

<b>Boyle v Local 237 Teamsters-Town of Islip Health &amp; Welfare Fund</b>
2017 NY Slip Op 30332(U)
February 8, 2017
Supreme Court, New York County
Docket Number: 151991/2014
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 63

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KEVIN BOYLE AS TRUSTEE OF THE UNITED  
PUBLIC SERVICE EMPLOYEES BENEFIT FUND,  
KEVIN BOYLE AS PRESIDENT OF THE UNITED  
PUBLIC SERVICE EMPLOYEES UNION (AS THE  
COLLECTIVE BARGAINING REPRESENTATIVE OF  
THE TOWN OF ISLIP BLUE AND WHITE COLLAR  
COLLECTIVE BARGAINING UNITS), PETER  
POLLACK ON BEHALF OF HIMSELF AND ALL  
OTHER MEMBERS OF THE BLUE COLLAR  
COLLECTIVE BARGAINING UNIT SIMILIARLY  
SITUATED, and ELLEN PLEASANT ON BEHALF OF  
HERSELF AND ALL OTHER MEMBERS OF THE  
WHITE COLLAR COLLECTIVE BARGAINING UNIT  
SIMILIARLY SITUATED,

Plaintiffs,

- against -

LOCAL 237 TEAMSTERS – TOWN OF ISLIP  
HEALTH AND WELFARE FUND AND THE  
TRUSTEES THEREOF, A MUNICIPAL EMPLOYEES  
BENEFIT TRUST FUND,

Defendants.

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**ELLEN M. COIN, J.:**

This action is brought by two individual members of the Town of Islip Blue Collar and White Collar bargaining units, their current labor union (United Public Service Employees Union [UPSEU]), and the United Public Service Employees Benefit Fund (UPSE Fund) against Local 237 Teamsters-Town of Islip Health and Welfare Fund (the

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**DECISION & ORDER**  
(Motion Seq. 002)

Fund), seeking to compel the trustees of the Fund to turn over and pay to the UPSE Fund a proportionate share of reserves that the Fund had accumulated on behalf of the Blue and White Collar Employees of the Town of Islip (Town) prior to UPSEU's replacement of Teamsters Local 237 (Local 237) as union representative in 2010 and 2013, respectively. Plaintiffs now move pursuant to CPLR 3212 for partial summary judgment in their favor on the first through fifth causes of action of their amended complaint, while defendants cross-move for dismissal of all of plaintiffs' claims.

### FACTUAL ALLEGATIONS

The Fund was established in 1972 by Agreement and Declaration of Trust (Trust Agreement) between Local 237 and the Town. It was created to provide a supplemental health and welfare program for municipal employees working for the Town and covered by a collective bargaining agreement between the Town and Local 237 (the "Blue Collar Unit").

In December 1977, the trustees of the Fund amended the Trust Agreement so as to permit the trustees to provide health and welfare benefits for non-union employees of the Town, but the provision was not activated at that time. Thus, the term "Employee" was changed to: "all Employees of the Town covered by the Collective Bargaining Agreements between the Town and the Union [defined as Local 237] and other employees of the Town for whom the Town makes appropriate contributions" (Rocco Affirmation, Ex. G, Sec. 3 at 2). Another amendment was made on September 20, 1988 to redefine "Employee" as "any person employed by an Employer, who is represented by the Union for purposes of collective bargaining and for whom the appropriate

contributions are made to this Trust Fund” (*id.*, Ex. H at 3). The Trust Agreement was amended yet again on October 1, 1989 “to extend benefit coverage under the Trust to so-called ‘white collar employees’ who are employed full-time by the Town, for whom contributions have not previously been made” (*id.*, Ex. F at 1). Since that date, the Fund has also covered a number of non-union managerial and confidential employees employed by the Town and other employees represented by Local 237, who were employed by certain other municipalities within the Town, such as the Village of Brightwaters (*id.*, Ex. H at 4). This extension of coverage to White Collar employees was made on an initial three-year trial basis. On December 27, 1991, the trustees resolved to continue this coverage for White Collar employees until such time as it was modified or terminated by the trustees.

As of September 2010, there were 370 to 411 Blue Collar bargaining unit employees participating in the Fund; 270 to 296 White Collar bargaining unit employees participating; and 85 to 90 non-union managerial and confidential employees participating (Rocco Aff., Ex. H at 3-4). Thus, the overwhelming majority of the employees eligible for benefits from the Fund were from the Blue and White Collar bargaining units.

In 2010, UPSEU filed a petition with the New York State Public Employment Relations Board (PERB) seeking to represent the Town employees in the Blue and White Collar bargaining units, who were then represented by Local 237. Thereafter, both unions campaigned for votes. Among the key dividing issues was the potential impact of decertification on Fund benefits. As part of Local 237’s campaign, it distributed leaflets

and fliers warning its members that if UPSEU was voted in as their new bargaining agent, they would lose all benefits from the Fund, including vision, dental and disability benefits. UPSEU's response was to assure the two bargaining units that the UPSE Fund would cover them and provide the "same or better benefits" (Rocco Aff., Ex. D: Boyle Tr. at 39-40).

UPSEU is a union that represents employees of towns, villages, school districts and other local municipalities in four states. As of February 2015, UPSEU was comprised of approximately 425 bargaining units, with over 28,000 members. The majority of these bargaining units were previously represented by a different union. The UPSE Fund provides benefits for each of the bargaining units, although the benefits vary by contract (Rocco Aff., Ex D: Boyle Tr. at 7-8, 17, 24-25).

On September 21, 2010, following a decertification/certification election conducted under the auspices of PERB, Local 237 was decertified as the bargaining agent for the Blue Collar bargaining unit of the Town, and UPSEU was thereafter certified as its collective bargaining agent. The White Collar bargaining unit did not decertify at that time, and continued to be represented by Local 237. Effective immediately thereafter, the Fund stopped providing welfare benefits to the employees of the Blue Collar bargaining unit. The UPSE Fund immediately began providing coverage to the Blue Collar employees, although the Town refused to make any contributions to the UPSE Fund from the time UPSEU won the election until it finalized a new collective bargaining agreement with the Town 18-19 months later (Boyle Tr. at 79-81). The Town took the position that the collective bargaining agreement it had signed with Local 237

excused it from making any contributions for an extended period of time (*id.*). Plaintiffs contend that as a result, the UPSE Fund lost out on approximately \$450,000 in employer contributions during this gap (*id.*). The UPSE Fund “currently provides the same or better ancillary benefits” to the Blue and White Collar employees (Rocco Aff., ¶ 12).

On September 22, 2010, the trustees of the Fund held a meeting. According to the minutes of that meeting, Chairperson and Local 237 Trustee Richard Hendershot took the position that the Blue Collar employees were no longer eligible to participate in the Fund since there was no longer a contract with Local 237. Town Trustee Robert Finnegan agreed, but proposed that the trustees adopt a resolution allowing the Blue Collar employees, now represented by UPSEU as of September 21, 2010, to continue to participate in the Fund and to be provided with the same benefits as the other Town employees participating in the Fund. The three Town trustees voted in favor of the resolution, and the three Local 237 trustees voted against the resolution, resulting in a deadlock.

On September 30, 2010, the Fund submitted the deadlock to final and binding arbitration. A hearing was held on April 12, 2011, before the deadlock arbitrator, Martin Scheinman. Although the arbitrator did not permit UPSEU to intervene, it was allowed to appear and participate under certain limitations. In a decision dated June 14, 2011, Arbitrator Scheinman ruled in favor of the Local 237 trustees, finding that it was in the best interests of the Fund to reject the resolution (*see* Rocco Aff., Ex. H at 16). The arbitrator found that allowing the Blue Collar employees to participate in the Fund would “radically alter the character of the Fund,” from serving the needs of Local 237’s

membership to serving a participant base dominated by employees belonging to a competing labor organization (*id.* at 17). In so determining, the arbitrator noted:

“I reject the Town Trustees’ contention [that] equity favors adoption of their resolution because the benefit of accumulated contributions paid into the Fund on behalf of the Blue Collar employees will allegedly be lost to them unless they are restored to participant status. The record is not sufficient to establish [that] any individual Blue Collar employees suffered a loss of benefits to which he or she was entitled, or that any employee has an equitable claim to monies previously contributed by the Town to the Fund”

(*id.* at 21-22).

In December 2010, the Fund had 52 ½ months of reserves. In accordance with the collective bargaining agreement negotiated with Local 237, the Town was excused from making any contributions to the Fund until the reserve fell below 12 months. This temporary suspension of contributions to the Fund had been negotiated in favor of wage increases.

The trustees of the Fund held a meeting on July 20, 2011, to discuss how the Fund would proceed in light of the deadlock arbitrator’s decision. The Chairperson stated that the Fund had a reserve of approximately four years, and that with such a large reserve, the New York State Insurance Fund would, in all likelihood, mandate that benefits be increased (Kolker Aff., Ex. 6 at 1). Thereafter, effective January 1, 2012, the trustees voted to double the benefits available to the remaining participants, including the White Collar bargaining unit employees, who were still participants in the Fund (*id.*, Ex. 6).

In September 2013, following a decertification/certification election conducted under the auspices of PERB, Local 237 was decertified as the bargaining agent for the White Collar bargaining unit of the Town and UPSEU was thereafter certified as its

collective bargaining agent. As a result, the Fund stopped providing welfare benefits to employees of the White Collar bargaining unit (Rocco Aff., Ex A, ¶¶ 33-35).

Approximately 160 non-union employees were left participating in the Fund as of the first quarter of 2014.

The original complaint asserted five causes of action: (1) for equitable division of Fund assets; (2) unjust enrichment; (3) an accounting; (4) wrongful withholding of contractual benefits; and (5) conversion of Fund assets. By order dated July 30, 2015, this court permitted plaintiffs to amend the complaint to add a sixth cause of action alleging that the trustees of the Fund breached their fiduciary duty to the Blue and White Collar bargaining units. Although that claim is not part of plaintiffs' motion for partial summary judgment, it is part of defendants' cross-motion for summary judgment in their favor. By way of relief, the amended complaint seeks, inter alia, an order compelling the trustees of the Fund to transfer to the UPSE Fund "the proportionate amount of monetary reserves deemed proper" (Am. Cpl. at 15).

### DISCUSSION

The gravamen of plaintiffs' argument is that the Blue and White Collar bargaining unit employees have an equitable interest in the monies that were contributed to the Fund on their behalf prior to the change of union representation. Thus, they claim, equity requires that the reserves of the Fund be partitioned so that they can be enjoyed by the employees on whose behalf the reserves were accumulated. Plaintiffs primarily rely on three cases, *Nicolette v Essenfeld* (11 Misc 2d 197 [Sup Ct, New York County 1958]); *Nardolillo v Sovinsky* (89 Misc 2d 544 [Sup Ct, Erie County 1977]); and *Chautauqua*

*County Sheriff's Empls. Assn. v Chautauqua Local 807* (126 Misc 2d 469 [Sup Ct, Chautauqua County 1984], *affd* 115 AD2d 1001 [4<sup>th</sup> Dept 1985]).

Defendants contend that each of these cases is distinguishable on its facts. Further, they argue that no New York case requires an involuntary apportionment of Fund reserves, and that whether to apportion monies (or generally to administer the Fund) should be left to the discretion of the Trustees who are fiduciaries of the Fund and its participants. The court finds that under the facts of this case apportionment is not warranted, particularly in view of the outcome of the deadlock arbitration in 2011.

New York law does not mandate that a court must divide the assets of a welfare fund when a union local voluntarily changes affiliates. *Nicolette v Essensfeld* (11 Misc 2d 197) concerned an involuntary transfer of a group of dairy employees from one local union to another by mandate from the international union. The court merely upheld the discretion of the trustees of both the old and new welfare funds to transfer a portion of the reserves of the new fund over the objection of produce employees who remained in the old union. The court held that “[c]ontributions made to a welfare fund, as well as the reserve accumulated therefrom, actually constitute a portion of the compensation of the employees on whose behalf they are made,” and, as trust funds, the participating employees have only an equitable interest in the reserve (*id.* at 200). However, the court also stated:

“Plainly, however, where a reserve is accumulated in a welfare fund, the protection and advantages provided by that reserve should, in the absence of countervailing considerations, be enjoyed by the employees on whose behalf the reserve was accumulated (cf. *Whelan v O'Rourke*, NYLJ, April 23, 1956, p 7, col 7, mod 5 AD2d 156). This does not mean that an

employee could lawfully demand that his prorata portion of the reserve be paid directly to him; for his interest therein is only the equitable interest of a *cestui que trust*. Nor does it mean that there may not be circumstances under which an employee may lose even that equitable interest”

(*id.*). The court also specifically noted that the dairy employees had no control over the creation of a new local union, and thus, the loss of their equitable interest in the fund reserves. In the case at bar, in contrast, the plaintiff bargaining units were on notice during the decertification election campaign that they would cease being participants in the Fund once they opted to replace Local 237 with UPSEU.

*Whelan v O'Rourke* (5 AD2d 156 [1<sup>st</sup> Dept 1958]), cited in *Nicolette v Essenfeld*, was another inter-union change of jurisdiction case. After 1,000 employees were transferred from one local to another local of the same international union, the question of what to do with the former union's pension fund was submitted to a neutral arbitrator to determine after the trustees of the former fund reached a deadlock. The arbitrator voted in favor of the transfer of a portion of the pension fund to the new local's fund, the sum representing employer pension contributions to the old fund on behalf of the transferred employees, plus allocable income and expenses. In upholding the arbitrator's decision, the First Department ruled that the trustees of a welfare trust have broad power to construe the trust agreement and act as long as the fund “is not diverted from its primary purpose as a welfare and pension plan,” and that courts are “not at liberty to substitute [their] judgment for that of the trustees” (5 AD2d at 160).

In the case at bar, plaintiffs repeatedly contend that they were “expelled” or “kicked out” of the Fund, but that is not correct. This case is not about whether the Blue

and White Collar bargaining unit employees had a right to continue as participants in the Fund. Arbitrator Scheinman decided that issue back in 2011, shortly after the first decertification election. In reaching this determination, Arbitrator Scheinman held himself to the same fiduciary standards as the trustees of the Fund, i.e., “to act solely in the best interests of the Fund and its participants so as to provide benefits and defray the reasonable expenses of administration” (Rocco Aff., Ex. H at 14-15). Absent a showing of bad faith or arbitrariness, the court will not interfere with the trustees’ administration of the Fund.

Indeed, the group of employees who have participated in the Fund for decades has been fluid. That the plaintiff groups chose to move voluntarily to another union – as is their right – does not entitle them to force an involuntary partition of the Fund’s reserves, particularly at this late date, and after the White Collar employees had the benefit of those reserves and the increased benefits the Fund afforded during the period from January 1, 2012 to September 2013. Notably, plaintiffs fail to offer any methodology for calculating how the Fund should be partitioned, nor as of what point in time.<sup>1</sup> The Fund is a pooled asset fund and there are no individual accounts (Boyle Tr. at 14-15). Once an employee ceases to be a participant, coverage ends and the employee does not receive any payout as he might for an individualized benefit, such as unused vacation or sick days (*see* Kolker

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<sup>1</sup> Perhaps had lawsuits been commenced shortly after the certification elections in 2010 and 2013, the result might be different. Instead, plaintiffs waited until March 6, 2014 to commence this litigation, without making any prior claim to Fund reserves. Nor does the court find that the two groups of plaintiffs have a similar equitable interest in the Fund, given the fact that the White Collar bargaining unit employees continued to enjoy enhanced benefits for more than a year and a half prior to their change of union representation.

Aff, Ex. 3: Germana Tr. at 49-50; Boyle Tr. at 19, 22-24). While it is not disputed that the Fund had a large reserve as of December 2010, the Fund did not receive any employer contributions after December 2009. During this time, the Fund continued to incur operating expenses and to pay covered benefits to the White Collar bargaining unit employees (until September 2013) and to the other Fund participants. The unaudited net assets of the Fund available for benefits as of December 31, 2015 were about \$172,844, representing less than a one-year reserve for the provision of benefits to current participants (Kolker Aff., Ex. 13: Germana aff., ¶ 5). Accordingly, here, in contrast to the situation in *Whelan v O'Rourke* (5 AD2d at 161), any apportionment at this stage could threaten continued operation of the Fund (Germana Aff., ¶ 5).

In their reply brief, plaintiffs also cite to a case decided under Delaware law for the principal that “an interest in a welfare fund should not, in good conscience, cease when an employee merely changes unions” (*Harrison v Pote*, 252 A2d 558, 561 [Del Ch 1969]). In the *Harrison* case, however, a group of millwrights withdrew from their local union, Local 626, and formed a separate local, but did not withdraw from the Local 626’s welfare fund. The millwrights’ employers continued to pay benefits for such individuals into the Local 626 welfare fund, apparently on the strength of a resolution by the trustees of the welfare fund that members’ benefits would not be terminated upon leaving Local 626, a resolution later rescinded. The millwrights had no coverage until a new fund was created and funded for their benefit. On these facts, an accounting of the Local 626 welfare fund was ordered. The *Harrison* court merely ordered an accounting “in order to determine the complaining millwrights’ equity, if any, in Local 626’s fund” as of the date

they were denied benefits (252 A2d at 562). In the case at bar, in contrast, employer contributions to the Fund ceased well before the change in union representation and there was never any gap in the provision of welfare benefits to the Blue and White collar bargaining unit employees after decertification of Local 237 as their union and their joining UPSEU.

In addition, unlike the newly-created successor union funds in *Nicollette*, *Whelan* and *Harrison*, the UPSE Fund was first established in 1998, and has been funded by contributions from myriad employers. Thus, since the UPSE Fund benefits more than just the Blue and White collar bargaining unit employees of the Town (indeed, it has over 28,000 participants), any partition of the Fund in favor of the UPSE Fund would result in a windfall to those other employees.

Plaintiffs also rely on *Chautauqua County Sheriff's Empls. Assn. v Chautauqua Local 807* (126 Misc 2d 469). But the *Chautauqua* case involved a sick leave bank, not a trust fund, and thus the same level of deference to the determinations of trustees was not at issue. In that case, a union representing county sheriff's employees filed an action against the prior union, Local 807, and the County of Chautauqua, claiming a portion of a sick leave bank reserve which had been partially funded by its members when they were members of Local 807. Significantly, in distinction from the instant case, the sick days contributed in the *Chautauqua* case were individually earned sick days. In order to avoid a forfeiture of those sick days, the court was easily able to craft a remedy, by ordering a transfer from Local 807's sick leave bank to the new union's sick leave bank of all of the sick leave days contributed by the plaintiff's members, less the days used by that group

(126 Misc 2d at 473). Here, such a remedy is not possible for a pooled asset welfare fund providing supplemental health coverage. Nor has there been any forfeiture of benefits to the Blue and White Collar workers, as they have been receiving the same or better coverage from the UPSE Fund since joining UPSEU.

Plaintiffs also rely on *Nardolillo v Sovinsky* (89 Misc 2d 544) for the general proposition that employee participants of a welfare trust fund acquire “an equitable interest in the accumulated contributions as contingent beneficiaries of the trust” (*id.* at 547). However, the actual holding of that case was that the union employees were *not* entitled to any direct distributions from a union welfare fund, and the court upheld the determination of the trustees of the fund in this regard.

Plaintiffs’ second argument to support summary judgment in their favor is that the court would create a great disincentive for employees to ever change bargaining representatives if the Fund reserves are not partitioned. Plaintiffs rely on *Local 50, Bakery & Confectionery Workers Union, AFL-CIO v Local 3, Bakery & Confectionery Workers Union, AFL-CIO*, 733 F2d 229 [2d Cir 1984]), a case later abrogated by *Local 144 Nursing Home Pension Fund v Demisay* (508 US 581 [1993]). Even so, *Local 50* concerned a successor union’s claim for apportionment of welfare funds under section 302 (c) of the Labor Management Relations Act and section 187 (c) (5) of the Employee Retirement Income Security Act (ERISA), federal laws that are not applicable to public sector union welfare funds such as those at issue here.

More importantly, the Second Circuit’s concern-- that not allowing a partition would be imposing a disincentive for employees ever to change bargaining

representatives-- appears unfounded. Here, the democratic process operated unhindered twice and at numerous times in the past for the majority of the units comprising UPSEU. Indeed, UPSEU never once sought or received a single dollar from any of the unions or their welfare funds that had previously represented and covered its new members (Boyle Tr. at 67-68). UPSEU President Boyle testified that the real impetus for this action was the Town's refusal to make contributions to the UPSE Fund for the Blue Collar Unit for approximately 18-19 months (*id.* at 79-80, 90). Additionally, he testified that there was no gap in employer contributions on behalf of the White Collar bargaining unit employees (Boyle Tr. at 43, 84). Thus, plaintiffs' claim of lost monies pertains solely to the Town's refusal to contribute to the UPSE Fund for that limited period.

For these reasons, the court finds no basis for partition of the Fund's current assets based on plaintiffs' first cause of action for equitable division of the reserves. Similarly, plaintiffs' second cause of action for unjust enrichment is without merit. This is simply not a situation where the Fund has received money to which it is not entitled and equity demands that the money be returned to the plaintiffs; the money never belonged to plaintiffs (*see Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

Plaintiffs' remaining claims fare no better. Plaintiffs do not challenge defendants' assertion that the accounting claim is moot, since they obtained any relevant information they sought through discovery. The third cause of action is, therefore, dismissed on this basis.

Plaintiffs' fourth cause of action purports to state a claim for wrongful withholding of contractual benefits, while the fifth cause of action alleges a conversion of contractual benefits. Plaintiffs fail to allege any breach of any contract between them and the defendants. There is no contract between the Fund and the UPSE Fund or any contract between the Fund and the Blue and White collar bargaining units. Rather, the Fund was established by agreement between the Town and Local 237. "Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 883 [1<sup>st</sup> Dept 1982]). An action will lie for the conversion of money only where there is "a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question" (*Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124 [1<sup>st</sup> Dept 1990]). The claim "cannot be predicated on an equitable interest or a mere breach of a contractual obligation" (*Priel v Heby*, 4 Misc 3d 1011[A], 2004 NY Slip Op 50820[U], \*5 [Sup Ct, New York County 2004], quoting *Traffix Inc. v Herold*, 269 F Supp 2d 223, 228 [SD NY 2003]). Thus, any equitable interest that the Blue and White collar bargaining unit employees may have had in a pooled welfare fund cannot form the basis for a conversion claim. The fourth and fifth causes of action are dismissed as legally insufficient.

The sixth cause of action alleges that the trustees of the Fund have breached their fiduciary duty to the Blue and White Collar bargaining unit members in three discreet

ways.<sup>2</sup> First, plaintiffs contend that after the Blue Collar employees were “expelled” from the Fund in 2011, in 2012 the Fund demanded and collected from the Town an additional \$244,625 on behalf of these employees, and that this lump sum payment was not used to provide any benefits to the employees on whose behalf it was made (Am. Cpl., ¶ 71). Second, plaintiffs allege that pursuant to the Fund’s 1988 Restated Agreement and Declaration of Trust, only employees of the Town that are represented by Local 237 may participate in the Fund. Therefore, they claim, the fact that the trustees have permitted certain non-union employees to participate is a breach of duty, and has contributed to the draw-down of the Fund’s assets (*id.*, ¶ 72). Third, plaintiffs challenge the trustees’ decision in July 2011 to double the benefits available to the remaining participants, thus accelerating the draw-down of the Fund’s assets (*id.*, ¶ 73). None of these claims is meritorious.

The court rejects plaintiffs’ assertion that the trustees of the Fund somehow breached their fiduciary duty to the Blue and White Collar bargaining unit employees by collecting the sum of \$244,625 from the Town (contributions owed by the Town on behalf of the Blue Collar employees *as of September 30, 2010*, before they ceased being represented by Local 237 and joined UPSEU) (*see* Kolker Aff., Ex. 10 at 4-5). Indeed, since this money admittedly benefitted the White Collar bargaining unit employees, who continued to participate in the Fund until September 2013, there is certainly no basis to find any breach of fiduciary duty by the trustees of the Fund to that group of plaintiffs.

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<sup>2</sup> The amended complaint does not allege that the trustees had any fiduciary duty to UPSEU or the UPSE Fund (*see* Am. Cpl., ¶¶ 70, 75).

The plaintiffs' second assertion that the Trust Agreement, as amended, does not permit Town managerial and confidential employees to participate in the Fund is directly contrary to the October 1, 1989 amendment. The stated purpose of this amendment was to "extend benefit coverage under the Trust to so-called 'white collar employees' who are employed full-time by the Town of Islip, for whom contributions have not previously been made" (Rocco Aff., Ex. F at 1). The language employed in this "whereas" clause, in addition to the language of the first paragraph of the new Appendix A to the Trust Agreement,<sup>3</sup> is purposeful and distinct from the language used in the 1998 amendment that defined "Employees" as referring only to Local 237-represented employees. If, as plaintiffs contend, the term "White Collar Employees" of the Town as it appears in Appendix A, referred only to the White Collar bargaining unit represented by Local 237, it would be superfluous, as the bargaining unit would have met the definition of "Employee" in the 1988 amendment, and there would have been no need to further amend the Trust Agreement (Rocco Aff., Ex. H at 3). In addition, since any breach of fiduciary duty would have occurred in October of 1989 when these non-union employees were added to the Fund, the claim is clearly time-barred.

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<sup>3</sup> The first paragraph of Appendix A states, in pertinent part: "Effective October 1, 1989, 'White Collar Employees' of the Town of Islip shall be considered 'Employees' within the meaning of the Trust, . . . [T]he term 'White Collar employees' shall mean those full-time employees of the Town . . . who are not 'Blue-Collar Employees' (as defined in paragraph 2 of this Appendix A), . . ." Paragraph 2 of Appendix A defines "Blue Collar Employees" as "those employees in job titles covered by the Trust Fund immediately prior to the adoption of this Appendix A" (Rocco Aff., Ex. F at 2).

The remaining claim is that the trustees somehow breached their fiduciary duty to the Blue and White Collar bargaining unit employees when they voted, in July 2011, to increase benefits for the remaining members of the Fund as well as retirees, and thereby accelerated the draw-down of Fund assets. Again, since the White Collar bargaining unit employees enjoyed these enhanced benefits until they voted to decertify Local 237 in September 2013, they cannot show that they were damaged by this decision. In any event, plaintiffs cite no law or facts that can transform this decision into a breach of fiduciary duty, and offer no evidence to contradict the trustees' stated belief that state insurance regulators would mandate that benefits be increased (*see* Kolker Aff., Ex. 10 at 4-5; *see also* Kolker Aff., Ex. 3: Germana Tr. at 18, 47-48).<sup>4</sup> Even if the plaintiff bargaining units did retain some equitable interest in the Fund reserves as former beneficiaries, this does not mean that the Fund was required to withhold benefits from its current participants and hold the money until such time as the plaintiffs determined to sue for them. Thus, while plaintiffs repeat the fact that the Fund had large reserves as of December 2010, there is no evidence that any claim to those reserves was made until the commencement of this litigation seeking equitable apportionment on March 6, 2014.

Plaintiffs also decry the fact that the Fund permitted the Town to cease contributions. However, this was a collective bargaining decision made by Local 237,

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<sup>4</sup> Employee welfare benefit funds such as the Fund are exempt from ERISA preemption, but are regulated by the New York State Insurance Department pursuant to Article 44 of the Insurance Law, and, in addition to registration and annual reporting requirements, state insurance regulators have the authority to, inter alia, periodically conduct examinations of these funds (*see* Insurance Law § 4401, *et seq.*; *Feinstein v Lewis*, 477 F Supp 1256 [SD NY 1979], *affd* 622 F2d 573 [2d Cir 1980]; *Gotbaum v Lewis*, 68 NY2d 686 [1986]).

not the Fund, prior to the Blue Collar decertification election, and was negotiated in favor of wage increases. The fact that the Town refused to make contributions to the UPSE Fund for the Blue Collar employees until a new collective bargaining unit was negotiated cannot be blamed on the Fund or its trustees.

**CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that plaintiffs' motion for partial summary judgment in their favor is denied; and it is further

**ORDERED** that defendants' cross-motion to dismiss the amended complaint is granted, and the amended complaint is dismissed in its entirety as against all defendants, with costs and disbursements to the defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: February 8, 2017

ENTER:



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A.J.S.C.

**HON. ELLEN M. COIN**