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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BOARDS OF TRUSTEES OF THE  
NORTHWEST IRONWORKERS HEALTH  
AND SECURITY FUND,

Plaintiff,

v.

WESTERN REBAR CONSULTING INC.,

Defendant.

CASE NO. 2:18-cv-00486-BAT

**ORDER GRANTING MOTION TO  
DISMISS COUNTERCLAIM  
WITHOUT PREJUDICE AND WITH  
LEAVE TO AMEND**

Plaintiff Boards of Trustees of the Northwest Ironworkers Health and Security Fund (“The Trust Funds”) moves to dismiss the Counterclaim of Defendant Western Rebar Consulting, Inc. (“Western”). Dkt. 27. The motion shall be granted without prejudice and with leave to amend.

BACKGROUND

A. The Complaint and Audit

On April 3, 2018, Plaintiffs filed their Complaint against Western for unpaid contributions, under sections 502(a)(3) and 515 of ERISA, 29 U.S.C. §§ 1132(a)(3), and 1145. The Trust Funds are multiemployer, collectively bargained, employee benefit plans regulated by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et seq.* (“ERISA”), and

1 the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 186(c)(5). Western participated as  
2 part of the Northwest Ironworkers Employers Association under a Master Labor Agreement  
3 (“MLA”) by way of an “Independent Agreement.” Western agreed to participate with the Trusts  
4 by making the required contributions for Western employees whose scope of work falls under  
5 the MLA.

6 The Trusts allege, among other things, that Western had not complied with the Trust  
7 Funds’ request for an audit of the company’s payroll and related business records (“Audit”). Dkt.  
8 No. 1. After the complaint was filed, the parties agreed to delay litigation while an Audit was  
9 conducted. The Audit concluded that Western failed to make contributions in the amount of  
10 \$92,014.00 for the period June 2016 through July 2018. Dkt. 28, Declaration of Michelle Hill,  
11 Ex. C. In addition, the Audit indicates Western owes an additional \$32,695.65 in liquidated  
12 damages, \$16,611.91 in interest, and \$16,006.85 in audit costs, for a total due of \$157,328.77. *Id.*  
13 The Audit also found that Western overreported and incorrectly submitted contributions on  
14 behalf of some of its employees in the amount of \$26,621.27. *Id.*, p. 65.

15 The Trust Funds do not dispute that Western overreported and incorrectly submitted  
16 contributions on behalf of some of its employees and that the Audit confirms that Western over-  
17 reported in the amount of \$26,621.27. Dkt. No. 33. The Trust Funds do dispute that Western’s  
18 Counterclaim alleges facts sufficient to show that Western is entitled to a refund of the  
19 overreported contributions.

20 B. Western’s Counterclaim - Overpayment

21 Western asserts one counterclaim – that it is entitled to reimbursement or restitution of  
22 the incorrect contributions (\$26,621.27). Dkt. 26, pp. 8-9. Western also alleges various facts and  
23 states various conclusions that are not relevant to the instant motion to dismiss (but which the



1 S.Ct. 1955, 167 L.Ed.2d 929 (2007). “[A] plaintiff’s obligation to provide the ‘grounds’ of his  
2 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of  
3 the elements of a cause of action will not do.” *Id.* (quoting Fed.R.Civ.P. 8(a)(2)).

4 “Generally, the scope of review on a motion to dismiss for failure to state a claim is  
5 limited to the contents of the complaint.” *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).  
6 However, the Court may utilize “attached exhibits, documents incorporated by reference, and  
7 matters properly subject to judicial notice.” *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051  
8 (9th Cir. 2014). Here, the Audit is incorporated by reference in Western’s counterclaim, it is  
9 central to Western’s claim, and no party questions its authenticity. *Viggiano v. Hansen Natural*  
10 *Corp.*, 944 F. Supp. 2d 877, 882 (C.D. Cal. 2013) (citing *Marder*, 450 F.3d at 448).

#### 11 DISCUSSION

12 Section 403(c) of ERISA provides in pertinent part:

13 (1) Except as provided in paragraph (2) ... the assets of a plan shall never  
14 inure to the benefit of any employer and shall be held for the exclusive purposes  
15 of providing benefits to participants in the plan and their beneficiaries and  
16 defraying reasonable expenses of administering the plan.

17 (2)(A) In the case of a contribution ...

18 (ii) made by an employer to a multiemployer plan by a mistake of fact or  
19 law ... paragraph (1) shall not prohibit the return of such contribution or payment  
20 to the employer within 6 months after the plan administrator determines that the  
21 contribution was made by such a mistake.

22 Thus, ERISA provides for the return of contributions that an employer made to a  
23 multiemployer plan because of a mistake of fact. Section 403(c)(2)(A)(ii) provides that a refund  
of an employer's mistaken contribution is not prohibited within six months of the date that a plan  
administrator determines that the contribution was made by mistake. Based on this language, it  
appears that no refund can be made under this section without a determination by a plan

1 administrator that a mistake has occurred. However, the Ninth Circuit has stated that a trust fund  
2 cannot escape its responsibilities under ERISA by denying that a mistake has been made. *Chase*  
3 *v. Trustees of Western Conference of Teamsters Pension Trust Fund*, 753 F.2d 744, 752 (9th  
4 Cir.1985).

5 The Ninth Circuit has concluded that an employer has an implied right of action under  
6 section 403 to recover mistaken contributions. *British Motor Car Distrib., Ltd. v. San Francisco*  
7 *Auto. Indus. Welfare*, 882 F.2d 371, 374 (9th Cir.1989) (citing *Award Serv., Inc. v. Northern Cal.*  
8 *Retail Clerks Unions*, 763 F.2d 1066, 1068 (9th Cir.1985), *cert. denied*, 474 U.S. 1081, 106 S.Ct.  
9 850, 88 L.Ed.2d 890 (1986)) (stating that section 403 confers no right to refund expressly; “it  
10 merely permits the return of contributions mistakenly paid”). However, a showing of mistake of  
11 fact will not automatically result in a refund to the employer. After demonstrating that  
12 contributions resulted from a mistake, the employer must establish that the equities favor  
13 restitution. *Award Serv.*, 763 F.2d at 1069.

14 The Trusts argue that Western is not entitled to relief because Western has failed to  
15 provide factual allegations of a mistake of fact or law, which would demonstrate that it is entitled  
16 to a reimbursement of the improperly submitted contributions. Western has also failed to provide  
17 factual allegations, which would demonstrate that the equities justify the reimbursement of  
18 contributions.

19 Western argues that it has sufficiently set forth a factual basis of mistake of fact or law.  
20 Alternatively, Western requests leave to amend to allege a common law action for restitution.

21 The Court finds that Western’s allegations do not satisfy the requirements for asserting a  
22 claim for relief under 1103(c)(2)(A)(ii). In its response, Western devotes a good deal of time  
23 arguing that the Audit is “patently inaccurate,” and summarizing erroneously counted hours. Dkt.

1 32, pp. 9-11; Dkt. 32-1. Western does not however, allege facts showing that it made a mistake  
2 of fact or law when it submitted the improper contributions. Additionally, Western fails to allege  
3 facts showing that the equities favor restitution with respect to the amounts improperly paid and  
4 reported by Western.

5 Western argues that it should be allowed to amend its counterclaim to assert a common  
6 law action for restitution of overpayments made. Dkt. 30, p. 13. However, the Ninth Circuit has  
7 not recognized any federal common law action for restitution and there would appear to be no  
8 basis for such an action particularly as employers are allowed to bring suit under ERISA for  
9 restitution of mistaken contributions. *See British Motor Car*, 882 F.2d at 377.

10 The Court concludes that The Trusts are entitled to dismissal of Western's counterclaim  
11 for refund of overpayment. However, the Court grants Western leave to amend its counterclaim,  
12 to include factual allegations showing that it made a mistake of fact or law when it submitted the  
13 improper contributions and further, showing that the equities favor restitution with respect to the  
14 amounts improperly paid and reported by Western.

15 Accordingly, it is **ORDERED**:

16 1) The Trusts' motion to dismiss (Dkt. 27) is **granted**; Western's counterclaim is  
17 **dismissed without prejudice and with leave to amend**.

18 2) Western may file an amended counterclaim as explained herein, **on or before**  
19 **July 25, 2020**.

20 DATED this 15th day of July, 2020.

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23 BRIAN A. TSUCHIDA  
Chief United States Magistrate Judge