18-1140-cv(L), 18-1408-cv(XAP)

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

Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* THE SEGAL GROUP, INC. IN SUPPORT OF DEFENDANT-APPELLEE-CROSS-APPELLANT NEWSPAPER AND MAIL DELIVERERS'-PUBLISHERS' PENSION FUND

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, The Segal Group, Inc. discloses that it has no parent corporation and no publicly held corporation owns 10% or more of The Segal Group, Inc.'s stock.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Segal Group, Inc. ("Segal"), is the nation's leading provider of actuarial services for multiemployer pension plans.[1] Its actuaries serve hundreds of multiemployer pension plans, including, for several years, Cross-Appellant Newspaper & Mail Deliverers'-Publishers' Pension Fund (the "Pension Fund").

A principal issue on appeal is whether the Pension Fund's calculation of the withdrawal liability owed by The New York Times Company (the "Times") complied with the requirements of section 4213 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1393. The statute does not require a particular actuarial assumption or method to be used when calculating withdrawal liability. The statute requires that the actuarial assumptions and methods be "in the aggregate, . . . 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*.

The district court invalidated the Pension Fund's withdrawal liability calculation and the arbitration decision upholding it by focusing on a discount rate determined by using the "Segal Blend." In calculating withdrawal liability, an actuary must select a discount rate to determine the present value of the pension

[1] No party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than the *amicus curiae*, its members, or its counsel, contributed money for the brief's preparation or submission.

benefits that are to be paid by the pension fund in the future. Actuaries use various means to determine the discount rate. The Segal Blend approach was formulated in the early 1980s and has been the basis for the discount rate used for calculating withdrawal liability by hundreds of multiemployer plans. As the leading provider of actuarial services to multiemployer pension plans, and having utilized the Segal Blend for hundreds of those plans, Segal has a substantial interest in this Court's analysis of the Segal Blend. All parties have consented to Segal's filing of a brief as *amicus curiae*.

INTRODUCTION

This case involves a challenge to the calculation of withdrawal liability owed by an employer to an underfunded multiemployer pension plan. The actuary's calculation was based on professional expertise, in accordance with the profession's applicable Actuarial Standards of Practice ("ASOPs"), and was determined using an approach – the Segal Blend – that has been in place since the early 1980s, after Congress decided to mandate the collection of withdrawal liability. The Segal Blend has been used in thousands of withdrawal liability calculations, and employers have challenged it many, many times. Until the district court decision in this case, the Segal Blend had been upheld in every arbitration and court decision in which it has been challenged.

More than 10 million workers and retirees across the country are participants or beneficiaries in multiemployer pension plans. A multiemployer pension plan receives contributions from various employers – here, five newspapers in New York and New Jersey – and uses those contributions and investment returns to pay the pension benefits earned by employees (*i.e.*, the plan's "participants"). Employers that contribute to the multiemployer plan on an ongoing basis are responsible for any shortfall between the value of the plan's assets and the pension benefit obligations owed to the participants.

In response to concerns that, when a multiemployer plan is not sufficiently funded, employers could have an "incentive[] to flee the plan" and leave the remaining employers holding the bag, Congress amended ERISA by enacting the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 723 n.3 (1984). MPPAA "requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan," representing "the employer's proportionate share of the plan's 'unfunded vested benefits.'" *Id.* at 725. In exchange for this payment – referred to as "withdrawal liability" – the withdrawing employer is relieved of any further responsibility to fund the ongoing pension plan.

This case concerns an important and previously uncontroversial question about the assumptions the Pension Fund's actuary used to calculate withdrawal liability. The actuary used the Segal Blend, which is a formula-based, weighted mix of the actuarial present value of pension obligations using both the Pension Benefit Guaranty Corporation ("PBGC") rate and the rate used to determine the plan's minimum funding requirements under ERISA.

The PBGC – the federal agency responsible for administering ERISA's withdrawal liability provisions – publishes discount rates (the "PBGC rate") that it uses to determine the present value of pension benefits for plans terminated by a mass withdrawal. 29 U.S.C. § 1441(b); 29 C.F.R. § 4281.13(a). The PBGC rate approximates the prevailing market rate for employers to settle pension obligations by purchasing an annuity from an insurance company so that the insurance company assumes the payment obligation.

Other parts of ERISA and the Internal Revenue Code require pension obligations to be valued for different purposes, including for the purpose of determining the minimum amount that employers are required by law to contribute to the plan. *See* 29 U.S.C. § 1084(c)(3); 26 U.S.C. § 431(c)(3). The discount rate used to value the pension obligations for funding purposes is referred to as the "minimum funding rate" or "funding rate" and is based on the anticipated long-term rate of return on the plan's investments. The PBGC has made clear that "[t]here is no requirement that the actuarial assumptions used to determine withdrawal liability be the same as those used for [minimum funding] purposes." PBGC Op. Ltr. 86-24, 1986 WL 38802, at *1 (Oct. 31, 1986).

The Segal Blend uses a weighted mix of the valuation of the pension obligations using the PBGC rate and the valuation of the pension obligations using the funding rate. The example below demonstrates how the Segal Blend works:

(1)	Market value of the plan assets	$80
(2)	Present value of vested benefits using the PBGC rate	$100
(3)	Present value of vested benefits using the plan's funding rate	$90
(4)	Percentage funded using PBGC rate = (1)/(2)	80%
(5)	Present value of vested benefits for withdrawal liability	$98

	= 80% of (2) + 20% of (3)	
(6)	Present value of unfunded vested benefits for withdrawal liability = (5) – (1)	$18

In the example, the unfunded vested benefits on a PBGC rate basis, (2) – (1) = $20, are higher than the unfunded vested benefits for withdrawal liability under the Segal Blend, (5) – (1) = $18. In the current interest rate environment, the PBGC rate is far lower than most plans' minimum funding rate. As a result, a full market value assessment based on the PBGC rate results in a higher unfunded vested benefit value than an assessment based on the funding rate. In this case, the Segal Blend resulted in a higher unfunded vested benefit value than an assessment based on the funding rate, but a lower unfunded vested benefit value than a market value assessment based on the PBGC rate. This is not due to any manipulation on the part of the actuary, but merely reflects existing market rates and the plan's investment strategy. The Segal Blend is principles-based and has been consistently applied for nearly 40 years, regardless of fluctuations in the interest rate environment or trends in assumed funding rates.

The Times challenged its withdrawal liability assessment – first before an arbitrator, and now in federal court – by arguing that the Segal Blend unfairly penalized it. An employer challenging a withdrawal liability assessment "has [the] burden to show that an [actuary] . . . has based a calculation on a combination of methods and assumptions that falls outside the range of reasonable actuarial practice." *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 635 (1993). In rejecting the Times' challenge, the arbitrator held that the Segal Blend is reasonable and comports with published actuarial standards, and further observed that, even though "[l]iterally thousands of withdrawal liability assessments have been issued using the Segal Blend," the Times could not produce a single arbitration or court decision overturning the Segal Blend. *See* A.60.

In seeking judicial review, the Times did not argue that the Segal Blend fell "outside the range of reasonable actuarial practice." Nor could it – the range of reasonableness with respect to the discount rate for withdrawal liability is generally accepted in the actuarial community as running from the PBGC rate to the plan's funding rate. By blending those two ends of the reasonableness spectrum, the Segal Blend necessarily produces a result in between those end-point rates, that therefore is also reasonable.

Instead of challenging the actuarial reasonableness of the Segal Blend, the Times argued that the Segal Blend violated ERISA's requirement that withdrawal liability calculations be based on "the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1). This provision, the Times argued, requires actuaries to rely exclusively on a plan's funding rate – a position with no support anywhere in case law or applicable regulation.

Contrary to the Times' argument, the Second Circuit has held that "the 'best estimate' requirement is basically procedural in nature and is principally designed to insure that the chosen assumptions actually represent the actuary's own 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). There is no dispute that the Segal Blend represents the actuary's "own judgment" under *Wachtell*. Nonetheless, the district court reversed the arbitrator's decision and invalidated the withdrawal liability calculation as inconsistent with the "best estimate" requirement. SA.48-49. The district court did not address the Second Circuit's decision in *Wachtell*. The error of the district court's ruling is confirmed by a decision three months later that applied *Wachtell* and rejected an essentially identical challenge to the Segal Blend brought by the same lawyers that represent the Times (using the same expert actuary). *See Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund*, No. 17-cv-5076, 2018 WL 3528310 (D.N.J. July 3, 2018).

The district court's decision should be reversed because it is contrary to *Wachtell* and, as discussed below, was otherwise erroneous.

ARGUMENT

I. The Segal Blend Is Actuarially Reasonable.

In challenging the withdrawal liability calculation, the Times had the burden of demonstrating that the calculation was "based . . . on a combination of methods and assumptions that falls outside the range of reasonable actuarial practice." *Concrete Pipe*, 508 U.S. at 635; *see also* 29 U.S.C. § 1401(a)(3)(B) ("[T]he determination of a plan's unfunded vested benefits . . . is presumed correct unless a party contesting the determination shows . . . that . . . the actuarial assumptions and methods used . . . were, in the aggregate, unreasonable . . . ."); *Bd. of Trustees, Michigan United Food & Commercial Workers Union v. Eberhard Foods, Inc.*, 831 F.2d 1258, 1261 (6th Cir. 1987) ("[T]he test is not which withdrawal determination is the most reasonable but rather whether the challenged determination is unreasonable or clearly erroneous."). The Times could not, and did not, meet its burden to establish that the use of the Segal Blend was outside the range of reasonable actuarial practice.

The Actuarial Standards Board establishes standards for actuarial practice in the United States. The "Actuarial Standards of Practice" or "ASOPs" identify what an actuary should consider when performing an actuarial analysis. ASOP No. 27 ("ASOP 27") addresses "Selection of Economic Assumptions for

Measuring Pension Obligations."[2] It recognizes that valuing pension obligations "require[s] discount rates to convert future expected payments into present values." ASOP 27, § 3.1. ASOP 27 makes clear that "[t]he actuary should consider *the purpose of the measurement* as a primary factor in selecting a discount rate." *Id.* § 3.9 (emphasis added).[3]

ASOP 27 provides that, if the purpose of the measurement is related to contribution requirements, "[t]he actuary may use a discount rate that reflects the anticipated investment return from the pension fund." *Id*. § 3.9(a). The Times does not dispute that the Pension Fund's actuary, Rosana Egan, did exactly that: in calculating required contributions, the actuary used the anticipated long-term investment return rate of 7.5%.

If instead the purpose of the actuarial measurement is "Defeasance or Settlement," ASOP 27 provides that an actuary "may use a discount rate implicit in

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[2] *Actuarial Standard of Practice No. 27*, *Selection of Economic Assumptions for Measuring Pension Obligations*, Actuarial Standards Board (Adopted September 2013), available at https://www.actuarialstandardsboard.org/wp-content/uploads/2014/02/asop027_172.pdf.

[3] As counsel for the Times noted, the current version of ASOP 27 "was [adopted] in September 2013, and it was indeed in September of 2013 that the calculation and assessment here was made." A.136. The current version "clarifies . . . the [prior] version" that remained in effect at the time of the assessment. *See* A.135. While the prior version similarly stated that "[t]he actuary should consider . . . the purpose and nature of the measurement" and made clear that different rates could be used for different purposes, it provided fewer concrete examples. *See* FA. 257.

annuity prices." *Id*. § 3.9(b). Ethan Kra, former chief retirement actuary of Mercer, former Vice President for Pensions at the American Academy of Actuaries, and co-drafter of several ASOPs, testified that withdrawal liability "is a final ***settlement*** of an obligation to provide for certain benefits," because "the withdrawing employer is given a final number with no risk," and the Pension Fund "cannot go back to that withdrawing employer with another bill." FA.53 (emphasis added). *See also Manhattan Ford*, 2018 WL 3528310, at *28 ("[T]he Arbitrator could properly rely on the testimony regarding the withdrawn employer's transfer of its risk in a one-time settlement transaction."); *Bassett Const. Co. v. Trustees of the Centennial State Carpenters Pension Tr. Fund*, No. 83–F–980, 1985 WL 1270583, at *6 (D. Colo. Feb. 25, 1985) ("The Court finds the Segal method is . . . based upon actuarial assumptions and methods which . . . are reasonable . . . . [The withdrawing employer] does not bear the burden of future actuarial losses and in turn is not entitled to benefit from actuarial gains occurring subsequent to its withdrawal."). Using the Segal Blend to calculate the Times' withdrawal liability was fully consistent with ASOP 27.[4]

[4] *See also Assessing Pension Plan Health: More Than One Right Number Tells the Whole Story*, American Academy of Actuaries Issue Brief, at 4 (July 2017), available at http://www.actuary.org/files/publications/IB-RightNumber07.17.pdf ("The primary reason why there is *more than one right number* is that different measurements . . . can communicate very different information. For example, some pension obligation measurements are designed to

By blending the PBGC rate and funding rate, the Segal Blend recognizes both the defeasement/settlement component of the withdrawal liability analysis and the payment over time component. In this regard, the Segal Blend benefitted the Times "because it . . . [results in] a lower withdrawal liability than a [purely] market-based calculation [based on the PBGC rate]. So in exiting from [the Pension] Fund, [t]he [Times] was able to put risk on the remaining employers." FA.54-55.

The Segal Blend has long been among the leading "schools of thought among actuaries with respect to the selection of [discount] rate assumptions." *Combs v. Classic Coal Corp.*, No. CIV. A. 84-1562 TPJ, 1990 WL 66583, at *3, n.5 (D.D.C. Apr. 6, 1990), *aff'd*, 931 F.2d 96 (D.C. Cir. 1991). When the Segal Blend was developed in the early 1980s, the PBGC rate was higher than funding rates, which is the opposite of the rate environment today. Employers often argued the PBGC rate should be exclusively used instead of the Segal Blend as it would have resulted in a lower liability. Now that the PBGC rate is lower than the

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show how much it would cost a plan sponsor to transfer the responsibility of supporting a plan to an insurance company or other financial institution. . . . [T]hese measurements incorporate the concept of "settling" the pension obligations. Other pension obligation measurements convey information that is very different . . . . Among the differences between [a] "budget" measurement and a settlement calculation is that the budget approach includes an estimate of the future investment returns that the plan assets will earn, including any expected incremental return from investing in risky assets.").

funding rate, employers, like the Times, argue that the funding rate should be exclusively used because it would result in lower withdrawal liability. Unlike employers whose theories are wholly self-interested, the Segal Blend remains a principles-based and even-handed approach to calculating withdrawal liability.

Actuaries at other firms have also used either the Segal Blend or similar blended rates. *See, e.g.*, *Miller & Son Paving, Inc. v. Teamsters Pension Tr. Fund of Philadelphia*, No. CV 15-4869, 2016 WL 4802752, at *2 (E.D. Pa. Sept. 14, 2016) (upholding a similar blend that used the current liability rate instead of the PBGC rate).[5] In challenging a withdrawal liability calculation based exclusively on the PBGC rate, counsel for the Times argued that the use of "unadulterated PBGC rates . . . does [not] share the Segal Blend's historical pedigree." Claimant's Post-Hearing Brief in *C&S Wholesale Grocers, Inc. v. New York State Teamsters Conference Pension and Retirement Fund*, AAA Case No. 01-15-0002-5203, at 60 (Mar. 16, 2018).[6]

The Times introduced no evidence that the Segal Blend was "based . . . on a combination of methods and assumptions that falls outside the range of reasonable actuarial practice." *Concrete Pipe*, 508 U.S. at 635. Instead, the Times simply

[5] The current liability rate is a four-year weighted average of the yields of 30-year treasury bonds, a very low-risk asset class.

[6] Available at https://www.groom.com/wp-content/uploads/2018/11/CS-Post-Hearing-Brief-Excerpts-for-Amicus-Brief.pdf.

offered the personal view of its expert actuary that "the natural reading of ***the law***" is that ERISA's "best estimate of anticipated experience" requirement mandates the use of "the investment return assumption [for minimum funding.]" *See* A.133 (emphasis added). He did ***not*** opine that the Segal Blend fell outside the range of reasonable actuarial practice. Unsurprisingly, the arbitrator held that the Segal Blend is reasonable and "not violative of . . . ASOP No. 27." A.60. The arbitrator's factual findings are entitled to "a presumption [of correctness], rebuttable only by a clear preponderance of the evidence." 29 U.S.C. § 1401(c).

Before the district court, the Times did not challenge the arbitrator's factual findings with respect to actuarial standards and actuarial reasonableness of the Segal Blend. As such, the Times cannot now argue that the Segal Blend is an unreasonable actuarial assumption or method.

II. Using the Segal Blend Does Not Violate ERISA's "Best Estimate of Anticipated Experience" Requirement.

The Times argues that ERISA requires – as a matter of law – actuaries to calculate withdrawal liability using a plan's funding rate. But there is no provision in ERISA requiring use of the funding rate. Counsel for the Times conceded as much during the arbitration: "ERISA [does] ***not*** expressly contain a provision requiring a plan to use the same investment return assumption for valuing liabilities for withdrawal liability as it does for funding." FA.2 (emphasis added).

Nevertheless, the Times argues that a requirement to use the same discount rate should be inferred from "the relevant structure of the statutory scheme." *Id*. Specifically, the Times focuses on ERISA's requirement that withdrawal liability represent "the actuary's best estimate of anticipated experience under the plan," 29 U.S.C. § 1393(a)(1). The Times observes that the same "best estimate" language is used in other sections of ERISA and the Internal Revenue Code, including those that set forth the standards for calculating minimum funding. *See* 29 U.S.C. § 1084(c)(3); 26 U.S.C. § 431(c)(3). This, the Times argues, means that there can only be one "best estimate" for all purposes.

The district court correctly rejected this argument, holding:

> 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 the language of *Concrete Pipe* discussed above indicate otherwise. . . Congress envisioned the possibility that calculating withdrawal liability could combine many different assumptions and methods to result in something different than that found for the contribution requirements. . . . [T]he use of the Segal Blend uniquely in the context of calculating an employer's withdrawal liability is not prohibited as a matter of law.

SA.44-45.

Notwithstanding that holding, the district court invalidated "the use of the Segal Blend in this instance," because the actuary used a different "best estimate" for the withdrawal liability calculation and the minimum funding calculation, and the Segal Blend took into account the PBGC rate, which did not reflect the rate of anticipated return on Pension Fund assets. SA.46. The district court's conclusion directly contradicts its own holding that, under the two similarly worded "best estimate" standards, "different interest rates" may be used. SA.43.

The district court's flawed reasoning could invalidate every multiemployer plan's use of the Segal Blend – a holding the district court acknowledged would be improper – and every multiemployer plan's use of ***any discount rate*** other than the funding rate. For these reasons and those discussed below, the district court's conclusion was erroneous, and should be reversed.

A. The "Best Estimate of Anticipated Experience" Does Not Require The Same Assumptions To Be Used

According to the Times, "[t]he threshold defect in the Fund's discount rate is that it used a different assumption for calculating withdrawal liability than for calculating ERISA's minimum funding requirements." Def.'s Mem. in Supp. Summ. J., Dkt No. 20, at 24. But, the statute does not expressly require that the same assumptions be used, and inferring that would be contrary to the longstanding views of both federal courts and the PBGC. *See Artistic Carton Co. v. Paper Indus. Union--Mgmt. Pension Fund*, 971 F.2d 1346, 1351 (7th Cir. 1992) ("Does ERISA require a pension trust to use the same actuarial method in determining aggregate funding as it uses in assessing withdrawal liability? Artistic Carton does not identify any such requirement in the statute. And a plan may have good reasons to use multiple methods."); PBGC Op. Ltr. 86-24, 1986 WL 38802, at *1

("There is no requirement that the actuarial assumptions used to determine withdrawal liability be the same as those used for [minimum funding] purposes . . . .").[7]

If Congress intended to ***require*** the same assumptions to be used for withdrawal liability and minimum funding, it could have done so. *See Manhattan Ford*, 2018 WL 3528310, at *19 ("Congress viewed minimum funding and withdrawal liability as distinct calculations warranting the use of different assumptions by actuaries. If total parallelism were mandated, a cross-reference or a common definition would have been a more natural way to draft the statutes."). Instead of using mandatory language (*i.e.*, "shall"), however, Congress used permissive language when it expressed that "[i]n determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part, the plan actuary ***may*** . . . rely on the most complete actuarial valuation used for purposes of section 412 of title 26 [setting forth minimum funding standards] . . . ." 29 U.S.C. § 1393(b)(1) (emphasis added). As the PBGC has interpreted the statute: "This is a permissive, not a mandatory, provision. Thus, the fact that the assumptions used to compute withdrawal liability are not the

[7] "The PBGC, the agency charged with administering the withdrawal-liability provisions under ERISA, is traditionally afforded substantial deference in its reasonable interpretations of the statute." *Trustees of Local 138 Pension Tr. Fund v. F.W. Honerkamp Co. Inc.*, 692 F.3d 127, 134–35 (2d Cir. 2012).

same as those used [for minimum funding] does not of itself make those assumptions improper." PBGC Op. Ltr. 86-24, 1986 WL 38802, at *2.

The Times disagrees with the PBGC's common sense interpretation of the statute it administers. According to the Times, when Congress used the phrase "actuarial valuation" that ***may*** be relied upon, Congress was only referring to "data" underlying the actuarial valuation, and none of the actuarial assumptions. Def.'s Reply, Dkt No. 29, at 12. According to the Times, the same data may or may not be used, but the same actuarial assumptions must be used.

To the extent there is any ambiguity in the statute (and there is not), this Court may resolve it by deferring to the PBGC's interpretation, and by noting that the relevant section of the United States Code is titled "Actuarial Assumptions." 29 U.S.C. § 1393; *see I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a . . . section can aid in resolving an ambiguity in the legislation's text."); *Trustees of Pressmen Local 72 Indus. Pension Fund v. Judd & Detweiler, Inc.*, 736 F. Supp. 1351, 1354 (D. Md. 1988) ("Section 1393(b)(1) . . . permits the plan actuary to consider the ***assumptions and data*** contained in the plan's most recent actuarial study as part of [the] reasonableness determination") (emphasis added). Congress undoubtedly decided that the actuarial assumptions used for calculating minimum funding may or may not be used for calculating withdrawal liability.

The Times' view also presumes that the "best estimate" language is a ***substantive*** requirement. The Second Circuit (and several other circuits) has squarely held that "the 'best estimate' requirement is basically procedural in nature and is principally designed to insure that the chosen assumptions actually represent the actuary's own judgment rather than the dictates of plan administrators or sponsors." *Wachtell*, 26 F.3d at 296 (citing *Vinson & Elkins v. C.I.R.*, 7 F.3d 1235, 1238 (5th Cir. 1993)). Reading "the best estimate test [to] impose[] a second substantive hurdle for actuarial valuations to clear . . . conflicts . . . with the statutory scheme," and "would render the reasonableness test superfluous." *Vinson & Elkins*, 7 F.3d at 1238.

The Supreme Court's decision in *Concrete Pipe* is consistent with the conclusion that the "best estimate" standard does not impose an additional substantive test. The multiemployer plan's actuary in *Concrete Pipe* utilized the Segal Blend. *See* Brief on the Merits by Petitioner, 1992 WL 511948, at *15-16 ("CLPT, here, uses a blended interest rate consisting of the PBGC published rates . . . to the extent that assets are presently available and the plan's funding rate . . . to the extent that vested liabilities exceed assets."). The Supreme Court noted that "[f]or a variety of reasons, this actuary is not, like the trustees, vulnerable to suggestions of bias or its appearance. Although plan sponsors employ them, actuaries are trained professionals subject to regulatory standards." *Concrete Pipe*, 508 U.S. at 632. Of course, if there were evidence that "the chosen assumptions [did not] actually represent the actuary's own judgment rather than the dictates of plan administrators or sponsors," then those assumptions might not be the actuary's "best estimate of anticipated experience." *Wachtell*, 26 F.3d at 296.

These two statutory requirements – the procedural "best estimate of anticipated experience" requirement, and the substantive "reasonableness" requirement – provide ample grounds for a withdrawing employer to contest withdrawal liability. Here, the Times failed to introduce evidence demonstrating a violation of either requirement.

Even if the "best estimate of anticipated experience" requirement were a substantive test, that test is satisfied here. The Segal Blend reflects the professional actuary's best estimate of anticipated experience under the plan for two reasons. First, the Segal Blend incorporates experience with withdrawing employers and the pension funds that settle with them. The actuary knows that the Pension Fund will not have the option of a second assessment against the employer, and the actuary's best estimate of anticipated experience takes into account the cost of that risk transfer to the Pension Fund and employers that continue contributing to the Pension Fund.[8]

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[8] Moreover, when extending the analysis to the potential of additional employer withdrawals in the future, the actuary would ultimately anticipate a mass

Second, the Segal Blend takes into account the anticipated long-term rate of return on the plan's investments. The discount rate produced by the Segal Blend is directly dependent on a plan's anticipated long-term rate of return because the funding rate is one of the rates used in the Segal Blend.

Each of these two reasons independently satisfies the statutory requirement that the actuarial assumptions and methods "in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1). That the resulting discount rate is not ***identical*** to the plan's funding rate reflects the fundamentally different purposes of minimum funding and withdrawal liability calculations:

> Funding is an ongoing process, subject to adjustment for an employer that is remaining in the plan. The Plan's needs and actuarial projections are reassessed annually, and a participating employer may be required to make additional contributions to make up for any shortfall. Withdrawal liability, however, is calculated once, as of the time of withdrawal. Should the unexpected occur after that employer's departure, the burden may unfairly fall on other plan employers (or ultimately the taxpayer, through PBGC). . . . [A] responsible actuary might therefore opt to calculate that withdrawal liability on a more risk-averse or conservative basis. And it must always be remembered, of course, that ERISA is a remedial statute, which must be liberally construed to ensure that workers who were promised pension benefits will actually receive them.

Manhattan Ford, 2018 WL 3528310, at *19.

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withdrawal where the use of PBGC rate alone would be required. In today's interest rate environment, that would be even harder on withdrawing employers than using the Segal Blend.

The Times' argument, which focuses on the Supreme Court's observation in *Concrete Pipe* that "[t]he use of the same language to describe the actuarial assumptions and methods to be used in the[] different contexts [of withdrawal liability and minimum funding] tends to check the actuary's discretion in each of them," 508 U.S. at 632-33, has two major flaws.

First, the preceding sentence in *Concrete Pipe* makes clear that the Supreme Court was referring to the requirement that an actuary use reasonable assumptions and methods, rather than the best estimate requirement. *See* 508 U.S. at 632 ("The statutory requirement (of 'actuarial assumptions and methods—which, in the aggregate, are reasonable ...') is not unique to the withdrawal liability context . . . .").

Second, the very next paragraph in the Supreme Court's opinion explicitly states that "the assumptions used by the Plan in its other calculations ***may be 'supplemented by several actuarial assumptions <u>unique to withdrawal liability</u>***.'" *Id*. at 634 (quoting Brief for Respondent 26; emphasis added). The Times only addressed this critical passage in a footnote in its reply brief before the district court, claiming that the Supreme Court was referring to all actuarial assumptions ***except for*** the discount rate. Def.'s Reply, Dkt No. 29, at 10 n.3. That argument lacks textual support. It is also contradicted by the Supreme Court's decision because the Segal Blend falls within the category of "actuarial assumptions unique to withdrawal liability," given that the Supreme Court was explicitly referring to "the assumptions used by ***the Plan***" – *i.e.*, the Construction Laborers Pension Trust for Southern California ("CLPT"), whose brief it was quoting. The assumptions used by CLPT included the Segal Blend.

The Supreme Court concluded that "Concrete Pipe has 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." 508 U.S. at 633 (emphasis added). As every court since *Concrete Pipe* has held, the interest rate assumption being "used for other purposes" does ***not*** require the discount rate used for withdrawal liability to be identical to the funding rate. *See, e.g., Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. CPC Logistics, Inc.*, 698 F.3d 346, 354-55 (7th Cir. 2012) ("Language in the Supreme Court's decision in *Concrete Pipe* . . . could be read to suggest that having two different interest-rate assumptions—one for withdrawal liability and one for avoiding the tax penalty—might make a plan vulnerable to claims that either or both were 'unreasonable' within the meaning of 29 U.S.C. § 1393(a)(1). The danger was remote; the Court had indicated that 'supplemental' assumptions that might cause the rates to diverge were permissible.");[9] *Manhattan Ford*, 2018 WL 3528310, at *16-19 (similar).

Even if *Concrete Pipe* were interpreted to limit the actuary's discretion in calculating withdrawal liability to the rate assumptions that are "used for other purposes," the Segal Blend is consistent with the Supreme Court's ruling. That is because the Segal Blend is wholly-based on a blend of two assumptions, each of which is "used for other purposes": the funding rate used for minimum funding purposes, and the PBGC rate, which must be used in the event of a mass withdrawal from a multiemployer plan. *See* 29 U.S.C. § 1441(b); 29 C.F.R. § 4281.13(a). Accordingly, the Segal Blend is not contrary to ERISA nor the Supreme Court's decision in *Concrete Pipe*.[10]

B. There is Nothing Unique About the Application of The Segal Blend "*in this instance*."

The district court's invalidation of the "use of the Segal Blend ***in this instance***," SA.46 (emphasis added), was erroneous. The district court concluded:

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[9] In *CPC Logistics*, the Seventh Circuit affirmed a decision requiring a plan to use the Segal Blend instead of the minimum funding rate, because the Segal Blend represented the actuary's "best estimate" for withdrawal liability purposes. *CPC Logistics*, 698 F.3d at 356-57.

[10] *Concrete Pipe* affirmed a decision in which the Segal Blend was upheld, holding that "the assumptions used by the Plan in its other calculations may be 'supplemented by several actuarial assumptions <u>unique to withdrawal liability</u>.'" *Concrete Pipe*, 508 U.S. at 633 (emphasis added). The Supreme Court would not have made this holding in a case involving the Segal Blend, if it was viewed as inconsistent with ERISA.

> 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, can be accepted as the anticipated plan experience. This is especially when the blend includes interest rates for assets not included in the Fund's portfolio.

SA.46-47. The only logical reason for the district court's conclusion would be a requirement that there is just one "best estimate" that must be used for all purposes. That, however, is exactly the reasoning that the district court and every other court properly rejected. *See also* ASOP 27, § 3.8.4 ("The actuary may assume multiple investment return rates in lieu of a single investment return rate. [An] example[] [is] . . . One investment return rate is assumed for benefit payments covered by designated current or projected plan assets on the measurement date, and a different investment return rate is assumed for the balance of the benefit payments and assets") (emphasis omitted).

The district court's conclusion would not merely invalidate "the use of the Segal Blend ***in this instance.***" SA.46 (emphasis added). It likely would invalidate the use of the Segal Blend for any plan since the Segal Blend, by definition, blends a plan's anticipated long-term rate of return with the PBGC rate. The district court acknowledged such a result would be wrong, as "the use of the Segal Blend uniquely in the context of calculating an employer's withdrawal liability is not prohibited as a matter of law." SA.45.

The district court only briefly addressed the actuarial basis for the Segal Blend. The Pension Fund's actuary and its actuarial expert both "testified that the Segal Blend was, in the aggregate, reasonable," since "there is less risk facing employers like the Times who withdraw because the liability of those employers becomes fixed; if the Fund underperforms, the withdrawer is not required to pay more, unlike an employer still part of the Fund's plan." SA.47. The district court found that "the Times's rejoinder that a withdrawing employer also does not share in any over-performance by the Fund, which would reduce future contribution obligations, effectively nullifies the Fund's argument." SA.47-48. As another district court correctly concluded, however, "[this] symmetry is a false one; post-withdrawal, the Pension Fund remains responsible to pay benefits to the withdrawing employer's employees, but the withdrawing employer does not." *Manhattan Ford*, 2018 WL 3528310, at *28.[11] By focusing exclusively on the average expected return, the district court failed to account for the fundamental concept of a risk premium – the increased yield that an investor expects before taking on additional risk. *See Manhattan Ford*, 2018 WL 3528310, at *25 (crediting the testimony of an expert Segal actuary that "the withdrawal situation

[11] It is also not correct that "any over-performance by the Fund" would necessarily benefit the employers by "reduc[ing] future contribution obligations," SA.47-48, since employer contributions are generally dictated by collective bargaining agreements and investment gains are often used to increase benefits (or offset previous benefit reductions).

was unique in that it represented, not an ongoing funding relationship, but a one-time transfer of risk from the withdrawing employer to the continuing employers and participants. For that transfer, he implied, a premium must be paid; the transfer of risk of the investments' performance 'has a price.'").

The following illustrates how market risk translates into risk premium. Assume that a pension payment of $110 is due one year from now and the plan sponsor wants to pre-fund the obligation.

- A $100 stock investment with an anticipated return of 10% is expected to be worth $110 in one year. However, there is a risk that the actual return will be far more or far less than that. Regardless of performance, the $110 payment must be made, and if there is a shortfall, additional funds (employer contributions) will be needed to make the payment.

- In order to accumulate $110 in one year without taking risk, the sponsor could choose to pay $107 to purchase a certificate of deposit with a "guaranteed" 2.8% return.

- Both investment options have an expected value of $110, but the stock purchaser voluntarily accepts investment risk and the CD purchaser avoids risk. The $7 price difference is the market price of "defeasing" the risk attributable to investing in the stock. Put another way, the risk-taker has a higher expected future rate of return than the risk-free party. A withdrawn employer is a risk-free party, subject to neither the investment risk inherent in the pension fund's investment portfolio nor obligated to pay additional amounts if the actual returns are less than anticipated.

The district court offered no rationale for why a withdrawing employer that is not partaking in ***<u>any</u>*** of the investment risk is entitled to ***all*** of the potentially higher expected returns that may be associated with that risk. The district court also did not refer to any actuarial standards, nor any testimony or evidence about "what the actuarial profession considers to be within the scope of professional acceptability," *Concrete Pipe*, 508 U.S. at 635. The district court, therefore, ignored the controlling statutory standard and Supreme Court guidance that requires the Times to prove that the Segal Blend falls outside the range of reasonable actuarial practice. Had the district court applied the correct standard – and analyzed what the actuarial profession considered to be the range of reasonableness – it would have had to conclude (like every court and arbitrator to address the issue) that the Segal Blend is reasonable.

Finally, the district court criticized the supposed "paucity of the analysis by the Arbitrator" for not "actively engag[ing] with the issue of whether the Segal Blend's rate was a reasonable best estimate." SA.48. In a subsequent opinion in another case, the arbitrator eloquently addressed the district court's criticism:

> It was [the] position [of the Times' expert actuary] that any withdrawal liability interest rate that differed from the funding rate was per se unreasonable. Finding what was essentially [his] legal conclusion . . . unsupported by existing caselaw, noting that the Segal Blend had been utilized by numerous reputable actuaries for decades, mindful of the statutory burden of proof, and crediting the . . . testimony of [the Fund's expert actuary] that utilizing an even more conservative risk-free rate as part of the calculation of withdrawal liability would be a reasonable exercise of actuarial discretion, I found that the employer had not met its burden of proving the actuarial assumptions were unreasonable in the aggregate. Contrary to [the district court's] assertion, there was not a paucity of analysis, but rather an adherence to the statutory dictates. In contrast, [the district court]'s simplistic dismissal of the theory behind the utilization of a risk-free rate, which is consistent with ASOP No. 27, represented the judge making a decision based on what made sense to him, rather than

> whether it was "within the scope of professional acceptability," the applicable standard articulated by the Supreme Court in *Concrete Pipe.*

Energy West Mining Co. v. The United Mine Workers of America 1974 Pension Plan, AAA Case No. 01-17-0001-2758, 2018 WL 4204332 (Irvings, Arb. Aug. 7, 2018).

The actuarial assumptions and methods in this case meet the statutory requirement of "in combination, offer[ing] the actuary's best estimate of anticipated experience under the plan," 29 U.S.C. § 1393(a)(1), with the discount rate assumption set to reflect an aspect of the measurement that is "unique to withdrawal liability." *Concrete Pipe*, 508 U.S. at 634. Use of the blended rate reflects the purpose of the measurement and incorporates the actuary's breadth of knowledge and experience with withdrawing employers and pension funds. There is no basis in the record to conclude that the Segal Blend did not offer the actuary's "best estimate of anticipated experience under the plan." Accordingly, the district court's holding should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(a)(5) of the Federal Rules of Appellate Procedure because it contains 6,947 words, excluding the parts of the brief exempted by Rule 32(f).

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