IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES H. THOMAS,	:	
	:	
***Plaintiff*,**	:	**CIVIL ACTION**
	:	**No. 97-CV-2423**
v.	:	
	:	
BOARD OF TRUSTEES OF INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 542*, et al.*,	:	
	:	
***Defendants*.**	:	

MEMORANDUM OPINION AND ORDER

Bruce W. Kauffman, J. **June 24, 1998**

I. INTRODUCTION

Before the Court are Cross-Motions for Summary Judgment of plaintiff James H. Thomas ("Thomas"), and defendants Local 542 of the International Union of Operating Engineers ("Local 542" or the "Local"), the Board of Trustees of the International Union of Operating Engineers, Local 542, Pension Fund and its individual Trustees (the "Pension Fund"), the Board of Trustees of the International Union of Operating Engineers, Local 542, Annuity Fund and its individual Trustees (the "Annuity Fund") (collectively the "ERISA Funds").[1] This

[1]. The individual Trustees of the ERISA Funds have filed a separate motion for summary judgment. The principles that govern Thomas' claims against the ERISA Funds, however, are identical to those governing his claims against the Trustees. Accordingly, the following analysis applies to the Motion of the individual Trustees as well as to the Motion of the ERISA Funds.

Court has jurisdiction of Thomas' claims under § 502(e)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(e), and 28 U.S.C. § 1331.

Between 1978 and 1992, the Local made regular contributions to the ERISA Funds on behalf of Thomas, who, during those years, was not an employee of the Local. The central issue in this litigation is whether Thomas is now entitled to retirement benefits based on those contributions. As explained more fully below, the Court concludes that because Thomas was not a salaried employee of the Local during the years in question, he was not eligible to participate in the ERISA Funds, and consequently may not recover benefits arising out of contributions made during the period of his ineligibility. Nevertheless, ERISA does not leave Thomas wholly without remedy. It is well settled that federal common law may be utilized to "fill in interstices of ERISA and further the purposes of ERISA." *Luby v. Teamsters Health, Welfare & Pension Trust Funds*, 944 F.2d 1176, 1186 (3d Cir. 1991). Based on the common law principle of restitution, this Court will award Thomas the value of the pension and annuity contributions made on his behalf by Local 542 between 1978 and 1992, which were refunded to the Local on December 27, 1996, plus prejudgment interest.

II. BACKGROUND

Between 1964 and 1978 Thomas was employed by Local 542, first serving as a hiring agent, and then after 1975, as the Local's business agent. [Affidavit of James H. Thomas ("Thomas Aff.") at ¶1]. Throughout his employment with Local 542, the Local made regular contributions to the Pension Fund on Thomas' behalf. [Response of Local 542 to Plaintiff's Request for Admissions ¶2 (Exhibit "11" to Plaintiff's Motion for Summary Judgment)]. In May 1978, Thomas accepted full time employment with the International Union of Operating

Engineers (the "International"). [Thomas Aff. ¶1]. Although the parties disagree whether Thomas continued to perform services for Local 542 beyond the standard responsibilities of an International representative, there is no dispute that from 1978 until his retirement in 1993, Thomas' entire salary was paid by the International.

Thomas was reluctant to accept a position with the International because of its lower salary and because he was concerned about losing the substantial pension benefits he was receiving from Local 542. [Thomas Aff. ¶4]. According to Thomas, senior officials of Local 542 encouraged him to accept the position because the Local would benefit from having "one of their own" at the International. [Thomas Aff. ¶4]. To induce Thomas to accept the International position, Local 542's Executive Board promised that, while he was employed by the International, the Local would continue to make contributions on his behalf to the Pension Fund. [Thomas Aff. ¶5].

Between June 1978 and early 1992, the Local contributed a total of $65,899.01 to the Pension Fund for the benefit of Thomas. [Exhibit "10" to ERISA Funds' Motion for Summary Judgment]. Beginning in 1985, Local 542 also contributed $26,686 to the Annuity Fund for Thomas. *Id*. Throughout his employment with the International, Thomas received periodic statements from the ERISA Funds reflecting Local 542's contributions to both the Pension and Annuity Funds. [Exhibit "4" to ERISA Funds' Motion for Summary Judgment]. According to these statements, Local 542's contributions were calculated utilizing the current salary Thomas was receiving from the International and on the assumption of a forty-hour work week. *Id*.

In late 1991 or early 1992, the International's General President, Frank Hanley ("Hanley"), learned that Local 30 in New York City was contributing to an employee benefit

fund for the benefit of two employees of the International.[2] [Affidavit of Frank Hanley ("Hanley Aff.") ¶5 (Exhibit "D" to Local 542's Motion for Summary Judgment)]. Because Hanley believed that benefit contributions by a local union on behalf of employees of the International conflicted with the settled policy of the International, he directed Local 30 to terminate all such contributions. [Hanley Aff. ¶¶ 20-21]. In April 1992, Hanley directed all employees of the International to inform him whether they were receiving any benefits from a local union. [Hanley Aff. ¶22]. In response, approximately six employees of the International, including Thomas, informed Hanley that they were receiving benefit contributions from a local union. [Hanley Aff. ¶23].

Hanley was of the "strong belief that it was improper to receive local union benefits while serving solely as an International Union employee on the International payroll." [Hanley Aff. ¶24]. Accordingly, on April 29, 1992, Hanley issued a directive to ***all*** International personnel that such contributions cease immediately. [Hanley Aff. ¶25]. In addition to this general directive, Hanley specifically directed Thomas to inform Local 542 that contributions to the ERISA Funds on his behalf must cease, which they did. [Hanley Aff. ¶27]. Neither Thomas nor any other affected employee of the International protested Hanley's directive. [Hanley Aff. ¶25].

From the beginning of his affiliation with the International in 1958, Hanley understood International ***policy*** to prohibit its employees or representatives from accepting benefits or any other form of compensation from local unions. [Hanley Aff. ¶25]. Hanley had no reason to question ***the legality*** of benefit contributions by a local union to an employee of the

[2]. Hanley had been General President of the International since February 1990. [Hanley Aff. ¶1].

International, however, until April 1993, when he learned that the United States Department of Labor was conducting a criminal investigation into pension contributions made by Local 30 on behalf of three employees of the International. [Hanley Aff. ¶28]. By report dated April 22, 1993, counsel for Local 30's pension fund concluded that pension contributions made by Local 30 on behalf of employees of the International were ***illegal***, and recommended their recoupment. [Hanley Aff. ¶22].

In light of the conclusion of Local 30's counsel, Hanley directed Thomas to obtain an opinion letter regarding the legality of contributions made on his behalf by Local 542 while he was employed only by the International. [Hanley Aff. ¶32]. In response, Hanley received a January, 1994 opinion letter from John J. McAleese, Esquire, concluding that Thomas was merely "on loan" to the International and, therefore, remained an employee of Local 542 eligible to participate in the ERISA Funds. [Exhibit "13" to Plaintiff's Motion for Summary Judgment]. Hanley rejected McAleese's opinion, however, because he disagreed with its premise that between 1978 and 1993, Thomas remained an employee of Local 542. [Hanley Aff. ¶34 & Exhibit "29"]. Hanley then instructed Local 542 to inform the Trustees of the ERISA Funds of the "relevant facts" concerning Thomas' employment status. [Hanley Aff. ¶34].

In July 1994, Hanley learned that the IRS was conducting an audit of the ERISA Funds, and that it was investigating Thomas' status as an employee of the International. [Hanley Aff. ¶35]. The IRS informed Hanley that its audit was a serious matter that could result in the ERISA Funds' loss of tax-exempt status. *Id*. In March 1995, following the audit's completion, the IRS informed the Trustees that certain "operational issues" threatened the ERISA Funds' tax-exempt status. [Exhibit "5" to ERISA Funds' Motion for Summary Judgment]. Specifically, the

IRS contended that because Local 542 was making contributions on behalf of two non-employees (Thomas and Howard Evans), the ERISA Funds had lost their status as qualified trusts under § 401(a) of the Internal Revenue Code (the "IRC"). *Id*. Under the IRC, if the ERISA Funds lost their status as qualified trusts, their earnings would become subject to federal income tax and the contributions of participating employers would no longer be tax deductible. The ERISA Funds contend that this result would have been disastrous. [ERISA Funds' Brief at pp. 4-5].

Hanley also "understood that IRS disqualification of a multiemployer pension fund was not an idle threat." [Hanley Aff. ¶36]. In 1989, for example, the IRS had determined "that the IUOE Local 478 Pension Plan in Connecticut was not tax exempt for certain years and, although the IRS's determination was later overturned in court, the Local 478 Plan suffered severe disruption of its operations as a result of the IRS's action." [Hanley Aff. ¶36]. Rather than challenge the IRS determination and risk losing tax-exempt status, the Trustees of the ERISA Funds entered into a settlement with the IRS pursuant to which the disputed contributions would be refunded to the Local. [Exhibit "8" to ERISA Funds' Motion for Summary Judgment].

On November 20, 1996, the ERISA Funds informed Thomas that the contributions made on his behalf between 1978 and 1992 were being refunded to the Local without interest:

> The Internal Revenue Service concluded that contributions made by the Operating Engineers Local 542 to the Local 542 Pension and Annuity Funds on your behalf during the period 1978 to 1992 were in violation of the Internal Revenue Code and its regulations. Because of this the IRS threatened to proceed to disqualify these funds.
>
> In order to remedy this violation, and thereby to avoid a disqualification proceeding, the Trustees of these funds, pursuant to the mandate of the IRS, have agreed to refund to Local 542 the contributions made on your behalf. For pension, the contributions

> amount to $65,899.01. For annuity, the contributions amount to $26,686.00. Also pursuant to the mandate of the IRS, these refunds will be made without any interest on these monies.
>
> These refunds must be made as soon as the Trustees are notified by the IRS that it has executed a written agreement to this effect, which agreement has already been executed by the Trustees. It is anticipated that IRS execution of this agreement will take place in approximately one week.

[Exhibit "10" to the ERISA Funds' Motion for Summary Judgment].

On December 27, 1996, the ERISA Funds refunded $92,585.01 to Local 542, representing the Local's total contributions on behalf of Thomas while he was an employee of the International. [Exhibit "11" to Local 542's Motion for Summary Judgment]. In March 1997, the ERISA Funds rejected Thomas' request for confirmation that his retirement benefits should be calculated to include the refunded contributions.

On April 9, 1997, Thomas filed a five count Complaint against Local 542, the ERISA Funds, and the individual Trustees. Count I, brought against the ERISA Funds and the Trustees, seeks a declaratory judgment that Thomas is entitled to pension and annuity benefits reflecting Local 542's contributions on his behalf for the period 1978 through 1992. Count II, also brought against the ERISA Funds and the Trustees, claims that the decision to refund the contributions was motivated by Hanley's personal animosity toward Thomas (based on his alleged efforts to unionize International employees), in breach of fiduciary duties owed to Thomas.

Count III, brought against Local 542, alleges that the Local breached its contractual agreement with Thomas to continue contributing to the Funds for the duration of his employment with the International. Count IV, brought against the ERISA Funds and the Trustees, alleges that by accepting Local 542's contributions and by providing Thomas with periodic statements

reflecting these contributions, the ERISA Funds should be estopped from denying Thomas a level of retirement benefits reflecting the refunded contributions. Count V, brought against Local 542, alleges that Thomas justifiably relied on the Local's promise to continue making contributions on his behalf during his employment with the International, and that the Local should be estopped from denying his eligibility to receive either his anticipated retirement benefits or their monetary equivalent. Thomas has now moved for summary judgment on all Counts of his Complaint, and the Local, the ERISA Funds and the Trustees have filed separate Cross-Motions for Summary Judgment in their favor.

III. DISCUSSION

The Summary Judgment Standard

Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). A material fact is one that might affect the outcome of the suit under governing substantive law. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). The party moving for summary judgment has the initial burden of presenting specific evidence demonstrating the absence of a material factual dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If, however, the nonmoving party fails to produce sufficient evidence with respect to an essential element of its claim and for which it bears the burden of proof at trial, the moving party is entitled to summary judgment. *Id.* at 322-23.

Once the moving party meets its initial burden, the nonmoving party must come forward with specific facts contradicting those set forth by the moving party, thereby establishing

a genuine issue for trial. *See Matsushita Elec. Indus., Ltd. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Although the court must consider the nonmovant's evidence as true and draw all reasonable inferences in its favor, *see Anderson*, 477 U.S. at 255, to avoid summary judgment the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586.

Where the parties have filed cross-motions for summary judgment, the standard does not change. *Maryland Casualty Co. v. Regis Insurance Co.*, No. 96-CV-1790, 1997 WL 164268, at *2 (E.D. Pa. Apr. 9, 1997) (citing *United States v. Hall*, 730 F. Supp. 646, 648 (M.D. Pa. 1990)). Each party must establish that no issues of fact exist and that it is entitled to judgment as a matter of law. The case will not necessarily be decided at the summary judgment stage because cross-motions have been filed. *See Rains v. Cascade Indus.*, Inc., 402 F.2d 241, 245 (3d Cir. 1968); 10A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2720 (3d ed. 1998).

A. Between 1978 and 1993 Thomas was Not a Salaried Employee of Local 542 and Therefore was not Eligible to Participate in the ERISA Funds.

1. Under the Terms of the Pension Fund and Annuity Fund Documents, Participation is Limited to Salaried Employees of the Local.

The ERISA Funds are “governed by written documents and summary plan descriptions, which are the statutorily established means of informing participants and beneficiaries of the terms of their plan and its benefits.” *In re Unisys Corp. Retiree Medical Benefit ERISA Litigation*, 58 F.3d 896, 902 (3d Cir. 1995). Section 402(a)(1) of ERISA, which requires that "[e]very employee benefit plan shall be established and maintained pursuant to a

written instrument," 29 U.S.C. § 1102(a)(1), precludes any oral modification to a plan to either increase or decrease benefits. *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163-64 (3d Cir. 1990). Thus, oral "[r]epresentations made by a union official, clearly contrary to the written fund rules, cannot be binding on the Fund." *Cleary v. Graphic Communications Int'l Union Supplemental Retirement and Disability Fund*, 841 F.2d 444, 447 (1st Cir. 1988) (citing *Chambless v. Master, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1041 (2d Cir. 1985)).

Under the plain language of the Pension Fund agreement, Thomas was no longer eligible to participate in the ERISA Funds upon the termination of his employment with Local 542:

> All ***present and future full time salaried employees*** of this Pension Fund, of [Local 542], of the International Union of Operating Engineers Welfare Fund of Eastern Pennsylvania and Delaware, and of the International Union of Operating Engineers Joint Apprenticeship and Training Fund of Eastern Pennsylvania and Delaware ***shall be eligible for participation in the Fund provided contributions to the Fund are made by their respective Employers, on the basis of forty hours per week***, at the same rate as is required hereunder of other Employers.

[Pension Fund Agreement, Art. III, § 2, pp. 4-5 (emphasis added) (Exhibit "16" to Plaintiff's Motion for Summary Judgment)].

Similarly, participation in the Annuity Fund is limited to full-time salaried employees of Local 542 and members of the Local working for participating contractors. Under the Annuity Fund agreement, only persons who fall within the following definition of "Employee" are eligible to participate:

> **Section 1.10 EMPLOYEE** means a person who is an employee of an Employer and who is covered by the Collective Bargaining Agreement or any written agreement requiring Employer

> contributions on his behalf. This Annuity Fund, the Local 542 IUOE Welfare Fund, the Local 542 IUOE Pension Fund, and the Joint Apprenticeship Training Program and the Union [Local 542] are Contributing Employers and the employees with respect to whom such Employer participates in this Plan are to be deemed Employees.

[Annuity Fund § 1.10 at p. 2 (Exhibit "2" to ERISA Funds' Motion for Summary Judgment)].

Thomas does not contend that these plan provisions are ambiguous. Because he was not a salaried employee of Local 542 between June 1978 and his retirement from the International in 1993, Thomas was not eligible to participate in the ERISA Funds during that period. *See Phillips v. Kennedy*, 542 F.2d 52, 55 n. 8 (8th Cir. 1976) ("The actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan"); *Higgins v. Carpenters Health & Welfare Fund of Philadelphia & Vicinity*, 524 F. Supp. 601, 605-06 (E.D. Pa. 1981) (Giles, J.).[3] Accordingly, Thomas has no cause of action against the ERISA Funds for a level of benefits reflecting his years of service with the International, and summary judgment must be entered in favor of the ERISA Funds on Count I of the Complaint.

2. Facing Threatened Loss of their Tax-Exempt Status, the ERISA Funds Properly Refunded Contributions Made on Behalf of Thomas.

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[3]. *See also Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120 (4th Cir. 1989) ("unauthorized" modification of pension plan "impermissible" under ERISA); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) ("ERISA mandates that [a] plan itself and any changes made to it [are] to be in writing."); *Musto v. American General Corp.*, 861 F.2d 897, 910 (6th Cir. 1988) ("[A] written employee benefit plan may not be modified or superseded by oral undertakings on the part of the employer."); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) ("[A]n ERISA welfare plan is not subject to amendment as a result of informal communications between an employer and plan beneficiaries."); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988) ("[N]o liability exists under ERISA for purported oral modifications of the terms of an employee benefit plan.").

In Count II, Thomas alleges that the ERISA Funds and the individual Trustees breached their fiduciary duties by refusing to follow the opinion of their counsel, John J. McAleese, Esq. (that the contributions were lawful), and by refusing to challenge the IRS only because of Hanley's personal animosity towards Thomas. The record is quite clear, however, that the IRS was threatening to "disqualify" the ERISA Funds because the Local had made contributions on behalf of non-employees, including Thomas. [Exhibit "5" to ERISA Funds' Motion for Summary Judgment]. Following its audit, the IRS required the ERISA Funds to refund to Local 542 contributions made on behalf of employees of the International, which included Thomas and Howard Evans. [Exhibit "6" to ERISA Funds' Motion for Summary Judgment].

The threat to the ERISA Funds' tax-exempt status was clearly not frivolous. To qualify for tax-exempt status under § 401 of the Internal Revenue Code, a pension plan established by an employer must be "for the exclusive benefit of his employees or their beneficiaries." 26 U.S.C. § 401(a). *See, e.g., Professional & Executive Leasing, Inc. v. Commissioner*, 862 F.2d 751, 752-54 (9th Cir.1988) (plan including nonemployees not qualified under § 401); *Stochastic Decisions, Inc. v. Wagner*, 34 F.3d 75, 82 (2d Cir. 1994) ("To be qualified under section 401, a profit sharing plan created by an employer must be 'for the exclusive benefit of his employees or their beneficiaries.'"). In its settlement agreement with the ERISA Funds, the IRS asserted that by accepting contributions on behalf of Thomas and another non-employee, the Local was no longer a qualified employee benefit fund under § 401 of the Internal Revenue Code. [Exhibit "8" to ERISA Funds' Motion for Summary Judgment].

Thomas has failed to present any evidence that the ERISA Funds' decision to accede to the demands of the IRS and refund the improper contributions was based on personal animosity toward him, as opposed to a rational, considered, response to the IRS' colorable cause of action. Accordingly, the ERISA Funds' Motion for Summary Judgment must also be granted on Count II. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (where non-moving party fails to produce sufficient evidence in connection with an essential element of a claim for which it has the burden of proof, moving party is entitled to summary judgment).

B. Thomas has Failed to Adduce Evidence of the Extraordinary Circumstances Required to Support an ERISA-based Equitable Estoppel Claim.

In Count IV, Thomas asserts an equitable estoppel claim against the ERISA Funds and the individual Trustees, and in Count V, a similar claim against Local 542. Under well settled Third Circuit precedent, an ERISA beneficiary may recover benefits under an equitable estoppel theory by establishing: (1) a material misrepresentation; (2) reasonable and detrimental reliance upon the misrepresentation; and (3) extraordinary circumstances. *Smith v. Hartford Ins. Group*, 6 F.3d 131, 137 (3d Cir. 1993); *Rosen v. Hotel and Restaurant Employees Union*, 637 F.2d 592, 598 (3d Cir. 1981).

To establish "extraordinary circumstances," Thomas must show affirmative acts of fraud or similarly inequitable conduct by the employer such that it appears that the employer sought to profit at the expense of its employees. *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544, 1553 (3d Cir. 1996). "[N]othing short of demonstrable bad faith, affirmative misrepresentation or concealment of ERISA pension benefits or rights with knowledge that the participants or beneficiaries might be misled has sufficed to demonstrate the necessary `extraordinary

circumstances.'" *Jordan v. Federal Express Corp*., 914 F. Supp. 1180, 1191 (W.D. Pa. 1996), *aff'd in rel. part*, 116 F.3d 1005 (3d Cir. 1997).

In support of his equitable estoppel claim, Thomas relies heavily on the Third Circuit's decision in *Rosen*, where the court held that a plan participant could recover pension benefits, even though not entitled to such benefits under the plan documents, on a theory of equitable estoppel. The facts of *Rosen,* however, are materially different. In 1971, a trustee of Rosen's pension fund advised him that his pension was in jeopardy because his employer had failed to make any contributions since the fund's inception in 1967. After the trustee showed Rosen a tabulation reflecting a total arrearage of $419.20, Rosen tendered a personal check for that amount which the trustee accepted and then deposited in the pension fund's account. 637 F.2d at 595.

In 1976, the pension fund denied Rosen's application for pension benefits on the ground that, because his employer had failed to make contributions from 1967 through 1971, he lacked the minimum fifteen years of credited service required to receive a pension. When Rosen pointed out that he had personally cured his employer's arrearage, the pension fund responded that there was "no provision in the pension plan to allow for payment of contributions to the Fund by an ***employee*** for the purpose of acquiring credited service toward a pension benefit." 637 F.2d at 595 (emphasis added).

Quoting the Eighth Circuit's decision in *Phillips v. Kennedy*, 542 F.2d 52 (8th Cir. 1976), the *Rosen* court acknowledged that, absent "extraordinary circumstances," a pension fund's actuarial soundness was "too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan." 637 F.2d at

598 (quoting *Phillips*, 542 F.2d at 55 n. 8). The *Rosen* court concluded, however, that where a pension fund trustee informs an otherwise eligible participant that his employer's pension contributions are delinquent, and where the trustee accepts and deposits the employee's personal check for the precise amount of the arrearage, the "case can be classified as one of the `extraordinary circumstances' as outlined by the *Phillips* court." 637 F.2d at 697.

Thus, the circumstances in *Rosen* stand in marked contrast to those here. Foremost, the pension fund never disputed that Rosen was an "employee" within the scope of the pension plan document, and was therefore eligible to participate in the fund. After accepting and depositing his personal check to cover his employer's arrearage, the pension fund purported to deny Rosen his pension on the hyper-technical ground that nothing in the plan document authorized otherwise eligible employees personally to cure an employer's arrearage. In finding the pension fund estopped from raising this defense, the *Rosen* court expressly recognized that the source of a pension contribution has nothing to do with a fund's actuarial soundness. 637 F.2d at 598 & n. 9.

Here, there is no dispute that once Thomas began receiving his salary exclusively from the International, he was no longer a "salaried employee" of Local 542 eligible to participate in the ERISA Funds. Moreover, there is no evidence suggesting that prior to 1992, the ERISA Funds, the individual Trustees, or Local 542 knew or suspected that the post-1978 contributions on behalf of Thomas were unlawful. In May 1992, when Hanley directed that those contributions immediately cease, Local 542 complied. In 1996, when the IRS threatened to revoke their tax-exempt status, the ERISA Funds agreed to refund the disputed contributions to Local 542 -- without protest from Thomas. Thus, the undisputed facts fall far short of the

"extraordinary circumstances" that Thomas must establish in order to estop the ERISA Funds from denying him a level of pension benefits based upon improper, refunded contributions.

Although Count V does not indicate whether it is based on ERISA or state law, Thomas cannot obtain recovery against Local 542 under either theory. ERISA does not authorize an award of compensatory damages against non-fiduciaries. *See Buckley Dement, Inc. v. Travelers Plan Administrators of Illinois, Inc.*, 39 F.3d 784, 788-90 (7th Cir. 1994). Because the multiemployer ERISA Funds are controlled by appointed Trustees and not Local 542, the Local is not a "fiduciary" within the scope of 29 U.S.C. § 1002(21)(A) (defining fiduciary as person who exercises discretionary authority or control respecting management of ERISA plan). Accordingly, Local 542 is not subject to a participant's suit for increased benefits from an ERISA plan that it does not control. *Villars v. Board of Trustees, Sheet Metal Workers' National Pension Fund*, 901 F. Supp. 1111, 1120-21 (S.D. W.Va. 1995). Alternatively, if Count V is construed as an estoppel claim brought under state law, it is preempted by ERISA. *See* 29 U.S.C.A. § 1144(a) (ERISA preempts all state laws relating to employee benefit plans) & *infra* at pp. 16-18. Accordingly, the Court grants summary judgment in favor of the ERISA Funds and the individual Trustees on Count IV of the Complaint, and in favor of Local 542 on Count V of the Complaint.

C. ERISA Preempts Thomas' State Law Breach of Contract Claim Against Local 542.

Count III, which asserts a state law claim for breach of contract against Local 542, is preempted by ERISA, which "is a comprehensive statute enacted `to promote the interests of employees and their beneficiaries in employee benefit plans.'" *In re Unisys Corp. Retiree Medical Benefit ERISA Litigation*, 58 F.3d 896, 901 (3d Cir. 1995) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)). In drafting the statute, Congress included an extremely

broad preemption clause, providing that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan ...." 29 U.S.C. § 1144(a). A state law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan." *Shaw*, 463 U.S. at 97 & n.16 (citing *Black's Law Dictionary* 1158 (5th ed. 1979)). It is well settled that ERISA is the ***exclusive*** vehicle for challenging the denial of benefits under a qualified pension plan. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987). *See Gould v. Great-West Life & Annuity Ins. Co.*, 959 F. Supp. 214, 219 (D.N.J. 1997) ("Because plaintiff's breach of contract and equitable estoppel claims challenge the denial of a benefits claim ... they are preempted by ERISA.").

ERISA's preemption provisions "are deliberately expansive, and designed to establish pension plan regulation as exclusively a federal concern." *Pilot Life Ins.*, 481 U.S. at 46. "The term `relate to' has been construed broadly. A law `relates to' an employee benefit plan if it has a connection with or reference to" an ERISA plan. *Pane v. RCA Corp.*, 868 F.2d 631, 635 (3d Cir. 1989) (quoting *Shaw*, 463 U.S. at 96-97). In light of these principles of construction, the Third Circuit has concluded that a state law claim is preempted by ERISA if: (1) the existence of an ERISA plan is critical to establish liability, and (2) the court's inquiry would be directed to the plan." *1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc. v. Nobers*, 968 F.2d 401, 406 (3d Cir. 1992). *See, e.g., Bunnion v. Consolidated Rail Corp.*, No. 97-CV-4877, 1998 WL 32715, *7 (E.D. Pa. Jan. 6, 1998) (Bartle, J.) ("ERISA preemption encompasses actions for fraud, negligence, breach of contract, and unjust enrichment which relate to an employee benefit plan.").

Thomas alleges that this Court has jurisdiction pursuant to § 502(e)(1) of ERISA, 29 U.S.C. § 1132(e), and the parties do not dispute that both the Pension and Annuity Funds are covered by ERISA. In his prayer for relief, Thomas seeks an order requiring Local 542, "in the event [he] does not receive benefits from the [ERISA] Funds for the period he was employed by the Local, to pay ... Thomas the equivalent value of said benefits." Plainly, the existence of the ERISA Funds would be critical to establishing the Local's liability under a breach of contract theory, and the Court's inquiry would be directed to the plan documents if it were required to calculate Thomas' damages under a contract theory. *See Wassil v. Advanced Tech. Laboratories, Inc*., No. 95-CV-6777, 1996 WL 238688, *2 (E.D. Pa. May 7, 1996) (R. Kelly, J.) (ERISA preempts state law breach of contract claim where "calculation of damages would necessarily involve reference [to ERISA plan document]").

Accordingly, Thomas' state law breach of contract claim against Local 542 is preempted by ERISA, and summary judgment must be entered against him on Count III of the Complaint. *See, e.g., Bedger v. Allied Signal, Inc*., No. 97-CV-6786, 1998 WL 54411, *4 (E.D. Pa. Jan. 23, 1998) (Van Antwerpen, J.) (breach of contract claim relating to denial of pension benefits preempted by ERISA).

D. ERISA Incorporates Principles of Equitable Restitution that Provide Thomas a Superior Interest in the Refunded Pension and Annuity Contributions.

Between 1978 and 1992, Local 542 contributed $92,585.01 to the ERISA Funds on behalf of Thomas. [Exhibit "10" to ERISA Funds' Motion for Summary Judgment]. In December 1996, pursuant to its agreement with the IRS, the ERISA Funds refunded that amount to Local 542. [Exhibit "8" to ERISA Funds' Motion for Summary Judgment]. As explained above,

Thomas has no cause of action against either the ERISA Funds or Local 542 for a level of retirement benefits based on contributions made by the Local during his employment by the International. The question remains, however, whether Thomas has an interest in the refunded contributions superior to that of Local 542. The Court concludes that the answer is a clear "yes."

ERISA authorizes the federal judiciary to "establish a federal common law governing restitution of mistaken payments." *Construction Industry Retirement Fund of Rockford, Illinois v. Kasper Trucking, Inc.*, 10 F.3d 465, 467 (7th Cir. 1993) (citing *UIU Severance Pay Trust Fund v. Steelworkers Local No. 18-U*, 998 F.2d 509, 513 (7th Cir. 1993)). *See also Luby v. Teamsters Health, Welfare & Pension Trust Funds*, 944 F.2d 1176, 1186 (3d Cir. 1991). Federal common law is utilized to "fill in interstices of ERISA and further the purposes of ERISA." *Luby*, 944 F.2d at 11186 (citation omitted). "Rather than undermining ERISA's remedial scheme, equity supplements it by providing a tool for courts to use when one party `has been unjustly enriched at the expense of another.'" *Kwatcher v. Massachusetts Service Employees Pension Fund*, 879 F.2d 957, 967 (1st Cir. 1989) (quoting *Restatement of the Law of Restitution* § 1 (1937)).

Equitable remedies available under ERISA include restitution. *See Plucinski v. I.A.M. National Pension Fund*, 875 F.2d 1052, 1057-58 (3d Cir. 1989) (federal common-law restitution is available to employers to recover mistakenly paid pension fund contributions, unless restitution would result in underfunding of the ERISA plan). Restitution is appropriate if Thomas can establish that "(1) he had a reasonable expectation of payment, (2) the defendant should reasonably have expected to pay, or (3) society's reasonable expectations of person and property would be defeated by nonpayment." *Heller v. Fortis Benefits Ins. Co.*, __ F.3d ___, No. 97-CV-

7095, 1998 WL 210614, *7 (D.C. Cir. May 1, 1998) (citing *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 993-94 (4th Cir. 1990)).

In *Construction Industry Retiree Fund of Rockford, Illinois v. Kasper Trucking, Inc.*, 10 F.3d 465 (7th Cir. 1993), the Seventh Circuit applied a restitution remedy in circumstances quite similar to those here. Kasper Trucking employed drivers who owned their own rigs. For the purpose of an ERISA qualified multiemployer health and pension plan, Kasper Trucking originally had classified the driver/owners as employees, deducting money from their pay and remitting the funds to the multiemployer plan. 10 F.3d at 466. Subsequently, Kasper Trucking concluded that the driver/owners should be classified as independent contractors who were not eligible to participate in the ERISA plan, and demanded that the plan refund the erroneous contributions. *Id*. The ERISA plan agreed to refund the money, but filed an interpleader requesting that the court determine whether the funds should go to Kasper Trucking or to the drivers, both of whom claimed the money.

The district court found that Kasper Trucking lacked standing in the interpleader action and awarded the refunded contributions to the drivers. *Id*. Although the Court of Appeals disagreed with the district court's legal theory, it agreed that the drivers had the superior interest in the refunded contributions:

> Kasper and its drivers agreed that Kasper, instead of paying all cash for labor and vehicles, would pay partly in cash and partly in pension contributions. The pension is a form of deferred compensation, received after retirement. An attempt to provide that deferred compensation through the pension fund has failed. There are two other ways to reach the same objective: Kasper may take the money and buy annuities for the benefit of the drivers; or the drivers may take the money and buy their own annuities (or make equivalent investments), using the pension rollover features of the

> tax law. Federal common law in the shadow of ERISA is indifferent between these possibilities. What decides this case, therefore, is the use Kasper proposes to make of the money: Kasper wants to put the cash in the corporate treasury without funding substitute pension vehicles for the drivers. ***That outcome would be inconsistent with the parties' bargain of cash now and retirement income later. The district court therefore properly awarded the money to the drivers***.

10 F.3d at 469 (emphasis added).

In affirming the award of the fund to the drivers, the Seventh Circuit concluded that "Kasper lacks any equitable claim to the money." 10 F.3d at 468. Here, as in *Kasper Trucking*, Local 542 lacks any equitable claim to the money refunded by the ERISA Funds. In 1978, as part of its inducement to Thomas to accept a position with the International, Local 542 agreed to continue making contributions to the Pension Fund on his behalf. [Thomas Aff. ¶¶4-5]. For the next fourteen years, the Local kept its promise. To now permit Local 542 to retain the retirement contributions that Thomas bargained for and earned would constitute a windfall to which the Local has no equitable claim. On the other hand, Thomas will receive a pension substantially less than that which he reasonably expected.[4] [Thomas Aff. ¶6 & Exhibit]. While he has no legal claim to the pension and annuity benefits he expected, Thomas certainly has an equitable claim -- far superior to that of the Local -- to the actual contributions made over the course of fourteen years on his behalf and for his exclusive benefit.

In his prayer for relief against the Local, Thomas demands the "equivalent value" of the benefits he would have received from the ERISA Funds, calculated to include his years of

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[4]. According to a report from ADP Benefit Services, if the Local's contributions for the period 1978 to 1992 were included in the calculation of his pension, Thomas would receive a pension of $1273.05 per month. Without the refunded contributions, his pension will be reduced to $205.98 per month.

employment with the International. As explained above, under ERISA's framework, such relief cannot lawfully be granted. Although Thomas does not expressly seek restitution, his prayer for relief does include a demand "for such injunctive relief as the Court may deem appropriate."

Under Rule 8(a) of the Federal Rules, "a complaint need not spell out the theory of liability under which plaintiff hopes to recover." *Jones v. Philadelphia College of Osteopathic Medicine*, 813 F. Supp. 1125, 1131 (E.D. Pa. 1993). Rule 54(c) authorizes entry of final judgment granting relief to which a party is "entitled" even though they failed to "demand[ ] such relief" in the complaint. *See also Evans Prod. Co. v. West American Ins. Co*., 736 F.2d 920, 923 (3d Cir. 1984) (court may grant relief on a theory not pleaded); *Hammie v. Social Security Admin.*, 765 F. Supp. 1224, 1227 n. 4 (E.D. Pa. 1991) ("Under the federal rules, plaintiffs are required to plead facts, not legal theories"). Accordingly, the Court grants summary judgment in Thomas' favor on a claim for restitution and awards him the $92,585.01 refunded to Local 542 in December 1996 by the ERISA Funds.

Although precluded from awarding Thomas the interest earned by the ERISA Funds on the $92,518.01 refunded to Local 542,[5] the Court has broad discretion to award prejudgment interest to a prevailing party. *See Hardtke v. Exide Corp*., 821 F. Supp. 1021, 1031 (E.D. Pa. 1993) (Van Antwerpen, J.) (citing *Anthuis v. Colt Indus. Operating Corp*., 971 F.2d 999, 1010 (3d Cir. 1992); *Schake v. Colt Indus. Operating Corp. Severance Plan*, 960 F.2d 1187, 1190 (3d Cir.1992)). An award of prejudgment interest should be granted on "'considerations of fairness

[5]. *See Airco Indus. Gases, Inc. v. Teamsters Health & Welfare Fund of Philadelphia & Vicinity*, 850 F.2d 1028, 1037 (3d Cir. 1988); *Peckham v. Board of Trustees of Int'l Brotherhood & Allied Trades Union*, 724 F.2d 100, 101 (10th Cir. 1983); *Dumac Forestry Services, Inc. v. International Brotherhood of Electrical Workers*, 814 F.2d 79, 83 (2d Cir. 1987).

[and] denied when its exaction would be inequitable.'" *Hardtke*, 821 F. Supp. at 1031 (quoting *Ambromovage v. United Mine Workers*, 726 F.2d 972, 981-82 (3d Cir. 1984)).

Prejudgment interest is appropriate where the relief granted would fall short of making a party "whole because he has been denied use of money which was his." *Short v. Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567, 576 (8th Cir. 1984). This Court has broad discretion to fix both the rate and the accrual date for calculating an award of prejudgment interest. *Valle v. Joint Plumbing Indus. Bd.*, 623 F.2d 196, 206-07 (2d Cir. 1980).

As explained above, the Court concludes that as between Thomas and Local 542, Thomas has the superior equitable right to the refunded contributions. Accordingly, the Court awards Thomas prejudgment interest on the $92,585.01 judgment in his favor, calculated at the federal post-judgment statutory rate, to commence December 27, 1996, the date on which the contributions were refunded to Local 542. *See Hardtke*, 821 F. Supp at 1032 n.17 (prejudgment interest rate in ERISA cases may be based on post-judgment interest rate set forth in 28 U.S.C. § 1961); *Kann v. Keystone Resources, Inc.*, 575 F. Supp. 1084, 1096 (W.D. Pa. 1983) ("[T]he rate of pre-judgment interest in an ERISA case is a federal question which must be governed by federal law. Therefore, we adopt the Eighth Circuit's holding that 28 U.S.C. § 1961, the analogous section for post-judgment interest, is to be applied.").

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES H. THOMAS,	:	
	:	
***Plaintiff*,**	:	**CIVIL ACTION**
	:	**No. 97-CV-2423**
v.	:	
	:	
BOARD OF TRUSTEES OF INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 542*, et al.*,	:	
	:	
***Defendants*.**	:	

ORDER

AND NOW, this 24th day of June, 1998, upon consideration of the Cross-Motions for Summary Judgment of plaintiff James H. Thomas ("Thomas"), and defendants Local 542 of the International Union of Operating Engineers ("Local 542"), the Board of Trustees of the International Union of Operating Engineers, Local 542, Pension Fund and its individual Trustees (the "Pension Fund"), the Board of Trustees of the International Union of Operating Engineers, Local 542, Annuity Fund and its individual Trustees (the "Annuity Fund") (collectively the "ERISA Funds"), and having heard oral argument on the above motions, it is **ORDERED** as follows:

1. Summary judgment is **GRANTED** in favor of the Pension Fund and the Annuity Fund on Counts I, II & IV of the Complaint.

2. Partial Summary Judgment is **GRANTED** in favor of Local 542 on Counts III and V of the Complaint. Under an equitable claim for restitution, Local 542 is ordered to pay Thomas the sum of $92,585.01, plus prejudgment interest to be calculated at the federal statutory post-

judgment interest rate from December 26, 1996. In all other respects, Local 542's Motion is **GRANTED**.

3. This **ORDER** constitutes a Final Judgment and the Clerk is directed to mark the above-captioned action as **CLOSED**.

BY THE COURT:

_____

BRUCE W. KAUFFMAN, J.