UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TRUSTEES OF THE PAVERS AND ROAD BUILDERS DISTRICT COUNCIL WELFARE, PENSION, ANNUITY & APPRENTICESHIP, SKILL IMPROVEMENT & SAFETY FUNDS,	:	**REPORT AND RECOMMENDATION** 12-CV-0834 (CBA) (VMS)
Plaintiffs,	:	
-against-	:	
M.C. LANDSCAPE GROUP, INC.,	:	
Defendant.	:	

Scanlon, Vera M., United States Magistrate Judge:

Plaintiffs Trustees of the Pavers and Road Builders District Council Welfare, Pension, Annuity & Apprenticeship, Skill Improvement & Safety Funds (hereinafter "Plaintiffs," "Trustees" or "Funds") brought this action against Defendant M.C. Landscape Group, Inc. (hereinafter "Defendant" or "MC Landscape"), alleging violations of Sections 502 and 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1132, 1145, and Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), as amended, 29 U.S.C. § 185, to collect delinquent employer contributions to a group of employee benefit plans.[1] Docket No. 14.[2]

In brief, this action is about Defendant's disputed obligation to remit payment in response to Plaintiffs' demand for contributions to the Funds. Id. According to Plaintiffs, Defendant is

[1] The term "Funds" collectively refers to various Local 1010 Funds, which include, inter alia, the Welfare Fund, the Pension Fund, the Training Fund and the Annuity Fund. Docket No. 32-1 at 22; Docket No. 32-2 at 25. I will only refer to these Funds individually when necessary.

[2] Plaintiffs' Second Amended Complaint is the operative Complaint. Docket No. 14.

required to make contributions to the Funds pursuant to two Collective Bargaining Agreements (hereinafter "CBAs") which Defendant signed with the Highway, Road and Street Construction Laborers Local Union 1010 (hereinafter "Local 1010" or "the Union"). Id. The CBAs provide that Defendant will make contributions to the Funds in an amount that corresponds to the number of hours that Defendant's employees worked (or, in certain circumstances, to the number of hours for which Defendant's employees were paid when they worked overtime hours), provided that the work meets the definition of "covered work" in the CBAs (hereinafter "Covered Work"). Id.

One of the projects at issue provides a backdrop for the brief description of the dispute in more concrete terms. Pursuant to that project, Defendant accepted public funds to play a role in a park beautification project and Defendant agreed to use union labor in completing its work. At Defendant's request, Local 1010 granted Defendant's existing employees Union membership and Defendant had those and other employees perform work on the park beautification project. In keeping with the terms of the CBAs, Defendant submitted reports to the Funds which confirmed that Covered Work was done by those employees on the project and acknowledged that it owed related ERISA contributions. Later, when the Funds asked Defendant to pay its ERISA contributions debt, Defendant refused. Defendant argued that the CBAs were unenforceable as to those of its employees who had performed Covered Work but were unauthorized to work in the United States. Defendant also argued that it was not liable to pay the ERISA contributions debt despite the fact that it had previously acknowledged the amount on the reports because Defendant had subsequently come to believe that the reports were inaccurate.

Before the Court is Plaintiffs' motion for summary judgment. Docket Nos. 29-37, 49-50.

Defendant opposes. Docket Nos. 39-42, 45-46, 57.[3] The District Court referred the motion to me for a report and recommendation. For the following reasons, I respectfully recommend that the District Court **grant** Plaintiffs' motion for summary judgment in its entirety; **find** Defendant liable for the unpaid contributions reflected on the Fourteen Remittance Reports; and **order** Defendant to pay Plaintiffs $408,027.97 in damages and an additional $72.60 in per diem interest beginning October 16, 2015 through the entry of judgment.[4]

Plaintiffs' reasonable attorneys' fees and costs incurred in bringing this action are not included in the $408,027.97 damages award as Plaintiffs have requested that these amounts be determined on a separate motion. In the event that the District Court adopts the above recommendations in whole or part, I respectfully recommend that the District Court refer this matter back to me for a determination of Plaintiffs' reasonable attorneys' fees and costs.

I. Background

a. Underlying Facts

i. Introduction

The following factual summary is largely derived from the Parties' Local Rule 56.1 Statements and supporting evidence. See Local Rules of the United States District Courts for the Southern and Eastern Districts of New York ("Local Civ. Rule") 56.1; Docket Nos. 31, 36, 40.[5] The Parties have submitted a variety of evidence into the record to support their Rule 56.1

[3] The Parties' filings exceed the usual number because the Court required supplemental submissions.

[4] The $408,027.97 in damages reflects the sum of $264,981.94 in delinquent contributions; $89,225.40 in interest for the period June 5, 2012 through and including October 16, 2015; $824.24 in interest for Defendant's previous late payment of contributions; and $52,996.39 in liquidated damages.

[5] When the factual summary relies on evidence that does not appear in the Parties' Local Rule 56.1 Statements, I will highlight that fact.

Statements, including declarations, contracts and business records. The sworn declarations in the record are from: (1) Keith Loscalzo, an officer of Local 1010, Docket No. 32; (2) Joseph Montelle, a Funds administrator ("Fund Administrator Montelle"), Docket No. 33; (3) Charles R. Virginia, Plaintiffs' counsel, Docket No. 34; (4) Francisco Fernandez, an officer of Local 1010, Docket No. 37, 50; (5) Brian Gardner, Defendant's counsel, Docket No. 42; (6) Mariano Capparelli, Defendant's President ("President Capparelli"), Docket No. 41; and (7) Anna Ruscitto, Defendant's Office Manager ("Office Manager Ruscitto"), Docket No. 46. The record evidence is viewed in the light most favorable to the non-movant Defendant. See Tolan v. Cotton, 134 S.Ct. 1861, 1863 (2014) ("[I]n moving on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'") (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

As the non-movant, Defendant was required in its Local Rule 56.1 Statement to "include a correspondingly numbered paragraph responding to each numbered paragraph in [Plaintiffs'] statement[.]" Local Civ. Rule 56.1(b). "Each statement by [a non-movant defendant] . . . controverting any statement of material fact, must be followed by citation to evidence which would be admissible[.]" Local Civ. Rule 56.1(d). When a non-movant defendant has failed to "specifically controvert[]" one of the plaintiffs' material facts with a correspondingly numbered paragraph supported by record evidence, the plaintiffs' fact "will be deemed to be admitted for purposes of the motion[.]" Local Civ. Rule 56.1(c); see Kelly v. City of N.Y., 576 F. App'x 22, 24 n.2 (2d Cir. 2014) (finding no error in the district court "deem[ing the] plaintiffs' Local Rule 56.1 Statement admitted where [the] defendants' Rule 56.1 responses were general denials and admissions that did not meet the substance of [the] plaintiffs['] allegations"); Harris v. Queens Cnty. Dist. Attorney's Office, No. 08 Civ. 1702 (CBA), 2012 WL 832837, at *3 (E.D.N.Y. Mar.

12, 2012) (ruling that "each statement in [the defendants'] Rule 56.1 statement is deemed admitted" because the plaintiff "failed to file [a correspondingly numbered paragraph responding to each numbered paragraph]" in the defendants' statement) (citing Local Civ. Rule 56.1(c)); Maersk, Inc. v. Neewra, Inc., 687 F. Supp. 2d 300, 313 (S.D.N.Y. 2009) ("Paragraphs in [the plaintiff's] Rule 56.1 Statement that are not 'specifically controverted by a correspondingly numbered paragraph' in the [defendants'] Rule 56.1 Counterstatement are deemed admitted for purposes of [the plaintiff's] summary judgment motion.") (citing Local Civ. Rule 56.1(c)). Here, although Defendant has submitted a Rule 56.1 counterstatement, it at times denies Plaintiffs' fact without offering a citation to contrary and admissible evidence. In this factual summary, I will observe when Defendant's Rule 56.1 counterstatement fails to cite to admissible evidence to support its position and state the effect of the omission.

ii. The Nature Of Defendant's Business, Generally

According to Defendant, its business, which is limited to projects in New York State, is

> perform[ing] landscaping work, mostly with regard to publicly funded projects. This can include improvements to a public park such as laying new dirt, grass, and installation of plantings and trees, as well as plantings along public streets and roadways in the State of New York, whether in conjunction with roadway projects or independent of those projects.

Docket No. 41 ¶ 3.[6]

iii. Local 1010 And Membership Eligibility, Generally

Plaintiffs state, and Defendant does not contest, that Local 1010 is a labor organization

[6] Plaintiffs takes no position as to the truth of this description of Defendant's business. I accept the description as true for the purposes of this motion as background, but it does not affect my findings in this report and recommendation.

within the meaning of Section 301 of the LMRA, 29 U.S.C. § 185, and represents employees in an industry affecting commerce as defined in Section 502 of the LMRA, 29 U.S.C. § 142, and as further defined in Section 12 of the General Association Law of the State of New York. Docket No. 50 ¶ 3. Its principal place of business is at 136-25 37th Avenue, Flushing, New York. Id.

Plaintiffs are trustees of multi-employer labor-management trust funds organized and operated in accordance with Section 302(c) of the LMRA, 29 U.S.C. § 186(c). Docket No. 31 ¶ 1. The Funds, which benefit members of Local 1010, among those of other unions, are employee benefit plans within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3). Id.[7]

iv. Defendant Signed Two CBAs With The Local 1010 Union—One For The Period July 1, 2009 Through June 30, 2012, And One For The Period July 1, 2012 Through June 30, 2015

On July 16, 2010, Defendant's Office Manager Ruscitto signed the first CBA with Local 1010, which covered the period July 1, 2009 through June 30, 2012 (hereinafter the "2009-2012 Local 1010 CBA"). Docket No. 31 ¶ 3; Docket No. 32 ¶ 4; Docket No. 32-1 (a copy of the first CBA bearing Office Manager Ruscitto's signature); Docket No. 34-1 at 17 (President Capparelli's deposition testimony).[8]

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[7] Defendant's Rule 56.1 Statement denies that Plaintiffs are trustees of multi-employer labor-management trust funds which are employee benefit plans and asks that the Court make all "legal conclusions." Docket No. 40 ¶ 1. Because Plaintiffs provide the Court with Fund Administrator Montelle's declaration that the Funds are multi-employer funds which operate as employee benefit plans, 29 U.S.C. § 1002(3); Docket No. 33 ¶ 3, whereas Defendant cites to no contrary record evidence, Docket No. 31 ¶ 3, I deem Plaintiff's fact to be admitted.

[8] Defendant's Rule 56.1 Statement admits that Office Manager Ruscitto signed a 2009-2012 Local 1010 CBA, but denies that the document in the record is the 2009-2012 Local 1010 CBA, asking the Court to make this "legal conclusion[]." Docket No. 40 ¶ 3. Defendant cites to no record evidence "specifically controverting" Plaintiffs' assertion that the 2009-2012 Local 1010 CBA in the record is a true and accurate copy of that document and no counter document is offered. Docket No. 31 ¶ 3. Accordingly, I deem the 2009-2012 Local 1010 CBA in the record to be a true and accurate copy of that document for the purposes of this motion and I will hereinafter cite directly to that document when quoting its provisions. Docket No. 32-1.

The 2009-2012 Local 1010 CBA provided that

> [t]his Agreement shall continue in effect until and including June 30, 2012 and during each year thereafter unless on or before the fifteenth (15th) of March 2012, or on or before the fifteenth (15th) day of March of any year thereafter, written notice of termination or proposed changes shall have been served by either party on the other party.
>
> In the event that written notice shall have been served, an [A]greement supplemental hereto, embodying such change[s] agreed upon, shall be drawn up and signed by June 30th of the year in which the notice shall have been served.

Docket No. 32-1 at 33, Art. XVIII (hereinafter "the written termination requirement"). The Parties agree that Defendant never provided written notice indicating a desire to modify, amend or terminate the 2009-2012 Local 1010 CBA. Docket No. 31 ¶ 6; Docket No. 40 ¶ 6.

On August 6, 2012, Defendant's Office Manager Ruscitto signed the second CBA with Local 1010, covering the period July 1, 2012 through June 30, 2015 (hereinafter the "2012-2015 Local 1010 CBA"). Docket No. 31 ¶ 4; Docket No. 32 ¶ 5; Docket No. 32-2 (a copy of the second CBA bearing Office Manager Ruscitto's signature); Docket No. 40 ¶ 4. The 2012-2015 Local 1010 CBA contained the same written termination requirement as the 2009-2012 Local 1010 CBA (only the relevant deadlines run through 2015 instead of 2012), and the Parties agree that Defendant never provided written notice indicating a desire to modify, amend or terminate the 2012-2015 Local 1010 CBA either. Docket No. 32-2 at 34; Docket No. 31 ¶ 8; Docket No. 40 ¶ 8.[9]

[9] Once again, as Defendant cites to no record evidence "specifically controverting" Plaintiffs' assertion that the 2012-2015 Local 1010 CBA in the record is a true and accurate copy of that document, I deem the 2012-2015 Local 1010 CBA to be a true and accurate copy of that document for the purposes of this motion and I will hereinafter cite directly to that document when quoting its provisions. Docket No. 31 ¶ 4; Docket No. 32-2.

v. The Local 1010 CBAs Imposed Various Obligations Upon Defendant

1. The Local 1010 CBAs Required Defendant To Pay Contributions To The Funds For Each Hour Of Covered Work That The Defendant's Employees Performed

The Parties agree that the CBAs required Defendant to make contributions to the Funds on behalf of its employees for each hour they performed Covered Work in New York as defined by the CBAs (and to the Annuity Fund for each hour of Covered Work for which Defendant's employees were paid when the employees worked overtime hours). Docket No. 31 ¶ 11; Docket No. 40 ¶ 11.

2. In Sum And Substance, The Local 1010 CBAs Defined Covered Work As "Site And Ground Improvement" Which Included, Inter Alia, "Landscaping Which Is Incidental To Paving And Road Work"

The Local 1010 CBAs' definition of Covered Work was similar in both agreements, although each used slightly different verbiage. In sum and substance, the key point for the purposes of this motion is that both CBAs stated that Covered Work was landscaping incidental to paving work.[10] Docket No. 32-1, Art. VI § 1(19); Docket No. 32-2, Art. VI § 1(19).

[10] For example, the 2009-2012 Local 1010 CBA stated in relevant part that Covered Work was "Site and [G]round Improvement, Utility[,] Paving and Road and Highway Building Work" on parks and that "[l]andscaping which is incidental to paving work" was included in that definition. Docket No. 32-1, Art. VI § 1(19). In contrast, the 2012-2015 Local 1010 CBA explained in relevant part that Covered Work was "all Site and Grounds Improvement, including . . . Utility, Paving, Highway, Road and Street Construction Work" on parks, and that "[l]andscaping which is incidental to paving[] and road work" was included in that definition. Docket No. 32-2, Art. VI § 1(19).

3. The Local 1010 CBAs Required Defendant To Submit A Remittance Report To The Funds On A Regular Basis Reporting The Number Of Covered Work Hours Performed By And Paid To Its Employees And Calculating Defendant's Related Contributions Debt

The CBAs required Defendant to keep records of the Covered Work its employees performed and to submit Remittance Reports to the Funds on a regular basis, which calculated the amount of contributions debt that Defendant had accrued during the time periods under review. Docket No. 32-1, Art. IX § 1(b); Docket No. 32-2, Art. IX § 1(c). Defendant submitted monthly Remittance Reports. Docket No. 33-1. The monthly Remittance Reports listed the "name, [S]ocial [S]ecurity number, hours worked, project number and job locations" of each employee who had performed regular and overtime hours of Covered Work during the month in question. Docket No. 31 ¶ 12; Docket No. 40 ¶ 12; Docket No. 32-1, Art. IX § 1(c); Docket No. 32-2, Art. IX § 1(d).

Every Remittance Report prompted Defendant to calculate its contributions debt for the Welfare Fund, Pension Fund and Training Fund by multiplying the total number of Covered Work hours performed by Defendant's employees in the subject month by the contribution rate which the CBAs set for each one of those Funds. Docket No. 32-1, Art. VII § 8; Docket No. 32-2, Art. VII § 8. Defendant was instructed to calculate its contributions debt for the Annuity Fund slightly differently, which was by multiplying the total number of Covered Work hours paid to Defendant's employees in the subject month by the contribution rate that the CBAs set for the Annuity Fund. Docket No. 32-1, Art. IX § 1(a); Docket No. 32-2, Art. IX § 1(b). Stated differently in the words of the CBAs: "Annuity Fund contributions shall be paid for all hours

paid at the straight time, or time and one-half, or double time rate." Id.[11]

The CBAs' rate schedules set contribution rates for each Fund as follows:

	Defendant's Contribution Rate For Covered Work Performed By Or Paid To Defendant's Employees From July 1, 2009 Through June 30, 2012	**Defendant's Contribution Rate For Covered Work Performed By Or Paid To Defendant's Employees From July 1, 2012 Through June 30, 2015**
Welfare Fund	$14.60 per hour worked	$15.00 per hour worked
Pension Fund	$9.80 per hour worked	$10.40 per hour worked
Training Fund	$0.90 per hour worked	$0.10 per hour worked
Annuity Fund	$5.55 per hour paid	$6.00 per hour paid

Docket No. 32-3 at 3, 6. Defendant had to submit the Remittance Report for each individual employee no later than "thirty-five (35) days after the close of a month when [Defendant was] covered by a bond whether or not work is performed during said period," and pay the corresponding contributions debt by that date as well.[12] Docket No. 31 ¶ 13; Docket No. 40 ¶ 13; Docket No. 32-1, Art. IX § 1(b); Docket No. 32-2, Art. IX § 1(c); Docket No. 33-3 at 4, Art.

[11] It should be noted that Defendant objects to an hours-paid calculation for the Annuity Fund contributions because "[t]here is no indication or requirement on the form that overtime or double-time hours be calculated at some different rate." Docket No. 66. The argument has no merit because the Remittance Reports on their face say that the Annuity Fund multiplier is determined by "hours paid" and not "hours worked," with that latter phrase appearing in the lines corresponding to the Welfare, Pension and Training Fund. Docket No. 33-1. Defendant argues that the Annuity Fund multiplier should not be determined by reference to hours paid because the Annuity Fund already has a unique contributions rate. Docket No. 66. The argument has no merit because there is nothing about the Annuity Fund's unique contributions rate which would render unenforceable the CBAs' express language requiring Defendant to calculate its Annuity Fund contributions with reference to hours paid. Docket No. 32-1, Art. IX § 1(a); Docket No. 32-2, Art. IX § 1(b).

[12] Defendant's Rule 56.1 Statement suggests that the Court consider the Parties' "custom and practice, if any." Docket No. 40 ¶ 12. Defendant cites no record evidence as to the Parties' "custom and practice, if any," let alone an argument as to the relevance of such custom or practice. As a result, I deem Plaintiff's stated fact, supported by documentary evidence in the record, as admitted without the custom-and-practice qualification. See Local Civ. Rule 56.1(c).

II §§ 1-2, 4; Docket No. 33 ¶ 8.

vi. The Funds' Trustees Promulgated A Collection Policy Which Required Defendant To Pay Various Penalties In The Event That Defendant Failed To Pay Contributions Owed To The Funds

The CBAs contain a term authorizing the Trustees to promulgate Trust Agreements for the Funds which then become incorporated into the CBAs. Docket No. 31 ¶ 18; Docket No. 32-1, Art. IX § 1(a); Docket No. 32-2, Art. IX § 1(b). As a result, Defendant, as a signatory to the CBAs, agreed to be "bound by the Trust Agreements and Plan Documents for . . . the Funds, as they may be amended from time to time by the Trustees." Docket No. 31 ¶ 18; Docket No. 40 ¶ 18; Docket No. 32-1, Art. IX § 7; Docket No. 32-2, Art. IX § 9.[13]

The resulting Trust Agreements provide that the Trustees, in operating and administering the Funds, have the authority to establish "rules relating to the collection of contributions and other payments, and amend such from time to time as necessary or appropriate; provided however that such rules cannot conflict with the [CBAs.]" Docket No. 31 ¶ 18; Docket No. 33-2, Art. V § 3(b); Docket No. 33-3, 32, Art. V § 3(b).[14]

The Trustees exercised this authority and promulgated a Policy for Collection of Delinquent Fringe Benefit Contributions ("the Collection Policy"). Docket No. 30 ¶ 19; Docket No. 33 ¶ 8; Docket No. 33-4. The Collection Policy provides that if Defendant fails to pay

[13] Defendant states that the CBAs do not support this fact. Docket No. 40 ¶ 18. I disagree. The CBAs language is clear and Defendant cites to no contrary record evidence to support its position. Docket No. 32-1, Art. IX § 1(a); Docket No. 32-2, Art. IX § 1(b).

[14] As with the CBAs, Defendant's Local Rule 56.1 Statement does not admit that the Trust Agreements that Plaintiffs submitted in the record are true and accurate copies of the relevant Trust Agreements. Docket No. 40 ¶ 18. Once again, as Defendant cites to no record evidence "specifically controverting" Plaintiffs' assertion that the Trust Agreements in the record are true and accurate copies of the Trust Agreements being discussed in this motion, I deem that fact to be admitted, and I will hereinafter cite directly to the Trust Agreements when quoting their provisions. Docket No. 33-2; Docket No. 33-3.

contributions owed to the Funds when they are due, Defendant becomes liable to the Funds

> for the payment of [the] delinquent [c]ontributions with interest at the rate of ten percent (10%) per annum (calculated from the [thirty-fifth day after the close of the month in which the hours were worked]), plus liquidated damages of twenty percent (20%) of the amount of delinquent [c]ontributions owing, and, in the event a legal action is commenced, all costs including, but not limited to, reasonable audit and accounting expenses, witness costs and attorneys' fees, disbursements and court costs.

Docket No. 33-4, Art. II §§ 1-2, 4.[15]

vii. The Local 1010 CBAs Required Defendant's Employees Who Performed Covered Work To Be Local 1010 Members, And The Local 1010 CBAs Require Local 1010 To Operate A "Hiring Hall" For The Purpose Of Referring "Qualified Employee Applicants" To Signatories On Their Request

The Local 1010 CBAs required Defendant's employees who performed Covered Work to become or remain Local 1010 members. Docket No. 32-1, Art. III §1(a); Docket No. 32-2, Art. III § 1(a). In order to aid Defendant in this regard, the CBAs required Local 1010 to operate a "Hiring Hall" "in a non-discriminatory manner and in full compliance with all Federal, State [and] Local laws and regulations which require equal employment and non-discrimination." Docket No. 32-1, Art. III § 4(a); Docket No. 32-2, Art. III § 4(a); Docket No. 41 ¶ 7. In the event that Defendant "request[ed] [e]mployees from [Local 1010]," the CBAs required that Local 1010 fill Defendant's "referral requests and dispatch to [Defendant] qualified employee applicants[.]" Docket No. 32-1, Art. III §§ 4(b)-(c); Docket No. 32-2, Art. III §§ 4(b)-(c); Docket No. 41 ¶ 7.

[15] The CBAs, the Trust Agreements and the Collection Policy all contained penalty provisions in the event of Defendant's failure to timely pay due contributions. Plaintiffs' summary judgment motion is brought pursuant to the Collection Policy, which out of these three documents provides for the highest penalty. Docket No. 32-1, Art. IX § 5; Docket No. 33-2, Art. VII § 9; Docket No. 33-3, Art. VII § 9.

In addition, the CBAs required Local 1010 to accept Defendant's employees to its membership "on the same terms and conditions generally applicable to other members . . . and, further, [Defendant would] not be requested to discharge an [e]mployee for reasons other than such employee's failure to tender the periodic dues or fees uniformly required." Docket No. 32-1, Art. III § 1(a); Docket No. 32-2, Art. III § 1(a).

viii. Defendant Signed A Subcontract To Do Landscaping Work On The Bushwick Project

On July 8, 2010, Defendant signed a subcontract with Perfetto Contracting Company, Inc. to perform landscaping work for a construction project that Perfetto Construction was handling at Bushwick Inlet Park for the New York City Parks and Recreation Department (hereinafter "Perfetto Construction," "NYC Parks Department," "Bushwick Project" and "Bushwick Project Subcontract"). Docket No. 41-2. In exchange for its landscaping services, Defendant was to receive $360,408.00. Id., Art. X § 10.[16]

Perfetto Construction's prime contract with the NYC Parks Department was to construct the Department's "district headquarters and comfort station" at Bushwick Inlet Park. Docket No. 41-2 at 1. Perfetto Construction was required to "furnish[] [the] labor, materials, equipment and services in connection with the construction" and Defendant was required to execute "[a]ll plantings, not excluding trees, shrubs, mulch, topsoil and all items and maintenance as per specs and plans which have been reviewed and [the] subcontractor and its representatives state they are completely familiar with and understand." Id., Art. VIII.

[16] Defendant submitted this information outside the context of the Rule 56.1 Statements such that Plaintiffs have not admitted or denied Defendant's allegations that the Bushwick Project Subcontract in the record is a true and accurate copy of the document or that the Bushwick Project Subcontract contains this language. Nonetheless, I include the information for completeness.

The prime contract is not in the record. A copy of the Bushwick Project Subcontract is in the record, but related "specs and plans" are not included. Id., passim. As an example of "specs and plans" not in the record, on the Bushwick Project Subcontract's second page, the table of contents mentions a document titled "Site Details—Pavements and Curbs." Id. at 2.

The Bushwick Project Subcontract requires that "[a]ll labor on this project [is] to be performed by Union labor[.]" Docket No. 41-2, Art. 8. It further provides that "[a]ny remedies to any [related] labor disputes arising out of any non-union laborer that is required to complete [the subcontractor's] work shall be computed at a minimum of local 731 Laborers Union workers, and local 14 and/or 15 Operating Engineers Union workers, + other applicable (union) trade(s) at the prevailing union wage rates[.]" Id.

The Bushwick Project Subcontract's reference to the Local 731 Union is a reference to a union with which Defendant, on December 9, 2009, signed a CBA covering the period July 1, 2006 through June 30, 2012 (hereinafter the "Local 731 CBA"). Docket No. 41 ¶ 4; Docket No. 41, Exh. 1. The only information in the record relating to Local 731 or the terms of Defendant's Local 731 CBA is that it applies to Defendant's "employment of laborers" on, inter alia, "excavation and foundation work for buildings," "landscaping in connection with building projects" and "landscaping in connection with heavy construction and engineering." Docket No. 41 ¶ 4; Docket No. 41, Exh. 1.[17]

[17] Defendant submitted this information outside the context of Rule 56.1 Statements such that Plaintiffs have not admitted or denied Defendant's allegations that the Bushwick Project Subcontract contains this provision mentioning Local 731 or that the Local 731 CBA excerpts in the record are true and accurate copies of those pages. Plaintiffs do make arguments regarding the Bushwick Project Subcontract's irrelevance to Plaintiffs' entitlement to summary judgment, which I discuss below. In my discussion I assume, arguendo, that the Local 731 facts are true, but I find that they are not material to my findings in this report and recommendation.

ix. Defendant Asked Local 1010 To Grant Membership To Fourteen Of Defendant's Employees

In 2010 and 2011, before Defendant's employees ever performed Covered Work giving rise to the contested contributions, Defendant asked Local 1010 to grant Union membership to six of Defendant's pre-existing employees.[18] Docket No. 33-1; Docket No. 37-1; Docket No. 37-2. First, on December 22, 2010, President Capparelli wrote to Local 1010 and requested that the Union grant membership to two of Defendant's employees: Ignacio O. ("Mr. Ignacio O.") and Christian B. ("Mr. Cristian B."). Docket No. 37-1 (confirming that they were Defendant's employees). Then, on July 8, 2011, Office Manager Ruscitto wrote to Local 1010 and requested that the Union grant membership to four other Defendant employees: Francisco O. ("Mr. Francisco O."); Pantaleon R. ("Mr. Pantaleon R."), Elman S. ("Mr. Elman S.") and Israel G. ("Mr. Israel G."). Docket No. 37-2 (confirming that they were Defendant's employees). The Union granted them membership. Docket No. 49 at 17.[19]

x. Defendant Submitted Fourteen Remittance Reports To The Funds Reporting Its Contributions Debt, Which Defendant Calculated From The Number Of Covered Work Hours Performed By Its Employees

1. Defendant's Eleven Remittance Reports Covering September 2011 To August 2012 (Excepting May 2012)

Defendant submitted Remittance Reports to Plaintiffs on a monthly basis for the months of September 2011 through and including April 2012, and June 2012 through and including August 2012 ("the Eleven Remittance Reports"). Docket No. 33-1; Docket No. 31 ¶ 14; Docket

[18] In fact, Defendant asked Local 1010 to grant Union membership to thirteen of its pre-existing employees. Docket No. 37-1; Docket No. 37-2. As only six of these pre-existing employees are relevant to the instant dispute, my discussion focuses on them.

[19] The Parties do not address the allegedly undocumented workers' Union membership in their 56.1 Statements, but Plaintiffs concede in their briefing that Local 1010 granted the six workers membership. Docket No. 49.

No. 40 ¶ 14. The Eleven Remittance Reports conveyed the number of hours of Covered Work performed by twenty of Defendant's employees to the Funds. Docket No. 33-1. Those twenty employees were: Messrs. Christian B., Abelardo R. ("Mr. Abelardo R."), Jose S. ("Mr. Jose S."), Ignacio O. , Luis V. ("Mr. Luis V."), Oscar G. ("Mr. Oscar G."), Henry C. ("Mr. Henry C."), Israel G., Alexander B. ("Mr. Alexander B."), Guillermo B. ("Mr. Guillermo B."), Pantaleon R.. Francisco O., George M. ("Mr. George M."), Antonio A. ("Mr. Antonio A."), Joelson P. ("Mr. Joelson P."), Marcos P. ("Mr. Marcos P."), Francisco B. ("Mr. Francisco B."), Francisco A. ("Mr. Francisco A."), Pietro G. ("Mr. Pietro G.") and Leopoldo B. ("Mr. Leopoldo B."). Docket No. 31 ¶ 14; Docket No. 40 ¶ 14; Docket No. 33-1; Docket No. 41 ¶ 8.

President Capparelli testified at a March 27, 2013 deposition that during the two years relevant to this action, he reviewed Defendant's Remittance Reports (which were prepared by Office Manager Ruscitto) before they were sent to the "Pavers Funds." Docket No. 34-1 at 14-16. During his deposition, President Capparelli looked specifically at the Eleven Remittance Reports; confirmed that they were the ones that Defendant submitted to the Funds; and, in response to the question "Is the information [therein] accurate?", answered "I believe it would be." Id. at 16. During his deposition, President Capparelli then took additional time to review the Eleven Remittance Reports and, in response to the question "To your knowledge, is there anything inaccurate on these reports[,] any of the information that [Defendant] provided?", answered "I don't believe so. No." Id.

In summary, the Eleven Remittance Reports stated the following:

Relevant Work Period	**Employees Who Performed Covered Work**	**Total Hours Of Covered Work Performed**	**Defendant's Contributions Debt**
9/1/2011 through 9/30/2011	Messrs. Cristian B., Abelardo R. and Jose S.	408 hours	$12,675.60

10/1/2011 through 10/31/2011	Messrs. Jose S., Ignacio O., Luis V. and Oscar G.	256 hours	$7,897.60
11/1/2011 through 11/30/2011	Messrs. Henry C., Israel G., Oscar G., Alexander B. and Luis V.	232 hours	$7,157.20
12/1/2011 through 12/31/2011	Messrs. Luis V., Alexander B., Ignacio O., Israel G. and Oscar G.	200 hours	$6,170.00
1/1/2012 through 1/31/2012	Messrs. Cristian B. and Ignacio O.	192 hours	$5,923.20
2/1/2012 through 2/29/2012 (leap year)	Messrs. Abelardo R., Cristian B., Guillermo B., Henry C., Ignacio O. and Pantaleon R.	611 hours	$19,065.80
3/1/2012 through 3/31/2012	Messrs. Abelardo R., Cristian B., Guillermo B., Henry C., Ignacio O., Luis V., Francisco O., Israel G. and Alexander B.	1,000 hours	$30,850.00
4/1/2012 through 4/30/2012	Messrs. Cristian B., Israel G., Guillermo B., Abelardo R., Henry C., Ignacio O., Pantaleon R., Francisco O., Luis V., Alexander B., George M., Antonio A., Joelson P., Marcos P., Francisco B., Francisco A., Pietro G. and Leopoldo B.	1,192 hours	$36,941.33
5/2012	No submission	No submission	No submission
6/1/2012 through 6/30/2012	Messrs. Francisco B., Luis V., Ignacio O., Francisco O., Pantaleon R., Alexander B., Henry C., Abelardo R., Cristian B. and Guillermo B.	935 hours	$29,230.48
7/1/2012 through 7/31/2012	Messrs. Henry C., Alexander B., Luis V., Francisco O., Ignacio O., Francisco B., Pantaleon R., Abelardo R., Cristian B. and Guillermo B.	1,421 hours	$48,016.50
8/1/2012 through 8/31/2012	Messrs. Abelardo R., Cristian B., Francisco B., Guillermo B., Luis V., Henry C., Pantaleon R., Ignacio O., Alexander B. and Francisco O.	1,504 hours	$47,451.00

Docket No. 33-1 at 1-20; Docket No. 64-1.[20]

[20] It should be noted that I have not here transcribed the exact number appearing on each Remittance Report's line corresponding to that month's "Welfare, Pension, Training & Annuity

2. Defendant's Three Remittance Reports Covering The Period September 2012 To November 2012

Defendant also submitted remittance reports to Plaintiffs for its employees' work performed from September 2012 through and including November 2012 ("the Three Remittance Reports"). Docket No. 31 ¶ 15; Docket No. 40 ¶ 15; Docket No. 33-1 (copies of the Three Remittance Reports). Again, President Capparelli testified at his March 27, 2013 deposition that during the two years relevant to this action he reviewed Defendant's Remittance Reports (which were prepared by Office Manager Ruscitto) before they were sent to the "Pavers Funds." Docket No. 34-1 at 14-16. The Three Remittance Reports conveyed the number of hours of Covered Work performed by four of Defendant's employees: Messrs. Henry C., Luis V., Alexander B. and Carlos R. ("Mr. Carlos R."). Docket No. 31 ¶ 15; Docket No. 40 ¶ 15; Docket No. 33-1 at 20-22. In contrast to President Capparelli's specific review of the Eleven Remittance Reports during his March 27, 2013 deposition, President Capparelli did not specifically review the Three

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[Contributions] Total." If one were to add those numbers together, they amount to $269,972.35 and not the $274,981.94 that Plaintiffs seek in this action. Docket No. 33-1. In an August 11, 2015 conference, I asked Plaintiffs to address this discrepancy, and they explained that Office Manager Ruscitto made mathematical errors in preparing the Remittance Reports which Plaintiffs had corrected in doing their own calculation of Defendant's contributions debt. Docket No. 67. Office Manager Ruscitto at times made simple mathematical errors, but she also failed to calculate Annuity Fund contributions using the hours of Covered Work paid to Defendant's employees in a given month as the CBAs required rather than the hours of Covered Work worked. Docket No. 67.

After the August 11, 2015 conference, Defendant filed a letter with the Court stating that it did "not object to Plaintiffs' correction of mathematical errors in the [R]emittance [R]eports[.]" Docket No. 66 (Defendant did object to calculating the Annuity Fund contributions on the basis of hours paid and not hours worked, which objection I found without merit, supra, Section I.a.v.3). Plaintiffs submitted to the Court a chart detailing the mathematical errors they found in the Remittance Reports. Docket No. 64-1. I have reviewed and verified those mathematical errors by reading Plaintiffs' submission in conjunction with the Remittance Reports and so the above figures come from Plaintiffs' corrected chart. Id.

Remittance Reports and state his opinion as to their accuracy. Docket No. 34-1 at 14; Docket No. 35 n.1.

In summary, the Three Remittance Reports state the following:

Relevant Work Period	**Employees Who Performed Covered Work**	**Total Hours Of Covered Work Performed**	**Defendant's Contributions Debt**
9/1/2012 through 9/30/2012	Messrs. Henry C., Luis V., Carlos R. and Alexander B.	225.50 hours	$7,122.75
10/1/2012 through 10/31/2012	Messrs. Carlos R., Luis V. and Alexander B.	313 hours	$10,363.50
11/1/2012 through 11/30/2012	Messrs. Alexander B. and Luis V.	160 hours	$6,117.00

Docket No. 33-1 at 20-22; Docket No. 64-1.[21]

3. According To The Fourteen Remittance Reports, When Added Together, Defendant Owes $274,981.94 In Contributions To The Funds ($264,981.94 After A $10,000.00 Credit For A Onetime Payment To The Funds In That Amount)

Defendant's Fourteen Remittance Reports, when added together, declare that Defendant owes $274,981.94 in contributions to the Funds. Docket No. 31 ¶ 16; Docket No. 33-1; Docket No. 64-1.[22] After crediting Defendant with a onetime payment of $10,000.00 to the Funds,

[21] The numbers in this chart are not found on the face of the Three Remittance Reports, but rather in Plaintiffs' submission to the Court correcting the mathematical errors found in the Remittance Reports. Docket No. 64-1. Once again, Defendant does "not object to Plaintiffs' correction of mathematical errors in the [R]emittance [R]eports." Docket No. 66.

[22] It should be noted that Defendant denies that this is the sum not because it denies that the Remittance Reports in the record are not true and accurate copies of those documents, but because Defendant argues that the information it reported to the Funds on the Remittance Reports is inaccurate. Docket No. 41 ¶¶ 13-23. I discuss Defendant's argument below. Here, I only accept that the Remittance Reports, if accurate, reflect that Defendant has a $274,981.94 contributions debt. Docket No. 33-1 (copies of the Remittance Reports); Docket No. 64-1 (Plaintiffs' correction of mathematical errors in the Remittance Reports).

which the Parties do not dispute, Plaintiffs allege that Defendant's outstanding debt arising from the Fourteen Remittance Reports is $264,981.94. Docket No. 31 ¶ 17; Docket No. 40 ¶ 17.

xi. Defendant Allegedly Discovered That Some Of Its Employees Who Had Covered Work Reported On The Eleven Remittance Reports Were Not Authorized To Work In The United States At The Time They Performed The Covered Work (None Of These Workers Had Covered Work On The Three Remittance Reports)

Defendant alleges that eight of its employees—Messrs. Ignacio O., Pantaleon R., Israel G., Elman S., Francisco O., Cristian B., Francisco B. and Leopoldo B.—were not authorized to work in the United States. Docket No. 41 ¶ 8. All eight of these allegedly unauthorized workers performed Covered Work that was reported to the Funds on the Eleven Remittance Reports. Docket No. 33-1. The eight allegedly unauthorized workers did not perform work on the Three Remittance Reports. Docket No. 33-1 at 20-22.

Defendant found and hired six of these eight workers without Local 1010's involvement, as demonstrated by Defendant's December 22, 2010 and July 8, 2011 letters asking Local 1010 to grant Union membership to Defendant's employees Messrs. Ignacio O., Pantaleon R., Israel G., Elman S., Francisco O. and Cristian B. Docket No. 37-1; Docket No. 37-2. Local 1010 referred the remaining two allegedly unauthorized employees—Messrs. Francisco B. and Leopoldo B.—to Defendant for employment pursuant to the CBAs' "Hiring Hall" provision. Docket No. 41 ¶¶ 7-12.

When the allegedly unauthorized workers began their employment with Defendant, they provided Defendant with Individual Taxpayer Identification Numbers ("ITINs"): 9XX-76-XXXX (Mr. Ignacio O.); 9XX-85-XXXX (Mr. Pantaleon R.); 9XX-82-XXXX (Mr. Israel G.); 9XX-83-XXXX (Mr. Elman S.); 9XX-74-XXXX (Mr. Francisco O.); 9XX-80-XXXX (Mr.

Cristian B.); 9XX-74-XXXX (Mr. Francisco B.); and 9XX-78-XXXX (Mr. Leopoldo B.).[23] Docket No. 41 ¶¶ 8-10.

The Parties dispute the significance of the workers' ITINs to a determination that they are unauthorized to work in the United States. Defendant claims that it "was able to determine the workers' illegal status merely by their ITIN[s]," although Defendant elsewhere concedes that an individual possessing an ITIN does not necessarily lack authorization to work. Id. ¶ 12; Docket No. 45 at 5. Plaintiffs reiterates the latter point—that there is no evidence in the record that an individual possessing an ITIN necessarily lacks documentation to work such that there is a genuine issue of material fact as to whether the eight allegedly undocumented workers were, in fact, undocumented. Docket No. 35 at 4.

The record does not show precisely when Defendant allegedly learned through its payroll company that the allegedly unauthorized workers were not authorized to work in the United States, although Defendant suggests that it occurred after it had submitted the Eleven Remittance Reports to the Funds. Docket No. 41 ¶¶ 8, 10.

[23] The Internal Revenue Service's ("IRS") Web site explains that an ITIN "is a tax processing number issued by the [IRS]. It is a nine-digit number that always begins with the number 9 and has a range of 70-88 in the fourth and fifth digit." Docket No. 42-1 at 4. Relatedly, the Social Security Administration's Web site explains that the agency no longer issues Social Security Numbers ("SSNs") beginning with the number "9." See www.ssa.gov/kc/SSAFactSheet--Issuing SSNs.pdf (last accessed July 28, 2015); Internal Revenue Service, Social Security is changing the way SSNs are issued, www.ssa.gov/kc/SSAFactSheet--IssuingSSNs.pdf (last accessed Sept. 24, 2015).

I have redacted portions of the workers' ITINs above because they are only relevant to this case insofar as they begin with the number 9 and have a range of 70-88 in the fourth and fifth digit.

xii. Defendant Offers Examples Of Inaccuracies In The Eleven Remittance Reports Which Are Due To Listing Non-Covered Work And Which Are Unrelated To Workers' Immigration Status (None Of Defendant's Examples Come From The Three Remittance Reports)

According to President Capparelli in his October 22, 2013 declaration, all of the Remittance Reports that Defendant submitted to the Funds are inaccurate because Defendant's employees either did not perform Covered Work during those periods at all or performed substantially less than what Defendant reported. Id.

As an example of how the Remittance Reports are inaccurate, President Capparelli states in his October 22, 2013 sworn declaration that "[t]he Bushwick Project called for various landscaping within the park having nothing to do with road paving or the construction of roadways. [Defendant's] work on the Bushwick Project did not fall, in any manner, within the scope of Covered Work under the CBAs." Id. President Capparelli identifies the following alleged over-reporting of Covered Work hours relating to the Bushwick Project on select Remittance Reports:

Relevant Remittance Report	**The Erroneous Reporting Of Covered Work Hours**
12/1/2011 through 12/31/2011	Over-reporting 106 regular hours of Covered Work
2/1/2012 through 2/29/2012	Over-reporting 16 regular hours of Covered Work
4/1/2012 through 4/30/2012	Over-reporting 8 regular hours of Covered Work
6/1/2012 through 6/30/2012	Over-reporting 8 regular hours of Covered Work
7/1/2012 through 7/31/2012	Over-reporting 104 regular hours of Covered Work and 32.5 overtime hours of Covered Work
8/1/2012 through 8/31/2012	Over-reporting 25.5 regular hours of Covered Work

Id. ¶¶ 17-23. According to President Capparelli, he was able to identify the errors in the above

six Remittance Reports by "review[ing] the books and records of [Defendant] setting forth the hours worked on the Bushwick Project, and . . . cross-referenc[ing] those records with the Remittance Reports in issue." Id. ¶ 16. Defendant has not submitted as evidence the books and records cited by President Capparelli that reveal the Remittance Reports' inaccuracies.

The six Remittance Reports cited by President Capparelli as examples of Defendant's inaccurate reporting of Covered Work are part of the Eleven Remittance Reports. Docket No. 33-1. Defendant and President Capparelli do not point to any errors in the Three Remittance Reports, other than to say that "[f]urther errors in [all of] the [R]emittance [R]eports exist. These are preliminary reports subject to audit and review. Until [the amounts are confirmed], there is a substantial question as to the exact amount owed, if any, to the Local 1010 Benefits Funds." Docket No. 41 ¶ 23.

b. Procedural History

On February 21, 2012, Plaintiffs filed their Original Complaint. Docket No. 1. Defendant failed to answer or otherwise respond and the Clerk of Court made an entry of default on the docket. Docket No. 5.

On June 21, 2012, Plaintiffs filed a First Amended Complaint. Docket No. 8. On July 9, 2012, Defendant answered. Docket No. 11.

On October 24, 2012, I held an initial conference with the Parties and ordered a pretrial schedule with, inter alia, complaint amendment and discovery deadlines. Docket Entry 10/24/2012.

On January 28, 2013, Plaintiffs filed a Second Amended Complaint in order to reflect the alleged growth in Defendant's delinquency in paying contributions under the CBAs. Docket No. 14.

On February 1, 2013, the Parties jointly moved for an extension of the discovery deadline, which I granted until March 29, 2013. Docket No. 16; Docket Entry 2/2/2013.

On February 15, 2013, I held a status conference with the Parties, which reported that discovery was proceeding according to schedule. Docket Entry 2/15/2013. I ordered Plaintiffs to serve a settlement demand upon Defendant and Defendant to respond on or before March 5, 2013, which was the originally scheduled date for President Capparelli's deposition. Id.

On April 17, 2013, the Parties jointly informed the Court that discovery had closed, that they were discussing settlement, and they requested an extension of the date by which to initiate dispositive motion practice. Docket No. 17. I granted the extension and ordered the Parties to initiate any dispositive motions by May 30, 2013. Docket Entry 4/18/2013.

On May 30, 2013, Plaintiffs moved the District Court for a pre-motion conference seeking to bring a summary judgment motion against Defendant. Docket No. 18.

On June 21, 2013, the District Court held the pre-motion conference and set a briefing schedule for Plaintiffs' summary judgment motion. Docket Entry 6/21/2013.

On July 17, 2013, Defendant's original counsel filed a motion seeking a hearing on its request to withdraw as Defendant's counsel. Docket No. 19. That same day, Defendant's current counsel filed a letter announcing that it would be filing a notice of appearance on Defendant's behalf. Docket No. 20.

On July 31, 2013, I held a telephone conference with the Parties and directed Defendant's incoming counsel to file a substitution of counsel request. Docket Entry 7/31/2013. He did, and I granted the request. Docket No. 22; Docket Entry 8/3/2013.

As a result of Defendant's change in counsel, Defendant moved the District Court to extend the summary judgment briefing schedule four times. Docket Nos. 23-26. The District

Court granted these requests.

Plaintiffs filed the fully bundled motion for summary judgment. Docket Nos. 29-42. The District Court referred the motion to me for a report and recommendation.

I held a conference with the Parties to raise various legal and factual issues which the motion papers raised but had left unclear. Docket Entry 5/16/2014. I set a supplemental briefing schedule so that the Parties could present their positions to the Court. Docket Entry 5/24/2014. The Parties successfully filed various motions to extend the briefing schedule deadlines, but eventually completed that stage of supplemental briefing on or around October 13, 2014. Docket Nos. 47-48, 54-56, 58.

I held a conference with the Parties to discuss Plaintiffs' allegation that Office Manager Ruscitto had made mathematical errors on the Remittance Reports which should be corrected in the calculation of Plaintiffs' damages. Docket No. 65. In response to the Court's questions, the Parties submitted supplemental briefing on the issue. Docket Nos. 66-67.

II. Summary Judgment Legal Standard

Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, "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); see Kwong v. Bloomberg, 723 F.3d 160, 164-65 (2d Cir. 2013); Redd v. N.Y. Div. of Parole, 678 F.3d 166, 174 (2d Cir. 2012). The court's function is to decide "whether, after resolving all ambiguities and drawing all inferences in favor of the non-moving party, a rational juror could find in favor of that party." Pinto v. Allstate Ins. Co., 221 F.3d 394, 398 (2d Cir. 2000).

The role of the court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Cioffi v. Averill Park Cent. Sch.

Dist. Bd. of Educ., 444 F.3d 158, 162 (2d Cir. 2006) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The moving party carries the burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Nevertheless, the non-moving party cannot rest on mere allegations, speculations or denials. See Fed. R. Civ. P. 56(e); see also Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998). "Instead, the non-movant must produce specific facts indicating that a genuine factual issue exists." Scotto, 145 F.3d at 114 (internal quotation marks omitted). The "mere existence of a scintilla of evidence" is not enough to defeat summary judgment; "there must be evidence on which the jury could reasonably find for the [non-moving party]." Jeffreys v. City of N.Y., 426 F.3d 549, 554 (2d Cir. 2005) (internal quotation marks omitted) (citing Anderson, 477 U.S. at 252).

III. Discussion

a. Liability

Plaintiffs bring a claim for enforcement of Defendant's contributions obligation under Section 515 of ERISA, 29 U.S.C. § 1145, which requires employers to make benefit fund contributions in compliance with the terms of collective bargaining agreements and trust agreements. Docket No. 30. Section 515 of ERISA 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.

29 U.S.C. § 1145. Under Section 502(a)(3) of ERISA, Plaintiffs have the authority to seek delinquent contributions from Defendant pursuant to Section 515 as fringe benefit plan fiduciaries. See 29 U.S.C. § 1132(a)(3) (stating that a civil action may be brought by a plan fiduciary to enforce ERISA provisions or terms of the plan); Cent. States, Se. & Sw. Areas

Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 572 (1985) (stating that a "fundamental common-law dut[y] of a trustee is to preserve and maintain trust assets").

Plaintiffs allege (1) that the CBAs bound Defendant to pay contributions in connection with its employees' Covered Work hours and the rate schedules; (2) that Defendant reported a $274,981.94 contributions debt on its Fourteen Remittance Reports which has since become $264,981.94 due to Defendant's payment of $10,000.00; and (3) that Defendant refuses to pay the $264,981.94. Docket No. 30. Defendant responds with various arguments which I find to be without merit. Docket No. 39. I will discuss these arguments in turn.

i. The United States Immigration And Reform Control Act ("IRCA") Does Not Bar The Funds From Recovering The Contributions From Defendant

1. IRCA Generally

As many of Defendant's arguments in this action revolve around the allegation that Local 1010 violated IRCA in its dealings with Defendant when its hiring hall referred to Defendant workers allegedly lacking work authorization, a brief overview of IRCA is necessary. Docket Nos. 39, 45, 57.

In 1986, Congress enacted IRCA to be "a comprehensive scheme prohibiting the employment of illegal aliens in the United States" by requiring that employers verify that each new worker hired is authorized to work in the United States. Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 147 (2002) (citing 8 U.S.C. § 1324a et seq.). "Both Congress and the President expressed the view" that by sanctioning employers who failed to comply with IRCA, the United States would "remove the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens into the country." Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1253 (N.Y. 2006) (quotations & citations omitted).

"[T]he most important component of the IRCA scheme was the creation of a new '[e]mployment verification system' designed to deter the employment of aliens who are not lawfully present in the United States and those who are lawfully present, but not authorized to work." Id. In relevant part, IRCA's "employment verification system" required that "employers verify the identity and eligibility of all new hires by examining specified documents before they begin work." Hoffman Plastic, 535 U.S. at 147 (citing 8 U.S.C. § 1324a(b)). "If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired." Id. (citing 8 U.S.C. § 1324a(a)(1)).

"An employer who knowingly violates [IRCA's] employment verification requirements . . . is subject to civil or criminal prosecution and penalties." Balbuena, 845 N.E.2d at 1253 (citing 8 U.S.C. §§ 1324a(a)(1)-(2), (f)(1)). "IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents" or documents "lawfully issued to or with respect to a person other than the possessor" in order to obtain employment. Hoffman Plastic, 535 U.S. at 148 (quoting 8 U.S.C. §§ 1324c(a)(1)-(3)).

2. The Court Will Assume, Arguendo, That A Genuine Issue Of Material Fact Exists As To Whether The Allegedly Unauthorized Workers Were Unauthorized

The Parties dispute whether there is a genuine issue of material fact as to whether the eight allegedly unauthorized workers were, in fact, unauthorized to work in the United States at the time they performed Covered Work. Docket No. 35; Docket No. 39 at 10. I will assume, arguendo, that there is a genuine issue of material fact for the purposes of this motion as to whether the workers were authorized to work in the United States at the time they allegedly performed the Covered Work. This approach allows me to consider Defendant's argument regarding the impact of IRCA on its obligation to pay contributions for unauthorized workers.

As I explain below, I find that even if Defendant were able to prove that the eight workers were unauthorized, Defendant's IRCA argument does not defeat Plaintiffs' summary judgment motion.[24]

3. Courts Have Held That IRCA Permits An Unauthorized Worker To Recover Backpay Damages For Work Actually And Already Performed

Although IRCA discourages the employment of workers who are not authorized to work in the United States, it is well established that IRCA does not preclude courts from awarding an unauthorized worker backpay damages in the form of unpaid wages for work actually and already performed under federal and state labor laws.

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[24] It should be noted that Defendant points to three categories of circumstantial evidence in its effort to show that the workers were unauthorized. Each category of evidence has its problems.

First, Defendant cites as evidence President Capparelli's declaration that someone at Local 1010 "acknowledged that [the union was] aware" that the workers were unauthorized to work in the United States. Docket No. 41 ¶ 12. This is hearsay which would be inadmissible at trial. Local 1010 is not a party to this action (Plaintiffs are the Fund Trustees) such that the alleged remark does not qualify as an admission against interest made by a party. See Fed. R. Evid. 801(d)(2)(D) (explaining that a statement is not hearsay if "the statement is offered against an opposing party and . . . was made by the party's agent or employee on a matter within the scope of that relationship and while it existed"). Assuming, arguendo, that Defendant could make a case for Local 1010 and the Funds to be treated as one entity for the purposes of FRE 801(d)(2)(D)'s hearsay exemption, Defendant has not produced evidence relating to the Local 1010 declarant that would allow the statement to be admitted, such as information showing: "(1) the existence of the agency relationship, (2) that the statement was made during the course of the relationship, and (3) that it relates to a matter within the scope of the agency." Smith v. Pathmark Stores, Inc., 485 F. Supp. 2d 235, 238 (E.D.N.Y. 2007) (citing Pappas v. Middle Earth Condo. Ass'n, 963 F.2d 534, 537 (2d Cir. 1992)).

Second, Defendant's assertion that the workers had ITINs is poor evidence to show their alleged lack of work authorization because Defendant concedes that holding an ITIN does not by itself show lack of authorization to work. Docket No. 45 at 5.

Third, President Capparelli declares that the workers gave Defendant ITINs when Defendant asked them for Social Security Numbers, which may be the strongest aspect of Defendant's presentation. Docket No. 41. President Capparelli goes on to state that Defendant discovered that the workers in question were unauthorized "from a number of sources[,] including our payroll company," but that cannot be determined because Defendant has not provided detailed information about this evidence. Id. ¶¶ 8-10.

In Madeira v. Affordable Housing Foundation, Inc., 469 F.3d 219, 237-44 (2d Cir. 2006), the Second Circuit held that IRCA does not pre-empt New York's Worker's Compensation Law allowing an individual unauthorized to work in the United States to recover compensatory damages for lost earnings when injured in a construction accident. The Madeira Court stated that its decision was guided in part by the principle that a court's award of damages to an undocumented worker should "not require, or even presume, a continuing violation of IRCA[.]" Id. at 243. As an example of a damages award that did not violate IRCA, the Second Circuit Court of Appeals cited to an "order requiring an employer to pay his undocumented workers the minimum wages prescribed by the Fair Labor Standards Act ("FLSA") . . . for labor actually and already performed." Id.

> In such circumstances, the immigration law violation has already occurred. The order does not itself condone that violation or continue it. It merely ensures that the employer does not take advantage of the violation by availing himself of the benefit of undocumented workers' past labor without paying for it in accordance with minimum FLSA standards.

Id.; Flores v. Amigon, 233 F. Supp. 2d 462, 463-64 (E.D.N.Y. 2002) (stating that "[i]f employers know that they will . . . be subject to civil [and criminal] penalties . . . when they hire illegal aliens, [and] be required to pay them at the same rates as legal workers for work actually performed, there are virtually no incentives left for an employer to hire an undocumented alien") (citations omitted); Balbuena, 845 N.E.2d at 1262 (observing in dicta that it would be unfair in certain "illegal arrangements" to dismiss an unauthorized worker's claim when to do so is "to give a windfall to a defendant at least as guilty of wrongdoing as the plaintiff").

In noting that IRCA did not forbid an FLSA damages award for unpaid wages "for labor actually and already performed," the Second Circuit cited "a number of district courts" that had reached that conclusion. Madeira, 469 F.3d at 243 n.23 (citing Chellen v. John Pickle Co., 446

F. Supp. 2d 1247 (D. Okla. 2006); Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 321-25 (D.N.J. 2005); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 501-03 (W.D. Mich. 2005); Flores, 233 F. Supp. 2d at 463-64; Singh v. Jutla, 214 F. Supp. 2d 1056, 1060-62 (N.D. Cal. 2002)); see Zeng Liu v. Donna Karan Int'l Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002) (stating that IRCA does not preclude undocumented workers from seeking FLSA relief, such that immigration status is irrelevant); Flores v. Albertsons, Inc., No. 01 Civ. 515 (AHM) (SHX), 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) (finding that the plaintiffs' immigration status was not relevant to an FLSA action); Jara v. Strong Steel Doors, Inc., 851 N.Y.S.2d 58, at *4 (N.Y. Sup. Ct. Sept. 12, 2007) (stating that IRCA does not bar a plaintiff from seeking to recover wages for work performed). Since Madeira, courts continue to find that IRCA does not bar FLSA unpaid wages damages awards. See Lucas v. Jerusalem Café, LLC, 721 F.3d 927, 937 (8th Cir. 2013) ("[W]e hold that unauthorized aliens may sue under the FLSA . . . to recover statutory damages for work actually performed."); Alcoser v. A Spice Route Inc., No. 12 Civ. 2106 (HB), 2013 WL 5309496, at *2 (S.D.N.Y. Sept. 19, 2013) (stating that to allow an employer "to assert a defense under the FLSA on the grounds of the employee's immigration status would encourage employers to violate the immigration laws because they would effectively be immunized from [their] duty under the statute to pay earned wages") (citation omitted).

4. IRCA Does Not Preclude The Funds From Recovering Contributions For Covered Work Actually And Already Performed By Unauthorized Workers

a. Defendant's Allegation That Local 1010 Violated IRCA Does Not Affect The Funds' Entitlement To The Contributions Because Local 1010 Did Not Violate IRCA, Which Exempts Union Hiring Halls From Its Reach

Defendant argues that Local 1010's Hiring Hall violated IRCA when it referred allegedly unauthorized workers to Defendant for employment such that the Funds are not entitled to the contributions. Docket No. 39 at 10-14. I disagree because Local 1010 did not violate IRCA.

IRCA specifically exempts union hiring halls from its reach such that Defendant's claim that Local 1010's referrals violated IRCA is incorrect. See 8 CFR §§ 274a.1(c)-(e) (IRCA regulations exempting union hiring halls). Instead, IRCA places the duty to comply with the statute's verification procedures on employers. See Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1974 (2011) ("IRCA requires that employers review documents establishing an employee's eligibility for employment.") (citing 8 U.S.C. § 1324a(b)(1)); Bollinger Shipyards, Inc. v. Dir., Office of Worker's Comp. Programs, 604 F.3d 864, 874 (5th Cir. 2010) (noting primary focus on employer); Madeira, 469 F.3d at 231 (noting that employer sanctions were the centerpiece of the immigration-reform effort and sanctions for employees who knowingly or recklessly use false documents to obtain employment were added later).

IRCA's placement of responsibility for its verification procedures with an employer and its exemption of union hiring halls is found in federal regulations stating that "IRCA makes it 'unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.'" Whiting, 131 S. Ct. 1968, 1974 (2011) (quoting 8 U.S.C. § 1324a(a)(1)(A)). Federal regulations define the term

"hire" as "the actual commencement of employment of an employee for wages or other remuneration." 8 CFR § 274a.1(c). Next, the term "refer for a fee" means

> the act of sending or directing a person or transmitting documentation or information to another, directly or indirectly, with the intent of obtaining employment in the United States for such person, for remuneration whether on a retainer or contingency basis; however, this term does not include union hiring halls that refer union members or non-union individuals who pay union membership dues[.]

8 CFR § 274a.1(d) (emphasis added). Finally, the term "recruit for a fee" means

> the act of soliciting a person, directly or indirectly, and referring that person to another with the intent of obtaining employment for that person, for remuneration whether on a retainer or contingency basis; however, this term does not include union hiring halls that refer union members or non-union individuals who pay union membership dues[.]

8 CFR § 274a.1(e) (emphasis added); Lozano v. City of Hazleton, 724 F.3d 297, 307 n.13 (3d Cir. 2013) (finding that IRCA pre-empted a city ordinance that attempted to more broadly regulate the employment of unauthorized aliens by, inter alia, prohibiting union activity and the activity of not-for-profit organizations that referred individuals for employment but without a fee or profit motive, because federal regulations "specifically exclude 'union hiring halls that refer union members or non-union individuals who pay union membership dues'" from IRCA liability for referring for a fee or recruiting for a fee an unauthorized alien for employment).

Defendant also alleges that allowing the contested contributions would encourage Local 1010 to refer only unauthorized workers to employers so that it could later deny fringe benefits to those unauthorized workers and pocket the resulting surplus assets. Docket No. 39 at 13; Docket No. 60 at 14. I find Defendant's argument without merit. In addition to the fact that IRCA does not require union hiring halls to verify an individual's authorization to work in the United States before sending him/her to an employer, Defendant does not show that the Union is

entitled to any of the Plan's surplus assets. First, ERISA requires that Plan assets "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries," 29 U.S.C. § 1103(c)(1), and second, even in the event of any surplus assets, the Union would not be entitled to them "unless the plan provides for [such a] distribution." See Shepley v. New Coleman Holdings Inc., 174 F.3d 65, 69 (2d Cir. 1999) (stating that in the event of employers' "overpayment" of contributions, employers "lack any . . . entitlement [to surplus assets] unless the plan provides for an employer distribution").

b. Under Hoffman Plastic, IRCA Does Not Preclude The Contested Contributions

Defendant next argues that under Hoffman Plastic, IRCA precludes the contested contributions because they would encourage unauthorized workers to continue to violate IRCA. Docket No. 39 at 13-14. I disagree.

In Hoffman Plastic, 535 U.S. at 150, the Supreme Court held that IRCA precluded the NLRB from awarding backpay to an undocumented victim of an National Labor Relations Act violation for work the undocumented victim did not perform. In that case, the undocumented victim obtained his job with his employer by "tendering a birth certificate belonging to a friend who was born in Texas." Id. at 141. The Supreme Court explained that allowing the backpay award for "years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud" "not only trivializes the immigration laws, it also condones and encourages future violations." Id. at 149-50.

Defendant first argues that the contributions represent "future benefits" for the unauthorized workers which, as in Hoffman Plastic, would encourage them to stay in the United States where they might once again violate IRCA while waiting to receive those benefits. Docket No. 39 at 11-13. There is an important fact which distinguishes this case from Hoffman

Plastic, which is that the Trustees are suing for contributions calculated in connection with work actually and already performed, which courts have found is materially different than backpay for "years of work not performed [and] for wages that could not lawfully have been earned[.]" Hoffman Plastic, 535 U.S. at 141; see Madeira, 469 F.3d at 243; Flores, 233 F. Supp. 2d at 464.

As discussed, "courts distinguish between 'undocumented workers seeking backpay for wages actually earned,' as in FLSA wage and hour violations, and 'those seeking backpay for work not performed,' as in a termination in violation of the NLRA." Rosas v. Alice's Tea Cup, LLC, No. 14 Civ. 8788 (JCF), 2015 WL 4097947, at *3 (S.D.N.Y. July 6, 2015) (quoting Flores, 233 F. Supp. 2d at 463). Here, the contested contributions are for hours of Covered Work actually and already performed by Defendant's employees. Docket No. 31 ¶ 11; Docket No. 40 ¶ 11. To the extent that Defendant's employment of the allegedly unauthorized workers was an IRCA violation, the IRCA violation "has already occurred." Madeira, 469 F.3d at 243, 245 (stating that to "relieve employers from the obligation of obtaining workers' compensation coverage for [unauthorized] employees [would] contravene the purpose of [IRCA] by creating a financial incentive for unscrupulous employers to hire undocumented workers") (internal quotation omitted); see Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892 (1984) ("If undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.").[25]

[25] Defendant's other arguments are unavailing. First, Defendant cites 8 U.S.C. § 1611(a) for the proposition that any person who is, in effect, without the legal right to enter and remain in the United States, "is not eligible for any [f]ederal public benefit." Docket No. 39 at 11. The relevance of this principle to the present case is unclear. First, for the purposes of that statute, a "federal public benefit" is by definition "provided by an agency of the United States or by

c. Conclusion

In light of the foregoing, I respectfully recommend that the District Court find that Local 1010 did not commit an IRCA violation needing to be remedied with the withholding of the contributions from the Funds. I also recommend that the District Court find Hoffman Plastic distinguishable from this case such that IRCA permits the Funds to recover contributions for work actually and already performed by the allegedly unauthorized workers.

5. Section 515 Of ERISA Does Not Preclude The Enforcement Of The CBAs Because The CBAs Are Not "Inconsistent With Law"

Defendant argues that Section 515 of ERISA renders the CBAs unenforceable because they are illegal and void. Docket No. 39 at 14-16. Section 515 of ERISA provides that "[e]very employer who is obligated to make contributions to a multiemployer plan 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 agreement." 29 U.S.C. §

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appropriated funds of the United States." 8 U.S.C. § 1611(c). In other words, Section 1611(a) does not govern the Plan administered by the Funds. See Nat'l Med. Care, Inc. v. Rullan, No. 4 Civ. 1812 (HL), 2005 WL 2878094, at *7 n.19 (D.P.R. Nov. 1, 2005) ("ERISA, unlike Medicare [or] Medicaid, is funded by private entities (mostly employers).").

Second, the cases cited by Defendant are inapposite. For example, in Madeira v. Affordable Housing Foundation, Inc., 469 F.3d 219, 243, 254, IRCA did not disqualify an undocumented worker from the protections of New York's Worker's Compensation Law and discussed the availability of FLSA damages when the IRCA violation has already occurred. Defendant also cites Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1308 (11th Cir. 2013), which held that IRCA does not keep an unauthorized worker from suing under the FLSA for unpaid wages "for work already performed." (emphasis in original). Docket No. 39 at 11. I have already discussed how the principle that IRCA permits an undocumented worker to recover FLSA damages for work actually and already performed supports my recommendation that IRCA does not preclude the contributions, which are also for work actually and already performed.

1145 (emphasis added). I disagree that the CBAs are "inconsistent with law" pursuant to Section 515 of ERISA.

In Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 87-88 (1982), the Supreme Court observed that Congress passed Section 515 from a concern that "simple collection actions brought by plan trustees [had] been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions, and steps [were required] to simplify delinquency collection." Accordingly, the Kaiser Steel Court held that an employer may not raise an illegality defense to a contributions collection action if the illegality defense is "unrelated" or "extraneous" to the employer's promise and the plans' entitlement to the contributions. Id. at 88; Benson v. Brower's Moving & Storage, Inc., 907 F.2d 310, 314 (2d Cir. 1990) (stating that Section 515 limited "the defenses available to an employer when sued by an employee benefit plan" because benefit "plans must pay out to beneficiaries whether or not employers live up to their obligations").

As a consequence, there are only two illegality defenses recognized under ERISA Section 515, which are (1) that the pension contributions themselves are illegal, and (2) that the CBA is void. See Benson, 907 F.2d at 314; O'Hare v. Gen. Marine Transport Corp., 740 F.2d 160, `70 (2d Cir. 1984) ("Here, whatever problems there are [with a particular clause in the collective bargaining agreement] do not affect the obligations [the employer] has toward its employees clearly represented by [the union] whose pensions are at issue here."). Neither of these illegality defenses applies here. First, Defendant's promise to pay the contributions was not illegal under the CBAs because, as discussed above, Local 1010 did not violate IRCA in referring the allegedly unauthorized workers and because the contributions are for work actually and already performed by those workers. See Nat'l Elec. Ben. Fund v. Heary Bros. Lightning Protection Co.,

Inc., 931 F. Supp. 169, 181-82 (W.D.N.Y. 1995) (finding an illegality defense unrelated to the contributions because although the collective bargaining agreement required the employer to make illegal payments to the union for job-site access, those payments were not used as contributions). Second, the CBAs are not void because there is nothing per se illegal about the hiring hall provision or the way that Local 1010 performed its obligations thereunder. See 8 CFR §§ 274a1(c)-(e).

In light of the foregoing, I respectfully recommend that the District Court find that the CBAs are not "inconsistent with law" pursuant to Section 515 of ERISA.

6. Lewis v. Benedict Coal Corp. Precludes Defendant From Claiming That Its Contributions Debt To The Funds Is Offset By Damages It Suffered As A Result Of Local 1010's Alleged Breach Of The Hiring Hall Provision

Defendant's final argument with respect to the allegedly unauthorized workers is that under the CBAs, Local 1010 was contractually bound to refer only "qualified employee applicants" to Defendant for employment and that Local 1010 breached that obligation in sending unauthorized workers. Docket No. 39. I disagree because accepting that Defendant has a breach action against Local 1010 for referring unauthorized workers, Defendant's remedy may not be offset against its contributions obligations to the Funds.

In Lewis v. Benedict Coal Corp., 361 U.S. 459, 460-464 (1960), the trustees to a fringe benefit plan sued an employer coal operator for contributions the employer owed to the plan's fund pursuant to a collective bargaining agreement with a union. The employer coal operator argued that because the union had breached the collective bargaining agreement by organizing strikes that caused the employer damages, the employer's contributions obligation to the funds should be reduced "in an amount equal to the amount of the damages sustained from the union's breaches[.]" Id. at 465.

The Supreme Court rejected the employer's breach-of-contract argument, stating that although a promisor could generally raise the same defenses against a third-party beneficiary as against a promisee, a collectively bargained agreement was

> not a typical third-party beneficiary contract. . . . It is a commonplace of modern industrial relations for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death. While employers in many other industries assume this burden directly, [a] welfare fund [of the type under consideration] was jointly created by the coal industry and the union for that purpose. . . . If [coal operator employers] having damage claims against the union for breaches may curtail royalty payments [to the fund], the burden will fall in the first instance upon the employees and their families[.]

Benedict Coal, 361 U.S. at 468-69. Similarly, here, Defendant's argument that it is entitled to a remedy for Local 1010's breach of the "qualified employee applicant" provision taken out of the contributions is unavailing.

In light of the foregoing, I respectfully recommend that the District Court find that Defendant may not seek to recover damages for Local 1010's alleged breach of the "qualified employee applicant" provision of the CBAs by withholding contributions.

ii. There Is No Genuine Issue Of Material Fact As To The Fourteen Remittance Reports' Accuracy

Defendant argues that Plaintiffs are not entitled to summary judgment for the contributions debt shown on the Fourteen Remittance Reports because Defendant claims that the record shows a genuine issue of material fact as to the Fourteen Remittance Reports' accuracy. Docket No. 39. Defendant cites the following evidence as showing the issue of fact regarding the Fourteen Remittance Reports' accuracy: President Capparelli's October 22, 2013 declaration, Docket No. 41 at 1-9; the five pages of the Local 731 CBA, Docket No. 41 at 10-15; and the Bushwick Project Subcontract, Docket No. 41 at 16-32. I disagree; I begin by discussing the

Eleven Remittance Reports.

"The rule in the Second Circuit is well-settled that 'a party may not, in order to defeat a summary judgment motion, create a material issue of fact by submitting an affidavit disputing his own prior sworn testimony.'" Berrios v. Nicholas Zito Racing Stable, Inc., 849 F. Supp. 2d 372, 378 (E.D.N.Y. 2012) (citing Trans-Orient Marine Corp. v. Star Trading & Marine, Inc., 925 F.2d 566, 572 (2d Cir. 1991)). Under such circumstances, the Berrios Court held that the later, contrary testimony will be disregarded. Id.; see Weinstein v. Garden City Union Free Sch. Dist., No. 11 Civ. 2509 (AKT), 2013 WL 5507153, at *34 (E.D.N.Y. Sept. 30, 2013) ("The Court will not consider assertions [the plaintiff] makes within his opposition papers which contradict his sworn deposition testimony."); Chiari v. N.Y. Racing Ass'n Inc., -- F. Supp. 2d --, No. 12 Civ. 598 (SJF) (AKT), 2013 WL 5234242, at **16 (E.D.N.Y. Sept. 16, 2013) (rejecting the plaintiff's opposition-paper assertions stating that certain documents were never delivered to him because they contradicted his sworn deposition testimony that the documents were received at his address of record).

Here, President Capparelli's October 22, 2013 declaration that the Eleven Remittance Reports are inaccurate fails to create a genuine issue of material fact because, seven months earlier, on March 27, 2013, President Capparelli testified at his deposition that he had reviewed the Eleven Remittance Reports for accuracy before they were initially sent to the Funds. Docket No. 34-1 at 14-16. Then, President Capparelli looked at the Eleven Remittance Reports during his deposition, confirmed that they were the ones that Defendant submitted to the Funds and, in response to the question "Is the information [therein] accurate?", answered "I believe it would be." Id. President Capparelli then reviewed the Eleven Remittance Reports some more, and, in response to the question "To your knowledge, is there anything inaccurate on these reports[,] any

of the information that [Defendant] provided?", answered "I don't believe so. No." Id. at 16.

Defendant attempts to explain President Capparelli's changed testimony with respect to the accuracy of the Eleven Remittance Reports by stating that in preparing his declaration he was able to "review [Defendant's] books and records" and "cross-reference [them] with the Remittance Reports," which was not the case at his deposition. Docket No. 41 ¶ 16.

More importantly, Defendant's explanation does not address why Defendant should be excused from submitting the "books and records" which President Capparelli found to contradict the Eleven Remittance Reports so well. Federal Rule of Evidence 1002, commonly referred to as the "best evidence rule," provides: "To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by Act of Congress." Fed. R. Evid. 1002. As a result, President Capparelli's declaration that Defendant's books and records create a genuine issue of material fact as to the Eleven Remittance Reports' accuracy is inadmissible evidence on that point. See Gaft v. Mitsubishi Motor Credit of Am., No. 07 Civ. 527 (NG) (LB), 2009 WL 3148764, at *4 (E.D.N.Y. Sept. 29, 2009) (disregarding the defendant's counsel's affidavit, submitted in support of summary judgment motion, concerning the content of a report because it was inadmissible evidence barred by the best evidence rule); Medina v. Multaler, Inc., 547 F. Supp. 2d 1099, 1122 (C.D. Cal. 2007) (holding that the plaintiff's sworn declaration about the content of emails which she submitted in opposition to a summary judgment motion to prove an issue of fact as to discriminatory animus, violated the best evidence rule because she failed to submit copies of the emails); N.Y. ex rel. Spitzer v. St. Francis Hosp., 94 F. Supp. 2d 423, 428 (S.D.N.Y. 2000) (disregarding, on summary judgment, one of plaintiff's witness's affidavits concerning the contents of correspondence "because the letters themselves are the best evidence of their

contents").[26]

Defendant argues that while Berrios is inapposite because it is meant to address a witness's bare contradictory assertions, whereas here the Court has the Local 731 CBA and the Bushwick Project Subcontract in evidence to support President Capparelli's assertions in his October 22, 2013 declaration. Docket No. 39. First, I note that these two documents do not cure the best evidence problem cited above relating to the production of Defendant's books and records. Thus, the question becomes whether, in the absence of Defendant's books and records, the Local 731 CBA and the Bushwick Project Subcontract provide evidence that corroborates President Capparelli's claim that the Eleven Remittance Reports are inaccurate? Weighing the facts established by the Local 731 CBA and the Bushwick Project Subcontract in the light most favorable to Defendant, as I must on summary judgment, I find that a reasonable jury could not conclude from the Local 731 CBA and the Bushwick Project Subcontract that the Eleven Remittance Reports are inaccurate.

First, the Local 731 CBA at most establishes that Defendant could have hired Local 731 workers or could have had its employees perform work covered by the Local 731 CBA at some point between July 1, 2006 and June 30, 2012 (which is the period covered by the excerpt from the Local 731 CBA in the record). Docket No. 41 at 11-15. A reasonable jury could not infer from the mere existence of the Local 731 CBA that Defendant actually had employees perform work covered by that agreement, let alone make the much more specific conclusion that the Covered Work that Defendant reported on the Remittance Reports was actually work covered by the Local 731 CBA.

[26] Defendant has made no showing pursuant to FRE 1004 that the books and records are unavailable. Fed. R. Evid. 1004.

Defendant next argues that the Bushwick Project Subcontract shows that its employees performed work on that project covered by the Local 731 CBA because the Bushwick Project Subcontract alluded to Local 731 labor in its text. But the Bushwick Project Subcontract also mentions Local 14, Local 15 and other applicable union trade workers in its text. Docket No. 41 at 25, Art. 8. "Other applicable union trade workers" is a phrase that encompasses Local 1010 workers and does not exclude them. Again, the Bushwick Project Subcontract at most shows that Defendant may have had its employees perform some work covered by the Local 731 CBA on the Bushwick Project Subcontract, but a reasonable jury could not infer from the mere existence of that possibility that Defendant actually had employees perform work covered by the Local 731 CBA, much less the much more specific conclusion that the Covered Work that Defendant reported on the Remittance Reports had to have been covered by the Local 731 CBA and not the Local 1010 CBAs.

In summary, Defendant's argument that the Local 731 CBA and the Bushwick Project Subcontract prove that its employees performed work covered by the Local 731 CBA and that that in turn proves that its employees never performed Local 1010 Covered Work is speculative and fails to raise a genuine issue of material fact about the Eleven Remittance Reports' accuracy. See Cifarelli v. Vill. of Babylon, 93 F.3d 47, 51 (2d Cir. 1996) ("[M]ere conclusory allegations, speculation or conjecture will not avail a party resisting summary judgment."); see also Beechwood Restorative Care Ctr. v. Leeds, 436 F.3d 147, 155 (2d Cir. 2006); Morrison v. Brooks, No. 13 Civ. 4216 (JBW), 2015 WL 1276768, at *4 (E.D.N.Y. Mar. 13, 2015).

Defendant further alleges that the Bushwick Project Subcontract shows that the Eleven Remittance Reports are inaccurate because that document shows that Defendant's landscaping responsibilities were not connected in any way with paving. Docket No. 41 at 17-32.

Defendant's argument does not address the fact that the Bushwick Project Subcontract refers to accompanying plans titled "pavements and curbs[.]" Docket No. 41 at 18. Unfortunately the record does not contain the "pavements and curbs" plan or, for that matter, detailed information about the nature of Defendant's work on the Bushwick Project and that work's nexus to other aspects of the project. This is another example of Defendant's failure to comply with the best evidence rule. Fed. R. Evid. 1002.

Finally, I note that Defendant offers the Bushwick Project as just one example of inaccuracies in the Eleven Remittance Reports and states that it can reveal still more inaccuracies that create a genuine issue of material fact for trial. Docket No. 41 ¶ 15. Defendant cannot defeat summary judgment in this manner, i.e., promising that genuine issues of material fact exist about which it will only identify and elaborate at trial.

Defendant has also failed to show that a genuine issue of material fact exists as to the Three Remittance Reports' accuracy. The Court recognizes that President Capparelli's March 2013 deposition testimony did not address the Three Remittance Reports' accuracy except insofar as his testimony that he reviewed them before their original submission to the Funds. Even still, President Capparelli's October 22, 2013 declaration that the Three Remittance Reports are inaccurate fails to create a genuine issue of material fact for the same reasons as discussed in the context of the Eleven Remittance Reports, i.e., I must disregard President Capparelli's assertions about the content of Defendant's books and records contradicting the Three Remittance Reports because Defendant's failure to produce those records violates the best evidence rule. Fed. R. Evid. 1002.

In light of the foregoing, I respectfully recommend that the District Court find that President Capparelli's October 22, 2013 declaration does not create a genuine issue of material

fact as to the Fourteen Remittance Reports' accuracy because it fails to comply with the best evidence rule and the Local 731 CBA and the Bushwick Project Subcontract do not show that the Fourteen Remittance Reports are inaccurate.

iii. Plaintiffs Are Entitled To Summary Judgment On The Question Of Defendant's Liability To Pay Contributions To The Funds

In light of the fact that I find Defendant's various arguments challenging Plaintiffs' summary judgment motion to be without merit, I respectfully recommend that the District Court **grant** Plaintiffs' summary judgment motion on the question of liability and **find** Defendant liable for paying delinquent contributions and related damages to the Funds.

b. Damages

When an employer fails to make contributions, "ERISA enumerates the type of relief that may be awarded for a violation of Section 515." Ferrara v. Oakfield Leasing Inc., 904 F. Supp. 2d 249, 258 (E.D.N.Y. 2012). In particular, the statute provides:

> In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce Section [515] of this title in which a judgment in favor of the plan is awarded the court shall award the plan
> (A) the unpaid contributions,
> (B) interest on the unpaid contributions,
> (C) an amount equal to the greater of—
> (i) interest on the unpaid contributions, or
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
> (E) such other legal or equitable relief as the court deems appropriate.

29 U.S.C. § 1132(g)(2); see Nat'l Integrated Grp. Pension Plan v. Dunhill Food Equip. Corp., No. 11 Civ. 3652 (MKB), 2013 WL 1346356, at *14 (E.D.N.Y. Apr. 3, 2013) (stating that these

remedies are mandatory).

i. Delinquent Contributions

Plaintiffs provided evidence in the form of the Fourteen Remittance Reports that shows that Defendant has failed to pay $264,981.94 in contributions to the Funds during the period September 2011 through and including April 2012 and June 2012 through and including August 2012. Docket No. 33-1. Plaintiffs do not seek delinquent contributions in connection with any other months.

Fund Administrator Montelle has verified that the Fourteen Remittance Reports in the record are true and accurate copies of the Fourteen Remittance Reports submitted by Defendant to the Funds. Docket No. 33 ¶ 4.

This Court has reviewed the Fourteen Remittance Reports in the record and finds them consistent with Plaintiffs' calculation that Defendant owes the Funds $264,981.94 ($274,981.94 minus Defendant's previous payment of $10,000.00 to the Funds).[27] In light of Fund Administrator Montelle's sworn declaration, supporting evidence and calculations, I find that Defendant owes the Funds $264,981.94 in delinquent contributions.

Defendant argues that Plaintiffs have not produced any evidence beyond the Fourteen Remittance Reports showing that Defendant's employees performed the hours of Covered Work reported therein. Docket No. 39. Plaintiffs do not have to. Absent evidence creating a genuine issue of material fact as to the veracity of the Remittance Reports which, as discussed above, this record does not contain, Plaintiffs are entitled to rely upon the Remittance Reports to establish the amount of Covered Work for which contributions are due to the Funds. See Gesualdi v.

[27] The Court has also consulted Plaintiffs' submission which corrects mathematical errors in the Remittance Reports and has independently verified that Plaintiffs' corrections are valid. Docket No. 64-1.

Magnolia P R O Trucking Inc., No. 11 Civ. 1482 (ADS) (AKT), 2014 WL 859865, at *7 (E.D.N.Y. Mar. 4, 2014) (granting default judgment for the plaintiffs, finding that they "have sufficiently shown that [the d]efendant submitted remittance reports . . . , but failed to remit part or all of the contributions due for those months"); Trustees of N.Y. Oil Heating Ins. Fund v. Anchor Tank Lines Corp., No. 09 Civ. 9997 (DLC) (AJP), 2011 WL 767162, at *2 (S.D.N.Y. Mar. 4, 2011), adopted in relevant part by Romita v. Anchor Tank Lines Corp., 2011 WL 1641981, at *1 (S.D.N.Y. Apr. 29, 2011); Demopoulos v. Mystic Tank Lines Corp., No. 07 Civ. 9451 (DC), 2008 WL 4596274, at *3 (S.D.N.Y. Oct. 16, 2008); see also Docket No. 33-1 (collecting the Remittance Reports, each of which states that in submitting it, "[t]he [e]mployer and the undersigned officer/principal of the [e]mployer separately certify that the information contained in this report and attached schedules is true and correct").

ii. Interest On Unpaid Contributions

Plaintiffs next seek to recover an award of interest accrued during the period of delinquency. Docket No. 33 ¶ 9. ERISA entitles Plaintiffs to recover interest on unpaid contributions at the rate prescribed by the plan. See 29 U.S.C. § 1132(g)(2)(B); Ferrara v. Reliable Indus. II, Inc., No. 11 Civ. 1434 (ENV) (MDG), 2012 WL 6851088, at *4 (E.D.N.Y. Sept. 27, 2012); Finkel v. Omega Comm'cn Servs., Inc., 543 F. Supp. 2d 156, 161 (E.D.N.Y. 2008). Article II of the Collection Policy and Article IX of the CBAs provide that Defendant must pay the Funds interest at an annual rate of ten percent (calculated from the due date). Docket No. 33 ¶ 9; Docket No. 32-1, Art. IX; Docket No. 32-2, Art. IX; Docket No. 33-4, Art. II.

In order to calculate simple ten percent interest on the delinquent contributions from a date certain, Plaintiffs have identified June 5, 2012 as the midpoint of Defendant's delinquency

on contributions as it lands between November 5, 2011 (the date that Defendant's contributions obligation became delinquent on the first Remittance Report at issue in this action (the September 2011 Remittance Report)) and January 5, 2013 (the date that Defendant's contributions obligation became delinquent on the last Remittance Report at issue in this action (the November 2012 Remittance Report)).[28] Docket No. 31 ¶ 13; Docket No. 33 ¶ 11; Docket No. 33-1.

Simple interest at a rate of ten percent per annum on $264,981.94 in delinquent contributions yields $72.60 in per diem interest ($264,981.94 multiplied by .10 divided by 365). From June 5, 2012, the midpoint of Defendant's delinquency, through and including October 16, 2015, the date of this report and recommendation, there are 1,229 days. $72.60 multiplied by 1,229 days equals $89,225.40.

In addition, Plaintiffs are entitled to additional per diem interest of $72.60 from October 16, 2015 through the entry of judgment by the District Court.

Separate from the above calculations, Plaintiffs alleged in their Second Amended Complaint that Defendant owes the Funds an additional $824.24 in interest on previous late payments. Docket No. 33 ¶ 13; Docket No. 14 ¶ 25. Plaintiffs submit to the Court an interest

[28] I agree that June 5, 2012 represents an appropriate midpoint of Defendant's delinquency. There are 428 days between November 5, 2011 and January 5, 2013; 214 days is half of that; and June 5, 2012 is 214 days after November 5, 2011. November 5, 2011 marks the beginning of Defendant's delinquency on the first Remittance Report (the September 2011 Remittance Report) and January 5, 2013 marks the date that Defendant became delinquent on the last Remittance Report (the November 2012 Remittance Report) because Defendant had to submit a remittance report and pay the corresponding contributions debt no later than "thirty-five (35) days after the close of a month[.]" Docket No. 32-1, Art. IX § 1(b); Docket No. 32-2, Art. IX § 1(c); Docket No. 33-3 at 4, Art. II §§ 1-2, 4; Docket No. 33 ¶ 8; Trustees of Pavers and Road Builders Dist. Council Welfare v. Cole Partners, Inc., No. 13 Civ. 7103 (NGG) (RML), 2015 WL 861717, at *4 (E.D.N.Y. Feb. 27, 2015) (identifying the midpoint of the defendant's delinquency as a date from which to begin calculating simple interest on contributions due).

statement in chart form indicating that Defendant owes $824.24 in interest arising from its prior late payment of contributions. Docket No. 33 ¶ 13; Docket No. 33-4. As Defendant does not contest this amount, and Fund Administrator Montelle's sworn declaration asserts that the interest statement is true and accurate, I find evidence to support this additional of $824.24 in interest on Defendant's prior late payment of contributions.

In light of the foregoing, I find that Defendant owes the Funds $89,225.40 in interest through and including October 16, 2015 on the $264,981.94 in delinquent contributions; $72.60 in per diem interest on the $264,981.94 in delinquent contributions beginning October 16, 2015 through the District Court's entry of judgment; and an additional $824.24 in interest on Defendant's previous late payment of contributions.

iii. Liquidated Damages

Plaintiffs also seek to recover liquidated damages. Docket No. 33 ¶¶ 10, 12. As stated above, ERISA permits Plaintiffs to recover in liquidated damages the greater of the amount of the interest awarded, or 20% of unpaid contributions. See 29 U.S.C. § 1129(g)(2)(C); Trustees of the Local 7 Tile Indus. Welfare Fund v. Titan Interiors, LLC, No. 12 Civ. 135 (JG) (SMG), 2015 WL 4509061, at *4 (E.D.N.Y. July 24, 2015) (citing 29 U.S.C. § 1132(g)). Plaintiffs have elected to recover the amount of 20% of unpaid contributions. Docket No. 33 ¶ 10; Docket No. 33-4, Art. II. I find that Plaintiffs are entitled to $52,996.39 in liquidated damages ($264,981.94 multiplied by .20).

iv. Attorneys' Fees And Costs

Plaintiffs request that the Court award reasonable attorneys' fees and costs incurred in bringing this action but have asked that these figures be calculated in a later proceeding in the event the District Court enters judgment for the Funds.

Given Defendant's vigorous opposition to Plaintiffs' summary judgment motion on many fronts, which raised the specter of an entry of full, partial or no judgment for Plaintiffs, I find reasonable Plaintiffs' motion to address the issue of reasonable attorneys' fees and costs it incurred in bringing the successful parts of its summary judgment motion in a subsequent proceeding.

IV. Conclusion

In light of the foregoing, this Court respectfully recommends that the District Court **grant** Plaintiffs' motion for summary judgment in its entirety; **find** Defendant liable for the unpaid contributions reflected on the Fourteen Remittance Reports; and **order** Defendant to pay Plaintiffs $408,027.97 in damages and an additional $72.60 in per diem interest beginning October 16, 2015 through the entry of judgment.

The $408,027.97 in damages reflects the sum of $264,981.94 in delinquent contributions, $89,225.40 in interest for the period June 5, 2012 through and including October 16, 2015, $824.24 in interest for Defendant's previous late payment of contributions, and $52,996.39 in liquidated damages.

Plaintiffs' reasonable attorneys' fees and costs incurred in bringing this action are not included in the $408,027.97 damages award as Plaintiffs have requested that these amounts be determined in a separate proceeding. In the event that the District Court adopts the above recommendations in whole or part, I respectfully recommend that the District Court refer this matter back to me for a determination of Plaintiffs' reasonable attorneys' fees and costs.

V. Objections

Objections to this Report and Recommendation must be filed, with a courtesy copy sent to the Honorable Carol Bagley Amon, at 225 Cadman Plaza East, Brooklyn, New York 11201,

by October 30, 2015. Failure to file objections within the specified time waives the right to appeal before the District Court as well as a higher appellate court. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

Dated: Brooklyn, New York
October 16, 2015

Vera M. Scanlon
VERA M. SCANLON
United States Magistrate Judge