APPENDIX

TABLE OF CONTENTS

APPENDIX A - Court of Appeals Opinion...1a

APPENDIX B – Denial of the Petition for Rehearing 34a

APPENDIX C – District Court Opinion................. 35a

APPENDIX D – 29 USC 1381 .... 62a

APPENDIX E – 29 USC 1386 .... 63a

APPENDIX F – Excerpts from Petitioner's Complaint & Respondent's Answer 65a

APPENDIX G – Excerpts from the Minutes of the Meeting of the Board of Trustees of the RWDSU plan, December 10-12, 2018 .... 66a

APPENDIX H – Excerpts from the plan's assessment of withdrawal liability dated January 11, 2019 .... 67a

APPENDIX A

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-12533

PERFECTION BAKERIES INC.,

Plaintiff-Counter Defendant-Appellant,

versus

RETAIL WHOLESALE AND DEPARTMENT STORE INTERNATIONAL UNION AND INDUSTRY PENSION FUND,

Defendant-Counter Claimant-Appellee.

Appeal from the United States District Court

for the Northern District of Alabama

D.C. Docket No. 2:22-cv-00573-ACA

Before JORDAN, NEWSOM, and BRASHER, Circuit Judges.

NEWSOM, Circuit Judge:

On behalf of its employees in Michigan and Indiana, Perfection Bakeries paid into the Retail, Wholesale and Department Store International

Union's Industry Pension Fund. It later stopped contributing to the Fund—first in Michigan, and then in Indiana. Each of these actions led Perfection to incur "withdrawal liability" under the Multiemployer Pension Plan Amendments Act of 1980. The Fund figured Perfection's withdrawal liability by applying a four-step formula set out in 29 U.S.C. § 1381. Perfection challenges the Fund's math—contending, specifically, that it performed a particular calculation at the wrong step. The district court granted summary judgment for the Fund, and Perfection now appeals. After carefully considering the issue, and with the benefit of oral argument, we affirm the district court's judgment.

I

A

We begin—necessarily—with a pretty tedious statutory primer.

The Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461, ensures "that an employer who withdraws from an underfunded multiemployer pension plan must pay a charge sufficient to cover that employer's fair share of the plan's unfunded liabilities." *Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414, 415 (1995). To that end, the statute dictates that "an employer [who] withdraws from a multiemployer pension plan in a *complete withdrawal* or a *partial withdrawal* . . . is liable to the plan in the amount determined under this part to be the *withdrawal liability*." 29 U.S.C. § 1381(a) (emphasis added). A "complete withdrawal" occurs "when an employer—(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." *Id.* § 1383(a). With some exceptions not relevant here, a "partial withdrawal" occurs when, "on the last day of a plan year . . . (1) there is a 70-percent contribution decline, or (2) there is a partial cessation of the employer's contribution obligation." *Id.* § 1385(a).

Section 1381(b) provides a four-step formula for calculating the employer's "withdrawal liability." Because it's so central to the case, we quote it here in full:

> (1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted—
>
> > (A) first, by any de minimis reduction applicable under section 1389 of this title,
> >
> > (B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,
> >
> > (C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and
> >
> > (D) finally, in accordance with section 1405 of this title.

Id. § 1381(b)(1). We will refer to § 1381(b)(1)'s four sequential adjustments—"first," "next," "then," and "finally"—as steps one, two, three, and four, respectively.

The nub of the dispute here is what happens at step two—which applies "in the case of a partial withdrawal" and which adjusts the calculation "in accordance with section 1386." *Id.* § 1381(b)(1)(B). Section 1386, in turn, does two things. Subsection (a) prorates an employer's liability for a partial withdrawal to account for the fact that it isn't complete. *See id.* § 1386(a) (stating that "[t]he amount of an employer's liability for a partial withdrawal, before the application of sections 1399(c)(1) and 1405 of this title, is equal to the product of" two numbers).

More importantly here, Subsection (b) provides a credit for employers who have incurred liability from a previous partial with-drawal—*i.e.*, what we'll call the "partial-withdrawal credit." In relevant part, it says that:

> In the case of an employer that has withdrawal liability for a partial withdrawal from a plan, any withdrawal liability of that employer for a partial or complete withdrawal from that plan in a subsequent plan year shall be reduced by the amount of any partial withdrawal liability (reduced by any abatement or reduction of such liability) of the employer with respect to the plan for a previous plan year.

Id. § 1386(b)(1).

Though less central to this dispute, step three also warrants a brief explainer. At that step, § 1381(b)(1)(C) applies "the limitation on annual payments under section 1399(c)(1)(B) of this title." Section 1399, in turn, gives employers two options for paying off their withdrawal liability: in a single lump sum or in annual installments. *See id.* § 1399(c)(1), (c)(4). The amount of each installment "(roughly speaking) equals the withdrawing employer's typical contribution in earlier years." *Milwaukee Brewery*, 513 U.S. at 418; *see* 29 U.S.C. § 1399(c)(1)(C). In other words, "the statute fixes the amount of each payment and asks how many such payments there will have to be." *Milwaukee Brewery*, 513 U.S. at 418. Importantly, though, the statute also imposes a 20-year cap, which limits an employer's liability to no more than 20 annual installment payments. *See* 29 U.S.C. § 1399(c)(1)(B).

Once a plan sponsor has run through all four steps and applied their prescribed adjustments, the statute instructs her to "notify the employer of"—and ultimately "collect"—"the amount of the withdrawal liability." *Id.* § 1382.

B

Perfection Bakeries produces and distributes baked goods. Two of the company's facilities, one in Indiana and the other in Michigan, employed workers represented by the Retail, Wholesale and Department Store International Union. At each location, a collective bargaining agreement required Perfection to contribute to the Union's Industry Pension Fund.

In 2016, Perfection stopped contributing to the Fund for its Michigan employees because it no longer had a contractual obligation to do so. The parties agree that Perfection's liability for that partial withdrawal amounted to $2,228,268.

Two years later, Perfection ceased its contributions for its Indiana employees, prompting the Fund to calculate the liability for the company's complete withdrawal. Relying on the Ninth Circuit's then-recent decision in *GCIU-Employer Retirement Fund v. Quad/Graphics, Inc.*, 909 F.3d 1214 (9th Cir. 2018), the Fund's actuary applied the partial-withdrawal credit at what we've called step two. The math worked as follows: At the time of Perfection's complete withdrawal, its allocable amount of unfunded vested benefits was $17,331,978. Perfection's partial-withdrawal credit, attributable to its earlier

Michigan-based withdrawal, was $1,962,408.[1] After applying the partial-withdrawal credit at step two, Perfection's liability fell to $15,369,570. At step three, the Fund determined that the 20-year cap was $6,318,741, limiting Perfection's final withdrawal liability to that amount.

Perfection agreed with the amount of the partial-withdrawal credit, but it thought the Fund should apply that credit after completion of all other steps—*not* at step two. Under Perfection's preferred method, the Fund would have deducted the $1,962,408 partial-withdrawal credit *after* the 20-year cap had cut the liability to $6,318,741—meaning that its final withdrawal liability would have been only $4,356,333.

C

Objecting to the Fund's calculation, Perfection submitted the dispute to arbitration. *See* 29 U.S.C. § 1401(a)(1) (providing that "[a]ny 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"). The arbitrator approved the Fund's computation, concluding that the Fund properly applied the partial-withdrawal credit at step two.

Perfection took its case to a federal district court, which it asked to modify or vacate the arbitration award and to order the Fund to recalculate the liability for the complete withdrawal. The Fund counterclaimed to enforce the award. Eventually, the

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[1] Perfection's $1,962,408 partial-withdrawal *credit* is less than its $2,228,268 partial-withdrawal *liability* because Pension Benefit Guaranty Corporation regulations require the plan sponsor to apply an amortization schedule to convert the employer's liability into the credit. *See* 29 C.F.R. §§ 4206.6, 4206.7.

district court granted summary judgment for the Fund. It held that the relevant statutory text "unambiguously requires the credit to be applied as part of the second potential adjustment"—that is, at step two. *Perfection Bakeries, Inc. v. Retail Wholesale & Dep't Store Int'l Union & Indus Pension Fund*, No. 22-CV-573, 2023 U.S. Dist. LEXIS 116837, 2023 WL 4412165, at *9 (N.D. Ala. July 7, 2023).

This is Perfection's appeal.

II

This case raises a single question of statutory interpretation: In calculating an employer's "withdrawal liability," when should one apply the partial-withdrawal credit?[2] The Fund says at step two, and the district court agreed. Perfection contends, by contrast, that the Fund should have applied the partial-withdrawal credit only after working through all four steps of § 1381(b)'s sequential formula.

"In determining the meaning of a statute, we look first to its language, giving the words used their ordinary meaning." *Levin v. United States*, 568 U.S. 503, 513 (2013) (citation modified). In other words, we "interpret the law as an ordinary person would." *Tanzin v. Tanvir*, 592 U.S. 43, 52 (2020). "We do not look at one word or term in isolation, but instead . . .

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[2] We review de novo both the district court's grant of summary judgment, *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 767 (11th Cir. 2005), and its interpretation of the statute, *United States v. Milkintas*, 470 F.3d 1339, 1343 (11th Cir. 2006). And under the MPPAA, de novo review applies to legal conclusions reached by the arbitrator. *See Trs. of Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emps. v. Wolf Crane Serv., Inc.*, 374 F.3d 1035, 1039 (11th Cir. 2004) (distinguishing judicial review under the Federal Arbitration Act).

to the entire statutory context." *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999). "Our task is to interpret the statute as best we can, not to second-guess the wisdom of the congressional policy choice." *Mansell v. Mansell*, 490 U.S. 581, 594 (1989).

A

This is a hard case. The statute is complex, and each party's interpretation has something going for (and against) it. Based on the statute's language and structure, though, we conclude that the Fund's reading is the better one, which means that it properly applied the partial-withdrawal credit at step two.

Section 1381 prescribes the four-step formula for converting the employer's allocable amount of unfunded vested benefits into "withdrawal liability." As already noted, the steps it lays out are expressly sequential: "first," "next," "then," "finally." 29 U.S.C. § 1381(b)(1)(A)-(D). Subsection 1381(b)(1)(B) outlines step two of that sequence, and it directs that the second adjustment be made "in accordance with section 1386 of this title." *Id.* § 1381(b)(1)(B). Section 1386, in turn, has two halves. The first applies to what we'll call "current" partial withdrawals—it provides the liability equation when an employer's withdrawal is partial rather than complete. *See id.* § 1386(a). More importantly here, the second applies to what we'll call "previous" partial withdrawals—further reducing an employer's liability "by the amount of any partial withdrawal liability . . . of the employer with respect to the plan for a previous plan year." *Id.* § 1386(b)(1).

Significantly, Subsection 1381(b)(1)(B) refers on its face to *all* of "section 1386"—not just half of it. Accordingly, by its plain terms, step two incorporates Subsection 1386(b)'s credit for previous partial withdrawals just as much as Subsection 1386(a)'s proration for current partial withdrawals.

Other textual clues further indicate that all of § 1386—including the credit for a previous partial withdrawal—should be brought to bear at step two. In describing step three, Subsection 1381(b)(1)(C) conspicuously directs that the 20-year cap be applied according to "section 1399*(c)(1)(B)* of this title." *Id.* § 1381(b)(1)(C) (emphasis added). That specification of a single sub-sub-subsection indicates, on balance, that step two's incorporation of *all* of "section 1386" was intentional. What's more, step three also refers back to § 1386 in its entirety: Before applying the 20-year cap, the provision requires a plan sponsor to adjust the employer's liability "first under section 1389 of this title and then under section 1386 of this title." *Id.* § 1399(c)(1)(A)(i). The same goes for step four. Section 1405—to which § 1381(b)(1)(D) refers—states that its potential reduction comes into play only "after the application of all sections of this part having a lower number designation than this section." 29 U.S.C. § 1405(a)(1). The text thus requires "application" of all of § 1386—the entirety of which is a "section" with a "lower number designation' than § 1405—before step four.

Throughout the four-step formula, then, the relevant provisions refer repeatedly to all of § 1386 as part of step two. Taken together, these cross-references confirm what the statute's four-step structure indicates: that the partial-withdrawal credit should be applied at step two—not as its own tacked-on, extratextual step *five.*[3]

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[3] In reaching that conclusion, we join the unanimous Ninth Circuit panel in *GCIU*—the only other circuit to have decided this issue. Like we do today, the Ninth Circuit held that § 1381's four-step structure and its repeated references to all of § 1386

B

Perfection advances several counterarguments, none of which persuades us.

1

Perfection notes that Subsection 1386(b)(1) applies the partial-withdrawal credit to "withdrawal liability"—not the allocable amount of unfunded vested benefits. *See* 29 U.S.C. § 1386(b)(1). Perfection contends that "[b]ecause the credit reduces 'withdrawal liability,' and 'withdrawal liability' does not exist until after the four necessary adjustments have been applied to the allocable amount of unfunded vested benefits, the credit cannot be applied until that process is finished." Br. of Appellant at 28-29 (citations omitted); *accord* Dissenting Op. at 11-12.

Perfection is right that the statute defines "withdrawal liability" as "the amount determined" by the four-step formula. 29 U.S.C. § 1381(a). But the same provision also says that "withdrawal liability" is the "amount" for which the employer "is liable to the plan." *Id.* And that presents a problem for Perfection's reading: If the partial-withdrawal credit isn't deducted until *after* the completion of the four-step process, then the process doesn't yield the "amount" for which the employer "is liable to the plan"—or that the plan sponsor must ultimately "collect." *See id.* §§ 1381(a), 1382(3).[4]

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dictated that the partial-withdrawal credit be deducted at step two. *See GCIU*, 909 F.3d at 1218.

[4] The dissent counters that "[s]everal other sections of the statute expressly reduce or change 'withdrawal liability' *after* the plan sponsor fully applies the four steps in section 1381," pointing specifically to §§ 1387 and 1388. Dissenting Op. at 17-18; *see* 29 U.S.C. §§ 1387, 1388. It's a good point—§ 1381 doesn't expressly name those other sections. But we don't think that means they

Other parts of the statute further undermine Perfection's contention that only the final sum counts as withdrawal liability, with all interim amounts being mere adjustments to the allocable amount of unfunded vested benefits. At step two, Subsection 1386(a) provides that "[t]he amount of an employer's *liability* for a partial withdrawal, before the application of sections 1399(c)(1) and 1405 of this title, is equal to" the proration calculation. *See id.* § 1386(a) (emphasis added). And at step three, § 1399 similarly states that "the employer's *liability* shall be limited to the first 20 annual payments." 29 U.S.C. § 1399(c)(1)(B) (emphasis added).

Both provisions show that the statute references the employer's liability—*not* the allocable amount of unfunded vested benefits—even while it's in the process of being calculated. And that conforms with common sense and usage. After all, one might well call something a cake even while it's still in the oven and before it's fully baked. *Cf. Bondi v. VanDerStok*, 145 S. Ct. 857, 868 (2025) ("An author might invite your opinion on her latest *novel*, even if she sends you an unfinished manuscript. A friend might speak of the *table* he just bought at IKEA, even though hours of assembly remain ahead of him.").

2

Perfection also gestures toward step two's introductory phrase, which directs the plan sponsor to

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aren't folded into the four-step process. As § 1405 makes clear, step four applies only "after the application of all sections of this part having a lower number designation than this section." 29 U.S.C. § 1405(a)(1). By its plain terms, that includes §§ 1387 and 1388. In any event, our task here isn't to pinpoint §§ 1387 or 1388's location but to identify the partial-withdrawal credit's proper place. Based on the statute's structure and multiple cross-references, we think it's step two.

apply § 1386 "in the case of a partial withdrawal." *Id.* § 1381(b)(1)(B). On Perfection's reading, this preface signals that step two includes only Subsection 1386(a)'s proration for current partial withdrawals, *not* Subsection 1386(b)'s credit for previous partial withdrawals. To bolster that interpretation, Perfection highlights that Subsection 1386(a) doesn't mention Subsection 1386(b), providing instead that its adjustment for current partial withdrawals occurs "before the application of sections 1399(c)(1) and 1405 of this title." *See id.* § 1386(a). As Perfection sees it, this omission means that the partial-withdrawal credit doesn't belong at step two.

To be sure, Perfection's reading of "in the case of a partial withdrawal" might initially seem to be the more "natural" one. *See* Dissenting Op. at 13. But that alone isn't enough to overcome the surrounding statutory context. After all, Subsection 1381(b)(1)(B) expressly incorporates *all* of § 1386, and so do steps three and four.[5] These repeated and unqualified references to the partial-withdrawal credit outweigh Subsection 1386(a)'s failure to mention it—especially because that supposed omission may simply reflect

[5] The dissent contends that its interpretation also "applies *all* of section 1386 at the same time when the initial partial withdrawal occurs." Dissenting Op. at 16. On its read, "Subsection (a) tells the plan sponsor how to calculate that year's partial withdrawal liability . . . and subsection (b) tells it to book a credit in the amount of that year's partial withdrawal liability against any withdrawal liability in a 'subsequent' plan year." *Id.* Respectfully, we disagree. Subsection (b) says that the thing that reduces an employer's liability "in a subsequent plan year" is "the amount of any partial withdrawal liability . . . for a *previous* plan year." 29 U.S.C. § 1386(b)(1) (emphasis added). In other words, § 1386(b) isn't fully future-facing, but instead contemplates that the partial-withdrawal credit from "a previous plan year" be deducted at step two. That's exactly what the Fund did.

the fact that many employers won't have any credit from a previous partial withdrawal. Section 1386's language also indicates—even if only indirectly—that the phrase "in the case of a partial withdrawal" is shorthand for both of its halves. In words that parallel Subsection 1381(b)(1)(B)'s preface, Subsection 1386(b)(1) states that the credit applies "[i]n the case of an employer that has withdrawal liability for a partial withdrawal from a plan." *Id.* § 1386(b)(1). In short, our reading is consistent with the textual snippets on which Perfection relies, while Perfection's interpretation would ask us to ignore the fact that the statute seems clearly to embed all of § 1386 at step two.

3

Perfection further insists that applying the partial-withdrawal credit at step two would frustrate the operation of step three's 20-year cap. Understanding Perfection's argument requires a brief recap. At step two of the Fund's calculation, the partial-withdrawal credit reduced Perfection's liability from $17,331,978 to $15,369,570. The 20-year cap cut that number to $6,318,741, which was Perfection's final withdrawal liability. As Perfection correctly points out, the 20-year cap would have yielded the same outcome even without prior application of the partial-withdrawal credit, whereas applying the credit *after* the 20-year cap would have further reduced Perfection's liability to $4,356,333.

It's true that in Perfection's case the 20-year cap gobbled up the partial-withdrawal credit. That's mainly because the 20-year cap operates independently of the other adjustments. To repeat, the cap is the sum of 20 annual payments that "(roughly speaking) equal[] the withdrawing employer's typical contribution in earlier years."

Milwaukee Brewery, 513 U.S. at 418; *see* 29 U.S.C. § 1399(c)(1)(C). And that cap certainly redounded to Perfection's benefit, reducing its liability by nearly $10 million.

But Perfection exaggerates when it asserts that the Fund's reading renders the partial-withdrawal credit "illusory." *See* Br. of Appellant at 54. The partial-withdrawal credit can still have substantive bite even at step two—for example, when it reduces an employer's withdrawal liability below the 20-year cap. The statute also contemplates situations in which the 20-year cap doesn't apply, like mass withdrawals. *See* 29 U.S.C. § 1399(c)(1)(D). In short, Perfection's complaint about its own case doesn't translate to every circumstance, let alone change what the statute says.[6]

Boiled to its essence, Perfection's argument is an appeal to purpose. Perfection contends that the Fund's reading undermines "the purpose of the credit, which is that 'the liability for any complete or partial withdrawal in a subsequent year' should 'properly reflect[] the employer's share of liability with respect to the plan.'" Br. of Appellant at 54 (quoting 29 U.S.C. § 1386(b)(2)). But nothing in the statute's language persuades us that the partial-withdrawal credit and 20-year cap have no overlap. In both its structure and repeated cross-references, the statute counsels that the partial-withdrawal credit belongs at step two.

4

Finally, Perfection appeals to guidance from the

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[6] In other words, our reading of the statutory language doesn't lead to an absurd result—one "where a rational Congress could not conceivably have intended the literal meaning to apply." *United States v. Pate*, 84 F.4th 1196, 1205 n.3 (11th Cir. 2023) (en banc) (citation modified).

Pension Benefit Guaranty Corporation, to which § 1386 assigns a rulemaking role. *See* 29 U.S.C. § 1386(b)(2); *see also* Dissenting Op. at 15-16. In an opinion letter published within a few years of the statute's enactment, the Corporation interpreted the statutory scheme in Perfection's preferred manner—that is, to require the partial-withdrawal credit to be deducted after § 1381's four adjustments. *See* Pension Benefit Guar. Corp., Opinion Letter 85-4 (Jan. 30, 1985), https://www.pbgc.gov/sites/default/files/85-4.pdf [https://perma.cc/48TS-UT5S]. The agency's reasoning maps onto Perfection's core argument in contending that the credit "is an adjustment to withdrawal liability, i.e. a further adjustment to the [§ 1381] amount," and, therefore, "must be made after the employer's subsequent withdrawal liability is calculated in accordance with [§ 1381]." *Id.*

The Corporation's views merit respect to the extent they have the "power to persuade"—but they have no "power to control." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 402 (2024) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The agency's reasoning doesn't move the needle here because it merely echoes (or more accurately, anticipated) Perfection's main arguments, which we have rejected as unpersuasive. *See supra* at 11-16. The Corporation's guidance can't convert a losing position into a winning one.

* * *

By any measure, this is a tough case. The statute is complex, and both parties make plausible arguments. Neither reading is perfect, but we conclude that the Fund's is better. The statute's language and structure counsel that the partial-withdrawal credit's proper home is in step two. To repeat, in cases like this one, our charge "is to interpret the statute as best we can, not to second-guess the wisdom of the congressional policy choice." *Mansell*, 490 U.S. at 594. Having done so, we rule in the Fund's favor.

III

We **AFFIRM** the district court's grant of summary judgment.

JORDAN, Circuit Judge, Concurring:

This is a difficult case. After much back and forth, I am persuaded that Judge Newsom's approach is the better one, and I join the majority opinion in full. Neither reading of the statutory language is perfect, but the Fund's interpretation is more persuasive. Though I have some residual doubts about the correct answer, they are not sufficient to create a circuit split. *See Pub. Health Tr. of Dade Cnty. v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 n.4 (11th Cir. 1993) ("We do not create intercircuit splits lightly. When another circuit has ruled on a point, we often follow it (even if we have some doubt about its correctness) unless we believe the decision to be plainly wrong."); *Nationwide Mut. Ins. Co. v. Barrow*, 29 F.4th 1299, 1306 (11th Cir. 2022) (Jordan, J., concurring) ("I have my doubts about the result in this case, but they are not strong enough to advocate that we create a circuit split[.]").

BRASHER, Circuit Judge, dissenting:

I agree with the majority opinion that "[t]his is a hard case" and "each party's interpretation has something going for (and against it)." But I disagree that the majority opinion has picked the best interpretation as between the two.

This appeal turns on two terms used in the

Multiemployer Pension Plan Amendments Act of 1980: "unfunded vested benefits" and "withdrawal liability." When an employer withdraws from an underfunded pension plan, the law requires it to pay "withdrawal liability"—i.e., the employer's "fair share of the plan's underfund-ing"—into the pension fund. *Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414, 416 (1995); s*ee also* 29 U.S.C. § 1381(a). To determine that "withdrawal liability," the statute starts with the plan's "unfunded vested benefits" allocable to the employer. *See* 29 U.S.C. § 1391. Then, the statute adjusts that amount in four sequential steps to determine "withdrawal liability." 29 U.S.C. § 1381(b).

The second step in determining "withdrawal liability" provides that, "in the case of a partial withdrawal," the "unfunded vested benefits" should be modified "in accordance with section 1386 of this title." *Id.* § 1381(b)(1)(B). Section 1386 has two subsections. Subsection (a) provides instructions to determine partial withdrawal liability as a percentage of an employer's overall obligations and then refers the reader back to complete steps three and four. 29 U.S.C. § 1386(a). Subsection (b) says that, when "an employer . . . has withdrawal liability for a partial withdrawal from a plan," any "withdrawal liability . . . from that plan in a subsequent plan year shall be reduced by the amount of any partial withdrawal liability." 29 U.S.C. § 1386(b)(1).

Perfection Bakeries says that a pension plan should apply these provisions as follows. In the year that an employer partially withdraws from a plan—*i.e.* "in the case of a partial withdrawal"—the plan takes two actions under section 1386. First, it applies subsection (a) to determine the amount of the employer's partial withdrawal liability for that year before referring back to step three and step four. Second, it references subsection (b) to book a credit in the amount of that year's partial withdrawal liability against any future "withdrawal liability . . . from that plan in a subsequent plan year." If, at some point in the future, the employer withdraws from the plan again, the plan sponsor applies the credit against that employer's withdrawal liability for that subsequent plan year.

The Fund's actuary originally followed this practice in this case. The only reason that the Fund's actuary changed his mind and applied subsection 1386(b) differently—on his second attempt—is because of an intervening decision from the Ninth Circuit. In *GCIU-Employer Retirement Fund v. Quad/Graphics, Inc.*, 909 F.3d 1214, 1218 (9th Cir. 2018), the court held that the reduction provided by subsection 1386(b) applies at step two of section 1381 in the year of the subsequent withdrawal liability—even when a plan sponsor is calculating complete withdrawal liability—and reduces whatever figure is calculated after applying step one of section 1381 to the "unfunded vested benefits." The Ninth Circuit's reasoning is sparse and unpersuasive. Although the court recognized that "[t]he § 1386(b) prior partial withdrawal credit reduces the employer's complete withdrawal liability," *id.*, it did not address the fact that "withdrawal liability" is a defined term. *See* 29 U.S.C. § 1381(b)(1). The court also failed to address the ordinary meaning of "in the case of a partial withdrawal" or any of the statutory context.

To its credit, the majority opinion does not adopt the Ninth Circuit's analysis or lack thereof. But I don't find the majority opinion's attempt to justify the same result any more persuasive. In my view, the Fund's reading cannot be squared with three parts of the statute's text: (1) step two in section 1381 is implicated only when we are calculating liability "in the case of a partial withdrawal," (2) "withdrawal liability" is a defined term that means something different than "unfunded vested benefits," and (3) the defined term "withdrawal liability" is what must be "reduced" by the credit in subsection 1386(b). Accordingly, I respectfully dissent.

I.

I'll start with an overview of the statutory framework because it provides the context for this dispute. I'll then turn to the facts that led to the parties' two competing interpretations.

A.

The Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461, establishes an employer's withdrawal liability from a multiemployer pension plan. Before that statute, if a pension plan became insolvent, the law held only those employers who withdrew from the plan in the "previous five years liable for a fair share of the plan's underfunding." *Milwaukee Brewery*, 513 U.S. at 416; *see also* 29 U.S.C. § 1364. That scheme motivated employers to exit early from underfunded plans in hopes of avoiding liability. *See Milwaukee Brewery*, 513 U.S. at 417. But then the statute, as amended, eliminated those strategic decisions by "impos[ing] a withdrawal charge on all employers withdrawing from an underfunded plan." *Id.*

Under the statute, an employer can completely or partially withdraw from a plan. A "complete withdrawal . . . occurs when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. §

1383(a). With some exceptions, a "partial withdrawal" occurs when, "on the last day of a plan year . . . (1) there is a 70-percent contribution decline, or (2) there is a partial cessation of the employer's contribution obligation." *Id.* § 1385(a). As soon as practicable after a complete or partial withdrawal, the plan sponsor is supposed to notify the employer of the amount of its liability to the plan and a schedule for its liability payments. *Id.* § 1399(b)(1).

Section 1381 tells a plan sponsor to calculate the employer's liability, "in a complete withdrawal or a partial withdrawal," as the "amount determined under this part to be the withdrawal liability." 29 U.S.C. § 1381(a). The statute says that "withdrawal liability . . . is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted" by four sequential steps. *Id.* § 1381(b)(1). So, to arrive at withdrawal liability, the plan sponsor starts with a calculation of the "unfunded vested benefits" allocable to the employer. *See id.* § 1391. Then, the plan sponsor adjusts that amount in four steps. *See id.* § 1381(b)(1)(A)-(D).

Each of these four sequential adjustments, listed chronologically, cross-references another section. "[F]irst," the statute directs the plan sponsor to adjust the employer's allocable amount of unfunded vested benefits "by any de minimis reduction applicable under section 1389 of this title." *Id.* § 1381(b)(1)(A). "[N]ext," the statute directs the plan sponsor, "in the case of a partial withdrawal," to adjust the value resulting from the first step "in accordance with section 1386 of this title." *Id.* § 1381(b)(1)(B). "[T]hen," the statute directs the plan sponsor to apply the third adjustment "to the extent necessary to reflect the limitation on annual payments under section

1399(c)(1)(B) of this title." *Id.* § 1381(b)(1)(C). "[F]inally," the statute directs the plan sponsor to make the adjustment "in accordance with section 1405 of this title." *Id.* § 1381(b)(1)(D). This final adjustment applies in situations where an employer sells all its assets to a third party or liquidates or dissolves.

The parties' dispute turns on the second step, which references section 1386. The title of section 1386 is "Adjustment for partial withdrawal; determination of amount; reduction for partial withdrawal liability; procedures applicable." It has two main subsections that match the title description. Subsection 1386(a) adjusts an employer's partial withdrawal liability to account for the fact that it is not complete. Subsection 1386(b) provides a reduction against the withdrawal liability of an employer in a subsequent year by the amount of its current partial withdrawal liability:

> In the case of an employer that has withdrawal liability for a partial withdrawal from a plan, any withdrawal liability of that employer for a partial or complete withdrawal from that plan in a subsequent plan year shall be reduced by the amount of any partial withdrawal liability (reduced by any abatement or reduction of such liability) of the employer with respect to the plan for a previous plan year.

Id. § 1386(b)(1).

The third step, although not central to the dispute, explains why the parties are litigating. Simply put, this step limits an employer's liability to no more than twenty annual payments. Subsection 1399(c)(1)(B) results in an employer, except in cases of mass withdrawals, paying the lesser of (1) the twenty-year cap or (2) the amount "determined under section 1391" as adjusted by the first two steps of section 1381. If the latter value exceeds twenty years, then the employer's liability "shall be limited to" the first twenty annual payments determined under subsection 1399(c)(1)(C). This limitation is colloquially referred to as "the twenty-year cap." And the practical effect of the statute's subsection 1399(c)(1)(B) lesser-of payment structure is that, in some cases, "employers may not fully refund a pension plan." *Trustees of Loc. 138 Pension Tr. Fund v. F.W. Honerkamp Co. Inc.*, 692 F.3d 127, 135 (2d Cir. 2012).

B.

With this statutory framework in mind, I turn to the facts of this case.

Perfection Bakeries produces and distributes baked goods. Two Perfection facilities, one in Indiana and the other in Michigan, employed workers represented by the Retail, Wholesale and Department Store International Union and Industry Pension Fund. A collective bargaining agreement at each location required Perfection to contribute to the Fund.

In 2016, Perfection stopped offering pension benefits to the union employees in the Michigan facility and stopped contributing to the Fund. This action, withdrawing from one facility, amounted to a partial withdrawal. The parties agree that Perfection's partial withdrawal liability in 2016 (adjusted to present value) was $2,228,268.

Two years later, Perfection completely withdrew from the Fund. Following this complete withdrawal, the Fund calculated Perfection's partial withdrawal liability for 2016 and complete withdrawal liability for 2018. At first, the Fund's actuary applied the partial withdrawal credit after the twenty-year cap, as he has done for every such transaction over his thirty-one-year career. But, due to the Ninth Circuit's intervening judicial decision, the Fund's actuary changed his methodology and applied the partial withdrawal credit at the second step before applying the twenty-year cap.

Under the Fund's interpretation, at the time of Perfection's complete withdrawal, Perfection's allocable amount of unfunded vested benefits amounted to $17,331,978. The amount of the partial withdrawal credit was $1,962,408. After applying the prior partial withdrawal credit at step two, Perfection's allocable amount of unfunded vested liability reduced to $15,369,570. Then the Fund determined that the twenty-year cap was $6,318,741, limiting Perfection's withdrawal liability to that amount.

Perfection agreed that the credit was $1,962,408, but disagreed with the Fund's application of that credit at the second step before the twenty-year cap. Under Perfection's interpretation, its allocable amount of unfunded vested benefits was $17,331,978. No partial withdrawal credit is applied at step two. Applying the twenty-year cap takes the withdrawal liability to $6,318,741. Then, the $1,962,408 credit from Perfection's prior partial withdrawal is applied to that figure for a withdrawal liability of $4,356,333.

Arbitration, then litigation, ensued. And here we are.

II.

In a statutory interpretation case like this one, our task begins, and often ends, with the statute's text. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). We give the words of a statute "their ordinary meaning and import, or such meaning as is given to them by the common sense and understanding of mankind." *United States v. Prescott*, 44 U.S. 578, 581 (1845). "We do not look at one word or term in isolation, but instead we look to the entire statutory context." *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999). The goal is to "determin[e] the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (2012).

The statute we are asked to construe in this case is complex—with its many cross references, defined terms, and calculations within calculations. But, if we approach the text as an ordinary user of the statute—a plan sponsor trying to determine how much an employer owes the plan, *see* 29 U.S.C. § 1382—the statute becomes much clearer.

I will start with the parties' arguments and then briefly respond to two points in the majority opinion.

A.

Let's start with where the parties agree. When Perfection gave notice that it intended to partially withdraw from the plan, the plan sponsor started its liability calculation by determining Perfection's share of the plan's "unfunded vested benefits" under section 1391. Then it turned to section 1381 to "adjust" that amount through the four steps. At step two, the plan sponsor recognized that this was a "case of a partial withdrawal," so it turned to section 1386. It applied subsection 1386(a) to calculate Perfection's partial withdrawal liability. And, under subsection 1386(b), it knew to give Perfection a credit that matched its partial withdrawal liability for any future withdrawal liability that Perfection accrued in a "subsequent plan year."

Now to where the parties disagree. Perfection did, in fact, make an additional withdrawal in a subsequent plan year; Perfection gave notice that it intended to completely withdraw from the plan. The plan sponsor calculated Perfection's liability for that complete withdrawal by, again, assessing its share of "unfunded vested benefits" under section 1391 and, again, walking through the four steps in section 1381. When the plan sponsor got to step two, it determined that this complete withdrawal was also a "case of a partial withdrawal," because of Perfection's preceding partial withdrawal. So the plan sponsor referred to subsection 1386(b), but not subsection 1386(a), and applied the credit that Perfection had earned from its prior partial withdrawal to the "unfunded vested benefits" as adjusted by the first step. Then the plan sponsor went back to steps three and four in section 1381 to finish calculating Perfection's complete withdrawal liability.

Perfection argues that the plan sponsor erred by applying the partial withdrawal credit at step two. Perfection argues that the plain meaning of subsection 1386(b) requires a dollar-for-dollar reduction to its subsequent "withdrawal liability" as calculated through all four steps of section 1381 because, among other reasons, its complete withdrawal was not a "case of a partial withdrawal" that even implicated the cross reference to section 1386.

I agree with Perfection. I believe its reading best accords with how an ordinary person would understand the text of section 1386, section 1381, and the rest of the statute as a whole. This is so for three reasons.

First, subsection 1386(b)(1) speaks solely in terms of reducing "withdrawal liability." Specifically, it says that "any withdrawal liability of that employer for a partial or complete withdrawal from that plan in a subsequent plan year shall be reduced by the amount of any partial withdrawal liability." *Id.* "Withdrawal liability" is defined by the statute as "the amount determined" by the four-step process in section 1381. "Statutory definitions control the meaning of statutory words . . . in the usual case." *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949); s*ee also Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition . . . ."). And I have no doubt that, in a statute as complex as this one, Congress used the words "withdrawal liability" as it had defined the term—to refer to the amount calculated *after* the application of the four steps in section 1381.

Perfection's reading of the statute applies the reduction to "withdrawal liability"—the amount at the end of the four-step process—as the text of the statute provides. But the Fund's alternative reading does not. The Fund's reading does not directly "reduc[e]" the employer's "withdrawal liability." It reduces some other figure—whatever amount is calculated after step one but before step three.

In many ways, the Fund's reading of the statute would substitute "withdrawal liability" in subsection 1386(b) with the phrase "unfunded vested benefits," which is also a defined term. Subsection 1381(b)(1) provides that the "allocable amount of unfunded vested benefits" (which is determined by the calculations provided in section 1391) will be adjusted by the four steps to arrive at withdrawal liability. And, sure enough, the cross-referenced sections in steps one, three, four and subsection 1386(a) all reference "unfunded vested benefits," or section 1391's calculation for that value, as the starting point for the adjustment. *See* 29 U.S.C. § 1389(a); *id.* § 1386(a); *id.* § 1399(c)(1)(A)(i); *id.* § 1405(a)(1). Likewise, subsection 1386(a), the third step, and the fourth step expressly reference the adjustments in the other steps. *See id.* § 1386(a)(1); *id.* § 1399(c)(1)(A)(i); *id.* § 1405(a)(1). But subsection 1386(b) applies only to "withdrawal liability" without any reference to "unfunded vested benefits" or any of the steps in section 1381. Although these cross references are complicated, the relevant principle of interpretation is simple: "when Congress uses different language in similar sections, it intends different meanings." *Iraola & CIA, S.A. v. Kimberly-Clark Corp.*, 232 F.3d 854, 859 (11th Cir. 2000).

The Fund argues that Perfection's reading adds an extratextual fifth step to the calculation of withdrawal liability in section 1381. But that's not true. Section 1381 tells us how to calculate "withdrawal liability" through the four steps, and the reduction in subsection 1386(b) applies to "withdrawal liability" as calculated. As I see it, the Fund's argument is like saying that slicing a completed cake adds a step to the cake recipe. Even though "withdrawal liability" is fully calculated by following the four steps, "withdrawal liability" can still be modified after it is calculated. In other words, the enumeration of four steps in section 1381 to calculate "withdrawal liability" doesn't preclude additional changes to "withdrawal liability" after those four steps are complete.

Second, Perfection's position is most consistent with the ordinary, commonsense meaning of "in the case of a partial withdrawal" at step two. That step says, in relevant part, that "the withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted . . . next, *in the case of a partial withdrawal*, in accordance with section 1386 of this title." 29 U.S.C. § 1381(b)(1)(B) (emphasis added). Perfection says that this phrase means that, when the withdrawal liability that is being calculated is based on a partial withdrawal, one must refer to section 1386. The Fund reads "in the case of a partial withdrawal" to apply the cross reference both (1) when the withdrawal liability being calculated is based on a partial withdrawal and (2) when there has been a partial withdrawal at any point in the past.

The Fund's broader reading of this phrase—that the cross reference also refers to any withdrawal that follows a partial withdrawal—is not the most natural way to understand the phrase "in the case of a partial withdrawal" in the context of the statute. The statute consistently distinguishes between liability for a "complete withdrawal" and a "partial withdrawal." *Compare* 29 U.S.C. § 1381(b)(2), *with* § 1381(b)(3). These terms are mutually exclusive—either a withdrawal is complete, or it is partial. The steps in section 1381 exist so that a plan sponsor can calculate an employer's "withdrawal liability" after the employer has chosen either a "complete withdrawal" as defined in section 1383 or a "partial withdrawal" as defined in section 1385. In this context, the average person would read the cross reference as referring to the event that triggered the assessment of withdrawal liability, not some other event that happened earlier. Step two, then, applies when a plan sponsor is determining the consequences of an employer's present partial withdrawal—that's the "case of a partial withdrawal." *See id.* § 1381(b)(1)(B).

My reading of "case of partial withdrawal" in section 1381 is confirmed by the text of section 1386. *See MSPA Claims 1, LLC v. Tenet Florida, Inc.*, 918 F.3d 1312, 1322 (11th Cir. 2019) (noting that we must read a cross reference "in conjunction with the provision being interpreted"). Section 1386 does two main things. Under subsection (a), it adjusts the "amount determined under section 1391"—that is, the allocable amount of unfunded vested benefits—to account for the partial nature of a partial withdraw. And, under subsection (b), it provides a credit toward *future* withdrawal liability in a "subsequent" plan year based on the amount of the partial withdrawal liability after it is calculated through the four steps. Subsection (a) refers the reader back to step three and step four to finalize the calculation of partial withdrawal liability ("before the application of sections 1399(c)(1) and 1405 of this title"), but subsection (b) does not reference those provisions at all.

Both subsection (a) and subsection (b) operate at the time of a partial withdrawal—(a) adjusts the present partial withdrawal liability and (b) provides an offset to any "subsequent" liability based on the amount of the present partial withdrawal liability. But, when a plan sponsor is calculating liability for a complete withdrawal, section 1386 has nothing to do. There are no calculations to perform under subsection (a) and no credit to assign to a "subsequent" plan year under subsection (b).

Third, although not dispositive, my view is consistent with the Pension Benefit Guarantee Corporation's longstanding interpretation of these provisions. The statute gives the Corporation a rulemaking role. *See* 29 U.S.C. § 1386(b)(2). And, in an opinion letter issued shortly after the statute's enactment, the Corporation read the reduction in subsection 1386(b) to offset "withdrawal liability" after all the calculations in section 1381 are completed. *See* Pension Benefit Guar. Corp, Opinion Letter 85-4 (Jan. 30, 1985). The Corporation explained that the credit "is an adjustment to withdrawal liability, i.e. a further adjustment to the [s]ection [1381] amount" and, therefore, "must be made after the employer's subsequent withdrawal liability is calculated in accordance with [section 1381]." *Id.* The Corporation's position was apparently not challenged until the dispute that led to the Ninth Circuit's opinion in the mid-2010s.

Although we owe no special deference to this opinion letter, the Supreme Court has recognized that agency "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024). I believe this letter reflects such an interpretation. The letter was issued within a few years of the statute's passage and has been followed by the regulated community for thirty or forty years. *See United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 549 (1940) (giving weight to the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion"). For example, the Fund's actuary testified that he has followed the opinion letter for every calculation he has made over his thirty-one years of experience, including, initially, in this case. *See* Scalia & Garner, *supra*, at 71 ("In everyday life, the people to whom rules are addressed continually understand and apply them."). Especially when we are dealing with a complex statute with multiple potential interpretations, a longstanding practice like this seems a particularly good indication of the statute's ordinary meaning.

B.

Turning to the majority opinion, it makes two points that warrant a response.

First, the majority opinion finds it important that step two in subsection 1381(b)(1)(B) "expressly incorporates *all* of § 1386" instead of just 1386(a). I agree. But I think the majority opinion draws the wrong conclusion from that textual fact. My reading applies *all* of section 1386 at the same time when the initial partial withdrawal occurs. Subsection (a) tells the plan sponsor how to calculate that year's partial withdrawal liability (including a cross reference back to step three and step four to get the final amount) and subsection (b) tells it to book a credit in the amount of that year's partial withdrawal liability against any withdrawal liability in a "subsequent" plan year.

The majority opinion's reading, however, splits section 1386 into its constituent parts and applies them in a piecemeal fashion over two different transactions. This is how the majority opinion's reading works in practice. At the time of the initial partial withdrawal, only subsection (a) applies—to calculate the partial withdrawal liability for that year. At the time of a future complete withdrawal, only subsection (b) has a field of operation—to apply a credit in the amount of the previous year's partial withdrawal liability at step two of calculating the new year's complete withdrawal liability. The majority opinion's position applies both parts of section 1386 at the same time only when the second transaction is also a partial withdrawal; then, the plan sponsor would refer to subsection (a) to calculate liability for the present year and turn to subsection (b) to apply a credit from a previous year's partial withdrawal in an unrelated amount based on that earlier, unrelated transaction. If someone were concerned about applying "*all* of § 1386," I think he would follow my reading and not the majority opinion's.

Second, the majority opinion says that the partial withdrawal credit must be deducted before "the completion of the four-step process" or else "the process doesn't yield the 'amount' for which the employer 'is liable to the plan.'" I think this inference—which is otherwise logical—ignores the complete text of the statute. Several other sections of the statute expressly reduce or change "withdrawal liability" *after* the plan sponsor fully applies the four steps in section 1381. For example, section 1387 (which is not cross referenced at all in the four steps) provides for "the reduction or waiver of liability for a complete withdrawal" if an employer returns to the plan. 29 U.S.C. § 1387(a). Section 1388 (also not cross referenced in the four steps) provides for a reduction of partial withdrawal liability if "the number of contribution base units with respect to which the employer has an obligation to contribute under the plan for each such year is not less than 90 percent" of the employer's "high base year." 29 U.S.C. § 1388(a)(1). Because the statute expressly contemplates changes to "withdrawal liability" after it is calculated, there is nothing odd about applying the partial withdrawal credit in subsection 1386(b) in the same way.

III.

I recognize that my reading of the statute is not the only potential reading. But I believe it is the best one. Because the statute requires that Perfection's "subsequent" complete withdrawal liability be "reduced" by its previous partial withdrawal liability, the Fund's actuary was right the first time. Because the majority opinion concludes otherwise, I respectfully dissent.

APPENDIX B

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-12533

PERFECTION BAKERIES INC.,

Plaintiff-Counter Defendant-Appellant,

versus

RETAIL WHOLESALE AND DEPARTMENT STORE INTERNATIONAL UNION AND INDUSTRY PENSION FUND,

Defendant-Counter Claimant-Appellee.

Appeal from the United States District Court

for the Northern District of Alabama

D.C. Docket No. 2:22-cv-00573-ACA

Before JORDAN, NEWSOM, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellant Perfection Bakeries, Inc. is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Civil Action No. 2:22-cv-573-ACA

PERFECTION BAKERIES, INC.,

PLAINTIFF,

V.

RETAIL WHOLESALE & DEP'T STORE INT'L UNION & INDUS. PENSION FUND,

DEFENDANT.

Filed: July 7, 2023

MEMORANDUM OPINION

Perfection Bakeries, Inc. makes breads, buns, muffins, and other bakery products. Some of its employees in Saginaw, Michigan and Fort Wayne, Indiana were members of different Locals of the Retail, Wholesale and Department Store Union. As a result, Perfection Bakeries contributed to a pension plan for those employees. In 2016, Perfection Bakeries stopped offering pension benefits to union employees in Saginaw, Michigan. Two years later, it completely withdrew from the plan.

Under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, an employer that withdraws from a pension plan to which it has previously contributed must pay a penalty called its "withdrawal liability." As the Supreme Court has explained, this penalty "cover[s] that employer's fair share of the plan's unfunded liabilities." *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 415, 115 S. Ct. 981, 130 L. Ed. 2d 932 (1995). The Retail Wholesale and Department Store International Union and Industry Pension Fund ("the Fund") calculated Perfection Bakeries' withdrawal liabilities for both the partial withdrawal and the complete withdrawal. Though the parties agree that the Fund correctly calculated the partial withdrawal liability, they dispute the proper way to calculate the complete withdrawal liability.

The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381(b), sets out a formula to calculate an employer's withdrawal liability. The formula calls for the plan sponsor to calculate the withdrawing employer's "allocable amount of unfunded vested benefits" (*i.e.*, its proportional share of the plan's underfunding) and then to apply four potential adjustments to that number. *Id.* A separate section of the MPPAA provides that where an employer incurs withdrawal liability in successive withdrawals from the plan, the later withdrawal liability "shall be reduced" by the earlier withdrawal liability. *Id.* § 1386(b)(1). The parties refer to this reduction as the "partial withdrawal liability credit." This court will use the same terminology or call it simply "the credit."

The parties' disagreement centers on where to apply the partial withdrawal liability credit when calculating the complete withdrawal liability. The Fund contends that the credit is applied as part of the second potential adjustment described in § 1381(b). Perfection Bakeries contends that the credit is not one of the adjustments but is instead applied after all the adjustments. An arbitrator agreed with the Fund and ordered Perfection Bakeries to pay both withdrawal liabilities assessed by the Fund.

Perfection Bakeries then filed this lawsuit, seeking modification or vacatur of the arbitration award and an order directing the Fund to recalculate the 2018 complete withdrawal liability. The Fund counterclaimed, seeking to enforce and confirm the arbitrator's award. The parties then cross-moved for summary judgment. (Docs. 29, 36). Because the court interprets the statute to require application of the credit as part of the second potential adjustment, the court **WILL DENY** Perfection Bakeries' motion for summary judgment and **WILL GRANT** the Fund's motion for summary judgment.

I. BACKGROUND

Normally on cross-motions for summary judgment, the court "draw[s] all inferences and review[s] all evidence in the light most favorable to the non-moving party." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1239 (11th Cir. 2018) (quotation marks omitted). But this case involves review of an arbitrator's award, 29 U.S.C. § 1401(b)(2), requiring the court to apply a different standard, *see Trs. of Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emps. v. Wolf Crane Serv., Inc.*, 374 F.3d 1035, 1039 (11th Cir. 2004). The court must review the arbitrator's findings of fact for clear error and his conclusions of law *de novo*. *Id.* No party challenges any of the arbitrator's factual findings; the only dispute is about how to interpret 29 U.S.C. §§

1381(b) and 1386(b). The court's review is therefore *de novo*.

1. Legal Framework

ERISA "seeks to make the benefits promised by an employer more secure by mandating certain oversight systems and other standard procedures." *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 320-21, 136 S. Ct. 936, 194 L. Ed. 2d 20 (2016). One of ERISA's main purposes "was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984). As a result, "ERISA required employers to make contributions that would produce pension plan assets sufficient to meet future vested pension liabilities." *Milwaukee Brewery Workers' Pension Plan*, 513 U.S. at 416.

But employers can withdraw from pension plans. *Cf.* 29 U.S.C. §§ 1383, 1385. The withdrawal can be complete (when an employer "permanently ceases to have any obligation to contribute under the plan" or "permanently ceases all covered operations under the plan") or partial (when the employer's contributions decline by 70% or the employer's contribution obligation partially ceases). *Id.* §§ 1383(a), 1385(a).

To address concerns about employers withdrawing from underfunded pension plans, "ensuring the plan's demise," Congress passed the MPPAA, 29 U.S.C. §§ 1381-1461. *See Milwaukee Brewery Workers' Pension Plan*, 513 U.S. at 417. The MPPAA "requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan." *Pension Benefit Guar. Corp.*, 467 U.S. at 725; *see also*

Milwaukee Brewery Workers' Pension Plan, 513 U.S. at 415 ("[The MPPAA] provides that an employer who withdraws from an underfunded multiemployer pension plan must pay a charge sufficient to cover that employer's fair share of the plan's unfunded liabilities.") (citation omitted); *Connors v. Ryan's Coal Co.*, 923 F.2d 1461, 1463 (11th Cir. 1991) ("The basic concept of the provision is that each employer, in addition to the contributions to the plan pursuant to collective bargaining agreements, owes a share of the unfunded vested liability of the plan to its beneficiaries."). That debt is the employer's "withdrawal liability," and the employer incurs that liability whether the withdrawal is partial or complete. *See* 29 U.S.C. § 1381(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."); *Pension Benefit Guar. Corp.*, 467 U.S. at 725.

The MPPAA sets out a formula for calculating an employer's withdrawal liability:

> The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted--
>
> (A) first, by any de minimis reduction applicable under section 1389 of this title,
>
> (B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,
>
> (C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

29 U.S.C. § 1381(b)(1).

a. The Allocable Amount of Unfunded Vested Benefits

The starting point for the calculation is "the allocable amount of unfunded vested benefits." *Id.* This is the withdrawing employer's proportional share of "the value of nonforfeitable benefits under the plan, less . . . the value of the assets of the plan." *Id.* § 1393(c); *see generally id.* § 1391. To put it more simply, this is the "withdrawing employer's fair share of a plan's underfunding." *Milwaukee Brewery Workers' Pension Plan*, 513 U.S. at 417 (stating that § 1391 "explains (a) how to determine a plan's total underfunding; and (b) how to determine an employer's fair share (based primarily upon the comparative number of that employer's covered workers in each earlier year and the related level of that employer's contributions)").

After calculating the allocable amount of unfunded vested benefits, the plan sponsor then applies four potential adjustments to that number, in sequential order, to reach the employer's withdrawal liability. *See* 29 U.S.C. § 1381(b)(1) ("[F]irst . . . next . . . then . . . finally . . . ."). Some, none, or all of the potential adjustments may be applicable in any given withdrawal. *See id.*

b. First Potential Adjustment: The de Minimis Reduction

The first potential adjustment is "any de minimis reduction applicable under section 1389 of this title." 29 U.S.C. § 1381(b)(1)(A). Section 1389 describes how to calculate the potential reduction to the allocable amount of unfunded vested benefits as well as situations in which the de minimis reduction will not apply. *Id.* § 1389. Because the specifics of this section do not matter in resolving this case (*see* doc. 32 at 32 n.16; doc. 33 at 16), the court will not delve any deeper into the de minimis adjustment.

c. Second Potential Adjustment: The Partial Withdrawal Adjustment

Section 1381(b)(1)(B) sets out the second potential adjustment. It provides: "[I]n the case of a partial withdrawal, in accordance with section 1386 of this title." 29 U.S.C. § 1381(b)(1)(B). This sentence is the heart of the dispute in this case, because § 1386 does two things. Section 1386(a) describes how to prorate an employer's allocable amount of unfunded vested benefits, adjusted by the de minimis reduction, to account for the fact that the employer only partially withdrew. *Id.* § 1386(a). Section 1386(b) describes the partial withdrawal liability credit and directs the Pension Benefit Guaranty Corporation ("PBGC"), a federally chartered corporation, to prescribe regulations governing the credit. *Id.* § 1386(b); *see* 29 U.S.C. § 1302(a); *Pension Benefit Guar. Corp. v. 50509 Marine LLC*, 981 F.3d 927, 929 (11th Cir. 2020). The Fund asserts that the reference to § 1386 in § 1381(b)(1)(B) incorporates both the proration calculation and the credit; Perfection Bakeries asserts that the reference to § 1386 incorporates only the proration calculation. (Doc. 32 at 20; doc. 33 at 6-7).

Because § 1386 is central to the dispute in this case, the court will describe it in detail. As noted in the preceding paragraph, § 1386(a) describes how to perform the proration required to account for a partial withdrawal:

> The amount of an employer's liability for a partial withdrawal, before application of sections 1399(c)(1) and 1405 of this title, is equal to the product of . . . the amount determined under section 1391 of this title, and adjusted under section 1389 of this title if appropriate, determined as if the employer had withdrawn from the plan in a complete withdrawal . . . multiplied by [a fraction derived from the employer's contributions during a specified period of time].

29 U.S.C. § 1386(a). In simpler terms, § 1386(a) directs the Fund to calculate the allocable amount of unfunded vested benefits (as if the withdrawal were complete), apply the de minimis reduction if applicable, and then prorate that number to account for the fact that the withdrawal is partial. *See id.* After proration, the fund must apply the two final potential adjustments if applicable. *Id.*

Neither party disputes this reading of § 1386(a) or how it interacts with § 1381(b)(1)(B). (*See* doc. 32 at 31; doc. 39 at 24). They diverge about whether § 1381(b)(1)(B) also incorporates § 1386(b). (*See generally* doc. 32 at 18; doc. 33 at 6). Section 1386(b) first provides instructions for how to account for an employer's successive withdrawals from a plan:

> In the case of an employer that has withdrawal liability for a partial withdrawal from a plan, any withdrawal liability of that employer for a partial or complete withdrawal from that plan in a subsequent plan year shall be reduced by the amount of any partial withdrawal liability (reduced by any abatement or reduction of such liability) of the employer with respect to the plan for a previous plan year.

29 U.S.C. § 1386(b)(1).

To simplify, § 1386(b)(1) addresses a situation in which an employer partially withdraws from a plan and is assessed partial withdrawal liability, then in a later year partially or completely withdraws from the same plan and is again assessed withdrawal liability. It mandates that, in that situation, the plan sponsor must "reduce[]" the later withdrawal liability "by the amount of any partial withdrawal liability" from the earlier year. *Id.* The Fund contends that the reduction mandated by § 1386(b) takes place during the second potential adjustment described in § 1381(b)(1)(B); Perfection Bakeries contends that it does not occur until after all four potential adjustments have been applied. (Doc. 32 at 20; doc. 33 at 6-7).

Section 1386(b)(2) then directs the PBGC to prescribe regulations "to provide for proper adjustments in the reduction provided by paragraph (1) . . . so that the liability for any complete or partial withdrawal in any subsequent year (after the application of the reduction) properly reflects the employer's share of liability with respect to the plan." 29 U.S.C. § 1386(b)(2). In compliance with that directive, the PBGC promulgated 29 C.F.R. §§ 4206.1 to 4206.10. One of those regulations provides that the partial withdrawal credit must equal or exceed zero:

> Whenever an employer that was assessed withdrawal liability for a partial withdrawal from a plan partially or completely withdraws from that plan in a subsequent plan year, it shall receive a credit against the new withdrawal liability in an amount greater than or equal to zero, determined in accordance with this part. If the credit determined under [the regulations] is less than zero, the amount of the credit shall equal zero.

29 C.F.R. § 4206.3.

d. Third Potential Adjustment: The 20-Year Cap

The third potential adjustment under § 1381(b) is "to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title." 29 U.S.C. § 1381(b)(1)(C). Section 1399(c)(1)(B) describes the so-called "20-year cap." (*See* doc. 32 at 17; doc. 33 at 7). Understanding the 20-year cap requires a brief overview of § 1399 in general.

Section 1399 gives withdrawing employers a choice about how to pay the withdrawal liability: in a lump sum payment or in installments. *See* 29 U.S.C. § 1399(c)(1), (c)(4); *Milwaukee Brewery Workers' Pension Plan*, 513 U.S. at 418. Section 1399(c)(1)(A)(i) provides that, with some exceptions, "an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C)." Subparagraph (C) "(roughly speaking) equals the withdrawing employer's typical contribution in earlier years." *Milwaukee Brewery Workers' Pension Plan*, 513 U.S. at 418; *see* 29 U.S.C. § 1399(c)(1)(C).

In plain language, § 1399(c) requires the plan sponsor to calculate the allocable amount of unfunded vested benefits, apply the first two potential adjustments, and then calculate how long it would take to pay that amount (plus interest) if the employer continued its previous rate of contributions.[1] If it

[1] The Supreme Court has provided a helpful illustration:

would take more than twenty years to pay, "the employer's liability shall be limited to the first 20 annual payments." 29 U.S.C. § 1399(c)(1)(B). This is the "20-year cap"—it is a cap on the amount of money a plan can collect from a withdrawing employer.

e. Fourth Potential Adjustment: The § 1405 Adjustment

The fourth and final potential adjustment is "in accordance with section 1405 of this title." 29 U.S.C. § 1381(b)(1)(D). Section 1405—which is titled "[l]imitation on withdrawal liability"—describes how to adjust the "unfunded vested benefits allocable to an employer" when the employer is either selling substantially all of its assets in an arm's-length transaction to an unrelated party or when the employer is undergoing liquidation or dissolution. *Id.* § 1405(a)-(b). Section 1405(a), which addresses a sale of substantially all the employer's assets, specifically provides for a cap on "the unfunded vested benefits allocable to an employer (after the application of all sections of this part having a lower number designation than this section)." *Id.* § 1405(a)(1).

> [A]ssume that an employer withdraws from an underfunded plan . . . ; that the withdrawal [liability] . . . is $23.3 million; that the employer normally contributes about $4 million per year to the plan; and that the plan uses a 7% interest rate. In that case, the statute asks: "How many annual payments of about $4 million does it take to pay off a debt of $23.3 million if the interest rate is 7%?"

Milwaukee Brewery Workers Pension Plan, 513 U.S. at 419.

f. Pension Benefit Guaranty Corporation Opinion Letter 85-4[2]

The PBGC is a federally chartered corporation "charged with protecting the retirement incomes of workers in private-sector defined benefit pension plans." *Pension Benefit Guar. Corp.*, 981 F.3d at 929; *see* 29 U.S.C. § 1302(a). In 1985, the PBGC issued Opinion Letter 85-4 to address a question about how a plan sponsor accounts for a previous partial withdrawal when calculating a later, successive withdrawal. U.S. Dep't of Labor, Pension Benefit Guar. Corp., Opinion Letter 85-4 (Jan. 30, 1985). Opinion Letter 85-4 acknowledged two potential methods. In the first method, the plan sponsor calculates the second withdrawal liability "without regard to the prior year's partial withdrawal[] and then reduces the current amount of withdrawal liability by the amount of the previously assessed liability." *Id.* at 1. A calculation performed under the first method would look like this:

> Step 1: Calculate the allocable amount of unfunded vested benefits (§ [1391])
>
> Step 2: Subtract de minimis deductible, if any (§ [1389])
>
> Step 3: If partial withdrawal has occurred, multiply by partial withdrawal fraction (§ [1386(a)])
>
> Step 4: Make any additional adjustments required by [§ 1381(b)] (§§ [1399, 1405])

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[2] Although Opinion Letter 85-4 does not appear in the record, the court takes judicial notice of it. *See* Fed. R. Evid. 201(b).

> Step 5: Reduce withdrawal liability by the amount of any previously assessed partial withdrawal liability (§ [1386(b)(1)])

Id. (one alteration omitted).

In the second method described in Opinion Letter 85-4, the plan sponsor calculates the allocable amount of unfunded vested benefits, subtracts any de minimis reduction, subtracts any prior year's partial withdrawal liability, and then completes the remaining steps. *Id.* at 1. A calculation performed under the second method would look like this:

> Step 1: Calculate the allocable amount of unfunded vested benefits (§ [1391])
>
> Step 2: Subtract de minimis deductible, if any (§ [1389])
>
> Step 3: Subtract amount of any previously assessed partial withdrawal liability (§ [1386(b)(1)])
>
> Step 4: If partial withdrawal has occurred, multiply by partial withdrawal fraction (§ [1386(a)])
>
> Step 5: Make any additional adjustments required by Section [1381(b)] (§§ [1399, 1405])

Opinion Letter 85-4 at 1 (one alteration omitted).

The PBGC opined that "Method 1 is correct and Method 2 is clearly erroneous." *Id.* It explained that § 1381(b)(1) "defines withdrawal liability as the result of four potential adjustments to an employer's allocable amount of unfunded vested benefits." *Id.* None of those potential adjustments include application of the partial withdrawal liability credit. *Id.* In the PBGC's opinion, two reasons supported its interpretation that § 1386(b) is not a part of the potential adjustment set out in § 1381(b)(1)(B).

First, by its own terms, § 1386(b) promises a reduction to "withdrawal liability." Opinion Letter 85-4 at 2. The PBGC considered the MPPAA to provide a specific definition of "withdrawal liability": the amount reached after applying all four potential adjustments. *See id.* And, if "withdrawal liability" is reached only after applying all adjustments, it is not possible for one of the adjustments to include a credit to "withdrawal liability." *See id.* In other words, the PBGC believed that if the § 1386(b) reduction were applied as one of the potential adjustments, it would actually be an adjustment to the "allocable amount of unfunded vested benefits" instead of the "withdrawal liability."

Second, the PBGC highlighted the fact that the second potential adjustment applies only "in the case of a partial withdrawal," Opinion Letter 85-4 at 1, while § 1386(b) "applies to either a partial or complete withdrawal," *id.* at 2 (alteration omitted). Given these two reasons, the PBGC concluded that "the reduction in an employer's withdrawal liability required by [§ 1386(b)(1)] on account of a previous partial withdrawal assessment must be made after the employer's subsequent withdrawal liability is calculated in accordance with [§ 1381(b)] (without regard to [§ 1386(b)(1)])." *Id.* In short, the PBGC opined that § 1381(b)(1)(B)'s reference to § 1386 was really only to § 1386(a).

g. Ninth Circuit Decision

In 2018, the Ninth Circuit issued its decision in *GCIU-Employer Ret. Fund v. Quad/Graphics, Inc.*, 909 F.3d 1214, 1216 (9th Cir. 2018), approving the second method described in Opinion Letter 85-4—the method the PBGC disfavored. The Ninth Circuit rejected Opinion Letter 85-4 as unpersuasive and a misconstruction of the statute's plain language. *Id.* at 1218-19. Instead, it held that given § 1381(b)'s sequential language, the plan sponsor must apply any partial withdrawal liability credit *before* the 20-year cap. *Id.* at 1218.

In the Ninth Circuit's view, an employer's withdrawal liability is determined by calculating the allocable amount of unfunded vested benefits, subtracting any de minimis liability, and then crediting any prior partial withdrawals. *Id.* This is because the § 1386(b) credit "reduces the employer's complete withdrawal liability" while the 20-year cap "forgives debt" and "can only logically be applied after that withdrawal liability is calculated." *Id.*

<u>2. Facts</u>

Perfection Bakeries makes and distributes baked goods. (Doc. 31-23 at 2 ¶ 8). It operated facilities in Saginaw, Michigan and Ft. Wayne, Indiana, where some of its employees were members of different Locals of the Retail, Wholesale and Department Store Union. (*Id.* at 2 ¶¶ 9, 11). Perfection Bakeries contributed to a multiemployer pension fund for its employees consistent with its collective bargaining agreements, Perfection Bakeries had to contribute to a multiemployer pension fund—the Fund in this case. (*Id.*; doc. 1 at 4 ¶ 28; doc. 14 at 4 ¶ 28).

Perfection Bakeries partially withdrew from the pension plan in 2016 and completely withdrew from the plan in 2018. (Doc. 31-23 at 2-3 ¶¶ 13-14). In 2019, the Fund assessed Perfection Bakeries' partial withdrawal liability for the 2016 partial withdrawal and its complete withdrawal liability for the 2018 complete withdrawal. (*Id.* at 2-3 ¶¶ 13-14, 4 ¶ 28-29).

The parties agree that Perfection Bakeries' 2016 partial withdrawal liability was $2,228,268 and that its partial withdrawal liability credit amounts to $1,962,408.[3] (*Id.* at 3 ¶ 21; doc. 32 at 15 ¶ 50(1); doc. 39 at 10-13). The parties also agree that, for the starting point of the calculation, the allocable amount of unfunded vested benefits for the 2018 complete withdrawal was $17,331,978 and that the first adjustment is inapplicable. (Doc. 33 at 10 ¶ 11; doc. 38 at 5 ¶ 11; *see also* doc. 31-34 at 48). This is where the parties part ways.

In applying the second potential adjustment, the Fund, following the Ninth Circuit's *Quad/Graphics* decision, calculated a credit of $1,962,408 based on Perfection Bakeries' 2016 partial withdrawal liability and subtracted that credit from the allocable amount of unfunded vested benefits, yielding $15,369.570. (Doc. 31-34 at 48; *see* doc. 31-2 at 45-46, 163). The Fund then applied the third potential adjustment—the 20-year cap—to reach $6,318,741. (Doc. 31-34 at 48). Because no further adjustments applied (*see* doc. 31-34 at 48; *see also* doc. 31-2 at 127), the Fund determined that Perfection Bakers' withdrawal liability for the 2018 complete withdrawal was $6,318,741. (Doc. 31-2 at 130; *see* doc. 31-34 at 48).

Perfection Bakery contends the second potential adjustment does not apply because the 2018 withdrawal was a complete, not a partial, withdrawal. (*Id.* at 3; *see also id.* at 5). It asserts that, at the third potential adjustment, the 20-year cap reduced the result to $6,318,741 and that the fourth potential

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[3] The Fund initially calculated a different credit for the partial withdrawal, but the arbitrator ordered recalculation. (*See* doc. 1-1 at 45). The court uses the number the Fund provided after recalculating the credit.

adjustment was also inapplicable. (*Id.* at 4; *compare* doc. 31-34 at 48). At this point, Perfection Bakeries contends, the partial withdrawal liability credit of $1,962,408 should be applied to reduce its complete withdrawal liability to $4,090,473. (Doc. 31-11 at 4).[4]

In summary, the Fund's calculation results in a complete withdrawal liability of $6,318,741. (*See id.* at 4-5). Perfection Bakeries' calculation results in a complete withdrawal liability of $4,090,473. (*See id.* at 4). Perfection Bakeries requested arbitration as to the assessments of withdrawal liability for the 2016 and 2018 withdrawals. (Doc. 1 at 5 ¶ 34; doc. 14 at 4 ¶ 34). The arbitrator agreed with the Fund that the partial withdrawal liability credit should be applied as part of the second potential adjustment and ordered Perfection Bakeries to pay the assessed withdrawal liabilities for the 2016 partial withdrawal and the 2018 complete withdrawal.[5] (Doc. 1-1 at 36-41, 46).

II. DISCUSSION

Perfection Bakeries moves for summary judgment in its favor on its claim seeking to vacate or modify the arbitrator's decision. (Doc. 36 at 1; *see* doc. 1 at 8-9). The Fund moves for summary judgment in its favor on its counterclaim seeking to enforce and confirm the arbitrator's decision. (Doc. 29 at 1; *see* doc. 14 at 7-9). The question central to each motion is simple: does the

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[4] The expert report cited here uses the partial withdrawal liability credit that the Fund originally calculated. The arbitrator later ordered the Fund to recalculate the credit. (Doc. 1-1 at 46). The court uses the corrected credit.

[5] The arbitrator also found that the Fund had erred in its calculation of the amount of the partial withdrawal liability credit and ordered the Fund to recalculate that amount. (Doc. 1-1 at 46). Neither party challenges that part of the arbitrator's decision.

MPPAA require application of the partial withdrawal liability credit as part of the second potential adjustment or after application of all four potential adjustments? The answer is also simple: the MPPAA requires application of the credit as part of the second potential adjustment. But getting to that answer is not so simple.

It is axiomatic that a court interpreting a statutory provision must begin by looking to "the language of the statute itself." *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056, 203 L. Ed. 2d 433 (2019) (quotation marks omitted). Although the court has described § 1381 in detail already, the importance of the specific language in the section warrants quoting it again.

First, § 1381 provides that "[i]f 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." 29 U.S.C. § 1381(a). Section 1381(b) then describes how to calculate the withdrawal liability: first by calculating the allocable amount of unfunded vested benefits, then adjusting that amount by four potential adjustments:

> (A) first, by any de minimis reduction applicable under section 1389 of this title,
>
> (B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,
>
> (C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and
>
> (D) finally, in accordance with section 1405 of this title.

29 U.S.C. § 1381(b)(1).

Section 1381(b)(1)(B) refers to § 1386, which has two subsections. Section 1386(a) sets out how to prorate the allocable amount of unfunded vested benefits, adjusted by any applicable de minimis reduction, to account for an employer's withdrawal being partial. *Id.* § 1386(a). And § 1386(b)(1) mandates application of the partial withdrawal liability credit in cases involving an employer's successive withdrawals from a plan. *Id.* § 1386(b)(1).

Perfection Bakeries' position is essentially that "next, in the case of a partial withdrawal, in accordance with *section 1386* of this title" really means "next, in the case of a partial withdrawal, in accordance with *section 1386(a)* of this title." (*See generally* doc. 32). Perfection Bakeries makes two arguments in support of its position: (1) the terms "withdrawal liability," "adjustment," and "reduction" have specific meanings that, if used correctly, establish the necessity of applying the credit after all the potential adjustments; and (2) to the extent the statute is ambiguous, this court should defer to the PBGC's opinion letter and regulations. (Doc. 32 at 16-45; doc. 38 at 12-31). The Fund argues that (1) the plain language of § 1381(b)(1)(B) requires application of the credit as part of the second potential adjustment; (2) the statute does not define "withdrawal liability," "adjustment," and "reduction" in the ways Perfection Bakeries asserts; and (3) the PBGC's opinion letter does not warrant any deference because the statute is unambiguous. (Doc. 33 at 14-21; doc. 39 at 14-37; doc. 41 at 6-10).

Although the text of § 1381(b)(1)(B) does not speak in the clearest terms and the court does not find the reasoning in *Quad/Graphics* persuasive, the court ultimately agrees that "in the case of a partial withdrawal, in accordance with section 1386" incorporates all of § 1386, so that the partial withdrawal liability credit must be applied as part of the second potential adjustment.

The court will address the *Quad/Graphics* opinion first. Of course, the Ninth Circuit's opinion is not binding on this court, though it may have persuasive value. *Cf. McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004). In this case, the court finds a significant part of the Ninth Circuit's reasoning unpersuasive. The Court first correctly held that the unambiguous words of the statute require application of the credit as part of the second potential adjustment. *Quad/Graphics*, 909 F.3d at 1218. But having interpreted the plain language of the statute, the Ninth Circuit went on to conduct an atextual interpretation based on language, not from the statute, but from a Supreme Court decision that described the 20-year cap as a "debt forgiveness provision." *Id.* The Ninth Circuit reasoned that because the 20-year cap forgives debt, it "can only logically be applied after [the] withdrawal liability is calculated. The § 1386(b) credit reduces the employer's debt, and an employer cannot be forgiven a debt for which it is not liable." *Quad/Graphics*, 909 F.3d at 1218 (citation omitted).

This atextual interpretation of the statute is not persuasive. For one thing, it ignores the existence of the fourth potential adjustment, which by the statute's terms must be applied after the 20-year cap. *See* 29 U.S.C. § 1381(b)(1)(D). For another, the Supreme Court's reference to the 20-year cap as a debt forgiveness provision came in a case that had nothing to do with the order of operations in calculating an employer's withdrawal liability. *See generally Milwaukee Brewery Workers' Pension Plan*, 513 U.S. 414. Instead, that case involved when interest begins to accrue after an employer's withdrawal. *See id.* at 416. The Supreme Court used the phrase "debt forgiveness" to assist in conceptualizing the amortization calculation required under the statute. *Id.* at 419. The Supreme Court did not, by referring to the 20-year cap as a debt forgiveness provision, hold or even imply anything about the meaning of the term "withdrawal liability."

Nevertheless, the court does agree that the statute unambiguously requires the credit to be applied as part of the second potential adjustment. The second potential adjustment provides: "next, in the case of a partial withdrawal, in accordance with section 1386 of this title." 29 U.S.C. § 1381(b)(1)(B). The tension here is between the phrase "in the case of a partial withdrawal" and the reference to "section 1386" without specification of a subsection. At first glance, "in the case of a partial withdrawal" appears to limit application of the adjustment to situations in which a plan sponsor is calculating an employer's liability for a partial withdrawal, thereby excluding situations in which the employer's withdrawal is complete. *See, e.g.*, A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012) ("*Reading Law*") (describing the negative-implication canon, which provides that "[t]he expression of one thing implies the exclusion of others"); *LaCroix v. Town of Fort Myers Beach*, 38 F.4th 941, 949 (11th Cir. 2022) ("One familiar canon of statutory construction is 'expressio unius est exclusio alterius,' which explains that the mention of one thing implies the exclusion of another.") (some quotation marks omitted). But "[n]o canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions." *Reading Law* 59. Here, other principles overcome the negative-implication canon.

For example, § 1381(b)(1)(B) could easily have specified "section 1386(a)" if the drafters meant for the second potential adjustment to consist only of proration for current partial withdrawal calculations. *See Reading Law* 93 (explaining that under the omitted-case canon, "[n]othing is to be added to what the text states or reasonably implies"). The drafters did exactly that in the third potential adjustment, which specifies the applicable subsection, paragraph, and subparagraph of § 1399 to apply as an adjustment. *See* 29 U.S.C. § 1381(b)(1)(C). This indicates that Congress's decision to incorporate all of § 1386 was deliberate, rather than oversight or an unwritten implication. *See Reading Law* 167 (describing the whole-text cannon, "which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts"). Congress could also have included a fifth potential adjustment if it had intended for the credit to be applied at a different part of the calculation.

The whole-text canon supports this interpretation of the statute in other ways. Most significantly, the fourth potential adjustment is described as being the "final[]" adjustment. *See* 29 U.S.C. § 1381(b)(1)(D). That adjustment can be found in § 1405, which sets out limitations on an employer's allocable amount of unfunded vested benefits in two specific situations. *Id.* § 1405(a)-(b). Of particular relevance is the part of § 1405(a)(1) stating that when calculating withdrawal liability in one of those situations, "the unfunded vested benefits allocable to an employer (*after the application of all sections of this part having a lower number designation than this section*) . . . shall not exceed" certain amounts. *Id.* § 1405(a)(1) (emphasis added). By its clear and unambiguous terms, § 1405(a)(1) requires application of *all* of § 1386 before the fourth potential adjustment can be applied.

Similarly, § 1399(c)(1)(A)(i)—which generally describes the 20-year cap—requires the fund to calculate the allocable amount of unfunded vested benefits under § 1391, "adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title." As in § 1381(b), the reference is to § 1386 as a whole, not to any particular subsection of § 1386. The court rejects Perfection Bakeries' argument that "if appropriate" implicitly excludes § 1386(b) from the reference to § 1386 as a whole. "If appropriate" is more naturally read to refer to *any* potential adjustment found in § 1389 or § 1386.

The text of the MPPAA unambiguously indicates that the second adjustment includes the credit set out in § 1386(b). The phrase "in the case of a partial withdrawal," 29 U.S.C. § 1381(b)(1)(B), does not overcome the clarity of the rest of the statute. As the Fund argues and the arbitrator found, there is an interpretation of "in the case of a partial withdrawal" that permits that language to perform a function while still honoring the rest of the text. "In the case of a partial withdrawal" could bear two meanings: (1) "where an employer's current withdrawal is partial"; and (2) "where an employer has liability for a previous partial withdrawal." (Doc. 39 at 27-28; doc. 1-1 at 36-37).

Perfection Bakeries contends that this interpretation is incorrect because § 1381(b)(3) defines "partial withdrawal" by reference to 29 U.S.C. § 1385, which in turn sets out the ways to tell if an employer has partially withdrawn from a plan. (Doc. 32 at 27-28). According to Perfection Bakeries, because § 1385 does not mention the credit, "in the case of a partial withdrawal" must mean "in the case of a current partial withdrawal" and cannot include situations in which an employer's previous withdrawal was partial. (*Id.* at 28-29). Any other interpretation is, according to Perfection Bakeries, a rewrite of the statute. (*Id.* at 30-31). The court disagrees. Interpreting "in the case of a partial withdrawal" to trigger application of the adjustment whenever a partial withdrawal *has occurred* or *is occurring* is consistent with the plain language of § 1381(b)(1)(B) and the MPPAA as a whole. Indeed, given the clarity of the rest of the statute—in particular § 1405(a)(1)—any other reading could lead to a situation where the credit cannot be applied at all.

For example, an employer might partially withdraw then completely withdrew via a bona fide sale qualifying for an adjustment under § 1405(a)(1). Under Perfection Bakeries' reading, the partial withdrawal credit in § 1386(b) could not be applied as part of the second potential adjustment because the bona fide sale amounts to a complete withdrawal. But the "final" adjustment under § 1405 *requires* application of every section of the part "having a lower number designation than" § 1405. 29 U.S.C. § 1405(a)(1). In that situation, if the credit could not be applied at the second potential adjustment and could not be applied after the final adjustment, it could not be applied at all.

In sum, the court finds that, although § 1381(b)(1)(B) is not drafted in the clearest of terms, the canons of statutory interpretation support the Fund's reading of the statute. That ends the court's inquiry. But for the sake of completeness, the court will address Perfection Bakeries' remaining arguments.

Perfection Bakeries contends that the Fund's own actuary admitted at the arbitration that it does not make sense to use the previous partial withdrawal liability, which was capped under § 1399(c)(1)(B), to calculate a credit that will be applied against the uncapped allocable amount of unfunded vested benefits. (Doc. 32 at 46). Even if the court found Perfection Bakeries' characterization of the expert's testimony accurate, it does not find a witness's opinion about the actuarial sense of a calculation persuasive in interpreting the meaning of a statute. And even if the formula mandated by Congress were unfair or inconsistent, it is not the place of the court to rewrite or interpret the statute purposively to correct a perceived flaw in it. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381, 207 L. Ed. 2d 819 (2020) ("[A] policy concern cannot justify supplanting the text's plain meaning. It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.") (citation and quotation marks omitted).

Perfection Bakeries' next argument is that "[t]he purpose of the credit is to protect a withdrawing employer from being charged twice for the same unfunded vested benefits of the plan." 29 C.F.R. § 4206.1(a); *see* 29 U.S.C. § 1386(b)(2) (directing the PBGC to prescribe regulations for calculating the credit "so that the liability for any complete or partial withdrawal in any subsequent year . . . properly reflects the employer's share of liability with respect to the plan"); (*see* doc. 32 at 46). The court notes that the statement of purpose Perfection Bakeries relies on is from the PBGC, not Congress. *See* 29 C.F.R. § 4206.1(a). Nevertheless, even assuming that such a statement of purpose made in an agency's regulation could impact the court's interpretation of a statute, Perfection Bakeries has not established that application of the credit before the cap resulted in charging Perfection Bakeries twice for the same unfunded vested benefits of the plan.

Finally, Perfection Bakeries urges this court to find that, if its interpretation of the statute is unpersuasive, the statute is ambiguous and the PCBG's regulations and opinion letter are entitled to deference. As stated above, the statute is not ambiguous. But in the interest of completeness, the court finds in the alternative that neither the regulation nor the opinion letter alter the analysis. Section 4206.3 provides that if a withdrawing employer already has withdrawal liability from an earlier plan year, the employer "shall receive a credit against the new withdrawal liability in an amount greater than or equal to zero." 29 C.F.R. § 4206.3. To the extent the statute is ambiguous, the regulation does not clarify it, because it does not say anything about whether the credit must be applied as part of the second potential adjustment or after all adjustments have been made.

As for Opinion Letter 85-4, the court finds it unpersuasive. Agency opinions are "entitled to respect under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944), but only to the extent that those interpretations have the power to persuade." *Gregory v. First Title of Am., Inc.*, 555 F.3d 1300, 1302 (11th Cir. 2009) (cleaned up). The persuasiveness of an opinion letter rests on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. Perfection Bakeries' only argument about the persuasiveness of the opinion letter is that it is consistent with the text of the statute. But as the court has already found, the text of the statute is clear and requires application of the credit as part of the second potential adjustment. The court has considered the other factors on its own, but does not find the opinion persuasive.

III. CONCLUSION

The court **WILL DENY** Perfection Bakeries motion for summary judgment and **WILL GRANT** the Fund's motion for summary judgment. The court **WILL ENTER FINAL JUDGMENT** enforcing the arbitrator's award.

DONE and **ORDERED** this July 7, 2023.

/s/ Annemarie Carney Axon

ANNEMARIE CARNEY AXON

UNITED STATES DISTRICT JUDGE

APPENDIX D

29 USC §1381. 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.

(b) For purposes of subsection (a)—

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted—

(A) first, by any de minimis reduction applicable under section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term "complete withdrawal" means a complete withdrawal described in section 1383 of this title.

(3) The term "partial withdrawal" means a partial withdrawal described in section 1385 of this title.

APPENDIX E

29 USC §1386. Adjustment for partial withdrawal; determination of amount; reduction for partial withdrawal liability; procedures applicable

(a) The amount of an employer's liability for a partial withdrawal, before the application of sections 1399(c)(1) and 1405 of this title, is equal to the product of—

(1) the amount determined under section 1391 of this title, and adjusted under section 1389 of this title if appropriate, determined as if the employer had withdrawn from the plan in a complete withdrawal—

(A) on the date of the partial withdrawal, or

(B) in the case of a partial withdrawal described in section 1385(a)(1) of this title (relating to 70-percent contribution decline), on the last day of the first plan year in the 3-year testing period,

multiplied by

(2) a fraction which is 1 minus a fraction—

(A) the numerator of which is the employer's contribution base units for the plan year following the plan year in which the partial withdrawal occurs, and

(B) the denominator of which is the average of the employer's contribution base units for—

(i) except as provided in clause (ii), the 5 plan years immediately preceding the plan year in which the partial withdrawal occurs, or

(ii) in the case of a partial withdrawal described in section 1385(a)(1) of this title (relating to 70-percent contribution decline), the 5 plan years immediately preceding the beginning of the 3-year testing period.

(b)

(1) In the case of an employer that has withdrawal liability for a partial withdrawal from a plan, any withdrawal liability of that employer for a partial or complete withdrawal from that plan in a subsequent plan year shall be reduced by the amount of any partial withdrawal liability (reduced by any abatement or reduction of such liability) of the employer with respect to the plan for a previous plan year.

(2) The corporation shall prescribe such regulations as may be necessary to provide for proper adjustments in the reduction provided by paragraph (1) for—

(A) changes in unfunded vested benefits arising after the close of the prior year for which partial withdrawal liability was determined,

(B)changes in contribution base units occurring after the close of the prior year for which partial withdrawal liability was determined, and

(C) any other factors for which it determines adjustment to be appropriate,

so that the liability for any complete or partial withdrawal in any subsequent year (after the application of the reduction) properly reflects the employer's share of liability with respect to the plan.

APPENDIX F

Excerpts from Petitioner's Complaint

6. Under the MPPAA, *withdrawal liability* and *unfunded vested benefits* are different things.

31. With respect to Ft. Wayne, the Fund determined that on or about April, 2018, Perfection ceased having an obligation to contribute to the Fund, and on or about January 11, 2019, assessed Perfection withdrawal liability. ("Original Complete") The Fund assessed this as a complete withdrawal, and not a partial withdrawal.

43. In the Arbitration, the Fund admitted "that when calculating Perfection's complete withdrawal, the Fund applied the prior partial withdrawal credit to which Perfection is entitled against Perfection's allocable unfunded vested benefits, rather than Perfection's subsequent withdrawal liability."

Excerpts from Respondent's Answer

6. Defendant admits the allegations in Paragraph 6.

31. Defendant admits the allegations in Paragraph 31.

43. Defendant admits the allegations in Paragraph 43.

APPENDIX G

Excerpts from the Minutes of the Meeting of the Board of Trustees of the RWDSU plan, December 10-12, 2018

B. Schaefer Bakeries and Perfection Bakery

Mr. Friedman reported that both employers have withdrawn, and withdrawal liability assessments were issued by the Fund. They are part of a controlled group and withdrew at different times, leading to calculations of partial and full withdrawal liabilities. He explained that, based on a recent ruling by the United States Court of Appeals for the Ninth Circuit in the case of the Board of Trustees of the GCIU Employer Retirement Fund v. Quad/Graphic, Inc., the determination of withdrawal liability in the case of a full withdrawal after a partial withdrawal should be made before any adjustment for the 20-year cap, which differs from prior PBGC guidance and would result in an increase in the assessable amount for these two employers. After Trustee discussion,

> **MOTION** was made, and seconded requesting Mr. Friedman and Ms. Mantooth to update the assessments based on new Segal calculations to be performed based on the Ninth Circuit decision.

ADOPTED UNANIMOUSLY

APPENDIX H

Excerpt from the plan's assessment of withdrawal liability dated January 11, 2019

According to our records, Perfection Bakeries permanently ceased all contributions to the RWDSU Pension Pan ("the Plan") as of April 13, 2018. As a result, Perfection Bakeries has affected a complete withdrawal from the Plan, within the meaning of Section 4203(a) of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("ERISA").