No. 18-___

IN THE

Supreme Court of the United States

TEAMSTERS LOCAL 210 AFFILIATED
HEALTH AND INSURANCE FUND,

Petitioner,

v.

LEON SILVERMAN, LOUIS FLACKS, PAUL BERKMAN,
JAMES CROWLEY, JANET SACHS AND HERBERT POBINER,
as TRUSTEES of the UNION MUTUAL MEDICAL FUND,

Respondents.

*On Petition For a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Second Circuit impermissibly expand the jurisdiction of LMRA § 301(a) and drastically alter national labor policy when it held that a union-sponsored benefit trust fund can be liable for violating collective bargaining agreements even though the trust fund is not a labor organization and was not a signatory or party to any of the agreements?

2. Can a union-sponsored medical and hospital benefit trust fund whose assets are held solely for the benefit of union members and their dependents be held liable under section 301(b) of the Labor Management Relations Act of 1947 for the misdeeds of their employers and union?

3. Does a district court have jurisdiction over a federal claim first pled on remand where all federal claims had been dismissed on appeal and the appellate court's mandate limited the district court's jurisdiction to exercising supplemental jurisdiction over the remaining state law claims?

LIST OF PARTIES

The caption of the case contains the names of all of the parties.

CORPORATE DISCLOSURE STATEMENT

Teamsters Local 210 Affiliated Health and Insurance Fund is a New York state trust created for the purpose of providing health and hospital benefits to the members of Teamsters Union No. 210, International Brotherhood of Teamsters, and their dependents. It has no parent or subsidiary corporations and issues no stock.

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I. OPINIONS BELOW

The Second Circuit's June 7, 2018 Amended Summary Order is available at 725 Fed. Appx. 79 (2d Cir. 2018). The district court's September 30, 2016, Opinion and Order is reported at 213 F. Supp.3d 519 (S.D.N.Y. 2016 and the Second Circuit's August 1, 2014, Opinion is reported at 761 F.3d 277 (2d Cir. 2014).

II. JURISDICTION

On June 7, 2018, the Second Circuit affirmed the September 30, 2016 Opinion and Order of the United States District Court for the Southern District of New York. The Second Circuit denied a petition for rehearing and rehearing *en banc* on August 1, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367(a). Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367 (b). In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title [28 USCS § 1332], the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332 [28 USCS § 1332].

28 U.S.C. § 1367 (c). The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
(1) the claim raises a novel or complex issue of State law,
(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

LMRA 301(a), 29 U.S.C. § 185(a). Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

LMRA 301(b), 29 U.S.C. § 185(b). Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

IV. STATEMENT OF THE CASE

This case involves a dispute between two union sponsored benefit trust funds, the Union Mutual Medical Fund ("UMMF"), and Teamsters Local 210 Affiliated Health and Insurance Fund ("the 210

Fund"). Teamsters Local Union 210 (the "Teamsters Union") and numerous employers entered into the collective bargaining agreements ("CBAs ") that are at dispute in this case. The CBAs required the employers to contribute money directly to the Allied Welfare Fund (AWF) to pay for medical benefits for union members and their dependents of two different unions, the Teamsters Union and the Allied Trades Council Union (the "ATC Union"). The CBAs provided that from out of the contributions to the AWF, $8.00 per employee, per week shall be paid to the UMMF. For years, the AWF accepted the contributions from the employers and made the $8.00 pass through to the UMMF. The AWF was not a signatory to any of the CBAs and did not participate in the negotiations of the labor contracts.

In March and April of 2006, the Teamsters Union, the ATC Union and the participating employers to the CBAs amended the contracts to reduce the amount of the pass through to the UMMF from $8.00 to $0.10. The 210 Fund did not play any role in amending the CBAs because it did not exist at the time. The CBAs were amended because the participating unions believed that the UMMF was violating the law by requiring retired union members to maintain a paid membership in another entity, the Union Mutual Benefit Association, in order to receive benefits from the UMMF. The Teamsters Union created its own retiree fund that provided these retirees with more benefits than the UMMF and did not require a paid membership in any organization to obtain any benefits. All of the employers that were parties to the CBAs agreed to amend the agreements to reduce the amount of the pass through to the UMMF.

On June 16, 2006, after the CBAs were amended, the 210 Fund was created to provide medical benefits to the members and their dependents of the Teamsters Union. On July 30, 2006, the Teamsters Union members and their dependents who received medical insurance from the AWF were transferred to the newly created 210 Fund. The AWF also transferred $22 million of its assets to the 210 Fund, and the 210 Fund assumed that portion of the AWF's liabilities it incurred from the Teamsters members' and dependents' participation in the AWF. The AWF retained all of its other liabilities, including any liabilities it may have incurred arising from the CBAs in effect before July 30, 2006.

A. The UMMF's Complaint and District Court's November 16, 2009 and January 9, 2013 Decisions.

On November 15, 2006, the UMMF filed a complaint in the Southern District of New York against the 210 Fund for allegedly violating ERISA §§ 502(a)(3) and 515. Section 502(a)(3) provides equitable remedies for violations of ERISA or an ERISA plan, and Section 515 obligates employers to make contributions to multiemployer plans in accordance with applicable collective bargaining agreements. The UMMF brought these claims against the 210 Fund in connection with the

Teamsters Union's and employer's reduction of the $8.00 pass through to the UMMF, even though the 210 Fund was not a signatory to any of the CBAs and had no role in amending the labor agreements. The UMMF did not name the Teamsters Union or any of the employers as defendants in their lawsuit, despite the fact that the union and the employers were the only signatories to the CBAs and were responsible for reducing the contributions to the UMMF called for in the contracts.

On January 9, 2013, the district court issued its final judgment on UMMF's claims against the 210 Fund by dismissing its Section 515 claim, ruling in favor of the UMMF on its Section 502(a)(3) claims and awarding the UMMF $2.4 million plus interest. *Silverman v. Miranda,* 918 F. Supp.2d 200, 212-19, 221 (S.D.N.Y. 2013). The 210 Fund appealed to the Second Circuit.

B. The Second Circuit's August 1, 2014 Decision and the August 28, 2014 Mandate.

On August 1, 2014, the Second Circuit affirmed the district court's dismissal of the ERISA § 515 claim and vacated the summary judgment award on the remaining two ERISA claims. *Silverman v. Teamsters Local 210 Fund*, 761 F.3d 277 (2d Cir. 2014). With respect to the ERISA § 515 claim, the Second Circuit held:

> Under no reading of the CBAs (pre-amendment or post-amendment) is the

> employer obligated to contribute any money to the UMM Fund. Not a single employer has been named as a defendant. Because the 210 Fund was not obligated to remit funds to the UMM Fund in the interest of an employer, the Section 515 claim was properly dismissed.

Id. at 286. The Second Circuit also held that the district court lacked subject matter jurisdiction over UMMF's Section 502(a)(3) claims because the UMMF failed to allege any violations of ERISA or an ERISA plan. *Id.* at 288. The Second Circuit held that there was no subject matter jurisdiction for the ERISA claims because the CBAs were not plan documents and did not fall within ERISA's jurisdiction. *Id.*

The Second Circuit also held that while the UMMF's first two causes of action failed to plead ERISA claims, they met the "pleading requirements for state law breach-of-contract claims." *Silverman,* 716 F.3d at 288. The Second Circuit noted that because a breach of contract claim was pleaded against a defendant who was later voluntarily dismissed from the action, the Amended Complaint recites supplemental jurisdiction as a proper basis for subject matter jurisdiction. *Id.* The Second Circuit then held:

> Therefore, rather than reverse and direct dismissal of all the UMM Fund's claims, we vacate the award to the UMM Fund and remand for the district court

> to consider whether to exercise supplemental jurisdiction over the first two claims, construed as alleging state law breach of contract. The district court has discretion to retain supplemental jurisdiction over such claims after it (properly) dismissed the Section 515 claim.

Id.

In a footnote, the Second Circuit stated that "[t]reating the remaining claims as contract claims rather than ERISA claims is no mere formality. The 210 Fund may enjoy additional defenses to state law claims for breach of contract, including ERISA preemption. We express no view on the merits of such a defense." *Id.* at 289.[1] At the time that the matter was remanded to the district court, all of the UMMF's federal claims had been dismissed for lack of subject matter jurisdiction and the only remaining claims were possible state law breach of contract claims.

C. The District Court's Decisions on Remand

On remand, the district court decided to exercise supplemental jurisdiction over the UMMF's state law breach of contract claims, and the parties cross moved for summary judgment. The 210 Fund

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[1] It is unclear how the Second Circuit thought that ERISA preemption could apply since all the ERISA claims had been dismissed.

moved to dismiss the state law breach of contract claims on preemption grounds based on LMRA § 301. The district court granted the 210 Fund's motion, dismissed the state law claims and granted the UMMF leave to file a Second Amended Complaint. Eleven years after this action began, the UMMF was allowed to plead new federal claims under LMRA §301, despite the fact that the Second Circuit remanded the matter for the sole purpose of exercising supplemental jurisdiction over state law breach of contract claims.

The 210 Fund moved to dismiss the Second Amended Complaint and the new LMRA § 301 claim on numerous grounds, including that the district court lacked subject matter jurisdiction under LMRA § 301 because the 210 Fund was not a signatory or party to the CBAs. The district court rejected the 210 Fund's arguments and granted the UMMF summary judgment on the LMRA § 301 claims. According to the district court, the 210 Fund could be held "accountable under the CBAs because, while not a signatory, [it] accepted their obligations under relevant CBAs to accept funds from the Contributing Employers and then remit a certain percentage of such funds to Plaintiff UMMF." *Silverman v. Miranda*, 213 F.Supp.3d 519, 525 (S.D.N.Y. 2016) q*uoting Fishbein v. Miranda,* 670 F.Supp.2d 264, 273-74 (S.D.N.Y. 2009). In *Fishbein*, the district court relied on a host of cases that dealt with breaches of ordinary state law contracts for the purchase of goods and services and not case law dealing with labor agreements under LMRA § 301. The district court overlooked well-settled law that CBAs are not ordinary contracts for the purchase of goods and services that are governed by common law concepts. *See, e.g., Transportation-Communication Employees Union v. Union P.R.* 385 U.S. 157, 160 (1996).

D. The Second Circuit's June 7, 2018 Amended Summary Order

The Second Circuit affirmed the district court's award of summary judgment to the UMMF and rejected the 210 Fund's argument that the district court lacked subject matter jurisdiction under LMRA § 301 because the 210 Fund was not a signatory to the CBAs. The Second Circuit agreed with the district court and held that the AWF became a party to the contracts when it performed the obligations described in the CBAs and manifested an intent to be bound by the contracts, including the obligation to remit payments to the UMMF. The Second Circuit further reasoned that the 210 Fund became liable under the CBAs when it became the successor-in-interest to the AWF. The Second Circuit rejected the 210 Fund's argument that, like all union sponsored benefit funds, it was simply an intermediary that followed the directions of the contracting parties, the union and the employers, by accepting and disbursing the contributions from the employers. The Second Circuit affirmed the district court's finding that the 210 Fund was an actual party to the CBAs, despite the fact that it never signed the contracts, participated in the negotiations of the agreements or made any enforceable promises in exchange for consideration.

The Second Circuit's decision also impermissibly expanded the jurisdictional reach of LMRA § 301(a), which is limited to labor organizations and does not include union sponsored benefit trust funds.

The Second Circuit also rejected the 210 Fund's argument that the district court lacked original federal jurisdiction under the Second Circuit's August 28, 2014 mandate to grant the UMMF's motion to add a federal LMRA Section 301 claim to its pleadings and subsequently rule in favor of the UMMF on that claim.

To be discussed in greater detail below, the Second Circuit's decision is worthy of review by this Court for the following reasons**:**

1. The Second Circuit impermissibly expanded the jurisdiction of LMRA § 301(a) to include union sponsored benefit trust funds as defendants. The plain language of LMRA § 301(a) makes clear that the statute's reach is limited to law suits for violations of contracts between employers and labor organizations. The 210 Fund is a trust fund that provides health benefits to Teamsters members; it is not a labor organization that represents union members in connection with grievances, labor disputes, wages or other working conditions, as that term is defined in the LMRA.

2. The Second Circuit's decision drastically alters national labor policy in the United States by holding that a union sponsored benefit trust fund can

become an actual party to a CBA and be responsible for the actions of a union and contributing employers.

3. The Second Circuit's decision conflicts with the plethora of case law from numerous circuits that hold that LMRA § 301 actions are limited to claims against the signatories of CBAs, the employers and the union, who are the only entities that fall within the reach of the statute's remedial scheme.

4. The Second Circuit decision is directly at odds with this Court's decision in *Lewis v. Benedict Coal Corp,* 361 U.S. 459, 471 (1960), which held that a third-party action against a union sponsored trust fund is prohibited under LMRA § 301(b) since a judgment against the trust fund would effectively be a judgment against the individual members of the union that the fund benefits.

5. Review of the Second Circuit's decision affirming the district court's impermissible exercise of original jurisdiction over the UMMF's federal LMRA Section 301 claim first pled on remand where the Second Circuit's August 28, 2014 mandate limited the district court's jurisdiction to exercising supplemental jurisdiction over the remanded state law breach of contract claims will resolve the split among the circuits on whether an appellate court's mandate is jurisdictional or a discretionary practice in the administration of justice.

6. Review will also serve the interest of preserving the hierarchical structure of the federal

court system with the reaffirmation of this Court's holding in *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948).

V. REASONS FOR GRANTING THE WRIT

A. THE SECOND CIRCUIT IMPERMISSIBLY EXPANDED THE JURISDICTION OF LMRA § 301(a) AND DRASTICALLY ALTERED NATIONAL LABOR POLICY WHEN IT HELD THAT A UNION-SPONSORED BENEFIT TRUST FUND CAN BE LIABLE FOR VIOLATING COLLECTIVE BARGAINING AGREEMENTS EVEN THOUGH THE TRUST FUND IS NOT A LABOR ORGANIZATION AND WAS NOT A SIGNATORY OR PARTY TO ANY OF THE LABOR AGREEMENTS

Collective bargaining is a key component of the organized labor world that is designed to prevent labor strife and interference with the free flow of commerce in the United States. Collective bargaining is defined as negotiations between employers and unions aimed at obtaining agreements to regulate wages, working hours, health and safety, benefits and grievance mechanisms. The parties refer to the result of the negotiations as a collective bargaining agreement ("CBA"), or labor contract between an employer and a union.

Section 1 of the National Labor Relations Act of 1935 declared it "to be the policy of the United States to eliminate the causes of substantial obstructions to the free flow of commerce. . . by encouraging the practice and procedure of collective bargaining . . .." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578 (1960). In 1947, Congress enacted Section 301 of the Labor Management Relations Act ("LMRA") to provide federal district courts with jurisdiction over suits involving CBAs. This Court has held that Section 301 does not merely grant federal courts jurisdiction over contract actions involving CBAs, but that Congress envisioned the development of an entire body of federal common law designed to reflect the unique nature of labor-management contracts. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 48 (1957).

LMRA § 301(a) provides that the reach of the statute is limited to suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. A labor organization is an entity that represents employees and exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work. 29 U.S.C. 152(5). A union sponsored benefit trust fund, like the 210 Fund, is not a labor organization because it does not represent employees or negotiate with employers for wages, benefits, working conditions or anything else on behalf of employees. Union sponsored benefit trust funds are created to hold the contributions from employers that are required under CBAs to pay for benefits for employees, such as health insurance and pensions. Union sponsored benefit trust funds do not participate in the collective bargaining process and they are never signatories to CBAs. Because they are not actual parties to the CBAs, they are not responsible for any of the obligations set forth in the labor agreements. The only parties that can be liable under a CBA are the employers and the union who negotiated and signed the agreement.

The Second Circuit's decision drastically alters well-settled national labor policy to allow union sponsored benefit trust funds to be liable under CBAs for the actions of a union and employers after they collectively decided to amend the labor contracts. The Second Circuit's decision is also at odds with this Court's holding in *Lewis v. Benedict Coal,* 361 U.S. 459 (1960), which prohibits third-party actions and money judgments under LMRA § 301(b) against union trust funds.

1. The 210 Fund is not a Labor Organization

It is a fundamental precept that federal courts are courts of limited jurisdiction and lack the power to disregard such limits as have been imposed by the Constitution or Congress. *See, e.g., Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375, 377 (1994); *Willy v. Coastal Corp.,* 503 U.S. 131,136-37 (1992); *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 541 (1986); *Owen Equip & Erectio Co. v. Kruger,* 437 U.S. 365, 374 (1978). It is to be presumed that a cause lies outside a federal court's limited jurisdiction, and the burden on establishing the contrary rests upon the party asserting jurisdiction. *Kokkonen,* 511

U.S. at 377. Federal courts have an independent obligation to determine if subject matter jurisdiction exists, even in the absence of a challenge from any party. *Arbaugh v. Y&H Corp.,* 546 U.S. 500, 514 (2006). As this Court noted in *Arbaugh,* subject matter jurisdiction can never be waived or forfeited. *Id.*

LMRA § 301(a) provides that suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce may be brought in any district court of the United States. 29 U.S.C. § 185(a). Congress limited the reach of LMRA § 301 actions to violations of labor agreements involving two classes of entities: employers and labor organizations. Because the 210 Fund is neither an employer nor a labor organization, it cannot be held liable under LMRA § 301. According to the LMRA,

> Labor organization means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, rates of pay, hours of employment, or conditions of work.

29 U.S.C. 152(5).[2]

The 210 Fund is not a "labor organization" because it does not deal with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of work. *See, e.g., Waugh Chapel South LLC v. United Food and Commer. Workers Union Local 27,* 728 F.3d 354, 361 (4th Cir. 2013) (Joint Management Fund not a "labor organization" under LMRA); *Teamsters Local Union No. 469 v. Teamsters Joint Council No. 73 Pension Fund*, 14-7466, 2015 U.S. Dist. Lexis 127144, at *11-12 (D. N.J. Sept. 22, 2015) (court lacked jurisdiction over union pension fund under LMRA § 301 because it was not a labor organization); *Trs. of the Operating Eng'Rs Pension Trust v. Tab Constrs.*, 224 F. Supp. 1272, 1279 (2002) (court lacked jurisdiction under LMRA § 301 over union health and pension funds because they were not labor organizations). Rather, the 210 Fund is a trust created by the Teamsters Union to provide its members and their dependents with health insurance benefits. *See* 29 U.S.C. § 402(l) ("Trust in which a labor organization is interested" means a trust or other fund or organization created or established by a labor organization or one or more of its trustees whose primary purpose is to provide benefits to the members of the labor organization or their beneficiaries); *see also United States v. Ferrara*, 451 F.2d 91, 94 (2d Cir. 1971) (retirement plan trusts

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[2] The definition of "labor organization" in the LMRA mirrors that term in other federal statutes. See e.g., 29 U.S.C. § 402(i) (Labor Management Reporting and Disclosure Act of 1959 or LMRDA); 42 U.S.C. § 2000e(d) (Title VII).

are not included in the definition of labor organization under the LMRDA).

The Second Circuit erred and impermissibly expanded the jurisdiction of LMRA § 301(a) when it held that the 210 Fund was an "actual party" to the CBAs and was liable under LMRA § 301.

2. The Second Circuit's Summary Order Conflicts with Well-Settled Law Regarding the Jurisdictional Reach of LMRA § 301

The Second Circuit's decision also conflicts with numerous decisions from circuits throughout the country that hold that LMRA § 301 claims are limited to defendants who are signatories to the CBAs. *See, e.g. Ramsey v. Signal Delivery Svc., Inc.*, 631 F.2d 1220, 1221(5th Cir. 1980); *Int'l Union, United Mine Workers of Am. v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992); *Loss v. Blankenship*, 673 F.2d 942, 946 (7th Cir. 1982); *Gorenflo v. Penske Logistics*, 592 F. Supp.2d 300, 306 (N.D.N.Y. 2009); *Duane Reade v. Allied Trades Council*, 04 Civ. 3542, 2005 U.S. Dist. LEXIS 29690, at *15 (S.D.N.Y. Oct. 7, 2005). In the labor world, it is well known that the only signatories to CBAs are the contributing employers and the labor organization, which is usually the union representing and negotiating for its members. Union sponsored benefit trust funds do not participate in the negotiation of CBAs and they are never parties to the agreements, by their conduct or otherwise. Section 301 claims are limited to the signatories of the CBAs because only those two classes of entities, employers and labor organizations, fall within the jurisdiction of LMRA § 301(a).

The 210 Fund cannot fall within the jurisdictional reach of LMRA § 301(a) even if it assumed the contractual obligations of the AWF, as the Second Circuit held. Like the 210 Fund, the AWF is also a union sponsored benefit trust fund and not a labor organization. Regardless of the AWF's actions in allegedly complying with the terms of the CBAs by making the $8.00 pass through to the UMMF, the AWF does not fall within the reach of LMRA § 301(a) because, like the 210 Fund, it is not a labor organization. Since the AWF cannot be liable under LMRA § 301(a), it follows that the 210 Fund cannot be liable as the AWF's "successor-in-interest."

B. A UNION-SPONSORED MEDICAL AND HOSPITAL BENEFIT TRUST FUND WHOSE ASSETS ARE HELD SOLELY FOR THE BENEFIT OF UNION MEMBERS AND THEIR DEPENDENTS CANNOT BE HELD LIABLE UNDER SECTION 301(b) OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 FOR THE MISDEEDS OF THEIR EMPLOYERS AND UNION

The Second Circuit's decision also conflicts with this Court's holding in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 471 (1960), which prohibits third-party actions and money judgments under LMRA § 301(b) against union trust funds. Section 301(b) of the Taft-Hartley Act provides that "any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual or his assets." 29 U.S.C. § 185(b).

In *Lewis,* this Court held that a third-party action against union trust funds was prohibited "since a judgment against the Funds would effectively be a judgment against the individual members of the union that the Funds benefit. *Lewis,* 361 U.S. at 369. When Congress enacted LMRA § 301(b) it intended that "the union as an entity, like a corporation, should in the absence of an agreement be the sole source of recovery for injury inflicted by it." *Id.* at 471. The Second Circuit's decision conflicts with *Lewis* because it holds the beneficiaries of the 210 Fund responsible for the injuries inflicted by the union when it amended the CBAs and reduced the pass through to the UMMF. The Second Circuit's decision will open the flood gates for lawsuits against union benefit trust funds for actions committed by unions or contributing employers in connection with CBAs. The Second Circuit's decision cannot be reconciled with this Court's holding in *Lewis.*

C. A DISTRICT COURT DOES NOT HAVE JURISDICTION OVER A FEDERAL CLAIM FIRST PLED ON REMAND WHERE ALL FEDERAL CLAIMS HAD BEEN DISMISSED ON APPEAL AND THE APPELLATE COURT'S MANDATE LIMITED THE DISTRICT COURT'S JURISDICTION TO EXERCISING SUPPLEMENTAL JURISDICTION OVER THE REMAINING STATE LAW CLAIMS.

The following question is presented for this Court's review: may an appellate court's mandate limit a district court's authority for exercising supplemental jurisdiction where all federal claims have been disposed of on appeal? The 210 Fund respectfully submits that a mandate may limit a district court's jurisdiction on remand when all federal claims have been dismissed and the appellate court specifically states that the claims being remanded are state law breach of contract claims. The 210 Fund also respectfully submits that this question is worthy of review because its disposition will (a) resolve a split among the circuit courts of appeal as to whether a mandate is jurisdictional or a discretion-guiding practice; (b) clarify the scope of the mandate rule; and (c) serve the interests of preserving the hierarchical structure of the federal court system.

As described in the Statement of the Case, the Second Circuit affirmed in its August 1, 2014 Opinion the district court's dismissal of the UMMF's ERISA § 515 claim and held that the district court lacked subject matter jurisdiction over the UMMF's remaining two federal claims, leaving only state law breach of contract claims to be decided on remand. *Silverman*, 761 F.3d at 288. Appx D. On remand, the district dismissed the UMMF's state law breach of contract claims on LMRA preemption grounds, but granted the UMMF's motion to amend its pleadings to add an LMRA breach of labor agreement claim. The district court in its September 30, 2016 decision granted the UMMF's motion for summary judgment on its newly pled LMRA claim and awarded the UMMF $2,460,777.33 in damages plus interest. *Silverman v. Miranda*, 213 F. Supp.3d 519, 530 (S.D.N.Y. 2016), Appx B. The 210 Fund appealed.

On June 7, 2018, the Second Circuit affirmed the district court's ruling on the UMMF's LMRA claim, holding that "[n]othing in our opinion restricted the district court from considering LMRA preemption." *Silverman v. Teamsters Local 210 Fund*, 725 Fed. Appx. 79, 81 (2d Cir. Aug. 1, 2018), Appx. A. The Second Circuit's reasoning missed the mark for two reasons. First, the 210 Fund's appeal did not seek to restrict the district court from considering LMRA preemption. On the contrary, LMRA preemption was the 210 Fund's principal argument for successfully defeating the UMMFs state law breach of contract claims. *See Silverman v. Miranda*, 116 F. Supp. 3d 289, 306 (S.D.N.Y. 2015) (concluding that "[d]efendant's motion for Summary Judgment as to preemption for breach of contract claims under LMRA Section 301 is granted"). Second, the Second Circuit never addressed the issue actually raised by the 210 Fund in its appeal. That is, whether the

Second Circuit's August 28, 2014, mandate precluded the district court from exercising original jurisdiction in granting the UMMF's motion to add a Section 301 claim to its pleading and then ruling in favor of the UMMF on its Section 301 claim. Appx C.

In remanding the case back to the district court, the Second Circuit made several significant points in its August 1, 2014 opinion to indicate that the district court's jurisdiction was limited to exercising supplemental jurisdiction over the state law breach of contract claims. First, it was remanding a case where all federal claims had been dismissed. *Silverman v. Teamsters Local 210 Fund,* 761 F.3d 277, 288 (2d Cir. 2014). Second, the Second Circuit pointedly stated that it would have reversed the district court's judgment and dismissed all the claims if the UMMF's pleadings could not be construed to make out a claim for state law breach of contract. *Silverman,* 761 F.3d at 288. Third, the Second Circuit emphasized that "treating the remaining claims as contract claims rather than ERISA claims is no mere formality [and that the] 210 Fund may enjoy additional defenses to state law claims for breach of contract, including ERISA preemption." *Id* at n.5. Fourth, the only discretion given to the district court in the Second Circuit's instructions was "to consider whether to exercise supplemental jurisdiction over the first two claims, construed as alleging state law breach of contract." *Id.*

It is ancient law that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948) (citing *Himely v. Rose*, 9 U.S. 313, 317 (1809); *see also Kansas City Southern R. Co. v. Guardian Trust Co.*, 281 U.S. 1, 10(1930); *Ex Parte Union Steamboat Company*, 178 U.S. 317, 319 (1900); *In re Washington &Georgetown R. Co., 140 U.S. 91, 97) (1891)*; *The Santa Maria*, 23 U.S. 431,446 (1825). The issue before the Court in *Briggs* was whether the mandate of the Court of Appeals allowed the district court to award interest to the plaintiff where the mandate made no provision for such interest. In the opinion written by Justice Jackson, this Court held that the district did not have such discretion:

> It is clear that the interest was in excess of the terms of the mandate and hence was wrongly included in the District Court's judgment and rightly stricken out by the Circuit Court of Appeals. The latter court's mandate made no provision for such interest and the trial court had no power to enter judgment for an amount different than directed. If any enlargement of that amount were possible. It could be done only by amendment of the mandate.

Briggs, 334 U.S. at 306. The mandate rule contemplated under *Briggs* left little or no discretion to the district court to deviate from the terms of a superior court's mandate

Under current practice, the progeny of *Briggs* may be found in those courts that view their respective mandate rules as jurisdictional. *See, e.g., United States v. Thrasher*, 483 F.3d 977, 982 (9th Cir. 2007)(describing "mandate as limiting the district court's authority on remand, which is jurisdiction language"); *Seese v. Volkswagenwerk, A.G.*, *Eutectic Corp. v. Metco, Inc.*, 679 F.2d 336, 337 (3d Cir. 1982)("district court is without jurisdiction to alter the mandate of this court"); *Tapco Products Co. v. Van Mark Products Corp.*, 466 F.2d 109, 110 (6th Cir. 1972)("the District Court was without jurisdiction to modify or change the mandate"); *United States v. Tamayo*, 80 F.3d 1514, 1520 (11th Cir. 1996)(district courts cannot "assert jurisdiction over matters outside the scope of a limited mandate")

Four other circuits, however, have departed from this Court's precedent in *Briggs* in holding that their mandates are not jurisdictional. *See, e.g., United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002) (mandate "is not a jurisdictional rule, but a discretionary practice"); *Tronzo v. Bromet, Inc.*, 236 F.3d 1342, 1349 (Fed. Cir. 2001)(mandate rule "better viewed as prudential doctrine that directs a court's discretion, but does not necessarily limit a court's power"); *United States v. Gama-Bastidas*, 222 F.3d 779, 784 (10th Cir. 2000)("mandate rule is [not] jurisdictional. . . [it] is a discretion-guiding rule"); United *States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993) (mandate rule "is a discretion-guiding rule")

Despite the characterization of their respective mandate rules as a discretion-guiding practice, some of these courts have in practice cast their mandates in jurisdictional terms without using the term "jurisdiction." *See, e.g., Deutsche Bank Nat'l Trust Co. v. Burke*, No. 18-20026, 2018 U.S. App. LEXIS 25196 at *5 (5th Cir. Sept. 5, 2018)(mandate rule requires a district court on remand to effect our mandate and to do nothing else"); *Tec Sec, Inc. v. IBM*, 731 F.3d 1336, 1341-42 (Fed. Cir. 2013)("[a]fter our mandate issues, the mandate rule forecloses reconsideration of issues implicitly or explicitly decided on appeal"); *United States v. Correy*, 773 F.3d 276, 281 (1st Cir. 2014)("mandate rule … requires a district court to follow the decisions of a higher court").

The 210 Fund respectfully submits that if this Court grants the petition, the Second Circuit's June 7, 2018, decision would likely be reversed under this Court's holding in *Briggs* and the mandate rules of the Third, Sixth, Ninth and Eleventh Circuits. The 210 Fund respectfully urges this Court to grant its writ and review the Second Circuit's June 7, 2018 decision upholding the district court's exercise of original federal jurisdiction over the UMMF's LMRA claim. The Second Circuit's decision is worthy of review because it will resolve the conflict among the circuits as to whether an appellate mandate is jurisdictional or a discretion-guiding practice. The mandate issue is also worthy of review because it seeks to preserve the hierarchical structure of the federal court system through the reaffirmation of this Court's holding in *Briggs*.

VI. CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this 30th day of October, 2018.

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APPENDIX

APPENDIX A --- AMENDED SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JUNE 7, 2018

Silverman v. Teamsters Local 210 Affiliated Health and Ins. Fund, 725 Fed. Appx. 79
United States Court of Appeals for the Second Circuit
June 6, 2018, Decided; June 7, 2018, Filed
Nos. 17-1184, 17-1480
Reporter
725 Fed. Appx. 79 * | 2018 U.S. App. LEXIS 15178 ** | 2018 WL 2715103

LEON SILVERMAN, AS A TRUSTEE OF THE UNION MUTUAL, Plaintiff-Appellee-Cross-Appellant, LOUIS FLACKS, TRUSTEE OF THE UNION MUTUAL MEDICAL FUND, PAUL BERKMAN, TRUSTEE OF THE UNION MUTUAL MEDICAL FUND, UNION MUTUAL MEDICAL FUND, JAMES CROWLEY, TRUSTEE OF THE UNION MUTUAL MEDICAL FUND, Plaintiffs-Counter-Defendants-Appellees-Cross-Appellants, JANET SACHS, TRUSTEE OF THE UNION MUTUAL MEDICAL FUND, HERBERT POBINER, TRUSTEE OF THE UNION MUTUAL MEDICAL FUND, Plaintiffs-Counter-Defendants-Appellants, v. TEAMSTER LOCAL 210

Appendix A

AFFILIATED HEALTH AND INSURANCE FUND, Defendant-Appellant-Cross-Appellee.2

Notice:
PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.
Counsel: Appearing for Appellant: Roland R. Acevedo (Thomas A. Thompson, Yarmouth, Maine, on the brief), New York, N.Y.

Appearing for Appellee: Robert J. Kipnees, Lowenstein Sandler LLP (Michael A. Kaplan, on the brief), New York, N.Y.

Judges: Present: ROSEMARY S. POOLER, RAYMOND J. LOHIER, JR., Circuit Judges, RICHARD J. SULLIVAN, District Judge.

Opinion

[*80] AMENDED SUMMARY ORDER
ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is

AFFIRMED.

Appendix A

The trustees of Teamsters Local 210 Affiliated Health and Insurance Fund and Teamsters Local 210 Affiliated Health and Insurance Fund (collectively, "210 Fund") appeal from the October 3, 2018 opinion and order of the United States District Court for the Southern District of New York (Ramos, J.) granting summary judgment to the trustees of the Union Mutual Medical Fund and the Union Mutual Medical Fund (collectively, "UMMF"). The district court awarded UMMF $2,460,777.33, resolving a decade-long litigation regarding which of the two employee benefit funds were entitled to certain contributions made by employers pursuant to a number of collective bargaining agreements. The district court also awarded UMMF $1,246,211.80 in prejudgment interest, plus post-judgment interest. The 210 Fund moved for reconsideration of the calculation of prejudgment interest and the district court denied the motion on April 10, 2017. The 210 Fund also appeals from that decision. The UMMF cross appeals from the district court's July 23, 2015 decision that its state law claims were preempted by the Labor Management Relations Act ("LMRA"). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

The 210 Fund argues that in allowing UMMF to amend its complaint to assert claims under the LMRA, the district court violated this Court's mandate in Silverman [*81] v. Miranda, 761 F.3d 277 (2d Cir. 2014). The 210 Fund argues the mandate limited the district court to consider only whether to exercise supplemental jurisdiction over UMMF's state law claims. Once the district court concluded that those claims were preempted by the LMRA, the 210 Fund argues, that should have ended the district court's inquiry.

"We determine de novo the meaning of a previous mandate of this Court." Brown v. City of New York, 862 F.3d 182, 184 (2d Cir. 2017). It is well-settled that a district court cannot stray from the mandate issued by an appellate court, such that "[w]here a mandate limits the issues open for consideration on remand, a district court cannot ordinarily consider additional issues." Puricelli v. Argentina, 797 F.3d 213, 218 (2d Cir. 2015). "We consider both the express terms and broader spirit of the mandate to ensure that its terms have been scrupulously and fully carried out." Id. (internal quotation marks omitted). However, "the mandate is controlling only as to matters within its compass." Statek Dev. Corp. v. Dev. Specialists, Inc., 809 F.3d 94, 98 (2d Cir. 2015) (internal quotation marks omitted).

Appendix A

"When the mandate leaves issues open, the lower court may dispose of the case on grounds not dealt with by the remanding appellate court." Id.

The district court did not impermissibly exceed the scope of this Court's mandate on remand. The mandate here directed the district court to conduct "further proceedings in accordance with the opinion of this Court." Silverman, 761 F.3d at 288. Nothing in our opinion restricted the district court from considering LMRA preemption, so the district court did not violate our mandate when it exercised its discretion to permit amendment of the complaint. See Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co., 762 F.3d 165, 175-76 (2d Cir. 2014) (where appellate court does not consider an issue, mandate rule does not preclude the district court from deciding the case on alternate grounds).

[*82] We also reject the 210 Fund's argument that the district court lacked subject matter jurisdiction under Section 301 of the LMRA because the 210 Fund was not a signatory to the underlying collective bargaining agreements ("CBAs"). See, e.g., Loss v. Blankenship, 673 F.2d 942, 946 (7th Cir. 1982) (HN3 "[C]ourts construing the statute have held that [Section] 301(a) does not provide the basis for an LMRA claim against a nonparty to the

underlying collective bargaining agreement."); see also id. at 946-47 (collecting cases). Here, however, the 210 Fund was a party to the CBAs. The Allied Welfare Fund ("AWF") became a party when it performed that obligations prescribed to it in the CBAs and "manifested an intent to be bound" by the CBAs, including the obligation to remit payments to the UMMF. See MBIA Ins. Corp. v. Royal Bank of Canada, 706 F. Supp. 2d 380, 396-98 (S.D.N.Y. 2009); see also RUS, Inc. v. Bay Indus., Inc., 322 F. Supp. 2d 302, 2004 WL 1240578, at * 20 (S.D.N.Y. 2004) [**5] ; aff'd sub nom. Recticel Foam Corp. v. Bay Indus., Inc., 128 F. App'x 798 (2d Cir. 2005) (summary order). The 210 Fund, which described itself as a successor-in-interest to the AWF, see Fishbein v. Miranda, 670 F. Supp. 2d 264, 273 n.3 (S.D.N.Y. 2009), became a party to the CBAs when it assumed the obligations of the AWF. See Burden v. Robertson, 7 F.2d 266, 268 (2d Cir. 1925) ("No one doubts that one may assume a contract which he did not originally make . . . ."). Contrary to what the 210 Fund argues, it was not simply an intermediary—it was a party. As such [**6] the UMMF, as a third-party beneficiary of the CBAs, was entitled to enforce the CBAs against the 210 Fund pursuant to Section 301. Further, there is no merit to the 210 Fund's argument that the district court erred when it refused to recalculate pre-judgment interest. The

210 Fund abandoned any objection it could have made to the district court's April 10, 2017 order because its opening brief fails to address the principal dispositive ground on which the district court based its decision to deny the motion, and because we see no manifest injustice in the result. See, e.g., Garcia v. Hartford Police Dep't, 706 F.3d 120, 130-31 (2d Cir. 2013).

We affirm the district court's judgment for the reasons set forth in the several thorough opinions below. As to UMMF's cross-appeal, the district court correctly applied Supreme Court precedent in dismissing UMMF's state law claims as preempted by the LMRA.

We have considered the remainder of the arguments made by the 210 Fund and UMMF and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

Footnotes

- 2

The Clerk of the Court is directed to amend the caption as above.

- 1

Judge Richard J. Sullivan, United States District Court for the Southern District of New York, sitting by designation.

APPENDIX B --- OPINION AND ORDER OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 30, 2016.

Silverman v. Miranda, 213 F. Supp. 3d 519

United States District Court for the Southern District of New York

September 30, 2016, Decided; September 30, 2016, Filed

06 Civ. 13222 (ER)

Reporter
213 F. Supp. 3d 519 * | 2016 U.S. Dist. LEXIS 136902 ** | 2016 WL 5793395

LEON SILVERMAN, JAMES CROWLEY, JANET SACHS, HERBERT POBINER, LOUIS FLACKS, and PAUL BERKMAN, as Trustees of the Union Mutual Medical Fund, and UNION MUTUAL MEDICAL FUND, Plaintiffs, -against- GEORGE MIRANDA, ROBERT BELLACH, ANTHONY CERBONE, and MARTIN SHEER, as Trustees of the Teamsters Local 210 Affiliated Health and Insurance Fund, and TEAMSTERS LOCAL 210 AFFILIATED HEALTH AND INSURANCE FUND, Defendants.

Appendix B

Subsequent History: Reconsideration denied by, Sanctions disallowed by Silverman v. Miranda, 2017 U.S. Dist. LEXIS 54367 (S.D.N.Y., Apr. 7, 2017)

Prior History: Fishbein v. Miranda, 670 F. Supp. 2d 264, 2009 U.S. Dist. LEXIS 107286 (S.D.N.Y., Nov. 16, 2009)

Counsel: _For Trustee James Crowley of the Union Mutual Medical Fund, Trustee Louis Flacks, of the Union Mutual Medical Fund, Trustee Paul Berkman, of the Union Mutual Medical Fund, Union Mutual Medical Fund, Plaintiffs: Robert J. Kipnees, LEAD ATTORNEY, Lowenstein Sandler PC, Roseland, NJ; John Albert Fialcowitz, Michael Andrew Kaplan, Lowenstein Sandler LLP (NJ), Roseland, NJ.

For Leon Silverman as a trustee of the Union Mutual, Plaintiff: Robert J. Kipnees, LEAD ATTORNEY, Lowenstein Sandler PC, Roseland, NJ; Michael Andrew Kaplan, Lowenstein Sandler LLP (NJ), Roseland, NJ.

PLAINTIFFS, Leon Silverman, James Crowley, Janet Sachs, Herbert Pobiner, Louis Flacks and Paul Berkman, as TRUSTEES of the Union Mutual Medical Fund, and the UNION MUTUAL MEDICAL FUND, Plaintiff, Pro se.

Appendix B

For John Does 1-6 in their capacities as Trustees of Treamsters Local 210 Affiliated Health and Insurance Fund and Crossroads Healthcare Management, LLC, Defendant: Thomas Albert Thompson, LEAD ATTORNEY, Thomas A. Thompson, Law Offices, Yonkers, NY.

For Crossroads Healthcare Management, LLC., Defendant: Roland Richard Acevedo, Seiff Kretz & Abercrombie, New York, NY.

For Trustee Robert Bellach in his capacity as Trustee of Teamsters [**2] Local 210 Affiliated Health and Insurance Fund, Trustee Anthony Cerbone in his capacity as Trustee of Teamsters Loccal 210 Affiliated Health and Insurance Fund, Defendants: Thomas Albert Thompson, LEAD ATTORNEY, Thomas A. Thompson, Law Offices, Yonkers, NY; Roland Richard Acevedo, Seiff Kretz & Abercrombie, New York, NY.

For Crossroads Healthcare Management, LLC., Counter Claimant: Roland Richard Acevedo, Seiff Kretz & Abercrombie, New York, NY.

For Trustee Louis Flacks of the Union Mutual Medical Fund, Trustee Paul Berkman of the Union Mutual Medical Fund, Union Mutual Medical Fund, Trustee

Appendix B

James Crowley of the Union Mutual Medical Fund, Counter Defendants: Robert J. Kipnees, LEAD ATTORNEY, Lowenstein Sandler PC, Roseland, NJ.

Judges: Edgardo Ramos, United States District Judge.

Opinion by: Edgardo Ramos

Opinion

[*520] OPINION AND ORDER

Ramos, D.J.:

This is a decade-long dispute between two employee benefit funds concerning the right to contributions made by employers pursuant to a number of collective bargaining agreements ("CBAs"). Plaintiffs are the trustees of the Union Mutual Medical Fund ("UMMF") and the UMMF (collectively, "Plaintiffs"), and Defendants are the trustees of the Teamsters Local 210 Affiliated Health and Insurance Fund ("Local 210 Fund") and the Local 210 Fund (collectively, "Defendants"). After significant motion practice, various rulings by this Court, and an appeal to the Second Circuit Court of Appeals, Plaintiffs filed a Second Amended Complaint on August 13, 2015, alleging that Defendants failed to remit to Plaintiffs certain employer contributions as required by the

CBAs, in violation [*521] of Section 301 of the Labor Management Relations Act ("LMRA"). Pending before the Court are the parties' cross-motions for summary judgment. For the reasons set forth below, Plaintiffs' motion for summary judgment is GRANTED in part and DENIED in part, and Defendants' motion for summary judgment is DENIED.

I. BACKGROUND1

Plaintiff UMMF is a collectively bargained group health plan under the Employee Retirement Income Security Act of 1974 ("ERISA") that was established to obtain and provide medical benefits to its participants and beneficiaries. Pls.' 56.1 ¶ 1. The UMMF's participants and beneficiaries primarily consist of the retired members of two unions, the Allied Trades Council and the International Brotherhood of Teamsters Local Union 210 ("Local 210 Union"), and their spouses. Id. ¶ 2. Defendant Local 210 Fund is an employee welfare benefit plan under ERISA that was established to provide health insurance to its participants, who are primarily current members of the Local 210 Union and their spouses. Id. ¶ 12.

Appendix B

The Allied Welfare Fund ("AWF") is also a collectively bargained employee welfare benefit plan under ERISA that provides benefits to its participants, who are primarily active union members. Id. ¶ 8. Both the Local

210 Fund and the AWF are funded by contributions from employers ("Contributing [**5] Employers") made pursuant to the CBAs. Id. ¶¶ 8, 14; see Defs.' Counter-56.1 ¶ 7. On April 30, 2006, the AWF was bifurcated and a portion of its assets (Plaintiffs contend it was 80% while Defendants contend it was 70%) was transferred to the Local 210 Fund. Defs.' Counter-56.1 ¶ 9. Thereafter, most of the Contributing Employers who had previously contributed to the AWF began contributing to the Local 210 Fund. Pls.' 56.1 ¶ 10.

The various CBAs provide, in relevant part, that:

From and out of the contributions made to the Allied Welfare Fund as specified above, Eight Dollars per employee per week shall be unconditionally and irrevocably allocated and paid to the Union Mutual Medical Fund . . . for the benefit of retired employees of the Employer and retired employees of all other employers similarly situated and their families . . . .

Id. ¶ 7; see generally Declaration of Robert J. Kipnees, Esq., dated June 15, 2010 (Doc. 125), Ex. G (excerpts of

CBAs). Plaintiffs contend that pursuant to this provision, the AWF and, more recently, the Local 210 Fund were obligated to remit a portion of the money collected from the Contributing Employers to the UMMF. Pls.' 56.1 ¶ 6. Defendants deny that [**6] they were under any such obligation but admit that they paid the UMMF in accordance with the terms of the CBAs. Defs.' Counter-56.1 ¶¶ 4, 6.

In 2000, the AWF trustees filed suit against Duane Reade in the Southern District [*522] of New York, claiming that Duane Reade, as a Contributing Employer, failed to make the required contributions pursuant to its CBA. Pls.' 56.1 ¶ 18. In 2006, the AWF and Duane Reade settled their dispute for $825,000. Id. ¶¶ 19-20. The Duane Reade settlement was received by the AWF in satisfaction of Duane Reade's obligation under its CBA to pay contributions to the AWF. Id. ¶ 21. Plaintiffs claim that 80% of the settlement monies were transferred to the Local 210 Fund as a consequence of the bifurcation of the AWF. Id. ¶ 22. The UMMF received no portion of those proceeds. Id.

In January 2006, the Local 210 Union began persuading Contributing Employers to amend their respective CBAs to reduce the contributions remitted to the UMMF (and, necessarily, increase the contributions retained by the AWF and Local 210 Fund). Id. ¶ 25. Whereas the CBAs then in place had provided that $8.00 per employee per week would be allocated to the UMMF, the Local 210 Union persuaded Contributing [**7] Employers that $0.10 per employee per week should be allocated to the UMMF. Id. ¶ 26. In March or April 2006, without the UMMF's consent, the CBAs were amended to reflect this reduction. Id. ¶¶ 28-29. As a result of the amendments, the monthly contributions received by the UMMF from the AWF and/or the Local 210 Fund significantly decreased, from approximately $59,000 to $74,000 per month in the first three months of 2006 to $449 in January 2007. Id. ¶¶ 30-31.

Plaintiffs sued Defendants in November 2006, seeking remittance of the employer contributions allegedly due, including a portion of the proceeds from the Duane Reade settlement. Doc. 1.2 In June 2008, Plaintiffs filed an Amended Complaint. Doc. 54. Construing Plaintiffs' allegations as claims under ERISA, the district court awarded judgment in favor of Plaintiffs in the amount of $2,460,777.33 plus interest. Silverman v. Miranda, 918 F. Supp. 2d 200 (S.D.N.Y. 2013) (Jones, J.) ("Miranda III"), vacated sub nom. Silverman v. Teamsters Local 210 Affiliated Health & Ins. Fund, 761

F.3d 277 (2d Cir. 2014) ("Silverman").3 The Second Circuit vacated the award, finding that Plaintiffs failed to state claims under ERISA, and remanded the action for the district court to consider whether to exercise supplemental jurisdiction over Plaintiffs' claims, construed as alleging state law breach of contract. Silverman, 761 F.3d 277. On remand, this Court concluded that Plaintiffs' allegations sufficiently alleged state law claims for breach of contract but held that the claims were preempted by Section 301 of the

LMRA. Silverman v. Miranda, 116 F. Supp. 3d 289 (S.D.N.Y. 2015) ("Miranda IV"). The Court granted Plaintiffs leave to amend their Complaint a second time to assert violations of the LMRA, and Plaintiffs did so on August 13, 2015. Doc. 325. The parties' cross-motions for summary judgment are now before the Court.

II. LEGAL STANDARD

Summary judgment is appropriate where "the movant shows that there is no [*523] genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). "An issue of fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Senno v. Elmsford Union Free Sch. Dist., 812 F. Supp. 2d 454, 467 (S.D.N.Y. 2011) (citing SCR Joint Venture L.P. v. Warshawsky, 559 F.3d 133, 137 (2d Cir. 2009)). A fact [**9] is "material" if it might affect the outcome of the litigation under the governing law. Id. The party moving for summary judgment is first responsible for demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party meets its burden, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." Saenger v. Montefiore Med. Ctr., 706 F. Supp. 2d 494, 504 (S.D.N.Y. 2010) (internal quotation marks omitted) (quoting Jaramillo v. Weyerhaeuser Co., 536 F.3d 140, 145 (2d Cir. 2008)).

In deciding a motion for summary judgment, the Court must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." Brod v. Omya, Inc., 653 F.3d 156, 164 (2d Cir. 2011) (quoting Williams v. R.H. Donnelley, Corp., 368 F.3d 123, 126 (2d Cir. 2004)). However, in opposing a motion for summary judgment, the non-moving party may not rely on unsupported assertions, conjecture or surmise. Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995). The non-moving party must do more than show that there is "some metaphysical doubt as to the material facts." McClellan v. Smith, 439

F.3d 137, 144 (2d Cir. 2006) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). When both parties move for summary judgment, "neither side is barred from asserting that there are issues of fact, sufficient to prevent the entry of judgment, as a matter of law, against it." Heublein, Inc. v. United States, 996 F.2d 1455, 1461 (2d Cir. 1993). "[T]he court must evaluate each party's motion on its own [**10] merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Schwabenbauer v. Bd. Of Ed. Of City Sch. Dist. Of Olean, 667 F.2d 305,314 (2d Cir. 1981). To defeat a motion for summary judgment, "the non-moving party must set forth significant, probative evidence on which a reasonable fact-finder could decide in its favor." Senno, 812 F. Supp. 2d at 467-68 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

III. DISCUSSION

A. Defendants are Liable for Breaching the CBAs.

Defendants do not dispute that they have failed to remit any portion of the Duane Reade settlement proceeds to Plaintiffs, or to remit employer contributions to

Plaintiffs at the $8 rate specified in the CBAs. Instead, Defendants argue that their actions do not constitute a breach of the CBAs for three principal reasons: First, Defendants argue that Plaintiffs were, at most, incidental beneficiaries of the CBAs who were not entitled to contributions at the $8 rate once the CBAs were amended. Defs.' Mem. at 19-21. Second, Defendants argue that the Local 210 Fund, as a third-party beneficiary of the newly amended CBAs, was entitled to retain the promised increased of employer contributions. Id. at 13-16. Third, Defendants argue that regardless of what the AWF's obligations may have been, the Local 210 Fund had no obligation to remit to [*524] the UMMF the monies sought by Plaintiffs. Id. at 7-12. All of these arguments are rehashed from Defendants' prior briefing and, as the Court has found before, none are persuasive.As to Defendants' first argument, that Plaintiffs were not intended third-party beneficiaries of the CBAs, the Court has already decided this issue a number of times under New York law, in each instance rejecting Defendants' argument. See Fishbein v. Miranda, 670 F. Supp. 2d 264, 274-76 (S.D.N.Y. 2009) (Jones, J.) ("Miranda I") (holding that Plaintiffs adequately alleged that they are intended third-party beneficiaries to the CBAs under New York law); April 12, 2010 Order (Doc.

117), 2010 U.S. Dist. LEXIS 147925, *5 (Jones, J.) (denying Defendants' motion for reconsideration on this issue); April 16, 2010 Order (Doc. 118), 2010 U.S. Dist. LEXIS 147924 (Jones, J.) at 7 (reaffirming the prior decision on this issue); Fishbein v. Miranda, 785 F. Supp. 2d 375, 384-85 (S.D.N.Y. 2011) (Jones, J.) ("Miranda II") (clarifying that the earlier finding was a "legal determination, based on the express terms of the CBAs"), vacated sub nom. Silverman, 761 F.3d at 288 (despite taking "no position" on whether the district court correctly resolved the question of whether Plaintiffs were third-party beneficiaries of the CBAs, stating that Plaintiffs allegations "do meet the pleading requirements for state law breach-of-contract claims"); Miranda IV, 116 F. Supp. 3d at 300-03 & nn.14-15 (treating the district court's earlier decisions as persuasive authority and holding that Plaintiffs have standing as third-party beneficiaries to the CBAs under New York law). In its most recent decision on this issue, the Court applied the test outlined in the Restatement (Second) of Contracts and found that Plaintiff had shown "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [Plaintiffs'] benefit and (3) that the benefit to [Plaintiffs] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [Plaintiffs] if the benefit is lost." Miranda IV, 116 F. Supp. 3d at 301.

Claims under Section 301 of the LMRA are analyzed under the federal common law as opposed to state law. Livadas v. Bradshaw, 512 U.S. 107, 121-22, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994); Cement & Concrete Workers Dist. Council Welfare Fund v. Lollo, 35 F.3d 29, 35 (2d Cir. 1994). Analyzing the issue under federal common law, however, does not alter the result. The federal common law and New York law both look to the Restatement (Second) of Contracts to determine whether a party is a third-party beneficiary of a contract. See Kinek v. Gulf & W., Inc., 720 F. Supp. 275, 280 (S.D.N.Y. 1989), aff'd sub nom. Kinek v. Paramount Communications, 22 F.3d 503 (2d Cir. 1994); Corley v. Jahr. No. 11 Civ. 9044 (RJS), 2014 U.S. Dist. LEXIS 25489, at *6 (S.D.N.Y. Feb. 10, 2014).. Accordingly, for the same reasons this Court concluded that Plaintiffs are third-party beneficiaries of the CBAs under New York law, the Court now concludes that Plaintiffs are third-party beneficiaries under the federal common law. See Miranda IV, 116 F. Supp. 3d at 301-02; c.f. [**13] Benson v. Brower's Moving & Storage, Inc., 907 F.2d 310, 313 (2d Cir. 1990) (explaining, in the ERISA context, that employee benefit funds "occupy the position of a third party beneficiary to the collective bargaining agreement between [the employer] and [the union]").

Next, because Plaintiffs are third-party beneficiaries of the CBAs, their consent was required for any amendment modifying their benefits. Miranda IV, 116 F. Supp. 3d at 301 n.13 (citing Trustees of the Four Joint Bds. Health & Welfare & Pension [*525] Funds v. Penn Plastics, 864 F. Supp. 342, 347 n.6 (S.D.N.Y. 1994)). Plaintiffs never consented to the March and April 2006 amendments to the CBAs that purported to reduce the amount of contributions remitted to the UMMF. Accordingly, those amendments were ineffective, as was the Local 210 Fund's purported right to retain money owed to the UMMF. Id. at 301 n.13, 308 ("If the UMMF is an intended third party beneficiary, the amendments to the CBAs are ineffective and the Local 210 Fund breached the original CBAs by failing to remit contributions owed to the UMMF.").

Finally, Defendants' argument that the Local 210 Fund had no obligation to remit monies to the UMMF has already been rejected by the Court numerous times before. See Miranda I, 670 F. Supp. 2d at 272-74 (holding that Plaintiffs sufficiently alleged that the Local 210 Fund accepted an obligation to remit monies to the UMMF in accordance with the terms of the CBAs and that the surrounding circumstances indicated that the Local 210 Fund intended to be bound by those agreements); Miranda II, 785 F. Supp. 2d at 385 (finding that the Local 210 Fund "accepted the CBAs and acted upon them"); Miranda III, 918 F. Supp. 2d at 211 (noting that the Court already ruled on the issue of Defendants' contractual liability and that the Local 210 Fund "assumed all liabilities of the former AWF"); see also Silverman, 761 F.3d at 281 (taking no position on whether the district court correctly decided whether the CBAs obligated Defendants to remit funds to Plaintiffs, but stating that the Local 210 Fund "assumed all the liabilities (and 80 percent of the assets) of" the AWF).

Most recently, this Court found that the Local 210 Fund "can be held accountable under the CBAs because, while not a signatory, Defendants 'accepted their obligations under relevant CBAs' 'to accept funds from Contributing Employers and then remit a certain percentage of such funds to Plaintiff UMMF." Miranda IV, 116 F. Supp. 3d at 302-03 (quoting Miranda I, 670 F. Supp. 2d at 273-74). The Court's prior decision on this issue is now the law of the case. See United States v.Uccio, 940 F.2 753, 758 (2d Cir. 1991)("[W]hen a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case.").4

B. Defendants' Remaining Arguments Lack Merit.

1. This Court Has Jurisdiction Over Plaintiffs' Claims.

Defendants raise two challenges to this Court's jurisdiction over Plaintiffs' claims, neither [**16] of which is successful. Defendants first argue that this Court's jurisdiction on [*526] remand is limited solely to considering Plaintiffs' state breach of contract claims and, thus, that this Court violated the Second Circuit's mandate by allowing Plaintiffs the opportunity to replead their preempted claims under the LMRA. Defs.' Mem. at 21-25. This Court has already considered and rejected Defendants' argument. Miranda IV, 116 F. Supp. 3d at 310 ("Nothing in the Second Circuit's decision limits this Court's jurisdiction to determine 'only' whether supplemental jurisdiction exists over Plaintiffs' breach of contract claims. Moreover, the Second Circuit itself recognized the possibility that Plaintiffs' state law claims may be preempted. Thus, the Second Circuit implicitly recognized that this Court would have to decide (1) whether Plaintiffs' claims were preempted, and, if so, (2) how this litigation would proceed.") (citation omitted). Defendants alternatively argue that the Court lacks subject matter jurisdiction over Plaintiffs' claims under the LMRA. Defs.' Mem. at 4-5. Section 301 of the LMRA provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). Accordingly, "[i]n order to sustain jurisdiction over an action under Section 301, the action must allege: (1) a violation (2) of a contract (3) between an employer and a labor organization or between two labor organizations." Smith v. Hickey, 482 F. Supp. 644, 646-47 (S.D.N.Y. 1979). Plaintiffs allege that Defendants violated a number of CBAs, all of which are contracts between employers and labor organizations. The Court thus has jurisdiction over Plaintiffs' claims.

Defendants argue that they may not be held liable under the LMRA because of case law stating that Section 301 actions may only be brought against defendants who are "parties" or "signatories" to the contract alleged to have been breached. See Smith, F.

Supp. at 647 ("Section 301 . . . does not extend to suits brought against defendants who are not parties to the contract whose breach is alleged."); see also Int'l Union, United Mine Workers of Am. v. Covenant Coal Corp., 977 F.2d 895, 897 (4th Cir. 1992) (finding that "a suit against a nonsignatory of a contract cannot be considered a suit for violation of the contract," in part because "[a] contract governs only the conduct of the parties who have agreed to its terms"); Ramsey v. Signal Delivery Serv., Inc., 631 F.2d 1210, 1212 (5th Cir. 1980) (finding that individual employees were not proper defendants in a Section 301 action because those "suits are confined to defendants who are signatories of the collective bargaining agreement under which they are brought"); Gorenflo v. Penske Logistics, 592 F. Supp. 2d 300, 306-07 (N.D.N.Y. 2009) (same); Cement & Concrete Workers Dist. Council Welfare Fund v. Atlas Concrete Const. Corp., No. 04 Civ. 0915 (CPS), 2007 U.S. Dist. LEXIS 9817, 2007 WL 526621, at *4 (E.D.N.Y. Feb. 13, 2007) ("The statute extends only to suits brought against defendants who are parties to the underlying collective bargaining agreement."); Duane Reade v. Allied Trades Council, No. 04 Civ. 3542 (BSJ), 2005 U.S. Dist. LEXIS 29690, 2005 WL 3038645, at *4 (S.D.N.Y. Oct. 7, 2005) (quoting Smith). Because they are neither "parties" nor "signatories" to the underlying

CBAs, Defendants argue that the Court lacks jurisdiction over Plaintiffs' LMRA claims.The Court does not read these cases as narrowly as Defendants. In Smith, for example, [*527] the trustees of one pension plan sued the trustees of two other pension plans in state court, alleging that the defendants violated the parties' private contracts to provide training courses for plan beneficiaries. 482 F. Supp. at 645-46. The defendants sought removal to federal court, on the basis that the action should be viewed as one involving a breach of the CBA between the plan beneficiaries' unions and employers. Id. at 646. The district court found that it lacked jurisdiction over the claims under Section 301, since the complaint did not allege any breach of that CBA and [**19] the defendants in the suit were not parties to the CBA "and owe[d] no duties to the plaintiffs under that agreement." Id. at 647-48.

The concern animating Smith was that a CBA would be invoked to bring federal claims against a party untethered to the rights and obligations created by that agreement. The present case raises no such concern. Here, unlike in Smith and the other cases to which Defendants cite, Defendants did owe Plaintiffs duties pursuant to the CBAs. In fact, the very reason this Court found Plaintiffs' claims preempted by the LMRA was because "Plaintiffs' rights have no independent basis separate from the CBA[s]." Miranda IV, 116 F. Supp. 3d at 310. It would surely work an injustice to find that Defendants violated Plaintiffs' rights but that Plaintiffs had no remedy, because the same statute that preempted their claims also proscribed them. The Court finds that such a result is simply lacking in reason here.

In sum, Plaintiffs are third-party beneficiaries who—by definition—have a right to enforce the CBAs. See Sazerac Co., Inc. v. Falk, 861 F. Supp. 253, 257-58 (S.D.N.Y. 1994). Regardless of whether Defendants were parties to or signed those agreements, Plaintiffs may hold them accountable for failing to satisfy their contractual obligations.

2. The LMRA Does Not Bar Plaintiffs' Claims Against Defendants.

Defendants argue that the LMRA bars suits against union funds, and that Plaintiffs' claims against Defendants must accordingly be dismissed. Defs.' Mem. at 5-7. In support of their argument, Defendants point to Section 301 of the LMRA, which provides, in relevant part, that "[a]ny money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." 29 U.S.C. § 185(b). The Supreme Court has explained that the foregoing language "evidences a congressional intention that the union, as an entity, like a corporation, should in the absence of agreement be the sole source of recovery for injury inflicted by it." Lewis v. Benedict Coal Corp., 361 U.S. 459, 470, 80 S. Ct. 489, 496, 4 L. Ed. 2d 442 (1960). Here, Plaintiffs are not seeking to hold Defendants liable for any injury inflicted by a union—Plaintiffs are seeking to hold Defendants liable for the injury that Defendants themselves inflicted. The language invoked by Defendants is thus inapplicable to the present case.

Defendants rely on Duane Reade, but that case is distinguishable. In Duane Reade, an employer alleged that union funds and their trustees breached CBA provisions regarding equal representation in voting, appointment of trustees, and distribution of benefits. 2005 U.S. Dist. LEXIS 29690, 2005 WL 3038645, at *4. The employer admitted, however, that neither the funds nor the trustees were parties to that agreement. 2005 U.S. Dist. LEXIS 29690, [WL] at *4 & n.5. Instead, the employer attempted to hold the funds and trustees liable as mere [*528] third-party beneficiaries of the CBA, an action the Court deemed impermissible under Section 301. 2005 U.S. Dist. LEXIS 29690, [WL] at *4. Here, by contrast, Defendants are not mere third party beneficiaries of the CBAs—they assumed obligations to Plaintiffs under those agreements. Plaintiffs' attempt to hold Defendants liable for breaches of their own obligations is not prohibited by Section 301. The remaining cases cited by Defendants are also inapposite, as they involve attempts to hold union funds liable for wrongs committed by unions. See Lewis, 361 U.S. at 495-96 (holding that a union fund's claim against an employer for failure to remit payments pursuant to a CBA could not be subject to offset because of the union's breach); Tuvia Convalescent Center, Inc. v. National Union of Hospital & Health Care Employees, etc., 717 F.2d 726, 728, 730-31 (2d Cir. 1983) (affirming the district court's determination that an employer's breach of contract action could not be maintained against union funds, where the employer claimed that the union breached the CBA).

3. The CBAs Do Not Compel Plaintiffs To Arbitrate Their Claims.

Defendants argue that the CBAs upon which Plaintiffs base their claims all contain mandatory arbitration provisions and that, because Plaintiffs never sought to submit their dispute with Defendants to arbitration, Plaintiffs failed to exhaust their administrative remedies. Defs.' Mem. at 16-19. Plaintiffs raise three arguments in response: First, Plaintiffs argue that Defendants waived their right to compel arbitration, since this is the first time Defendants have raised the issue. Pls.' Mem. at 18-19. Next, Plaintiffs argue that the relevant arbitration provisions are not part of the record and, thus, there is no evidence supporting Defendants' argument that the CBAs require the parties to arbitrate. Id. at 19-20. Finally, Plaintiffs argue that submitting this dispute to arbitration now would be futile. Id. at 21. Without the need to address Plaintiffs' arguments, the Court finds that Plaintiffs were not required to arbitrate their claims.

In Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364, 104 S. Ct. 1844, 80 L. Ed. 2d 366 (1984), the Supreme Court considered whether fund trustees who were third-party beneficiaries of CBAs were bound by the arbitration clauses provided therein. Id. at 371. The Court acknowledged the general presumption in favor of arbitrating labor disputes but concluded that "the presumption of arbitrability is not a proper rule of construction in determining whether arbitration agreements between the union and the employer apply to disputes between trustees and employers, even if those disputes raise questions of interpretation under the collective-bargaining agreements." Id. at 371-72. Instead, the Court looked to the terms of the CBAs to determine whether they evidenced an "intent on the part of the parties to require arbitration of disputes between the trustees and the employers," ultimately concluding that they did not. Id. at 372-73. Courts since Schneider have continued to analyze whether a CBA calls for benefit funds to arbitrate claims for unpaid contributions as opposed to presuming the arbitrability of those claims. See, e.g., O'Hare v. Gen. Marine Transp. Corp., 740 F.2d 160, 168 (2d Cir. 1984) (affirming the district court's determination that the agreement's general arbitration provision did not apply to trustees); Trustees of the Hollow Metal Pension Fund v. Morris Fine Furniture Work Shops Inc., No. 13 Civ. 1660 (PAC), 2013 U.S. Dist. LEXIS 157786, 2013 WL 5912162, at *2 (S.D.N.Y. Nov. 4, 2013) (finding no evidence of intent to bind trustees to arbitration).

[*529] Along with their reply papers, Defendants submitted copies of the arbitration provisions from seven of the CBAs. See Declaration of Michael A. DeBartolome, dated December 9, 2015 (Doc. 359), Exs. A-G. Assuming arguendo that these provisions are properly before the Court, the [**24] Court finds no evidence therein of an intent to bind Plaintiffs to arbitration. Two of the CBAs do not even mandate arbitration. Id., Ex. C ("In the event the grievance is not settled, it may be submitted to arbitration . . . .")

(emphasis added), Ex. E ("[T]he parties hereto may submit the matter to arbitration . . . .") (emphasis added). One of the agreements permits only employees to invoke the arbitration process. Id., Ex. F (providing that the parties shall attempt to settle any dispute concerning the breach of any term of the agreement after "[a]n employee and/or his or her shop steward" first "take[s] up the grievance or dispute with the Company"); see Schneider, 466 U.S. at 375 ("It is unreasonable to infer that the parties to these agreements, or to the trust agreements, intended the trustees to rely on the Union to arbitrate their disputes with the employer."). And the remaining agreements all provide that the costs of arbitration "shall be borne equally by the Employer and the Union." DeBartolome Decl. (Doc. 359), Exs. A, B, D, F, G. "Because arbitration may be expensive, there is no reason to assume, without more persuasive evidence than is presented here, that the Union intended to incur such expenses at the request of the trustees and without any requirement that the trustees provide reimbursement." Schneider, 466 U.S. at 375.

As the arbitration clauses submitted by Defendants do not establish an intention to require Plaintiffs to arbitrate their claims, Plaintiffs cannot be said to have failed to exhaust their administrative remedies before bringing this suit.

C. The Court Adopts the Previous Damages Award.

Plaintiffs argue that Judge Jones's now-vacated award of $2,460,777.33 plus interest remains the correct amount of damages to compensate for Defendants' breach. Pls.' Mem. at 23-24; see Miranda III, 918 F. Supp. 2d at 212-21.. However, Plaintiffs ask the Court to award prejudgment interest at a rate of 9%, contrary to the statutory rate previously awarded. Id. at 24-25. In response, Defendants largely rehash arguments they previously made. Defs.' Opp'n Mem. at 20-24. Having considered the parties' arguments, the Court agrees with the prior calculation of damages in this case.

The parties have not supplemented the Accounting relied upon in the years since first submitting it to the Court. That Accounting summarizes the records of all monies received by the Local 210 Fund, pursuant to the relevant CBAs, from January 1, 2005 to December 31, 2010. Pls.' 56.1 ¶¶ 34, 44. The Accounting reflects a calculation of $1,909,736.26 allegedly due to the UMMF. See Declaration of Barry N. Marzigliano, dated March 22, 2012 (Doc. 190), Ex. A.

Appendix B

The facts of this case have not changed since the parties previously briefed this issue, and the parties largely rely on the arguments they previously made. Plaintiffs had argued that the Accounting figure was incomplete in several material respects, namely that the amount: failed to reflect $89,491.53 owed to the UMMF from the settlement with Duane Reade; improperly offset $73,285.36 from the Local 210 Fund's liability;5 omitted $103,302.64 in [*530] contributions made by Manhattan Drug Company pursuant to its CBA; and omitted $284,961.54 in contributions made by certain other Contributing Employers pursuant to their CBAs. In its now-vacated decision, the Court agreed with Plaintiffs and awarded them a total of $2,460,777.33 in damages, plus pre- and post-judgment interest.

Although Miranda III is no longer binding on this Court, it was vacated on grounds unrelated to damages, and the Court treats the decision as persuasive authority as to those issues. See Brown v. Kelly, 609 F.3d 467, 476-77 (2d Cir. 2010). Finding no reason to depart from the sound reasoning of this portion of the Court's prior decision, the Court adopts in its entirety the rationale for the prior award. See Miranda III, 918 F. Supp. 2d at 212-21.6

IV. CONCLUSION

For the aforementioned reasons, Defendants' motion for summary judgment is DENIED, and Plaintiffs' motion for summary judgment is GRANTED in part and DENIED in part. Specifically, Plaintiffs' motion is denied with respect to their request for pre-judgment interest at a rate of 9%, and granted in all other respects. Plaintiffs are awarded judgment in the amount of $2,460,777.33 plus interest.[7] The Clerk of the Court is respectfully directed to terminate the motions, Docs. 340 and 351, and close the case.

It is SO ORDERED.

Dated: September 30, 2016

New York, New York

/s/ Edgardo Ramos

Edgardo Ramos, U.S.D.J.

Footnotes

1

The following facts are taken from the parties' statements of material facts, submitted pursuant to

Local Rule 56.1, and are undisputed unless otherwise noted. See Defendants' Statement Pursuant to Rule 56.1 of the Civil Rules of This Court ("Defs.' 56.1") (Doc. 341); Plaintiffs' Statement of Undisputed Material Facts Pursuant to Rule 56.1 and Response to Defendants' Rule 56.1 Statement ("Pls.' 56.1" and "Pls.' Counter-56.1") (Doc. 354); Defendants' Counter Statement of Material Facts to Plaintiffs' Rule 56.1 Statement ("Defs.' Counter-56.1") [**4] (Doc. 360). The Court assumes knowledge of the relevant facts and procedural history of this case, however, as they were discussed extensively in the Court's July 22, 2015 Opinion and Order. See Silverman v. Miranda, 116 F. Supp. 3d 289, 294-99 (S.D.N.Y. 2015) ("Miranda IV").

2

Plaintiffs also brought claims against the AWF and another entity, both of whom were subsequently voluntarily dismissed with prejudice from this action. Docs. 160 & 243.

3

See also Fishbein v. Miranda, 670 F. Supp. 2d 264 (S.D.N.Y. 2009) (Jones, J.) ("Miranda I") (granting in part and denying in part Defendants' motion to dismiss); Fishbein v. Miranda, 785 F. Supp. 2d 375

(S.D.N.Y. 2011) (Jones, J.) ("Miranda II") (granting in part and denying in part Plaintiffs' motion for partial summary judgment and directing Defendants to provide Plaintiffs with an accounting), vacated sub nom. Silverman, 761 F.3d 277.

4

The Court need not revisit Defendants' argument that the Local 210 Fund did not assume the AWF's liability when it assumed [**15] most of its assets. See Defs.' Mem. at 10-12. The Court notes, however, that in their moving papers, Defendants assert—for the first time in the long history of this case—that the "Transfer Agreement" on which they relied consistently throughout this proceeding is actually one of many drafts, and that the "Spin-Off Agreement" submitted to the Court for the first time with their papers is the operative document memorializing their transaction with the AWF. See Defendants' Rule 56.1 Counter Statement of Material Facts, dated July 15, 2010 (Doc. 148) ¶ 16 (relying on the Transfer Agreement); Defendants' Rule 56.1 Counter Statement of Material Facts, dated February 20, 2015 (Doc. 309) ¶ 15 (relying on the Transfer Agreement); Defs.' Mem. at 10-11 (relying on the Spin-Off Agreement); Declaration of Michael DeBartolome, dated December 8, 2015 (Doc.

358) ¶¶ 7-8 (claiming that "[t]he Transfer Agreement was modified numerous times . . . before it was finalized," and that the Spin-Off Agreement is the "finalized document").

5

Defendants now concede that the Accounting should be adjusted to add the amount of the improper offset. Defs.' Opp'n Mem. at 20.

6

In his concurring opinion in Silverman, Judge Calabresi recognized that this Court on remand would likely reach the same result as before. 761 F.3d at 289 (Calabresi, J., concurring).

7

Pre-judgment interest is to be calculated from April 1, 2006, "at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding" that date. 28 U.S.C. § 1961(a); see Miranda III, 918 F. Supp. 2d at 220 ("[W]hile this award may be less [**28] than the amount Plaintiffs proposed, any award to the UMMF will necessarily be paid out from funds that otherwise would assist the beneficiaries of the Local 210 Fund.").

Post-judgment interest is to be calculated in accordance with 28 U.S.C. § 1961(a).

APPENDIX C --- MANDATE OF THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 28, 2014.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of August, two thousand and fourteen. Before: Dennis Jacobs, Guido Calabresi, Rosemary S. Pooler,

*Circuit Judge*s.

Leon Silverman, Trustee of the Union Mutual Medical Fund, Plaintiff - Appellee - Cross-Appellant, James Crowley, Trustee of the Union Mutual Medical Fund, Janet Sachs, Trustee of the Union Mutual Medical Fund, Herbert Pobiner, Trustee of the Union Mutual Medical Fund, Louis Flacks, Trustee of the Union Mutual Medical Fund, Paul Berkman, Trustee of the Union Mutual Medical Fund, Union Mutual Medical Fund, Plaintiff-Counter-Defendants - Appellees-Cross Appellants, Arthur Fishbein, Trustee of the Union Mutual Medical Fund, Plaintiff-Counter-Defendant,

Appendix C

JUDGMENT
Docket No.13-392(L)
13-1175(XAP)

v.

Teamster Local 210 Affiliated Health and Insurance Fund, George Miranda, Trustee in his capacity as Trustee of the Allied Welfare Fund and in his capacity as Trustee of Teamsters Local 210 Affiliated Health and Insurance, Robert Bellach, in his capacity as Trustee of Teamsters Local 210 Affiliated Health and Insurance Fund, Anthony Cerbone, in his capacity as Trustee of Teamsters Local 210 Affiliated Health and Insurance Fund, Defendants - Appellants-Cross-Appellees, Crossroads Healthcare Management, LLC, Defendant-Counter-Claimant,

MANDATE
MANDATE ISSUED ON 08/28/2014

Case 13-392, Document 171, 08/28/2014, 1307808,

Allied Welfare Fund, Charles Hall, Sr., in his capacity as Trustee of the Allied Welfare Fund, Martin Keane, in his capacity as Trustee of the Allied Welfare Fund, Thomas Mackell, Jr., in his capacity as Trustee of Allied Welfare Fund, Martin Sheer, in his capacity as Trustee of Allied Welfare Fund and in his capacity as Trustee of

Appendix C

Teamsters Local 210 Affiliated Health and Insurance Fund, John Does, 1 - 6 in their capacities as Trustees of Teamsters Local 210 Affiliated Health and Insurance Fund and Crossroads Healthcare Management, LLC, Defendants.

The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the district court record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the district court's judgment in favor of the Union Mutual Medical Fund is VACATED and the case is REMANDED for further proceedings in accordance with the opinion of this court.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX D --- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 1, 2014

Silverman v. Teamsters Local 210 Affiliated Health and Ins. Fund, 761 F.3d 277

United States Court of Appeals for the Second Circuit

February 6, 2014, Argued; August 1, 2014, Decided

Docket Nos. 13-392-cv(L), 13-1175-cv(XAP)

Reporter
761 F.3d 277 * | 2014 U.S. App. LEXIS 14875 ** | 164 Lab. Cas. (CCH) P10,706 | 59 Employee Benefits Cas. (BNA) 1599 | 2014 WL 3765933

Leon Silverman, Trustee of the Union Mutual Medical Fund, Plaintiff-Appellee-Cross-Appellant, James Crowley, Trustee of the Union Mutual Medical Fund, Janet Sachs, Trustee of the Union Mutual Medical Fund, Herbert Pobiner, Trustee of the Union Mutual Medical Fund, Louis Flacks, Trustee of the Union Mutual Medical Fund, Paul Berkman, Trustee of the Union Mutual Medical Fund, Union Mutual Medical Fund, Plaintiffs-Counter-Defendants-Appellees-Cross-Appellants, Arthur Fishbein, Trustee of the Union Mutual Medical Fund, Plaintiff-Counter-Defendant, -v.- Teamsters Local 210 Affiliated Health and

Insurance Fund, George Miranda, in his capacity as Trustee of the Allied Welfare Fund and in his capacity as Trustee of Teamsters Local 210 Affiliated Health and Insurance, Robert Bellach, in his capacity as Trustee of Teamsters Local 210 Affiliated Health and Insurance Fund, Anthony Cerbone, in his capacity as Trustee of Teamsters Local 210 Affiliated Health and Insurance Fund, Defendants-Appellants-Cross-Appellees, Crossroads Healthcare Management, LLC, Defendant-Counter-Claimant, Allied Welfare Fund, Charles Hall, Sr., in his capacity as Trustee of the Allied Welfare Fund, Martin Keane, in his capacity as Trustee of the Allied Welfare Fund, Thomas Mackell, Jr., in his capacity as Trustee of the Allied Welfare Fund, Martin Sheer, in his capacity as Trustee of the Allied Welfare Fund and in his capacity as Trustee of Teamsters Local 210 Affiliated Health and Insurance Fund, John Does 1-6 in their capacities as Trustees of Teamsters Local 210 Affiliated Health and Insurance Fund and Crossroads Healthcare Management, LLC, Defendants.

The Teamsters Local 210 Affiliated Health and Insurance Fund ("210 Fund") and its trustees appeal from a final judgment of the United States District Court for the Southern District of New York (Jones, J.), awarding approximately $2.5 million to the Union

Mutual Medical Fund ("UMM Fund") for unpaid ERISA plan contributions. Because the 210 Fund was not obligated to contribute funds to the UMM Fund under the terms of an ERISA plan, the district court lacked subject matter jurisdiction under ERISA over the claims on which the UMM Fund prevailed. However, because these claims can be construed as state law breach-of-contract claims, we vacate and remand for the district court to decide, in the first instance, whether to exercise supplemental jurisdiction and decide the claims under this alternative theory.

Fishbein v. Miranda, 785 F. Supp. 2d 375, 2011 U.S. Dist. LEXIS 40974 (S.D.N.Y., Apr. 11, 2011) Fishbein v. Miranda, 670 F. Supp. 2d 264, 2009 U.S. Dist. LEXIS 107286 (S.D.N.Y., Nov. 16, 2009)

Counsel: THOMAS A. THOMPSON, Law Offices of Thomas A. Thompson, Yarmouth, Maine (Roland Acevedo, Scoppetta Seiff Kretz & Abercrombie, New York, New York, on the brief), for Defendants-Appellants-Cross-Appellees.

ROBERT J. KIPNEES (Ryan J. Cooper, on the brief), Lowenstein Sandler LLP, Roseland, New Jersey, for Plaintiffs-Counter-Defendants-Appellees-Cross-Appellants.

Appendix D

Judges: Before: JACOBS, CALABRESI, and POOLER, Circuit Judges. Judge Calabresi concurs in part and dissents in part in a separate opinion.

Opinion by: DENNIS JACOBS Opinion

[*279] DENNIS JACOBS, Circuit Judge:

Under collective bargaining agreements ("CBAs") entered into by multiple employers with Teamsters Local Union No. 210 (the "Union"), the employers promised to contribute to the Teamsters Local 210 Affiliated Health and Insurance Fund ("210 Fund"), and the 210 Fund would, in turn, "unconditionally and irrevocably" transfer approximately 14 percent of the payments to another fund, the Union Mutual Medical Fund ("UMM Fund"), which provided medical benefits primarily to retired union members. Both the 210 Fund and the UMM Fund are group health plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA").

[*280] In 2006, after some years in which the 210 Fund duly paid the UMM Fund in accordance with the CBAs, the 210 Fund established a new medical plan for the retirees and, no longer in need of the UMM Fund, amended the CBAs--with consent of the employers but not the UMM Fund--to reduce payments to the UMM

Fund by 98 percent. The UMM Fund (and its trustees) brought this action in the United States District Court for the Southern District _of New York (Jones, J.), against the 210 Fund and its trustees (collectively, "Defendants") to contest the amendment of the CBAs without its consent, to demand an accounting of all amounts received by the 210 Fund under the CBAs, and to collect the payments abated by the amendment.

The UMM Fund's Amended Complaint asserts three claims against the 210 Fund. The first two claims, which plead entitlement to money, an accounting and payment, do not indicate whether the one or both claims arise under state contract law, under a federal or state statute, or under some combination of these. The third claim asserts a violation of ERISA.

The district court construed all three claims as pleading causes of action under section 502 of ERISA, which provides a federal civil cause of action to an ERISA plan fiduciary to obtain equitable relief for harms resulting from violations of (i) "the terms of" an ERISA "plan," and (ii) ERISA. ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B). The district court construed the first two claims to allege that, by failing to remit the amounts owed to the UMM Fund under each CBA, the 210 Fund violated "the terms of" an ERISA "plan," and proceeded to identify the CBA _as constituting the terms of an ERISA plan. The court construed the third claim as asserting a violation of ERISA, but not violation of an ERISA plan term: i.e., that the 210 Fund's reduced payments to the UMM Fund violated section 515 of ERISA, which requires an employer, or an entity acting in the interest of an employer, to fulfill its CBA plan contribution obligations (the "Section 515 claim").

The district court dismissed the Section 515 claim on the ground that the 210 Fund was neither an "employer" nor an entity acting "in the interest of an employer." Fishbein v. Miranda, 670 F. Supp. 2d 264, 277-78 (S.D.N.Y. 2009) ("Miranda I"). Two years later, the district court granted summary judgment in favor of the UMM Fund on its first two claims, concluding that each CBA "established" an ERISA "plan," and that the 210 Fund violated a plan term by reducing payments to the UMM Fund. Fishbein v. Miranda, 785 F. Supp. 2d 375, 384-85 (S.D.N.Y. 2011) ("Miranda II"). The court awarded the UMM Fund approximately $2.5 million (plus interest) in damages and fees. The 210 Fund appeals from the award, and the UMM Fund cross-appeals the dismissal of the Section 515 claim.

The Section 515 claim was properly dismissed because, as the district court explained, the 210 Fund is not an employer, and the 210 Fund's payments to the UMM Fund were not made in the interest of an employer. See Miranda I, 670 F. Supp. 2d at 277-78. Absent some type of agency or ownership relationship, or direct assumption of an employer's obligations, an entity is not considered to be acting "in the interest of" an employer for purposes of section 515. Greenblatt v. Delta Plumbing & Heating Corp., 68 F.3d 561, 575-76 (2d Cir. 1995).

However, the district court erred in granting summary judgment in favor of the UMM Fund on its first two claims, because the terms of each CBA were not terms of an ERISA plan. The terms of an ERISA plan, and the benefits it agrees to [*281] provide, are not set forth in a CBA; they are by definition set out in a governing trust document and the summary plan description.

Although the UMM Fund has failed to state a claim under ERISA, the first two claims in the Amended Complaint can be construed as state law breach-of-contract claims. We therefore (i) affirm the dismissal of the Section 515 claim; and (ii) vacate the grant of summary judgment in favor of the UMM Fund on the first two claims, [**6] and remand for the district court to decide in the first instance whether to exercise supplemental jurisdiction over them.

Appendix D

BACKGROUND

Plaintiff UMM Fund is an employee health plan established in 1978 to obtain and provide medical and insurance benefits to its participants and beneficiaries, primarily retired Union members and their spouses. The purposes and obligations of the UMM Fund are enumerated in a September 6, 1978 Trust Indenture ("UMM Fund Trust Indenture") entered into between the predecessor to the Union and a corporation that represents the interests of the retirees. The UMM Fund is an employee welfare benefit plan governed by ERISA. See 29 U.S.C. § 1002. The named plaintiffs are trustees of the UMM Fund.

Defendant 210 Fund is likewise an employee welfare benefit plan under ERISA. It was established to provide health insurance for Union members and their spouses, and is funded by contributions from employers who are party to CBAs with the Union. In April 2006, the 210 Fund assumed all the liabilities (and 80 percent of the assets) of another ERISA plan, the Allied Welfare Fund ("Allied Fund"), and began to receive contributions pursuant to a number of CBAs under which employers had previously been contributing to the Allied Fund.[2]

Appendix D

The UMM Fund receives the bulk of its funding from employer contributions pursuant to CBAs with the Union. But employers pay nothing to the UMM Fund directly. The CBAs (in nearly identical language) direct the employers to contribute funds to the Allied Fund--now the 210 Fund--and then, in turn, direct the 210 Fund to pass a portion of the contribution along to the UMM Fund:

It is hereby agreed . . . the Employer shall pay to the Allied Welfare Fund the sum of Fifty-Nine ($59.00) Dollars, each and every week for each employee who is employed within the bargaining unit[.] . . .

From and out of the contributions made to the Allied Welfare Fund as specified above, Eight Dollars per employee per week shall be unconditionally and irrevocably allocated and paid to the Union Mutual Medical Fund . . . for the benefit of retired employees of the Employer and retired employees of all _other employers similarly situated and their families.

In January 2006, the Allied Fund and the Union began persuading employers to amend their CBAs and reduce the amount remitted to UMM Fund. The motive for the Union's initiative is in dispute: The UMM Fund alleges that it was retaliation for a failed merger between the UMM Fund and the Allied Fund, whereas the 210 Fund cites the Union's unhappiness [*282] with certain fees and practices of the UMM Fund (leading the Union to create a replacement medical plan). Whatever the motivation, the CBAs were amended in March or April 2006, without the UMM Fund's consent. Under the amended CBAs, the amount the 210 Fund remitted to the UMM Fund per employee per week was reduced from eight dollars to ten cents.

In the first quarter of 2006, the UMM Fund received between $59,000 and $74,000 pursuant to the CBAs. After the CBA amendments became effective in April, the UMM Fund's receipts dwindled to a few hundred dollars per month.

At the same time the Allied Fund and the Union were persuading employers to amend their CBAs, the trustees of the Allied Fund were in settlement negotiations with Duane Reade, an employer that had allegedly failed to make required [**9] CBA payments years earlier. The parties settled their dispute in March 2006 for $825,000. The 210 Fund concedes that these funds were received by the Allied Fund in satisfaction of Duane Reade's obligation to pay contributions to the Allied Fund under its CBA, and that the UMM Fund got nothing from the settlement, but denies that the 210 Fund received all the settlement proceeds when it became successor in interest to the Allied Fund one month later. Miranda II, 785 F. Supp. 2d at 379-80.

The UMM Fund filed suit in November 2006, and filed an Amended Complaint in June 2008 asserting three claims against the 210 Fund.[3] The first claim alleged that the Allied Fund received "at least [$825,000] from Duane Reade by way of settlement of the [Allied Fund]'s claim for unpaid contributions," and that "[t]he [UMM Fund] is entitled" to eight dollars for every fifty-nine dollars of the settlement proceeds received. Am. Compl. ¶¶ 44-46. The requested relief was, principally, an accounting of the funds received in the settlement and remittance of the portion claimed by the UMM Fund (plus interest). Id. at ¶ 46.

The second claim alleged that payments to the UMM Fund "dropped precipitously since the end of March 2006," and sought an accounting of all monies received by the Allied Fund and the 210 Fund "for the period January 1, 2005, to the date of judgment." Id. at ¶¶ 48-50. A prospective order was sought, requiring the Local 210 Trustees "to remit to the [UMM Fund] Trustees, within five (5) days of receipt . . . , that portion properly payable to the [UMM Fund] out of all monies received by way of contributions by employers pursuant to [CBAs]." Id. at ¶ 50.

The UMM Fund's third claim, the Section 515 claim, asserted that "failure by the [Allied Fund] and the [210 Fund] to remit contributions constitutes a violation of section 515 of ERISA, 29 U.S.C. § 1145." Id. at ¶ 53. The UMM Fund asked the court to "[o]rder[] the [Allied Fund] and the [210 Fund] to remit to the [UMM Fund] all employer contributions received by them which were properly payable to the [UMM Fund] pursuant to the terms of the collective bargaining agreement." Id. The Section 515 claim also asks for liquidated damages available for a section 515 violation, see 29 U.S.C. 1132(g), plus interest and attorney's fees.

Absent from the first two claims in the Amended Complaint is mention of their legal basis. The pleading is unclear as to whether the duty of the 210 Fund to remit funds and provide an accounting was premised on state contract law, a federal [*283] or state statute, or something else. Only the Section 515 claim indicates the legal basis for monetary relief: a violation of the ERISA provision mandating that an employer (or an entity acting in the interest of an employer) comply with its plan contribution obligations under a CBA. Such an ERISA violation is actionable under section 502(a) of the statute. See 29 U.S.C. § 1132(a).

The 210 Fund (jointly with the other defendants) filed a motion to dismiss all three claims for lack of jurisdiction and failure to state a claim under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). On November 16, 2009, the district court dismissed the Section 515 claim with prejudice, holding that the Allied Fund and the 210 Fund were not "employers" and were not acting in the interest of any employers. The court held that, within the meaning of ERISA, an entity can act "in the interest of" an employer only _if it is empowered to negotiate benefits on behalf of the employer. Miranda I, 670 F. Supp. 2d at 278. Since the Allied Fund and the 210 Fund were no more than "intermediaries between the Contributing Employers and Plaintiffs" and were not authorized to negotiate on behalf of the contributing employers, Section 515 liability was precluded. Id.

The district court, however, preserved the first two claims in the Amended Complaint. The court began by considering the legal basis for the claims, omitting that the complaint itself failed to offer one:

I. Claims for "Appropriate Equitable Relief" Under ERISA § 502(a)(3)(B)

Under ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B), a "participant, beneficiary, or fiduciary" of an employee benefit plan may bring a civil suit "to obtain other appropriate equitable relief (i) to redress . . . violations or (ii) to enforce . . . the terms of the plan." Plaintiffs make claims for equitable relief under this section, demanding an accounting of all monies received from Duane Reade pursuant to the Duane Reade Settlement and a judgment ordering Defendants [Allied Fund] and Local 210 Fund to remit to Plaintiff [UMM Fund] the same percentage of the Duane Reade Settlement monies as would be owed to Plaintiff [UMM Fund] under the Duane Reade CBA. Plaintiff further demands an accounting of all monies received by Defendants [Allied Fund] and Local 210 Fund since January 1, 2005 pursuant to all CBAs in which Plaintiff is named and a judgment ordering Defendants to relinquish all monies owing to Plaintiff [UMM Fund] under these CBAs.

Id. at 271. The district court thus interpreted the claims as alleging that the failure to pay the UMM Fund under the terms of the CBA was a "violation" of "the terms of the plan" and was therefore actionable under section 502(a)(3)(B) of ERISA. But the opinion did not consider how the terms of a CBA, which is not an UMM Fund plan document, could constitute terms of an ERISA plan. The district court went on to deny the Defendants' motion to dismiss, concluding that the UMM Fund had standing to sue as a third-party beneficiary of the CBA, and that the CBA could be "enforced against" the 210

Fund, a non-signatory, because the 210 Fund "accepted the written agreement and . . . acted upon it." Id. at 272.

After discovery, the UMM Fund moved for summary judgment. In opposition, the 210 Fund argued that the district court lacked subject matter jurisdiction over the two claims, because: Section 502(a) permits an ERISA plan fiduciary to sue for equitable relief only if (i) a party has violated an ERISA provision or (ii) a party [*284] has violated "the terms of the plan"; the court had already dismissed the Section 515 claim, the sole alleged violation of ERISA itself; and the CBAs were not part of an ERISA "plan."

The district court held that it had jurisdiction on the following analysis. Under ERISA, a "plan" includes "any . . . plan, fund, or program . . . established or . . . maintained for the purpose of providing for its participants or their beneficiaries . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits." 29 U.S.C. § 1002(1). Because each CBA earmarks the funds contributed to the Allied Fund (and the UMM Fund) for "insurance, welfare, Major Medical insurance and similar benefits" of union members, the district court concluded that the CBA itself "established" an ERISA plan, and therefore its terms constituted terms of "a plan." Miranda II, 785 F. Supp. 2d at 384.

Turning to the merits of the two _remaining claims, the district court granted summary judgment in favor of the UMM Fund, and directed the 210 Fund to provide the UMM Fund with an accounting of (1) all monies received from the Duane Reade settlement; and (2) all monies received pursuant to the CBAs from January 1, 2005, to the date of the order. Id. at 375. After the accounting was complete, the district court entered judgment in favor of the UMM Fund in the amount of $2,460,777.33, plus pre- and post-judgment interest. Silverman v. Miranda, 918 F. Supp. 2d 200, 221 (S.D.N.Y. 2013) ("Miranda III"). The request for attorney's fees was denied. Id.

Both parties appeal. The 210 Fund appeals the award to the UMM Fund. The UMM Fund cross-appeals, challenging (i) the dismissal of its Section 515 claim, (ii) the method used to calculate interest on the award, and (iii) the denial of attorney's fees.

DISCUSSION

HN4 We review the district court's dismissal of the Section 515 claim pursuant to Rule 12(b)(6) de novo. See, e.g., Legnani v. Alitalia Linee Aeree Italiane, S.P.A, 274 F.3d 683, 685 (2d Cir. 2001). HN5 We review de novo a district court's grant of summary judgment, Pilgrim v. Luther, 571 F.3d 201, 204 (2d Cir. 2009), and we affirm _only where we are able to conclude, after construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor, that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

I

Subject matter jurisdiction over ERISA claims is conferred by section 502(f), which allows the federal district court to grant relief "provided for in subsection (a) of this section." ERISA § 502(f), 29 U.S.C. § 1132(f). The referenced subsection enumerates the following ERISA causes of action:

(a) A civil action may be brought . . .

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan.

ERISA § 502(a), 29 U.S.C. § 1132(a). The provision specifies the parties who [*285] have standing to bring suit--a plan participant, beneficiary, or fiduciary--as well as two categories of redressable violations: (i) violations of "any provision of this subchapter;" and (ii) violations of "the terms of the plan." Id.

The trustees of the UMM Fund assert standing as fiduciaries. Their third claim sought relief for an ERISA violation; specifically, a failure to comply with section 515 of ERISA, which provides that

[e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

ERISA § 515, 29 U.S.C. § 1145. An ERISA "employer" is defined as "any person acting directly as an employer, or indirectly in the interest of an employer in relation to an employee benefit plan." 29 U.S.C. § 1002(5); see also Greenblatt v. Delta Plumbing & Heating Corp., 68 F.3d 561, 575 (2d Cir. 1995) (applying this definition of "employer" to section 515). The Amended Complaint asserts that the 210 Fund was obligated to contribute to the UMM Fund "in the interest of" the "employers" who were signatories to the CBAs, and that the 210 Fund failed to do so. Am. Compl. ¶ 12.

A person who acts in an employer's interest _is one who controls an employer (e.g., a parent corporation) or explicitly assumes the employer's obligations. Thus, in Cement & Concrete Workers District Council Welfare Fund v. Lollo, a corporate president who personally assumed the corporation's obligation to make pension contributions under a CBA was held liable under section 515. 35 F.3d 29, 37 (2d Cir. 1994); see also Simas v. Quaker Fabric Corp. of Fall River, 6 F.3d 849, 855 (1st Cir. 1993) (corporation that took control of an employer is an ERISA employer); Frank v. U.S. West, Inc., 3 F.3d 1357, 1363 n.5 (10th Cir. 1993) (parent corporation may be an ERISA employer). However, absent "any type of agency or ownership relationship or direct assumption of the employer's functions with regard to the administration of a plan," courts in this Circuit have been reluctant to find employer status for the purpose of section 515. Greenblatt, 68 F.3d 561 at 575-76.; see also Bldg. Serv. 32B-J Health Fund v. Impact Real Estate Mgmt., Inc., No. 00-Civ-1343, 2000 U.S. Dist. LEXIS 15065, 2000 WL 1530009, at *4

(S.D.N.Y. Oct. 16, 2000); Mason Tenders Dist. Council Welfare Fund v. Logic Constr. Corp., 7 F. Supp. 2d 351, 356 (S.D.N.Y. 1998).

Citing Lollo, the UMM Fund argues that the 210 Fund actually assumed the employer's contribution obligation under the terms of each CBA. The argument does not withstand scrutiny of the CBA wording in Lollo. There, the president of a family-owned business signed the CBA

in a dual capacity both on behalf of himself and on behalf of the Employer and represents by his signature his authority to bind himself, the Employer or Firm, and the principals and members thereof. The person signing on behalf of the Employer also agrees to be personally bound by and to assume all the obligations of the Employer provided for in this Agreement.

Cement & Concrete Workers Dist. Council Welfare Fund, Pension Fund, Legal Servs. Fund and Annuity Fund v. Lollo, No. 89 cv 3784, 1992 U.S. Dist. LEXIS 15091, 1992 WL 281039 (E.D.N.Y. Oct. 1, 1992). The CBAs here contain no provision obligating the employer to pay the UMM Fund, or an assumption by the 210 Fund of such an obligation. Rather, each CBA obligates the employer to pay a contribution in full to the 210 Fund, which in turn dispenses it.

[*286] The CBAs do provide that "[f]rom and out of the contributions made" to the 210 Fund, a portion "shall be unconditionally and irrevocably allocated and paid to the Union Mutual Medical Fund." Whether this provision contractually obligated the 210 Fund, a non-signatory to the CBAs, to remit these funds to the UMM Fund is a question of contract law heavily litigated in the district court. A related contract question is whether, under relevant state law, the UMM Fund was a third-party beneficiary of the pre-amendment CBAs, such that the Union and management could not amend the CBAs to impair the flow of payments to the UMM Fund without its consent. But under no reading of the CBAs (pre-amendment or post-amendment) is the employer obligated to contribute any money to the UMM Fund. Not a single employer has been named as a defendant. Because the 210 Fund was not obligated to remit funds to the UMM Fund "in the interest of" an employer, the Section 515 claim was properly dismissed.

II

The other two claims against the 210 Fund were understood by the district court to be included within the category of civil ERISA claims that permit a plan fiduciary to seek "appropriate equitable relief . . . to enforce any provisions of . . . the terms of the plan." 29 U.S.C. § 1132(a) (emphasis added). The UMM Fund argued that by failing to comply with a term of the CBA, the 210 Fund violated the terms of an ERISA plan.

ERISA defines an "employee benefit welfare plan" as

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise,

(A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or

(B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

ERISA § 3(1), 29 U.S.C. § 1002(1). The parties agree that the UMM Fund is an employee benefit welfare plan under this definition.

Appendix D

ERISA itself does not make plain where one looks to find the "terms" of an ERISA plan, other than to mandate that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." ERISA § 402(a), 29 U.S.C. § 1102(a)(1); see Smith v. Dunham-Bush, Inc., 959 F.2d 6 (2d Cir. 1992) (discussing the written instrument requirement). But a number of federal appellate circuits, including this Court, have identified (in various contexts) two documents as setting forth plan terms: (1) the governing plan document, i.e., the trust agreement or contract under which the plan was formed;4 and (2) the summary plan description ("SPD"), a plain-English summary of plan benefits and obligations that the plan administrator must file with the United States Department of Labor and provide [*287] to each participant and beneficiary of the plan. See, e.g., Pettaway v. Teachers Ins. & Annuity Ass'n of Am., 644 F.3d 427, 434, 396 U.S. App. D.C. 40 (D.C. Cir. 2011); Jenkins v. Yager, 444 F.3d 916, 923 n.4 (7th Cir. 2006); Militello v. Cent. States, Se. & Sw. Areas Pension Fund, 360 F.3d 681, 686 n.2 (7th Cir. 2004); Bergt v. Ret. Plan for Pilots Employed by MarkAir, Inc., 293 F.3d 1139, 1143 (9th Cir. 2002); Sunbeam-Oster Co., Inc. Grp. Benefits Plan for Salaried & Non-Bargaining Hourly Emps. v. Whitehurst, 102 F.3d 1368, 1375 (5th Cir.

1996) (noting that in some circumstances, the SPD may be the only plan document); cf. Heidgerd v. Olin Corp., 906 F.2d 903, 907-08 (discussing which plan term controls when the governing plan document contradicts the SPD). These two documents must be made available by the plan administrator "for examination by any plan participant or beneficiary." 29 U.S.C. § 1024(b). In other words, the documents that lay out the plan terms must be readily accessible in written form to all covered employees. See Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83, 115 S. Ct. 1223, 131 L. Ed. 2d 94 (1995) (noting that one of ERISA's purposes was to afford employees the opportunity to inform themselves, "'on examining the plan documents,'" of their rights and obligations under the plan) (quoting H.R. Rep. No. 93-1280, at 297 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 5077, 5078). The UMM Fund finds no case that treats a CBA as a governing plan document setting forth ERISA plan terms. The district court cited none.

HN14 If a plan's trust agreement explicitly provides that employers must fulfill their CBA contribution obligations (or comply with other plan terms), such a provision can subject a delinquent employer to suit under section 502(a) for violating a plan term. However, the Supreme Court has only recognized such a cause of action when the employer violated a plan term that the

CBA expressly bound the employer to perform. Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp. Inc., 472 U.S. 559, 105 S. Ct. 2833, 86 L. Ed. 2d 447 (1085).. For example, the CBA in Central States provided that the employer was "bound by [the plan] trust agreement[]." Id. at 565. And the trust agreement specifically "place[d] on each participating employer the responsibility to make 'continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement,'" and further obligated each employer to furnish records to the plan administrator upon request. Id. On those facts, the employer was required to adhere to these plan terms and submit to a field audit conducted by the plan trustee.

Here, however, no term of the UMM Fund Trust Indenture obligates employers to make prompt payments under their CBAs. See UMM Fund Trust [**25] Indenture, Silverman v. Miranda, No. 06-cv-13222 (S.D.N.Y. June 5, 2010), ECF #125-2. And in any event, the CBAs do not require that the employers bind themselves to the UMM Fund Trust Indenture. Although the CBAs provide that the Allied Fund and the UMM Fund must handle the contributions received in accordance with the terms of their respective trust indentures, that is not an obligation that the employers perform (or could perform).

The district court opinion granting summary judgment in favor of the UMM Fund held that the CBA "established" an ERISA plan:

Here, pursuant to the terms of each CBA, nearly all of which contain identical operative language, "an employer" (i.e., each contributing employer) and "an employee organization" (i.e., the unions) "established" a plan to provide "insurance, [*288] welfare, Major Medical insurance and similar benefits for" retired employees of the unions. . . . Although not every CBA qualifies as a "plan" under ERISA § 502(a)(3)(B), in view of the plain language of the CBAs at issue here and the [UMM Fund] indenture, Plaintiffs' action to enforce the CBAs is an action to enforce "the terms of [a] plan." 29 U.S.C. § 1132(a)(3)(B).

Miranda II, 785 F. Supp. 2d at 384. True, each CBA directs an employer to contribute money for certain welfare benefits; however, the contributions are not directed to some distinct plan established under the CBA. The contributions are to be made to the Allied Fund, with a portion passed along to the UMM Fund, and the UMM Fund was itself "established" by a 1978 trust indenture that long preceded all the CBAs at issue in this case. Although the CBAs recite some of the provisions found in the Allied Fund and UMM Fund trust documents, those references do not transmute the CBA itself into a plan document; and it certainly does not make the employer contribution requirement, which does not appear in the UMM Fund Trust Indenture, an UMM Fund plan term. It is telling that Congress added section 515 to ERISA in 1980 for the express purpose of creating a federal cause of action for delinquent contributions, see, e.g., Robbins v. B.W. Blaushild Motors, Inc., 559 F. Supp. 1, 2 (D.C. Ill. 1981)--a legislative measure that would have been unnecessary if aggrieved plan trustees could simply sue under ERISA for delinquent contributions as a violation of a plan term.

III

The first two claims in the Amended Complaint, which the district _court decided in favor of the UMM Fund, identified no legal basis for relief. Though we conclude that these allegations fail to state a claim under ERISA--because the payment terms of the CBAs were not UMM Fund plan terms--these claims do meet the pleading requirements for state law breach-of-contract claims. And because a breach of contract claim was pleaded against a defendant who was later voluntarily dismissed, the Amended Complaint recites supplemental jurisdiction as a proper basis for subject matter jurisdiction. Am. Compl. ¶ 11.

Therefore, rather than reverse and direct dismissal of all the UMM Fund's claims, we vacate the award to the UMM Fund and remand for the district court to consider whether to exercise supplemental jurisdiction over the first two claims, construed as alleging state law breach of contract. The district court had discretion to retain supplemental jurisdiction over such claims after it (properly) dismissed the Section 515 claim. See Klein & Co. Futures, Inc. v. Bd. of Trade of City of New York, 464 F.3d 255, 262-63 (2d Cir. 2006).

Federal courts will normally decline to retain jurisdiction in such circumstances. See id. However, in this case, it may be that [**28] discretion will be exercised in favor of retaining jurisdiction, given that most of the relevant contract law issues have already been briefed by the parties and decided in a trio of opinions.5

We take no position on whether those issues were correctly decided; and we have no occasion to consider the calculation of the award, or the denial of attorney's fees.

Appendix D

[*289] CONCLUSION

For the foregoing reasons, we vacate the judgment in favor of the UMM Fund, and remand to the district court for further proceedings consistent with this opinion.

Concur by: CALABRESI (In Part)

Dissent by: CALABRESI (In Part)

Dissent

CALABRESI, Circuit Judge, concurring in part and dissenting in part:

I concur with Part I of the majority's opinion, in which we affirm dismissal of UMMF's ERISA § 515 claim. I write separately to dissent from Part II of the majority opinion, which concludes that the district court lacked subject matter jurisdiction over UMMF's other claims because the CBAs in question [**29] did not constitute an ERISA "plan" under § 502(a)(3)(B).

I dissent for the simple reason that the district court expressly found, as a factual matter, that the language and circumstances of these particular CBAs made them an ERISA "plan" under § 502, and this factual finding was not appealed. The district court wrote: "Although not every CBA qualifies as a 'plan' under ERISA §

502(a)(3)(B), in view of the plain language of the CBAs at issue here and the UMMF indenture, Plaintiffs' action to enforce the CBAs is an action to enforce 'the terms of [a] plan.'" Miranda II, 785 F. Supp. 2d at 384 (quoting 29 U.S.C. § 1132(a)(3)(B)). However dubious such a finding may be, since the Local 210 Fund did not contest it on appeal, a factual finding it remains, and it gives the district court a proper basis for subject matter jurisdiction under § 502(f).

Were I to decide this issue in the first instance, I might well agree with the majority that these CBAs do not meet § 502(a)'s definition of an ERISA "plan." But I am not prepared to say that there are no circumstances in which a CBA could ever be an ERISA "plan," and therefore am not prepared to vacate the district court's decision that, in this _instance, it was.

I join the majority in remanding this case to the district court, which, I hope, will decide the remaining claims under state law. I note that if the district court were to find a state law contract breach for the same reasons that it found a violation of ERISA, then the district court would likely reach the same result as before. That is because the district court denied attorney's fees, which, had they been granted, would have been the principal difference between a victory by UMMF on state law grounds and a victory under ERISA.

For these reasons, I concur in Part I of the majority's opinion, respectfully dissent from Part II, and join the majority in remanding the case to the district court for reconsideration of UMMF's remaining claims.

Footnotes

*

The Clerk of Court is directed to amend the caption to conform with the above.

2

The Allied Fund was initially a named defendant in this case but was voluntarily dismissed. The administrator and manager of the 210 Fund, Crossroads Healthcare Management, LLC ("Crossroads"), was also initially named as a defendant but was voluntarily dismissed.

3

The Amended Complaint also asserted three causes of action against Crossroads, which [**10] were all voluntarily dismissed and are not at issue in this appeal.

4

ERISA establishes a general requirement that plan assets be held in trust, 29 U.S.C. § 1103(a), (b). The trust agreement is sometimes signed by the union and its employers, see, e.g., Chao v. Merino, 452 F.3d 174, 177 (2d Cir. 2006), and sometimes, as here, by the union and a separate corporation representing a subset of union members.

5

Treating the remaining claims as contract claims rather than ERISA claims is no mere formality. The 210 Fund may enjoy additional defenses to state law claims for breach of contract, including ERISA preemption. We express no view on the merits of such a defense.

APPENDIX E --- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING 210 FUND'S EN BANC PETITION, FILED AUGUST 1, 2018

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of August, two thousand eighteen.

Leon Silverman, as a Trustee of The Union Mutual, Plaintiff-Appellee-Cross-Appellant, Louis Flacks, Trustee of The Union Mutual Medical Fund, Paul Berkman, Trustee of The Union Mutual Medical Fund, Union Mutual Medical Fund, James Crowley, Trustee of The Union Mutual Medical Fund, Plaintiffs-Counter-Defendants-Appellees-Cross-Appellants, Janet Sachs, Trustee of The Union Mutual Medical Fund, Herbert Pobiner, Trustee of The Union Mutual Medical Fund, Plaintiffs-Counter-Defendants-Appellants,

v.

Teamster Local 210 Affiliated Health and Insurance Fund, Defendant-Appellant-Cross-Appellee.

ORDER

Docket Nos: 17-1184, 17-1480

Appendix E

Appellant-Cross-Appellee, Teamster Local 210 Affiliated Health and Insurance Fund, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX F --- STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367(a). Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367 (b). In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title [28 USCS § 1332], the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332 [28 USCS § 1332].

28 U.S.C. § 1367 (c). The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

LMRA 301(a), 29 U.S.C. § 185(a). Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Appendix F

LMRA 301(b), 29 U.S.C. § 185(b). Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.