon its claim that M & K was not eligible for it because M & K Alsip made contributions to the Fund past the five-hear free look time period. The Fund relies upon the decision in South City Motors, Inc. v. Automotive Industries Pension Trust Fund, No. 17- cv 04475, 2018

WL 2387854 (N.D. Cal. May 25, 2018), which was affirmed by the Ninth Circuit Court of Appeals, 796 F. App'd 393 (9CA 2020). In that case, South City Motors was a member of a control group consisting of the Ford Motor Company and other Ford dealerships. While the South City dealership participated in the pension fund for less than five years, the Ford Motor Company and other dealerships had participated for more than five years on the date of withdrawal. Since the Ford control group had participated for more than five years, the Court held that the free look was not available to the individual dealership.

That is not the case here, M & K asserts. For the M & K control group, including M & K Alsip, had participated for less than five years at the time M & K Joliet and M & K Summit withdrew. Thus, South City Motors is not relevant here.

To deny M & K its five year "free look" would be inconsistent with the plan language of ERISA and, therefore, improper. The statute at bar is plain. It clearly provides a free look to "an employer who withdraws from a plan in complete or partial withdrawal. A partial withdrawal is what occurred here in 2017 when M & K ceased its contribution obligations for the bargaining units at the Joliet and Summit facilities. M & K, it insists, qualified for the free look exception at the time of the partial withdrawal in 2017 because it had participated in the Fund for less than five years.

M & K also argues that to interpret the "free look" exception restrictively – as the Fund would have me do – erodes the purpose of the MPPAA as it discourages new or increased participation in multi-employer plans and would leave them with a dwindling contribution base. That, it submits, runs contrary to public policy.

Moreover, M & K argues that once a five year free look is established, the contributions must be excluded from the calculation of the assessment. Section 4206 (b)(1) of ERISA provides that any "complete withdrawal from the plan in a subsequent plan year shall be reduced by the amount of any partial withdrawal liability...." That means the M & K Joliet M & K Summit contribution history must be excluded from the calculation of liability. To hold otherwise would mean the "free look" is not really free.

M & K points to a decision in Robbins v. Pepsi Cola Metropolitan Bottling wherein the court specifically held that a control group's withdrawal liability should not include calculations of members whose contributions were exempt. 636 F. Supp. 641 (N.D. Ill 1986). That ruling is on point here. Once the free look exception is applied, the Joliet and Summit contribution history must be excluded from any complete withdrawal liability assessment. Accordingly, the Fund's calculation was incorrect and should be recalculated using only the M & K Alsip contribution history.

B. The Fund's Position

The Fund contends M & K is not entitles to the "free look" exception. It raises several arguments in support of that position.

To begin with, it stresses that the MPPAA of 1980 was designed to reduce the incentive for employers to withdraw from multi-employer plans and to lessen the impact and burden on plans when employers do withdraw. To that end, the MPPAA "...requires that an employer withdrawing from a multi-employer pension plan pay...the employer's proportionate share of the plan's unfunded vested benefits...." To achieve that objective, the MPPAA provides a comprehensive statutory scheme for the calculation, assessment and collection of withdrawal liability. Importantly, the application of provisions that serve to reduce an employer's withdrawal liability are to be "narrowly construed" so as to effectuate the protection of a multi-employer pension plan's assets.

The "free look" provision in ERISA, Section 4210 provides that "[a]n employer who withdraws from a plan in complete or partial withdrawal is not liable to the plan," if the employer meets certain criteria. Among these is that the employer had an obligation to contribute to the plan for no more than five years after its "obligation to contribute" to the Fund began. It is important, the Fund notes, that <u>all</u> members of a controlled group must satisfy the statutory free-look requirements in order for the exception to apply. It points to <u>Auto Industry Pension Trust Fund v. South City Motors</u>, 796 F. App'x 393 (9th Cir. 2020) which held that a car dealership is not eligible for a free look exception when the control group of which it was a part did not satisfy the requirement that its obligation to contribute be for no more than five years. Under ERISA Section 1301 (b)(1) provides that "all employees of trades or businesses...which are under common control shall be treated as employed by a single employer and all such trades and business as a single employer."

Because M & K's controlled group had an obligation to contribute to the Fund for more than five years, it was not eligible for the five year exception.

It is, the Fund maintains, undisputed that M & K Joliet, M & K Summit and M & K Alsip were a controlled group. Each had an obligation to contribute to the Fund starting on October 1, 2012. To be eligible for the free look exception, their obligation to contribute had to cease by September 30, 2017. That did not happen. For M & K Alsip's obligation to contribute did not end until December 31, 2018. That is well after the five year deadline. Therefore, the Fund asserts, M & K has never been eligible for the "free look" exception.

Employers that affect a partial withdrawal are still eligible for the "free loo" exemption <u>so</u> <u>long</u> <u>as</u> the controlled group affects a complete withdrawal within the five year period. Had M & K Alsip terminated its collective bargaining by September 30, 2017, M & K clearly would be eligible for the exception. But it did not. Thus, it is not eligible.

The Fund also asserts that M & K's reliance upon <u>Robbins v. Pepsi Cola Metropolitan Bottling</u> is misplaced. ERISA Section 4210 does not reference any reduction in an employer's withdrawal liability or contribution history – certainly not for an employer like M & K which fails to satisfy all of the statute's requirements. An employer, under 29 U.S.C. Section 1390(b), is not liable "only if" it satisfies the provisions of (a), (b)(2) and (b)(3).

In sum, the Fund asks that M & K's motion be denied.

C. <u>M & K's Reply</u>

M & K maintains that it stopped making contributions on behalf of bargaining unit members at Joliet and Summit in 2017, and therefore qualified for the "free look" exception at the time of its partial withdrawal. Because it had participated in the Fund for less than five years, it qualified for the five year exception.

M & K believes that <u>only</u> the contribution history at M & K Alsip should be considered for a determination of withdrawal liability. The holding in <u>Robbins</u> should be followed. The court there specifically held that a control group's withdrawal liability should not include the calculations of members whose contributions were exempt. The plain text of the statute requires that the Summit and Joliet contributions be excluded since neither contributed for five years.

M & K rejects the Fund's reliance upon <u>South City Motors</u> as misplaced. The decision there, it contends is not applicable to it. South City Motors was a member of a control group which included the Ford Motor Company and other Ford dealerships. South City Motors – the entity seeking the free look – had participated in a fund for less than five years at the time of its withdrawal. The other members of the control group had participated for more than five years at the time of South City's withdrawal. Unlike here, the M & K control group had participated for <u>less</u> than five years at the time of Joliet and Summit's partial withdrawal.

Moreover, M & K adds <u>South City Motors</u> and the language of Section 4210 of ERISA establish that you measure participation as of the triggering event – i.e., the date of withdrawal. The statute does not contemplate waiting until some future event to determine if a current withdrawal is exempt.

In brief, since Joliet and Summit participated in the Fund for less than five years, they satisfied the "free look" exception.

Finally, M & K asserts the Fund has unlawfully manipulated assessments by including the Joliet and Summit contribution histories in its calculation of Alsip's withdrawal liability. That provided the Fund an undeserved windfall. That should not be allowed.

M & K, in conclusion, asks that the Fund's withdrawal liability assessment be annulled and vacated. The Fund should be required to recalculate any withdrawal liability assessment using the methods and assumptions in place as of the December 31, 2017 measurement date, and that the contributions histories of M & K Joliet and M & K Summit be excluded from that calculation.

Congress in 2974 enacted the Employment Retirement Income Security Act ("ERISA"). Its central purpose was to insure that workers who were promised a defined pension benefit upon retirement would actually receive it if they fulfill whatever conditions are required to secure a vested benefit. A complex statutory scheme was enacted to regulate the operation of defined benefit pension plans to fulfill that goal.

A key part of ERISA was the creation of the Pension Benefit Guaranty Corporation ("PBGC"). It established a program for plan termination insurance coverage. Thus, covered pension plans would remit insurance premiums to the PBGC, which would be used to distribute benefits to plan participants in the event a particular plan was terminated without sufficient assets to cover benefits it had guaranteed.

The insurance program created an important distinction between single employer pension plans and multi-employer pension plans. While PBGC's obligation to pay benefits for terminated single employer pension plans took effect upon passage of ERISA in 1974, the PBGC was not obligated to issue guaranteed payments in the case of defaulting multi-employer plans until January 1, 1978. (The PBGC, however, could in its discretion distribute benefits following the termination of a multi-employer pension plan.)

As 1978 approached, Congress had concern over the number of plans experiencing financial difficulties. It foresaw the danger of the PBGC becoming bankrupt if many large multi-employer plans were terminated and the PBGC was forced to assume obligations beyond its capacity. Congress, thus, deferred the provisions dictating mandatory coverage for multi-employer pension plans. And it directed the PBGC to prepare a report addressing problems unique to multi-employer pension plans and to suggest appropriate legislation to deal with the problems.

On July 1, 1978, the PBGC issued its report. Its main criticism of ERISA was that it "did not adequately protect plans from the adverse consequences that resulted when individual employers terminate their participation or withdraw from multi-employer plans."

The PBGC's Executive Director explained that a key problem-especially in declining industries - is that employer withdrawals reduce a plan's contribution base and consequently pushes the contribution rate for remaining employers higher and higher in order to fund liabilities generated by employers no longer contributing. Those rising costs can result in further employer withdrawals. This "vicious downward spiral" may make it impossible for the pension plan to survive.

To avoid this, the PBGC recommended that ERISA be amended to include new rules which require an employer withdrawing from a multi-employer plan to pay a proportional share of the plan's unfunded vested liabilities. There were two advantages to the proposal: One, it would discourage voluntary withdrawals. Two, when withdrawals do occur, withdrawal liability would cushion negative impact on the plan.

In 1980, Congress amended ERISA by enacting the MPPAA. Among other things, it obliges an employer withdrawing from a multi-employer pension plan to pay a withdrawal liability, which is 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.

Thus, a statutory framework was created under which an employer who terminates contributions to a multi-employer plan is no longer able to avoid a responsibility to fund the plan. Instead, the withdrawing employer who affects a withdrawal is now liable for a proportionate share of the plan's unfunded vested benefit liability at the time of its withdrawal.

The MPPAA, thus, requires an assessment of withdrawal liability if an employer affects either a complete or partial withdrawal from a plan.

A "complete" withdrawal occurs when an employer (1) permanently ceases to have an obligation to contribute to the plan, or (2) permanently ceases all covered operations of the plan. A "partial" withdrawal occurs if (1) there is a 70 percent contribution decline for a given plan year, or (2) there is a partial cessation of the employer's contribution obligation.

The MPPAA also creates specific statutory exemptions by defining circumstances which are not labeled a "withdrawal."

That brings us to the "free look" exemption.

The statute's free look provision provides that an "employer who withdraws from a plan in a complete or partial withdrawal is not liable to the plan" [for withdrawal liability] if it meets certain conditions. 29 U.S.C. Sec. 1390.

Of particular relevance here is the provision that an employer is <u>not</u> <u>liable</u> to the plan if it had an obligation to contribute to the plan for no more than five years after the start of its obligation to contribute. As of October 1, 2012, M & K Alsip, Joliet and Summit all had an obligation to contribute to the Fund. For M & K to be eligible for the free look exception, that obligation had to cease by September 30, 2017. M & K Joliet stopped contributions by March 3, 2017. M & K Summit stopped by July 31, 2017. The problem for M & K, as I see it, is that M & K Alsip continued to have an obligation to contribute to the Fund until December 31, 2018. That is, <u>after</u> the five year period.

The significance is that all three entities were – it is stipulated – part of a single control group. And, for purposes of the subchapter governing withdrawal liability, the definition of an employer provides that "...all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer."

The "free look" exception simply does not apply unless "an employer" meets all of the conditions required for an exception. The exception, in other words, does not apply unless all employees of the trades or businesses which are under common control meet those conditions.

The U.S. District Court for the Northern District of California clearly concluded that the foregoing analysis is correct. See South City Motors, Inc. v. Auto Indus. Pension Trust Fund, It flatly rejected the argument that individual members of a control group should be able to take advantage of the free look exemption even if the control group of which they are a part could not.

Its decision was affirmed by the Ninth Circuit Court of Appeals. See Auto Indus. Pension Trust Fund v. South City Motors, 796 Fed. Appx. 393 (2020). It plainly held that if a controlled group does not meet all of the requirements to be eligible for the free look exemption, neither do the individual members.

In my view, that ruling is dispositive here. After all, it was Congress' intent that exceptions reducing or eliminating an employer's withdrawal liability are to be interpreted "narrowly."

In sum, I deny M & K's motion to invoke the free look exception with regard to its partial withdrawals by the Joliet and Summit facilities in 2017.

VIII. AWARD

To reiterate, I award as follows:

1. The Fund improperly failed to calculate M & K's withdrawal liability using the assumptions and methods in effect on the December 31, 2017 measurement date. M & K's motion for partial summary judgment is granted. The Fund is ordered to annul its assessment of withdrawal liability and to recalculate it using the methods and assumptions in effect on the December 31, 2017 Measurement Date.

   Jurisdiction is retained to resolve any dispute arising from the application of the foregoing order.

2. M & K's motion to invoke the free look exception with regard to its partial withdrawal by its Joliet and Summit facilities is denied.

DATED: July 13, 2021

/s/ [Signature]
STANLEY L. AIGES

AFFIRMATION

I, STANLEY L. AIGES, do hereby affirm upon my oath as Arbitrator that I am the individual who executed this instrument, which is my Award.

/s/[Signature]
STANLEY L. AIGES

EXHIBIT C

[Dkt. 7-4]

Proskauer

Proskauer Rose LLP
Eleven Times Square
New York, NY 10036-8299

Anthony S. Cacace
Member of the Firm

d +1.212.969.3307
f 212.969.2900
ACACACE@PROSKAUER.COM
www.proskauer.com

July 20, 2021

By Email

Donald J. Vogel, Esq.
Scopelitis Garvin Light Hanson & Feary
30 West Monroe Street, Suite 600
Chicago, Illinois 60603

Re: ***M&K Employee Solutions, LLC v. IAM National Pension Fund***
Case No. 1:19-0004-1350

Dear Don:

Pursuant to the July 13, 2021 Award (the "Award") in the above-referenced matter, attached is a recalculation of Petitioner M & K Employee Solutions, LLC's withdrawal liability to the IAM National Pension Fund (the "Fund") using the methods and assumptions in effect as of December 31, 2017. Petitioner's recalculated withdrawal liability is $1,797,781, and as a result of the Fund's September

10, 2020 acceleration of the liability, $1,786,294—the entire amount of the recalculated liability, less the $11,487 in interim payments made to date—is due immediately. Pursuant to ERISA § 4221(d), 29 U.S.C. § 4221(d) and 29 C.F.R. § 4219.31(d), Petitioner is not entitled to any refunds or interest, as the recalculated liability is in excess of the amounts paid to date.

The Fund expressly reserves the right to collect any liquidated damages and interest accruing on the amount originally assessed, as well as any amounts that are not immediately remitted pursuant to the revised calculation. The Fund further reserves the right to have the Award modified or vacated, for the original amount of the liability to be reinstated, and to collect all outstanding amounts.

Should you have any questions, please let us know.

Respectfully submitted,

/s/ Anthony S. Cacace

Enclosure

Beijing | Boca Raton | Boston | Chicago | Hong Kong | London | Los Angeles | New Orleans | New York | Newark | Paris | São Paulo | Washington, DC

Exhibit 1

IAM NATIONAL PENSION FUND
Allocated Share of UVB Calculation for M&K Employee Solutions
For Withdrawals Between January 1, 2018 and December 31, 2018

	1	2	3	4	5	6	7
		5-Year Contribution History					
Plan Year Ending 12/31	Contributions by M&K Employee Solutions	M&K Employee Solutions	Total Fund Adjusted For Withdrawn Employers *	Allocation (2) ÷ (3)	Unamortized Unfunded Vested Benefits *	Unamortized Reallocated Amounts	UVB and Reallocated Amounts Attributable to M&K Employee Solutions (4) x ((5) + (6))
2012	$ 134,524						
2013	563,851						
2014	677,495						
2015	977,948						
2016	966,361	$ 3,320,179	$ 1,856,116,054	0.1789%	$ 425,694,206	$ -0-	$ 761,472
2017	724,671	3,910,325	1,934,786,520	0.2021%	509,042,557	3,712,069	1,036,309

	Total UVB:	**$ 934,736,763**	**Employer's Share of UVB**	**$ 1,797,781**
1	Employer Share of UVB and Reallocated Amounts (sum of column 7):			$ 1,797,781
2	De Minimis Reduction:			
	a. 0.75% X UVB (column 5, above):			$ 7,010,526
	b. Initial De Minimis Reduction: Lesser of (2.a) and $50,000:			50,000
	c. Adjustment to Initial Reduction: Employer's Total Allocated Share (1) minus $100,000; not less than zero:			1,697,781
	d. Line (2.b) minus (2.c), not less than zero:			-0-
3	**Employer's Allocated Share of UVB after De Minimis: [(1) - (2.d), not less than zero]**			**$ 1,797,781**

* *Underlying data provided by prior actuary for periods prior to 1/1/2014.*

Exhibit 2

IAM NATIONAL PENSION FUND
Allocated Share of UVB Calculation for M&K Employee Solutions
For Withdrawals Between January 1, 2018 and December 31, 2018

1. Contribution Base Units for the 10 years before the year of withdrawal

	Plan Year Ending Dec 31,	Base Units	3 Year Average
1	2008	0	
2	2009	0	
3	2010	0	0
4	2011	0	0
5	2012	76,871	25,624
6	2013	309,519	128,797
7	2014	336,865	241,085
8	2015	361,790	336,058
9	2016	359,507	352,721
10	2017	241,103	320,800
		Maximum	**352,721**

2. Calculation of Payment Schedule

a. Highest consecutive 3-year average of contribution base units for the 10-year period ending on 12/31/2017	352,721
b. Highest contribution rate in the 10-year period ending in the year of withdrawal	$ 4.00
c. Annual Payment	$1,410,884
d. Quarterly Payment	$\boxed{\$\ 352{,}721}$

e. Employer's Allocated Share of UVB after De Minimis	$1,797,781
f. Years to amortize withdrawal liability at 7.50%	1.2948
<u>Payment Schedule:</u>	
5 Quarterly Payments of	$ 352,721
1 Quarterly Payment of	$ 63,193

Exhibit 3

IAM NATIONAL PENSION FUND
Additional Information

Withdrawal Liability Method:	ERISA Section 4211(b) unmodified presumptive method, adjusted to include the fresh start provisions as approved by the PBGC
Date of Calculation:	12/31/2017 (i.e. the last day of the plan year preceding the year of withdrawal)

Valuation Assumptions for Unfunded Vested Liability purposes:

- discount rate of 7.50%
- expense load of 0.00%
- same demographic assumptions as used in the January 1, 2018 Actuarial Valuation

De Minimis Amounts:	lesser of $50,000 or ¾ of 1% of the total plan unfunded vested liability

Unfunded Vested Liability as of 12/31/2017:

1	Present Value of Vested Benefits	$	13,020,413,797
2	Actuarial Value of Assets	$	12,085,677,034
3	Unfunded Vested Benefits	$	934,736,763

[Dkt. 31-1]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

TRUSTEES of the IAM NATIONAL PENSION FUND,

Plaintiff,

v.

M & K EMPLOYEE SOLUTIONS, LLC.

Defendant.

Case No. 21-cv-02152-RCL

[Filed: March 4, 2022]

DEFENDANT'S RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Defendant, M&K Employee Solutions, LLC (M&K), by its undersigned attorneys, and pursuant to the Federal Rules of Civil Procedure and Local Rule 7(h)(1), respectfully submits the following response to Plaintiffs' Statement of Undisputed Material Facts.

I. The Fund

1. The IAM National Pension Plan (the "Plan") is an employee pension benefit plan within the meaning of §§ 3(2) and 502(d)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA") (29

U.S.C. §§ 1002(2) and 1132(d)(1)), and a multi-employer plan within the meaning of §§ 3(37) and 515 of ERISA (29 U.S.C. §§ 1002(37) and 1145). (Stip. ¶ 1.)

RESPONSE: Admitted.

2. The Plan's assets are held in the Fund, a jointly-administered, multi-employer, labor-management trust fund established and maintained pursuant to collective bargaining agreements in accordance with § 302(c)(5) of the Taft-Hartley Act (29 U.S.C. § 186(c)(5)). (Id. ¶ 3.)

RESPONSE: Admitted.

3. The Plan provides retirement benefits to employees who performed covered work for employers that remitted contributions to the Fund in accordance with collective bargaining agreements with the International Association of Machinists and Aerospace Workers, AFL-CIO or with affiliated local or district lodges. (Id. ¶ 2.)

RESPONSE: Admitted.

4. The Fund is governed by an agreement and declaration of trust that was last restated as of May 15, 2014 (the "Trust Agreement"). The Fund's Plan Year runs from January 1 to December 31. (Id. ¶ 4.)

RESPONSE: Admitted.

5. Pursuant to the Trust, an employer's withdrawal liability is calculated using the "presumptive" method set forth in ERISA § 4211(b) (29 U.S.C. § 1391(b)). (Stip., Ex. A at 19.)

RESPONSE: Admitted.

6. Pursuant to the Trust, "[w]ithdrawal liability shall be determined 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 Plan actuary's best estimate of anticipated experience under the Plan." (Stip. ¶ 6 & Ex. A at 19.)

RESPONSE: Admitted.

7. As set forth in Article VII, Section 14 of the Trust, the Fund has adopted the "free-look" exception to withdrawal liability described in ERISA § 4210 (29 U.S.C. § 1390). Under the terms of the Trust, the free-look exception is available to an "Employer" that: (i) had an obligation to contribute to the Fund for no more than five (5) years after the commencement of its obligation to contribute to the Fund, and (ii) satisfies various other criteria that are not in dispute. (Stip. ¶ 7.)

RESPONSE: Admitted.

8. As further set forth in Article VII, Section 17(a) of the Trust: "For purposes of this Article, all corporations, trades or businesses that are under common control, as defined in regulations of the Pension Benefit Guaranty Corporation (PBGC) are considered a single Employer, and the entity resulting from a change in business form described in Section 4218(1) of ERISA is considered to be the original Employer." (Id. ¶ 8.)

RESPONSE: Admitted.

II. The Fund's Actuarial Assumptions

9. Cheiron has served as the Fund's actuary since March 2014. (Id. ¶ 9.)

RESPONSE: Admitted.

10. In that role, Cheiron prepares actuarial valuations of Fund assets, calculates the amounts required for minimum funding purposes, and calculates an employer's withdrawal liability in the event of a complete or partial withdrawal from the Fund. (Id. ¶ 10.)

RESPONSE: Admitted.

11. Cheiron cannot prepare an actuarial valuation until after the end of the Plan Year. (Id. ¶ 11.)

RESPONSE: Denied in part. Paragraph 11 of the Stip. provides that Cheiron "does not prepare the actuarial valuation for the prior Plan Year until after the end of the Plan Year." The Stipulation does not provide that Cheiron "cannot prepare" such evaluation until after the end of the Plan Year.

12. On November 2, 2017, Cheiron published the actuarial valuation for the Fund for the 2016 Plan Year (the "2016 Actuarial Valuation"). (Id. ¶ 12.)

RESPONSE: Admitted.

13. The 2016 Actuarial Valuation stated that, as of the end of the 2016 Plan Year, the Fund had unfunded vested benefits ("UVBs") of $448,099,164. The 2016 Plan Year was the first time in several years that the Fund had UVBs. (Id. ¶ 13.)

RESPONSE: Admitted.

14. Cheiron utilized a 7.50% discount rate, along with various other methods and assumptions, in preparing the 2016 Actuarial Valuation. (Id. ¶ 14.)

RESPONSE: Admitted.

15. On January 24, 2018, at a meeting of the Trustees, Cheiron discussed with the Trustees how withdrawal liability is calculated and the actuarial assumptions that are used to make those calculations. (Id. ¶ 15.)

RESPONSE: Denied in part. It is admitted that a Trustees' meeting was held on January 24, 2018 and that "Cheiron reviewed with the Trustees how withdrawal liability is calculated and discussed with them the key actuarial assumptions that are used to make those calculations", including "the discount rate used to calculate unfunded vested benefits. Stip. at ¶ 15-16.

16. Following the discussion with the Trustees, Cheiron changed certain methods and assumptions it uses to calculate withdrawal liability for employers that effected a withdrawal from the Fund during the 2018 Plan Year as follows:

a. Asset Valuation Method: Changed from Actuarial Value of Assets to Market Value of Assets.

b. Discount Rate: Changed from 7.50% to 6.50%.

c. Administrative Expense Load: Added an expense load reflecting projected administrative expenses.

(Id. ¶ 17 & Ex. D.)

RESPONSE: Denied in part. Admitted that the Fund's Trustees' January 24, 2018 minutes state that the Trustees "unanimously approved the following recommendations from the Fund's Actuary, Cheiron:

- Asset Valuation Method - Market Value.
- Discount Rate for Withdrawal Liability purposes - Funding Discount Rate less 100 basis points. January 1, 2017 funding discount rate of 7.5% less 100 basis point yields 6.5% discount rate for withdrawal liability purposes.
- Expense Load - Include 4% expense load. Reflects projected administrative expenses on behalf of Fund populations, based on 2% inflationary increase and on valuation mortality assumption. Redetermine annually upon completion of the actuarial valuation."

(Stip. ¶ 17 and Ex. D.) Denied that any discussion with the Trustees took place, as the January 24, 2018 meeting minutes do not record any such discussion. (Stip. ¶ 17& Ex. D.) Also denied that "Cheiron changed certain methods and assumptions it uses to calculate withdrawal liability," as the meeting minutes state that the Trustees, and not Cheiron, "approved" the listed assumptions. (Stip. ¶ 17 & Ex. D.)

17. At the meeting, Cheiron "confirmed that all of [the] changes to the withdrawal liability calculation and the actuarial assumptions are reasonable and defensible." (Stip., Ex. D.)

RESPONSE: Admitted.

18. On April 17, 2019, Cheiron published the actuarial valuation for the Fund for the 2017 Plan Year (the "2017 Actuarial Valuation"). (Stip. ¶ 19.)

RESPONSE: Admitted.

19. The 2017 Actuarial Valuation stated that, as of the end of the 2017 Plan Year, the Fund had UVBs of $3,043,369,928. (Stip. ¶ 20.)

RESPONSE: Admitted.

20. The 2017 Actuarial Valuation further stated that "a participating employer who withdraws from the Fund during the plan year beginning January 1, 2018, may have a withdrawal liability which will be based on its allocated share of the unfunded vested benefits." (Stip., Ex. E at 23.)

RESPONSE: Admitted.

21. Cheiron utilized a 6.5% discount rate in preparing the 2017 Actuarial Valuation. (Stip. ¶ 21 & Ex. E, App'x C at 35, 38.)

RESPONSE: Admitted.

III. Defendant's Withdrawal From the Fund

22. From October 1, 2012 through and including December 31, 2018, Defendant M & K Employee Solutions, LLC ("M&K") was a trade or business under common control and a single employer within the meaning of ERISA § 4001(b)(1) (29 U.S.C. § 1301(b)(1)) with the following: (i) M & K Employee Solutions, LLC-Alsip ("Alsip"); (ii) M & K Employee Solutions, LLC-Joliet ("Joliet"); and (iii) M & K Employee Solutions, LLC-Summit ("Summit"). (Stip. ¶ 23.)

RESPONSE: Admitted.

23. Alsip, Joliet, and Summit were parties to separate collective bargaining agreements, pursuant to which they were each obligated to remit contributions to the Fund. (Id. ¶ 24.)

RESPONSE: Admitted.

24. The obligation to contribute to the Fund commenced on October 1, 2012, for all three companies and ceased as follows: (i) on March 31, 2017, for Joliet; (ii) on July 31, 2017, for Summit; and (iii) on December 31, 2018, for Alsip. (Id. ¶ 30.)

RESPONSE: Admitted.

25. On June 26, 2018, the Fund provided M&K a withdrawal liability estimate showing that a withdrawal during the 2018 Plan Year would be calculated using, inter alia, a 6.5% discount rate and an administrative expense load. (Stip. ¶ 31 & Ex. L at Ex. 3.)

RESPONSE: Admitted.

26. Following the respective withdrawals of Joliet, Summit, and Alsip, on June 14, 2019, the Fund assessed M&K with $6,158,482 in withdrawal liability. The calculation was prepared using the methods and assumptions adopted at the January 24, 2018 Trustees' meeting and set forth in the 2017 Actuarial Valuation. (Stip. ¶ 33 & Ex. N.)

RESPONSE: Admitted.

IV. The Arbitrations

27. M&K commenced arbitration to challenge the withdrawal liability assessment. (Stip. ¶ 35.)

RESPONSE: Admitted.

28. The Trustees and M&K agreed that the arbitrator would first resolve the following issues before addressing any other challenges to the withdrawal liability calculation:

a. Whether Cheiron improperly applied the 6.50% discount rate adopted at the January 24, 2018 Trustees' meeting rather than the 7.50% rate it had previously used to prepare the valuation of the Fund's UVBs for the 2016 Plan Year.

b. Whether M&K's withdrawal liability should be recalculated pursuant to the "free-look" exception (ERISA § 4210, 29 U.S.C. § 1390).

(Briefing Schedule ¶¶ 1–3.)

RESPONSE: Denied in part. The Trustees and M&K agreed as follows:

a. Whether it was a violation of ERISA, as amended, for the discount rate to be changed after the December 31, 2017 measurement date;

b. Whether the "free-look" exception (ERISA § 4210, 29 U.S.C. § 1390) is available to M&K and requires a recalculation of its withdrawal liability; and

c. Following the Arbitrator's resolution of the issues set forth in (a) and (b) above, M&K shall have an opportunity to challenge the assumptions, method, and manner in which the Fund calculated its withdrawal liability.

29. On July 13, 2021, the Arbitrator ruled in favor of M&K on the first issue and in favor of the Fund on the second issue. (Award.)

RESPONSE: Admitted that the Arbitrator ruled in favor of M&K on issue (a) above, in favor of the Fund on issue (b) above and is still considering issue (c) above.

Dated: March 4, 2022

Respectfully submitted,

SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY, P.C.

By: */s/ Donald J. Vogel*

Donald J. Vogel
(*Pro Hac Vice*)
30 West Monroe Street, Suite 1600
SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY, P.C.
Chicago, IL 60603
Telephone: 312 255 7178
E-Mail: dvogel@scopelitis.com

William H. Shawn (DC Bar # 198416)
SHAWNCOULSON, LLP
1320 19th Street NW, Suite 601
Washington D.C. 20036
Telephone: 202 331 7900
E mail: wshawn@shawncoulson.com

Attorneys for M & K Employee Solutions, LLC

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2022, the foregoing was filed electronically. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Donald J. Vogel

4881-4211-7136,

[Dkt. 33-1]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

TRUSTEES of the IAM NATIONAL PENSION FUND,

Plaintiffs,

- against -

M & K EMPLOYEE SOLUTIONS, LLC,

Defendant.

Case No.: 1:21-cv-02152-RCL

[Filed: March 28, 2022]

PLAINTIFFS' RESPONSE TO DEFENDANT'S STATEMENT OF ADDITIONAL MATERIAL FACTS

Pursuant to Local Rule 7(h)(1), Plaintiffs, the Trustees (the "Trustees") of the IAM National Pension Fund (the "Fund"), submit this response to Defendant's Local Rule 7(h)(1) Statement of Additional Material Facts in Opposition to Plaintiffs' Motion for Summary Judgment (ECF No. 31-2).

1. On October 1, 2012, M&K Quality Truck Sales of Joliet, LLC ("Truck Sales of Joliet"), M&K Quality Truck Sales of Alsip, LLC ("Truck Sales of Alsip"), and M&K Quality Truck Sales of Summit, LLC ("Truck Sales of Summit"), pur-

chased the assets of Chicago Mack Sales & Services, Inc. ("Chicago Mack") and Chicago Truck Sales & Service, Inc. ("Chicago Truck"). *Stipulation of Undisputed Facts* (*Stip.*) attached to Complaint at Exhibit 2 (ECF No. 01-02) ¶¶ 22-29.

RESPONSE: Disputed/Objection. The Stipulation cited as support for this statement of fact does not reference: (i) Chicago Mack or Chicago Truck, or any sale of assets by them, (ii) the purchase of assets by Truck Sales of Alsip, Joliet, and/or Summit, or (iii) when any such transaction occurred. (Stip. ¶¶ 22–29.)

2. On August 3, 2012, M&K and its Series LLC's, M&K Employee Solutions, LLC – Joliet ("M&K Joliet"), M&K Employee Solutions, LLC – Alsip ("M&K Alsip") and M&K Employee Solutions, LLC – Summit ("M&K Summit") were formed to hire substantially all of the employees employed at the various locations formerly owned by Chicago Mack and Chicago Truck, and lease those employees to the corresponding Truck Sales entity. *Stip.* ¶¶ 22-29.

RESPONSE: Disputed/Objection. The Stipulation cited as support for this statement of fact does not reference: (i) any "Series LLC's," (ii) Chicago Mack and Chicago Truck, or their employees, (iii) when they were formed or why, or (iv) the hiring or "leas[ing]" of any employees. (Stip. ¶¶ 22–29.)

3. Some of these employees were represented by the Automobile Mechanics' Local No. 701 ("Local 701"). *Stip.* ¶¶ 22-25.

RESPONSE: Undisputed.

4. At the time it hired the bargaining unit members, M&K retained the existing terms embodied in the collective bargaining agreements between Local 701 and the bargaining units' former employer, including an obligation to contribute to the Fund. *Id.*

RESPONSE: Disputed/Objection. The Stipulation cited as support for this statement of fact does not state that M&K: (i) hired any bargaining unit members, or (ii) retained any terms embodied in a prior collective bargaining agreement. (Stip. ¶¶ 22–25.)

5. Those terms remained in place while initial collective bargaining agreements were separately negotiated. *Stip.* ¶ 25.

RESPONSE: Disputed/Objection. The Stipulation cited as support for this statement of fact does not state that M&K retained any terms embodied in a prior collective bargaining agreement. (Stip. ¶ 25.)

6. At no time prior to October 1, 2012, did M&K or any member of its control group participate in or have any obligation to contribute to the Fund. *Stip.* ¶¶ 23-25.

RESPONSE: Disputed/Objection. The Stipulation cited as support for this statement of fact states only that, as of October 1, 2012, M&K Alsip, Joliet, and Summit, each had an obligation to contribute to the Fund. (Stip. ¶¶ 23–25.)

7. Subsequently, M&K Alsip, M&K Summit and M&K Joliet negotiated and entered into separate collective bargaining agreements with Local 701 for the bargaining unit members represented at each of their locations: Alsip, Joliet and Summit, Illinois. *Stip.* ¶¶ 24-29.

RESPONSE: Undisputed.

8. Each of these collective bargaining agreements required M&K to contribute to the Fund on behalf of its covered employees. *Id.*

RESPONSE: Disputed. The collective bargaining agreements required M&K Alsip, Joliet, and Summit (not M&K) to remit contributions to the Fund. (Stip. ¶ 24.)

9. In 2017, less than five years after M&K began making contributions, M&K Joliet and M&K Summit permanently ceased contributing on behalf of its bargaining unit members at the Joliet and Summit locations. *Stip.* ¶ 30(a) and (b).

RESPONSE: Disputed. The Stipulation does not state that M&K remitted contributions to the Fund. Undisputed that M&K Joliet and Summit ceased having an obligation to contribute to the Fund as of March 31 and July 31, 2017, respectively. (Stip. ¶ 30.)

10. As a result, M&K incurred a partial withdrawal from the Fund. *See* Section 4205(b)(2) or ERISA, 29 U.S.C. §1385(b)(2); *Stip.* ¶ 32; Exhibit M.

RESPONSE: Undisputed.

11. The Fund originally issued a partial withdrawal liability assessment based on the withdrawal of M&K Joliet and M&K Summit in 2017 (using a December 31, 2016 Measurement Date, before the changes in assumptions) in the amount of $611,110, (*Stip.* ¶ 32,).

<u>RESPONSE</u>: Undisputed.

12. The Fund sent the partial withdrawal liability assessment on June 26, 2018 (*Id.*,) at the same time that it provided a withdrawal liability estimate for the M&K Alsip bargaining unit. *Defendant's Response to Plaintiffs' Statement of Undisputed Material Facts (Resp. SUMF)* ¶ 25.

<u>RESPONSE</u>: Disputed. The cited portion of the Resp. SUMF does not stand for the proposition stated. (ECF No. 31-1 ¶ 25.) Undisputed that on June 26, 2018, the Fund: (i) assessed partial withdrawal liability for a partial withdrawal by M&K Joliet and M&K Summit during the 2017 Plan Year, which was subsequently withdrawn without prejudice; and (ii) provided a withdrawal liability estimate for a complete withdrawal by M&K Alsip during the following 2018 Plan Year. (*Id.* ¶¶ 31–32.)

13. The calculations did not double up – in other words the partial withdrawal liability assessment included just the Joliet and Summit contributions histories, and the complete withdrawal liability estimate included just the Alsip contribution history. (*Stip.* Ex. M; *Resp. SUMF* ¶ 25 (*Stip.* ¶ 31 & Ex. L at Ex. 3.)

RESPONSE: Disputed. The Stipulation does not reference the contribution histories used to prepare the June 26, 2018 partial withdrawal liability assessment or the withdrawal liability estimate. (*See* Stip., Exs. L–M.)

14. The Fund subsequently retracted the partial withdrawal liability assessment (*Stip.* ¶ 32) and then assessed a complete withdrawal liability against M&K using the new calculation assumptions that were implemented after the December 31, 2017 Measurement Date and included the M&K Joliet and M&K Summit contribution histories. *Resp. SUMF* ¶ 26.

RESPONSE: Disputed/Objection. The portion of the Resp. SUMF cited as support for this statement of fact does not reference the contribution histories used to calculate withdrawal liability. (ECF No. 31-1 ¶ 32.) Undisputed that: (i) on January 22, 2019, the Fund withdrew, without prejudice, the partial withdrawal liability assessment (Stip. ¶ 32); and (ii) on June 14, 2019, the Fund assessed complete withdrawal liability using the methods and assumptions Cheiron adopted on January 24, 2018 (*id.* ¶ 33 & Ex. N).

15. In 2018, M&K Alsip embarked on negotiations for a replacement CBA related to the bargaining unit members it leased to Truck Sales of Alsip at the Alsip location. The CBA was set to expire on August 31, 2018. *Stip.* ¶¶ 27 and 30(c).

RESPONSE: Disputed/Objection. The portions of the Stipulation cited as support for this statement of fact do not state that, in 2018, M&K Alsip engaged in bargaining negotiations or with respect to any "leased" employees. (Stip. ¶¶ 27, 30(c).) Undisputed that M&K Alsip was party to a collective bargaining agreement that was effective for the period September 1, 2014 through August 31, 2018. (*Id.* ¶ 27.)

16. On June 26, 2018, the Fund provided a withdrawal liability estimate relative to M&K Alsip (*Stip.* ¶ 31)

RESPONSE: Disputed. On June 26, 2018, the Fund provided a withdrawal liability estimate for a complete withdrawal during the 2018 Plan Year. (Stip. ¶ 31.) The cited portion of the Stipulation does not state it is "relative to M&K Alsip," and instead states it relates to "all trades or businesses under common control." (*Id.* & Ex. L at 2.)

17. M&K Alsip's obligation to contribute to the Fund permanently ceased effective December 31, 2018, when it terminated its collective bargaining agreement. *Stip.* ¶ 30.

RESPONSE: Undisputed.

18. The last contribution made to the Fund on behalf of M&K Alsip was for work performed through December 31, 2018. *Stip.* ¶ 30.

RESPONSE: Disputed/Objection. The portion of the Stipulation cited as support for this statement of fact does not state when M&K Alsip remitted its last contributions to the Fund, or for what work. (*See* Stip. ¶ 30.)

19. The minutes of the January 24, 2018 meeting of the Fund's Board of Trustees state that Cheiron modeled for the Trustees the impact

that four alternative discount rates would have on Fund unfunded vested benefits ("UVBs"), as well as the impact those discount rates would have on employer participation. (*Stip.* Ex. D.)

RESPONSE: Disputed. The minutes for the January 24, 2018 Trustees' meeting do not state that Cheiron modeled the impact of any discount rates on the Fund's UVBs or on employer participation. (Stip., Ex. D.)

20. Neither the PowerPoint presentation nor the minutes of the Fund's January 24, 2018 Board of Trustees meeting indicate that Cheiron modeled the impact of a 6.5% discount rate. (*Stip.* Exs. C and D.)

RESPONSE: Undisputed.

21. As of December 31, 2017, neither the Fund nor its actuary, Cherion, had changed the 7.5% discount rate assumption that was used in the Fund's November 2, 2017 Actuarial Valuation for the 2016 Plan Year to calculate withdrawal liability. (*Stip.* Exs. C and D.)

RESPONSE: Undisputed.

22. Neither the PowerPoint presentation nor the minutes of the Fund's January 24, 2018 Board of Trustees meeting indicate that Cheiron adopted the 6.5% discount rate but rather that the Trustees adopted the new rate. (*Stip.* Ex. C and D.)

RESPONSE: Disputed. The minutes of the January 24, 2018 Trustees' meeting state that the change in discount rate was among the "recommendations of the Fund's Actuary, Cheiron"; that "[u]pon questioning, [Cheiron] confirmed that all of [the] changes to the withdrawal calculation and the actuarial assumptions are reasonable and defensible"; and that the Trustees "unanimously approved" the recommended changes." (Stip., Ex. D.) Further, the Stipulation states: "Following the discussion with the Trustees, Cheiron changed various methods and assumptions used to calculate withdrawal liability for employers that effected a withdrawal during the 2018 Plan Year, including reducing the discount rate from 7.50% to 6.50%." (Stip. ¶ 17.)

23. Although the Fund's discount rate was 7.5% as of the December 17, 2017 Measurement Date, when calculating M&K's withdrawal liability, the Fund retroactively applied the lower 6.5% discount rate, thereby dramatically increasing its withdrawal liability calculation related to M&K. *Stip.* ¶¶ 20-21, 25.

RESPONSE: Disputed. Cheiron, not the Trustees nor the Fund, performed the withdrawal liability calculation using the actuarial assumptions Cheiron, not the Trustees nor the Fund, adopted at the January 24, 2018 Trustees' meeting. (Stip. ¶ 17, 33 & Ex. N.)

24. Based upon the revised discount rate, the Fund assessed M&K's withdrawal liability in the amount of $6,158,482.00 (Assessment, *Stip.* Ex. N).

RESPONSE: Undisputed.

25. On September 10, 2019, M&K submitted its Request for Review of the withdrawal liability assessment pursuant to 29 U.S.C. §1399(b)(2)(A) stating, in part:

> **M&K disputes the amount of the withdrawal liability assessed and the calculations used in determining the withdrawal liability, including assumptions based on rates of return, amount of credits given, increases in unfunded vested benefits liability caused by increasing benefits and granting service credits without corresponding contributions, and other such matters that affect the amount of M&K's withdrawal liability. This has resulted in an assessment that is incorrect, unreasonable, arbitration, and capricious.**

(Complaint at ¶ 17; *Stip.* ¶ 34; Request for Review, including information request, is attached hereto as Exhibit A.)

RESPONSE: Undisputed that, on September 10, 2019, M&K requested a review of the June 14, 2019 withdrawal liability assessment pursuant to 29 U.S.C. § 1399(b)(2)(A). (Stip. ¶ 34.) Disputed/objection as to the remainder of Paragraph 25, which relies on evidence (the attached Exhibit) that was not submitted to the Arbitrator or relied upon in the Award or the subsequent denials of the parties' cross-motions for reconsideration. Therefore, it cannot be considered on this motion for summary judgment.

26. The Fund denied the Request for Review via letter dated October 18, 2019 and, accordingly, M&K timely commenced Arbitration to challenge the assessment. Complaint ¶¶ 17-18; *Stip.* ¶34.

<u>RESPONSE</u>: Undisputed.

27. On March 15, 2021, M&K filed its Motion for Partial Summary Judgment in the Arbitration, attached hereto as Exhibit B. Appended to the Motion as Exhibits D1, D2 and D3 were the District Court Opinion, Appellate Court Opinion and Arbitration Award, respectively, in *South City Motors, Inc. v. Automotive Industries Pension Trust Fund*, No. 17-cv-04475, 2018 WL 2387854 (N.D. Cal. May 25, 2018), *aff'd* 796 F. App'x. 393 (9th Cir. 2020).

<u>RESPONSE</u>: Undisputed.

28. In its Motion for Partial Summary Judgment and in accordance with a Stipulation between the parties, M&K sought the following relief:

> **1. Pursuant to the agreement of the Parties, the Parties shall submit to the Arbitrator pursuant to the schedule set forth in Paragraph 2 below the following issues for resolution based in whole or in part on the facts set forth in a set of stipulated facts agreed to by the Parties (the "Stipulation"):**

a. Whether it was a violation of ERISA, as amended, for the discount rate to be changed after the December 31, 2017 measurement date; and

b. Whether the "free-look" exception (ERISA § 4210, 29 U.S.C. § 1390) is available to M&K Employee Solutions and requires a recalculation of its withdrawal liability.

(Complaint at ¶19; *See also* Complaint Ex. 1 (*Briefing Stip*); *see also* Award attached to Complaint as Exhibit 3 for discussion of relief sought.)

<u>RESPONSE</u>: Undisputed.

29. Pursuant to the Stipulation, the parties also agreed that after the Arbitrator's resolution concerning the appropriate "measurement date" for purposes of calculating withdrawal liability, "M&K Employee Solutions shall have an opportunity to challenge the assumptions, method, and manner in which the Fund calculated its withdrawal liability." *Briefing Stip.* ¶ 3.

<u>RESPONSE</u>: Undisputed.

30. On July 13, 2021, Arbitrator Aiges issued his decision (Award) ordering the Fund to annul its assessment of withdrawal liability in the amount of $6,158,482.00, and to recalculate the assessment.

The Fund improperly failed to calculate M&K's withdrawal liability using the as-

> **sumptions and methods in effect on the December 31, 2017 measurement date. M&K's motion for partial summary judgment is granted. The Fund is ordered to annul its assessment of withdrawal liability and to recalculate it using the methods and assumptions in effect on the December 31, 2017 Measurement date.**

Complaint at Exhibit 3, p. 36.

RESPONSE: Undisputed.

31. Following motions for reconsideration regarding the Award, on August 11, 2021, the Arbitrator denied both parties' motions and confirmed his decision to annul the assessment. (Complaint at ¶23; *See also* "Confirmation of Award," attached hereto as Exhibit C.)

RESPONSE: Undisputed.

32. In addition to confirming the annulment of the assessment, the Arbitrator provided M&K until September 30, 2021, to contest the recalculated amount of withdrawal liability, stating specifically:

> **M&K, however, seeks the right to contest the Fund's revised calculation of $1,797,781. It is, I believe, entitled to that. But its right should not be open-ended. It must raise a claim by September 30, 2021 or be deemed to have waived its ability to do so. I shall continue to retain jurisdiction in the event it does so.**

Confirmation of Award, at p. 2.

RESPONSE: Undisputed.

33. On September 30, 2021, M&K initiated its challenge to the recalculated assessment and the Arbitrator retains jurisdiction. *See* Reply in Support of Motion to Dismiss (ECF No. 12-00) and Exhibit A thereto (ECF No. 12-01.)

RESPONSE: Disputed/Objection. The evidence cited was not part of the record submitted to the Arbitrator in preparing the Award, or the subsequent denials of the parties' cross-motions for reconsideration. Therefore, it cannot be considered on this motion for summary judgment.

[Dkt. 40]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRUSTEES of the IAM NATIONAL PENSION FUND,

Plaintiffs,

- against -

M & K EMPLOYEE SOLUTIONS, LLC,

Defendant.

Case No.: 1:21-cv-02152-RCL

[Filed: October 21, 2022]

JUDGMENT

Plaintiffs, the Trustees (the "Trustees") of the IAM National Pension Fund, having brought this action against Defendant, M & K Employee Solutions, LLC ("M&K"), pursuant to 29 U.S.C. §§ 1401(b)(2) and 1451(a) to confirm in part and modify and/or vacate in part the July 13, 2021 Arbitration Award (the "Award") entered in *M& K Employee Solutions v. IAM National Pension Fund*, AAA Case No. 01-19-0004-1350 (the "Arbitration"); M&K, having cross-moved to confirm in part and modify and/or vacate in part the Award; and the matter having been brought to the Honorable Royce C. Lamberth, United States District Judge, it is hereby,

ORDERED, ADJUDGED, AND DECREED that for the reasons stated in the Court's September 28, 2022 Memorandum Opinion (ECF No. 36) (the "Opinion") and accompanying Order (ECF No. 37):

1. The Trustees' request to vacate the Award in part is granted and M&K's request to vacate the Award in part is granted, as a result of which the Award is vacated to the extent it requires that assumptions and methods be adopted by a plan prior to the measurement date applicable to a withdrawal and to the extent it rejects that M&K was eligible for the free-look exception with regard to its partial withdrawal.

2. The Trustees' request to confirm the Award in part is denied and M&K's request to confirm the Award in part is denied for the same reasons.

3. The case is remanded to the Arbitrator to address all outstanding issues in a manner consistent with the Opinion. Among the issues to be decided by the Arbitrator on remand is how M&K's eligibility for a "free look" regarding its partial withdrawal affects liability for M&K's subsequent complete withdrawal. In the Opinion, the Court overturned the Arbitrator's ruling that M&K did not satisfy 29 U.S.C. § 1390(a)(2) of the free-look exception, but was not presented with, and did not resolve, any other questions concerning the application of that exception.

4. Plaintiffs' October 12, 2022 Motion for Clarification, or in the Alternative, Reconsideration of the Court's September 28, 2022 Memorandum Opinion is denied as moot.

Dated: October 21, 2022 /s/ [Signature]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2023

No. 22-7157

TRUSTEES OF THE IAM NATIONAL PENSION FUND,

APPELLEE

v.

M & K EMPLOYEE SOLUTIONS, LLC,

APPELLANT

Consolidated with 22-7158

Appeals from the United States District Court
for the District of Columbia
(No. 1:21-cv-02152)

No. 23-7028

TRUSTEES OF THE IAM NATIONAL PENSION FUND,

APPELLEE

v.

OHIO MAGNETICS, INC., ET AL.,

APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-00928)

[Filed: February 9, 2024]

Before: RAO, WALKER and CHILDS, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgments of the District Court appealed from in these causes be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

Date: February 9, 2024

Opinion for the court filed by Circuit Judge Childs.

(ORDER LIST: 606 U.S.)

MONDAY, JUNE 30, 2025

CERTIORARI GRANTED

23-1209 M & K EMPLOYEE SOLUTIONS, ET AL. V. TRUSTEES OF THE IAM PENSION

The petition for a writ of certiorari is granted limited to the following question: Whether 29 U. S. C. §1391's instruction to compute withdrawal liability "as of the end of the plan year" requires the plan to base the computation on the actuarial assumptions to which its actuary subscribed at the end of the year, or allows the plan to use different actuarial assumptions that were adopted after the end of the year.

(ORDER LIST: 606 U.S.)

THURSDAY, JULY 3, 2025

ORDERS IN PENDING CASES

23-1209 M & K EMPLOYEE SOLUTIONS, ET AL. V. TRUSTEES OF THE IAM PENSION

The order granting the petition for a writ of certiorari is amended as follows. The petition for a writ of certiorari is granted limited to the following question: Whether 29 U. S. C. §1391's instruction to compute withdrawal liability "as of the end of the plan year" requires the plan to base the computation on the actuarial assumptions most recently adopted before the end of the year, or allows the plan to use different actuarial assumptions that were adopted after, but based on information available as of, the end of the year.