№ 18-1140

№ 18-1408 (Cross-Appeal)

United States Court Of Appeals For The Second Circuit

THE NEW YORK TIMES COMPANY,

Plaintiff-Appellant-Cross-Appellee,

v.

NEWSPAPER AND MAIL DELIVERERS'-PUBLISHERS' PENSION FUND, AND

THE BOARD OF TRUSTEES OF THE NEWSPAPER AND MAIL DELIVERERS'- PUBLISHERS' PENSION FUND,

Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE PENSION BENEFIT GUARANTY CORPORATION AS *AMICUS CURIAE* SUPPORTING CROSS-APPELLANTS

JUDITH STARR, *General Counsel*
ISRAEL GOLDOWITZ, *Deputy General Counsel*
JON CHATALIAN, *Acting Assistant General Counsel*
JOHN GINSBERG, *Attorney*

PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W.
Washington, DC 20005-4026
(202) 326-4020, ext. 3714 (telephone)
(202) 326-4112 (facsimile)
ginsberg.john@pbgc.gov

TABLE OF CONTENTS

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 4

Legal Background 4

The Present Controversy 9

ARGUMENT 15

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO APPLY THE STATUTORY PRESUMPTION IN FAVOR OF THE PLAN AND IMPERMISSIBLY SHIFTING THE BURDEN OF PROOF ON THE REASONABLENESS OF ACTUARIAL ASSUMPTIONS 15

I. The district court correctly held that MPPAA does not require a plan's actuary to value vested benefits for withdrawal liability purposes using her funding interest assumption, which should have resulted in a decision in favor of the Fund 15

II. The district court failed to apply MPPAA's presumption that the plan actuary's determination of the plan's unfunded vested benefits was correct, impermissibly shifted the burden of proof from the Times to the Fund, and, in so doing, contradicted its correct holding that the funding interest assumption need not be applied 23

CONCLUSION 32

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 30

Bazemore v. Friday,
478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986) 30

Beck v. PACE International Union,
551 US. 96 (2007) 2

Board of Trustees, Michigan United Food & Commercial Workers Union v. Eberhard Foods, Inc., 831 F.2d 1258 (6th Cir. 1987) 18

Citrus Valley Estates, Inc. v. C.I.R.,
49 F.3d 1410 (9th Cir. 1995) 17

Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund v. CPC Logistics, Inc., 698 F.3d 346 (7th Cir. 2012) 17, 21, 22

Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund v. Louis Zahn Drug Company, 890 F.2d 1405 (7th Cir. 1989) 30

Combs v. Classic Coal Corporation,
No. 84-1562, 1990 WL 66583 (D.C.C. Apr. 6, 1990) 25

Combs v. Classic Coal Corporation,
931 F.2d 96 (D.C. Cir. 1991) 23, 24, 25

Concrete Pipe & Product of California, Inc. v. Construction Laborers Trust for Southern California, 508 U.S. 602 (1993) 4, 14, 19, 20, 24, 30

Huber v. Casablanca Industries, Inc.,
916 F.2d 85 (3d Cir. 1990) 17

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 4

ILGWU National Retirement Fund v. Levy Brothers Frocks, Inc.,
846 F.2d 879 (2d Cir. 1988)..7, 25

In re U.S. Airways Group, Inc.,
303 B.R. 784 (Bankr. E.D. Va. 2003).. 11, 27

Keith Fulton & Sons v. New England Teamsters & Trucking Industry Pension Fund,
762 F.2d 1137 (1st Cir. 1985)..24

Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund,
No. 17-5076, 2018 U.S. Dist. LEXIS 111969 (D.N.J. July 3, 2018), *appeal dismissed by stipulation*, No. 18-2709 (3d Cir. Oct. 9, 2018) 16, 17, 21, 22

Masters, Mates & Pilots Pension Plan v. USX Corporation,
900 F.2d 727 (4th Cir. 1990) 18

Mead Corporation v. Tilley,
490 U.S. 714 (1989) 2

Mertens v. Hewitt Associates,
508 U.S. 248 (1993) 2

Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.,
513 U.S. 414 (1995) 17

Nachman Corporation v. Pension Benefit Guaranty Corporation,
446 U.S. 359 (1980) 2

National Retirement Fund v. Metz Culinary Management, Inc.,
No. 16-CV-2408, 2017 WL 1157156 (S.D.N.Y. Mar. 27, 2017) 27

Perkin-Elmer Corporation v. Computervision Corporation,
732 F.2d 888(Fed. Cir. 1984) 30

Plan Board of Sunkist Retirement Plan v. Harding & Leggett, Inc.,
463 F. App'x 702 (9th Cir. 2011)..27

Rhoades, McKee & Boer v. United States,
43 F.3d 1074 (6th Cir. 1995) 17

Russello v. United States,
464 U.S. 16, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) 18

Santa Fe Pacific Corporation v. Central States, Southeast & Southwest Areas Pension Fund, 22 F.3d 725 (7th Cir. 1994) 25

SUPERVALU, Inc. v. Board of Trustees of Southwest Pennsylvania & West Maryland Area Teamsters & Employers Pension Fund,
500 F.3d 334 (3d Cir. 2007) 25

Trustees of the Pressman Local 72 Industry Pension Fund v. Judd & Detweiler, Inc.,
736 F. Supp. 1351 (D. Md. 1988) 19, 22

United States v. Naftalin,
441 U.S. 768 (1979) 18

Vinson & Elkins v. C.I.R.,
7 F.3d 1235 (5th Cir. 1993) 17

Wachtell, Lipton, Rosen & Katz v. C.I.R.,
26 F.3d 291 (2d Cir. 1994) 17

U.S. Code

Title 26
Section 404(a)(1)(A) 17
Section 412 5
Section 412(c)(3)(1988 & 1994) 17, 20, 22
Section 412(c)(9)(1976 & Supp. III 1980) 18
Section 431 5
Section 431(c)(3) 8, 15
Section 431(c)(7) 6, 18, 29
Section 432 2
Section 4971 5
Section 6059 6
Section 7701(a)(35) 5, 29

Title 29
Section 186(c)(5) 4
Section 1001a(a)(4)(A) 25

Section 1002(16)(B)(iii) 4
Section 1002(34) 4
Section 1002(35) 4
Section 1082(c)(3) 20, 22
Section 1084(c)(3) 8, 15
Section 1084(c)(7)(A) 6, 18, 29
Section 1085 2
Section 1103(a) 4
Section 1241 .... 5, 29
Section 1242 .... 5, 29
Sections 1301-1461 1
Section 1301(a)(3) 4
Section 1301(a)(18) 11
Section 1302(b)(1) 3
Section 1321 4
Section 1322a 2, 7
Section 1322b 2
Section 1361 2
Section 1362(a) 11
Section 1362(b) 11
Section 1381(a) 7
Section 1383(a) 6
Section 1393(a) 8
Section 1393(a)(1) 15
Section 1401(a)(1) 9
Section 1401(a)(2) 9
Section 1401(a)(3)(B) 10, 23
Section 1401(a)(3)(B)(i) 30
Section 1401(b)(2) 13
Section 1401(c) 30
Section 1431 2
Section 1461 7

Other Authorities

20 C.F.R. §§ 901.0-.72 .... 5, 29

26 C.F.R. § 301.6059-1 6

29 C.F.R. pt. 4221 9

29 C.F.R. § 4281.13 12

29 C.F.R. Pt. 4044 11

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 1

Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 .... 20, 22

Valuation of Benefits, Mortality Assumptions, 70 Fed. Reg. 72205 (Dec. 2, 2005) 11, 27

Actuarial Standard of Practice, http://www.actuarialstandardsboard.org/standards-of-practice/ 5, 29

Actuarial Standard of Practice No. 27 §§ 3.8.3, 3.9 (Sept. 2013 ed.), *available at* http://www.actuarialstandsboard.org/wp-content /uploads/2014/02/asop027_172.pdf 6

Actuarial Standard of Practice No. 27 § 3.6 (Sept. 2007 ed. Updated May 1, 2011) 25

Actuarial Standard of Practice No. 27 § 3.6 (Sept. 2013 ed.) 25

H.R. Rep. No. 96-869, pt. 1 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 2918, 2935 26

Eric J. Magnuson & David F. Herr, Federal Appeals Jurisdiction and Practice § 5:3 (2018 ed. 2017) 30

Fed. R. App. P. 29 (a) 3

Amy Gallo, *A Refresher on Net Present Value*, Harv. Bus. Rev. (Nov. 19, 2014), https://hbr.og/2014/11/a-refresher-on-net-present-value 10

Judith Mazo & Susan Lee, *Multiemployer Pension Plan Withdrawal Liability*, 23 Ben. L. J., no. 4, 2010 25

PBGC, FY2017 Projections Report 1, 7 (May 31, 2018),
https://www.pbgc.gov/sites/default/files/fy-2017-
projections-report.pdf 2

PBGC Opin. Ltr. 86-24 (1986),
https://www.pbgc.gov/sites/default/files/legacy/
docs/oplet/86-24.pdf 15

INTEREST OF THE *AMICUS CURIAE*

This case presents issues under the Multiemployer Pension Plan Amendments Act of 1980 ("**MPPAA**"), Pub. L. No. 96-364, 94 Stat. 1208. The Pension Benefit Guaranty Corporation ("**PBGC**") is the federal agency responsible for administering Title IV of the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**"), 29 U.S.C. §§ 1301-1461 (2012 & Supp. V 2018),[1] including provisions of MPPAA at issue.

ERISA is a "comprehensive and reticulated statute"[2] and "enormously complex and detailed."[3] As a unanimous Supreme Court said in *Beck v. Pace Int'l Union*, PBGC's views on the interpretation of Title IV of ERISA—expressed in that case as *amicus curiae*—warrant deference, "for 'to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embar[k] upon a voyage without a compass.'"[4]

PBGC insures the payment of pension benefits to participants in insolvent

---

[1] Unless otherwise specified, all citations to the United States Code refer to the 2012 edition and 2018 supplement. Parallel cites to ERISA are omitted.

[2] *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

[3] *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993).

[4] *Beck v. PACE Int'l Union*, 551 U.S. 96, 104 (2007) (quoting *Mead Corp. v. Tilley*, 490 U.S. 714, 722, 725-726 (1989)).

multiemployer defined-benefit pension plans.[5] Coverage extends to some ten million participants in some 1,400 multiemployer plans. About one quarter of those plans are in "critical" status and must adopt a rehabilitation plan that may include reduced benefit accruals and increased employer contributions, and some 130 are expected to become insolvent within twenty years unless they reduce benefits to sustainable levels.[6]

The district court disregarded the statutory burden of proof in an employer's challenge to actuarial assumptions used to determine its liability upon withdrawal from a multiemployer plan. Affirmance would likely increase the cost and uncertainty of arbitration and litigation over withdrawal liability, contrary to the statutory design. That in turn would tend to hasten plan insolvency, triggering PBGC's guarantee and participants' loss of benefits above the guaranteed level.

As an agency of the United States, PBGC may file an *amicus curiae* brief without leave of Court.[7] Through its independent litigating authority, PBGC may represent itself.[8]

---

[5] *See* 29 U.S.C. §§ 1322a, 1322b, 1361, 1431.

[6] *See* 26 U.S.C. § 432; 29 U.S.C. § 1085; PBGC, *FY2017 Projections Report* 1, 7 (May 31, 2018), https://www.pbgc.gov/sites/default/files/fy-2017-projections-report.pdf.

[7] *See* Fed. R. App. P. 29(a).

[8] *See* 29 U.S.C. § 1302(b)(1).

STATEMENT OF THE CASE

Legal Background

A multiemployer plan is a defined benefit pension plan to which more than one employer is required to contribute and that is maintained pursuant to one or more collective bargaining agreements.[9] A multiemployer plan provides benefits for employees of all contributing employers. Multiemployer plans allow employers to provide portable pensions with advantageous cost- and risk-sharing mechanisms, which helps ensure a trained labor force.[10]

A multiemployer plan is administered by a board of trustees, half appointed by labor and half by management, with a tie-breaker mechanism.[11] Plan assets must be held in trust.[12] The board of trustees is the "plan sponsor."[13]

In a defined benefit pension plan, retirement benefits are defined by the plan—usually as a fixed amount or percentage of pay times years of service—rather than as the balance of a participant's individual account, as in a defined contribution plan. The employer therefore bears the shortfall risk.[14]

---

[9] 29 U.S.C. §§ 1301(a)(3), 1321.

[10] *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 605-07 (1993).

[11] *See* 29 U.S.C. § 186(c)(5).

[12] *See* 29 U.S.C. § 1103(a).

[13] *See* 29 U.S.C. § 1002(16)(B)(iii).

[14] *See* 29 U.S.C. § 1002(34)-(35); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432,

Multiemployer plans are funded by employer contributions, withdrawal liability payments (described below), and returns on investment of plan assets. A contributing employer's liability for contributions is determined by its collective bargaining agreement. That agreement provides the employer's contribution rate and defines the contribution base unit (such as an hour of service by an employee). The employer's liability for contributions is determined by multiplying its contribution rate by the number of contribution base units.

Multiemployer plans are subject to statutory minimum funding standards.[15] If those standards are not met, contributing employers are generally subject to an excise tax.[16]

Determining the minimum funding for a "plan year" (typically a calendar year) requires a determination of the present value of future liabilities for benefits and of the costs of plan administration. Each multiemployer plan must retain an enrolled actuary, who is subject to regulatory and professional standards,[17] to prepare an

---

439-40 (1999).

15 *See* 26 U.S.C. §§ 412, 431.

16 *See* 26 U.S.C. § 4971.

17 *See* 29 U.S.C. §§ 1241-42; 26 U.S.C. § 7701(a) (35); 20 C.F.R. §§ 901.0-.72; Actuarial Standards of Practice, http://www.actuarialstandardsboard.org/standards-of-practice/.

annual valuation of the plan's liabilities,[18] and to annually calculate the total amount of contributions necessary to avoid a funding deficiency for the plan year.[19] That minimum funding amount is reported to the Internal Revenue Service.[20]

To value future benefit liabilities, the actuary must make certain assumptions, including turnover (*i.e.*, how many participants will vest in their benefits and in what amounts), and retirement age and mortality (*i.e.*, how long participants and their beneficiaries will receive benefits). The actuary also assumes an interest rate, which she uses to discount future plan liabilities to the present dollar equivalent ("**Funding Interest Assumption**"). The actuary may select a Funding Interest Assumption that reflects anticipated average investment returns on plan assets, considering the plan's investment policy.[21]

An employer completely withdraws from a multiemployer plan when it permanently ceases to have an obligation to contribute to the plan or to have operations covered by the plan.[22] The plan remains liable for the benefits of the

---

18 *See* 26 U.S.C. § 431(c)(7); 29 U.S.C. § 1084(c)(7)(A).

19 *See* 26 U.S.C. § 6059; 26 C.F.R. 301.6059-1.

20 *See id.*

21 *See* Actuarial Standard of Practice No. 27 ("**ASOP 27**") §§ 3.8.3, 3.9 (Sept. 2013 ed.), http://www.actuarialstandardsboard.org/wp-content/uploads/2014/02/asop027_172.pdf.

22 *See* 29 U.S.C. § 1383(a).

withdrawn employer's employees. ERISA protects plan participants and contributing employers by imposing withdrawal liability on the withdrawn employer.[23] Because withdrawal liability is a source of plan funds, it also protects PBGC's multiemployer-plan insurance fund, which covers benefit payments upon plan insolvency.[24] That insurance fund is projected to become insolvent by 2026.[25]

ERISA also imposes withdrawal liability on an employer that partially withdraws, which occurs when there is a 70% decline in the employer's contribution base units or a partial cessation of the employer's contribution obligation.[26]

Withdrawal liability is an employer's share of the plan's unfunded vested benefits.[27] "Unfunded vested benefits" means the value of vested benefits minus the value of plan assets.[28]

The plan's enrolled actuary determines the present value of vested benefits. To do so, the actuary must use actuarial assumptions, as when she values benefit liabilities in determining the plan's minimum funding.

---

[23] *See* 29 U.S.C. § 1381(a); *ILGWU Nat'l Ret. Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879, 880-81 (2d Cir. 1988).

[24] 29 U.S.C. §§ 1322a, 1461.

[25] PBGC, *FY2017 Projections Report* 1-2, 10-12 (May 31, 2018), https://www.pbgc.gov/sites/default/files/fy-2017-projections-report.pdf

[26] *See* 29 U.S.C. §§ 1381, 1385.

[27] *See* 29 U.S.C. § 1381(b)(1).

[28] *See* 29 U.S.C. § 1393(c).

Separate legal standards govern the actuary's selection of actuarial assumptions for determining withdrawal liability and minimum funding. Under section 4213(a) of ERISA, a plan's actuary must value the plan's unfunded vested benefits for withdrawal liability purposes based on:

> (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 [PBGC] regulations for purposes of determining an employer's withdrawal liability.[29]

Until PBGC promulgates a regulation providing actuarial assumptions and methods that may be used under section 4213(a)(2), section 4213(a)(1) supplies the operative standard.

A plan's actuary must value the plan's liabilities for minimum funding purposes based on actuarial assumptions and methods:

> *each of which is 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."

26 U.S.C. § 431(c)(3); 29 U.S.C. § 1084(c)(3) (the "**Funding Assumptions Standard**") (emphasis added).

---

[29] 29 U.S.C. § 1393(a) (emphasis added).

The Present Controversy

The Newspapers & Mail Deliverers'-Publishers' Pension Fund is a multiemployer plan maintained pursuant to collective bargaining agreements between the Newspaper and Mail Deliverers Union of New York and Vicinity and several newspaper publishers. The plan is sponsored and administered by a joint board of trustees. We will refer to both the plan and its board of trustees as the "**Fund**."

The New York Times Co. (the "**Times**") is a contributing employer to the Fund.

The Fund notified the Times that it had twice partially withdrawn from the Fund, in successive plan years ending May 31, 2012, and May 31, 2013. The Fund assessed withdrawal liability of $25.7 million for the first partial withdrawal and $7.8 million for the second.[30]

Withdrawal liability disputes are subject to mandatory arbitration under ERISA section 4221, conducted under "fair and equitable procedures . . . promulgated by [PBGC]."[31] In such a proceeding,

> the determination of a plan's unfunded vested benefits is presumed correct unless [the employer] shows by a preponderance of the evidence that—

[30] A.28-32. "**A.__**" refers to the Times's Appendix, ECF Nos. 37-38. "**SA.__**" refers to the Times's Special Appendix, ECF No. 36. "**FA.__**" refers the Fund's Supplemental Appendix, ECF No. 58.

[31] 29 U.S.C. § 1401(a)(1)-(2); *see* 29 C.F.R. pt. 4221.

> (i) the actuarial assumptions and methods used 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.

29 U.S.C. § 1401(a)(3)(B).

The Times initiated arbitration, disputing its withdrawal liability assessments on several grounds, including that: (1) section 4213(a)(1) requires that, in determining withdrawal liability, vested benefits be valued using the plan actuary's Funding Interest Assumption; and (2) because the Fund's actuary assumed an interest rate lower than her Funding Interest Assumption, the Fund's unfunded vested benefits and the Times's withdrawal liability were overstated.[32]

In assessing the Times's withdrawal liability, the Fund relied on a valuation of the Fund's unfunded vested benefits prepared by enrolled actuary Rosana Egan ("**Egan**") of The Segal Company ("**Segal**"), who valued the Fund's vested benefits using the "**Segal Method**."[33]

Under the Segal Method: (1) vested benefits in excess of the value of plan assets are valued using the actuary's Funding Interest Assumption, and (2) vested

---

[32] FA.112-15; A.58-63. Using a lower discount rate to value future payments results in a higher present value. *See* Amy Gallo, *A Refresher on Net Present Value*, Harv. Bus. Rev. (Nov. 19, 2014), https://hbr.org/2014/11/a-refresher-on-net-present-value.

[33] SA.17-18; A.33-35.

benefits covered by the value of plan assets are valued using interest assumptions prescribed by PBGC under 29 C.F.R. Pt. 4044 ("**PBGC Close-Out Rates**").[34] That blend of interest assumptions (the "**Segal Blend**") yielded, in this case, an average interest assumption of approximately 6.5%.[35] Egan's Funding Interest Assumption was 7.5%.[36]

PBGC Close-Out Rates are used for valuing the liabilities of a terminated single-employer plan, which affects employer liability to PBGC for the plan's unfunded benefit liabilities.[37] PBGC values liabilities based on the average market price of a life annuity, which PBGC determines from a quarterly survey of insurance companies. Valuing benefits using PBGC Close-Out Rates and the other actuarial assumptions described in 29 C.F.R. pt. 4044 approximates the cost of purchasing annuities to cover those benefits.[38] Those assumptions must also be used to value

---

[34] A.29

[35] *Id.*

[36] *Id.* Because of the leveraging effect of discounting over long periods, the 100-basis-point difference resulted in a 33% increase in the Times's withdrawal liability, according to the Times's expert. A.144.

[37] *See* 29 U.S.C. §§ 1301(a)(18); 1362(a)-(b).

[38] *See* Valuation of Benefits; Mortality Assumptions, 70 Fed. Reg. 72205, 72205-06 (Dec. 2, 2005); *In re U.S. Airways Grp., Inc.*, 303 B.R. 784, 788-89 (Bankr. E.D. Va. 2003). Annuity prices are based on returns on high-quality corporate bonds. *See id.* at 795. When interest rates are high, as in the 1980s, PBGC Close-Out Rates are relatively high. Currently, they are relatively low.

benefits in multiemployer plans terminated because all employers have withdrawn.[39]

In the arbitration, the Fund called Egan, who testified that her use of the Segal Method is appropriate. She explained that, while contributing employers bear risk of plan investments underperforming the long-term average rate of return reflected in her Funding Interest Assumption (in that they may be called upon to increase their contributions), a withdrawn employer bears no such risk. It settles its liability once and for all in the fixed amount of its withdrawal liability. Therefore, it is appropriate to use PBGC Close-Out Rates, which approximate the market price of annuities, to value the funded portion of vested benefits (*i.e.*, the portion for which the plan could afford to purchase annuities).[40]

The Fund also called Dr. Ethan Kra, another enrolled actuary and a Fellow in the Society of Actuaries, as an expert witness. He opined that Egan's assumptions were reasonable in the aggregate.[41] The Times called Darren French, an enrolled actuary and an Associate in the Society of Actuaries, who asserted that only the Funding Interest Assumption was permissible, and who did not testify as to whether Egan's assumptions were reasonable in the aggregate.[42]

---

[39] *See* 29 C.F.R. § 4281.13.

[40] FA.28-29; A.35.

[41] FA.53, 118, 131-32; A.36.

[42] A.127 *et seq*. Mr. French is now employed as an actuary by the PBGC. He was

Arbitrator Mark L. Irvings found that Egan's actuarial assumptions were, in the aggregate, reasonable.[43] He rejected the Times's argument that Egan's interest rate assumption violated ERISA, stating "the settled law is that the use of the Segal Blend is consistent with the requirements of [section 4213(a) of ERISA]."[44] He noted that more than 250 multiemployer plans use the Segal Blend, including some plans not advised by Segal, that plans have done so for decades, and that "thousands of withdrawal liability assessments have been issued using the Segal Blend."[45] He wrote:

> The consideration of a risk-free rate is within the range of actuarial reasonableness for an estimate of the anticipated experience under the plan. Particularly given investment results in recent years and the shrinking and endangered newspaper sector, protecting the Fund against the very real possibility that investment returns will be below what has been projected, is hardly unreasonable.

A.62.

When arbitration of a withdrawal liability dispute is complete, a party may bring an action to enforce, vacate, or modify the arbitral award.[46] The Times sued to, *inter alia*, vacate that part of the arbitral award regarding Egan's interest rate assumption,

---

walled off from participation in this case.

[43] A.58-63.

[44] A.62.

[45] A.34-35, 60.

[46] *See* 29 U.S.C. § 1401(b)(2).

and for an order directing the Fund to recalculate the Times's withdrawal liability.[47]

District Judge Robert W. Sweet rejected the Times's argument that use of the Segal Blend was legally impermissible under section 4213(a)(1): "Insofar as the Times wishes to argue that use of different interest rates in different contexts is always impermissible as a matter of law, that argument fails. Both the ERISA provisions and *Concrete Pipe [& Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602 (1993)] . . . indicate otherwise.").[48]

Judge Sweet nevertheless held that Arbitrator Irvings clearly erred in concluding that Egan's use of the Segal Blend satisfied section 4213(a)(1) "in this instance," because "Egan's testimony before the Arbitrator was that a 7.5% percent [*sic*] assumption was her 'best estimate of how the . . . Fund's assets . . . will on average perform over the long term."[49] He ordered the Fund to recalculate the Times's withdrawal liability using the Fund's 7.5% Funding Interest Assumption.

The Fund, as cross-appellant, seeks reversal of the District Court's decision on Egan's use of the Segal Blend.

---

47 Complaint ¶¶ 51, 63-84 & 1st request for relief, No. 17-6178 (S.D.N.Y. Aug. 15, 2017), ECF No. 1.

48 SA.43-45.

49 SA.45-49.

ARGUMENT

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO APPLY THE STATUTORY PRESUMPTION IN FAVOR OF THE PLAN AND IMPERMISSIBLY SHIFTING THE BURDEN OF PROOF ON THE REASONABLENESS OF ACTUARIAL ASSUMPTIONS.

I. The district court correctly held that MPPAA does not require a plan's actuary to value vested benefits for withdrawal liability purposes using her funding interest assumption, which should have resulted in a decision in favor of the Fund.

Section 4213(a)(1) is similar, but not identical, to the Funding Assumptions Standard. Both require "actuarial assumptions and methods . . . which, in combination, offer the actuary's best estimate of anticipated experience under the plan." But while the Funding Assumptions Standard requires that the actuarial assumptions and methods used in determining a plan's minimum funding *each* be reasonable,[50] section 4213(a)(1) requires that the actuarial assumptions and methods used to determine withdrawal liability be reasonable *in the aggregate*.[51]

The Times contended: (1) that, because of the similarity of those two statutory standards, section 4213(a)(1) implicitly requires that withdrawal liability be determined using the plan actuary's Funding Interest Assumption (the "**Statutory Similarity Argument**"); and (2) that the Supreme Court "squarely held" in *Concrete Pipe* that

---

[50] *See* 26 U.S.C. § 431(c)(3); 29 U.S.C. § 1084(c)(3).

[51] *See* 29 U.S.C. § 1393(a)(1)

section 4213(a)(1) so requires.[52] Judge Sweet correctly rejected both contentions,[53] as did the district court in *Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund*, No. 17-5076, 2018 U.S. Dist. LEXIS 111969, at *31-48 (D.N.J. July 3, 2018), *appeal dismissed by stipulation,* No. 18-2709 (3d Cir. Oct. 9, 2018).[54]

The Statutory Similarity Argument is premised on two invalid propositions.

First, the Statutory Similarity Argument is valid only if section 4213(a)(1) sets a standard for the interest rate assumption considered in isolation. But by its terms, section 4213(a)(1) applies to actuarial assumptions and methods only "in the aggregate" and "in combination."

Second, the Statutory Similarity Argument depends on the proposition that "actuarial assumptions and methods . . . , in combination, offer the actuary's best estimate of anticipated experience under the plan" means that the interest rate assumption must offer the actuary's best estimate of the long-term average rate of return on plan assets. That proposition is inconsistent with precedent. Courts have construed that requirement as "basically procedural in nature and . . . principally designed to ensure that the chosen assumptions actually represent the actuary's own

---

[52] Times's Mem. in Supp. of M.S.J. at 24-25, No. 17-6178 (S.D.N.Y. Sept. 15, 2017), ECF No. 20.

[53] SA.43-45 ("Both the ERISA provisions and *Concrete Pipe* . . . indicate otherwise.").

[54] PBGC opined in 1986 that section 4213 does not require an actuary to use her funding assumptions. *See* PBGC Opin. Ltr. 86-24 (1986), https://www.pbgc.gov/sites/default/files/legacy/docs/oplet/86-24.pdf.

judgment rather than the dictates of plan administrators or sponsors." *Wachtell, Lipton, Rosen & Katz v. C.I.R.*, 26 F.3d 291, 296 (2d Cir. 1994); *accord Citrus Valley Estates, Inc. v. C.I.R.,* 49 F.3d 1410, 1414-15 (9th Cir. 1995); *Rhoades, McKee & Boer v. United States*, 43 F.3d 1071, 1074-75 (6th Cir. 1995); *Vinson & Elkins v. C.I.R.*, 7 F.3d 1235, 1238 (5th Cir. 1993). Those decisions addressed the "actuary's best estimate" requirement under a predecessor Funding Assumptions Standard.[55] Courts have similarly construed the "actuary's best estimate" requirement under section 4213(a)(1).[56]

---

[55] The decisions followed a wave of IRS audits of defined benefit pension plans. At the time, both single- and multiemployer plans were subject to similar minimum funding requirements. The statutory minimum funding standard required "actuarial assumptions and methods . . . which, in combination, offer the actuary's best estimate of anticipated experience under the plan." *See* 26 U.S.C. § 412(c)(3) (1988 & 1994). Section 404 of the Internal Revenue Code limits tax-deductible contributions and requires that the actuarial assumptions used to determine maximum deductible contributions be those used for minimum funding. *See* 26 U.S.C. § 404(a)(1)(A). The IRS disallowed deductions of plan contributions because, the IRS asserted, the plan actuary's interest assumption was lower than his "best estimate of anticipated experience under the plan" and therefore overstated deductible contributions.

[56] *See Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 357 (7th Cir. 2012) (Posner, J.) ("[T]he plan's resolution directing Segal to switch from one method of estimating the interest rate to another and back again . . . violated the 'best estimate' requirement, which exists to maintain the actuary's independence."); *Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund*, No. 17-5076, 2018 U.S. Dist. LEXIS 111969, at *51-55 (D.N.J. July 3, 2018); *see also Huber v. Casablanca Indus., Inc.*, 916 F.2d 85, 90-93 (3d Cir. 1990), *abrogated on other grounds by Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.*, 513 U.S. 414 (1995) (upholding arbitrator's finding that actuary's valuation of plan assets for withdrawal liability purposes, "did not represent the best estimates of the actuary"

If Congress had wanted to require valuation of vested benefits for withdrawal liability purposes based on funding assumptions, Congress could easily have said so. "'The short answer is that Congress did not write the statute that way.'"[57] Rather, its use of disparate language in the same statute—here, in the Funding Assumptions Standard and section 4213(a)(1)—is presumed to be intentional.[58]

Section 4213(b)(1) does provide that, "for purposes of determining an employer's withdrawal liability . . . , the plan actuary may . . . rely on the most recent complete actuarial valuation used for purposes of section 412 of title 26 [the minimum funding standard] and reasonable estimates for the interim years of the unfunded vested benefits."[59] Courts have held that section 4213(b)(1) may *permit* use of funding assumptions for withdrawal liability purposes but *only if* the assumptions are reasonable for withdrawal liability purposes.[60]

---

but "had its genesis in the Board of Trustees . . . and has an objective . . . of inflating the withdrawal liability . . . .")

[57] *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Naftalin*, 441 U.S. 768, 773 (1979)).

[58] *See id.*

[59] When section 4213(b)(1) was enacted, ERISA's minimum funding provisions required a triennial actuarial valuation. *See* 26 U.S.C. § 412(c)(9) (1976 & Supp. III 1980). Now an annual valuation is required. *See* 26 U.S.C. § 431(c)(7); 29 U.S.C. § 1084(c)(7)(A).

[60] *See Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727, 731-32 (4th Cir. 1990); *Bd. of Trs., Michigan United Food & Commercial Workers Union v. Eberhard Foods, Inc.*, 831 F.2d 1258, 1262 (6th Cir. 1987); *Trs. of the Pressman Local 72 Indus. Pension Fund*

The Times incorrectly asserted that, in *Concrete Pipe,* the Supreme Court "squarely h[eld] that actuaries must employ the same rate in both [the withdrawal liability and funding] contexts."[61] The issue was whether the section 4221(a)(3)(B) presumption (that the actuary's determination of the plan's unfunded vested benefits was correct) shielded the actuary's assumptions from effective review in arbitration, denying the employer a neutral forum in violation of the Due Process Clause.[62] In holding that presumption constitutional, the Court reasoned that "the assumptions and methods used in calculating withdrawal liability are selected in the first instance not by the trustees [of the plan], but by the plan actuary," who, as a "trained professional[] subject to regulatory standards," "is not, like the trustees, vulnerable to suggestions of bias or its appearance."[63] To the extent that risk of bias remained despite actuaries' professional independence and the regulatory standards governing their profession, that risk was limited by the "necessity for applying the same assumptions and methods in more than one context"—that is, in determinations of both minimum funding and withdrawal liability.

---

v. Judd & Detweiler, Inc., 736 F. Supp. 1351, 1354-55 (D. Md. 1988).

[61] Times's Mem. in Supp. of M.S.J. at 25, No. 17-6178 (S.D.N.Y. Sept. 15, 2017), ECF No. 20.

[62] *See Concrete Pipe*, 508 U.S. 602 at 631-36.

[63] *Id.*

At the time *Concrete Pipe* was decided, the Funding Assumption Standard used the same language as section 4213(a)(1).[64] "The use of the same language to describe the actuarial assumptions and methods to be used in these different contexts tends to check the actuary's discretion in each of them," although "the assumptions used by the [p]lan . . . *may be 'supplemented by several actuarial assumptions unique to withdrawal liability*.'"[65] Concrete Pipe had:

> not shown that any method or assumption unique to the calculation of withdrawal liability is so manipulable as to create a significant opportunity for bias to operate, and arguably the most important assumption (in fact, the only actuarial assumption or method that Concrete Pipe attacks . . .) is the critical interest rate assumption that must be used for other purposes as well.

Concrete Pipe, 508 U.S. at 633.

The Times extracted from the Supreme Court's reasoning that the interest rate assumption must be the same (ignoring what the Court said about supplemental actuarial assumptions unique to withdrawal liability). At least two courts have agreed with Judge Sweet, however, that *Concrete Pipe* does not require a plan's actuary to use

---

[64] Prior to the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780, ERISA's standard for the actuarial assumptions and methods that multiemployer plans used to value benefit liabilities for minimum funding purposes was identical to the section 4213(a)(1) standard. *See* 29 U.S.C. § 1082(c)(3); 26 U.S.C. § 412(c)(3) (1988 & 1994).

[65] *Concrete Pipe*, 508 U.S. at 632-33 (quoting plan's brief) (emphasis added).

the same interest rate in withdrawal liability and funding determinations. *See Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346 (7th Cir. 2012); *Manhattan Ford*, 2018 U.S. Dist. LEXIS 111969, at *31-36.

In *CPC Logistics*, the plan's actuary had used the Segal Method to calculate withdrawal liability. But Segal became concerned that withdrawal liability assessments might be susceptible to challenge if *Concrete Pipe* were interpreted to mean that determination of withdrawal liability using any interest assumption but the Funding Interest Assumption violated section 4213(a)(1). Segal told plan trustees that they could direct the plan's actuary to use his Funding Interest Assumption to calculate withdrawal liability, but that Segal actuaries stood by the Segal Blend as their best estimate of anticipated experience under the plan in the withdrawal-liability context.[66] Plan trustees directed the actuary to use the funding rate from 1996 until 2004, when they directed reversion to the Segal Blend. CPC Logistics's withdrawal liability was greater than it would have been had the Segal Blend been used consistently.[67]

The arbitrator ruled that use of the Funding Interest Assumption failed to satisfy section 4213(a)(1) based on the actuary's testimony that Segal Blend was at all times his "best estimate of anticipated experience under the plan" in the withdrawal-

---

[66] *See CPC Logistics*, 698 F.3d at 354.

[67] *See id.* at 355.

liability context. The district court upheld the arbitrator's ruling.

The Seventh Circuit affirmed. Judge Posner, writing for the Seventh Circuit, dismissed the proposition that, following *Concrete Pipe*, an interest assumption that was the plan actuary's "best estimate of anticipated experience under the plan" in the withdrawal-liability context must be the same as his Funding Interest Assumption. "[T]he Court [in *Concrete Pipe*] had indicated that 'supplemental' assumptions that might cause the rates to diverge were permissible."[68]

Section 4213(a)(1) and the Funding Assumptions Standard themselves diverged in 2006,[69] after the withdrawal at issue in *CPC Logistics*. That reinforces the correctness of the Seventh Circuit's conclusion.[70]

Having correctly held that neither the statute nor the case law supports the Times' argument that the actuarial assumptions for funding and withdrawal liability must be identical, Judge Sweet should have held the Times to its burden of showing

---

68 *Id.* at 354-55 ; *see also Trs. of the Pressman Local 72 Indus. Pension Fund v. Judd & Detweiler, Inc.*, 736 F. Supp. 1351, 1356-57 (D. Md. 1988) (concluding that other actuarial assumptions may have borne on the actuary's interest assumption—which was, the withdrawn employer argued, unreasonably low—and on the reasonableness of the actuarial assumptions in the aggregate).

69 *See supra* note 64.

70 *See also Manhattan Ford*, 2018 WL 3528310, at *16 ("The language . . . quoted from *Concrete Pipe* rested on the proposition that ERISA used entirely "identical language" to describe the actuarial assumptions and methods that must be used in the "different contexts" of withdrawal liability and minimum funding . . . . In 1993, when *Concrete Pipe* was decided, that was true. . . . *Concrete Pipe*'s discussion of the "identical" statutes must now, post-2006, be taken with a grain of salt.")

that the Fund's actuarial assumptions were unreasonable in the aggregate. Instead, he entirely disregarded the statutory presumption, and thereby committed reversible error.

II. The district court failed to apply MPPAA's presumption that the plan actuary's determination of the plan's unfunded vested benefits was correct, impermissibly shifted the burden of proof from the Times to the Fund, and, in so doing, contradicted its correct holding that the funding interest assumption need not be applied.

Under section 4221(a)(3)(B) of ERISA, in a withdrawal liability dispute, the actuary's determination of the plan's unfunded vested benefits is presumed correct unless a party contesting the determination shows by a preponderance of the evidence that :

> (i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or
>
> (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

29 U.S.C. § 1401(a)(3)(B).

The D.C. Circuit has described the policy underlying the presumption:

> Actuarial valuations are based upon and reflect the experience of the plan, the professional judgment of the actuary, and the theories and expectations to which the actuary ascribes. Great differences of opinion exist as to actuarial methods. Congress, therefore, created the statutory presumption in favor of withdrawal determinations expressly to forestall endless disputes "over technical actuarial matters with respect to which there are often several equally 'correct approaches.'" S. 1076, The

> Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 98th Cong., 2d Sess. 21 (1980). In the absence of this presumption, "employers could effectively nullify their obligation by . . . forcing the plan sponsor to prove every element involved in making an actuarial determination." H.R. Rep. No. 869, pt. I, 96th Cong., 2d Sess. 1, 86, reprinted in 1980 [U.S.C.C.A.N.] 2918, 2954.

Combs v. Classic Coal Corp., 931 F.2d 96, 99-100 (D.C. Cir. 1991); *accord Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 762 F.2d 1137, 1143 & n.7 (1st Cir. 1985).

The Supreme Court has described the employer's burden of proof:

> [A]n employer's burden to overcome the presumption in question (by proof by a preponderance that the actuarial assumptions and methods were in the aggregate unreasonable) is simply a burden to show that *the combination of methods and assumptions employed in the calculation would not have been acceptable to a reasonable actuary*. . . . The employer merely has a burden to show that an apparently unbiased professional, whose obligations tend to moderate any claimed inclination to come down hard on withdrawing employers, has based a calculation on *a combination of methods and assumptions that falls outside the range of reasonable actuarial practice*.

Concrete Pipe, 508 U.S. at 635 (emphases added).

That range is fairly wide. Actuaries serving multiemployer plans apply either: (1) the Funding Interest Assumption, (2) PBGC Close-Out Rates, or (3) the Segal

Method.[71] (PBGC's description of the range of actuarial practice is not an endorsement of any particular practice.)

The Actuarial Standards Board issues Standards of Practice governing the actuarial profession. Actuarial Standard of Practice No. 27, entitled "Selection of Economic Assumptions for Measuring Pension Obligations," provides that: (1) the economic assumptions selected by the actuary should be reasonable; and (2) to be reasonable, an assumption must be "appropriate for the purpose of the measurement."[72] One purpose of withdrawal liability "is to protect the other employers in the multi-employer plan from having to pay for" the withdrawn employer's share of unfunded vested benefits.[73]

---

[71] *See Combs v. Classic Coal Corp.*, No. 84-1562, 1990 WL 66583, at *3 n. 5 (D.D.C. Apr. 6, 1990), *aff'd*, 931 F.2d 96 (D.C. Cir. 1991) (describing those "three schools of thought among actuaries with respect to the selection of interest rate assumptions"); *see also* Judith Mazo & Susan Lee, *Multiemployer Pension Plan Withdrawal Liability*, 23 Ben. L. J., no. 4, 2010, at 36, 40 (describing Funding Interest Assumption and Segal Method as the "two main methodologies").

[72] ASOP 27 § 3.6 (Sept. 2013 ed.), http://www.actuarialstandardsboard.org/wp-content/uploads/2014/02/asop027_172.pdf; *see also* ASOP 27 § 3.6 (Sept. 2007 ed. updated May 1, 2011), http://www.actuarialstandardsboard.org/wp-content/uploads/2014/10/asop027_145.pdf ("[F]or some purposes, . . . the discount rate [used to value plan liabilities] may be selected independently of the plan's investment return assumption. . . . The purpose of the measurement is a primary factor.").

[73] *Santa Fe Pac. Corp. v. Cent. States, Se. & Sw. Areas Pension Fund*, 22 F.3d 725, 726-27 (7th Cir. 1994); *accord SUPERVALU, Inc. v. Bd. of Trs. of Sw. Pa. & W. Md. Area Teamsters & Employers Pension Fund*, 500 F.3d 334, 337 (3d Cir. 2007); *see also* 29 U.S.C. § 1001a(a)(4)(A); *cf. ILGWU Nat'l Ret. Fund v. Levy Bros. Frocks*, 846 F.2d 879, 881 (2d

Egan and Dr. Kra testified that, while contributing employers bear risk of plan investments underperforming the long-term average rate of return reflected in the Funding Interest Assumption (in that they may be called upon to increase their contributions), a withdrawn employer bears no such risk. It settles its liability once and for all in the fixed amount of its withdrawal liability.[74] Dr. Kra testified:

> [T]he withdrawing employer is given a final number with no risk. If the investments underperform, you cannot go back to that withdrawing employer with another bill. If the investment is outperforming, the withdrawing employer gets no credit. . . . [I]t is a final settlement of an obligation to provide for certain benefits. . . . [A]ll of the ongoing employers share in the upside, share in the downside. If the fund underperforms, they pay more. If the fund overperforms, they pay less. They take the risk, they take the benefit.[75]

Some actuaries, including Dr. Kra, therefore believe that the withdrawn employer should be treated as purchasing a fixed rate of return rather than participating with the plan in its investment portfolio, with the attendant risk or

---

Cir. 1988) ("'The purpose of withdrawal liability 'is to relieve the funding burden on remaining employers and to eliminate the incentive to pull out of a plan which would result if liability were imposed only on a mass withdrawal by all employers.'") (quoting H.R. Rep. No. 96-869, pt. 1, at 67 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 2918, 2935).

[74] *See* FA.28 (Egan's testimony), FA.53-55, 61 (Dr. Kra's testimony); *see also* FA.127-28 (Dr. Kra's Expert Report); A.35-36 (Arbitrator's Interim Opin & Award).

[75] FA.53-54. Judge Sweet's statement (at SA.47-48) that the Times's ceasing to bear investment risk is offset by its ceasing to benefit from any upside ignores the thrust of the testimony that a risk premium goes to those who take risk.

reward.[76] The market price of a life annuity contract—that is, the price insurance companies charge to assume a pension-benefit-like liability—is the market price of a fixed rate of return. PBGC close-out assumptions approximate that market price.[77] As the withdrawn employer is relieved of investment risk, it forgoes any risk premium.

Egan testified that it is appropriate to use the Segal Method, under which PBGC Close-Out Rates are used in valuing the funded portion of vested benefits (for which the plan could afford to purchase annuities).[78] Many actuaries agree with her.[79]

Dr. Kra opined that Egan's assumptions were reasonable in the aggregate.[80] The Times's expert asserted that only the Funding Interest Assumption was permissible and did not testify as to whether Egan's assumptions were reasonable in the aggregate.[81]

---

[76] *See id.*; *cf. Plan Bd. of Sunkist Ret. Plan v. Harding & Leggett, Inc.*, 463 F. App'x 702, 703 (9th Cir. 2011) (affirming district court decision upholding withdrawal liability assessment based on PBGC Close-Out Rates); *Nat'l Ret. Fund v. Metz Culinary Mgmt., Inc.*, No. 16-CV-2408, 2017 WL 1157156, at *3 (S.D.N.Y. Mar. 27, 2017) (noting calculation of withdrawal liability using PBGC Close-Out Rates by actuary from Horizon Actuarial Services LLC).

[77] *See supra* note 38 and accompanying text.

[78] FA.28-29; A.35.

[79] *See supra* note 45 and accompanying text.

[80] FA.53, 118, 131-32; A.36.

[81] *See* A.127 *et seq.*

Given the record, it is not surprising that Arbitrator Irvings concluded that the Times had not met its burden of proof.[82]

Perhaps recognizing the difficulty of meeting its statutory burden of proof, given the range of accepted actuarial practice, the Times attempted to sidestep the section 4221(a)(3)(B) presumption by arguing that section 4213(a)(1) requires a plan's actuary to value vested benefits for determination of withdrawal liability using his or her Funding Interest Assumption,[83] and therefore that Egan's use of the Segal Blend in determining the Times's withdrawal liability was "*legally* 'unreasonable,'" and her actuarial assumptions "were tainted 'in the aggregate.'"[84]

Judge Sweet accepted the Times's reframing of its burden of proof. He stated the issue on review as whether "the Segal Blend's use was reasonable in the aggregate."[85] He concluded that Arbitrator Irvings had clearly erred in finding that it was.[86] He reasoned:

> Egan's testimony before the Arbitrator was that a 7.5%

---

[82] *See* A58-63 (concluding that Egan's actuarial assumptions were, in the aggregate, reasonable).

[83] *See* Times's Mem. in Supp. of M.S.J. at 24, 26, No. 17-6178 (S.D.N.Y. Sept. 15, 2017), ECF No. 20 ("[I]nconsistency is impermissible as a matter of law. . . . [A] plan actuary must use for withdrawal liability purposes the same discount rate that she uses for minimum funding purposes.")

[84] Times's Reply in Supp. of M.S.J. at 13 n. 4, No. 17-6178 (S.D.N.Y. Nov. 3, 2017), ECF No. 29.

[85] SA.46.

[86] SA.46-49.

> percent [*sic*] assumption was her "best estimate of how the Pension Fund's assets . . . will on average perform over the long term." . . . If 7.5% was the Fund actuary's "best estimate," it strains reason to see how the Segal Blend, a 6.5% rate derived by blending that 7.5% "best estimate" assumption with lower, no-risk PBGC bond rates [*sic*], can be accepted as [her best estimate of] the anticipated plan experience. This is especially when [*sic*] the blend includes interest rates for assets not included in the Fund's portfolio.

SA.46-47.

That reasoning implies that Judge Sweet accepted the two flawed propositions necessary to the Times's Statutory Similarity Argument: (1) that section 4213(a)(1) sets a standard for the interest rate assumption considered in isolation; (2) that section 4213(a)(1)'s requirement that the "actuarial assumptions and methods . . . , in combination, offer the actuary's best estimate of anticipated experience under the plan" means that the interest rate assumption must offer the actuary's best estimate of the long-term average rate of return on plan assets.[87] In doing so, he contradicted his own correct holding that funding and withdrawal liability interest assumptions need not be identical.

Moreover, the issue is not whether "the Segal Blend's use was reasonable in the aggregate," but whether "the actuarial assumptions and methods used in the determination were, in the aggregate, *unreasonable* (taking into account the experience

---

[87] *See supra* pp. 15-16.

of the plan and reasonable expectations).”[88] That is, *the Times* had the burden of showing that Egan based her calculation of unfunded vested benefits “on a combination of methods and assumptions that falls outside the range of reasonable actuarial practice.”[89] Section 4221(a)(3)(B) requires that the employer meet a preponderance-of-the-evidence burden on that issue, implying that it is a question of fact. ERISA requires a court reviewing the arbitrator’s award to review the arbitrator’s findings of fact for clear error.[90]

Judge Sweet failed to take the section 4221(a)(3)(B) presumption into account. Determining whether a factfinder erred implicates the burden of proof that the factfinder was required to apply.[91] Judge Sweet could conclude that Arbitrator Irvings

---

[88] 29 U.S.C. § 1401(a)(3)(B)(i) (emphasis added).

[89] *Concrete Pipe*, 508 U.S. at 635.

[90] *See* 29 U.S.C. § 1401(c); *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Louis Zahn Drug. Co.*, 890 F.2d 1405, 1411 (7th Cir. 1989).

[91] *See Bazemore v. Friday*, 478 U.S. 385, 397-98 (1986) (holding that district court’s determination that plaintiff had not proven racial discrimination by a preponderance is reviewed for clear error); *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 893 (Fed. Cir. 1984) (affirming denial of defendant’s motion for judgment notwithstanding the verdict in a patent infringement action, holding: “Where . . . there is a verdict of validity, the question is . . . whether the challenger’s evidence so met the burden [to overcome the presumption of a patent’s validity by proving invalidity by clear and convincing evidence] that reasonable jurors could not have concluded that the challenger failed to overcome that burden.”); Eric J. Magnuson & David F. Herr, Federal Appeals Jurisdiction and Practice § 5:3 (2018 ed. 2017); *cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (“[T]he inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive

clearly erred only if the arbitral record showed that the Times had proven, by a preponderance of the evidence, that the combination of actuarial assumptions and methods that Egan used in determining the Times's withdrawal liability was "outside the range of reasonable actuarial practice."

Judge Sweet's opinion does not address that issue. Judge Sweet did not apply, nor even mention, the presumption of correctness required by section 4221(a)(3)(B). He reached his own conclusion about the reasonableness of Egan's actuarial assumptions and methods, without reference to whether they were outside the range of reasonable actuarial practice. That was reversible error.

---

evidentiary standard of proof that would apply at the trial on the merits.").

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision on the interest rate assumption.

November 7, 2018 Respectfully submitted,

/s/ John Holland Ginsberg
JUDITH STARR, *General Counsel*
ISRAEL GOLDOWITZ, *Deputy General Counsel*
JON CHATALIAN, *Acting Assistant General Counsel*
JOHN GINSBERG, *Attorney*

PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W.
Washington, DC 20005-4026
(202) 326-4020, ext. 3714 (telephone)
(202) 326-4112 (facsimile)
ginsberg.john@pbgc.gov

CERTIFICATE OF COMPLIANCE

I, John Holland Ginsberg, hereby certify, that the Brief for the Pension Benefit Guaranty Corporation as *Amicus Curiae* Supporting Cross-Appellants complies with the type-volume limitation as set forth in Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 6,973 words. The Brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Garamond font.

Dated: November 7, 2018

/s/ John Holland Ginsberg
John Holland Ginsberg

CERTIFICATE OF SERVICE

I, John Holland Ginsberg, certify that on November 7, 2018, a true and correct copy of the Brief for the Pension Benefit Guaranty Corporation as *Amicus Curiae* Supporting Cross-Appellants was served via the Court's ECF system and by a third-party carrier on:

Ronald E. Richman, Esq.
Max Garfield, Esq.
Adam B. Gartner, Esq.
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
Defendant-Appellee/Cross-Appellant Newspaper and Mail Deliverers'-Publishers' Pension Fund and its Trustees

Evan Miller, Esq.
Mark Christopher Savignac, Esq.
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Plaintiff-Appellant/Cross-Appellee The New York Times Company

/s/ John Holland Ginsberg
John Holland Ginsberg