UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| TRUSTEES OF THE UNITED HEALTH AND WELFARE FUND; LOCAL 976, ILA, PRODUCTION, SERVICE & WAREHOUSEMEN, | : | 22-CV-8965 (VSB) |
| Plaintiffs, | : | **OPINION & ORDER** |
| -against- | : | |
| COPPER SERVICES, LLC, | : | |
| Defendant. | : | |

Appearances:

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Tobia & Lovelace Esqs., LLC
North Haledon, NJ
*Counsel for Plaintiffs*

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VERNON S. BRODERICK, United States District Judge:

The Trustees of the United Health and Welfare Fund ("Fund") and Local 976, ILA, Production, Service & Warehousemen (the "Union") bring this action against Copper Services, LLC ("Copper"), alleging delinquent employer contributions under Sections 502 and 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132 and 1145, and Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185. Before me is Copper's motion to dismiss the complaint pursuant to Federal Rules of Civil

Procedure 12(b)(1) and 12(b)(6). For the reasons set forth below, the motion is GRANTED in part and DENIED in part.

## I. Background and Procedural History[1]

The Fund is a multiemployer benefit fund established for the benefit of workers represented by the Union. (Compl. ¶¶ 5, 7, 14.) "The purpose of the Fund is to receive and collect required fringe benefit contributions and to provide various fringe benefits to eligible employees on whose behalf employers contribute to the Fund pursuant to their collective bargaining agreements." (*Id*. ¶ 5.) Copper entered into a collective bargaining agreement (the "CBA") with the Union in September 2016. (*Id.* ¶ 11.)

Pursuant to its obligations under the CBA, Copper was required to pay contributions to the Fund for work performed within the trade and geographical jurisdiction of the Union. (*Id.* ¶ 12; Doc. 17, Ex. 2 ("CBA") art. 7.) To ensure compliance with this obligation, the CBA authorized the Fund to audit Copper annually. (CBA art. 7.) Article 23 of the CBA set forth the terms of the CBA's duration:

> THIS AGREEMENT shall commence on January 1, 2016 and shall continue in full force and effect until midnight on August 31, 2018 when it shall terminate. If either party desires to continue or renegotiate this Agreement, it may do so by giving the other party written notice to that effect not less than sixty (60) days nor more than ninety (90) days prior to August 31, 2018. In the event notice is not provided the Agreement shall automatically renew for a period of one year.

(CBA art. 23.)

In September 2019, the Union executed a supplemental collective bargaining agreement ("Supplemental CBA") that it alleges extended the terms of the CBA through August 31, 2022.

[1] The facts in this section are based upon the factual allegations set forth in the Complaint. (Doc. 1 ("Complaint" or "Compl.").) I assume the well-pleaded allegations in the Complaint to be true in considering the motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). *See Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). My reference to these allegations should not be construed as a finding as to their veracity, and I make no such finding.

(Doc. 17, Ex. 3 ("Supp. CBA").) The Supplemental CBA, however, was never signed by Copper. (Supp. CBA at 2.) Nonetheless, the Fund continued to provide Copper's workers with health benefits until approximately the end of 2020. (Doc. 17, Ex. 1 ¶ 10.)

To recoup the missed contributions, Plaintiffs filed this lawsuit on October 20, 2022, alleging various violations of ERISA and the LMRA. (Compl. ¶¶ 16–28.) Copper filed its motion to dismiss on February 28, 2023. (Doc. 12.) Plaintiffs filed their opposition brief on April 13, 2023. (Doc. 17.) One week later, Copper filed its reply. (Doc. 19.)

## II. Legal Standards

### A. *Federal Rule of Civil Procedure 12(b)(1)*

A district court properly dismisses an action under Rule 12(b)(1) if the court "lacks the statutory or constitutional power to adjudicate it." *Garcia v. Lasalle Bank NA.*, No. 16-CV-3485, 2017 WL 253070, at *3 (S.D.N.Y. Jan. 19, 2017) (quoting *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.A.R.L.*, 790 F.3d 411, 417 (2d Cir. 2015)). "The plaintiff bears the burden of proving subject[-]matter jurisdiction by a preponderance of the evidence." *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005). While a district court resolving a motion to dismiss under Rule 12(b)(1) "must take all uncontroverted facts in the complaint . . . as true, and draw all reasonable inferences in favor of the party asserting jurisdiction," "where jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits," in which case "the party asserting subject[-]matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014) (internal quotation marks and alterations omitted); *see also Ernst v. Gateway Plaza Mgmt. Corp*., No. 11-CV-1169, 2012 WL 1438347, at *2 (S.D.N.Y. Mar. 14, 2012) ("In

deciding jurisdictional issues, the court may rely on affidavits and other evidence outside the pleadings.").

### B. *Federal Rule of Civil Procedure 12(b)(6)*

To survive a motion to dismiss under Rule 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim will only have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint is properly dismissed, where, as a matter of law, "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558. Accordingly, a district court must accept as true all well-pleaded factual allegations in the complaint, and draw all inferences in the plaintiff's favor. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). However, that tenet "is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678.

## III. Discussion

Section 515 of ERISA provides that an "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 . . . make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U.S.C. § 1145. ERISA further requires employers to "maintain records with respect to each of [their] employees sufficient to determine the benefits due" and to make records "available for examination." *Id.* §§ 1027, 1059(a)(1); *see also Grabois v. Action Acoustics, Inc.*, No. 94-CV-7386, 1995 WL 662127, at *2 (S.D.N.Y. Nov. 9, 1995) ("ERISA requires employers to maintain records so that employee benefit plans may review them to determine whether benefits are due or may become due their beneficiaries.").

Where an employer fails to comply with these requirements, the plan trustees can bring suit in federal court. *See* 29 U.S.C. § 1132.

### A. *Subject-Matter Jurisdiction*

Before turning to the merits of Plaintiffs' claims, I must determine whether I have jurisdiction to consider them. In doing so, I consider subject-matter jurisdiction on a claim-by-claim basis. *See Rocky Aspen Mgmt. 204 LLC v. Hanford Holdings LLC*, 358 F. Supp. 3d 279, 282 (S.D.N.Y. 2019). With respect to the First Claim for Relief, Plaintiffs seek an award "for all unpaid and unreported contributions for the period of October 2019 to present." (Compl. ¶ 17.) However, the CBA expired one month earlier on August 31, 2019, at the end of the CBA's one-year automatic renewal period. (CBA art. 23.) Accordingly, I lack jurisdiction over the First Claim for Relief. *See Laborers Health & Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 548–49 (1988) (holding that district courts lack jurisdiction to determine whether an employer's failure to make contributions after expiration of contract violates ERISA); *Mason Tenders Dist. Council Welfare Fund v. Itri Brick & Concrete Corp.*, No. 96-CV-6754, 1997 WL 678164, at *4 n.4 (S.D.N.Y. Oct. 31, 1997) (same).

In arguing otherwise, the Fund insists that the Supplemental CBA extended Copper's contribution obligations through August 2022. However, Copper never signed the Supplemental CBA, (Supp. CBA at 2), and is "therefore arguably not bound to [its] contents," *Div. 1181 Amalgamated Transit Union-N.Y. Emps. Pension Fund v. N.Y.C. Dep't of Educ.*, 527 F. Supp. 3d 455, 465 (E.D.N.Y. 2020), *aff'd*, 9 F.4th 91 (2d Cir. 2021); *see also 32BJ N. Pension Fund v. Nutrition Mgmt. Servs. Co.*, 935 F.3d 93, 102 (2d Cir. 2019) (refusing to permit a fund to unilaterally impose terms of trust agreement on employer who did not sign agreement). Even assuming, as the Fund contends, that an employer may be found to have agreed to the terms of an

unsigned or expired CBA through a course of conduct indicative of an intent to be bound by its terms, (Doc. 17 at 11), this claim must still fail because neither the Complaint nor the record include any facts giving rise to the inference that Copper intended to be bound by the Supplemental CBA. Indeed, although the Complaint repeatedly references "collective bargaining agreements," which are defined in the Complaint as "Agreements," (Compl. ¶¶ 1, 11, 12, 15, 21, 22), it never references the Supplemental CBA, let alone the negotiations that preceded the transmission of the Supplemental CBA for Copper's signature, or Copper's conduct following its refusal to sign the Supplemental CBA. Moreover, the evidence in the record, including the email communications filed by Plaintiffs, show only that Copper ignored the multiple attempts to have it sign the Supplemental CBA. (Doc. 17, Exs. 4, 5.) Contrary to Plaintiffs' contention, the fact that Copper never objected to the terms of the Supplemental CBA does not demonstrate that there was a meeting of the minds and that it intended to be bound by its terms, especially considering that it ceased making contribution payments that would have been due under the Supplemental CBA. Accordingly, I conclude that the Supplemental CBA is not binding on Copper. *See Gorodkin v. Q-Co. Indus., Inc.*, No. 89-cv-8033, 1992 WL 122769, at *2 (S.D.N.Y. May 27, 1992) ("We hold that collective bargaining agreements expire according to their own terms and neither employers nor unions have any implied obligation to enter into a new agreement."). Therefore, Defendant's motion to dismiss the First Claim for Relief is GRANTED and the claim is dismissed without prejudice.

With regard to the Second Claim for Relief, Plaintiffs seek an "Order requiring [Copper] to [1] make all benefit contribution payments for the period October 2019 to present . . . to the Fund and [2] to supply all required information to the Fund in accordance with [its audit] obligations under the Collective Bargaining Agreements and Trust Agreements." (Compl. ¶ 19.)

With respect to the request for contribution payments, I lack subject-matter jurisdiction over this part of the claim for the reasons explained above. Accordingly, Defendant's motion to dismiss the Second Claim for Relief is also GRANTED with regard to the portion of the claim that seeks an order directing Copper to make all benefit contribution payments for the period October 2019 to present and that portion of the claim is dismissed without prejudice.

With regard to the part of the Second Claim for Relief seeking an audit and information to conduct that audit, Copper contends that it should likewise be dismissed because Plaintiffs seek to audit its books and records for the period after the CBA's expiration. (Doc. 14 at 7.) Copper does not address, however, the allegation in the Complaint that it failed to comply with an audit covering the period "September 1, 2016 through Present." (Compl. ¶ 22.) It is reasonable to infer from this language that Plaintiffs are seeking an order to remedy Copper's alleged uncooperative conduct for a period prior to the expiration of the CBA. (*Id*.) Indeed, because the CBA was in effect between September 1, 2016 and August 31, 2019, Plaintiffs have a right to audit Copper's records for that period. (CBA art. 23). However, Plaintiffs are not entitled to review Copper's records for any period after the CBA expired on August 31, 2019. *See, e.g.*, *Ferrara v. Prof'l Pavers Corp.*, No. 11-cv-1433, 2013 WL 1210522, at *10 & n.13 (E.D.N.Y. Feb. 15, 2013) (denying request for an audit in part because the CBAs at issue had expired and the plaintiffs had not submitted evidence of the defendants' intent to be bound by a new CBA), *report and recommendation adopted by* 2013 WL 1212816 (E.D.N.Y. Mar. 23, 2013); *see also Lanzafame v. Dana Restoration, Inc.*, No. 09-cv-873, 2010 WL 6267657, at *14 (E.D.N.Y. Aug. 12, 2010) (recommending an audit limited to the period ending with the expiration of the CBA), *report and recommendation adopted by* 2011 WL 1100111 (E.D.N.Y. Mar. 22, 2011). Accordingly, Defendant's motion to dismiss the Second Claim for Relief is

DENIED with regard to the portion of the claim that seeks an order directing Copper to submit to an audit for the period between September 1, 2016 and August 31, 2019.[2]

In the Third Claim for Relief, Plaintiffs seek a "judgment for all outstanding fund contributions and working dues, plus interest from the date of default, liquidated damages and attorneys' fees." (Compl. ¶ 26.) Similarly, the Fourth Claim for Relief requests a "a judgment for all outstanding working dues, plus interest from the date of default, liquidated damages and attorneys' fees." (*Id.* ¶ 28.) Although the Complaint does not specify the dates of the outstanding fund contributions and working dues that it seeks to recoup, the allegations in the Complaint—when read together and in context—make clear that the only contributions Plaintiffs seek to recoup are those that they allege were due after the CBA expired in August 2019. Accordingly, for the reasons I have explained above, the Defendant's motion to dismiss the Third and Fourth Claims for Relief is GRANTED and the claims dismissed without prejudice.

**B. *Failure to State a Claim***

Even if Plaintiffs' allegations and supporting documents were sufficient to demonstrate subject-matter jurisdiction, I would still dismiss the Complaint—except for the part of the Second Claim for Relief seeking an audit for the period while the CBA was in effect—for failure to state a claim. In considering Copper's motion to dismiss for failure to state a claim, I may consider only the Complaint and "any statements or documents incorporated in it by reference." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (internal quotation marks omitted). Even where a document is not incorporated by reference, I "may nevertheless consider

[2] To the extent that the Second Claim for Relief seeks to recover audit fees associated with the period while the CBA was in effect, that portion of the claim likewise survives Copper's motion to dismiss. My conclusion that I have jurisdiction over part of the Second Claim for Relief does not, as Plaintiffs contend, provide me with "ancillary jurisdiction over Plaintiffs' remaining claims," and Plaintiffs do not cite a case to the contrary. (Doc. 17 at 10.)

it where the complaint relies heavily upon its terms and effect, which renders the document 'integral' to the complaint." *Id.* (internal quotation marks omitted).

With these principles in mind, I find that the CBA is incorporated into the Complaint by reference and that the Supplemental CBA is integral to the Complaint. These documents, however, do not support the existence of a valid contract after August 31, 2019. As explained above, the CBA expired on August 31, 2019, (CBA art. 23), Copper never signed the Supplemental CBA, (Supp. CBA at 2), and the facts alleged in the Complaint do not support an inference that Copper intended to be bound by the Supplemental CBA. In arguing that the Supplemental CBA bound Copper, Plaintiffs rely on two email chains never referenced in the Complaint that were first filed with their brief in opposition to Copper's motion to dismiss—evidence that cannot be considered on a motion to dismiss for failure to state a claim. *See Friedl v. City of New York*, 210 F.3d 79, 83–84 (2d Cir. 2000) (holding that a district court "errs when it considers affidavits and exhibits submitted by defendants, or relies on factual allegations contained in legal briefs or memoranda in ruling on a 12(b)(6) motion to dismiss"); *In re Petrobras Secs. Litig*., No. 14-CV-9662, 2016 WL 11671141, at *3 (S.D.N.Y. Mar. 25, 2016) (declining to consider information in the plaintiff's exhibits to an affidavit submitted in opposition to the motion to dismiss because "it is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss" (internal quotation marks omitted)). Because the allegations in the Complaint, considered together with the CBA and the Supplemental CBA, fail to plausibly allege the existence of an agreement that extended beyond August 31, 2019, Defendant's motion to dismiss the First, Second, Third, and Fourth Claims for Relief is GRANTED and the claims dismissed, except for the part of the Second Claim for Relief seeking an audit.

## IV. Conclusion

For the reasons stated above, Copper's motion is GRANTED in part and DENIED in part. Copper's motion is GRANTED as to the First, Third, and Fourth Claims for Relief and those claims are DISMISSED without prejudice. However, Copper's motion is DENIED as to the Second Claim for Relief to the extent it seeks an order directing Copper to comply with an audit or pay audit fees covering the period between September 1, 2016 and August 31, 2019.

Copper is directed to file an answer within fourteen days of this Opinion & Order.

The Clerk of Court is respectfully directed to terminate the motion pending at Doc. 12.

SO ORDERED.

Dated: July 26, 2024
New York, New York

VERNON S. BRODERICK
United States District Judge