APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-7157
Consolidated with No. 22-7158

TRUSTEES OF THE IAM NATIONAL PENSION FUND,
APPELLEE

v.

M & K EMPLOYEE SOLUTIONS, LLC, APPELLANT

Argued: Dec. 11, 2023
Decided: Feb. 9, 2024

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-02152)

No. 23-7028

TRUSTEES OF THE IAM NATIONAL PENSION FUND,
APPELLEE

v.

OHIO MAGNETICS, INC., ET AL., APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-00928)

Before: RAO, WALKER and CHILDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* CHILDS.

CHILDS, *Circuit Judge*:

The Multiemployer Pension Plan Amendments Act ("MPPAA"), part of the Employee Retirement Income Security Act of 1974's ("ERISA") legal framework, requires an employer to pay "withdrawal liability" if it leaves a multiemployer pension plan ("MPP") under certain conditions. 29 U.S.C. §§ 1381, 1391; *United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.*, 39 F.4th 730, 733 (D.C. Cir. 2022), *cert. denied*, 143 S. Ct. 1024 (2023). As the name suggests, in an MPP, multiple employers make financial contributions to the same trust fund for the purpose of providing employee pensions. *See* 29 U.S.C. § 1002. Withdrawal liability for employers withdrawing from underfunded MPPs is the amount of money the employer owes the plan. Calculating withdrawal liability requires an actuary to project the plan's future payments to pensioners. Germane to any financial projection, "this requires making assumptions about the future." *Energy W.*, 39 F.4th at 734. The MPPAA requires the actuary to use "assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1).

M&K Employee Solutions, LLC – Alsip ("Alsip"), M&K Employee Solutions, LLC – Joliet ("Joliet"), and M&K Employee Solutions, LLC – Summit ("Summit")

(collectively "M&K") and Ohio Magnetics, Inc. ("Ohio") were formerly contributing employers to the IAM National Pension Fund ("the Fund") and all withdrew during the 2018 plan year. The Fund assessed withdrawal liability for each entity based on actuarial assumptions by Cheiron, Inc. ("Cheiron"), an actuarial consulting firm. Trustees for the Fund filed separate suits against M&K and Ohio challenging arbitration awards in favor of both employers' withdrawal liability, as calculated by Cheiron. In both instances, the district court vacated the awards and remanded the case to the arbitrator for further proceedings consistent with the district court's findings. The Fund appealed.

Because these cases involve the same Fund, are based on a similar set of facts, and require this Court to address the same legal question, we write a single opinion to address both cases. The issue before us is whether an actuary may set actuarial assumptions for a given measurement date after the measurement date based on information that was available "as of" the measurement date.[1] We answer affirmatively and affirm both rulings of the district court.

I. BACKGROUND

The district court has provided an extensive explanation of the complicated litigation and background of the relationship between M&K, Ohio, and the Fund, as well as the circumstances underlying the

[1] The measurement date is the last day of the plan year preceding the year during which the employer withdraws.

employers' withdrawals.[2] *See Trs. of IAM Nat'l Pension Fund v. Ohio Magnetics, Inc.*, 656 F. Supp. 3d 112, 117–22 (D.D.C. 2023); *Trs. of IAM Nat'l Pension Fund v. M & K Emp. Sols., LLC*, No. 1:21-CV-02152-RCL, 2022 WL 4534998, at *1–6 (D.D.C. Sept. 28, 2022). Additionally, this Court recently discussed ERISA, the MPPAA, and the process of calculating withdrawal liability using actuarial assumptions. *See Energy W.*, 39 F.4th at 734–38. Therefore, we present a truncated review of the overall framework, followed by the background of the cases at hand.

Congress passed ERISA, 29 U.S.C. §§ 1001–1461, "[t]o ensure that employees who were promised a pension would actually receive it." *Energy W.*, 39 F.4th at 734. An MPP is "maintained pursuant to a collective bargaining agreement between multiple employers and a union." *Id.*; 29 U.S.C. § 1002(37)(A) (defining MPPs). Unlike single-employer pension plans, operated for the benefit of a single employer, MPPs are designed to serve many different employers. These employers operate "mostly in industries where there are hundreds or thousands of small employers going in and out of business and where the nexus of the employment relationship is the union that represents employees who typically work for many of those employers over the course of their career." *Energy W.*, 39

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[2] *Trs. of IAM Nat'l Pension Fund v. M & K Emp. Sols., LLC*, No. 20-cv-433 (RCL), 2021 WL 1546947 (D.D.C. Apr. 20, 2021) ("*IAM PI I*"); *Trs. of IAM Nat'l Pension Fund v. M & K Emp. Sols., LLC*, No. 20-cv-433 (RCL), 2021 WL 2291966 (D.D.C. June 4, 2021) ("*IAM PI II*"), *appeal dismissed*, No. 21-7072, 2022 WL 2389289 (D.C. Cir. Jan. 19, 2022); *Trs. of IAM Nat'l Pension Fund v. M & K Emp. Sols., LLC*, No. 20-cv-433 (RCL), 2022 WL 594539 (D.D.C. Feb. 28, 2022) ("*IAM PI III*").

F.4th at 734 n.1. Like single-employer plans, MPPs must "meet minimum funding standards, which require employers to contribute annually to the plan whatever is needed to ensure it has enough assets to pay for the employees' vested pension benefits when they retire." *Id.* at 734; *see Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 416 (1995). As initially enacted, ERISA served its purpose if a multiemployer plan was financially stable; however, if a plan became financially unstable, participants would be required to make large contributions to meet minimum funding standards. *Energy W.*, 39 F.4th at 734. This incentivized employers to withdraw to escape liability, "precipitating a death spiral for the plan." *Id.* (*citing Milwaukee Brewery*, 513 U.S. at 416–17).

Congress amended ERISA in 1980 to address these issues with the passage of the MPPAA, codified at 29 U.S.C. §§ 1381–1461. Now, if an employer withdraws from an underfunded plan, the plan and its remaining employer contributors remain obligated to provide the vested benefits of all participants. To this end, the withdrawing contributor is assessed a withdrawal liability equal to its proportional share of unfunded pension benefits. The pension plan is responsible for initially determining an employer's withdrawal liability, as calculated by the plan's actuary. *Id.* § 1382(1). An actuary must calculate withdrawal liability using assumptions "which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1).

ERISA and the MPPAA provide a process to adjudicate disputes over withdrawal liability. If an employer wants to contest the plan's determination, it must first do so through arbitration. *Id.* § 1401(a)(1). In those and all subsequent proceedings, a plan's determination of unfunded vested benefits ("UVBs") "is presumed correct unless a party contesting the determination shows by a preponderance of evidence that" either "(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods." *Id.* § 1401(a)(3)(B). Following arbitration, any party may seek "to enforce, vacate, or modify the arbitrator's award" in the district court. *Id.* § 1401(b)(2). The court must apply a "presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." *Id.* § 1401(c).

A. The Fund

The Fund at hand is an MPP that provides retirement benefits to employees of employers who maintain collective bargaining agreements with the International Association of Machinists and Aerospace Workers, AFL-CIO (or with affiliated local and district lodges). *Ohio Magnetics, Inc.*, 656 F. Supp. 3d at 119. The Fund, governed by a trust agreement, holds the plan's assets. J.A. 19. The trust agreement provides that the Fund's fiscal and ERISA plan year cor-

respond to the calendar year, and that withdrawal liability shall be calculated using the methodology set forth in 29 U.S.C. § 1393(b).[3] J.A. 20.

B. Plan Evaluation

In November 2017, Cheiron, the Fund's actuary, valued the Fund's 2016 Plan Year UVBs at $448,099,164. J.A. 21. To reach this result, it used a discount rate of 7.5%. J.A. 21.

On January 24, 2018, Cheiron met with the Fund's Board of Trustees to review assumptions and methods used in making actuarial valuation calculations.[4] After that meeting, Cheiron changed various methods and assumptions used to calculate withdrawal liability for employers withdrawing from the Fund during the 2018 Plan Year. J.A. 117–118. Cheiron selected a discount rate[5] assumption of 6.5%, a decrease from the previous 7.5% discount rate from the

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[3] 29 U.S.C. § 1393(b) states: "Factors determinative of unfunded vested benefits of plan for computing withdrawal liability of employer[:] In determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part, the plan actuary may—(1) rely on the most recent complete actuarial valuation used for purposes of section 412 of Title 26 and reasonable estimates for the interim years of the unfunded vested benefits, and (2) in the absence of complete data, rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan."

[4] The parties disagree as to what happened at this meeting and the impact it had on the assumptions, but such considerations are not before this Court. We need not speculate as there has not been proper fact development.

[5] Pertinent to this appeal, an actuary must also assume the rate used to calculate the present value of the plan's liabilities

2016 Plan Year valuation, and an administrative expense load of 4%. J.A. 118, 144. Additionally, it changed the method used to value the Plan's assets. J.A. 118.

As the district court noted, Cheiron did not include any assumption for the Fund's future administrative expenses, which are paid out of the Fund's assets and therefore contribute to the Plan's UVBs. *Ohio Magnetics, Inc.*, 656 F. Supp. 3d at 119. The 2018 decrease in the discount rate would result in greater withdrawal liability for employers. *Id.* at 120.

C. M&K

For purposes of ERISA, M&K was considered a single employer from October 1, 2012, through December 31, 2018. *M & K Emp. Sols., LLC*, 2022 WL 4534998, at *3; *see also* J.A. 459. The relevant plan year for M&K ran from January 1 through December 31. J.A 116. M&K had partially withdrawn on March 31, 2017 (Joliet), and July 31, 2017 (Summit), and the Fund had therefore issued a partial withdrawal assessment based on the withdrawals (using a December 2016 measurement date). J.A. 24–25.

As discussed, Cheiron selected its new actuarial assumptions in January 2018, and thereafter, M&K

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for future benefit payments, which is known as the discount rate. In other words, the discount rate is the rate at which the plan's assets will earn interest. The discount rate assumptions influence the plan's calculation of its UVBs because UVBs are the difference between the present value of vested benefits and the current value of the plan's assets. When the discount rate assumption is revised downward, the value of the UVBs increases, along with withdrawal liability for departing employers, and vice versa.

completely withdrew during the 2018 plan year. J.A. 21–22. In April 2018, Cheiron calculated the Fund's UVBs for the 2017 plan year using those assumptions. J.A. 458–59. The Fund subsequently eliminated the 2017 partial assessment and merged the Joilet and Summit withdrawals into a complete 2018 withdrawal liability assessment of $6,158,482. J.A. 24-25.

M&K commenced arbitration challenging the Fund's assessment of its withdrawal liability. At arbitration, the issues for resolution included: (1) whether it was a violation of ERISA, as amended, for the discount rate to be changed after the December 31, 2017, measurement date and (2) whether the "free-look" exception,[6] 29 U.S.C. § 1390(a), applies to M&K and consequently requires a recalculation of its withdrawal liability, *M & K Emp. Sols., LLC*, 2022 WL 4534998, at *4. The arbitrator issued an award on July 13, 2021, concluding that the Fund erred in its calculations by utilizing the January 2018 assumptions and methods instead of those in effect on December 31, 2017, and denying M&K's bid to invoke the free-look exception for the withdrawal of Joliet and Summit. *Id.* Both parties filed motions for reconsideration, which the arbitrator denied. *Id.*

The Fund filed two lawsuits against M&K, but only one is relevant to this appeal.[7] The Fund sought

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[6] The free-look exception allows an employer to withdraw from a plan within a specified period after joining without incurring withdrawal liability, thereby providing a "free look." *See* 29 U.S.C. § 1390(a).

[7] In one of the suits not before this Court, the Fund brought a suit against M&K and other related Defendants to enjoin them from paying the assessed withdrawal liability. *Trs. of IAM Nat'l*

to confirm in part and vacate in part the arbitrator's award.[8] The district court held that 29 U.S.C. §§ 1391, 1393(a)(1) are best "read to allow later adoption of actuarial assumptions, so long as those assumptions are 'as of' the measurement date—that is, the assumptions must be based on the body of knowledge available up to the measurement date." *M & K Emp. Sols., LLC*, 2022 WL 4534998, at *19. Moreover, the district court held that M&K was entitled to the free-look exception because "it had (1) a 'complete or partial withdrawal' and (2) 'an obligation to contribute to the plan for no more than' five years." *Id.* at *20 (citing 29 U.S.C. § 1390(a)). The Fund appealed and M&K cross-appealed. J.A. 557.

D. Ohio

Ohio was a party to a collective bargaining agreement requiring it to contribute to the Fund.[9] J.A. 119.

Pension Fund v. M & K Emp. Sols., LLC, No. 1:20-CV-433 (RCL), 2022 WL 594539, at *1 (D.D.C. Feb. 28, 2022), *reconsideration denied sub nom. Trs. of IAM Nat'l Pension Fund v. M & K Emp. Sols., LLC*, No. 1:20-CV-433-RCL, 2023 WL 6065013 (D.D.C. Sept. 18, 2023). As the district court noted, under the MPPAA, employers "pay now, dispute later," means that they still have a duty to pay the calculated withdrawal liability even as they challenge the underlying calculations. *Id.* This rule is meant to protect the solvency of an MPP during a potentially lengthy arbitration. *Id.* That case's complicated procedural history, and this Court's several injunctions, are distinct from the present dispute.

[8] The Fund asked the district court to vacate the portion of the award requiring it to assess withdrawal liability based on the methods and assumptions in effect on December 31, 2017, and affirm the portion rejecting M&K's bid to use the free-look exception. *See M & K Emp. Sols., LLC*, 2022 WL 4534998, at *5.

[9] This dispute also involved two other companies, Toyota Logistics Services, Inc. ("Toyota"), and Phillips Liquidating Trust

Ohio withdrew from the Fund as of June 30, 2018. J.A. 120. As with M&K, the Fund's plan year runs from January 1 to December 31. J.A. 116. The Fund assessed Ohio with $447,475 in withdrawal liability using the assumptions adopted in the January 24, 2018, meeting and contained in the 2017 Plan Year valuation: a 6.5% withdrawal liability discount rate and a 3.5% expense load. *Ohio Magnetics, Inc.*, 656 F. Supp. 3d at 120. The Fund later denied Ohio's request to review its withdrawal liability assessment. *Id.* at 121. Ohio then initiated arbitration to decide when an actuary's assumptions must be adopted. *Id.* The crux of the issue before the arbitrator was whether it is "permissible for the Fund to assess withdrawal liability for the Companies, which withdrew in 2018, based on actuarial assumptions adopted in January 2018, or was Cheiron required as a matter of law to use assumptions that had been adopted prior to December 31, 2017?" *Id.* The arbitrator, relying on *National Retirement Fund on Behalf of Legacy Plan of National Retirement Fund v. Metz Culinary Management, Inc.*, 946 F.3d 146 (2d Cir. 2020), concluded that Cheiron erred in basing its withdrawal liability calculations on assumptions adopted after December 31, 2017. *Ohio Magnetics, Inc.*, 656 F. Supp. 3d at 121.

("Phillips"), which both withdrew from the Fund and were assessed withdrawal liability using the actuarial assumptions from the January 2018 Trustees meeting. Each company initiated its own arbitration proceedings, and each was similarly decided. In addition to filing a lawsuit against Ohio, the Fund also initiated suits against Toyota and Phillips seeking to vacate the arbitration award. All of the parties counterclaimed, and the suits were consolidated. *See Ohio Magnetics, Inc.*, 656 F. Supp. 3d at 116, 120–22.

The Fund appealed, and Ohio counterclaimed to enforce the arbitration award. *Id.* at 122. The district court held that an actuary could set employer withdrawal liability assumptions after the year-end measurement date, but only based on information available as of that date. *Id.* at 136–37. In doing so, the district court granted the Fund's motion, vacated the arbitration award, and remanded the issue to the arbitrator.

II. ANALYSIS

A. Standard of Review

This Court reviews "the district court's grant of summary judgment de novo, which means, in essence, we are reviewing the arbitrator's decision." *Energy W.*, 39 F.4th at 737. We presume the arbitrator's findings of fact are correct unless rebutted "by a clear preponderance of the evidence." 29 U.S.C. § 1401(c). We review the arbitrator's legal determinations de novo. *Energy W.*, 39 F.4th at 737 (citing *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus.*, 727 F.2d 1204, 1207 n.7 (D.C. Cir. 1984)).

B. Actuarial Assumptions

The district courts correctly found that the arbitrator erred in concluding that an actuary must use "the assumptions and methods in effect" on the relevant measurement date when calculating withdrawal liability.

An employer withdrawing from an MPP will be assessed withdrawal liability equal to its proportionate share of the plan's UVBs, i.e., the present value of its liabilities minus the current value of its assets. *See* 29 U.S.C. § 1391(b). The employer's withdrawal liability is calculated based on the plan's UVBs "as of"

the measurement date. *See id.* § 1391(b)(2)(E)(i) ("An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of ... the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by [the fraction of that amount attributable to the employer.]").

When adopting actuarial assumptions, an actuary may base their assumption on information after the measurement date "so long as those assumptions are 'as of' the measurement date — that is, the assumptions must be based on the body of knowledge available up to the measurement date." *M & K Emp. Sols.*, 2022 WL 4534998, at *19. As the district court noted, this rule "best complies with Congress' dual directives that unfunded vested benefits be determined 'as of' the measurement date and that actuarial assumptions be generated by 'taking into account the experience of the plan and reasonable expectations' such that they 'offer the actuary's best estimate of anticipated experience.'" *M & K Emp. Sols.*, 2022 WL 4534998, at *19 (quoting 29 U.S.C. §§ 1391, 1393(a)(1)). This aligns the calculation of the plan's experience, reasonable expectations, and the best estimate of anticipated experience "as of" the measurement date, rather than the date of the calculation. It would be contrary to 29 U.S.C. § 1393(a)(1)'s requirement that an actuary use its "best estimate" of the plan's anticipated experience as of the measurement date to require an actuary to determine what assumptions to use before the close of business on the measurement date. *See* 29 U.S.C. § 1393(a)(1). As Judge Lamberth recognized in *M & K Employee Solutions*,

the value of UVBs "as of" the measurement date constitutes a snapshot of the information available "as of" that date. 2022 WL 4534998, at *15. Moreover, § 1393(a)(1) directs plan actuaries to use assumptions that "are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan...." 29 U.S.C. § 1393(a)(1).

The arbitrator, Ohio, and M&K place considerable weight on the Second Circuit's decision in *Metz*. As the district court correctly concluded, *Metz* is "neither controlling in this jurisdiction nor persuasive." *Ohio Magnetics, Inc.*, 656 F. Supp. 3d at 131; *see also M & K Emp. Sols.*, 2022 WL 4534998, at *17. We need not rehash what the district court correctly analyzed, but the main point is that *Metz*'s reasoning is counter to the text of the MPPAA, which protects MPPs and their beneficiaries. *See* 29 U.S.C. § 1001a(c) ("It is hereby declared to be the policy of this Act ... to alleviate certain problems which tend to discourage the maintenance and growth of [MPPs], ... to provide reasonable protection for the interests of participants and beneficiaries of financially distressed [MPPs], and ... to provide a financially self-sufficient program for the guarantee of employee benefits under [MPPs]."). Moreover, the parallels that *Metz* draws between 29 U.S.C. § 1393 and § 1394[10] are attenuated given that § 1394 does not discuss actuarial assumptions, and § 1393, the actual provision concerning actuarial assumptions, contains no such limitations. *M & K Emp.*

[10] 29 U.S.C. § 1394 expressly limits retroactivity for changes to plan rules and amendments.

Sols., 2022 WL 4534998, at *18 ("The presence of an anti-retroactivity provision in the section dealing with plan rules and amendments, and the absence of one in the section dealing with actuarial assumptions, suggests that anti-retroactivity was purposefully omitted in the latter."). "In sum, the MPPAA's text reflects a balance struck by Congress between the competing considerations of actuarial flexibility and fairness to employers, and it is not for this Court to rewrite that legislative balance." *Ohio Magnetics, Inc.*, 656 F. Supp. 3d at 135.

C. Free-Look Exception

Specific to M&K, the district court correctly concluded that the arbitrator erred as a matter of law in determining that M&K was not entitled to the free-look exception. If a plan elects to allow a free-look exception, an employer may contribute to a plan for an initial specified period and then subsequently withdraw without incurring liability. *See* 29 U.S.C. § 1390. Specifically, among other statutory requirements that the parties agree are satisfied here, "[a]n employer ... is not liable to the plan" if the employer (1) "withdraws from a plan in complete or partial withdrawal" and (2) "had an obligation to contribute to the plan for no more than ... the number of years required for vesting under the plan." *See id.* § 1390(a); *M & K Emp. Sols., LLC*, 2022 WL 4534998, at *20. The Fund elected to allow the free-look exception and set the specified period to vest at five years. *M & K Emp. Sols., LLC*, 2022 WL 4534998, at *20.

As discussed, Cheiron selected its new actuarial assumptions in January 2018, and thereafter, M&K completely withdrew during the 2018 plan year. J.A.

21–22. In April 2018, Cheiron calculated the Fund's UVBs for the 2017 plan year using those assumptions. J.A. 458–59. The Fund subsequently eliminated the 2017 partial assessment and merged the Joliet and Summit withdrawals into a complete 2018 withdrawal liability assessment of $6,158,482. J.A. 24–25.

M&K partially withdrew in March 2017 and July 2017. *Id.* Joliet ended its obligation to the Fund in March when its representation was decertified. *Id.* Moreover, Summit ceased its obligation in July when it negotiated a new collective bargaining agreement. *Id.* These actions triggered M&K's partial withdrawal during the 2017 plan year. *See* 29 U.S.C. § 1390(a)(2), (b)(2).[11] The parties previously agreed that M&K had an obligation of fewer than five years at the time that Joliet and Summit withdrew from the Fund.[12] *See M & K Emp. Sols., LLC*, 2022 WL 4534998, at *20.

[11] The district court also noted that the arbitrator concluded that M&K had a "partial withdrawal by its Joliet and Summit facilities." *M & K Emp. Sols., LLC*, 2022 WL 4534998, at *20 (citation omitted).

[12] The arbitrator came to the contrary conclusion, relying on *South City Motors, Inc. v. Automotive Industries Pension Trust Fund*, No. 17-cv-04475, 2018 WL 2387854 (N.D. Cal. May 25, 2018), *aff'd* 796 F. App'x 393 (9th Cir. 2020). It is neither binding in our Circuit nor persuasive considering this specific set of facts. *See M & K Emp. Sols., LLC*, 2022 WL 4534998, at *21 ("And, unlike the single employer in *South City Motors*, the single employer M&K *did* meet the requirements to invoke a 'free look' at the time of its partial withdrawal. M&K had a partial withdrawal, with an obligation to IAM of no more than five years, and therefore the Arbitrator erred by denying it the exception."). This case is unlike *South City Motors*, where the single employer did not meet the requirements to invoke a "free look" at the time of its partial withdrawal. *See S. City Motors*, 796 F. App'x at 395–96.

Thus, M&K's partial withdrawal met the free-look exception requirements.

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For the reasons set forth above, we affirm the judgments of the district court.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:21-cv-02152-RCL

TRUSTEES OF THE IAM NATIONAL PENSION FUND,
PLAINTIFFS,

v.

M & K EMPLOYEE SOLUTIONS, LLC, DEFENDANT.

Filed: Sept. 28, 2022

MEMORANDUM OPINION

This case requires the resolution of several classic legal issues: the propriety of judicial review, appropriate timing of a counterclaim, and several difficult issues of statutory interpretation. The cause for these questions is the Employee Retirement Income Security Act ("ERISA") and its many provisions aimed at maintaining the stability of multiemployer pension plans ("MPPs"). Nationally, MPPs manage many billions of dollars in assets and serve millions of current and former employees. IAM National Pension Fund ("IAM") is one such plan. Through its trustees, it seeks confirmation in part and vacatur in part of an arbitration award resolving two discrete issues governing the calculation of liability to be assessed a former employer-participant in the plan. That former employer, M&K Employee Solutions, LLC ("M&K"), is

the defendant in this action and seeks to keep IAM's lawsuit out of the courts, or alternatively, to vacate in part and confirm in part the award. After a deep dive into ERISA's labyrinthian statutory scheme, the Court concludes that it may review the award in full and holds that the arbitrator erred as a matter of law on the issues submitted to him by the parties. Accordingly, the Court will **VACATE** the award and **REMAND** to the arbitrator for further proceedings consistent with the Court's memorandum opinion.

I. BACKGROUND

This Court has previously explained much of the background on the relationship between M&K and IAM as well as the circumstances underlying M&K's withdrawal across three separate opinions in a related case.[1] Therefore, a truncated review of the framework surrounding MPPs, followed by the background of the case at hand and its procedural history, is sufficient for present purposes.

A. ERISA and MPPs

In 1974, Congress passed ERISA "[t]o ensure that employees who were promised a pension would actually receive it." *United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.*, 39 F.4th 730, 734 (D.C. Cir. 2022). One type of pension plan is an MPP,

[1] *Trustees of IAM Nat'l Pension Fund v. M & K Emp. Sols., LLC*, No. 20-cv-433 (RCL), 2021 WL 1546947 (D.D.C. Apr. 20, 2021) ("*IAM PI I*"); *Trustees of IAM Nat'l Pension Fund v. M & K Emp. Sols., LLC*, No. 20-cv-433 (RCL), 2021 WL 2291966 (D.D.C. June 4, 2021) ("*IAM PI II*"), *appeal dismissed*, No. 21-7072, 2022 WL 2389289 (D.C. Cir. Jan. 19, 2022); *Trustees of the IAM Nat'l Pension Fund v. M & K Emp. Sols., LLC*, No. 20-cv-433 (RCL), 2022 WL 594539 (D.D.C. Feb. 28, 2022) ("*IAM PI III*").

which is "maintained pursuant to a collective bargaining agreement between multiple employers and a union." *Id.*; 29 U.S.C. § 1002(37)(A) (defining MPPs). Unlike single employer pension plans, operated for the benefit of a single employer, MPPs are designed to serve many different employers "mostly in industries where there are hundreds or thousands of small employers going in and out of business and where the nexus of the employment relationship is the union that represents employees who typically work for many of those employers over the course of their career." *United Mine Workers*, 39 F.4th at 734 n.1.

In the late 1970s, legislative attention turned to ERISA's inadequate protection of MPPs "from the adverse consequences that resulted when individual employers terminate their participation in, or withdraw from, multiemployer plans." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 722 (1984). Specifically, in ERISA's original formulation, employers in MPPs were generally free to withdraw from MPPs without an ongoing obligation to support the plan—even as workers retained earned benefits. *See United Mine Workers*, 39 F.4th at 734 & n.2. That put MPPs under significant financial stress. *Id.* at 734–35.

So, in 1980, Congress added new obligations for employers withdrawing from MPPs with the passage of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), codified at 29 U.S.C. §§ 1381–1461. The MPPAA was designed "to 'protect the financial solvency of multiemployer pension plans'" by implementing "withdrawal liability." *IAM PI III*, 2022 WL 594539 at *1 (quoting *Bay Area Laundry &*

Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 196 (1997)). Withdrawal liability "requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. . . . [Comprising] the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets." *R.A. Gray*, 467 U.S. at 725 (citing 29 U.S.C. §§ 1381, 1391). That liability is determined "as of" the last day of the "Plan Year" prior to the "Plan Year" during which the employer withdrew. 29 U.S.C. § 1391; *Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414, 417–18 (1995). Thus, a withdrawal during the 2018 Plan Year would generate liability based on the unfunded vested benefits as of the last day of the 2017 Plan Year. That last day of the Plan Year is referred to as the "measurement date."

Upon an employer's withdrawal from an underfunded MPP, "[t]he MPPAA calls upon a plan's trustees, not the employer, to propose the amount of withdrawal liability and orders the trustees to set a payment schedule." *IAM PI III*, 2022 WL 594539 at *1; 29 U.S.C. § 1382. When calculating that liability, a plan actuary "must make numerous assumptions," such as "how long employees will work and how long retirees will live," as well as the "discount rate, i.e., the rate at which the plan's assets will earn interest." *United Mine Workers*, 39 F.4th at 735. If there are no specific regulations on the issue, plan actuaries are required to use "actuarial assumptions and methods which" (1) "in the aggregate, are reasonable (taking into account the experience of the plan and reasonable

expectations)" and (2) "in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a).

If an employer wishes to dispute the liability calculation generated by the trustees, the employer "may timely initiate a dispute-resolution procedure, first by requesting review from the trustees and later by pursuing arbitration." *IAM PI III*, 2022 WL 594539 at *1 (citing 29 U.S.C. §§ 1399(b)(2), 1401(a)(1)). "[A] plan's determination of unfunded vested benefits 'is presumed correct unless a party contesting the determination shows by a preponderance of the evidence that' either '(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.'" *United Mine Workers*, 39 F.4th at 735–36 (quoting 29 U.S.C. § 1401(a)(3)(B)). Furthermore, "[t]he court must apply a 'presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.'" *Id.* at 736 (quoting 29 U.S.C. § 1401(c)).

"Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action ... to enforce, vacate, or modify the arbitrator's award." 29 U.S.C. § 1401(b)(2).

B. IAM's Operations and Actuarial Valuations

IAM is a qualifying MPP within the requirements of ERISA. Arbitration Stipulation Undisputed Facts ¶ 1, ECF No. 1-2 at 2–9. IAM "provides retirement

benefits to employees who performed covered work for employers that remitted contributions to the Fund in accordance with collective bargaining agreements with the International Association of Machinists and Aerospace Workers, AFL-CIO (or with affiliated local or district lodges)." *Id.* ¶ 2.

IAM's actuary prepares actuarial valuations and calculates withdrawal liability for employers withdrawing from IAM. *Id.* ¶¶ 9–10. In that role, the actuary must prepare actuarial valuations for a Plan Year which runs from January 1 to December 31. *Id.* ¶ 11. These valuations are made after the Plan Year concludes. *Id.* For example, the actuarial valuation for the 2016 Plan Year was produced on November 2, 2017. *Id.* ¶ 12. When computing the actuarial valuations, IAM's actuary must use a discount rate, along with other methods and assumptions, to determine the required calculation of unfunded vested benefits. *Id.* ¶¶ 12–15. The 2016 Plan Year actuarial valuation concluded that, as of the end of the 2016 Plan Year, IAM had unfunded vested benefits of $448,099,164. *Id.* ¶ 13. That calculation was based on a 7.5% discount rate and investment return assumption. *Id.* ¶ 14.

On January 24, 2018, IAM's actuary met with the Board of Trustees of IAM to review assumptions and methods used in making actuarial valuation calculations. *Id.* ¶ 15. After that meeting, "[IAM's actuary] changed various methods and assumptions used to calculate withdrawal liability for employers that effected a withdrawal from the Fund during the 2018 Plan Year, including reducing the discount rate from

7.50% to 6.50%." *Id.* ¶ 17. When IAM's actuary subsequently calculated the actuarial valuation for the 2017 Plan Year, it used the 6.5% discount rate and 7.5% investment return assumption—a discount rate only adopted following the meeting in January 2018. *Id.* ¶¶ 17, 21. The actuarial valuation for the 2017 Plan Year then showed unfunded vested benefits of $3,043,369,928. *Id.* ¶ 20.

C. M&K's Relationship with IAM and M&K's Withdrawal

M&K Employee Solutions, LLC-Alsip ("M&K Alsip"), M&K Employee Solutions, LLC-Joliet ("M&K Joliet"), and M&K Employee Solutions, LLC-Summit ("M&K Summit"), along with the defendant, M&K, were a single employer for purposes of ERISA from October 1, 2012 through December 31, 2018. *Id.* ¶¶ 22–23. M&K Alsip, M&K Joliet, and M&K Summit were all parties to separate bargaining agreements that required them "to remit contributions to [IAM] on behalf of their respective employees who performed covered work." *Id.* ¶ 24. Those obligations began in October of 2012 and "were renegotiated and extended on several occasions." *Id.* ¶¶ 25–26. Each permanently ceased their obligations to IAM for different reasons. *Id.* ¶ 30. M&K Joliet's bargaining unit employees decertified representation, thus ending M&K Joliet's obligation on March 31, 2017. *Id.* M&K Summit negotiated a new collective bargaining agreement which ended required contributions on July 31, 2017. *Id.* And M&K Alsip terminated its collective bargaining agreement, ending its obligation on December 31, 2018. *Id.*

As a result, on June 26, 2018, IAM provided M&K with an estimate of withdrawal liability based on a complete withdrawal during the 2018 Plan Year. *Id.* ¶ 31. This meant that withdrawal liability was required to be assessed "as of" December 31, 2017, the measurement date for a withdrawal during the 2018 Plan Year. Critically, "the Fund provided M&K Employee Solutions a withdrawal liability estimate showing that a complete withdrawal during the 2018 Plan Year would be calculated using the new 6.5% discount rate [adopted after December 31, 2017], and calculated the '[e]stimated years to amortize withdrawal liability at 7.5%.'" *Id.* On June 14, 2019, IAM informed M&K that its share of unfunded vested benefits totaled $6,158,482 to be paid in 20 installments. *Id.* ¶ 33.[2] After M&K's request for review of the assessment was denied, it timely commenced an arbitration to dispute the computation of liability. *Id.* ¶¶ 34–35.

D. The Arbitration Proceedings and Decision

The parties proceeded to arbitration with arbitrator Stanley L. Aiges ("the Arbitrator"). Once in arbitration, IAM and M&K agreed to "submit to the Arbitrator . . . [certain] issues for resolution based in whole or in part on the facts set forth in a set of stipulated facts agreed to by" IAM and M&K. Arbitration Stipulation ¶ 1, ECF No. 1-1. Those issues were:

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[2] IAM originally assessed a liability from partial withdrawal during the 2017 Plan Year of $611,110 which it later withdrew without prejudice. Arbitration Stipulation Undisputed Facts ¶ 32.

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

b. Whether the "free-look" exception (ERISA § 4210, 29 U.S.C. § 1390) is available to M&K Employee Solutions and requires a recalculation of its withdrawal liability.[3]

Id. Furthermore, IAM and M&K "agree[d] that, following the Arbitrator's resolution of the issues set forth in Paragraphs 1(a)-(b), M&K Employee Solutions [would] have an opportunity to challenge the assumptions, method, and manner in which the Fund calculated its withdrawal liability." *Id.* ¶ 3. The parties also submitted their agreed stipulated facts. Arbitration Stipulation Undisputed Facts.

Pursuant to the parties' submitted issues, M&K moved for partial summary judgment in the arbitration proceeding and both IAM and M&K submitted briefing. Arbitration Decision 9, ECF No. 1-3. The Arbitrator issued an award, dated July 13, 2021, concluding that IAM erred by calculating M&K's withdrawal liability using assumptions and methods other than those in effect on December 31, 2017, and denying M&K's bid to invoke the free-look exception for the withdrawal of M&K Joliet and M&K Summit. *Id.* at 36–37. The Arbitrator's "[a]ward" stated as follows:

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[3] The free-look exception allows an employer to withdraw from a plan within a specified period after joining without incurring withdrawal liability, thereby providing a "free look." *See infra* Part III.D.

1. The Fund improperly failed to calculate M & K's withdrawal liability using the assumptions and methods in effect on the December 31, 2017 measurement date. M & K's motion for partial summary judgment is granted. The Fund is ordered to annul its assessment of withdrawal liability and to recalculate it using the methods and assumptions in effect on the December 31, 2017 Measurement Date.

   Jurisdiction is retained to resolve any dispute arising from the application of the foregoing order.

2. M & K's motion to invoke the free look exception with regard to its partial withdrawal by its Joliet and Summit facilities is denied.

Id. IAM and M&K filed motions for reconsideration. ECF No. 33-1 at 9.

By July 20, 2021, IAM recalculated the amount of withdrawal liability to accord with the Arbitrator's decision. Letter from Stanley L. Aiges, Arbitrator, to Donald J. Vogel, Esq., Scopelitis, Garvin, Light, Hanson & Feary, and Anthony S. Cacace, Esq., Proskauer Rose, LLP. (Aug. 11, 2021) ("August 11 Letter"), ECF No. 7-3. Following a July 23, 2021 conference call, the Arbitrator "agreed to issue a clarification" regarding his award on the first issue. *Id.* Specifically, given IAM's recalculation of the withdrawal liability amount in compliance with the Arbitrator's instructions, the Arbitrator concluded that "[t]he matter of relief, then, appears to me to now be moot." *Id.* After

clarifying the status of the first issue, the Arbitrator rejected M&K's request that the Arbitrator reconsider his ruling on the availability of the free-look exception. *Id.* In sum, the Arbitrator's letter set the award as final by definitively resolving the two issues and rejecting any further reconsideration. Finally, the Arbitrator acknowledged that M&K had the right to contest IAM's revised calculation by September 30, 2021. *Id.*

M&K proceeded to contest several aspects of that revised calculation. ECF No. 12-1.

E. IAM's Two Lawsuits

IAM has filed two lawsuits against M&J.

It first sued M&K, and other related defendants, in February 2020 to enjoin those defendants to pay the assessed withdrawal liability. *IAM PI III*, 2022 WL 594539 at *2. Under the MPPAA, employers "pay now, dispute later," meaning that they still have a duty to pay the calculated withdrawal liability even as they challenge the underlying calculations. *Id.* This rule is meant to protect the solvency of an MPP during a potentially lengthy arbitration. *Id.* That case's complicated procedural history, and this Court's several injunctions, are distinct from the present dispute.

IAM's second lawsuit, the subject of this opinion, was filed following the Arbitrator's decision. IAM seeks to confirm in part and vacate in part the Arbitrator's award—asking this Court to vacate the portion of the award requiring it to assess withdrawal liability based on the methods and assumptions in ef-

fect on December 31, 2017, and affirm the portion rejecting M&K's bid to use the free-look exception. Pls.' Compl., ECF No. 1.

M&K moved to dismiss the complaint for failure to state a claim. Def.'s Mot. Dismiss, ECF No. 7; Def.'s Mem. In Supp. Mot. Dismiss ("Def.'s Dismiss Mem."), ECF No. 7-1. M&K also pled a counterclaim to enforce the portion of the arbitration award requiring use of methods and assumptions in effect on December 31, 2017, and to vacate the portion denying it the free-look exception. Def.'s Countercl., ECF No. 7 at 1–7. IAM opposed M&K's motion to dismiss and moved in turn to dismiss M&K's counterclaim for failure to state a claim due to untimeliness. Pls.' Cross-Mot. Dismiss, ECF No 8; Pls.' Mem. Opp'n and in Supp. Cross-Mot. Dismiss, ECF No. 8-1 ("Pls.' Dismiss Mem."). M&K replied in support of its motion to dismiss. Def.'s Reply, ECF No. 12. M&K also opposed IAM's motion to dismiss. Def.'s Opp'n Pls.' Cross-Mot. Dismiss, ECF No. 16. And IAM replied. Pls.' Reply Supp. Cross-Mot. Dismiss, ECF No. 20.

After the parties briefed the motions to dismiss, IAM moved for summary judgment to vacate in part and confirm in part the Arbitrator's award. Pls.' Mot. Summ. J., ECF No. 24; Pls.' Mem. in Supp. ("Pls.' Summ. J. Mem."), ECF No. 24-1.[4] M&K opposed. Def.'s Opp'n Pls.' Mot. Summ J. ("Def.'s Summ. J. Opp'n"), ECF No. 31. M&K then cross-moved for summary judgment to vacate in part and confirm in part

[4] M&K moved to strike or stay IAM's motion for summary judgment for substantially the same reasons as it moved to dismiss IAM's complaint. ECF No. 26. IAM opposed, ECF No. 29, and M&K replied, ECF No. 30.

the Arbitrator's award. Def.'s Cross-Mot. Summ. J., ECF No. 32; Def.'s Mem. in Supp. Mot. Summ. J. ("Def.'s Summ. J. Mem."), ECF No. 32-1.[5] IAM opposed M&K's motion for summary judgment and further supported its own motion. Pls.' Mem. Opp'n Def.' Summ. J. Cross-Mot. ("Pls.' Summ. J. Reply"), ECF No. 33. And M&K replied. Def.'s Reply in Supp. Cross-Mot. Summ. J. ("Def.'s Summ. J. Reply"), ECF No. 35.

The various motions are now ripe for the Court's review.

II. LEGAL STANDARDS

A. Motions to Dismiss

To survive a motion to dismiss pursuant to Rule 12(b)(6), a pleading must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible when the party "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* A court "should assume the veracity" of well-pleaded factual allegations, *id.* at 679, which "must be presumed true and should be liberally construed in [the pleading party's] favor." *Ndondji v. InterPark Inc.*, 768 F. Supp. 2d 263, 271 (D.D.C. 2011). A court need not accept the party's legal conclusions in evaluating a motion to dismiss.

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[5] The Court recognizes that M&K's memorandum in support of its motion for summary judgment and opposition to IAM's motion for summary judgment differ from each other and the Court has carefully considered both.

Alemu v. Dep't of For-Hire Vehicles, 327 F. Supp. 3d 29, 40 (D.D.C. 2018).

B. Summary Judgment Motions

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphases in original). "A fact is 'material' if a dispute over it might affect the outcome of a suit under the governing law." *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006) (quoting *Anderson*, 477 U.S. at 248). Even hotly contested factual disputes will not defeat summary judgment if they are irrelevant under the governing law. *Id.* A factual issue is "genuine 'if the nonmovant presents evidence such that a reasonable [factfinder] could return a verdict for the nonmoving party.'" *Occupational Safety & Health L. Project, PLLC v. Dep't of Lab.*, No. 1:21-cv-2028 (RCL), 2022 WL 3444935, at *3 (D.D.C. Aug. 17, 2022) (alteration in original) (quoting *Doe v. Exxon Mobil Corp.*, No. 1:01-cv-1357 (RCL), 2022 WL 3043219, at *7 (D.D.C. Aug. 2, 2022)). The Supreme Court has further explained that if the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (quoting Fed. R. Civ. P. 56) (internal quotation marks omitted).

To that end, the Court will "view the evidence in the light most favorable to" the nonmoving party and should not "make credibility determinations." *Holcomb*, 433 F.3d at 895. Furthermore, when evaluating the motion, a "court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3).

C. Review of Arbitration Awards Between an Employer and an MPP

When reviewing an arbitration dispute between an employer and an MPP under ERISA, "[t]he arbitrator's findings of fact are presumed correct unless they are rebutted 'by a clear preponderance of the evidence,' and the arbitrator's legal determinations are reviewed de novo." *United Mine Workers*, 39 F.4th at 737 (internal citation omitted) (quoting 29 U.S.C. § 1401(c)).

III. DISCUSSION

The Court will discuss the series of motions by the parties in the following order. (1) M&K's motion to dismiss the complaint, or strike or stay the motion for summary judgment, because the arbitration proceedings have not concluded; (2) IAM's motion to dismiss M&K's counterclaim for untimeliness; (3) the cross-motions for summary judgment as to the merits of the Arbitrator's award.

A. The Arbitration Proceedings Are Complete for the Arbitrator's Issued Award

As an initial matter, this Court must address M&K's motion to dismiss the complaint because there has not been "completion of the arbitration proceedings." 29 U.S.C. § 1401(b)(2); Def.'s Dismiss Mem. 5

(citing *JLNW, Inc. v. Nat'l Ret. Fund*, No. 17-cv-5095 (AJN), 2018 WL 4757953, at *4 (S.D.N.Y. Sept. 28, 2018)). The completion language represents an "exhaustion requirement that parties complete arbitration before judicial review is appropriate." *JLNW*, 2018 WL 4757953 at *4.

In M&K's view, its pending challenges to IAM's revised withdrawal liability assessment in the underlying arbitration bar this Court's review of the Arbitrator's already issued award. Def.'s Dismiss Mem. at 5–7; ECF No. 12-1. In opposition, IAM argues that the arbitration proceedings are complete, or final, as to the issues before this Court, because the Arbitrator has rendered the award as to those issues and has denied reconsideration. Pls.' Dismiss Mem. 3–8. This exhaustion requirement has generated "scarce caselaw." *JLNW*, 2018 WL 4757953 at *5 (collecting cases). After reviewing the statutory text and the available cases, this Court concludes that the requirement has been satisfied.

1. The Relevant Statutory Text

Beginning with the statutory structure, 29 U.S.C. § 1401(b) sets out what is required before enforcing, vacating, or modifying an arbitrator's award. The most directly relevant provision, Section 1401(b)(2), reads as follows:

> Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court . . . to enforce, vacate, or modify the arbitrator's award.

29 U.S.C. § 1401(b)(2). Focusing on the operative language, there must be "completion of the arbitration proceedings" the result of which is the "issuance of an arbitrator's award." *Id.* After that, "any party" is empowered to "enforce, vacate, or modify the arbitrator's award." *Id.*

Without proper context, the language "completion of the arbitration proceedings" might very well suggest that M&K's position is the correct one—that every issue related to the challenge of a withdrawal liability assessment must be resolved before judicial review is appropriate. However, "[t]he meaning of statutory language, plain or not, depends on context." *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). And, in context, the answer is the reverse of M&K's position. After all, the full statement is that there must be completion of the arbitration proceedings and "issuance of an arbitrator's award" before "the arbitrator's award" can be enforced, vacated, or modified. A challenge to withdrawal liability does not demand one singular arbitrator's award resolving all the raised issues. To the contrary, there may be several arbitrator's awards during a challenge to a single withdrawal liability assessment. The completion language must be read within that context.

This case is an excellent example of why an arbitrator's award need not resolve the entire challenge to a withdrawal liability assessment. The Arbitrator's award here resolved two specific issues submitted by the parties.[6] Arbitration Decision 36–37; August 11

[6] Both parties agree that the Arbitrator's award definitively and conclusively resolved the two issues submitted and that the issues cannot be relitigated before the Arbitrator. *See* Def.'s

Letter. The next award will resolve additional issues. *See* ECF No. 12-1. But the fact that an additional award is in the works does not undermine the completed and final arbitration proceedings for the already issued award.

In sum, when an arbitrator issues an award resolving specific issues submitted by the parties, and the proceedings as to that arbitrator's award are complete, an action to enforce, vacate, or modify the arbitrator's award is appropriate.

2. Decisions in Other Districts

The Court is not alone in coming to this conclusion. Another district court, in a decision relied on by both parties, reached the same result for the same statutory section and held that when "an arbitrator finally resolves a separate issue that the parties have bifurcated from the others and submitted to arbitration, that decision is final and complete for the purposes of review." *JLNW*, 2018 WL 4757953 at *6; *see* Def.'s Dismiss Mem. 5–6; Pls.' Dismiss Mem. 5–7; Def.'s Dismiss Reply 3. There, "the parties fully submitted a specific issue for the arbitrator to review separately" and "held in abeyance" other issues. *JLNW,* 2018 WL 4757953 at *7. "The arbitrator then reached a final decision" on the submitted issue and rendered a final award resolving it. *Id.* Accordingly, because

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Opp'n Pls.' Cross-Mot. Dismiss 4 n.2 ("Both parties agree that the award is final in the context of the arbitration (it is not subject to another motion to reconsider,) and for purposes of the Fund's claim for interim payments."); Pls.' Dismiss Mem. 6 (agreeing that the Arbitrator has no further authority over the two issues resolved by the Arbitrator's award).

the "arbitrator []therefore resolved the issue submitted to arbitration and [] resolved it definitively enough that it did not stand in need of further adjudication," the proceedings as to the award were complete and judicial review was appropriate. *Id.*

The *JLNW* Court bolstered its reading by looking to the further language in Section 1401(b) stating that arbitration proceedings, "shall, to the extent consistent with th[e ERISA] subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers . . . , and enforced in United States courts as an arbitration proceeding carried out under [the Federal Arbitration Act ("FAA")]." 29 U.S.C. § 1401(b)(3). By reviewing Second Circuit cases on the topic, the *JLNW* Court concluded that the FAA's finality requirement is satisfied when "an arbitration award . . . resolve[s] all the issues submitted to arbitration, and []resolve[s] them definitively enough so that the rights and obligations of the two parties, with respect to the issues submitted, do not stand in need of further adjudication." *JLNW,* 2018 WL 4757953 at *4 (quoting *Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc.*, 157 F.3d 174, 176 (2d Cir. 1998)). That is, an arbitrator's award conclusively resolving specified and bifurcated issues is sufficiently final for immediate judicial review. *Id.* at *4–6.

While the parties were unable to identify a directly on point case for FAA finality in the D.C. Circuit, the closest decision suggests that this Circuit's view would be substantially the same as the Second Circuit's. *See Union Pac. R.R. Co. v. Surface Transp. Bd.*, 358 F.3d 31 (D.C. Cir. 2004). In *Union Pacific*, the D.C. Circuit considered a multi-phase arbitration

and whether a decision by the Surface Transportation Board reviewing the arbitrator's decision on the first phase was final enough to enable judicial review. *Id.* at 32–34. The panel concluded that the decision reviewing the first phase was final because it "complete[d]" the first phase of the bifurcated proceedings. *Id.* at 34. In so holding, the panel cited approvingly to the First Circuit's FAA jurisprudence, *id.* at 34–35 (citing *Hart Surgical, Inc. v. Ultracision, Inc.*, 244 F.3d 231, 234–35 (1st Cir. 2001)), which is substantially the same as the Second Circuit's. *See Hart Surgical*, 244 F.3d at 234–35.

M&K's cited cases for Section 1401(b)'s exhaustion requirement do not lead this Court to a different result. Almost all of its cases are either inapposite or cut against M&K's position.[7] One decision, however, is both relevant and contrary to this Court's opinion. *See Nat'l Dairy Ass'n v. W. Conf. of Teamsters Pension Tr. Fund,* No. 17-cv-0214 (RSL), 2017 WL 6310623 (W.D. Wash. Dec. 11, 2017). In *National Dairy Association*, the parties agreed to bifurcate the resolution of three issues, and the arbitrator issued an "Interim

[7] One involved waiver of arbitration. *Robbins v. Chipman Trucking Inc*, 693 F. Supp. 628, 639 (N.D. Ill. 1986), *aff'd*, 848 F.2d 196 (7th Cir. 1988), and *aff'd,* 866 F.2d 899 (7th Cir. 1988). Two other cases resolved whether arbitration proceedings were complete when a dispositive issue had been satisfied, without touching on the effect of bifurcation. *See Genz-Ryan Plumbing & Heating Co. v. Sheet Metal Workers' Loc. 10*, 207 F. Supp. 3d 1038, 1041–42 (D. Minn. 2016); *Bd. of Trustees of W. Conf. of Teamsters Pension Tr. Fund v. Loomis Armored Car, Inc.*, 626 F. Supp. 218, 219 (W.D. Wash. 1986). Another case cuts against M&K's position and cites approvingly to *JLNW*. *Riverbay Corp. v. Serv. Emps. Int'l Union Loc. 32BJ*, No. 18-cv-4660 (RA), 2019 WL 1244568, at *3 (S.D.N.Y. Mar. 18, 2019).

Award & Opinion" resolving one of them. *Id.* at *1. Even though the first issue was resolved in the arbitration proceedings, the court concluded that "[t]he arbitrator's work in this case [was] not done" and because two issues remained to be resolved "judicial review [was] premature." *Id.* at *2. This Court, however, finds the language of the statute and the reasoning of *JLNW* more persuasive. The *National Dairy Association* Court focused on the phrase "[u]pon completion of the arbitration proceedings" while giving little attention to the later statutory language of "arbitrator's award." *See* 29 U.S.C. § 1401(b)(2). As this Court has explained, a challenge to a withdrawal liability assessment might include several "arbitrator's awards" resolving different issues. By failing to recognize and apply this fact, the *National Dairy Association* Court erred.

3. Application to this Award

M&K's ultimate contention—that the arbitration was not actually bifurcated into different parts—also fails. The parties chose two issues to "submit to the Arbitrator . . . for resolution." Arbitration Stipulation. In M&K's own words, the agreement was for resolution of "two *preliminary* issues" by the Arbitrator that were "specified and discrete" from other issues. Def.'s Summ. J. Opp'n 12, 18 (emphasis in original). The Arbitrator issued an award resolving both, Arbitration Decision 36–37, and then finalized the decision by letter, August 11 Letter. M&K concedes that the Arbitrator's award on both submitted issues has been finalized and that neither issue is subject to relitigation. Def.'s Opp'n Pls.' Cross-Mot. Dismiss 4 n.2. The

arbitration proceedings have thus come to completion as to the award before this Court.

In sum, because there had been "completion of the arbitration proceedings" as to "an arbitrator's award," "any party" was permitted to bring an action "to enforce, vacate, or modify the arbitrator's award." 29 U.S.C. § 1401(b)(2). M&K's motion to dismiss will be denied. Because its motion to strike or stay relied on the same arguments now rejected by this Court, it will also be denied.

B. M&K's Counterclaim is Timely

Alongside its motion to dismiss, M&K pled a counterclaim to enforce the portion of the arbitration award requiring use of methods and assumptions in effect on December 31, 2017, and to vacate the portion denying it use of the free-look exception. Def.'s Countercl. IAM moved to dismiss, arguing that the time to file the counterclaim had expired. Pls.' Dismiss Mem. 8–9.

Once again, the Court must turn to Section 1401(b). It states that "[u]pon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, *no later than 30 days after the issuance of an arbitrator's award* . . . to enforce, vacate, or modify the arbitrator's award." 29 U.S.C. § 1401(b)(2) (emphasis added).

IAM argues that the counterclaim was untimely because the period to file it expired on September 3. Pls.' Dismiss Mem. 8–9. Under its formulation, the clock started on the day that the Arbitrator issued his decision, July 13, 2021. *Id.*; Arbitration Decision. Then, the clock was suspended between July 20 and

August 11 while a motion to reconsider was pending, before restarting upon the issuance of the Arbitrator's letter on August 11. Pls.' Dismiss Mem. 8–9; *see* 29 C.F.R. § 4221.9(a). Under this calculation method, M&K's counterclaim, filed on September 10, would be one week late.

IAM's timeline presumes that the award to be enforced, vacated, or modified was issued on July 13 for purposes of calculating the 30 days. The Court, however, concludes otherwise. While the Arbitrator rendered his decision on July 13, his award explicitly retained jurisdiction over how to enforce one of the two issues that he was tasked with resolving. Arbitration Decision 36–37. In his August 11 letter, the Arbitrator delivered "a clarification" regarding his prior award and only after concluding that "[t]he matter of relief, [as to the issue over which the Arbitrator retained jurisdiction] appear[ed] to now be moot" did he release jurisdiction on that issue. August 11 Letter. The 30-day timeline began to run at that time. Indeed, IAM agrees that "the deadline to enforce, vacate, or modify a withdrawal liability arbitration award begins to accrue once the 'arbitrator *finally* resolves a separate issue that the parties have bifurcated from the others and submitted to arbitration.'" Pls.' Reply Supp. Cross-Mot. Dismiss 3 (emphasis added) (quoting *JLNW,* 2018 WL 4757953 at *6–7). There was no such final resolution until the Arbitrator's self-imposed hold on the first issue was resolved by letter on August 11. August 11 Letter. For that same reason, IAM's reliance on the implementing regulations which "suspend[] the 30–day period" upon "filing of a written motion for modification or reconsideration"

misses the mark. *See* 29 C.F.R. § 4221.9(a). This suspension scheme did not come into effect because the Arbitrator had not finalized his resolution of the first issue, so there was no clock to suspend.[8]

Furthermore, this understanding is the only one that makes practical sense within the statutory structure. Consider the result if the Arbitrator's award were understood to have been issued on July 13. The parties would have 30 days from that date to bring an action in federal court. However, the Arbitrator's remaining work on the first issue would preclude the necessary finality for review. *See supra* Part III.A. The arbitration proceedings as to the award were, after all, not at "completion" until the self-initiated retention of jurisdiction was relinquished. *See* 29 U.S.C. § 1401(b)(2). It was only when the Arbitrator sent his letter that the award was finalized and ripe for review. *See* August 11 Letter. IAM's position would mean that an award can be issued for purposes of the 30-day period to bring an action but not final for purposes of review. Accordingly, a delay by an arbitrator in finalizing resolution of an issue could deprive the parties of the opportunity to ever bring an action. Such an absurd result is not required, nor suggested,

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[8] The lack of finality from a self-retained jurisdiction is functionally different from the lack of finality caused by a motion to reconsider or modify. Those motions act to temporarily suspend an otherwise final award because the parties wish to change an otherwise ultimate decision. *See* 29 C.F.R. § 4221.8–9. Here, the Arbitrator's award was not an otherwise ultimate decision until he relinquished jurisdiction "to resolve any dispute arising from the application of the foregoing order." Arbitration Decision 36–37. The clock consequently never started.

by the statute. The award was not issued here for purposes of Section 1401(b)(2) until the Arbitrator sent his letter.

In sum, the 30-day clock did not begin to run until August 11, 2021. M&K had until September 10 of that year to file an action to enforce, vacate, or modify the award. It met that timing requirement, and this Court will reject IAM's motion to dismiss.

C. The Arbitrator Incorrectly Decided that Assumptions Must be Adopted by the Measurement Date

"Federal pension law is a highly specialized field" that can prove "terribly opaque." *See Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 350–52 (7th Cir. 2012). True to form, the individual provisions cited by the parties on the measurement date dispute—a critical issue in this case—are multifarious and complex. Before diving into pages of statutory intricacies, it may be helpful to step back and consider again what is at issue.

The question before the Court is about the permissible timing of an actuarial assumption. That specific actuarial assumption is the discount rate, "i.e., the rate at which the plan's assets will earn interest." *United Mine Workers*, 39 F.4th at 735. The discount rate assumption will naturally affect the plan's calculation of its unfunded vested benefits because unfunded vested benefits are "the difference between the present value of vested benefits and the current value of the plan's assets." *R.A. Gray*, 467 U.S. at 725 (citing 29 U.S.C. §§ 1381, 1391). When the discount rate assumption is revised downward, the value of unfunded

vested benefits must increase, along with withdrawal liability for departing employers. It is also important to remember that there is nothing special about the discount rate assumption within the statutory scheme. Congress set standards for actuarial assumptions generally without a specific mention of "discount rate." *See* 29 U.S.C. § 1393. Lastly, when an employer withdraws from an MPP, its withdrawal liability must be determined "as of" the last day of the Plan Year prior to its withdrawal (the measurement date). *See supra* Part I.A.

The Court is tasked with deciding whether the Arbitrator was correct, as a matter of law, that ERISA requires a discount rate assumption to be adopted by the measurement date to affect liability for employers that withdraw during the following Plan Year. After careful consideration, the Court concludes that the Arbitrator was incorrect. ERISA allows actuarial assumptions adopted after the measurement date to be used for withdrawal liability assessments. However, the Court rejects IAM's theory that actuaries are free to rely on information from *any time* when producing those post-measurement-date actuarial assumptions. Instead, assumptions must be limited to the body of knowledge available *on or before the measurement date*. That is, the actuary cannot rely on events and factual developments that occur after the measurement date, but it *can* collect and analyze the data generated as of the measurement date to understand the factual universe that existed on that date.

The Court will begin by diagraming out the relevant portion of the statutory scheme. Through that process, the Court hopes to traverse the maze of

ERISA and reveal the ordinary legal principles lurking within. After deciphering the statute's text, the Court will set forth its affirmative understanding of the correct rule. Finally, the Court will apply its rule to the Arbitrator's decision.

1. Relevant Statutory Provisions

The focus of the Court's statutory inquiry is Subtitle E of Title 29 of the United States Code, which contains "Special Provisions for Multiemployer Plans." Part 1 of that subtitle contains Congress' plan for employer withdrawals and how liability is to be calculated. Section 1381 establishes what exactly withdrawal liability is. It states that, upon complete or partial withdrawal of an employer from an MPP, "[t]he withdrawal liability of an employer to a plan is the amount determined under [§] 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted [by four additional steps]." 29 U.S.C. § 1381 (a), (b)(1). The four adjustment steps do not affect the current issue.

Section 1391 next provides how to determine the "amount of the unfunded vested benefits allocable to an employer." *Id.* § 1391(a). That complicated section consists of nearly 3,500 words, which the Supreme Court has helpfully summarized. In short, it "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)." *Milwaukee Brewery Workers' Pension Plan*, 513 U.S. at 417. Section 1391 also "instructs a plan to make the withdrawal charge calculation, not as of the

day of withdrawal, but *as of the last day of the plan year preceding the year during which the employer withdrew*—a day that could be up to a year earlier." *Id.* at 417–18 (emphasis in original) (citing 29 U.S.C. §§ 1391(b)(2)(A)(ii), (b)(2)(E)(i), (c)(2)(C)(i), (c)(3)(A), and (c)(4)(A)); *see* 29 U.S.C. § 1391 (using the language "as of the end of the plan year preceding the plan year in which the employer withdraws" and similar formulations to define how to calculate unfunded vested benefits). This concept of "as of" is made far simpler when directly applied to this case. Here, the unfunded vested benefits for M&K's withdrawal liability calculation must be as of December 31, 2017. In short, December 31, 2017 is the measurement date.

Next, the Court must consider the provision laying out Congress's restrictions on the "[a]ctuarial assumptions" to be used "in determining unfunded vested benefits of a plan for computing withdrawal liability." 29 U.S.C. § 1393(a). Once again, it is worth reiterating that the "unfunded vested benefits" calculation is critical because withdrawal liability is essentially just "the allocable amount of unfunded vested benefits." *See id.* § 1381(b)(1).

There are two permissible paths prescribed by Congress for defining the actuarial assumptions and methods to be used for calculating unfunded vested benefits. The first allows a plan to use "actuarial assumptions and methods set forth in the corporation's regulations." *Id.* § 1393(a)(2). IAM does not allege that it relied on any such regulations here. *See* Pls.' Summ. J. Mem. 12 n.5. Therefore, IAM was obligated to follow the second path, which requires that withdrawal liability "be determined by each plan on the

basis of—[]actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1). Congress also specifically allowed a plan actuary to rely on less than perfect information, including (1) "the most recent complete actuarial valuation used for purposes of [minimum funding] and reasonable estimates for the interim years of the unfunded vested benefits" as well as (2) "in the absence of complete data . . . data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan." *Id.* § 1393(b). In accordance with minimum funding requirements, plans must submit "a determination of experience gains and losses and a valuation of the plan's liability . . . not less frequently than once every year." *Id.* § 1084(c)(7)(A).

There are a few additional sections of the statute worth highlighting. First, the scheme contains an explicit anti-retroactivity provision for certain kinds of plan rules and amendments which are used to calculate withdrawal liability. Those rules and amendments may not "be applied without the employer's consent with respect to liability for a withdrawal or partial withdrawal which occurred before the date on which the rule or amendment was adopted." *Id.* § 1394(a). Congress also required uniform application of the rules and amendments so that they "shall operate and be applied uniformly with respect to each employer, except that special provisions may be made to take into account the creditworthiness of an employer." *Id.* § 1394(b). Finally, Congress obligated

plan sponsors[9] to give notice of such rules and amendments. *Id.* Although the discount rate at issue is an actuarial assumption, rather than one of these rules or amendments, the existence of these provisions provides relevant context for understanding the overall statutory scheme. *See id.* §§ 1389, 1391(c) (comprising the kinds of rules and amendments covered by Section 1394).

Next, two provisions set out timing for calculation of unfunded vested benefits. Section 1021 requires a plan to provide an estimate of withdrawal liability upon an employer's request. *Id.* § 1021(l). The estimate is based on a hypothetical scenario where the employer withdrew on the last day of the Plan Year prior to the year of the request. *Id.* Given the "as of" rule, the estimated withdrawal liability is then calculated as of the last day of the Plan Year two years prior to the Plan Year during which the employer requested the estimate. For example, if an employer makes a request to IAM on September 30, 2022, it will receive an estimate of withdrawal liability calculated as of a December 31, 2020 measurement date. *See id.* The plan must furnish this estimate, and an explanation of the actuarial assumptions and other relevant inputs used to generate it, within 180 days of the request. *Id.* Another timeliness provision, Section 1399, states that an employer actually withdrawing from a plan shall receive notice of the "amount of the liability" and "the schedule for liability payments" "as

[9] A plan sponsor is "the plan's joint board of trustees" "or if the plan has no joint board of trustees, the plan administrator." 29 U.S.C. § 1301(a)(10). IAM has a board of trustees. *See, e.g.*, Pls.' Summ. J. Mem. 6.

soon as practicable after an employer's ... withdrawal." *Id.* § 1399(b). Both provisions implicitly acknowledge that calculation of withdrawal liability will lag the end of the relevant Plan Year.

Finally, Congress imposed highly deferential review of the actuary's "determination of a plan's unfunded vested benefits for a plan year" directing that "the determination is presumed correct" unless the contesting party shows one of two things by a preponderance of the evidence. *Id.* § 1401(a). The challenging employer must either show that "the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations)" or that "the plan's actuary made a significant error in applying the actuarial assumptions or methods." *Id.*

If there is a per se statutory rule barring use of an actuarial assumption chosen after the measurement date, for withdrawals to be calculated as of that date, the rule must live within the aforementioned provisions.

2. The Rule Resulting from the Statutory Provisions

The Court begins its analysis with Section 1381 and Section 1391. The former establishes that the key to withdrawal liability is the "allocable amount of unfunded vested benefits" for an employer. *Id.* § 1381(b)(1). The latter requires the assessment to be made "as of" the measurement date. *Milwaukee Brewery Workers' Pension Plan*, 513 U.S. at 417–18; 29 U.S.C. § 1391. "As of" is generally defined as "at or on (a specific time or date)," *As of*, Webster's Third

New Int'l Dictionary 129 (1965), or "used to indicate a time or date at which something begins or ends," *As of*, Merriam–Webster Dictionary Online, http://www.merriamwebster.com/dictionary/as%20of (last visited Sept. 20, 2022). The "as of" language can cut in multiple directions. One version, put forward by IAM, provides that the "as of" rule has no bearing on the choice of actuarial assumptions like the discount rate. Specifically, IAM argues that the "as of" limitation only applies to the "plan's assets and liabilities" which must be "fixed" on the measurement date, while actuarial assumptions may be updated afterward such that they represent "the actuary's best estimate on the date of calculation." Pls.' Summ. J. Mem. 17, 26. Second, M&K argues that previously adopted assumptions still in effect on the measurement date are fixed for withdrawal liability calculations as of that date. *See* Def.'s Summ. J. Mem. 17–21. Finally, there is a third option in the middle of those two positions. This reading allows actuarial assumptions to be determined after the measurement date so long as the factual basis for the assumptions is "as of" the measurement date. *See* Pls.' Summ. J. Mem. 26 (using a similar theory as an in the alternative argument). Under that interpretation, assumptions must be based on the plan's experience and the available knowledge up to and including the measurement date, but no further. This third option best fits the statutory scheme.

The Court starts with IAM's theory that actuaries can rely on factual information from any point in time when generating assumptions. It concludes that this reading fits poorly within the statutory structure and precedent.

Computation of unfunded vested benefits must be made "as of the last day of the plan year preceding the year during which the employer withdrew." *Milwaukee Brewery Workers' Pension Plan*, 513 U.S. at 417–18 (emphasis removed). At the very least, IAM agrees that the "as of" requirement demands fixing the assets and liabilities of the plan at the measurement date. *See* Pls.' Summ. J. Mem. 17. But this Court reads the language to encompass actuarial assumptions as well. This follows from the expansive scope of what Section 1391 covers. It governs the "determination of . . . the amount of the unfunded vested benefits allocable to an employer." 29 U.S.C. § 1391; *see Milwaukee Brewery Workers' Pension Plan*, 513 U.S. at 417–18. This determination involves multiple inputs. Assets and liabilities are two obvious ones, but actuarial assumptions are themselves simply additional inputs in the determination. And because the "as of" language governs the entire determination of unfunded vested benefits, assumptions and methods fall under the "as of" requirement.

This understanding fits with Section 1393's requirement that actuaries use "reasonable expectations" "tak[e] into account the experience of the plan" and make a "best estimate of anticipated experience." 29 U.S.C. § 1393(a)(1). IAM suggests that actuaries could develop assumptions based on events that occur months after the measurement date, and perhaps that have even dramatically affected the assets and liabilities that remain frozen at the measurement date. But it would be an exceedingly odd to hold assets and liabilities of the plan at one date and allow "taking into account the experience of the plan" past that same date. *See id.* The more natural understanding

of the interplay between Section 1391 and Section 1393 is that they fix the factual underpinnings for determining actuarial assumptions and methods at the measurement date, just as Section 1391 fixes the factual composition of the plan's assets and liabilities. Then, after the measurement date, the actuary can collect and consider the data, understand the experience of the plan up through the end of the Plan Year, and consider what assumptions and methods are reasonable and best estimate anticipated experience from the viewpoint of the measurement date.

IAM asserts that the use of present tense in Section 1393(a)(1) means that Congress must have required actuarial assumptions to be established from the date of the withdrawal liability calculation. Pls.' Summ. J. Mem. 13. However, given the applicability of Section 1391 to the entirety of the unfunded vested benefits determination, the two sections must be read in conjunction. Consequently, the plan actuary does use assumptions that "are reasonable" and "offer the actuary's best estimate," *id.* (quoting § 1393(a)(1)), but the reasonableness and best estimate are focused at the measurement date, rather than the date of calculation.

An actuarial standard cited by IAM validates that requiring actuarial assumptions to be generated based on the body of knowledge available by the measurement date is not unnatural. Of course, no actuarial standard can overcome statutory requirements. *United Mine Workers*, 39 F.4th at 740. But such standards can provide helpful context. And the Actuarial Standards Board ("ASB") advises in a standard of practice titled "Changes In Circumstances" that

"[t]he actuary should select economic assumptions that reflect the actuary's knowledge as of the measurement date." ASB, Actuarial Standard of Practice No. 27, § 3.5.5 (June 2020); *accord* ASB, Actuarial Standard of Practice No. 27, § 3.5.5 (Sept. 2013) ("The economic assumptions selected should reflect the actuary's knowledge as of the measurement date."). This reference to the knowledge available "as of the measurement date" helps to underscore that grounding actuarial assumptions in the factual universe at the measurement date is not so bizarre a result as to suggest a serious error of statutory interpretation.

IAM relies on the next portion of that actuarial standard of practice to support its own argument that actuaries should be able to consider events that occur after the measurement date: "If the actuary learns of an event occurring after the measurement date that would have changed the actuary's selection of an economic assumption, the actuary may reflect this change as of the measurement date." ASB, Actuarial Standard of Practice No. 27, § 3.5.5; Pls.' Summ. J. Mem. 16; Pls.' Summ. J. Reply 3; *see also* ASB, Actuarial Standard of Practice No. 27, § 3.5.5 (Sept. 2013) (addressing the same situation, but stating "[*i*]*f appropriate*, the actuary may reflect this change as of the measurement date" (emphasis added)). The very wording of the sentence—that if a post-measurement-date event *would have changed* a selection, the event *may be* reflected "as of the measurement date"—suggests a kind of exception to the "as of" requirement. The language "as of" and the pronouncement that "economic assumptions [should] reflect the actuary's knowledge as of the measurement date" conflict with allowing a post-date event. ASB's standard appears

to provide actuaries with the go-ahead to bypass the "as of" restriction, but ERISA does not—it requires its application to the entirety of the unfunded vested benefits determination, 29 U.S.C. §§ 1381, 1391. And in a contest between the ASB and Congress, ERISA wins. *United Mine Workers*, 39 F.4th at 740.

Beyond a direct reading of the statutory text, and consideration of actuarial practice, the Circuit's decision in *Combs v. Classic Coal Corp.*, 931 F.2d 96 (D.C. Cir. 1991), undermines IAM's position and supports requiring actuarial assumptions to be based on the body of knowledge at the measurement date. The panel there considered the propriety of an arbitrator "consider[ing] evidence gathered after [an employer's] withdrawal to find the assumptions used to calculate [its] withdrawal liability unreasonable." *Id.* at 102. The Circuit explained that a withdrawal liability "calculation is like a snapshot, in that it represents the actuary's best estimate given the evidence *then available*." *Id.* (emphasis in original) (quoting *Combs v. Classic Coal Corp.*, No. 84-cv-1562 (TPJ), 1990 WL 66583, at *8 n.10 (D.D.C. Apr. 6, 1990)) (internal quotation marks omitted). Considering the best estimate requirement, the Circuit held that pension plans were not "*require*[*d*] . . . to base their assumptions on information gathered *after* the fiscal year-end of the [p]lans." *Id.* (emphases in original).

IAM's reading that actuaries can use any information to develop assumptions would replace a "snapshot" at the end of the Plan Year with a freewheeling assessment beyond the confines of the measurement date. Such a reading would conflict with *Combs*'s rule

that a withdrawing employer is not entitled to challenge a withdrawal liability assessment using "information gathered *after*" the end of the relevant Plan Year. *See id.* (emphasis in original). At the same time, IAM argues that other language in the opinion stating that "[the plan] relied upon evidence 'then available,' i.e., available at the time of [the employer's] withdrawal, to calculate [withdrawal] liability," supports its contention that the operative time period for assumptions is the time of calculation, rather than the measurement date. *See id.* (emphasis removed); Pls.' Summ. J. Mem. 25–26. However, the Circuit's subsequent focus on "information gathered after the fiscal year-end of the Plans" reflects the measurement date as being the fulcrum for the "snapshot" rather than the day of calculation. *See Combs*, 931 F.2d at 102.

Yet, even as the Court rejects IAM's primary reading, it is unconvinced by M&K's. The defendant's reading would fix all actuarial assumptions and methods to those adopted before the measurement date and thus require assumptions and methods to roll over if not affirmatively changed. This strikes the Court as an improper interpretation of how the "as of" requirement must be applied to the determination of actuarial assumptions.

First and most importantly, M&K's reading is in tension with the requirement that a plan actuary "tak[e] into account the experience of the plan and reasonable expectations[]" as well as use "the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a). Under M&K's theory, actuaries would be required to use *every actuarial as-*

sumption and method last adopted before the measurement date, and prior to having the full data and information for a Plan Year. Assumptions and methods would need to be determined and finalized before knowing "the experience of the plan" at the time of the measurement date and before a "best estimate of anticipated experience" could be generated. *See id.*[10] This conflict provides a strong textual reason to reject M&K's contention.

The tension is underscored by two D.C. Circuit cases looking at the requirements for generating actuarial assumptions under Section 1393.

Turning back to the *Combs* case, the Circuit made clear that actuarial assumptions should be determined based on a "snapshot" centered on the evidence "then available" by "the fiscal year-end of the [p]lans." *See Combs*, 931 F.2d at 102. M&K, however, would bar an actuary from using that end-of-Plan-Year snapshot to develop assumptions. Instead, actuaries would be made to develop and adopt assumptions before the snapshot is available, or to simply roll over

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[10] While it is true that plan actuaries "may" "rely on" less than complete information like "the most recent complete actuarial valuation" for minimum funding purposes and "reasonable estimates for the interim years," that does not lead this Court to adopt M&K's position. *See* 29 U.S.C. § 1393(b)(1). *Enabling* actuaries to use "most recent" information and "reasonable estimates" for building a model that complies with Section 1393(a)'s larger directive does not naturally read as *requiring* actuaries to use all the last adopted assumptions prior to the measurement date. Indeed, to bolster its argument, M&K misstates the language of Section 1393 writing that "an actuary *must* 'rely on the most recent complete actuarial valuation'" rather than *may*. *See* Def.'s Summ. J. Mem. 17–18 (emphasis added).

prior assumptions. Both conflict with how the Circuit contemplated that actuarial assumptions would be made.

Second, in a recently issued decision, the Circuit provides further insight into the role of an actuary in selecting assumptions—undermining M&K's reading of ERISA. In that case, a withdrawing employer challenged the use of a "risk-free" discount rate assumption by an MPP actuary, in part, because it was not "[the actuary's] best estimate of anticipated experience under the plan." *United Mine Workers*, 39 F.4th at 736–38; 29 U.S.C. § 1393(a)(1). The Circuit agreed with the challenge and held that Section 1393 establishes (1) "a procedural rule that the assumptions be made by the actuary" and (2) "a substantive rule that the assumptions reflect the characteristics of the plan." *United Mine Workers*, 39 F.4th at 738. Applied to the discount rate, the Circuit held that Section 1393's substantive rule requires the assumption to be "based on the plan's actual investments." *Id.* at 740. Consequently, the Circuit rejected the risk-free discount rate assumption because the "discount rate assumption was not chosen based on the Pension Plan's past or projected investment returns." *Id.*; *see id.* at 738 ("[I]f the plan is *currently* and projects to be invested in riskier assets, the discount rate used to calculate withdrawal liability *must reflect that fact*." (emphases added)).[11] And the Circuit determined that

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[11] M&K points to two authorities in response. The first, *D.A. Nolt & Roofers Local No. 30 Combined Pension Fund v. D.A. Nolt, Inc.*, held that a plan may not issue a retroactive revision of withdrawal liability calculations after an assessment and review process, suggesting nothing of relevance for the current question. *See* 719 F. Supp. 2d 530, 546–51 (E.D. Pa. 2010), *aff'd,*

this substantive rule has teeth, holding that "[i]f [an] actuary is not basing the assumptions on the plan's characteristics, the assumptions will not be reasonable." *Id.* at 141.

M&K's reading conflicts with the reasoning of the *United Mine Workers* Court. The Circuit read Section 1393 to demand that an actuary select the actuarial assumptions and "to base his assumptions on the Plan's actual characteristics." *Id.* at 738, 743. That requirement does not allow actuarial assumptions to simply apply from one Plan Year to the next without action by the plan actuary. Automatically rolled over assumptions are not selected by the actuary for that Plan Year (the procedural rule), and, in the context of the discount rate, a rolled over assumption is certainly not "based on the plan's actual investments" (the substantive rule). *See id.* at 738–40. Moreover, if actuaries were instead forced to create assumptions prior to the end of the Plan Year, they would still fail the Circuit's substantive rule that "assumptions reflect the characteristics of the plan" and, for the discount rate, that the assumption be "currently" "based on the plan's actual investments" and experience. *See id.* "By not tak[ing] into account the experience of the plan" a rolled over assumption, or one made without considering the plan's characteristics at the measurement date, is "therefore [] not a reasonable assumption." *See id.* at 741.

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444 F. App'x 571 (3d Cir. 2011). The second, a Pension Benefit Guaranty Corporation ("PBGC") opinion letter, makes substantially the same point and has the same lack of relevance. *See* PBGC Opinion Letter No. 90-2 (Apr. 20, 1990).

The best reading of Section 1391 and Section 1393, alongside the D.C. Circuit's two cases on actuarial assumptions, is that actuaries may generate assumptions after the measurement date for withdrawals during the following Plan Year. However, the assumptions must be based on the plan's experience up to the measurement date and from the viewpoint of the measurement date. This interpretation best aligns the text of the statutory provisions, *Comb*'s snapshot approach, and the *United Mine Workers* requirement that actuaries choose their assumptions and do so based on the plan's actual experience. By grounding assumptions in the snapshot of the world on the measurement date, assumptions are properly determined "as of" that date.[12]

The Court acknowledges that its reading contradicts a Second Circuit decision on this topic. *See Nat'l Ret. Fund On Behalf of Legacy Plan of Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.* ("*Metz*"), 946 F.3d 146 (2d Cir. 2020), *cert. denied sub nom. Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.*, 141 S. Ct. 246 (2020). M&K cites to that case and the Arbitrator heavily relied on it. But after careful consideration, this Court

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[12] ERISA's timing provisions ensure that an actuary has sufficient time to consider the factual universe as of the measurement date and calculate appropriate assumptions. For withdrawal liability estimates, a plan need only provide, at the earliest, an estimate of withdrawal liability 1.5 years following the relevant measurement date along with the actuary's assumptions and methods. *See* 29 U.S.C § 1021(l). For withdrawals, the scheme provides that a plan will only be required to provide the liability assessment "as soon as practicable after an employer's . . . withdrawal." *Id.* § 1399(b).

respectfully disagrees with the Second Circuit's reasoning.

There, the Second Circuit held that the last discount rate assumption adopted prior to the measurement date becomes fixed for all withdrawal liability determined as of that measurement date. *Id.* at 152. Specifically, the Second Circuit held that:

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

Id. The panel, in reversing the district court's contrary conclusion, relied on several considerations. First, it explained that Section 1393 is "silent as to whether interest rate assumptions on the Measurement Date must be affirmatively adopted, or whether, absent an actuary's affirmative selection of a new assumption rate, the rate in effect during the previous plan year rolls over automatically," and noted that an interest rate assumption is generally stable. *Id.* at 150. Given that silence, the panel found Section 1394's notice and anti-retroactivity requirements for plan rules and amendments to be helpful, alongside the legislative history of the section, concluding that they support anti-retroactivity for actuarial assumptions as well. *Id.* at 150–51. It also found an employer's right to demand a withdrawal liability estimate to count in favor of fixing actuarial assumptions

to those adopted before the measurement date. *Id.* at 151 (citing 29 U.S.C. § 1021(l)). Finally, the *Metz* Court feared that, without such a rule, there would be "opportunity for manipulation and bias." *Id.* at 151–52.

This Court respectfully disagrees with the *Metz* Court's contentions.

First, this Court agrees that Section 1393 is not explicit on the timing of assumptions. But the directives in Section 1393 about "tak[ing] into account the experience of the plan" "reasonable expectations" and "the actuary's best estimate of anticipated experience" undermine the argument that assumptions can be allowed to merely roll over. *See* 29 U.S.C. § 1393(a). This is true even though the "as of" requirement grounds the whole determination at the time of the measurement date. *See id.* § 1391. The best reading of those two provisions together is not that assumptions can be allowed to roll over, but rather that the assumptions must be based on the plan's experience, reasonable expectations, and the best estimate of anticipated experience from the viewpoint of the measurement date.

Second, this Court understands Section 1394 to have the opposite import as the one given to it by the Second Circuit. The presence of an anti-retroactivity provision in the section dealing with plan rules and amendments, and the absence of one in the section dealing with actuarial assumptions, suggests that anti-retroactivity was purposefully omitted in the latter. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452–53 (2002). And the Second Circuit's excerpt of legislative history says nothing to the contrary. *See*

Metz, 946 F.3d at 150. In fact, the cited report plainly states that Congress was only targeting "plan rules and amendments" with an anti-retroactivity protection. *See id.* (citing H.R. Rep. No. 96-869, pt. 2 at 30). And even if Section 1394 were to embody a legislative intent against anti-retroactivity that is to be applied to the entire statutory scheme, it would still not counsel in favor of M&K here. Section 1394 only prevents retroactive application of rules and amendments adopted after an employer's *withdrawal*, rather than after the measurement date. 29 U.S.C. § 1394(a). The discount rate change here happened before M&K's withdrawal, not after. Arbitration Stipulation Undisputed Facts ¶¶ 27, 30–31.

Third, the Second Circuit's reliance on the right of an employer to demand a withdrawal estimate is unpersuasive. The Second Circuit cites that provision as proof that actuarial assumptions cannot be adopted after the measurement date because "[s]uch provisions are of no value if retroactive changes in interest rates assumptions may be made at any time." *Id.* at 151 (citing 29 U.S.C. § 1021(l)). Yet, as this Court explained, that estimate will be as of the last day of the Plan Year two years prior to the date that the estimate is requested. The Second Circuit contemplated that Section 1021(l) enables employers to demand the applicable actuarial assumptions before deciding whether to withdraw. *See id.* However, the withdrawal estimate under that section will always be out-of-date and represent what would have happened if the employer withdrew during the prior Plan Year. *See* 29 U.S.C. § 1021(l)(1)(A). Congress did not require that employers receive the applicable actuarial assumptions prior to a decision to withdraw, which is

consistent with a statutory scheme that allows for formulation of those assumptions after the measurement date.

Fourth, the Second Circuit worried that "the selection of an interest rate assumption after the Measurement Date would create significant opportunity for manipulation and bias" by enabling plans "to pressure actuaries to assess greater withdrawal liability on recently withdrawn employers." *Metz*, 946 F.3d at 151. This Court disagrees that the Second Circuit's concern counsels in favor of its rule for two principal reasons.

Most importantly, the statute already deals with the Circuit's apprehension. The actuarial assumptions must be, in the aggregate, "reasonable (taking into account the experience of the plan and reasonable expectations)" and "offer *the actuary's* best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1) (emphasis added). If the applied assumptions are not the actuary's best estimate, or are unreasonable, then they should be challenged on those grounds. *See United Mine Workers*, 39 F.4th at 738 ("[There is] a procedural rule that the assumptions be made by the actuary and a substantive rule that the assumptions reflect the characteristics of the plan.").

And even if this Court were to consider fashioning a rule based on policy, or purpose-based concerns, the Second Circuit's choice seems likely to create a more extreme risk of manipulation and bias. Rather than requiring that actuaries generate the best assumptions based on the evidence then available, the Second Circuit' rule enables "the interest rate assumption in place from the previous plan year [to] roll over automatically." *Metz*, 946 F.3d at 152. Consider a plan

with a relatively low discount rate. If the plan believed that review of the Plan Year's data would indicate that the rate should be increased (thus lowering future withdrawal liability), but wished to avoid that outcome, it would need only delay adoption of a new actuarial assumption until after the measurement date. For example, it could try to slow the speed of its actuary to delay final adoption of a new discount rate. Or the plan could fire its actuary and delay the new actuary from adopting its assumptions until after the measurement date. Those methods of manipulating withdrawal liability, in compliance with the Second Circuit's rule, strike this Court as more likely than affirmatively causing an actuary to adopt malicious actuarial assumptions after the measurement date. Indeed, the Supreme Court has recognized that plan actuaries are "apparently unbiased professional[s], whose obligations tend to moderate any claimed inclination to come down hard on withdrawing employers." *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 635 (1993). To generate a rule that assumes actuaries will disregard professional obligations and manipulate withdrawal liability on behalf of pension plans would be to disregard the Supreme Court's understanding of actuarial independence. And, if the purpose of the MPPAA were a consideration in fashioning the relevant rule, then the Court would heed that "Congress enacted the MPPAA to protect the financial solvency of multiemployer pension plans" and develop its rule accordingly. *See Bay Area Laundry*, 522 U.S. at 196. But neither policy, nor legislative intent, guides the Court's decision here. Rather, the

statutory text and prior precedent dictate this Court's reading.

* * *

In sum, the Court concludes that the statutory structure, relevant precedent, and policy concerns do not support the Second Circuit's rule that actuarial assumptions may, and indeed must, roll over when not changed before the measurement date. Instead, the statute is best read to allow later adoption of actuarial assumptions, so long as those assumptions are "as of" the measurement date—that is, the assumptions must be based on the body of knowledge available up to the measurement date. That rule best complies with Congress' dual directives that unfunded vested benefits be determined "as of" the measurement date and that actuarial assumptions be generated by "taking into account the experience of the plan and reasonable expectations" such that they "offer the actuary's best estimate of anticipated experience." *See* 29 U.S.C. §§ 1391, 1393(a)(1). The plan's experience, reasonable expectations, and the best estimate of anticipated experience are therefore evaluated, not from the date of calculation, but rather from the viewpoint of the measurement date, just as the statutory scheme's "as of" requirement demands.

3. Application of the Rule to the Arbitrator's Decision

Having clarified the proper interpretation and resulting rule, this Court must now consider the Arbitrator's decision. The Arbitrator concluded that a fund must use "the assumptions and methods in effect" on the relevant measurement date when calculating withdrawal liability. Arbitration Decision 17–

23. To come to that rule, he relied on several sources, including Section 1391, the *Metz* decision, and *D.A. Nolt*. *Id.* The Court appreciates the Arbitrator's reasoned decision, but his rule conflicts with the best reading of ERISA and D.C. Circuit precedent. It is accordingly incorrect as a matter of law. Therefore, this Court will vacate the Arbitrator's award insofar as it establishes that IAM had to "us[e] the assumptions and methods in effect on the December 31, 2017 Measurement Date." Arbitration Decision 36.

At the same time, the Court cannot hold that the 6.5% discount rate was determined as of the measurement date. Plaintiffs urge this Court to do so, arguing that the evidence shows its assumptions were based on the factual universe at the time of the measurement date. *See* Pls.' Summ. J. Mem. 26. M&K, for good measure, does not help its situation by implying that IAM's actuary based its decision only on information available before the measurement date (to demonstrate that it was adopted later for wrongful purposes). *See* Def.'s Summ J. Mem. 17 ("[T]he modeling on interest rates in [IAM's actuary's] PowerPoint is all based on data that predates the December 31, 2017 Measurement Date . . . [i]t would, therefore, be pure speculation to conclude that [the actuary] changed the discount rate on the basis of any particular information"). Nevertheless, the record before this Court, including the stipulation of facts generated during the arbitration, does not sufficiently settle the question. It is not even clear that the Court should do so, even if it thought the record was clear, given that the Arbitrator was not given an opportunity to apply the proper legal rule in the first instance. *Cf. I.A.M.*

Nat. Pension Fund Ben. Plan C. v. Stockton TRI Indus., 727 F.2d 1204, 1207–08 & n.7 (D.C. Cir. 1984) (likening review of an arbitrator in this context to review of an administrative agency and recognizing that Congress expressed a preference for "initial resolution of the dispute in a non-judicial forum"). Either way, the question will be left to the Arbitrator, now supplied with the effective legal rule to apply.

Along those lines, the Court recognizes that M&K has spent a good portion of its briefing questioning the circumstances by which the discount rate assumption was adopted in this case. Def.'s Summ. J. Mem. 26–30. M&K asserts that the rate was adopted, not because it was reasonable or a best estimate, but rather to increase withdrawal liability. *See id.* Furthermore, M&K argues that, in reality, it was IAM's trustees that chose the 6.5% discount rate, and points to parts of the record to indicate that IAM's actuary will not defend the assumption as reasonable or in keeping with actuarial standards. *Id.* The Court reiterates that those allegations are not a reason to create an extra-statutory rule, particularly given that the statute provides guidelines for the procedure and substance of assumptions, 29 U.S.C. § 1393, along with a means for attacking challenged assumptions, *id.* § 1401(a)(3)(B); *see also United Mine Workers*, 39 F.4th at 738–40 (discussing the procedural and substantive requirements for actuarial assumptions). In front of the Arbitrator, M&K can pursue its allegations within Congress's guidelines for testing the legality of actuarial assumptions imposed on an employer through a withdrawal liability assessment. Included within that framework is the opportunity to show that IAM has failed to comply with Congress's

requirement for actuarial assumptions as described in this opinion. The Court can provide nothing more than that.

D. The Arbitrator Incorrectly Decided that M&K Did Not Qualify for the Free-Look Exception

The final issue in this case is whether M&K was entitled to the free-look exception. Under that exception, an employer may contribute to a plan for an initial specified period and then withdraw without liability, so long as the plan elects to allow this "free look." *See* 29 U.S.C. § 1390. Specifically, "[a]n employer . . . is not liable to the plan" if the employer (1) "withdraws from a plan in complete or partial withdrawal" and (2) "had an obligation to contribute to the plan for no more than . . . the number of years required for vesting under the plan." *See id.* § 1390(a).[13] IAM chose to enact the free-look exception and set the specified period to vest at five years. Arbitration Stipulation Undisputed Facts ¶ 7.

M&K argues that it was entitled to the free-look exception because it started contributing to IAM in 2012 and two of its entities, M&K Joliet and M&K Summit, ceased contributing within the first five years of M&K's obligation. Def.'s Opp'n Summ. J. 36–42. The Arbitrator disagreed. He came to this conclusion by applying a provision of ERISA which directs that multiple entities in a controlled group are to be considered "a single employer." 29 U.S.C. § 1301(b)(1); Arbitration Decision 32–36. Both parties

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[13] There are other statutory requirements that the parties agree are satisfied here. Pls.' Summ. J. Mem. 5 n.1.

agree that the three relevant M&K entities here, M&K Joliet, M&K Summit, and M&K Alsip, were a controlled group and thus a single employer under that section. Arbitration Stipulation Undisputed Facts ¶¶ 22–23. Both parties also agree that M&K Joliet and M&K Summit withdrew before any M&K entity had an obligation of more than five years. *Id.* ¶ 30. M&K Alsip, however, continued contributing to IAM for more than five years. *Id.* Because the collective entities ended up having an obligation for longer than five years, the Arbitrator concluded that the free-look exception did not apply to M&K as a single employer. Arbitration Decision 32–36.

The Court concludes that the Arbitrator erred as a matter of law in determining that M&K was not entitled to the free-look exception. The single employer combination of the three M&K entities met the free-look exception's requirements because it had (1) a "complete or partial withdrawal" and (2) "an obligation to contribute to the plan for no more than" five years. *See* 29 U.S.C. § 1390(a).

First, the cessation of M&K Joliet and M&K Summit's obligations to IAM constituted a partial withdrawal by the single employer M&K. Under ERISA, an employer partially withdraws when there is "a partial cessation of the employer's contribution obligation." *Id.* § 1385(a)(2), (b)(2) (laying out the specifics required for a partial cessation). This is as opposed to a complete withdrawal, which terminates completely the employer's obligation to contribute to a plan or covered operations. *Id.* § 1383(a).

A partial cessation is exactly what happened in March 2017 and then again in July 2017. In March,

M&K Joliet ended its obligation to IAM when representation was decertified. Arbitration Stipulation Undisputed Facts ¶ 30. In July, M&K Summit ceased its obligation with the negotiation of a new collective bargaining agreement. *Id.* Treating those entities as part of a single M&K employer, M&K ceased its contribution obligations at those two locations, which ultimately triggered a partial withdrawal during the 2017 Plan Year. *See* 29 U.S.C. § 1385(a)(2), (b)(2). In fact, IAM determined that M&K had engaged in "a partial withdrawal" "based upon a cessation of [M&K's] obligation to contribute to the Fund at [the] company's Joliet, IL location effective March 31, 2017 and [the company's] Summit, IL location effective July 31, 2017." ECF No. 1-2 at 319. The Arbitrator also concluded that M&K had a "partial withdrawal by its Joliet and Summit facilities." Arbitration Decision 37.

Second, the single employer M&K "had an obligation to contribute to the plan for no more than" five years. *See* 29 U.S.C. § 1390(a). The best reading of the combined language "an employer who withdraws from a plan in complete or partial withdrawal" and "had an obligation to contribute to the plan for no more than [a specified time period]" is that, together, they require the length of the obligation to be considered at the time of the withdrawal. *See id.* This is particularly true given that the exception applies to partial withdrawals along with complete withdrawals. *Id.* An employer's obligation to a plan definitionally continues after a partial withdrawal. *See id.* § 1385(a)(2), (b)(2). If the obligation requirement for the free-look exception were held open indefinitely, and not assessed at the time of withdrawal, then any

"free look" for a partial withdrawal would eventually time out when the employer passed the specified obligation period. But Congress chose to include both partial withdrawals and complete withdrawals in the free-look exception. Consequently, the employer's obligation must be measured at the time of the withdrawal.

The only question then is, at the time of the partial withdrawal, did the single employer M&K have an obligation of less than five years? And the answer, stipulated by the parties, is yes. Arbitration Stipulation Undisputed Facts. ¶¶ 22–23, 30. So, "treat[ing the] 'controlled group' employer like any other ERISA employer," *Robbins v. Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp. 641, 657 (N.D. Ill. 1986), M&K's partial withdrawal met the free-look exception's requirements.

To come to the contrary conclusion, the Arbitrator relied on *South City Motors, Inc. v. Automotive Industries Pension Trust Fund*. No. 17-cv-04475, 2018 WL 2387854 (N.D. Cal. May 25, 2018), *aff'd* 796 F. App'x 393 (9th Cir. 2020). The district court there held that "a control-group employer is not exempt from withdrawal liability unless the [single] employer . . . meets all of the free look's requirements." *Id.* at *6. Similarly, the Ninth Circuit, in affirming, held that "for purposes of the free look exemption, the word employer refers to the [entities] as a controlled group—not the individual [entities]—and [when] the controlled group does not meet all of the requirements to be eligible for the free look exemption, neither do the individual [entities]." *See S. City Motors*, 796 F. App'x at 395–96. In sum, both courts held what the statute

plainly requires: that a controlled group must be treated as a single employer when applying the free-look exception. And, unlike the single employer in *South City Motors*, the single employer M&K *did* meet the requirements to invoke a "free look" at the time of its partial withdrawal. M&K had a partial withdrawal, with an obligation to IAM of no more than five years, and therefore the Arbitrator erred by denying it the exception.

Finally, because the Arbitrator did not allow M&K to invoke the exception, he did not decide how M&K's eligibility for a "free look" regarding its partial withdrawal affects liability for M&K's subsequent complete withdrawal. *See* Arbitration Decision 32–37. Because the Arbitrator did not address this question in the first instance, the Court will remand to the Arbitrator for a determination. *Cf. I.A.M. Nat. Pension Fund Ben. Plan C.*, 727 F.2d at 1207–08 & n.7.

IV. CONCLUSION

Based on the reasoning above, this Court will **GRANT IN PART AND DENY IN PART** IAM's motion for summary judgment and **GRANT IN PART AND DENY IN PART** M&K's motion for summary judgment. The Court will **DENY** M&K's motion to dismiss and motion to strike. It will further **DENY** IAM's motion to dismiss.

The result is that this Court will **VACATE** the Arbitrator's award to the extent that it requires that assumptions and methods be adopted by a plan prior to the measurement date applicable to a withdrawal and to the extent that it rejects that M&K was eligible for the free-look exception with regard to its partial withdrawal by its Joliet and Summit facilities. The Court

will **REMAND** to the Arbitrator for further proceedings consistent with its memorandum opinion.

A separate order will issue.

Date: September 28, 2022.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 21-928 (RDM)
Consolidated with:
No. 21-00931 (RDM)
No. 21-02132 (RDM)

TRUSTEES OF THE IAM NATIONAL PENSION FUND,
PLAINTIFFS,

v.

OHIO MAGNETICS, ET AL., DEFENDANTS.

Filed: Feb. 6, 2023

MEMORANDUM OPINION

These consolidated cases require the Court to interpret various provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, a prospect that can send chills down the judicial spine. But Judge Richard Posner, invoking a quote from Oliver Wendell Holmes, offers words of comfort to judges required to give meaning to ERISA's arcane terms. *See Chicago Truck Drivers Union v. CPC Logistics, Inc.*, 698 F.3d 346, 353 (7th Cir. 2012). As Justice Holmes wrote to the English jurist Sir Frederick Pollock in a very different time and context but in words that, as Judge Posner notes, are apt to judicial efforts to interpret ERISA: "I am frightened

weekly [by seemingly hard cases,] but . . . when you walk up to the lion and lay hold[,] the hide comes off and the same old donkey of a question of law is underneath." *Id.* (quoting 1 *Holmes–Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock*, 1874–1932, at 156 (Mark De Wolfe Howe ed. 1941)). This is such a case. The complexity of the statutory regime and the intricate calculations required to implement it are, at first, daunting. But once that "hide comes off," both the question presented and the answer to it are readily discernible. *Id.*

The present dispute began in 2018, when three companies—Ohio Magnetics, Inc., Toyota Logistics Services, Inc., and Phillips Liquidating Trust (successor in interest to the Phillips Corporation) (collectively the "Defendants" or "Companies")—withdrew from the IAM National Pension Fund (the "Fund"). Dkt. 34-2 at 5 (Pl.'s SUMF ¶ 20); *see* 29 U.S.C. § 1383(a).[1] The Companies' withdrawal entitled the Fund to assess withdrawal liability against each of them. 29 U.S.C. § 1381. Simplifying somewhat, withdrawal liability is a charge equal to each company's proportionate share of the unfunded pension benefits to which workers participating in the pension plan associated with the Fund have a vested interest. *Id.* § 1381(b)(1). Pension funds retain actuaries to calculate withdrawal liability, and the Fund's actuary did so here,

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[1] In their briefing, the parties typically refer to the pension fund, rather than the pension plan associated with the fund. The statute and the bulk of the case law, however, speak primarily in terms of pension plans. *See, e.g.*, 29 U.S.C. §§ 1381, 1383, 1393. There is no practical difference in most contexts, and, accordingly, the Court will refer to plans and funds interchangeably except where specifically noted.

basing its calculations on certain actuarial assumptions that it adopted on January 24, 2018. Dkt. 34-2 at 6 (Pl.'s SUMF ¶ 22).

The question presented here is whether the Fund's actuary was permitted to use the assumptions that it did in calculating the Companies' withdrawal liability. The Companies say that the actuary was not permitted to do so. They contend that because they withdrew in 2018, the actuary was required to use the assumptions that were "in effect" on December 31, 2017 to calculate their liability. Dkt. 37 at 5. For support, they point to provisions of ERISA that require liability for a withdrawing employer to be assessed based on a fund's unfunded vested benefits "as of" the end of the year prior to that in which the employer withdraws. Plaintiffs, the Fund's trustees, disagree. They maintain that, under the very same statutory provisions, the Fund's actuary was free to set its assumptions at any time and, in so doing, to consider any and all events occurring up to the time it made its withdrawal liability calculation, including events occurring after December 31, 2017. Dkt. 34-1 at 7.

The Court disagrees with both positions. It concludes that ERISA provides actuaries more flexibility than the Companies posit but less than they would have under the Trustees' theory. Because the Court's reading of the statute is at odds with those of the arbitrators whose awards are under review—all of whom sided with the Companies—the Court will **GRANT** Plaintiffs' motion for summary judgment, Dkt. 34, **DENY** Defendants' cross-motion for summary judgment, Dkt. 38, **VACATE** the arbitration awards, and **REMAND** the cases to their respective

arbitrators for further proceedings consistent with this opinion and to resolve any further challenges to the withdrawal liability assessments.

I. BACKGROUND

A.

In a multiemployer pension plan, multiple employers make financial contributions to the same general trust fund, and the money in that fund is used to provide for the pensions of the various employers' employees. 29 U.S.C. § 1002(37); *see Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 605–06 (1993). These plans are maintained in accordance with collective bargaining agreements between the employers and a union and are governed by the provisions of ERISA. *United Mine Workers of Am. 1974 Pension Plan v. Energy West Mining Co.*, 39 F.4th 730, 734 (D.C. Cir. 2022). Among other things, ERISA requires employers participating in multiemployer plans to "contribute annually to the plan whatever is needed to ensure it has enough assets to pay for the employees' vested pension benefits when they retire." *Id.*

An employer who participates in a multiemployer plan is free to withdraw from the plan and to terminate its obligation to make annual contributions. 29 U.S.C. § 1383. But an employer's withdrawal does not divest any worker enrolled in the plan of the pension benefits he or she has earned; the fund and its remaining contributors must still provide for the vested pension benefits of all its participants. *See Energy West*, 39 F.4th at 734–35 & n.2. This structure can create perverse incentives: if a plan's funding begins to lag—say, because a market downturn decreases the value

of its assets—participating employers will be required to make larger annual contributions in order to comply with ERISA. *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 416–17 (1995). And as required annual contributions grow, so too does the incentive for participating employers to withdraw. *Id.* Withdrawals further exacerbate funding shortfalls, and a shortfall-withdrawal-shortfall cascade can send a plan into a "death spiral." *Energy West*, 39 F.4th at 734. ERISA created a federally chartered insurance corporation, the Pension Benefit Guaranty Corporation ("PBGC"), to backstop troubled pension plans and to head off death spirals. 29 U.S.C. § 1302. But, in practice, the existence of this safety net only further encouraged withdrawals and threatened to stretch the PBGC's obligations beyond its means. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 214–15 (1986).

Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA"), Pub. L. 96-364, 94 Stat. 1208, to address this problem. To ensure that employers pay their fair share (and to discourage strategic withdrawals) the MPPAA requires withdrawing employers to pay for the privilege. 29 U.S.C. § 1381. Under the MPPAA, an employer that withdraws from a multiemployer plan must pay "its pro rata share of the pension plan's funding shortfall," also known as its withdrawal liability. *CPC Logistics*, 698 F.3d at 347; 29 U.S.C. § 1381(a), (b). More specifically, withdrawal liability is imposed based on "the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets." *Pension Benefit*

Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 725 (1984) (quoting 29 U.S.C. §§ 1381, 1391); *see* 29 U.S.C. § 1393(c).

Withdrawal liability is a function of both known variables and indeterminate assumptions. For instance, when calculating withdrawal liability, a plan's actuary knows how many employees are enrolled in the plan and what benefits their pensions provide. But the actuary must estimate, among other things, how long these employees will work and how long they will live. *Energy West*, 39 F.4th at 735. The assumption with the greatest effect on the withdrawal liability bottom line is the rate at which the plan's assets will grow "by the miracle of compound interest"—that is, the discount rate. *CPC Logistics*, 698 F.3d at 348. The higher the discount rate, the faster the fund's assets are projected to grow on their own, and thus the smaller the present value of the plan's liabilities, the lower the funding shortfall, and the less a withdrawing employer's withdrawal liability. *See id.* And, conversely, the lower the discount rate, the slower the assets are assumed to grow, and thus the greater the present value of the plan's liabilities, and the more a withdrawing employer must pony up. *See id.* The MPPAA requires plans calculating withdrawal liability to use "actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1).

Of particular importance here, the statute also requires that withdrawal liability be calculated "not as

of the day of withdrawal, but *as of the last day of the plan year preceding the year during which the employer withdrew*," also known as the "measurement date." *Jos. Schlitz Brewing Co.*, 513 U.S. at 418 (citing 29 U.S.C. §§ 1391(b)(2)(A)(ii), (b)(2)(E)(i), (c)(2)(C)(i), (c)(3)(A), and (c)(4)(A)). So, for a plan operating on a calendar year, withdrawal liability is based on the plan's unfunded vested benefits "as of" December 31 of the year before the year in which the employer withdraws. *Id.* This is true regardless of when in the year the withdrawal takes place. Employers who withdrew from a calendar year plan on January 1, 2022, June 30, 2022, and December 31, 2022, would all be liable for their share of the plan's unfunded vested benefits "as of" December 31, 2021. 29 U.S.C. § 1391(b)(2)(E)(i).

Congress apparently adopted "this calculation date" to foster "administrative convenience." *Jos. Schlitz Brewing Co.*, 513 U.S. at 418. Irrespective of any withdrawals, ERISA and the internal revenue code both require plans to prepare "a valuation of the plan's liability" every year. 29 U.S.C. § 1084(c)(7)(A); 26 U.S.C. § 431(c)(7)(A). Setting a plan-year-end measurement date allows an actuary to use the calculation "it must prepare in any event," thereby "avoiding the need to generate new figures tied to the date of actual withdrawal." *Jos. Schlitz Brewing Co.*, 513 U.S. at 418. The MPPAA makes this option explicit, stating that an actuary "may rely on the most recent complete actuarial valuation" and "reasonable estimates for the interim years of the unfunded vested benefits" when determining an employer's withdrawal liability. 29 U.S.C. § 1393(b)(1).

Withdrawal liability can be substantial, and, not surprisingly, plans and withdrawing employers disagree about which assumptions to use. A withdrawing employer that wants to dispute the calculations made by a plan's actuary must do so through arbitration in the first instance. 29 U.S.C. § 1401(a)(1). A plan's determination of withdrawal liability receives considerable deference in the arbitration process and is "presumed correct" by the arbitrator unless the withdrawing employer "shows by a preponderance of evidence" that either the actuarial "assumptions and methods" used were unreasonable "in the aggregate," "taking into account the experience of the plan and reasonable expectations," or that the plan's actuary "made a significant error" in applying those assumptions or methods. *Id.* § 1401(a)(3)(B); *see also id.* § 1401(a)(3)(A). After arbitration, "any party can seek 'to enforce, vacate, or modify the arbitrator's award' in district court." *Energy West*, 39 F.4th at 736 (quoting 29 U.S.C. § 1401(b)(2)).

B.

1.

IAM National Pension Plan is a multiemployer pension plan. It provides retirement benefits to certain employees who performed work for employers maintaining collective bargaining agreements with the International Association of Machinists and Aerospace Workers, AFL-CIO (or with affiliated local and district lodges). Dkt. 34-2 at 2 (Pl.'s SUMF ¶¶ 1–2). The plan's assets are held in the Fund, which is governed by a trust agreement. *Id.* (Pl.'s SUMF ¶¶ 3–4). Under that agreement, the Fund's fiscal year and ERISA plan year correspond to the calendar year. *Id.*

(Pl.'s SUMF ¶ 4); Dkt. 4-1 at 44 (Pl.'s Ex. A). The agreement also provides that withdrawal liability shall be calculated using the methodology set forth in 29 U.S.C. § 1391(b). Dkt. 34-2 at 2 (Pl.'s SUMF ¶ 5); Dkt. 4-1 at 32 (Pl.'s Ex. A).

Cheiron is the Fund's actuary and performs the Fund's annual valuations and withdrawal liability calculations. *See* Dkt. 34-2 at 3 (Pl.'s SUMF ¶¶ 7–8). In November 2017, Cheiron issued the Fund's 2016 Plan Year valuation, which concluded that as of January 1, 2017, the Fund had $448,099,164 in unfunded vested benefits. *Id.* (Pl.'s SUMF ¶¶ 10–11). To reach this result, Cheiron employed a discount rate of 7.5%. *Id.* (Pl.'s SUMF ¶ 12). In making this calculation, Cheiron did not include any assumption for the Fund's future administrative expenses, even though these expenses are paid out of the Fund's assets and therefore contribute to the Plan's unfunded vested benefits. *See* Dkt. 4-1 at 79 (Pl.'s Ex. B); Dkt. 38-12 at 2 (Phillips Stip. ¶ 4).

On January 24, 2018, the Fund's trustees held a meeting at which Cheiron recommended, and the Trustees unanimously approved, certain new withdrawal liability assumptions. Dkt. 34-2 at 4 (Pl.'s SUMF ¶¶ 13–14); Dkt. 37-8 at 4 (Def.'s Resp. Pl.'s SUMF ¶ 14); Dkt. 4-1 at 126 (Pl.'s Ex. D). Two such assumptions are relevant here: First, the withdrawal liability discount rate was set at 6.5%, versus the 7.5% rate that had been used for the 2016 Plan Year valuation. Dkt. 34-2 at 4 (Pl.'s SUMF ¶ 14). Second, an administrative expense load assumption equal to 4.0% of the present value of vested benefits was put in place, with the proviso that this assumption would be

"[r]edetermine[d] annually upon completion of the actuarial valuation." Dkt. 4-1 at 126 (Pl.'s Ex. D); Dkt. 34-2 at 4 (Pl.'s SUMF ¶ 14); *see id.* at 5 (Pl.'s SUMF ¶ 18). All else equal, both of these assumptions would result in greater withdrawal liability than would the assumptions used in the 2016 Plan Year valuation.

The parties disagree about how best to characterize what occurred at this meeting. The Trustees assert that Cheiron adopted the assumptions after a discussion with the Trustees. Dkt. 34-2 at 4 (Pl.'s SUMF ¶ 14). The Companies, however, dispute whether there was any discussion. Dkt. 37-8 at 4–5 (Def.'s Resp. Pl.'s SUMF ¶ 14). The minutes of the meeting state that "following discussion," the Trustees "unanimously approved" the assumptions as "recommend[ed] [by] the Fund's Actuary, Cheiron." Dkt. 4-1 at 126 (Pl.'s Ex. D); Dkt. 38-13 at 128 (Phillips Ex. D). They further indicate that, at the meeting, Cheiron "confirmed that all of [the] changes to the withdrawal liability calculation and the actuarial assumptions" were "reasonable and defensible." Dkt. 34-2 at 4 (Pl.'s SUMF ¶ 15) (alteration in original). Although the parties' disputes about the meeting may at some point become significant, they are immaterial for present purposes. What matters for today is simply that these assumptions were adopted at the January 24, 2018 meeting.

On April 17, 2019, Cheiron issued the actuarial valuation for the 2017 Plan Year. *Id.* (Pl.'s SUMF ¶ 16). This valuation employed a 6.5% withdrawal liability discount rate and a 3.5% expense load assump-

tion. *Id.* at 5 (Pl.'s SUMF ¶ 18). The resulting unfunded vested benefits figure was $3,043,369,928. *Id.* at 4 (Pl.'s SUMF ¶ 17).

2.

As of the beginning of 2018, the Companies were party to collective bargaining agreements that required them to make annual contributions to the Fund. *Id.* at 5 (Pl.'s SUMF ¶ 19). All withdrew from the Fund over the course of the year: Phillips as of April 7; Ohio Magnetics as of June 30; and Toyota Logistics as of December 29. *Id.* (Pl.'s SUMF ¶ 20). The Fund assessed withdrawal liability against them on the following days and in the following amounts: On April 2, 2019, the Fund assessed $2,013,028 and $477,475 against Phillips and Ohio Magnetics, respectively. *Id.* at 6 (Pl.'s SUMF ¶ 22); Dkt. 38-12 at 6 (Phillips Stip. ¶ 28); Dkt. 38-11 at 5 (Ohio Mag. Stip. ¶ 26). And on June 18, 2019, the Fund assessed $1,289,384 against Toyota Logistics. Dkt. 34-2 at 6 (Pl.'s SUMF ¶ 22); Dkt. 38-13 at 5 (Toyota Log. Stip. ¶ 24). Each calculation was prepared using essentially the same assumptions adopted in the January 24, 2018 meeting and contained in the 2017 Plan Year valuation: a 6.5% withdrawal liability discount rate and a 3.5% expense load.[2] Dkt. 34-2 at 5, 6 (Pl.'s SUMF ¶¶ 18, 22); Dkt.

[2] To be sure, the 3.5% expense load was slightly lower than the 4.0% adopted at the January 24, 2018 meeting. But for obvious reasons the Companies have not argued that 4.0% should apply, and, as a result, neither the arbitrations nor this case raise the question whether Cheiron erred in applying an expense load assumption that was not adopted until April 2019 and that was lower than the assumption approved in January 2018.

37-9 at 2 (Def.'s SUMF ¶ 8). The Companies requested review of their respective assessments, and each demanded arbitration after the Fund denied those requests. Dkt. 38-11 at 6 (Ohio Mag. Stip. ¶¶ 27, 29); Dkt 38-12 at 7 (Phillips Stip. ¶¶ 30–31); Dkt. 38-13 at 5–6 (Toyota Log. Stip. ¶¶ 25–26).

3.

In each of the three arbitrations, the parties agreed that the arbitrator would resolve certain issues at the outset based on stipulated facts before addressing any further challenges to the withdrawal liability assessments. Dkt. 34-2 at 6–7 (Pl.'s SUMF ¶ 24). These threshold issues differed to some extent between the arbitrations, but each arbitrator was asked to decide a variation of the following question: Was it permissible for the Fund to assess withdrawal liability for the Companies, which withdrew in 2018, based on actuarial assumptions adopted in January 2018, or was Cheiron required as a matter of law to use assumptions that had been adopted prior to December 31, 2017? Dkt. 37-1 at 6–7 (Ohio Mag. Award); Dkt. 37-2 at 1–2 (Phillips Award); Dkt. 37-3 at 1 (Toyota Log. Award).

All three arbitrators concluded that Cheiron erred in basing its withdrawal liability calculations on assumptions adopted after December 31, 2017. Dkt. 37-1 at 37 (Ohio Mag. Award); Dkt. 37-2 at 10–11 (Phillips Award); Dkt. 37-3 at 14 (Toyota Log. Award). Although each arbitrator employed slightly different reasoning, all relied on the Second Circuit's decision in *National Retirement Fund On Behalf of Legacy Plan*

of National Retirement Fund v. Metz Culinary Management, Inc., 946 F.3d 146 (2d Cir. 2020), which had adopted the following bright-line rule:

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

Id. at 152; *see* Dkt. 37-1 at 29–33 (Ohio Mag. Award); Dkt. 37-2 at 12–14 (Phillips Award); Dkt. 37-3 at 15 (Toyota Log. Award). Because Cheiron's withdrawal liability calculations ran afoul of this holding, the arbitrators directed Cheiron to recalculate withdrawal liability using the actuarial assumptions that the Fund had most recently adopted before December 31, 2017: a 7.5% discount rate and no expense load. Dkt. 37-1 at 39 (Ohio Mag. Award); Dkt. 37-2 at 15 (Phillips Award); Dkt. 37-3 at 17 (Toyota Log. Award). Because this issue proved dispositive to the withdrawal liability assessments, the arbitrators did not reach any of the other questions before them, which questions did not turn on the same timing principle.

On April 4, 2021, the Trustees filed two separate lawsuits. In the first, they asked the Court to vacate the arbitration award entered in favor of Ohio Magnetics, Dkt. 1 at 1 (Compl. ¶ 1), and, in the second, they sought vacatur of the arbitration award entered in favor of *Toyota Logistics, Trustees of the IAM Nat'l Pension Fund v. Toyota Logistics Servs., Inc.*, No. 21-

931, at Dkt. 1 at 1 (Compl. ¶ 1). In both cases, the defendants counterclaimed to enforce the arbitration awards. Dkt. 10; *Toyota Logistics Servs., Inc.*, No. 21-931, at Dkt. 8. On the Trustees' motion, the Court subsequently consolidated the *Ohio Magnetics* and *Toyota Logistics* cases. Dkt. 19. Then, on August 10, 2021, the Trustees brought a third lawsuit, this time challenging the arbitration award in favor of Phillips. *Trustees of the IAM Nat'l Pension Fund v. Phillips Liquidating Trust*, No. 21-2132, at Dkt. 1 at 1 (Compl. ¶ 1). As in the two earlier filed cases, the defendant counterclaimed to enforce the arbitration award. *Id.* at Dkt. 7. The Court consolidated the *Phillips* case with the two earlier filed actions and set a briefing schedule in the consolidated litigation for cross-motions for summary judgment. Min. Order (Aug. 16, 2021).

The parties' briefing is now complete, and the case is ripe for decision.

II. STANDARD OF REVIEW

This case implicates two distinct standards of review: the typical summary judgment standard under Federal Rule of Civil Procedure 56 and the specific standard by which the Court reviews an ERISA arbitration award.

Starting with the more familiar of the two, summary judgment is warranted if a party can "show[] that there is no genuine dispute as to any material fact and [that the party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[I]n ruling on cross-motions for summary judgment, the court shall grant summary judgment only if one of the moving parties is entitled to judgment as a matter of law upon

material facts that are not genuinely disputed." *See Muslim Advocs. v. U.S. Dep't of Just.*, 833 F. Supp. 2d 92, 98 (D.D.C. 2011).

When reviewing an arbitration award under ERISA, however, the Court (1) presumes that the arbitrator's findings of fact are correct "unless they are rebutted 'by a clear preponderance of the evidence'" and (2) reviews the arbitrator's legal conclusions de novo. *Energy West*, 39 F.4th at 737 (quoting 29 U.S.C. § 1401(c)). The Fund contends, and the Companies do not dispute, that the only question raised by each of the arbitration awards at issue in this case is a pure question of law. *See* Dkt. 34-1 at 15. The Court agrees, so its review is de novo.

III. ANALYSIS

The issue before the Court is a narrow one. The Court need not decide whether Cheiron correctly calculated the Companies' withdrawal liability or whether it applied substantively reasonable actuarial assumptions. Instead, the Court must simply decide—as a matter of statutory interpretation—whether Cheiron erred when it applied actuarial assumptions that were adopted after the measurement date. The parties offer markedly different answers to that question.

A.

An employer's withdrawal liability, as explained above, is equal to its proportionate share of the plan's unfunded vested benefits—that is, the present value of its liabilities less the current value of its assets. *See* 29 U.S.C. § 1391(b). So that an employer is not held responsible for unfunded liability accrued before it

participated in the plan—a potential disincentive to join a multiemployer plan in the first place—the MPPAA creates "default rules (that is, rules that govern unless the plan provides otherwise)" for apportioning to a withdrawing employer "a share of only so much of the plan's funding shortfall as occurred while the employer was participating in the plan." *CPC Logistics*, 698 F.3d at 348. These rules are complex and involve calculating, allocating, and ultimately combining the change in a plan's unfunded vested benefits during each year in which a withdrawing employer participated. *See id.* Mercifully, the intricacies of this methodology are not at issue in this case. The critical thing, and common ground among the parties, is that the employer's withdrawal liability is calculated based on the plan's unfunded vested benefits "as of" the measurement date.

The statutory provision that most clearly sets forth the "measurement date" requirement reads as follows:

> An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of . . . the unamortized amount of such change (*as of the end of the plan year preceding the plan year in which the employer withdraws*); multiplied by [the fraction of that amount attributable to the employer].

29 U.S.C. § 1391(b)(2)(E)(i) (emphasis added). So, simplifying somewhat, when an actuary calculates withdrawal liability, it must determine the withdrawing employer's share of what the plan's unfunded vested benefits were "as of the end of the plan year

preceding the plan year in which the employer withdraws." *Id.*

In addressing the temporal aspect of what an actuary must calculate, the parties cite more frequently to § 1391(b)(2)(A). That paragraph provides that "[a]n employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits" is "the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits *for each plan year* in which the employer has an obligation to contribute under the plan ending . . . *before the plan year in which the withdrawal of the employer occurs.*" 29 U.S.C. § 1391(b)(2)(A) (emphasis added). Perhaps the measurement date requirement can be gleaned from this provision too, but, in the Court's view, § 1391(b)(2)(E)(i) provides a much clearer articulation of the requirement. The Court's reliance on § 1391(b)(2)(E)(i), moreover, is consistent with the approaches taken in the handful of judicial decisions that have addressed the measurement date requirement, all of which rely on the "as of" language found in § 1391(b)(2)(E)(i). *See, e.g.*, *Jos. Schlitz Brewing Co.*, 513 U.S. at 417–18; *Metz*, 946 F.3d at 148; *Nat'l Ret. Fund ex rel. Legacy Plan of Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.*, No. 16-2408, 2017 WL 1157156, at *7 (S.D.N.Y. Mar. 27, 2017); *Trustees of IAM Nat'l Pension Fund v. M & K Emp. Sols., LLC*, No. 21-02152, 2022 WL 4534998, at *2 (D.D.C. Sept. 28, 2022). It is also consistent with the test the parties invoke in their briefs, which, despite citing to § 1391(b)(2)(A), repeatedly employ § 1391(b)(2)(E)(i)'s "as of" terminology. *E.g.*, Dkt. 34-1 at 10, 12, 22, 32; Dkt. 37 at 5, 7, 10, 11, 13, 14, 15, 16, 18, 19, 20.

Although the parties agree that ERISA requires actuaries to calculate the withdrawing employer's share of unfunded vested benefits "as of" the measurement date, they disagree about what this means. In the Companies' view, plan actuaries must "apply the actuarial assumptions in effect as of the . . . [m]easurement [d]ate" for purposes of calculating an employer's withdrawal liability. Dkt. 37 at 9. What they evidently mean by this is that when, as here, a plan has adopted actuarial assumptions at any time prior to the measurement date, those assumptions remain "in effect"—and are thus binding—for purposes of calculating withdrawal liability, unless the plan's trustees affirmatively approve an alternative set of actuarial assumptions prior to the measurement date. *Id.* at 9–18. They contend that this rule is "implicit" in ERISA's requirement that actuaries employ "reasonable assumptions" and that it is necessary to avoid "widespread manipulation" of assumptions by actuaries seeking to punish withdrawing employers. *Id.* at 14, 17, 22; *see also* 29 U.S.C. § 1393(a)(1).

An example may make the Companies' argument concrete. Under the rule that they propose, if a plan adopted a discount rate assumption in June 2020 and did not adopt a different assumption before December 31, 2022, then withdrawal liability for employers that withdraw in 2023 would have to be calculated using the assumption adopted in June 2020. This would be true even if in January 2023, after reviewing the data for the year 2022, the actuary concluded that the assumptions made in June 2020 no longer made sense. It would be true, for instance, even if the economy sustained a shock akin to 1929's Black Thursday in De-

cember 2022, before the measurement date. The actuary could change the assumptions in January 2023 to reflect this development, but the new assumptions could not be used to calculate withdrawal liability for employers who withdraw in 2023; the old assumptions would govern for withdrawals prior to January 1, 2024.

The Trustees, in contrast, argue that actuarial assumptions are unconstrained by the measurement date. Dkt. 34-1 at 7, 17–19. They posit that the only limitations on actuarial discretion in setting assumptions are found in 29 U.S.C. § 1393, which, as relevant here, provides that "[w]ithdrawal liability . . . shall be determined by each plan on the basis of . . . actuarial assumptions and methods which, in the aggregate, are *reasonable* (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's *best estimate* of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1) (emphasis added). So, if the actuary's assumptions are reasonable and if they reflect the actuary's best estimate of the plan's anticipated experience, nothing more is required. The measurement date exists, the Trustees say, for the fixed, knowable components of the withdrawal liability calculation: the then-existing value of the plan's assets and liabilities (before discounting and the application of other assumptions). Dkt. 34-1 at 21. But, they continue, actuarial assumptions can be refined at any time prior to the plan's issuance of a notice and demand for payment of withdrawal liability, *id.* at 7, 17–19, which can occur long after the measurement date, *see, e.g.*, Dkt. 38-11 at 174–79 (Def.'s Ex. F) (Notice Issued to

Ohio Magnetics). Not only that, when adopting assumptions, an actuary can (and should) consider the latest information available at the time it makes its calculation. Dkt. 34-1 at 19. So, for example, if an employer withdrew from a plan on December 1, 2022 (making the measurement date December 31, 2021), an actuary could consider data generated (and events occurring) up to the time at which it calculates withdrawal liability—*i.e.* long after both December 31, 2021 and December 1, 2022. *See id.* A market downturn or jump in interest rates in March 2023, months after the measurement date, could be fair game. *See id.*

Neither position is correct. As Judge Lamberth recognized in *Trustees of IAM National Pension Fund v. M & K Employee Solutions,* whatever unfunded vested benefits were "as of" the measurement date constitutes a snapshot of the information available "as of" that date. 2022 WL 4534998, at *14.[3] Because an actuary must take time to consider what that information was (presumably it is not setting its assumptions at 11:59 p.m. on New Year's Eve), and because withdrawal liability is necessarily calculated after the

[3] The Court notes that "information available" is not necessarily the same thing as "facts in existence." Many facts "exist" in some theoretical sense long before they are ever known, understood, or reasonably available to actuaries; a person may have cancer, for example, years before she is diagnosed—or even could be diagnosed with existing medical technology. The Court's holding limits actuaries to consideration of information available on the measurement date and does not permit an actuary to base its assumptions on facts that, although extant on the measurement date in some abstract sense, were not actually available for practical use on that date.

measurement date, this means that the actuary need not determine before close of business on the measurement date what assumptions to use in generating its "best estimate" of the plan's "anticipated experience" as of the measurement date. *See* 29 U.S.C. § 1393(a)(1). Otherwise, the actuary could not reasonably account for developments up to the measurement date. By the same token, an actuary may only consider information that was available by the measurement date. It may not set assumptions reflecting developments that occur in the following plan year. What matters is the informational landscape on the measurement date—not whatever (possibly outdated) assumptions had been set prior to that date and not anything (including a significant economic shock) that happens after.

This rule best reflects what the statute says. *See Sebelius v. Cloer*, 569 U.S. 369, 376 (2013). Section 1391(b)(2)(E)(i) provides that an employer's withdrawal liability is based, in relevant respects, on its share of the fund's unfunded vested benefits "as of the end of the plan year preceding the plan year in which the employer withdraws," 29 U.S.C. § 1391(b)(2)(E)(i), that is, "as of" the measurement date. Although much of the language used in ERISA is technical in nature, the phrase "as of" is not. It simply means "at or on (a specific time or date)," *As Of*, Webster's Third New International Dictionary 129 (1976), or "as things stood on (a date)," *As Of*, Oxford English Dictionary (3d ed., June 2011), https://www.oed.com/view/Entry/11307 (last visited February 6, 2023). Accordingly, an employer's withdrawal liability is based on a snapshot of its "allocable amount of unfunded vested benefits" as

things stood on the measurement date, here December 31, 2017. 29 U.S.C. §§ 1381(b), 1391(b)(2)(E)(i).

Neither party's argument fares well under the statute's plain language. Consider first the Trustees' position that actuaries may consider events occurring after the measurement date when deciding what the appropriate discount rate was "as of" the measurement date. That argument fails, because as a matter of ordinary meaning and common sense, the condition or valuation of something "at," "on," or "as things stood" on a given date is necessarily independent of events that occur subsequent to that date. Imagine, for example, that a benchmark interest rate with which a fund's assets are highly correlated stood at 5% on the measurement date but then climbed to 12% a year-and-half later when the plan's actuary got around to calculating the employer's withdrawal liability. As the Trustees would have it, the actuary would be permitted (and perhaps required) to consider the 12% interest rate when setting its assumptions to calculate unfunded vested benefits. But that argument ignores the fact that the concept of "unfunded vested benefits" turns on, among other things, the actuary's estimate of the *anticipated* returns of the fund's assets. Hence, an actuary following the Trustees' approach would not be following the statute, because he could not fairly be said to be looking at a snapshot of the world as "things stood" on the measurement date with respect to an essential component of unfunded vested benefits.

To take another example, imagine that the statute required actuaries to determine the average life expectancy of their plans' participants "as of" December

1, 2019. In making that assessment at some later date, an actuary might reasonably consider the age of the average plan participant on December 1, 2019, other demographic information, and data that existed on December 1, 2019 regarding projected life expectancies. The actuary could not consider, however, any impact that the COVID-19 pandemic—or any other intervening public health event—has had on average life expectancies. To do so would violate the mandate to make the calculation "as of" the specified date, because "as things stood" on December 1, 2019, there was no basis for taking account of a then-quiescent virus.

If anything, the Companies' position fares even worse on the face of the statutory text. In their view, if a plan has adopted certain actuarial assumptions prior to the measurement date—say, for example, for purposes of conducting the required valuation for the preceding year—and if it does not adopt new assumptions before the measurement date, it is bound to apply the previously adopted assumptions. This is true, moreover, even in cases in which significant events occur before the measurement date. The difficulty for the Companies is that it is unreasonable as a matter of both language and common sense to read the statutory requirement that an actuary determine what unfunded benefits were—and thus what the appropriate discount rate was—"as of" the measurement date to require an actuary to ignore the information available on that date.

To see the problem, assume that a plan applied a discount rate of 5% for purposes of its 2016 valuation and did not "adopt" a different actuarial assumption

before a measurement date of December 31, 2022. The Companies would require the plan's actuary to apply that rate—even if that assumption was proved wildly wrong before the measurement date. Indeed, even if the fund was invested principally in stocks, and the stock market suffered a cataclysmic crash after the 5% discount rate was adopted but before the measurement date, the Companies would say that the 5% discount controls. That cannot be right, however, because no one would say that a discount rate based on a 5% expected return on the plan's assets reflects how "things stood" on December 31, 2022. Nor can the Court find in § 1391, or any other provision of ERISA, an "implicit" requirement that an actuary use a discount rate that is disconnected from reality. *Cf. Energy West*, 39 F.4th at 740 ("[T]he discount rate assumption cannot be divorced from the plan's anticipated investment returns."). Although Congress could have required actuaries to do so, the Court will not strain to reach such a result in the face of a much more obvious reading of the statute.

In one sense, the very different arguments the Trustees and the Companies press suffer from a common flaw: both ask the Court to decouple the various components of the concept of "unfunded vested benefits." As explained above, a plan's unfunded vested benefits are a function of certain knowable values—a plan's assets, the number of its beneficiaries, the generosity of the plan's benefits, and the schedule by which those benefits vest, among other things—and certain indeterminate assumptions, like the discount rate and the life expectancy of the beneficiaries. Both parties agree that the knowable values are set based on what they were on the measurement date. Dkt. 34-

1 at 21; Dkt. 39 at 9; Dkt. 37 at 13–14. And both parties recognize that the data used to determine these values can be and as a practical matter must be compiled and analyzed after the measurement date. Dkt. 34-1 at 21; Dkt. 39 at 9; Dkt. 37 at 13–14. Yet both of them want to treat actuarial assumptions differently. The Trustees would allow actuarial assumptions to take account of developments subsequent to the measurement date, despite recognizing that this practice would not be permissible for the value of the plan's assets or its number of beneficiaries. Dkt. 34-1 at 19; Dkt. 39 at 9. And the Companies would forbid actuaries from engaging in the exact same practices they insist are required for assets and liabilities—producing values after the end of a plan year based on information available as of the measurement date—to formulate the appropriate assumptions. *See* Dkt. 37 at 13–14.

The statute draws no such lines and, instead, treats unfunded vested benefits as a single, unified concept, at least as a temporal matter. Section 1391 is the only provision that says anything about timing, and it speaks only of what "unfunded vested benefits" were "as of" the measurement date. 29 U.S.C. §§ 1391(b)(2)(E)(i), 1391(b)(2)(A). It does not distinguish, for example, between the pre-discounted value of a plan's future liabilities and the discount rate that is used to generate the *present* value of those liabilities.[4] And it does not include so much as a stray clause

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[4] For simplicity, the Court disregards the separate set of actuarial assumptions, not at issue here, used to determine future benefit obligations, such as assumptions regarding the life expectancy of participants.

hinting that plan actuaries must determine the relevant actuarial assumptions based on events occurring before some cutoff *prior to* the measurement date or based on the previous issuance of other plan reports (including annual valuations). Read in this manner, the statutory text is clear, and it requires actuaries to consider the concept of unfunded vested benefits as a whole and to calculate that amount "as of" the measurement date.

The Companies at times seem to recognize as much. They candidly acknowledge that the statute "does not expressly prohibit" the application of actuarial assumptions determined after the measurement date that are based on information available or events occurring before the measurement date. Dkt. 37 at 22. As explained above, that is, if anything, an understatement, given the statute's complete absence of any such restriction. But more importantly, although the Companies recognize that the statute is silent as to the limitation they support, they ignore the clear takeaway from that silence: Congress did not impose any such limitation. The same principle applies to the Trustees' argument. Congress treated "unfunded vested benefits" as a single concept with respect to the measurement date, and the Court has no warrant to separate, for example, the current value of a plan's assets and future value of its liabilities from the assumptions used to project future returns on those assets and the present value of those liabilities.

Similarly, the statutory section devoted to actuarial assumptions does not even suggest that separate timing rules exist for these assumptions than for

other components of the withdrawal liability calculation. 29 U.S.C. § 1393. Not only that, the language of that section cuts against the Companies' argument that the Court should read such rules into the statute. Section 1393(a)(1) directs plan actuaries to use assumptions that "are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." *Id.* § 1393(a)(1). At least at times, an actuary could not possibly comply with these directives while also following the Companies' reading of the measurement date requirement. If a major economic shock altered the return profile of the plan's assets before the measurement date but after the plan had issued its annual valuation for the prior plan year, the Companies would prohibit the plan's actuary from considering those events when calculating withdrawal liability (unless it revised its assumptions prior to the measurement date). But if the actuary failed to take account of these developments, it could not make a "reasonable" assumption based on the plan's actual experience.

Nor could the actuary give its "best estimate of anticipated experience" for the plan, if it were required to ignore such significant events. Something is "best" when it "excel[s] all others." *Best*, Webster's Third New International Dictionary, *supra*, at 208. And an estimate excels all others when it is the most accurate. The statute, accordingly, should be read to permit an actuary to make its most accurate estimate so far as is possible from the perspective of the measurement date. *See Energy West*, 39 F.4th at 738 (explaining that the best estimate requirement "lay[s] down . . . a

substantive rule that the assumptions reflect the characteristics of the plan"). Under the Companies' contrasting view, the actuary would be reduced to admitting that its actuarial assumptions were wrong and could say only that its hands were tied by a restriction that appears nowhere in the statute. That presents not only an untenable position for the actuary but, more importantly for present purposes, an untenable reading of the statute.

The Trustees, for their part, take this theme even further and argue that the "best estimate" provision means that an actuary who is calculating withdrawal liability months or years after the measurement date may, and should, consider any and all intervening events that might materially affect the relevant, actuarial assumptions. Dkt. 34-1 at 19–20. But their argument misunderstands the relevance of actuarial assumptions in the statutory scheme. The actuary is required to make its "best estimate of anticipated experience under the plan" for purposes of determining the "unfunded vested benefits" of a plan, which, in turn, is used to calculate the employer's withdrawal liability. 29 U.S.C. § 1393(a). As explained above, unfunded vested benefits is a concept premised on both current assets and liabilities and actuarial assumptions regarding future returns, and § 1391(b)(2)(E)(i) specifies that this amount must be valued "as of" the measurement date. *Id.* § 1391(b)(2)(E)(i). Accordingly, the "best estimate" requirement must be understood as limited by the measurement date requirement.

The Court pauses to note that although the Companies and the arbitrators repeatedly discuss the "retroactive" application of actuarial assumptions, *see, e.g.*, Dkt. 37 at 9, 13, the rule the Court adopts today does not allow for any more retroactivity than that which all agree the MPPAA requires. As the Court reads the statute, a withdrawing employer cannot be held liable for events that take place after the measurement date. As a result, the relevant informational inputs are set before the measurement date. It is only the actuary's application of judgment and analytical methods to that pre-existing information that occurs after the measurement date. There is nothing unusual or troubling about applying judgment to past events; that is, after all, what courts typically do. And in any event, retroactivity of this type—if that is, in fact, the right word—is inherent in the statutory scheme, which sets a measurement date that invariably antedates an employer's withdrawal and does not require an actuary to determine an employer's withdrawal liability until after the employer withdraws. *See* 29 U.S.C. §§ 1391(b)(2)(E)(i), 1391(b)(2)(A). The Court does not understand the Companies to take issue with this basic process, and the Court's decision does not create an extra layer of "retroactivity."

Here, moreover, the plan's actuary had already adopted the assumptions used to calculate the Companies' withdrawal liability at the time the Companies withdrew. So any elevated retroactivity concern that might arise when an actuary sets an assumption for the first time after an employer withdraws is not present, and the Court expresses no view on whether such a scenario would pose a problem. It also seems unlikely that when the Fund's trustees approved the

use of a 6.5% discount rate (and use of an administrative expense load) on January 24, 2018 it relied on data generated or events occurring after the measurement date, that is December 31, 2017. But because the Court's decision precludes the reliance on information that first becomes available after the measurement date, that is an issue that can be addressed, if necessary, on remand. For present purposes, however, the Court concludes that the Companies' concerns about retroactivity are overblown and bear little, if any, relation to the facts of this case.

B.

Although the D.C. Circuit has yet to address the specific question presented in this case, it did address withdrawal liability in *Combs v. Classic Coal Corp.*, 931 F.2d 96 (D.C. Cir. 1991). *Combs* considered an employer's (Classic Coal's) challenge to a plan's withdrawal liability assessment. 931 F.2d at 97. The plan's actuary had revised its discount rate assumption upward after Classic had withdrawn from the plan (and thus also after Classic's measurement date), and Classic sought the benefit of that revised assumption. *Id.* at 98–99. The D.C. Circuit was unpersuaded. It rejected Classic's contention that the plan's actuary was required to "consider[] evidence gathered after Classic's withdrawal"—*i.e.*, the evidence that had supported the discount rate change—in setting its assumptions for Classic's withdrawal liability. *Id.* at 102. The court explained that a withdrawal liability calculation "is like a snapshot, in that it represents the actuary's best estimate given the evidence *then available*." *Id.* (internal quotation marks and citation

omitted). As such, "[o]nce a withdrawn employer's liability is fixed, changes in [unfunded vested benefits] are irrelevant to the inquiry regarding withdrawal liability," and there is no basis for "*requir[ing]* the [fund's] Trustees to base their assumption on information gathered *after* the fiscal year-end of the Plan[]." *Id.* "Just as an employer's liability is not increased if the plan suffers losses in the withdrawal year," the court continued, "the employer is not entitled to benefit from actuarial changes subsequent to its withdrawal." *Id.* This narrow holding has little bearing on the question presented here, which has nothing to do with whether a plan may—or must—consider evidence gathered after the employer withdraws.

The parties' respective attempts to spin *Combs* in their favor are unconvincing. The Trustees observe that at one point *Combs* appears to approve of the plan's reliance on the information "available at the time of [Classic's] withdrawal" to calculate withdrawal liability. Dkt. 39 at 23 (quoting 931 F.2d at 102). Read in isolation, this language might be construed to support the Trustees' view that an actuary can consider developments after the measurement date, as long as those developments occur before an employer's withdrawal. But the court followed that sentence by explaining that the relevant cutoff is "the fiscal year-end of the Plan[]" and that events "in the withdrawal year"—that is, at any time after the measurement date—cannot be considered. *Combs*, 931 F.2d at 102. So, if anything, *Combs* supports this Court's conclusion that events occurring after the measurement date are off limits. Nor is this decision the first to read *Combs* this way. Judge Lamberth took

the same view in *M & K Employee Solutions*, treating withdrawal liability as a "snapshot," contra the Trustees, and basing that snapshot on "the evidence 'then available' by 'the fiscal year-end of the [p]lan[].'" *M & K Emp. Sols.*, 2022 WL 4534998, at *16 (first alteration in original) (quoting *Combs*, 931 F.2d at 102).

The Companies' reading of *Combs* is even less convincing. They first suggest that when *Combs* refers to "evidence" available and "information gathered" as of the measurement date, it means the actuary's discount rate assumption. Dkt. 37 at 19. That is implausible. An assumption is not itself "evidence" or "information," and one cannot "gather" an assumption. An assumption is something that an actuary makes based on its judgment and experience and the evidence and information it has gathered. *Combs* is crystal clear on this point, observing that "[t]o require the Trustees to *base their assumptions on information gathered* after the fiscal year-end of the Plans would discourage actuarial updating." 931 F.2d at 102 (emphasis both added and omitted).

The Companies' next move cuts less ice still. They argue that when *Combs* said an employer cannot "benefit from actuarial changes *subsequent to its withdrawal*," 931 F.2d at 102 (emphasis added), what it "should have" said is that an employer cannot "benefit from actuarial changes *in the withdrawal year*," Dkt. 37 at 19 (quoting Dkt. 37-3 at 16 (Toyota Logistics Award)). Tempting though this liberated approach to reading precedent may be, the Court is constrained to consider only what the D.C. Circuit actually said. And *Combs* said nothing about actuarial changes made in

the withdrawal year, at least so long as they are made before day on which the employer withdrew.[5]

Even putting these flaws in the parties' arguments aside, the Court would place little weight on the relevant paragraph from *Combs*. The question presented in that case was narrowly focused on whether the plan was *required* to base its actuarial assumptions on evidence gathered *after the withdrawal date*. Here, in contrast, the question is whether a plan is *permitted* to consider evidence that likely was likely available *before the measurement date* for purposes of making actuarial assumptions. There is no reason to

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[5] It is possible that there is more to *Combs*' statement that an employer cannot "benefit from actuarial changes subsequent to its withdrawal" than first meets the eye, but it is not what the Companies think. 931 F.2d at 102. Read on its own, the passage suggests that an actuary may not set assumptions after an employer withdraws, even if the actuary relies only on information available as of the measurement date. But in *Combs* itself, the plan did not formally adopt the discount rate that the D.C. Circuit ultimately upheld until after Classic had withdrawn from the plan. *Combs v. Classic Coal Corp.*, No. 84-1562, 1990 WL 66583, at *1–2 (D.D.C. Apr. 6, 1990) (noting that Classic withdrew from the plan in March 1981 and that the plan set its relevant discount rate assumption in May 1981). Strictly speaking, this was not an actuarial *change*, because it was the first withdrawal liability discount rate assumption the plan adopted after the MPPAA's passage in late 1980. Nevertheless, this factual context, combined with the fact that the statutory text does not tie actuarial assumptions to the withdrawal date, could be reason to think that adopting assumptions after an employer has withdrawn—but considering only information available and developments that had occurred by the measurement date—is permissible. The Court need not resolve this question, however, since the actuarial assumptions at issue here were adopted before the Companies withdrew.

believe that the D.C. Circuit gave the question presented here any consideration, and the parties' attempts to divine an answer to that question from competing phrases—or snippets of phrases—appearing in *Combs* almost certainly ascribes greater meaning to the court's words than the court intended.

C.

The Companies also place considerable weight on the Second Circuit's decision in *Metz*, as did the arbitrators. *Metz*, however, is neither controlling in this jurisdiction nor persuasive.

Metz involved an employer that withdrew from a multiemployer pension plan in May 2014. 946 F.3d at 147. As of that time, the plan's actuary had for several years used a 7.25% discount rate assumption to calculate withdrawal liability. *Id.* at 148. But the plan retained a new actuary, and in June 2014 the new actuary set a withdrawal liability discount rate assumption of approximately 3.25%. *Id.* The actuary then used that assumption to calculate the employer's withdrawal liability, which was tied to a December 31, 2013 measurement date. *Id.* at 149. The employer challenged the withdrawal liability assessment, arguing that the use of a discount rate adopted after the measurement date was impermissible. *Id.* The employer prevailed in arbitration, but the district court vacated the award, concluding that the statute imposed no constraint on when an actuary can set its assumptions. *Id.* The Second Circuit then reversed, holding that "the assumptions and methods used to calculate the interest rate assumption for purposes of withdrawal liability must be those in effect as of the [m]easurement [d]ate." *Id.* at 151. "Absent a change

by a Fund's actuary before the [m]easurement [d]ate," it concluded, "the existing assumptions and methods remain in effect." *Id.*

The *Metz* decision relied on four non-textual arguments. First, the court observed that, "[i]n the context of multiemployer pension plans, interest rate assumptions cannot be altered daily and must have a degree of stability." *Id.* at 150. For support, the court pointed to the fact that the very plan at issue there had used a "7.25% rate for several years and [the plan's] annual reports to the government reflect[ed] [that] ongoing rollover" of the same rate over time. *Id.* Second, the court looked to a different provision of the statute, § 1394, which provides that "[n]o plan rule or amendment . . . may be applied without the employer's consent with respect to liability for a withdrawal or partial withdrawal which occurred before the date on which the rule or amendment was adopted" and requires a plan to give notice to employers "of any plan rules or amendments" that the plan adopts. 29 U.S.C. § 1394. As the *Metz* court explained, the legislative history of this provision "demonstrates that it was designed to protect employers from the retroactive application of rules relating to the calculation of withdrawal liability." *Metz*, 946 F.3d at 150. The court recognized that § 1394 "does not define 'plan rules and amendments'" and that § 1393, which governs actuarial assumptions "does not specifically address retroactivity." *Id.* at 151. But it nevertheless reasoned that "the retroactive selection of interest rate assumptions for purposes of withdrawal liability [is] . . . inconsistent with Congress's legislative intent." *Id.* Third, the court invoked yet another provision of the statute, § 1021(*l*)(1), which requires a plan, at an employer's

request, to provide the employer a "[n]otice of potential withdrawal liability." *Id.* (alteration in original) (quoting 29 U.S.C. § 1021(*l*)(1)). In the court's view, this notice would be of "no value" if "retroactive changes in interest rate[] assumptions may be made at any time." *Id.* Finally, the *Metz* court posited that "the selection of an interest rate assumption after the [m]easurement [d]ate would create significant opportunity for manipulation and bias," because "[n]othing would prevent trustees from attempting to pressure actuaries to assess greater withdrawal liability on recently withdrawn employers than would have been the case if the prior assumptions and methods actually in place on the [m]easurement [d]ate were used." *Id.*

This Court does not see things the same way. Starting with the *Metz* court's first argument, the Court takes no issue with the observation that interest rate assumptions cannot fluctuate daily nor remain open forever. But that sensible insight does not compel the result in *Metz*. Under the rule this Court adopts today, an actuary may set its assumptions after the measurement date, but it may do so based only on information that was available as of that date. This universe of relevant evidence does not fluctuate or remain open indefinitely, and thus there is no reason to expect that an actuary following this Court's approach would have cause to alter its assumptions daily or to revise them long after the fact. To the contrary, repeated revision of assumptions that must be based on a fixed universe of available facts and that must represent the actuary's "best estimate of anticipated experience under the plan" would be suspect

and open to challenge under the best estimate requirement. *See* 29 U.S.C. § 1393(a)(1). Although it is, of course, conceivable that after setting an assumption "as of" the measurement date once, an actuary might reinterpret the pre-existing evidence and change its mind, there is no reason to believe that this practice would be commonplace, particularly given the burden of justification that such an actuary would face if its decision was contested. The prospect that an actuary might, on occasion, alter its assumptions based on evidence that comes to light between an earlier determination and the measurement date, moreover, is precisely what the statute contemplates.

The Court is also unpersuaded by the inference the *Metz* court drew from § 1394 and its legislative history. *Metz* concluded that because § 1394 expressly limits retroactivity for changes to plan rules and amendments, the statute should be read also to limit retroactivity for changes to actuarial assumptions—even though § 1393, the provision dealing with actuarial assumptions, contains no such limitation. But as Judge Lamberth explained in *M & K Employee Solutions*, "[t]he presence of an anti-retroactivity provision in the section dealing with plan rules and amendments, and the absence of one in the section dealing with actuarial assumptions, suggests that anti-retroactivity was purposefully omitted in the latter." 2022 WL 4534998, at *18; *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

(internal quotation marks omitted)). But even if actuarial assumptions like the discount rate and expense load were plan "rules or amendments"—the Companies (wisely) do not argue that they are—and thus § 1394 was directly applicable to them, its retroactivity provision would make no difference in this case. Section 1394 limits the application of a rule or amendment to an employer's withdrawal liability only if the rule or amendment is adopted after the employer withdrew. 29 U.S.C. § 1394(a). The disputed assumptions here, however, were set before any of the Companies withdrew. Dkt. 34-2 at 4–5 (Pl.'s SUMF ¶¶ 13–14, 20).

More generally, *Metz*'s § 1394-based appeal to legislative purpose fails to consider what was, according to Congress, its predominant purpose in enacting the MPPAA: preserving and protecting multiemployer pension plans and their beneficiaries. *See* 29 U.S.C. § 1001a(c) ("It is hereby declared to be the policy of this Act . . . to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans, to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans."). That predominant purpose is served by permitting actuaries to make their best estimates of the "anticipated experience" of the plan on the measurement date, rather than tying their hands based on possibly outdated assumptions that no longer reflect expected performance. *Id.* § 1393(a)(1).

This is not to say that Congress was unconcerned with unfair withdrawal liability assessments. The problem with the *Metz* decision, however, is that it emphasizes this concern over the principal concern that the MPPAA was enacted to address and that it does so at the expense of the statutory text. *See W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of [statutory] purpose is the statutory text adopted by both Houses of Congress and submitted to the President."). Nor does *Metz* consider the statute's alternative means of ensuring that employers are treated fairly, most notably the requirement that actuaries employ "reasonable" actuarial assumptions based on "the experience of the plan and reasonable expectations" and that they "offer" their "best estimate[s]" of "anticipated experience." 29 U.S.C. § 1393(a)(1).

The Court must also part ways with *Metz* on the significance of the withdrawal liability notice provision. That provision states in relevant part that a "plan shall, upon written request, furnish to any employer who has an obligation to contribute to the plan a notice of . . . the estimated amount which would be the amount of such employer's withdrawal liability ... *if such employer withdrew on the last day of the plan year preceding the date of the request.*" 29 U.S.C. § 1021(*l*)(1)(A) (emphasis added). According to Metz, any such notice would be "of no value if retroactive changes in interest rate[] assumptions may be made at any time." 946 F.3d at 151.

The *Metz* court's argument, however, misunderstands how § 1021(*l*)(1)(A) operates. As § 1021(*l*)(1)(A) provides, if an employer makes a request in year X,

the plan must provide it with an estimate of what its withdrawal liability would be had the employer withdrawn on the last day of year X – 1. That is, for purposes of the notice provision, the plan must act on the assumption that the relevant measurement date is the last day of year X – 2. But, if the employer actually withdrew in year X, its measurement date would be the last day of year X – 1. *See* 29 U.S.C. § 1391(b)(2)(E)(i). As a result, any estimate provided according to the terms of § 1021(*l*)(1)(A) will be based on information and assumptions that are a year out of date, as compared to the employer's actual measurement date for any given year.

The *Metz* court is correct that its holding removes an element of surprise. If plans are required to use actuarial assumptions that are adopted prior to the measurement date, employers will know with certainty what actuarial assumptions will apply if they elect to withdraw—the assumptions would be fixed and known on the measurement date, which, by definition, will precede the decision to withdraw. But that fact has nothing to do with the operation of § 1021(*l*)(1)(A), which looks back a year earlier and does nothing to guard against changes that may occur up to the measurement date. Indeed, if anything, § 1021(*l*)(1)(A) cuts against the reasoning in *Metz* and the Companies' argument here, because the procedure that Congress made available to employers to obtain estimates to employers of their withdrawal liability provides no assurances regarding—and takes no steps to protect employers from—potentially evolving actuarial assumptions. *See M & K Emp. Sols.*, 2022 WL 4534998, at *18 ("Congress did not require that employers receive the applicable actuarial assumptions

prior to a decision to withdraw, which is consistent with a statutory scheme that allows for formulation of those assumptions after the measurement date.").

Finally, the potential for "manipulation and bias" does not justify the result in *Metz*. 946 F.3d at 151. For one thing, as *Metz* itself acknowledged, the Supreme Court in *Concrete Pipe* expressed a less suspicious view of actuaries than did the Second Circuit. *Metz*, 946 F.3d at 151–52. *Concrete Pipe* explained that actuaries are "apparently unbiased professional[s], whose obligations tend to moderate any claimed inclination to come down hard on withdrawing employers" and who are not "vulnerable to suggestions of bias or its appearance" because they are "trained professionals subject to regulatory standards." 508 U.S. at 632, 635.

Moreover, even if one took a less rosy view of the actuarial profession, the statute has ways of protecting against bias and manipulation. As explained above, § 1393(a) requires that actuaries calculating withdrawal liability employ assumptions and methods that are "reasonable" and that "offer the actuary's best estimate of anticipated experience under the plan." An actuarial assumption adopted at the insistence of a plan's trustees that ignores professional standards or that is analytically unsound can be attacked under this provision twice over. First, unfounded actuarial assumptions or those that are changed simply to suit the trustees' preferences at any given time can be attacked as "unreasonable[,] both in arbitration and on judicial review." *Concrete Pipe*, 508 U.S. at 633. The consequences of actuarial assumptions, moreover, can vary based on circumstances.

"For example, the use of assumptions (such as low interest rates) that would tend to increase the fund's unfunded vested liability for withdrawal liability purposes would also make it more difficult for the plan to meet the minimum funding requirements of § 1082." *Id.* Yet, any effort by the plan's trustees (or, more accurately, their actuary) to manipulate the relevant assumptions to achieve favorable results on both counts, without intervening cause, would invite a compelling reasonableness challenge. *See Energy West*, 39 F.4th at 741 (holding that a plan's minimum funding rate and withdrawal liability discount rate assumptions "must be similar"). Second, in addition to its substantive requirements, the best estimate clause contains a "procedural rule" of actuarial independence—namely, that the actuary's assumptions be made *by the actuary*, not by a plan's trustees. *Id.* at 738; *see also CPC Logistics*, 698 F.3d at 357 (noting that the best estimate requirement "exists to maintain the actuary's independence"). Congress struck the balance between the need for actuarial flexibility—and thus accuracy—and outright manipulation by giving professional actuaries the necessary leeway, checked by the reasonableness requirement.

Nor does *Metz* solve the problem of actuarial bias. As Judge Lamberth pointed out, plans and their actuaries committed to manipulation have tools at their disposal no matter how one understands the measurement date requirement. The *Metz* rule, for example, does nothing to stop a plan from slow rolling an update to its assumptions until after the next measurement date in order to lock in for another year assumptions that might be more punitive to employers than is justified under current conditions. *See M & K Emp.*

Sols., 2022 WL 4534998, at *18. *Combs* itself worried about such a scenario, cautioning against interpreting the measurement date requirement in a way that would "discourage actuarial updating." 931 F.2d at 102. In sum, the MPPAA's text reflects a balance struck by Congress between the competing considerations of actuarial flexibility and fairness to employers, and it is not for this Court to rewrite that legislative balance.

D.

The parties' other arguments are equally unavailing. The Companies invoke *Roofers Local No. 30 Combined Pension Fund v. D.A. Nolt, Inc.*, 719 F. Supp. 2d 530 (E.D. Pa. 2010), *aff'd*, 444 F. App'x 571 (3d Cir. 2011), but that decision has little to do with this case. Dkt. 37 at 14–15; Dkt. 38-2 at 13. *Nolt* rejected a plan's reliance on an error in its unfunded vested benefits calculation discovered in 2003 to revise an employer's withdrawal liability in 2006, where the plan had previously calculated the employer's liability in 2002 based on a December 31, 2000 measurement date. 719 F. Supp. 2d at 539–40, 550–51. *Nolt* therefore did not address the only question presented here: whether an actuary can initially set its withdrawal liability assumptions after the measurement date. Nor does the *Nolt* court's reasoning help in resolving this case. *Nolt* relied almost entirely on two PBGC opinion letters that speak only to the propriety of a plan making "additional assessment[s]" of withdrawal liability if errors in the unfunded vested benefits calculation are uncovered; neither opinion letter addresses the constraints on an actuary making an assessment in the first instance. *See* PBGC Op. Letter 94-5 at 1;

PBGC Op. Letter 90-2 at 2. No broadly applicable rule can be extracted from these letters and therefore from *Nolt*.

The Trustees, on the other hand, argue that the entire debate about the measurement date is beside the point, because actuarial assumptions can only be attacked as unreasonable or at odds with the actuary's "best estimate," not on the basis of a measurement date violation. Dkt. 34-1 at 6, 15–17 (citing 29 U.S.C. § 1393(a)(1)). But this contention begs the question of what makes an assumption unreasonable. And the Court has little doubt that an assumption that violates a provision of the MPPAA is unreasonable by the MPPAA's lights.

Finally, the parties joust over the significance of a MPPAA provision that permits an actuary "[i]n determining the unfunded vested benefits" to "rely on the most recent complete actuarial valuation used for purposes of section 412 of title 26 [a provision of the IRS code] and reasonable estimates for the interim years of the unfunded vested benefits." 29 U.S.C. § 1393(b)(1). The Trustees say that this provision shows than an actuary can rely on information learned after the measurement date. Dkt. 34-1 at 18; Dkt. 39 at 13–15. After all, a plan's "most recent" actuarial valuation may postdate the most recent measurement date and, for that matter, the relevant company's withdrawal date. Dkt. 39 at 13–15. And nothing in the statute purports to limit what information an actuary may consider when creating an actuarial valuation for reporting purposes. *Id.* The Companies, in contrast, insist that § 1393(b)(1) should be understood to refer to "the most recent complete actuarial

valuation" *that predates the measurement date.* Dkt. 37 at 16–18. They point out that the statute's reference to "reasonable estimates for the interim years of the unfunded vested benefits" presumes that there will be "interim years" between an actuarial valuation used for this purpose and the measurement date to which unfunded vested benefits must be tied. *Id.*

Both arguments fall short. The Trustees' position that § 1393(b)(1) frees actuaries from any constraints imposed by the measurement date fails for several reasons. For starters, if the Trustees were right, there would be no point to the statute's imposition of a measurement date in the first place, and the Court must, to the extent possible, avoid reading one provision of a statute to nullify the significance of another. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (rejecting an interpretation of a statute that would leave a provision "insignificant, if not wholly superfluous"). The Trustees' argument also proves too much. If § 1393(b)(1) was as freeing as they claim, an actuary could presumably use not only the actuarial assumptions from the most recent actuarial valuation, but also the asset and liability values it contains, even if these values postdate the measurement date. But the Trustees concede that an actuary must rely on what those figures were on the measurement date, Dkt. 34-1 at 21, and much like the provision that establishes the measurement date, § 1391(b)(2)(E)(i), § 1393(b)(1) provides no basis for treating assets and liabilities differently from actuarial assumptions. Finally, the Trustees' analysis, even if persuasive on a blank slate, cannot be squared with *Combs*' statement that "an employer's liability is not increased if the plan suffers losses in the withdrawal year." 931 F.2d at 102. If

the inference the Trustees draw from § 1393(b)(1) were sound, an employer's liability could increase if the plan suffers losses in the withdrawal year, so long as the plan's actuary calculated the employer's withdrawal liability based on its actuarial valuation for that year, which the Trustees contend it would be free to do.

The Companies' position, in turn, would do little to help them, even if it was correct. Subsection 1393(b)(1) states than actuary "*may* rely on the most recent complete actuarial valuation." 29 U.S.C. § 1393(b)(1) (emphasis added). So even if the Court read into § 1393(b)(1) the words "the most recent complete actuarial valuation that predates the measurement date"—and it is far from clear that the reference to "interim years" provides sufficient basis to so fundamentally rewrite the provision—the Companies would be no better off, because use of that valuation would be an option, not a requirement. An actuary would remain free to conduct a fresh valuation, and, for the many reasons given, could rely on all information present on the measurement date in so doing.

CONCLUSION

The Court, accordingly, concludes that when setting actuarial assumptions applicable to a given measurement date, an actuary may look to the information that was available as of the measurement date but may look no further. So long as the actuary adheres to this rule, it may set its assumptions after the measurement date.

Because all three arbitrators applied a contrary rule, the Court will **VACATE** the arbitration awards.

It will also **REMAND** the cases to their respective arbitrators to determine whether the Fund's actuary selected the disputed interest rate and expense load assumptions based only on information that was available as of the measurement date, and to resolve any further challenges the Companies have to their assessed withdrawal liability. The Court, accordingly, will **GRANT** the Trustees' motion for summary judgment, Dkt. 34, and **DENY** the Companies' cross-motion, Dkt. 38.

A separate order will issue.

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

Date: February 6, 2023

APPENDIX D

1. 29 U.S.C. 1391 provides:

Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d), the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of—

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded

vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2)(A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending—

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which—

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of—

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after September 25, 1980, and preceding the

plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of—

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute

under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of—

(A) such unamortized amount; multiplied by—

(B) a fraction—

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before September 26, 1980, by all employers—

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4)(A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional share of the unamortized

amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of—

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded

vested benefits with respect to a plan year is the product of—

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

(c) Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount

(1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d). A plan described in section 1383(b)(1)(B)(i) of this title (relating to the building and construction industry) may be amended, to the extent provided in regulations prescribed by the corporation, to provide that the amount of the unfunded vested benefits allocable to an employer not described in section 1383(b)(1)(A) of this title shall be determined in a manner different from that provided in subsection (b).

(2)(A) The amount of the unfunded vested benefits allocable to any employer under this paragraph is the sum of the amounts determined under subparagraphs (B) and (C).

(B) The amount determined under this subparagraph is the product of—

(i) the plan's unfunded vested benefits as of the end of the last plan year ending before September 26, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the last 5 plan years ending before September 26, 1980, and

(II) the denominator of which is the sum of all contributions made for the last 5 plan years ending before September 26, 1980, by all employers who had an obligation to contribute under the plan for the first plan year ending after September 25, 1980, and who had not withdrawn from the plan before such date.

(C) The amount determined under this subparagraph is the product of—

(i) an amount equal to—

(I) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less

(II) the sum of the value as of such date of all outstanding claims for withdrawal liability which can reasonably be expected to be collected, with respect to employers withdrawing before such plan year, and that portion of the amount determined under subparagraph (B)(i) which is allocable to employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws and who also had an obligation to contribute under the plan for the first plan year ending after September 25, 1980; multiplied by

(ii) a fraction—

(I) the numerator of which is the total amount required to be contributed under the plan by the employer for the last 5 plan years ending before the date on which the employer withdraws, and

(II) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the date on which the employer withdraws, increased by the amount of any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer who withdrew from the plan under this part during those plan years.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(3) The amount of the unfunded vested benefits allocable to an employer under this paragraph is the product of—

(A) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year; multiplied by

(B) a fraction—

(i) the numerator of which is the total amount required to be contributed by the employer under the plan for the last 5 plan years ending before the withdrawal, and

(ii) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

(4)(A) The amount of the unfunded vested benefits allocable to an employer under this paragraph is equal to the sum of—

(i) the plan's unfunded vested benefits which are attributable to participants' service with the employer (determined as of the end of the plan year preceding the plan year in which the employer withdraws), and

(ii) the employer's proportional share of any unfunded vested benefits which are not attributable to service with the employer or other employers who are obligated to contribute under the plan in the plan year preceding the plan year in which the employer withdraws (determined as of the end of the plan year preceding the plan year in which the employer withdraws).

(B) The plan's unfunded vested benefits which are attributable to participants' service with the employer is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such employer (determined under plan rules not inconsistent with regulations of the corporation) decreased by the share of plan assets determined under subparagraph (C) which is allocated to the employer as provided under subparagraph (D).

(C) The value of plan assets determined under this subparagraph is the value of plan assets allocated to nonforfeitable benefits which are attributable to service with the employers who have an obligation to contribute under the plan in the

plan year preceding the plan year in which the employer withdraws, which is determined by multiplying—

(i) the value of the plan assets as of the end of the plan year preceding the plan year in which the employer withdraws, by

(ii) a fraction—

(I) the numerator of which is the value of nonforfeitable benefits which are attributable to service with such employers, and

(II) the denominator of which is the value of all nonforfeitable benefits under the plan

as of the end of the plan year.

(D) The share of plan assets, determined under subparagraph (C), which is allocated to the employer shall be determined in accordance with one of the following methods which shall be adopted by the plan by amendment:

(i) by multiplying the value of plan assets determined under subparagraph (C) by a fraction—

(I) the numerator of which is the value of the nonforfeitable benefits which are attributable to service with the employer, and

(II) the denominator of which is the value of the nonforfeitable benefits which

are attributable to service with all employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws;

(ii) by multiplying the value of plan assets determined under subparagraph (C) by a fraction—

(I) the numerator of which is the sum of all contributions (accumulated with interest) which have been made to the plan by the employer for the plan year preceding the plan year in which the employer withdraws and all preceding plan years; and

(II) the denominator of which is the sum of all contributions (accumulated with interest) which have been made to the plan (for the plan year preceding the plan year in which the employer withdraws and all preceding plan years) by all employers who have an obligation to contribute to the plan for the plan year preceding the plan year in which the employer withdraws; or

(iii) by multiplying the value of plan assets under subparagraph (C) by a fraction—

(I) the numerator of which is the amount determined under clause (ii)(I) of this subparagraph, less the sum of benefit payments (accumulated with interest)

made to participants (and their beneficiaries) for the plan years described in such clause (ii)(I) which are attributable to service with the employer; and

(II) the denominator of which is the amount determined under clause (ii)(II) of this subparagraph, reduced by the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(II) which are attributable to service with respect to the employers described in such clause (ii)(II).

(E) The amount of the plan's unfunded vested benefits for a plan year preceding the plan year in which an employer withdraws, which is not attributable to service with employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which such employer withdraws, is equal to—

(i) an amount equal to—

(I) the value of all nonforfeitable benefits under the plan at the end of such plan year, reduced by

(II) the value of nonforfeitable benefits under the plan at the end of such plan year which are attributable to participants' service with employers who have an obligation to contribute under the plan for such plan year; reduced by

(ii) an amount equal to—

(I) the value of the plan assets as of the end of such plan year, reduced by

(II) the value of plan assets as of the end of such plan year as determined under subparagraph (C); reduced by

(iii) the value of all outstanding claims for withdrawal liability which can reasonably be expected to be collected with respect to employers withdrawing before the year preceding the plan year in which the employer withdraws.

(F) The employer's proportional share described in subparagraph (A)(ii) for a plan year is the amount determined under subparagraph (E) for the employer, but not in excess of an amount which bears the same ratio to the sum of the amounts determined under subparagraph (E) for all employers under the plan as the amount determined under subparagraph (C) for the employer bears to the sum of the amounts determined under subparagraph (C) for all employers under the plan.

(G) The corporation may prescribe by regulation other methods which a plan may adopt for allocating assets to determine the amount of the unfunded vested benefits attributable to service with the employer and to determine the employer's share of unfunded vested benefits not attributable to service with employers who have an obligation to contribute under the plan in the plan year in which the employer withdraws.

(5)(A) The corporation shall prescribe by regulation a procedure by which a plan may, by amendment, adopt any other alternative method for determining an employer's allocable share of unfunded vested benefits under this section, subject to the approval of the corporation based on its determination that adoption of the method by the plan would not significantly increase the risk of loss to plan participants and beneficiaries or to the corporation.

(B) The corporation may prescribe by regulation standard approaches for alternative methods, other than those set forth in the preceding paragraphs of this subsection, which a plan may adopt under subparagraph (A), for which the corporation may waive or modify the approval requirements of subparagraph (A). Any alternative method shall provide for the allocation of substantially all of a plan's unfunded vested benefits among employers who have an obligation to contribute under the plan.

(C) Unless the corporation by regulation provides otherwise, a plan may be amended to provide that a period of more than 5 but not more than 10 plan years may be used for determining the numerator and denominator of any fraction which is used under any method authorized under this section for determining an employer's allocable share of unfunded vested benefits under this section.

(D) The corporation may by regulation permit adjustments in any denominator under this sec-

tion, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(E) Fresh start option

Notwithstanding paragraph (1), a plan may be amended to provide that the withdrawal liability method described in subsection (b) shall be applied by substituting the plan year which is specified in the amendment and for which the plan has no unfunded vested benefits for the plan year ending before September 26, 1980.

(d) Method of calculating allocable share of employer of unfunded vested benefits set forth in subsection (c)(3); applicability of certain statutory provisions

(1) The method of calculating an employer's allocable share of unfunded vested benefits set forth in subsection (c)(3) shall be the method for calculating an employer's allocable share of unfunded vested benefits under a plan to which section 404(c) of Title 26, or a continuation of such a plan, applies, unless the plan is amended to adopt another method authorized under subsection (b) or (c).

(2) Sections 1384, 1389, 1399(c)(1)(B), and 1405 of this title shall not apply with respect to the withdrawal of an employer from a plan described in paragraph (1) unless the plan is amended to provide that any of such sections apply.

(e) Reduction of liability of withdrawn employer in case of transfer of liabilities to another plan incident to withdrawal or partial withdrawal of employer

In the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, the withdrawn employer's liability under this part shall be reduced in an amount equal to the value, as of the end of the last plan year ending on or before the date of the withdrawal, of the transferred unfunded vested benefits.

(f) Computations applicable in case of withdrawal following merger of multiemployer plans

In the case of a withdrawal following a merger of multiemployer plans, subsection (b), (c), or (d) shall be applied in accordance with regulations prescribed by the corporation; except that, if a withdrawal occurs in the first plan year beginning after a merger of multiemployer plans, the determination under this section shall be made as if each of the multiemployer plans had remained separate plans.

2. 29 U.S.C. 1393 provides:

Actuarial assumptions

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

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

(1) actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan, or

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

(b) Factors determinative of unfunded vested benefits of plan for computing withdrawal liability of employer

In determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part, the plan actuary may—

(1) rely on the most recent complete actuarial valuation used for purposes of section 412 of Title

26 and reasonable estimates for the interim years of the unfunded vested benefits, and

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

(c) Determination of amount of unfunded vested benefits

For purposes of this part, the term "unfunded vested benefits" means with respect to a plan, an amount equal to—

(A) the value of nonforfeitable benefits under the plan, less

(B) the value of the assets of the plan.