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March 1, 2016

The Honorable Jacob J. Lew, Secretary of the Treasury
Department of the Treasury
MPRA Office
1500 Pennsylvania Avenue NW
Room 1224
Washington, DC 20220
Attn: Deva Kyle

Submitted electronically via the Federal eRulemaking Portal at <http://www.regulations.gov>

Re: TREAS-DO-2015-0009 – Comments on the Application to Reduce Benefits Submitted by Central States, Southeast and Southwest Areas Pension Plan

Dear Mr. Secretary:

Central States, Southeast and Southwest Areas Pension Plan (“Central States” or the “Fund”) appreciates the opportunity to provide comments to the Department of the Treasury and the Internal Revenue Service (the “Department”) regarding the application (the “Application”) to reduce benefits under the Multiemployer Pension Reform Act of 2014 (“MPRA”) that the Board of Trustees (the “Board”) filed on September 25, 2015. Since the Application was filed, a number of groups and individuals have submitted comments to the Department, attempting to call into question whether the Application has satisfied all of the necessary conditions for approval. This letter responds to those comments and explains why none stands in the way of the Department’s approval of the Application.

This comment letter addresses the following general topics that have been raised in comments filed by other interested parties: (1) the assumptions used in designing the benefit suspensions proposed in the Application; (2) the manner in which the proposed suspensions are distributed; (3) the reasonable measures taken by the Board to forestall insolvency prior to submitting the Application; (4) a private contractual dispute between Central States and UPS; and (5) constitutional arguments.

I. Central States’ Application Uses Reasonable Assumptions and Projections

Two large organizations have filed comments criticizing the assumptions the Fund’s actuary applied when projecting the solvency of the Fund. The comments submitted by the International Brotherhood of Teamsters (the “IBT”) assert that these assumptions are unrealistically optimistic, while the comments submitted by United Parcel Service (“UPS”) argue that they are unrealistically pessimistic. Because no one knows for certain what the future holds, actuarial assumptions inherently involve a substantial element of professional judgment. It is

therefore rare for two actuaries to be in complete agreement regarding their best estimates of future events.¹ Courts have long recognized that, where ERISA requires actuarial determinations to be “reasonable,” the standard is satisfied as long as the actuary’s methods and assumptions fall within a reasonable range.² In this instance, both the IBT and UPS retained the services of actuarial firms to support their respective positions—but the fact that these two organizations and their actuarial advisors have taken positions on either side of the assumptions applied by the Fund’s actuary serves only to confirm that those assumptions fall within the range of reasonable assumptions about future events.³

Specifically, the comments filed by the IBT refer to the “extraordinarily unrealistic investment and contribution assumptions” that support the Fund’s application. Based primarily on its opinions regarding these two assumptions, the IBT concludes “with certainty” that the Fund’s rescue plan will not be successful. IBT Comment, at 2. The IBT is incorrect.

The Fund’s actuary has selected an assumed rate of investment return of 7.5% per year for the “deterministic” projections. The actuarial consulting firm retained by the IBT, Cheiron Inc., prepares many actuarial valuations for multiemployer defined benefit pension plans. In 2013, the most recent year for which complete data is available, Cheiron actuaries applied an assumed rate of return of 7.5% or higher in more than 70% of their valuations.⁴ The New England Teamsters & Trucking Industry Pension Plan, which is another very large IBT-affiliated multiemployer pension plan with a similar demographic and financial profile to the Fund, was a Cheiron client until 2011. In performing the valuation for that plan, Cheiron actuaries assumed investment returns of 8.5% per year. Moreover, the actuarial firm that replaced Cheiron continues to assume 8.5% annual investment returns for that fund.

¹ As the professional standards governing actuarial practice explain, “[i]n many instances, the [Actuarial Standards of Practice (“ASOPs”)] call for the actuary to take ‘reasonable’ steps, make ‘reasonable’ inquiries, select ‘reasonable’ assumptions or methods, or otherwise exercise professional judgment to produce a ‘reasonable’ result when rendering actuarial services. . . . Because actuarial practice commonly involves the estimation of uncertain events, *there will often be a range of reasonable methods and assumptions, and two actuaries could follow a particular ASOP, both using reasonable methods and assumptions, and reach different but reasonable results.*” ASOP No. 1, § 2.10 (March 2013) (emphasis added). See also ASOP No. 27, § 3.6.2 (September 2013) (applying the same reasonableness standard to the selection of economic assumptions in measuring pension obligations); ASOP No. 35, § 3.4 (September 2014) (applying the same reasonableness standard to the selection of demographic and other noneconomic assumptions for measuring pension obligations). All ASOPs are available at <http://www.actuarialstandardsboard.org/standards-of-practice/>.

² See, e.g., *Rhoades, McKee & Boer v. United States*, 43 F.3d 1071, 1075 (6th Cir. 1995) (quoting *Wachtell, Lipton, Rosen & Katz v. C.I.R.*, 26 F.3d 291, 296 (2d Cir. 1994)) (“[G]enerally, § 412(c) is not violated when an actuary chooses an assumption that is *within the range of reasonable assumptions*[.]”) (emphasis added). See also *Vinson & Elkins v. C.I.R.*, 7 F.3d 1235, 1238 (5th Cir. 1993) (“[B]y entrusting actuaries with the task of determining plan contributions, and by granting the latitude inherent in the statutory reasonableness test, Congress intended to give actuaries some leeway and freedom from second-guessing.”); *Artistic Carton Co. v. Paper Industry Union—Management Pension Fund*, 971 F.2d 1346, 1351 (7th Cir. 1992) (“Reasonableness is a zone, not a point.”).

³ Further confirmation of this fact is found in the report of the independent actuary retained by the retiree representative, who concluded that the projections prepared by the Fund actuary are reasonable. See Report to Central States Pension Fund Retiree Representative Susan Mauren, at 4 (Jay K. Egelberg, ASA, First Actuarial Consulting, September 22, 2015).

⁴ The figures cited in this paragraph were derived using publicly available Form 5500s filed by multiemployer plans.

It is absurd for the IBT to claim with certainty that the Fund’s projected investment returns will not be realized. The IBT attempts to support this claim by comparing the capital market assumptions shown in the Application with expected asset return data shown in a survey published by Horizon Actuarial Services.⁵ IBT Comments, at 4. There are several serious flaws with this analysis. Most significantly, any direct comparison of the figures published in the Horizon survey to the figures in the Application is inappropriate and meaningless because, as discussed below, the expected returns are not presented on the same mathematical basis. Moreover, the figures in the Horizon survey represent average expectations from 29 different investment advisors, indicating that approximately half of the respondents expect higher returns than are shown in the survey averages. Finally, the figures in the Horizon survey represent expectations over 20 years, while the assumptions in the Application apply to a 50-year projection period to comply with the extended period requirements of the proposed Treasury regulation. *See* Prop. Treas. Reg. § 1.432(e)(9)-1(d)(5)(ii).

As mentioned above, the figures shown in the Application are future investment return input assumptions for the stochastic projection model. As such, they represent the “arithmetic average” of future investment returns, while the figures shown in the survey represent their “geometric average” – a different mathematical basis.⁶ The following table presents the expected return figures for asset classes with a significant target allocation from both the Application and the Horizon survey on a comparable (geometric average) basis:

Asset Class	Target Allocation	Application Geometric Return (50-year horizon)	Horizon Survey Geometric Return (20-year horizon)
Domestic Equity	46.5%	8.22%	7.81% large cap 8.18% small/mid cap
Core Fixed Income	26.0	4.53	4.41
International Developed Market Equity	13.0	8.51	8.07
High Yield Fixed Income	8.0	6.76	6.33
Emerging Market Equity	3.5	10.28	9.00

⁵ The Horizon survey is available on the firm’s website. <http://www.horizonactuarial.com/blog/2015-survey-of-capital-market-assumptions/>

⁶ The arithmetic average of the expected returns is the sum of the returns divided by the number of trials. For a simple example, if there are two trials, one of which produces 0% return and the other of which produces 10% return, the arithmetic average is 5%. However, if an investor were to earn 0% in one year, and then 10% in the next, the end result would not be the same as earning 5% in each of those years. But if the investor were to earn 4.88% in each of those years, then the end result would be identical to earning 0% in the first year and 10% in the next. In this example, 4.88% is the geometric average of the returns. The geometric average represents the constant level of return that produces the same end result as is produced by the trials. As the level of volatility in the returns increases, the difference between the arithmetic and geometric averages of the returns tends to increase. Neither measurement basis is superior to the other and both are widely used; they simply communicate different information about the returns.

These figures illustrate that the great majority of the gap between the expected return figures in the Application and the averages in the Horizon survey is attributable solely to the different manner in which each set of figures is presented, as opposed to an actual difference in the underlying assumption.⁷ For example, the IBT claims that “Central States’ assumption for domestic equity exceeded the survey average by 1.94% per year for large cap domestic equity.” IBT Comment, at 5. In fact, roughly 80% of the difference highlighted by the IBT is solely the result of the manner in which the information is presented. The remainder of the gap is primarily attributable to the fact that the figures in the Horizon survey represent the average expectations of a wide variety of investment advisors, with roughly half of these advisors expecting returns that are above these levels. Further, the survey shows that, for each asset class, the optimistic advisors are anticipating returns considerably higher than the Fund’s actuary has anticipated. As is recognized in the Actuarial Standards of Practice, there is a reasonable range for actuarial assumptions, and actuaries may use their professional judgment in selecting a best estimate assumption from within this range. The Horizon survey supports the conclusion that the expected rates of return in the Application fall within such a range.

The IBT also claims that “today’s low interest rates and equity valuations . . . suggest that earning 7.5% per year is highly unlikely over the next five to 10 years.” IBT Comment, at 3. It is true that most investment experts believe that asset returns will be lower over the short term than they will be over longer time frames, and this is one of the reasons why the expected return figures in the Application are higher than those in the Horizon survey. However, both the interest rate and equity valuation characteristics of the current economic environment are fully recognized in the capital market assumptions that underlie the Application. For example, the Fund actuary’s expected rate of return on core fixed income securities shown above (4.53% on a geometric basis) is consistent with today’s low interest rates. Further, actuaries rarely use different assumptions for expected investment returns over various periods (“select-and-ultimate” returns) for multiemployer plan valuations or projections. The projections in the Application have been prepared consistent with commonly used and accepted actuarial practice.

Moreover, in the 7-year period following the 2008 market crash, the Fund’s annual investment returns have exceeded 7.5% a majority of the time, with an average annual rate of return of 11.5%. In addition, the median assumed rate of return across all multiemployer plans is currently 7.5% per year, and the Fund has exceeded the industry average investment returns over the previous decade. Finally, for extended periods like those used in the Application’s projections, the Fund’s returns have consistently exceeded 7.5%; for example, during the twenty-year period between 1996 and 2015, the Fund’s average rate of return was 8.41%. In light of these multiemployer plan return expectations and historical Fund figures, not only is a 7.5% return attainable, it is a reasonable and appropriate estimate of anticipated future returns for the Fund.

In addition to criticizing the assumed rate of investment return, the IBT argues that the Fund’s assumptions regarding future contribution revenue are unrealistically high. UPS attacks

⁷ See the table attached as Exhibit A to this letter for additional detail on the difference between the expected rates of return in the Application and the rates shown in the Horizon survey.

the very same assumption and comes to the exact opposite conclusion. The IBT bases its opinion on the competitive pressures facing the Fund's contributing employers, arguing that "[i]t is absurd to expect that participating employers will be able to afford the financial burden of these contribution increases." IBT Comment, at 6. The long-term contribution rate increases in the Application are typically between 2.5% and 4.0%, which are consistent with long-term wage inflation expectations. Considering that salaries make up the largest component of employees' wage packages, is it the IBT's position that the union will be unable to successfully negotiate future salary increases that keep pace with inflation? Surely not.

For its part, UPS points to the recent experience of the Fund, projections released by the Census Bureau and the Bureau of Labor Statistics, the anticipated improvements in the Fund's financial strength, and the withdrawal liability provisions of MPRA as evidence that the Fund's assumptions are "overly pessimistic." UPS Comment, at 18. UPS's contention that the Fund's attrition assumptions are unreasonably pessimistic because they are inconsistent with figures developed by the Census Bureau and the Bureau of Labor Statistics is a non sequitur. UPS Comment, at 18. Neither growth in the U.S. population in general, nor overall trends in the industry (which continues to experience a shift toward non-unionized jobs, *see* Application at 18.2) are particularly relevant to predicting the Fund's future contribution base. Indeed, in recent decades there has not been a significant decline in the overall industry covered by the Fund, nor has there been a decrease in the U.S. population, yet the active participant population in the Fund has declined by nearly 85% since 1980. *See* <http://www.bls.gov/iag/tgs/iag484.htm#workforce> (workforce statistics for the Truck Transportation industry subsector). Far more significant factors affecting the Fund's contribution base are the continued viability of the specific companies that currently contribute to the Fund (which the Trustees carefully examined in the form of an analysis by SRR, *see* Application at 19.8.165-.325), as well as the ability of the Fund to attract and retain new employers (which the Trustees have considered at length, *see* Application at 8.2.46-.48; *see also*, Application at 18.9).

In light of the diametrically opposed criticisms presented by the IBT and UPS, we remain confident that the contribution revenue projections in the Application are neither unrealistically optimistic nor unrealistically pessimistic. App., at 8.2.25-.37.

With respect to the impact of MPRA's withdrawal liability provisions, UPS argues that the statutory provisions that prevent the proposed benefit reductions from affecting withdrawal liability calculations for ten years create an incentive for employers to remain in the Fund until the ten-year period ends, and that the Fund's attrition assumptions are therefore overly pessimistic. UPS Comment, at 19. UPS's argument fails for two reasons. Most significantly, the focus on the marginal incentives created by MPRA ignores the fact that more than 80% of employer withdrawals from the Fund have historically been due to business hardship or bankruptcy, which would not be impacted by the benefit reductions. In addition, there are many variables besides vested benefits that factor into the calculation of withdrawal liability, and therefore projecting assessments into the future is not a simple matter. These variables include the interest rate environment and the level of an employer's contributions relative to the Fund as a whole, among others. These factors make it impractical for employers to predict whether and to what extent the decline in the Fund's vested benefit obligations produced by the rescue plan will result in lower withdrawal assessments ten years in the future. For these reasons, it is not

reasonable to assume that attrition rates will be substantially lower in the next 10 years due to MPRA's incentives.

The IBT comments further criticize the Application because it shows that the Fund's actuary has calculated the likelihood of avoiding insolvency to be only modestly higher than 50%. Presumably to avoid unnecessary benefit reductions, however, proposed rules by the Department of Treasury require that the Fund's benefit reductions go no deeper than those the Board has included in the rescue plan. In particular, the criticism neglects to recognize that Prop. Reg. 1.432(e)(9)-1(d)(5)(iii) requires that the Board set the level of benefit reductions such that if each participant were to receive a 5% lesser reduction, the Fund would be projected to fail. This regulation provides an extremely narrow range of permissible reduction levels, making it impossible for the Board to adopt a benefit suspension plan that has a likelihood of success that exceeds 50% by more than a very small margin. Ironically, the only mechanism for raising the likelihood that the Fund will avoid insolvency would be to impose deeper benefit cuts on the participants whom the IBT represents.

UPS also criticizes the administrative expense and mortality assumptions used for projecting the solvency of the Fund as unreasonably pessimistic. UPS Comment, at 27-28. The comments suggest that projected administrative expenses should correlate with the size of the benefit payments. This makes no sense. The Fund will incur the same expenses regardless of the amount of participants' monthly payments. The cost of processing the monthly payments, PBGC premiums, office expenses, professional fees, etc. would not decline simply because benefit payments are smaller and the active participants' rate of future accrual is reduced. While the total Fund population is projected to decline gradually over time due to attrition, expenses such as PBGC premiums are expected to grow. For instance, the PBGC premium rate for multiemployer pension plans increased from \$12 per participant in 2014 to \$26 in 2015. This increase caused the Fund's PBGC premium expense to increase by \$5.5 million. Assuming all other administrative expenses had stayed the same, the \$5.5 million PBGC premium increase alone would have caused nearly a 15% increase in the Fund's administrative expenses. The Obama Administration's recently-released Fiscal Year 2017 budget proposes raising PBGC multiemployer plan premiums by \$15 billion over the next 10 years, suggesting that larger increases may be enacted in the near future. In addition, as noted in the Application, the Fund's administrative expenses are already very low compared with those of other multiemployer plans due to the substantial economies of scale available to a plan of Central States' size,⁸ and it would be unreasonable to assume administrative expenses would not increase with inflation over the extended 50-year projection period.

The mortality assumption used to determine life expectancies for the benefit suspension solvency modeling were the Fund actuary's best estimate used in the most recent actuarial valuation. The mortality assumption recognizes that people are expected to continue living longer, based on actuarial studies of mortality rates. The adjustment for additional longevity is known as a mortality improvement scale. UPS correctly indicates that a new mortality

⁸ By way of comparison, the most recent audited financial report in the Form 5500 of the Western Conference of Teamsters Pension Fund (WCTPF) indicates that the WCTPF had an administrative expense to benefits paid ratio of 3.5% during 2014, a ratio that is more than double the Central States Pension Fund's comparably determined administrative expense to benefits paid ratio of 1.4% for 2014.

improvement scale was released by the Society of Actuaries after the Application was submitted in late 2015, and the new scale anticipates slightly less mortality improvement in the future than the scale that was used in the Application. UPS Comment, at 27. While this new scale could represent a reasonable assumption that an actuary might consider using, there is no basis for concluding that use of the previous mortality improvement scale is unreasonable. It is also unlikely that the use of the new projection scale would materially impact the proposed benefit reductions.

II. Central States' Proposed Benefit Suspensions are Equitably Distributed

Several commenters have asserted that the distribution of cuts in the Application fails to satisfy MPRA's requirement that the Board distribute benefit reductions equitably across the participant population. Most of these comments focus on participants whom the commenters feel are subject to unreasonably large benefit reductions. Few of these comments acknowledge that distributing benefit reductions is a "zero-sum" process, meaning that, for every participant whose reduction is lessened, another participant must face larger cuts.

Contrary to the assertions made in these comments, the Fund's rescue plan treats all participants equitably. Under the Fund's rescue plan, participants' post-reduction monthly benefits are generally equal to 1% of the contributions made on their behalf, reduced for early commencement and joint & survivor elections where appropriate.⁹ This formula results in some participants receiving larger reductions than others. But any unevenness in the percentage of benefit suspensions resulting from application of this "percent-of-contributions" formula is attributable to the fact that, prior to the reductions, some groups of participants effectively paid much less for each dollar of pension benefits than others.

Prior to the sharp declines in the financial markets between 2000 and 2003, the financial condition of the Fund was strong. The plan provisions in effect at that time provided benefit accruals equal to 2% of the contributions made on participants' behalf, and many participants were eligible for highly subsidized early retirement provisions that allowed them to retire several years before their normal retirement ages without any reductions for early commencement. In 2004, the Board cut the rate of benefit accrual in half—to 1%—and "froze" the highly subsidized early retirement provisions.

This alteration in the plan provisions has led to a significant disparity in the benefits that the Fund provides to participants. For example, a typical participant with 30 years of service who retired in 2004 at age 55 with an unreduced pension could expect to receive approximately \$7.00 in benefits for every \$1.00 contributed on his or her behalf. If instead this participant were to have worked the same number of years (30), only 10 years later—*i.e.*, he or she retired at age

⁹ This general formula is subject to the following overrides: (i) as required by ERISA section 305(e)(9)(D)(vii)(I), benefits in Tier 1 receive the maximum permissible reductions; (ii) participants' benefits cannot be reduced below 110% of the amount guaranteed by PBGC; (iii) participants over age 80 are exempt from reductions, and participants between ages 75-80 receive phased-in protections; (iv) no benefits based on disability are reduced; (v) terminated participants with less than 20 years of service have post-suspension benefits based on a 0.5% of contributions formula instead of 1%; and (vi) the maximum reductions for participants with 20 or more years of service are 50% for Tier 2 benefits, and 40% for Tier 3 benefits.

65 in 2014, having worked for 10 years under the reduced benefit accrual formula—he or she would only have expected to receive approximately \$3.50 in benefits for every \$1.00 contributed. Thus, under the plan provisions that are in effect absent the proposed benefit reductions, one participant could receive a benefit that is twice as valuable as another participant's, despite the fact that the Fund received an identical amount of employer contributions on behalf of each.

Applying the same percentage reduction to all participants would be grossly inequitable in light of this disparate treatment built in to the Fund's current benefit structure. The Board rejected this approach because it fails to take into account this great disparity. The participants who earned many years of service in the Fund after the dramatic benefit reductions were implemented in 2004 have already sacrificed considerably. To reduce their benefits by the same percentage that is applied to participants who were unaffected by the 2004 cuts, and are therefore the recipients of heavily subsidized benefits, would be unjust.¹⁰ For this reason, the Board determined that it would be far more equitable to apply the Fund's limited resources to build for each participant a benefit based on the contributions made on his or her behalf. This is an inherently fair formula. The fact that it results in different reduction percentages for different participants is simply a reflection of past unequal treatment.

Other than participants required to receive maximum suspensions under MPRA's mandatory Tiering structure, 29 U.S.C. § 1085(e)(9)(D)(vii)(I), the only participants for whom reductions are less favorable than the 1% of contribution formula are terminated participants (*i.e.*, participants who had previously accrued a benefit under the Fund, have since left covered employment, but have not yet retired) with less than 20 years of service. These participants will receive post-reduction benefits equal to 0.5% of the contributions made on their behalf. The Board considered applying the 1% formula to all participants, but the Fund's actuary determined that this would not be sufficient to enable the Plan to avoid insolvency. In order to maintain this benefit level for retired participants and beneficiaries in payment status and active participants while ensuring that the Fund is projected to avoid insolvency, it was necessary to establish a lower, 0.5% of contributions formula for certain terminated participants. This differential treatment recognizes that terminated participants with less than 20 years of service are younger and more likely than other participant groups to have access to retirement income other than through the Fund (*e.g.*, through their current employment). *See App.*, at 13.1.3-4. We note that the vast majority of public comments criticizing the Application have been submitted by retirees and active workers, supporting the Board's belief that terminated participants are not as dependent as other groups on their Central States pensions.

In addition, the various limitations and requirements of MPRA make applying the same reduction percentage to all participants impractical and inconsistent with the law. Under section 305(e)(9)(D)(vii) of ERISA, the Board must classify all benefits payable from the Fund into three distinct "Tiers." This provision obligated the Board to reduce Tier 1 benefits to the

¹⁰ This conclusion is amply supported by the text of MPRA, which lists the "extent to which [a] participant or [a] beneficiary is receiving a subsidized benefit" as one of the factors to be considered by plan sponsors in deciding how to equitably distribute benefit suspensions. 29 U.S.C. § 1085(e)(9)(D)(vi)(V).

maximum extent permitted by law.¹¹ More than 70,000 participants have benefits that fall into multiple tiers. In addition to mandating the different treatment that applies to benefits in different tiers, MPRA provides that participants over age 80 must not be subject to any reductions, and those between ages 75 and 80 receive phased-in protection. Participants who have received disability benefits from the Fund cannot have their benefits reduced below the amounts payable on account of disability, which can result in full or partial protection from reductions depending on the circumstances. In light of this complex framework in which 61% of participants in the Fund receive some combination of mandatory reductions, or full or partial protection from reductions, developing a rescue plan that reduces all participants' benefits by the same percentage was both impractical and inconsistent with the intent of MPRA.

A number of commenters have also suggested that the benefits of active participants should be calculated under a reduction formula that is less favorable than that applied to retirees. The Board considered this alternative and rejected it for several reasons. First, since all active participants have earned service in the Fund subsequent to the 2004 benefit cuts discussed above, they have already endured substantial sacrifices.¹² Additionally, maintaining the support of active participants is vital to preserving benefits for retirees, because approximately \$0.50 of every dollar contributed by active participants is used to support the benefits of participants who are no longer active.¹³ If the active participants withdraw their support for the Fund, retirees will experience greater benefit losses. The Board determined that, in light of the past sacrifices active participants have made, and the fact that prospectively their benefit accrual rate will be reduced further to 0.75% of contributions, it would be unreasonable and counterproductive to impose larger reductions on active participants than those set forth in the Application. App., at 8.2.4-.5. For all of these reasons, the Board concluded that it was appropriate to apply the same 1%-of-contributions formula to active participants as to retired participants.

¹¹ Comments filed by the Pension Rights Center ("PRC") criticize the Application for including benefits in Tier 1 that are attributable to certain categories of employers that PRC believes do not belong in Tier 1. PRC Comment, at 8-9. Under MPRA, Tier 1 includes "benefits attributable to a participant's service with an employer which withdrew from the plan and failed to pay (or is delinquent with respect to paying) the full amount of its withdrawal liability under section 4201(b) or an agreement with the plan." 29 U.S.C. § 1085(e)(9)(D)(vii)(I). The Fund agrees with PRC that an employer who fails to pay the full amount of its statutory withdrawal liability, but later reaches an agreement with the Fund to pay a different amount and fully satisfies that obligation, is not a Tier 1 employer. Such an employer would have paid "the full amount of its withdrawal liability under . . . an agreement with the plan." Accordingly, the Application has allocated benefits attributable to such employers to Tier 2, and PRC's criticisms suggesting otherwise reflect a misreading of the Application. However, in the absence of regulatory guidance embracing a contrary interpretation, the language quoted above does not permit the Board to exclude an employer from Tier 1, as PRC implies, simply because the employer (i) had its withdrawal liability discharged in bankruptcy, (ii) paid "a substantial portion" of its withdrawal liability, or (iii) was a predecessor in interest to the employer that ultimately withdrew without paying its withdrawal liability. In none of these cases would the employer have paid "the full amount of its withdrawal liability" as MPRA requires to avoid Tier 1.

¹² We note that MPRA expressly lists both "[h]istory of benefit increases and reductions" and "[a]ny discrepancies between active and retiree benefits" among the factors to be taken into account by the Board in determining how to distribute benefit suspensions equitably. 29 U.S.C. § 1085(e)(9)(D)(vi)(VII), (IX).

¹³ Another factor to be taken into account by the Board is the "[e]xtent to which active participants are reasonably likely to withdraw support for the plan, accelerating employer withdrawals from the plan and increasing the risk of additional benefit reductions for participants in and out of pay status." 29 U.S.C. § 1085(e)(9)(D)(vi)(X).

On top of the reduction in the benefit accrual rate from 1.0% of contributions to 0.75% of contributions that will go into effect for active participants when the benefit suspensions take effect, the early retirement reduction factors for active participants with 20 or more years of service will also gradually become less favorable over a 10-year period. This change represents an additional sacrifice by the active participants that has no impact on retirees and beneficiaries who are currently in pay status. The Board concluded that it is necessary to phase-in this change to foster the continued support of the Fund by active participants and to ensure an equitable distribution of sacrifices, both past and current, across the participant population.

Certain commenters also disagreed with the Application because they feel that participants who are receiving disability benefits from Social Security, but do not receive disability benefits from the Fund, should enjoy the same protection as participants who receive disability benefits from the Fund. This criticism is misplaced for several reasons. First, MPRA does not include language protecting *disabled participants*; the statutory text refers instead to *disability benefits*. Section 305(e)(9)(D)(iii) of ERISA provides that “no benefits based on disability (as defined under the plan) may be suspended.” Because MPRA’s protections are based on the status of the benefit, rather than the status of the participant, it is entirely consistent with MPRA that participants receiving pension benefits are subject to the same reductions whether or not they qualify for disability under the Social Security program.

Moreover, the disability benefits provided by the Fund are typically small in comparison to the far more generous regular retirement benefits that the Fund provides. MPRA’s disability protections only help participants when (a) the disability benefit amount (which is exempt from reduction) exceeds (b) the retirement benefit that is payable after applying the benefit reduction formula. For approximately 80% of participants who are eligible for MPRA’s disability protections, their regular retirement benefits remain greater than the disability benefit amounts even after the reduction formula in the Application is applied.¹⁴ Thus, contrary to the assumption under which commenters may be operating, expanding the disability protection criteria to include all participants with Social Security disability awards would not have a positive impact on most affected participants’ benefits.

Finally, it would have been impractical for the Board to go beyond the requirements of MPRA and voluntarily provide this additional protection. The Fund has no way of knowing which participants receive Social Security disability benefits and which do not unless the participants have applied for a disability benefit from the Fund. As the Fund does not possess this information, it could not develop a benefit reduction approach that included this protection,

¹⁴ The amount of the disability benefit payable from the Fund varies based on the level of contributions that an employer is making on the participant’s behalf and on the participant’s age. The maximum disability benefit payable from the Fund is \$1,015 per month, and in most cases the amount is less. A participant who begins receiving a disability benefit prior to normal retirement age is eligible to convert the disability benefit to a normal retirement benefit when he or she reaches normal retirement age. As normal retirement benefits are typically larger than disability benefits, most participants choose to convert. In the event that a participant converts to a normal retirement benefit, the disability protection provision of MPRA continues to apply, ensuring that post-suspension retirement benefits are not reduced below the amount of pre-conversion disability benefits. To the extent that the post-conversion retirement benefit is larger than the disability benefit, the excess retirement benefit is not protected under MPRA. Therefore, the participants who benefit from this protection are those for whom their disability benefit is greater than their post-suspension normal retirement benefit.

since the Fund could not accurately measure the impact of the benefit reductions on its projected solvency, as is required by MPRA.¹⁵

III. The Board of Trustees Took All Reasonable Measures to Avoid Insolvency Before Applying for Benefit Suspensions

Several commenters argue that the Application must be rejected because the Board failed to take “all reasonable measures to avoid insolvency” as required by MPRA. 29 U.S.C. § 1085(e)(9)(C)(ii). Some commenters have gone so far as to list specific measures, which they deem to be “reasonable,” that they feel the Board should have taken. Pension Rights Center (“PRC”) Comment, at 4-5; American Association of Retired Persons (“AARP”) Comment, at 1-4. These comments reflect a lack of thorough understanding of the factors affecting the Fund’s solvency. As explained below, none of the measures proposed by these commenters would have been reasonable with respect to the Fund.

Determining what constitutes “all *reasonable* measures” requires an in-depth understanding of the unique factors affecting the Fund, including the characteristics of its many different participant groups, the conditions of the many distinct industries in which the Fund’s participants and contributing employers operate, and the structures of various benefit programs under the Fund. This assessment can most effectively be made by those most familiar with these factors: the Board of Trustees. Congress recognized this simple truth when it enacted MPRA, by requiring the Department to apply the deferential “clear error” standard in reviewing a plan sponsor’s determinations.¹⁶

Comments submitted by the PRC and the AARP underscore this point. For example, both PRC and AARP argue that the Board failed to take all reasonable measures because it could have imposed higher contribution rate increases than are proposed in the Application. PRC Comment, at 4; AARP Comment, at 2-3.

As an initial matter, we note that the IBT, which represents the Fund’s active participants in collective bargaining and is therefore far more familiar than AARP or PRC with the economic pressures facing its members and the companies that employ them, filed comments on the Application that express the precise *opposite* view. The IBT argues that, far from being unreasonably low, the proposed contribution rate increases are so high that they will force the Fund’s contributing employers out of business. IBT Comment, at 6.¹⁷ These conflicting

¹⁵ Even if it were possible to accurately measure the effects on the proposed benefit suspensions resulting from additional disability protections, the Board was mindful that deeper cuts to other participants would be necessary to offset this impact due to the “zero-sum” nature of benefit suspensions under MPRA.

¹⁶ The applicable statutory provision states: “In evaluating the plan sponsor’s application, the Secretary of the Treasury shall accept the plan sponsor’s determinations unless it concludes, in consultation with the Pension Benefit Guaranty Corporation and the Secretary of Labor, that the plan sponsor’s determinations were clearly erroneous.” 29 U.S.C. § 1085(e)(9)(G)(v). Despite UPS’s assertion to the contrary, nothing about this provision limits application of the “clear error” standard to the determination of “whether the plan sponsor has met the criteria specified in clause (ii) of subparagraph (C).” UPS Comment, at 11-12.

¹⁷ The IBT’s criticism ignores that the proposed contribution rate increases are fully consistent with historical and expected rates of wage inflation.

criticisms only serve to reaffirm that the Trustees struck an appropriate balance between increasing contributions and doing so to a point of driving employers away from the Fund.

PRC's specific complaint is as follows:

Central States indicates that it will raise contribution rates beginning on August 1, 2018, by 2.5% annually, and by 3% annually beginning in 2028. . . . Yet the fund commissioned a report that concluded that most of the largest contributing employers "could satisfy their obligations and remain competitive . . . even if the proposed Contribution Rate increases are implemented." (See Central States application, Prior Plan Actions, Item 19, pp. 268-271) *The Fund does not explain why, or even if, it disagreed with this conclusion of the expert it retained, but its benefit suspension plan includes contribution increases that are substantially less than most employers could afford and remain competitive.*

PRC Comment, at 4 (emphasis added). That is wrong, and it shows that the PRC does not understand the required contribution rate increase applicable to the contributing employers under Central States' rehabilitation plan.¹⁸

The obvious reason that the Application "does not explain why, or even if, [the Board] disagreed with this conclusion of the expert it retained" is because the Board did not disagree with the conclusion of its expert. The contribution rate increases that the expert report characterized as reasonable are the exact contribution rate increases that have been included in the rescue plan—except with respect to one contributing employer for which the Board determined to require *greater* contribution rate increases than those recommended by its expert:¹⁹ "Accordingly, the Trustees have determined to accept the recommendations and conclusions of SRR, except that the Trustees concluded that YRC will likely have the ability to absorb the rate increase shown above by means of reducing other costs in collective bargaining or through other negotiations." App., at 19.8.3.

The annual contribution rate increases that PRC decries as too low—2.5% beginning in 2018, and 3% beginning in 2028 (the "capped rate increases")—apply only to those contributing employers whose contribution rates are frozen at the *top* NMFA and NMATA rates.²⁰ Those

¹⁸ Pursuant to the Pension Protection Act of 2006 ("PPA"), Central States was required to adopt a rehabilitation plan in 2008. The rehabilitation plan, including subsequent annual updates thereto, was included in the Application at pp. 36.1.168–265. The Application also included summaries of the specific reasonable measures taken pursuant to the rehabilitation plan at pp. 18.5–.12.

¹⁹ The Application fully explains the reasons for the Board's disagreement with its expert on this singular point. App. at 19.8.2–.3.

²⁰ The maximum contribution rates applicable to Contributing Employers covered by the National Master Freight Agreement ("NMFA") or National Master Auto Transporter's Agreement ("NMATA") were frozen, at \$342 per week and \$348 per week, respectively (together, the "capped rates"), as part of the Fund's 2010 update to its rehabilitation plan. The Board determined that freezing these rates was a reasonable measure because the Fund's Contributing Employers could not reasonably be expected to absorb additional increases above the capped rates. See App., at 19.8.1. The Board's conclusion was supported by the findings of an expert financial valuation consulting firm, Stout Risius Ross ("SRR"), a copy of which was submitted with the Application. App., at 19.8.9–.163.

rates were frozen in 2010 based on the advice of the Board's expert consultant, and are now being unfrozen based on the advice of this same expert. The Fund's contributing employers already are, and under the proposed benefit suspension plan will continue to be, subject to annual contribution rate increases of at least 4 percent. Thus, with the exception of YRC,²¹ contributing employers that are not currently at the top NMFA and NMATA rates will continue to be subject to annual contribution rate increases of at least 4 percent unless and until they reach the capped rate (at which time the capped rate increases will kick in).

AARP's comment is similarly inaccurate regarding the Board's prior actions and the information contained in the Application. For example, AARP states that "most of [SRR's] findings were made in 2010, during the economic crisis, and are not based on the current more robust economy." AARP Comment, at 2. To the contrary, however, SRR updated its 2010 report to reflect current economic conditions in July 2015. App., at 19.8.165–325.

Next, AARP alleges that "[t]he application does not include how much additional revenues would be received – and their impact – if higher contributions were required." AARP Comment, at 3. Yet the Application clearly discloses that the Board has repeatedly considered the possibility of higher contribution rates, and has determined each time that further contribution rate increases would likely cause a *net loss* of active participants and of contribution revenue to the Fund, thereby accelerating the Fund's insolvency. App., at 8.2.51–.52. In making these determinations, the Board has consistently relied on expert financial and actuarial advice, as well as the Trustees' own extensive experience with the bargaining units and contributing employers that participate in the Fund. *Id.*

Finally, AARP "strongly urge[s] the Department to direct the plan to consider higher contribution increases (or increases over a longer time period) and determine how such increases would obviate the level of retiree cuts." AARP Comment, at 2. The Board has repeatedly studied the possibility of requiring higher contribution increases,²² including considering the views of the collective bargaining representative of the Fund's active participants²³ and an independent expert (SRR).²⁴ AARP's suggestion that Central States be required to consider increases "over a longer time period" is especially puzzling given that the required annual contribution rate increases proposed in the Application continue indefinitely.

That two leading national advocacy groups that profess to have special pension expertise have so badly misunderstood the contribution rates proposed under the Application underscores the fact that determining which measures to forestall insolvency would be "reasonable" requires a comprehensive understanding of the myriad factors unique to the Fund. It also demonstrates that these organizations are determined to oppose benefit reductions even though those reductions are in the interest of the vast majority of participants in the Fund.

²¹ The special case of YRC is addressed in the Application at pp. 8.2.28 – 8.2.31.

²² App., at 18.5–6, 18.7, 18.8, 18.9–10.

²³ App., at 18.5.

²⁴ App., at 18.8, 19.8.1–7.

Similarly, PRC suggests that the Board failed to take “all reasonable measures to avoid insolvency” because the Application calls for early retirement subsidies to be phased out over the next 10 years rather than eliminating them all immediately. PRC Comment, at 4. In fact, the Board has considered eliminating all PPA adjustable benefits, including early retirement subsidies, but “determined that doing so would likely (a) cause many active participants to withdraw their support for the Fund, (b) increase Employer withdrawals, and (c) ultimately cause a more rapid deterioration of the Fund’s financial condition and an acceleration of its projected insolvency.” App., at 20.4. This conclusion was supported by the Fund’s actuary. *Id.* Ultimately, the record demonstrates that the package of benefit reductions applied to active participants under the rescue plan was determined by the Board to be the maximum that could be imposed without risking a serious erosion of active support for continued participation in the Fund. *See, e.g.*, App., at 8.2.4-.5; 8.2.45; 8.2.50.

AARP suggests that the Board has failed to take “all reasonable measures to forestall insolvency” because Central States should have transferred funding from its well-funded health plan to its pension plan. AARP Comment, at 3. Of course, serious legal issues would arise under ERISA’s fiduciary breach and prohibited transaction rules if the Board were to unilaterally transfer dollars from the health plan’s trust fund to the pension plan’s trust fund. Rather, we understand AARP to argue that the pension plan’s funding status could have been improved by diverting a portion of the contribution revenues owed to the health fund and reallocating those amounts to the pension fund.

The only way that such a reallocation could legally occur is if the bargaining parties—not the Board of Trustees, which lacks the necessary authority—agreed to do so. This is extremely unlikely, however, because the health plan and pension plan do not cover the same participants and contributing employers. Indeed, fewer than one in six of the nearly 200,000 participants in the health plan are also participants in the pension plan, and 84 percent of the health plan’s contribution revenue comes from employers who do not participate in (and therefore cannot legally divert contributions to) the pension plan.

Further, even the bargaining parties who represent participants in both plans are extremely unlikely to agree to divert contribution revenue from the health plan to the pension plan. This is because the resulting drop in contribution revenue to the health plan would need to be balanced with corresponding benefit reductions. At the same time, the economic impact to the pension fund would be negligible, since the effects of the additional contribution revenue from approximately 30,000 participants (*i.e.*, those in both plans) would be shared among more than 400,000 pension plan participants.

Both PRC and AARP assert that the Board failed to take “all reasonable measures to avoid insolvency” because the Application does not include sufficient reductions to the Fund’s administrative expenses. PRC Comment, at 4; AARP Comment, at 4. But as noted in Section I, *supra*, the Fund’s administrative expenses are already very low and reducing administrative expenses would have no appreciable impact on the Fund’s projected insolvency.

Lastly, AARP’s idea to freeze the plan entirely and replace future benefit accruals with another arrangement, such as a 401(k) plan, is nonsense. AARP Comment, at 3-4. In support, AARP analogizes to sponsors of single-employer plans who, following a plan freeze, “continue

to be required to pay all accrued benefits and [] generally do in fact make full contributions unless they go out of business.” *Id.* at 4. But the funding commitments in a multiemployer plan are entirely different from those in single-employer plans. Most significantly, contributing employers of multiemployer plans always have the option of withdrawing from their plans, and their financial obligation to those plans upon withdrawing is often only a fraction of what it actually would cost to guarantee the benefits in those plans. In contrast, sponsors of single-employer plans cannot “withdraw” from their own plans. Accordingly, the risk that benefits accrued under a frozen single-employer plan will not be fully funded is relatively lower.

The sponsors of a multiemployer plan, on the other hand, must weigh the potential effects of a freeze on the plan’s active employees and contributing employers, many of whom will oppose sacrificing money out of their wage packages to fund benefits accrued by others,²⁵ while earning no additional benefits themselves. Unlike an employer who sponsors a single-employer plan, contributing employers in a multiemployer plan may choose to withdraw in response to a freeze, and will do so if it serves their financial interests. While such employers are still liable to make withdrawal liability payments following the withdrawal, due primarily to the withdrawal liability payment schedule provisions of ERISA sections 4201 – 4225, these payments often fail to fully compensate the plan for the unfunded vested benefits resulting from the withdrawn employer’s participation.²⁶ Thus, the risk that benefits accrued under a frozen multiemployer plan will not be fully funded is much higher—especially in the case of a plan like Central States, which is already severely underfunded—than the analogous risk to frozen single-employer plans.

In any event, the Board *has* considered whether freezing all benefits would be a reasonable measure to forestall insolvency, most recently at its November 14, 2014 meeting. App., at 8.2.32-.33. Each time, the Board concluded, with expert advice from the Fund’s actuary, that a plan freeze would serve to hasten—not forestall—the insolvency of the Fund.

The IBT similarly complains that the Fund has failed to take “all reasonable measures to avoid insolvency” because the Board rejected an agreement between the IBT and The Kroger Company (“Kroger”) that would facilitate Kroger’s complete withdrawal from the Fund effective July 1, 2016. IBT Comment, at 5-6. Contrary to the IBT’s assertions, permitting the Fund’s 7th-largest contributing employer²⁷ to withdraw from the Fund would not be a reasonable measure.

The Application repeatedly emphasizes that the root cause of the Fund’s present financial challenges is the steady erosion of the Fund’s contribution base since the deregulation of the trucking industry in 1980.²⁸ When contributing employers withdraw, the reduced contribution

²⁵ We note that under the Fund’s existing contribution and benefit structure, only approximately \$0.50 of each dollar of contributions generated by work performed by active participants pays for benefits earned by those workers; the rest is used to fund benefits of retirees and terminated participants. If the proposed benefit suspension plan is approved, future accruals by active participants will be further reduced, resulting in only about one third of current contributions being used to pay for ongoing benefit accruals. App., at 20.6.

²⁶ The reasons for this are laid out extensively in the Application at pp. 18.5 – 18.7.

²⁷ Nearly 5,000 former and active Kroger employees participate in the Fund, and contributions made on behalf of active Kroger employees make up approximately 2.5% of the Fund’s total contribution revenue.

²⁸ *E.g.*, App., at 18.2. In 1980, there were 11,657 employers participating in the Fund. When the Application was filed in 2015, approximately 1,500 participating employers remained. App., at 17.1-.28.

base makes it more difficult for the Fund to improve funding through future increases in contribution rates. Instead, the Fund is forced to rely more heavily on investment returns for income, which are subject to far greater volatility than employer contributions. Thus, even if the IBT's claim that the proposed Kroger transaction would include withdrawal liability payments sufficient to cover all accrued liabilities attributable to Kroger participants is to be believed, the Fund will still be harmed over the long-term.

Further, the IBT's contention that "the IBT/Kroger agreement was neither mentioned nor included in the Application" is wrong. IBT Comment, at 6. Despite the Board's disagreement with the IBT as to the merits of the proposed transaction, the Application explicitly assumes that the agreement between IBT and Kroger will result in Kroger's withdrawal from the Fund effective July 1, 2016. *See App.*, at 7.1.22.²⁹

In the end, if any of the alternative measures proposed in public comments would have helped Central States to forestall insolvency, the Board would have diligently pursued those measures. The record confirms that, over the course of many years, the Board has considered a broad array of proposals, has retained independent experts, and has implemented every measure that it determined to be reasonable.³⁰ The tragic fact is that, because of factors outside the Board's control, like deregulation of the trucking industry and the global financial crisis in 2008-2009, none of the measures taken has been sufficient to prevent the Fund from becoming insolvent.³¹

IV. Central States' Proposed Benefit Suspension Plan Is Not a Breach of its Agreement with UPS

As a last-ditch argument, UPS maintains that the rescue plan cannot save the Fund from insolvency because, by filing the rescue plan application, the Fund has breached a 2007 Spin-Off and Withdrawal Liability Agreement (the "Agreement") between UPS and the Fund, such that the Fund owes UPS damages for that breach in an amount that would bankrupt the Fund. UPS Comment, at 32-39. UPS's argument is a red herring. Even if UPS had a colorable claim that the Fund has breached the Agreement, that private dispute would in no way provide a basis for the Department to deny the Application.

But the reality is that UPS's claims are baseless. The Fund has not breached the Agreement. And even if it had, UPS has not been damaged by the Fund's actions. The Fund owes nothing to UPS, and the Agreement does not stand in the way of implementation of the rescue plan.

²⁹ While July 1, 2016 is the date of withdrawal set forth in the agreement between the IBT and Kroger, we note that temporarily delaying Kroger's withdrawal until later in 2016 or the beginning of 2017 would not have a material impact on the amount of the benefit suspensions necessary to avoid insolvency.

³⁰ We note that unlike the Board's determinations regarding what would be a reasonable measure to forestall insolvency, none of the "reasonable measures" asserted by PRC or AARP are supported by expert analyses.

³¹ The structural causes of the Fund's present financial challenges are explained in the Application. *See App.* at 18.1-.12.

UPS bases its argument on language in the Agreement that prevents the Fund from “amend[ing] the CSPF Plan Documents or otherwise adopt[ing] or institut[ing] any increases or reductions in any Accrued Benefits Payable at Age 65, except with the advance, express written consent of [UPS].” Of course, there can be no argument that the Fund has breached this provision at this time, since it has not yet amended the plan to reduce benefits, and cannot do so unless and until Treasury approves the rescue plan.

In any event, if and when the Fund does implement the benefit suspensions, there will still be no breach of the Agreement. Express provisions in the Agreement, which UPS brushes aside, provide that the Fund may reduce benefits without UPS’s consent when doing so is “necessary to implement the terms of this Agreement or otherwise required by law[.]”

First, the Fund is obligated under the Agreement to provide retirement benefits to the UPS retirees. Because the Fund would become insolvent and be unable to pay benefits without the rescue plan, the rescue plan is necessary to implement the terms of the Agreement to the fullest extent possible.

Second, implementation of the rescue plan is required by law because the Board is required under the Pension Protection Act of 2006 (“PPA”) to take reasonable measures to forestall insolvency, and benefit suspensions are a reasonable measure to forestall insolvency. Specifically, PPA *requires* the trustees of a plan in critical status to adopt a rehabilitation plan. 29 U.S.C. § 1085(a)(2)(A). Where the trustees determine, based on reasonable actuarial assumptions and upon exhaustion of all reasonable measures, that the plan cannot reasonably be expected to emerge from critical status by the end of a specified period, PPA *requires* the trustees to adopt a rehabilitation plan that consists of “reasonable measures to emerge from critical status at a later time or to forestall possible insolvency.” 29 U.S.C. § 1085(e)(3)(A)(ii).

As set forth in the Application, the Fund was certified to be in critical status for the 2008 plan year. App., at 36.1.168. In formulating a rehabilitation plan in 2008, the Board concluded that, even upon exhaustion of all reasonable measures, the Fund could not reasonably be expected to emerge from critical status by the end of the rehabilitation period. *See* App., at 18.5-.7 and 36.1.175-.176. PPA therefore required the Board to adopt a rehabilitation plan incorporating reasonable measures to emerge from critical status at a later time, in the Fund’s case, by 2028. App., at 36.1.175. Following heavy investment losses suffered during the global financial crisis that began in 2008, the Fund was no longer able to emerge from critical status. Accordingly, in 2010, and each year thereafter, the Board was required under PPA to revise the rehabilitation plan to include reasonable measures designed to forestall insolvency. *See* App., at 35.1.191, -.207, -.226, and -.243. The reasonable measures taken by the Board to forestall insolvency during this time are detailed in pages 18.7 through 18.12 of the Application. Despite these measures, as of January 1, 2015, the Fund was still projected to become insolvent by 2026. App., at 5.1.8.

Now, because of MPRA, the Fund is no longer doomed to insolvency. MPRA added a new ERISA section 305(e)(9) that provides plans in “critical and declining” status with a new tool to save the plan from insolvency: benefit suspensions. MPRA did not, however, repeal any of the requirements imposed upon plans in critical status. (By definition, a plan in “critical and declining” status is also in “critical” status. 29 U.S.C. § 1085(b)(6).) Thus, the Board *must*

continue to operate under a rehabilitation plan and *must* continue to take reasonable measures to forestall insolvency.

The relevant portions of PPA, requiring the Board to take “reasonable measures,” and the relevant portions of MPRA, permitting the Board to suspend benefits, are both encapsulated within the *very same subsection* of ERISA—subsection 305(e). Rather than read this subsection as a comprehensive whole, UPS asserts that the Board is somehow exempt from PPA’s requirement that it take reasonable measures to forestall insolvency merely because PPA, *apart* from MPRA, would not otherwise allow benefit suspensions. UPS Comment, at 35. Under UPS’s theory, trustees who determine that benefit suspensions are a reasonable measure to save their plan are legally permitted to shrug off PPA’s requirement and sit by and allow their plan to descend into insolvency. Established principles of statutory construction, however, require that the provisions of PPA and MPRA be read together and harmonized.³² Accordingly, where a plan’s trustees have determined that benefit suspensions are a reasonable measure to forestall insolvency, they are required to take that measure which is specifically permitted under the circumstances.

That MPRA provides that plan trustees “may” apply to suspend benefits does not hinder this reading. Sensibly, MPRA does not force trustees to apply to suspend benefits if they conclude that doing so is not a reasonable measure to forestall insolvency. For example, trustees may conclude, based on the demographics of their plan, that suspending benefits would be just as likely to hasten insolvency (*e.g.*, by reducing the support of active employees and contributing employers for the plan) as it would be to forestall it. In that case, the trustees may not suspend benefits because doing so would not constitute a reasonable measure to forestall insolvency.

Here, the Application explains in detail the reasonable measures the Fund has already exhausted and the reasons why the benefit suspensions would allow the Fund to avoid insolvency. App., items 7, 18, 19. Because the Board can save the Fund from insolvency, it is legally required to do so.

Even if the rescue plan were not required by law or necessary to fulfill the terms of the Agreement, it is UPS—not the Fund—that has breached the Agreement by unreasonably withholding consent to the benefit suspensions. On November 17, 2015, prior to reducing any benefits, the Fund sought UPS’s written consent under section 11.7 of the Agreement to adopt reductions in Accrued Benefits Payable at age 65. Two days later, UPS responded by rejecting the Fund’s request to provide consent, insisting instead that the Application be “immediately withdrawn.”

To the extent that UPS’s consent is required, its refusal to provide consent breaches the Agreement by violating the duty of good faith and fair dealing, which is implied in every contract under Illinois law. *McCleary v. Wells Fargo Secs., LLC*, 2015 IL App (1st) 141287, ¶ 19. That duty requires parties exercising contractual discretion to do so “reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable

³² See, *e.g.*, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.” (internal citations omitted)).

expectations of the parties.” *Id.* ¶ 21 (citing *Wilson v. Career Educ. Corp.*, 729 F.3d 665, 673-76 (7th Cir. 2013)).

Even if UPS’ consent were required—and it is not—UPS’s refusal to provide consent violates that standard. Particularly in the context of the immense financial challenges facing the Fund, UPS’s refusal is unreasonable, driven by an improper motive, and wholly inconsistent with the parties’ reasonable expectations.

First, UPS’s refusal to consent is fundamentally unreasonable because UPS would be demonstrably *better off* under the rescue plan than it would be if the Fund were allowed to go insolvent. As demonstrated in the Application, unless the suspension plan is implemented, the Fund will become insolvent within the next 10 years. In that case, the present value of lost benefits for participants whose benefits UPS has agreed to backstop is at least \$2.9 billion, and much more if employer withdrawals accelerate insolvency of the Fund. Under the rescue plan, the present value of the benefits UPS has agreed to backstop is \$1.9 billion. Thus, UPS’s withholding of consent to a rescue plan that would benefit UPS by a billion dollars or more is wholly unreasonable.

Why, then, would UPS withhold its consent to the rescue plan? Out of a coldblooded, improper motive: it hopes to coerce the Fund into revising its Application to shift more of the benefit suspensions onto participants whose benefits UPS does not have to backstop. As the Application and many comments filed regarding it show, this would impose grievous hardships on those plan participants who rely solely on the Fund for their pension benefits.

Finally, UPS’s withholding of consent is inconsistent with the parties’ reasonable expectations when entering into the Agreement. Section 11.7 of the Agreement was not intended to protect UPS against financial exposure resulting from UPS’s own subsequent, voluntary commitment to maintain the pension levels of its employees. In fact, section 3.4 of the Agreement plainly states that neither UPS nor the UPS Transfer Plan “will have *any* responsibility for the payment of liabilities of the CSPF that are not transferred to the UPS Transfer Plan.” When agreeing to section 11.7, therefore, the Fund could not have “reasonably expected” that UPS could withhold consent to avoid a financial responsibility that the Agreement specifically states UPS will *not* undertake. UPS’s freely-undertaken obligation, which is contrary to the express terms of the Agreement, cannot justify a reckless, arbitrary, and unreasonable refusal to provide the requested written consent under section 11.7. *See, e.g., Interim Health Care of N. Ill., Inc. v. Interim Health Care, Inc.*, 225 F.3d 876, 885-86 (7th Cir. 2000) (reversing summary judgment on a claim for breach of the covenant of good faith and fair dealing, in part, because defendant’s stated reasons for failing to furnish account leads to the plaintiff were not contemplated by the terms of the contract at issue).

All of that said—even if the rescue plan were not required by law or necessary to effectuate the Agreement, and even if UPS’s consent were not unreasonably withheld—UPS has no claim against the Fund for breach of contract because UPS has suffered no damages. As explained above, UPS is better off under the rescue plan than without it. Perhaps recognizing this, UPS attempts to manufacture some other theory of damages, claiming that institution of the rescue plan will cause UPS to be “double charged” for withdrawal liability. This is nonsense. Though it is true that UPS paid the full amount of its withdrawal liability when it withdrew, any

additional amount UPS would have to pay now is unrelated to withdrawal liability or any other statutory obligation or, indeed, any obligation at all to the Fund. Any amount owed to retirees by UPS is entirely attributable to the separate, bilateral and voluntary agreement UPS entered into with the IBT without the Fund's involvement or even advance knowledge. UPS owes this obligation to those retirees, not to the Fund. That UPS now regrets the agreement that it bargained and signed does not mean that the Fund has caused it any damages.

For all of these reasons, the Agreement between UPS and the Fund does not stand in the way of implementation of the rescue plan.

V. There Are No Constitutional Issues Impairing Treasury's Authority to Review and Approve Central States' Application

Unable to articulate any compelling argument as to why Treasury should deny the Application, UPS attempts to torpedo the entire statutory scheme by decrying Congress' plan to save retirees' pensions as "unconstitutional." UPS devotes many pages to trying to explain its confusing theories, but verbosity and hand-waving do not a constitutional violation make.

To begin with, the suggestion that MPRA is unconstitutional because it would "potentially expos[e] UPS to severe retroactive burdens unrelated to promises made" by UPS, UPS Comment, at 39, is, frankly, mystifying. MPRA imposes not a single burden on UPS, retroactive or otherwise.³³ The only burden UPS will bear as a result of the rescue plan is one that it separately and voluntarily undertook in collective bargaining. To argue that a liability which *would not exist* in the absence of UPS's past promises or commitments is "unrelated to" such promises or commitments strains credulity. That UPS now wishes it had never made such promises does not render MPRA unconstitutional.

UPS's argument that MPRA's "clear error" standard of review violates the constitution is equally bewildering. UPS Comment, at 11-13, 30-32, 39-45. First, UPS's concern about Treasury deferring to the Board's statutory interpretation of MPRA's three tiers is nothing but a straw man. The Board never suggested that a federal agency should defer to a private party's *legal* interpretations.³⁴

³³ If anything, MPRA singles out UPS for *special protections*, not burdens. During the lead-up to the enactment of MPRA, UPS successfully lobbied for a provision (now codified at 29 U.S.C. § 305(e)(9)(D)(vii)) requiring separate treatment of benefits earned by certain of its employees. See AARP Comment, at 3; see also IBT Comment, at 7.

³⁴ Though deference has nothing to do with it, the Department has reached the same interpretation as the Board. See Prop. Treas. Reg. § 1.432(e)(9)-1(d)(8). Indeed, even the Pension Rights Center agrees with the Board that Tier II benefits need not be cut to the maximum extent permissible. It is only UPS—because of the financial consequences of its own undertakings—that disagrees. In its Application, the Board has fully explained the reasons why its interpretation of MPRA's three tiers is correct under the plain language of the statute, not least of which is the conspicuous absence of the phrase "to the maximum extent permissible" from Tier II. App., at 13.1.5. Other than circular logic, UPS's only explanation for the absence of this phrase from Tier II is that the phrase is unnecessary because Tier II includes "all other benefits that may be suspended under this paragraph[.]" UPS Comment, at 25-26. This does not follow. Each tier, of course, defines the *benefits* included within it. To state (correctly) that Tier II includes "all other benefits" not included in Tier I or Tier III, however, says nothing about the *extent* to which those benefits must be reduced. The phrase answers the question of "what benefits" but leaves unaddressed the question

UPS goes on to protest that its rights are somehow being violated by MPRA's clear error standard because the Board is concerned only with saving the Fund rather than with the "interests of withdrawn employers." UPS Comment, at 13. While it is indeed true that the Board has not sought to protect UPS (though some commenters maintain that the Board did not allocate *enough* benefit cuts to Tier III),³⁵ UPS is not an interested party in the eyes of MPRA. It is not even among the parties required to receive notice of the filing of a benefit suspension application. 29 U.S.C. § 1085(e)(9)(F)(i).³⁶ Quite unlike a statute that establishes plan trustees as the adjudicator of a plan's own claim against a withdrawing employer, MPRA neither creates any sort of claim against UPS by the Fund nor appoints the Board to adjudicate that claim. Nothing entitles UPS to have its interests taken into account by the Board, whose obligation is to the participants, let alone place those interests ahead of those of the participants relying on the Fund for their pension benefits.

Congress instructed Treasury to apply a clear error standard, the President signed that standard into law, and the rest of the Executive Branch must apply the law as written. If UPS is still convinced after approval of the Application that it has suffered a constitutional violation, it is free to try to convince a federal court of that view.

Ultimately, Central States and UPS agree on one point—that "the question of which standard of review applies is academic." UPS Comment, at 29. As noted above, the Application satisfies all requirements for approval regardless of whether the Department reviews it using a *de novo*, "clear error," or any other legal standard.

of "how much." Tier I includes "how much" language—"to the maximum extent permissible"—but Tier II is silent on this issue. The silence forbids us from reading in a requirement where Congress has not included one.

³⁵ See, e.g., PRC Comment, at 7; Comment of General Drivers, Warehousemen & Helpers Local Union No. 89, at 6-8.

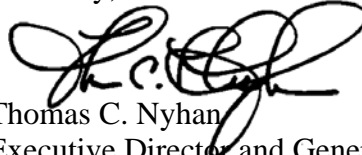
³⁶ Indeed, federal courts have typically concluded that employers fall outside of the zone of interests that ERISA seeks to protect. See, e.g., *Whitworth Bros. Storage Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, 794 F.2d 221, 224-33 (6th Cir. 1986) (analyzing legislative history of ERISA's civil enforcement scheme, collecting cases, and holding that ERISA provides an employer with neither an express nor an implied cause of action); *Cent. States, Se. & Sw. Areas Pension Fund v. Admiral Merchants Motor Freight, Inc.*, 511 F. Supp. 38, 47 (D. Minn. 1980), *aff'd sub nom. Cent. States, Se. & Sw. Areas Pension Fund v. Jack Cole-Dixie Highway Co.*, 642 F.2d 1122 (8th Cir. 1981) (rejecting an implied cause of action for employers under ERISA because, among other reasons, "ERISA was enacted for the especial benefit of participants in and beneficiaries of pension plans, and not for the especial benefit of employers."). Although MPRA nonetheless requires that contributing employers receive notice of a benefit suspension application, MPRA imposes that requirement only with respect to contributing employers, not withdrawn employers like UPS. 29 U.S.C. § 1085(e)(9)(F)(i)(II) (requiring notice to "each employer who has an obligation to contribute (within the meaning of section 1392(a) of this title) under the plan").

The Honorable Jacob J. Lew, Secretary of the Treasury
March 1, 2016
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VI. Conclusion

For all of these reasons, Central States respectfully requests that the Department approve the Application as submitted.

Sincerely,

A handwritten signature in black ink, appearing to read 'T.C. Nyhan', written in a cursive style.

Thomas C. Nyhan
Executive Director and General Counsel
Central States Southeast and Southwest Areas
Pension Fund

Exhibit A. Comparison of Expected Investment Returns

Asset Class	Application Arithmetic Return (A)	Application Geometric Return (B)	Horizon Survey Geometric Return (C)	Difference Highlighted in IBT Comments (A) – (C)	Difference Due to Different Presentation Basis (A) – (B)	Difference Due to Time Horizon and Actuarial Judgment (B) – (C)
Domestic Equity – Large Cap	9.75%	8.22%	7.81%	1.94%	1.53%	0.41%
Domestic Equity – Small / Mid Cap	9.75	8.22	8.18	1.57	1.53	0.04
Core Fixed Income	4.65	4.53	4.41	0.24	0.12	0.12
International Developed Market Equity	10.45	8.51	8.07	2.38	1.94	0.44
High Yield Fixed Income	7.50	6.76	6.33	1.17	0.74	0.43
Emerging Market Equity	12.75	10.28	9.00	3.75	2.47	1.28

- The majority of the differences between the expected returns in the Application and the Horizon survey are attributable to the fact that the Application figures are arithmetic averages and the survey figures are geometric averages, as opposed to being actual differences in the underlying expectations.
- The minority of the differences that actually represent different return expectations are attributable to (a) the survey figures are averages of 29 different investment advisors with a range of expectations and the Fund’s actuary’s professional judgment did not correspond to the exact middle of this range and (b) the expectations in the Application cover a longer time period than the average figures in the survey.