

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ZOOM ELECTRIC, INC.,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 595,
and DOES 1-20,

Respondents.

No. C 11-1699 CW

ORDER DENYING
B-SIDE'S MOTION TO
STAY (Docket No.
107), GRANTING
COUNTER-
PLAINTIFFS' MOTION
FOR SUMMARY
JUDGMENT (Docket
No. 108), DENYING
B-SIDE'S CROSS-
MOTION FOR SUMMARY
JUDGMENT (Docket
No. 112) AND
DIRECTING THE
CLERK TO ENTER
PARTIAL JUDGMENT

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 595;
ALAMEDA COUNTY ELECTRICAL
INDUSTRY SERVICE CORPORATION;
IBEW LOCAL 595 HEALTH & WELFARE
TRUST FUND; IBEW LOCAL 595
PENSION TRUST FUND; IBEW LOCAL
595 MONEY PURCHASE PENSION TRUST
FUND; IBEW LOCAL 595 VACATION
FUND; IBEW LOCAL 595 APPRENTICE &
TRAINING FUND; ELECTRICAL
CONTRACTORS TRUST; CONTRACT
ADMINISTRATION FUND; LABOR
MANAGEMENT COOPERATION FUND;
VICTOR UNO; and DON CAMPBELL,

Counter-Plaintiffs,

v.

ZOOM ELECTRIC, INC.; VEIKO HORAK;
B-SIDE, INC.; and DOES ONE
through TEN, inclusive,

Counter-Defendants.

United States District Court
For the Northern District of California

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1 B-SIDE, INC.,

2 Cross-Claimant,

3 v.

4 VEIKO HORAK, doing business as
5 ZOOM ELECTRIC,

6 Cross-Defendant.

7 _____/
8 Counter-Defendant B-Side, Inc. moves to stay proceedings
9 pending resolution of a state court action between it and
10 Counter-Plaintiff International Brotherhood of Electrical Workers,
11 Local 595 (the Union). The Union and the other Counter-
12 Plaintiffs, the employee benefit trust funds, Alameda County
13 Electrical Industry Service Corporation (EISC), which is the
14 collection agent for the trust funds, and Victor Uno and Don
15 Campbell, who are trustees for the trust funds and officers of
16 EISC, oppose the motion to stay and move for summary judgment on
17 their claims against B-Side. B-Side opposes Counter-Plaintiffs'
18 motion for summary judgment and also moves for summary judgment.

19 Having considered the papers filed by the parties and their
20 arguments at the hearing, the Court DENIES B-Side's motion to
21 stay, GRANTS Counter-Plaintiffs' motion for summary judgment and
22 DENIES B-Side's cross-motion for summary judgment. This resolves
23 all remaining claims in this action, except for those brought by
24 B-Side against Counter-Defendant and Cross-Defendant Vieko Horak.
25 Because Horak has filed for bankruptcy, the claims against him are
26 stayed pursuant to 11 U.S.C. § 362. Finding no just reason for
27 delaying the other claims during the stay, the Court directs the
28 Clerk to enter partial judgment on the claims that do not involve

1 Horak, including Counter-Plaintiffs' claims against B-Side and
2 those resolved in the Court's Order of March 20, 2012, which were
3 the Union's claims against Petitioner and Counter-Defendant Zoom
4 Electric, Inc. (ZEI) and ZEI's claim against the Union.

5 BACKGROUND

6 The following facts are taken from the evidence already in
7 the record and that submitted by the parties in connection with
8 the instant motions.

9 ZEI was first incorporated in 2007. Request for Judicial
10 Notice (RJN), Docket No. 27, Ex. D. ZEI's corporate status was
11 suspended at all times relevant to this action, until it was
12 revived on July 11, 2011. Id.; Horak Decl., Docket No. 50, ¶ 2,
13 Ex. A. At all times relevant, Vieko Horak was ZEI's sole owner
14 and its agent for service of process, and his address was the same
15 as ZEI's address. RJN, Docket No. 27, Ex. D. Since June 29, 2005,
16 Horak has also been registered to do business under the fictitious
17 business name "Zoom Electric" in the City and County of San
18 Francisco. RJN, Docket No. 27, Ex. E.

19 The Union is a party to a Project Labor Agreement (PLA),
20 which governs the wages and hours, and terms and conditions of
21 employment, for construction work at the Oakland Unified School
22 District (OUSD). See Maloon Decl., Docket No. 43, ¶ 3, Ex. A
23 (PLA). On or about September 8, 2010, Horak signed a Letter of
24 Assent on behalf of ZEI, agreeing to be bound by the terms of the
25 PLA while performing work on OUSD construction projects. Maloon
26 Decl., Docket No. 43, ¶ 9, Ex. C; Martin Decl., Docket No. 21, ¶ 3
27 & Ex. B. B-Side, Inc. also signed an identical Letter of Assent
28 to the PLA. Martin Decl., Docket No. 21, ¶ 3 & Ex. B. On ZEI's

1 Letter of Assent, Horak listed ZEI's California contractor's
2 license number as C10 857743. Maloon Decl., Docket No. 43, ¶ 9,
3 Ex. C; Martin Decl., Docket No. 21, ¶ 3 & Ex. B. This number was
4 not ZEI's but was Horak's individual contractor's license number,
5 which was registered for him to do business under the fictitious
6 name of "Zoom Electric." Horak Decl., Docket No. 50, ¶ 3; RJN,
7 Docket No. 27, Exs. A-C, E; Maloon Decl., Docket No. 43, ¶ 19.
8 More than a year later, on September 12, 2011, ZEI applied for its
9 own contractor's license; the State rejected its application on
10 September 19, 2011. RJN, Docket No. 72, Ex. A.

11 The PLA sets forth certain requirements with which
12 contractors must comply to hire workers for covered projects,
13 including that contractors must hire Union members who are out of
14 work, in a one-to-one ratio with the contractor's own employees;
15 hiring of either must take place through a referral from the
16 Union. PLA ¶ 8.1. According to this system, the contractor must
17 first hire a Union worker, then may hire the contractor's own
18 qualified worker through a referral from the Union, then may hire
19 a second Union worker, then a second of the contractor's workers,
20 and so on, until the contractor has a sufficient crew for the job
21 or he has hired ten of his own workers. Id. To be referred to
22 the contractor, the contractor's employees must first apply to the
23 Union to work on the project and must meet certain qualifications.
24 Id. The PLA excludes from this requirement "a Contractor's
25 executives, managerial employees, engineering employees,
26 supervisors . . ." Id. ¶ 2.7.

27 All contractors who are signatories to the PLA are obliged to
28 provide conditions of employment, and wages and benefits at

1 certain specified rates, in accordance with the PLA. Id. at
2 ¶¶ 9.3-9.4. Contractors also agree to "pay contributions to the
3 established vacation, pension or other form of deferred
4 compensation plan, apprenticeship, and health benefit funds for
5 each hour worked on the Project" in certain specified amounts.
6 Id. at ¶ 9.1. The contribution amounts are set forth in Schedule
7 A, which consists of the Alameda County Inside Construction
8 Agreement. Id. at ¶ 9.1; Maloon Decl., Docket No. 43, ¶ 6 & Ex.
9 B. This document also establishes eight employee benefit trust
10 funds, which are among the Counter-Plaintiffs to this action.
11 Maloon Decl., Docket No. 43, ¶ 7 & Ex. B. The trust funds are
12 jointly managed by Union and employer trustees and are governed by
13 written Trust Agreements. Id. Signatories to the PLA agree to be
14 bound by the written terms of the Trust Agreements. PLA ¶ 2.

15 The PLA further provides that it is "the responsibility of
16 the Contractor(s) and Unions to investigate and monitor compliance
17 with the provisions of the agreement" described above. PLA Art.
18 X. The PLA specifically states, "Nothing in this agreement shall
19 be construed to interfere with or supersede the usual and
20 customary legal remedies available to the Unions and/or employee
21 benefit Trust Funds to collect delinquent Trust Fund contributions
22 from Contractors on the Project." Id.

23 The PLA also establishes a "grievance arbitration procedure."
24 See id. at Art. XII. Under the procedure, if parties are unable
25 to resolve a dispute arising "out of the meaning, interpretation
26 or application of the provisions of this Agreement, including the
27 Schedule A agreements" by meeting and conferring about the dispute
28 (Step 1), they are required to submit the dispute to the Joint

1 Administrative Committee (JAC), which must meet "to confer in an
2 attempt to resolve the grievance" (Step 2). Id. at ¶¶ 12.1, 12.2.
3 If the dispute is not resolved within the time allowed for
4 resolution by the JAC, either party may refer the dispute to an
5 arbitrator within five days (Step 3). Id. at ¶ 12.2. The
6 arbitrator must conduct a hearing on the dispute and give the
7 parties a binding decision within five days after the hearing.
8 Id. The PLA specifies that the "Arbitrator shall have no
9 authority to change, amend, add to or detract from any of the
10 provisions of the Agreement." Id.

11 B-Side was awarded a contract for a fire alarm replacement
12 project at Roosevelt Middle School in the OUSD, Project 7099.
13 Kalafati 1st Decl., Docket No. 51, ¶ 1; Kalafati 2nd Decl., Docket
14 No. 112-2, ¶ 3;¹ Hwang Decl., Docket No. 108-1, Ex. A (B-Side's
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22 ¹ Counter-Plaintiffs object to each paragraph of the
23 declaration of Anton Kalafati, president of B-Side, that was
24 submitted with B-Side's cross-motion on the basis that the
25 statements made therein are hearsay or without foundation. They
26 also suggest that the Court should give the declaration "no
27 evidentiary weight" because it is "uncorroborated and self-
28 serving." Counter-Pls.' Opp. to B-Side's Cross-Mot. for Summ. J.
and Reply in Supp. of Mot. for Summ. J. 1 n.2, 5 n.6; Separate
Evid. Objections, Docket No. 115-2. In violation of Civil Local
Rule 7-3(a),(c), Counter-Plaintiffs have filed their evidentiary
objections separately from their brief. Because their brief and
this separate document are together under the page limit, the
Court excuses as harmless the violation of the Civil Local Rules.

1 Resp. to Requests for Admission), 3-4. On August 18, 2010, Horak
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3 Counter-Plaintiffs make only conclusory objections regarding
4 hearsay and foundation, without any explanation of the basis for
5 these objections. Most of the statements made by Kalafati are
6 based on his personal knowledge, including about his own beliefs,
7 and are not hearsay. Further, to the extent that Counter-
8 Plaintiffs contend that the documents attached to his declaration
9 are without foundation, Kalafati has provided a proper foundation
10 for them in his declaration. However, the statement made by
11 Kalafati, that, at the JAC evidentiary hearing, he learned "that
12 one of the two arbitrators, Gene Johnson, was an employee of
13 Davillier Sloan, a consulting firm that the OUSD had hired to
14 administer the Project Labor Agreement," Kalafati 2nd Decl.,
15 Docket No. 112-2, ¶ 8, is inadmissible as hearsay and without
16 foundation. Kalafati has not attested to how he learned this or
17 how it is a fact within his personal knowledge, and it appears
18 that Kalafati is repeating something that was stated at the
19 arbitration. Thus, the Court sustains the objection to this
20 statement and overrules the conclusory objections to the remainder
21 of the declaration.

22 As to Counter-Plaintiffs' suggestion that the declaration
23 should not be given any evidentiary weight, the Ninth Circuit
24 recognizes that a court "need not find a genuine issue of fact"
25 where a declaration is "self-serving" and contains only "bald,
26 uncorroborated, and conclusory assertions." FTC v. Neovi, Inc.,
27 604 F.3d 1150, 1159 (9th Cir. 2010) (internal quotation marks and
28 citations omitted); see also Hexcel Corp. v. Ineos Polymers, Inc.,
681 F.3d 1055, 1063 (9th Cir. 2012) ("Conclusory, self-serving
affidavits, lacking detailed facts and any supporting evidence,
are insufficient to create a genuine issue of material fact.")
(internal quotation marks, brackets and citation omitted).
However, that a declaration is self-serving is by itself not
enough to disregard it at the summary judgment stage:
"declarations oftentimes will be self-serving--and properly so,
because otherwise there would be no point in a party submitting
them." Id. at 909 (internal formatting, quotation marks and
citation omitted). Thus, generally, "that an affidavit is self-
serving bears on its credibility, not on its cognizability for
purposes of establishing a genuine issue of material fact." Id.
(internal formatting, quotation marks and citation omitted).
"Only in certain instances--such as when a declaration states only
conclusions, and not such facts as would be admissible in
evidence,--can a court disregard a self-serving declaration for
purposes of summary judgment." Id. (internal quotation marks,
formatting and citation omitted). Thus, to the extent that the
Court has found above that statements in his declaration were
otherwise admissible as evidence, it overrules this objection.

27 Finally, to the extent that Counter-Plaintiffs argue that
28 Kalafati's declaration is not credible, credibility disputes are
not appropriate for determination on summary judgment.

1 submitted a price quote to B-Side to provide certain services in
2 connection with the Roosevelt Middle School job. Thomas Decl.,
3 Docket No. 70, Ex. F (Horak Depo. as Rule 30(b)(6) witness of ZEI,
4 hereinafter Horak/ZEI Depo.), 19:16-20:24 & Ex. 5. The letterhead
5 of the quote listed "Zoom Electric, Inc." and "Zoom Electric Lic.
6 # 857743." Id. The quote listed the address of Roosevelt Middle
7 School as 1926 19th Avenue in Oakland, California. Id.

8 B-Side had once previously employed Horak as a subcontractor
9 earlier that year, in May 2010, in connection with a job at
10 California State University, East Bay. Kalafati 2nd Decl., Docket
11 No. 112-2 ¶ 2; Horak/ZEI Depo. 22:14-21. Before awarding the
12 subcontract for the California State University job, Anton
13 Kalafati, President and Responsible Managing Officer of B-Side,
14 checked the website of the Contractors State License Board and saw
15 that "Zoom Electric," Horak's fictitious business name, held a
16 valid license. Kalafati 2nd Decl., Docket No. 112-2 ¶ 2.
17 Kalafati does not state whether he checked the licensing status of
18 Zoom Electric, Inc. as well.

19 Kalafati attests that, after deciding to award "Zoom
20 Electric" the subcontract on the Roosevelt Middle School job, he
21 sent Horak a version of B-Side's standard subcontractor's
22 agreement by email. Kalafati 2nd Decl., Docket No. 112-2, ¶ 4.
23 Kalafati attaches to his declaration a copy of the version of the
24 agreement that he says he emailed to Horak, but not of the email
25 itself. Id., Ex. B. In the attached version, the subcontractor
26 is identified in two places as "Zoom Electrical," and the "License
27 Number" for the subcontractor is filled in as "857743." Id. The
28

1 only address that appears for the property at issue in the job is
2 "950 High Street Oakland CA." Id.

3 Kalafati states in his declaration that Horak sent him an
4 email stating "that the address of the project was incorrect," and
5 that Kalafati then emailed Horak "a corrected version which he
6 brought to my office and signed." Kalafati 2nd Decl., Docket No.
7 112-2 ¶ 4. Kalafati further attests that, although the version of
8 the document that he sent to Horak identified the subcontractor as
9 "Zoom Electric," the version Horak returned had "Inc." added after
10 "Zoom Electric." Id.² Horak did not tell Kalafati of this change
11 and Kalafati did not notice it. Id.

12 However, in the signed version of the Subcontractor's
13 Agreement, dated August 19, 2010, the address remained "950 High
14 Street Oakland CA" and was not changed. Horak/ZEI Depo., Ex. 5.
15 Also, no license number appears for the subcontractor. Id. In
16 one part of the signed agreement, the subcontractor is referred to
17 as "Zoom Electrical," and in another part, it is identified as
18 "Zoom Electric, INC." Id. (capitalization in original).

19 Kalafati attests that he noticed this interlineation sometime
20 after the Union began the grievance procedure on December 21, 2010
21 and he assumed it meant that the contracting party was ZEI, owned
22 by Horak, and not Horak doing business as "Zoom Electric," a sole
23 proprietorship; however, he does not state exactly when he noticed
24 this. Kalafati 2nd Decl., Docket No. 112-2, ¶ 6; Maloon Decl.,

25 _____
26 ² As noted previously, the version attached to Kalafati's
27 declaration, which he attests is the version he emailed to Horak,
28 identifies the sub-contractor as "Zoom Electrical" and not "Zoom
Electric," as Kalafati states in his declaration. Kalafati 2nd
Decl., Docket No. 112-2, ¶ 4, Ex. B.

1 Docket No. 43, ¶ 12. Kalafati represents that he became aware in
2 late March 2011 that ZEI was not licensed. Kalafati 2nd Decl.,
3 Docket No. 112-2, ¶ 6. Kalafati further states that, throughout
4 the course of the work on the Roosevelt Middle School project, he
5 assumed that B-Side had been dealing with "Zoom Electric," a sole
6 proprietorship, and corroborates this by offering checks that he
7 made out to "Zoom Electric" throughout 2010 and 2011 and tax forms
8 he addressed to "Vieko Horak, Zoom Electric" for those years.
9 Kalafati 2nd Decl., Docket No. 112-2 ¶ 5, Exs. C1 and C2.
10 However, the checks themselves do not corroborate Kalafati's
11 statement that he assumed he was dealing with a sole
12 proprietorship; these exhibits include checks dated as recently as
13 December 2011, long after Kalafati and B-Side learned of the
14 distinction between ZEI and Zoom Electric, and had acknowledged
15 that it had hired the former and not the latter. Id. at ¶¶ 5, 6,
16 Ex. C2.³ Thus, the checks were made out in this way regardless of
17 Kalafati's understanding of the entity with which B-Side had
18 contracted.

19 On October 14, 2010, three ZEI employees began electrical
20 work on the Roosevelt Middle School project. Martin Decl., Docket
21 No. 21, ¶ 4; Maloon Decl., Docket No. 43, ¶ 11. These included:
22 Horak, owner and Chief Executive Officer of ZEI; Aleh Holdvekht,
23

24 ³ In response to the Union's stop notice sent to OUSD,
25 Kalafati, on behalf of B-Side, sent OUSD an affidavit, dated April
26 10, 2011, stating that "Zoom Electric, Inc. was hired as an
27 electrical subcontractor." RJN, Docket No. 107-3, Union's State
28 Court Compl., Ex. I; see also Kalafati 3rd Decl., Docket No.
117-1, ¶ 3 (acknowledging that this exhibit contains B-Side's
response to the stop notice).

1 project manager; and Valentin Penkin, electrical wiring
2 supervisor. Martin Decl., Docket No. 21, ¶ 4.

3 On December 20, 2010, Union representative Matt Maloon
4 visited Roosevelt Middle School and observed Holdvekht and Penkin
5 working without any accompanying Union workers. Martin Decl.,
6 Docket No. 21, ¶ 4; Maloon Decl., Docket No. 43, ¶ 11. The Union
7 subsequently began the grievance procedures contained in the PLA
8 for ZEI's work in October through December 2010. Martin Decl.,
9 Docket No. 21, ¶¶ 5-6; Maloon Decl., Docket No. 43, ¶ 12. On
10 December 21, 2010, Maloon, on behalf of the Union, sent a
11 grievance letter to Horak. Maloon Decl., Docket No. 43, ¶ 12, Ex.
12 D. The face of the letter indicates that a copy was sent to
13 B-Side and Kalafati has stated that he received a copy of the
14 grievance. Id.; Kalafati 2nd Decl., Docket No. 112-2, ¶ 6.

15 The Union's grievance alleged that, during this period, ZEI
16 failed to comply with the PLA's referral process and that ZEI
17 failed to make contributions to the trust funds on behalf of the
18 employees who had worked on the project. Maloon Decl., Docket No.
19 43, ¶ 12, Ex. D. The Union demanded payment for the wages that
20 should have gone to Union workers and for employee benefit
21 contributions for all hours worked on the project. Id. The
22 grievance did not name B-Side as a respondent. Id.

23 On or about January 24, 2011, ZEI ordered labor from the
24 Union and journeyman electricians Wilberto Cuellar-Arandia and
25 Douglas R. Lindsey were dispatched to the Roosevelt Middle School
26 fire alarm replacement job. Maloon Decl., Docket No. 43, ¶ 14.

27 The JAC held an evidentiary hearing on January 31, 2011 on
28 the Union's grievance about the October through December 2010

1 violations and subsequently accepted written briefs from the
2 parties. Id. at ¶ 15. According to the JAC's written decision,
3 ZEI had not disputed "that hours were worked in violation of the
4 PLA" and disputed only the amount of money for which it should be
5 liable. Id. at ¶ 17, Ex. G (JAC Decision), 5. ZEI argued that
6 its employees were exempt from coverage by the PLA, because they
7 performed managerial work. Id. at 2-3. ZEI also contended that
8 the Union was seeking to recover "double benefits" to the trust
9 funds instead of the amount that the trust funds would have
10 received had ZEI complied with the PLA, because the Union sought
11 one award for the benefits contribution and a second award for
12 wages, which also included a benefits contribution. Id. at 5-6.
13 Finally, ZEI argued that it should be penalized only for the
14 number of hours that Union workers would have worked had ZEI
15 complied with the referral process. Id. at 3-4, 6.

16 Kalafati attended the JAC evidentiary hearing as a
17 representative of B-Side. Kalafati 2nd Decl., Docket No. 112-2,
18 ¶ 8. The JAC award issued subsequently noted that he had appeared
19 at the evidentiary hearing "for" ZEI. JAC Decision, 1. Kalafati
20 attests that he "did not participate in the hearing or submissions
21 to the JAC other than to assure the representatives of the Local
22 595 that going forward B-Side would oversee ZEI's compliance with
23 the Project Labor Agreement and offer a compromise payment to the
24 Union." Kalafati 2nd Decl., Docket No. 112-2, ¶ 8; see also
25 Kalafati Reply Decl., Docket No. 117-1, ¶ 2. He states that he
26 "did not advocate for ZEI" and "did not offer any testimony in
27 ZEI's defense." Kalafati 2nd Decl., Docket No. 112-2 ¶ 8.

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1 On or about February 18, 2011, B-Side submitted to the trust
2 funds reports of hours worked under the PLA by ZEI employees for
3 the month of January 2011. Maloon Decl., Docket No. 43, ¶ 16, Ex.
4 E. The reports stated that ZEI owed \$1,961.88 in fringe benefit
5 contributions on behalf of Cuellar-Arandia and Lindsey for
6 thirty-two hours of work each. Id.; Horak/ZEI Depo., Ex. 35. On
7 or about February 20, 2011, the Union received a timely check from
8 ZEI in the amount of \$1,961.88, which the Union forwarded to the
9 trust funds. Maloon Decl., Docket No. 43, ¶ 16, Ex. F; Horak/ZEI
10 Depo., Ex. 35. In addition to the thirty-two hours reported,
11 Cuellar-Arandia and Lindsay each worked eight hours for ZEI during
12 the month of January, which ZEI did not report and for which ZEI
13 did not make fringe benefit contributions. Horak/ZEI Depo., Exs.
14 37-38. ZEI's employee, Penkin, also worked thirty-two hours on
15 the project in January 2011, which ZEI did not report and for
16 which ZEI did not make fringe benefit contributions, though
17 payment of these contributions was required by the PLA. Id.

18 The JAC issued its written decision on or about February 22,
19 2011. Maloon Decl., Docket No. 43, ¶ 17. The JAC stated in part,

20 The JAC considered both the position of the UNION and
21 the EMPLOYER with regard to the payment of Trust Fund
22 benefits on behalf of workers of Zoom Electric, Inc.
23 that worked[] hours in violation of the PLA. The
24 EMPLOYER states that the payment of hours represents a
25 payment of "double benefits" to the UNION. In fact,
26 after review of Article IX, Wages, Benefits And Working
27 Conditions, it is clear to the JAC that the benefit
28 payments [do] not go to the benefit of the Union, but
rather, specifically they go to the benefit of workers
who are entitled to the accrued benefits of such
contributions. For the JAC to not acknowledge that fact
would contribute to further victimization of those
workers.

The JAC also considered the position taken by the
EMPLOYER which would only penalize a violating
contractor for hours in the proper ratio as required by

1 Article VIII, Referral. . . . To accept this premise
2 would be to accept a significant flaw with regard to
3 enforcement of the PLA. Employers that violated the PLA
4 with regard to proper dispatch would only be held to
5 account, as if they had properly dispatched and had not
6 violated the PLA. That would only create an enticement
7 to violate the PLA . . .

8 JAC Decision, 5-6. The JAC also credited the Union's argument
9 that a worker's title did not determine the actual work being
10 performed and that, if an otherwise management or executive
11 employee performed non-management tasks, those hours would be
12 covered by the PLA. Id. at 3-6. In so finding and rejecting
13 ZEI's argument that some of the hours worked should have been
14 considered exempt by the PLA as managerial work, the JAC found
15 there was a "credibility concern" for Horak's testimony that the
16 majority of hours worked were management hours, which was
17 inconsistent with industry standards and not supported by
18 evidence. Id. at 6. The JAC noted, "Had the hours claimed to be
19 Management Hours been accompanied with evidence during the
20 Evidentiary Hearing and had the percentage been consistent with
21 industry standard, the JAC may have considered those hours as an
22 error, when listed on the Certified Payroll Records." Id. The
23 JAC thus accepted ZEI's certified payroll records, which were
24 signed under penalty of perjury by Horak, as a proper showing of
25 hours covered by the PLA. Id.

26 The JAC ordered ZEI to pay as follows:

27 Payment to workers on the IBEW 595 Available for Work
28 list of 1648 hours totaling \$116,299.36

Payment on behalf of employees of Zoom Electric, Inc. to
the IBEW, 595 Trust Funds totaling \$42,963.36 for hours
worked in violation of the PLA.

Id. at 6.

1 ZEI continued to employ Union labor until sometime in March
2 2011. Maloon Decl., Docket No. 43, ¶ 18. During February 2011,
3 Cuellar-Arandia and Lindsey worked sixteen hours each and Penkin
4 worked thirty-two hours. Horak/ZEI Depo., Exs. 37-38. Neither
5 ZEI nor B-Side reported these hours to the trust funds or paid the
6 fringe benefit contributions owed on account of these hours.
7 Maloon Decl., Docket No. 43, ¶ 18.

8 On April 6, 2011, ZEI filed the instant action seeking to
9 vacate the JAC award, and amended its pleadings on April 29, 2011.
10 Docket Nos. 1, 11.

11 On May 6, 2011, the Union answered ZEI's amended pleading and
12 filed a counter-complaint for confirmation and enforcement of the
13 JAC award against both ZEI and Horak. Docket Nos. 15, 16.

14 On May 25, 2011, the Union filed a stop notice action in
15 state court. RJN, Docket No. 107, Ex. A. In that action, the
16 Union sought a court order pursuant to California Civil Code
17 section 3210, requiring OUSD to release to the Union an amount of
18 money equivalent to the arbitration award, which OUSD had withheld
19 from B-Side pursuant to a stop notice filed with it by the Union.

20 Id. Prior to being served with the stop notice, B-Side had
21 already paid ZEI and Horak approximately \$123,000 of the total
22 subcontract price of \$183,600. Kalafati 2nd Decl., Docket No.
23 112-2, ¶ 10. After the Union commenced the state court action to
24 enforce the stop notice, OUSD released the remaining approximately
25 \$60,000 to B-Side, which in turn paid it to ZEI and Horak, less an
26 offset to cover B-Side's legal fees in the state court action.

27 Id. B-Side engaged Benjamin Martin to represent it in the state
28 court action. Kalafati 3rd Decl. ¶ 3. Until recently, Martin

1 represented both ZEI and Horak in this action. He also
2 represented B-Side in this action when it was first made a party
3 to this case in 2012. See Docket No. 91.

4 On October 20, 2011, this Court granted the Union's motion
5 for leave to file a first amended counter-complaint, adding a
6 second cause of action under the Employee Retirement Income
7 Security Act (ERISA), 29 U.S.C. §§ 1132, 1145. Docket No. 54. In
8 that claim, the Union alleged that ZEI and Horak failed to make
9 benefit contributions for work performed under the PLA between
10 January and March 2011.

11 On November 18, 2011, the state court granted B-Side's motion
12 for judgment on the pleadings in the stop notice action. The
13 state court found that "the union was not statutorily authorized
14 to use the stop notice procedure to enforce its claims against ZEI
15 and its principals." RJN, Docket No. 107, Ex. B, 3. The court
16 reasoned that the state legislature had limited the stop notice
17 procedure to enforce claims "for materials, equipment, or services
18 furnished, or labor performed," id. (quoting former Cal. Civil
19 Code § 3159), and the Union had not alleged facts that could
20 support a "reasonable inference that it provided materials or
21 equipment, or furnished services or labor, on the Project," id.
22 at 2. Instead, the Union sought to enforce a claim for money owed
23 "by ZEI and its principals for denying its members the opportunity
24 to perform work on the project," or "unperformed work." Id. at
25 2-3. The court also noted that the Union was "not listed as one
26 of the 'persons' entitled to the benefit of the stop notice
27 remedy." Id. The Union subsequently filed a timely notice of
28 appeal from the order.

1 On March 20, 2012, this Court granted the Union's motion to
2 confirm and enforce the arbitration award against ZEI and Horak
3 and denied ZEI's cross-motion to vacate the award. Docket No. 82.
4 The Court also denied ZEI and Horak's motion to dismiss the
5 Union's ERISA cause of action and granted the Union's motion for
6 summary judgment on that claim against ZEI and Horak. Finally,
7 the Court granted the Union's motion for leave to file a second
8 amended complaint, adding B-Side as a Counter-Defendant, and
9 various Counter-Plaintiffs. The Union and the other
10 Counter-Plaintiffs sought to hold B-Side liable for both claims
11 pursuant to California Labor Code section 2750.5, as the employer
12 of the unlicensed ZEI. The Court also directed Counter Plaintiffs
13 to file a verified calculation of the damages requested in the
14 ERISA cause of action, specifically a calculation of the
15 contributions that ZEI failed to make, liquidated damages and
16 interest.

17 On March 27, 2012, Counter-Plantiffs filed a verified
18 calculation of damages on the second cause of action, showing
19 ZEI's balance due on that date, including accrued interest, as
20 \$3,581.41. Docket No. 84.

21 On June 27, 2012, the Court denied B-Side's motion to dismiss
22 both claims against it. Docket No. 102. B-Side had brought this
23 motion through the attorney that it had shared with ZEI and Horak,
24 Benjamin Martin. See Docket Nos. 90, 91.

25 On July 24, 2012, B-Side filed a notice of substitution of
26 counsel in the instant case, substituting Attorney William C.
27 Last, Jr. for Martin. Docket No. 103. B-Side continues to be
28 represented in state court by Martin.

1 The following day, on July 25, 2012, B-Side filed its answer
2 to the second amended complaint. Docket No. 104.

3 Twenty-one days after filing its answer, on August 15, 2012,
4 B-Side brought a cross-claim for indemnification against Horak,
5 doing business as Zoom Electric. Docket No. 105.

6 On August 28, 2012, Horak filed a notice of substitution of
7 attorney removing Martin and substituting himself in pro per.
8 Docket No. 106.

9 On October 25, 2012, the Court held a hearing on the instant
10 motions. Docket No. 119.

11 On December 3, 2012, thirty-nine days after the hearing,
12 B-Side moved for entry of default. Docket No. 120. On December
13 5, 2012, the Clerk entered default against Horak on B-Side's
14 cross-claims. Docket No. 122.

15 On December 5, 2012, ZEI filed a notice of substitution of
16 counsel, removing Martin as its counsel and substituting Attorney
17 Eric Milliken in his place. Docket No. 121.

18 On December 11, 2012, Milliken filed a motion to set aside
19 Horak's default, which was denied on January 17, 2013. Docket
20 Nos. 125, 132.

21 On January 23, 2013, Horak filed for bankruptcy. Docket No.
22 133.

23 DISCUSSION

24 I. Motion to Stay

25 B-Side moves to stay the instant action, pending the
26 resolution of the appeal of the stop notice action in state court,
27 under the abstention doctrines addressed by the Supreme Court in
28 Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25

1 (1959), and Colorado River Water Conservation Dist. v. United
2 States, 424 U.S. 800 (1976).

3 A. Thibodaux abstention

4 In Thibodaux, the Supreme Court addressed abstention in
5 diversity cases. In the absence of "exceptional circumstances" in
6 such cases, a federal court is not permitted to abstain from
7 determining questions of state law necessary to deciding the cases
8 before it "merely because the answers to the questions of state
9 law are difficult or uncertain or have not yet been given by the
10 highest court of the state." Meredith v. Winter Haven, 320 U.S.
11 228, 234-235 (1943). Abstention only is "appropriate where there
12 have been presented difficult questions of state law bearing on
13 policy problems of substantial public import whose importance
14 transcends the result in the case then at bar." Colorado River,
15 424 U.S. at 814 (discussing Thibodaux).

16 In Thibodaux, the city initiated an eminent domain proceeding
17 in state court, and the defendant removed the action to federal
18 court on the basis of diversity jurisdiction. 360 U.S. at 25. On
19 its own motion, the district judge decided to stay the proceedings
20 to allow the state court to interpret the relevant statute to
21 determine whether the city had the authority to take the subject
22 property. Id. at 26. The Supreme Court upheld the district
23 judge's decision, recognizing that the "special and peculiar
24 nature" of eminent domain proceedings, particularly in the case at
25 hand, which dealt with the "the nature and extent of delegation
26 . . . of governmental power between the city and state" and was
27 "intimately involved with the sovereign prerogative." Id. at 28.
28 Under Thibodaux, "the federal courts should abstain in diversity

1 cases if there is uncertain state law and an important state
2 interest that is 'intimately involved' with the government's
3 'sovereign prerogative.'" Moore's Federal Practice 3d § 122.03[5]
4 (emphasis in original); see also Nature Conservancy v. Machipongo
5 Club, Inc., 579 F.2d 873, 875 (4th Cir. 1978) (reading this
6 doctrine "as permitting abstention in diversity cases where (1)
7 state law is unsettled, and (2) an incorrect federal decision
8 might embarrass or disrupt significant state policies.").

9 Thibodaux abstention is inapplicable in this case, in which
10 federal jurisdiction is not based on diversity of citizenship.
11 See Chemerinsky, Federal Jurisdiction § 12.2 (2007) (recognizing
12 that Thibodaux addresses abstention in diversity cases); Moore's
13 Federal Practice 3d § 122.03 (same). Notably, B-Side has not
14 cited any case in which a court applied Thibodaux abstention
15 outside of the diversity context. Further, although B-Side
16 contends that "the Court's jurisdiction in the instant case is
17 based upon supplemental jurisdiction" and that Thibodaux should
18 apply because state law is at issue, Mot. to Stay, 3 n.5; Reply in
19 Supp. of Mot. to Stay, 3 n.5, the Court already has determined
20 that its jurisdiction over the claims against B-Side are not based
21 on supplemental jurisdiction and instead arise under both federal
22 and state law.

23 B-Side previously moved to dismiss the first cause of action,
24 arguing that the federal claims have been adjudicated in this case
25 and that the Court lacks supplemental jurisdiction to decide
26 whether to hold it liable pursuant to California Labor Code
27 section 2750.5. The Court rejected this argument, stating,
28

1 The first counter-claim in this action is brought
2 against all three Counter-Defendants, seeking to confirm
3 and enforce the arbitration award under section 301 of
4 the Labor-Management Relations Act [(LMRA)], 29 U.S.C.
5 § 185 and holding B-Side liable for that violation
6 through California Labor Code section 2750.5. . . . The
7 theory of the counter-claim against B-Side is that the
8 arbitration award should be confirmed and enforced
pursuant to federal law against ZEI and that B-Side
should be held liable for the award pursuant to state
law. This is not two distinct claims, as B-Side
characterizes it. For B-Side to be found liable for
anything, the underlying liability based on federal law
must be found as well as the obligation imputing that
liability to B-Side directly. The claim against B-Side
thus arises under both state and federal law.

9 Docket No. 102, 4-5. Similarly, the second cause of action
10 alleges that ZEI breached the collective bargaining agreement and
11 failed to make contributions to the Trust Funds, in violation of
12 § 301 of the LMRA and §§ 502 and 515 of ERISA, and that B-Side is
13 liable for this failure pursuant to state law. In the prior
14 order, the Court also held that, even if the claims against B-Side
15 were distinct from those against ZEI and Horak and arose under
16 state law, the Court has supplemental jurisdiction over them and
17 would not exercise its discretion to decline that jurisdiction.

18 Id. at 5-9.⁴

19 In addition, although there is no authority that is directly
20 on point regarding the applicability of California Labor Code
21 section 2750.5 to ERISA and LMRA claims, B-Side has not
22 articulated a basis for abstention that shows that the legal issue
23 in this case is "intimately involved" with "sovereign

24 _____
25 ⁴ However, even where a court has already considered its
26 discretion under 28 U.S.C. § 1367(c) to weigh the values of
27 judicial economy, comity, convenience and fairness and has
28 determined that those interests would be best served by exercising
jurisdiction over the claims, principles of abstention still may
oblige a district court to stay or dismiss state law claims. See
City of Chi. v. Int'l College of Surgeons, 522 U.S. 156, 174
(1997).

1 prerogative," such as eminent domain, or that it bears "on policy
2 problems so important that they transcend the result in this
3 case." Kern-Tulare Water Dist. v. City of Bakersfield, 828 F.2d
4 514, 517 (9th Cir. 1987). B-Side makes only conclusory statements
5 to this effect, such as that the case will determine "what rights
6 . . . unions and their members have under state law against
7 contractors and other parties" for breach of project labor
8 agreements "by subcontractors which denied union members their
9 contractual right to work on that project," and that "it is
10 difficult to see any statutory protection for workers who have not
11 worked on such projects." Mot. to Stay, 4. Although B-Side
12 refers summarily to "California's extensive regulation of
13 contractor-employee ('laborer') relationships, particularly for
14 public works projects" as a "matter of 'substantial public
15 import,'" Reply in Supp. of Mot. to Stay, 4, it does not explain
16 how the questions actually presented in this case in particular
17 are of sufficient import to make this the exceptional case in
18 which abstention is required. Further, that the question may be
19 "difficult" is not enough to warrant abstention. See Meredith,
20 320 U.S. at 234-235.

21 Finally, this case deals with rights under federal law,
22 namely ERISA and the LMRA, as well as under state law. The
23 federal court has exclusive jurisdiction over the ERISA cause of
24 action for delinquent benefits contributions, and thus a state
25 court would not be able to determine the interplay between ERISA
26 and California Labor Code section 2750.5.

27 Accordingly, the Court DENIES B-Side's request for a stay
28 based on Thibodaux abstention.

1 B. Abstention under the Colorado River doctrine

2 Pursuant to the Colorado River doctrine, in situations
3 involving the contemporaneous exercise of jurisdiction by
4 different courts over sufficiently parallel actions, a federal
5 court has discretion to stay or dismiss an action based on
6 considerations of wise judicial administration, giving regard to
7 conservation of judicial resources and comprehensive disposition
8 of litigation. 424 U.S. at 817. The two actions need not exactly
9 parallel each other to invoke the Colorado River doctrine; it is
10 enough that the two cases are substantially similar. Nakash v.
11 Marciano, 882 F.2d 1411, 1416 (9th Cir. 1989). However, "the
12 requirement of 'parallel' state court proceedings implies that
13 those proceedings are sufficiently similar to the federal
14 proceedings to provide relief for all of the parties' claims."
15 Intel Corp. v. Advanced Micro Devices, Inc., 12 F.3d 908, 913 n.4
16 (9th Cir. 1993). Thus, "the existence of a substantial doubt as
17 to whether the state proceedings will resolve the federal action
18 precludes the granting of a [Colorado River] stay." Smith v.
19 Cent. Ariz. Water Conservation Dist., 418 F.3d 1028, 1033 (9th
20 Cir. 2005) (quoting Intel Corp., 12 F.3d at 913); see also Moses
21 H. Cone Hospital v. Mercury Constr. Corp., 460 U.S. 1, 28 (1983)
22 ("When a district court decides to dismiss or stay under Colorado
23 River, it presumably concludes that the parallel state-court
24 litigation will be an adequate vehicle for the complete and prompt
25 resolution of the issues between the parties. If there is any
26 substantial doubt as to this, it would be a serious abuse of
27 discretion to grant the stay or dismissal at all.").

28

1 In the case at hand, B-Side argues that "the entire basis for
2 B-Side's liability is not federal labor law but the state's laws
3 pertaining to licensing and liabilities of construction
4 contractors." Reply in Supp. of Mot. to Stay, 4. However, as
5 discussed above, the Court has already rejected B-Side's argument
6 that the claims asserted against it in this action arise only
7 under state law. The Court has previously held that, for B-Side
8 to be found liable for anything, the Court must find both the
9 underlying liability based on federal law and the obligation under
10 state law imputing that liability to B-Side. Thus, the
11 applicability of California Labor Code section 2750.5 is not a
12 separate claim, as B-Side continues to urge.

13 Further, the second cause of action, which seeks compensation
14 for amounts other than in the arbitration award, is not at issue
15 at all in the state court action, which B-Side admits. Reply at
16 4. As noted above, the second cause of action is an ERISA claim
17 for delinquent benefits contributions, which is within the
18 exclusive jurisdiction of the federal courts, and which cannot be
19 resolved by the state courts. Because that cause of action
20 necessarily requires a determination by a federal court and not
21 the state court, and is not asserted in the state court action,
22 this Court cannot invoke the Colorado River doctrine to stay or
23 dismiss this action. See Moses H. Cone, 460 U.S. at 28 ("the
24 decision to invoke Colorado River necessarily contemplates that
25 the federal court will have nothing further to do in resolving any
26 substantive part of the case, whether it stays or dismisses").

27 Finally, B-Side's argument that the state court action will
28 be determinative of the proper application of California Labor

1 Code section 2750.5 in this case is unpersuasive. B-Side contends
 2 the state court's interpretation of who can use the stop notice
 3 procedure will resolve the interpretation of California Labor Code
 4 section 2750.5. However, the statutes themselves are very
 5 different. Even after the state court has interpreted the stop
 6 notice laws, this Court will still be required to interpret and
 7 apply Labor Code section 2750.5, making a Colorado River stay
 8 inappropriate, as noted above.

9 The state law provision at issue in this case provides,
 10 There is a rebuttable presumption affecting the burden
 11 of proof that a worker performing services for which a
 12 license is required pursuant to Chapter 9 (commencing
 13 with Section 7000) of Division 3 of the Business and
 14 Professions Code, or who is performing such services for
 15 a person who is required to obtain such a license is an
 16 employee rather than an independent contractor. Proof
 17 of independent contractor status includes satisfactory
 18 proof of these factors:

15 (a) . . .

16 (b) . . .

17 (c) . . .

18 In addition to the factors contained in subdivisions
 19 (a), (b), and (c), any person performing any function or
 20 activity for which a license is required pursuant to
 21 Chapter 9 (commencing with Section 7000) of Division 3
 22 of the Business and Professions Code shall hold a valid
 23 contractors' license as a condition of having
 24 independent contractor status.

22 For purposes of workers' compensation law, this
 23 presumption is a supplement to the existing statutory
 24 definitions of employee and independent contractor, and
 25 is not intended to lessen the coverage of employees
 26 under Division 4 and Division 5.

25 Cal. Labor Code § 2750.5. Courts have found that this provision
 26 also created "an employer-employee relationship between the
 27 ultimate hirer and the employees of the unlicensed contractor."
 28 Rinaldi v. Workers' Comp. Appeals Bd. (Rinaldi I), 196 Cal. App.

1 3d 571, 574 (1987) (quoting Blew v. Horner, 187 Cal. App. 3d 1380,
2 1389 (1986)).

3 In contrast, the stop notice laws that were in effect at the
4 time the state court action was filed,⁵ which are contained in the
5 Civil Code, provide, "Except for an original contractor, any
6 person mentioned in Section 3110, 3111, or 3112, or in Section
7 4107.7 of the Public Contract Code, or furnishing provisions,
8 provender, or other supplies, may serve a stop notice upon the
9 public entity responsible for the public work in accordance with
10 this chapter." Cal. Civ. Code § 3181, repealed July 1, 2012. The
11 former California Civil Code sections 3110, 3111 and 3112 appeared
12 in the section of the civil code that addresses what individuals
13 are entitled to mechanics' liens. Former section 3110 listed
14 various particular types of tradesmen and provided that they and

15 all persons and laborers of every class performing labor
16 upon or bestowing skill or other necessary services on
17 . . . a work of improvement shall have a lien upon the
18 property upon which they have bestowed labor . . . for
19 the value of such labor done . . . whether done or
20 furnished at the instance of the owner or of any person
21 acting by his authority or under him as contractor or
22 otherwise.

23 Cal. Civ. Code § 3110, repealed July 1, 2012. Former Civil Code
24 section 3089 defined laborer as "any person who, acting as an
25 employee, performs labor upon or bestows skill or other necessary
26 services on any work of improvement," including "any person or
27 entity, including an express trust fund described in Section 3111,
28 to whom a portion of the compensation of a laborer . . . is paid

27 ⁵ Effective July 1, 2012, these provisions were recodified.
28 B-Side contends, and Counter-Plaintiffs do not dispute, that the
recodification does not affect the pending state court action.
Mot. to Stay, 7 n.8.

1 by agreement with that laborer or the collective bargaining agent
2 of that laborer." Cal. Civ. Code § 3089, repealed July 1, 2012.

3 A finding that, under these provisions, the stop notice
4 procedures can be only used to recover compensation for labor that
5 was actually performed is not determinative of whether, under
6 Labor Code section 2750.5, a general contractor can be held
7 responsible for an unlicensed subcontractor's failure to pay
8 benefits on behalf of its workers under a collective bargaining
9 agreement or wages to laborers who should have been hired under
10 such an agreement but were not. It also does not appear that the
11 stop notice laws are useful for interpretation of Labor Code
12 section 2750.5 and notably, in its arguments about the proper
13 interpretation of the latter in the cross-motions for summary
14 judgment, B-Side does not once cite the stop notice provisions.

15 Accordingly, because the state case is not "an adequate
16 vehicle for the complete and prompt resolution of the issues
17 between the parties," Moses H. Cone, 460 U.S. at 28, the Court
18 DENIES B-Side's motion to stay under the Colorado River doctrine.

19 II. Cross-Motions for Summary Judgment

20 A. Legal Standard

21 Summary judgment is properly granted when no genuine and
22 disputed issues of material fact remain, and when, viewing the
23 evidence most favorably to the non-moving party, the movant is
24 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
25 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
26 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
27 1987).

28

1 The moving party bears the burden of showing that there is no
2 material factual dispute. Therefore, the court must regard as
3 true the opposing party's evidence, if supported by affidavits or
4 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,
5 815 F.2d at 1289. The court must draw all reasonable inferences
6 in favor of the party against whom summary judgment is sought.
7 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
8 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952
9 F.2d 1551, 1558 (9th Cir. 1991).

10 Material facts which would preclude entry of summary judgment
11 are those which, under applicable substantive law, may affect the
12 outcome of the case. The substantive law will identify which
13 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.
14 242, 248 (1986).

15 B. Discussion

16 Counter-Plaintiffs argue that the Court need only determine
17 that B-Side is legally responsible under California Labor Code
18 section 2750.5 for the liabilities that the Court previously found
19 against ZEI and Horak for the arbitration award and the failure to
20 make benefit contributions for work performed in January through
21 March 2011.

22 B-Side responds that the Court's Order adjudicating these
23 claims against ZEI and Horak are not binding upon it because it
24 was not a party to the case at that point and is not in privity
25 with ZEI or Horak. However, it is not necessary that B-Side be in
26 privity with ZEI or Horak. It is Labor Code section 2750.5 that
27 makes B-Side responsible for liabilities incurred by them.
28

1 B-Side also contends that Counter-Plaintiffs have not offered
2 any evidence that the arbitration award is correct or that ZEI
3 failed to make benefits contributions for work performed in
4 January through March 2011. However, the Union submitted
5 substantial evidence in connection with the prior motions and
6 incorporated the record into this motion by reference. Thus, the
7 Court takes into account all of the evidence that it considered
8 when deciding to adjudicate these claims in the Union's favor and
9 against ZEI and Horak previously. The Court need only determine
10 whether the new evidence and arguments raised by B-Side warrant a
11 different decision.

12 As previously noted, a finding against B-Side on each claim
13 consists of two parts: first, a finding of liability against ZEI
14 under federal law; and second, a finding that the liability is
15 imputed to B-Side under state law.

16 1. Federal Jurisdiction

17 B-Side argues that Counter-Plaintiffs have made no showing
18 that "the PLA is a 'collective bargaining agreement'" and
19 therefore that the "Court has subject matter jurisdiction under
20 the NLRA as pled in the SACC." B-Side's Opp. to Counter-Pls.'
21 Mot. for Summ. J. and Cross-Mot. 5. B-Side has not challenged
22 subject matter jurisdiction under ERISA as to the second cause of
23 action.

24 The LMRA covers suits "for violation of contracts between an
25 employer and a labor organization representing employees in an
26 industry affecting commerce as defined in this Act, or between any
27 such labor organizations." 29 U.S.C. § 185. On their faces, the
28 PLA and other relevant agreements in the record are such

1 contracts. Accordingly, the Court rejects B-Side's argument that
2 it does not have jurisdiction over the first cause of action.

3 2. B-Side's liability for unpaid benefits contribution for
4 work performed in January through March 2011

5 The Court previously found that the evidence in the record
6 was sufficient to show that ZEI had failed to make required
7 benefits contributions for work performed in January and February
8 2011. B-Side now claims that the "only evidence in the record
9 supporting it is a verified statement showing a calculation of the
10 amount of the claim," and that Counter-Plaintiffs have submitted
11 no evidence pertaining to this claim. Reply at 9. However, this
12 is inaccurate. In fact, that document was only submitted after
13 the Court granted summary judgment on this claim, at the request
14 of the Court to facilitate the calculation of the amount of
15 damages, although the relevant information was already in the
16 record.

17 In the prior summary judgment order, the Court found that
18 Counter-Plaintiffs had offered evidence that, in January 2011, two
19 Union members, Wilberto Cuellar-Arandia and Douglas R. Lindsey
20 each worked eight hours for ZEI on the Roosevelt Middle School
21 project, that ZEI's employee, Valentin Penkin, also worked thirty-
22 two hours on the project in January 2011, and that, during
23 February 2011, Cuellar-Arandia and Lindsey worked sixteen hours
24 each and Penkin worked thirty-two hours. Docket No. 82, 6-7; see
25 also Horak Depo., Docket No. 70-6, Ex. 38 (payroll records for
26 January 31, 2011 through February 6, 2011). The Court also found
27 that Counter-Plaintiffs provided evidence that neither ZEI nor
28 B-Side reported these hours or made fringe benefits contributions

1 for them, although payment of these contributions was required by
2 the PLA. Docket No. 82, 6-7; see also Maloon Decl., Docket No.
3 43, ¶ 18. Thus, there is sufficient evidence in the record that
4 the required benefits contributions were not made during this time
5 period, and B-Side has not offered evidence to create a material
6 dispute of fact.

7 In addition, the verified calculation of damages is
8 admissible evidence of the amount of damages suffered. It was
9 authenticated under penalty of perjury by the administrator for
10 the Trust Funds and shows a calculation of the contributions
11 required for the above hours, the liquidated damages and the
12 interest accumulated through the date on which it was signed. The
13 figures underlying these calculations--the aggregate trust fund
14 contribution rate for Union journeymen during the relevant time
15 period, the number of hours worked during the time period, the
16 percentage for liquidated damages, and the interest rate--are all
17 part of the record, and are contained in the PLA, schedules and
18 time sheets. B-Side has not presented any argument or evidence
19 that the calculation itself is erroneous.

20 Further, there is no material dispute of fact that B-Side
21 should be held liable for this claim. California state courts
22 have held that Labor Code section 2750.5, quoted above, "operates
23 to conclusively determine that a general contractor is the
24 employer of not only its unlicensed subcontractors but also those
25 employed by the unlicensed subcontractors." Sanders Const. Co.,
26 Inc. v. Cerda, 175 Cal. App. 4th 430, 434-35 (2009) (quoting Hunt
27 Bldg. Corp. v. Bernick, 79 Cal. App. 4th 213, 220 (2000)
28 (collecting cases)); see also Blew, 187 Cal. App. 3d at 1389

1 ("among the consequences which flow from a determination that a
2 person is an employee rather than an independent contractor is
3 that an employer-employee relationship exists between the hirer of
4 the employee and those whom the employee has hired to do the
5 hirer's work"). "Thus, where a 'subcontractor is unlicensed,
6 workers' compensation liability for the subcontractor's employees
7 will be imposed on the general contractor as a matter of law.'" Hunt,
8 79 Cal. App. 4th at 220 (quoting Rinaldi I, 196 Cal. App. 3d
9 at 574). "Similarly, a general contractor is liable to [the
10 California Employment Development Department] for unpaid
11 contributions [to unemployment and disability insurance funds] and
12 withholding taxes for its unlicensed subcontractor's employees."
13 Id. (citations omitted); see also Sanders Const., 175 Cal. App.
14 4th at 434-35 (holding that a general contractor may be held
15 liable for the unpaid wages of workers hired by an unlicensed
16 company that is its subcontractor).

17 B-Side acknowledges that it subcontracted with ZEI, the
18 corporate entity, and that ZEI was unlicensed from January through
19 March 2011 when ZEI employed Cuellar-Arandia, Lindsey and Penkin
20 to perform work on the Roosevelt Middle School project. B-Side
21 also concedes that ZEI was required to be licensed. Thus, by
22 operation of section 2750.5, B-Side, the general contractor, is
23 the employer of Cuellar-Arandia, Lindsey and Penkin. The PLA
24 provides that the employing contractor is required to "pay
25 contributions to the established vacation, pension or other form
26 of deferred compensation plan, apprenticeship, and health benefit
27 funds for each hour worked on the Project." PLA ¶ 9.1; see, e.g.,
28 Maloon Decl., Docket No. 43, Ex. B § 6.04(b) ("The Employer agrees

1 to pay the amount specified in Appendix A for each hour worked by
2 all employees working under the terms of this Agreement in and to
3 said Pension Trust . . .").

4 In Hunt, the California Court of Appeal held that a general
5 contractor was liable for contributions to state disability and
6 unemployment funds that its unlicensed subcontractors had failed
7 to make on behalf of their employees. Hunt, 79 Cal. App. 4th at
8 223. The court noted that state law placed the obligation on
9 employers to contribute to the unemployment fund based on wages
10 paid to their employees and to withhold employees' contributions
11 to the disability fund from their wages. Id. at 219. However,
12 "where an independent contractor performs services for a
13 principal, the principal is not required to withhold taxes or make
14 contributions." Id. The court found that, because section 2750.5
15 rendered the unlicensed subcontractors and their employees to be
16 the employees of the general contractor, the general contractor
17 was required to withhold taxes and make contributions on behalf of
18 the subcontractors and their employees. Id. at 223. Other courts
19 have also found the general contractor responsible for any
20 liabilities that it would otherwise have as the employer of the
21 unlicensed subcontractor's employees, such as workers'
22 compensation claims, contributions to unemployment funds and
23 wages. See, e.g., Sanders Const., 175 Cal. App. 4th at 434-35
24 (wages; collecting cases); Zellers v. Playa Pacifica, Ltd., 61
25 Cal. App. 4th 129, 132-134 (1998) (workers' compensation
26 benefits).

27 Similarly, here, the PLA and Schedule A require the employing
28 contractor to make contributions to the trust funds on behalf of

1 its employees. Because ZEI was unlicensed, ZEI's employees were
2 the employees of B-Side by statute. Thus, B-Side is liable for
3 the unpaid benefits contributions for these employees.

4 In response, B-Side argues that the "Court should pierce
5 ZEI's corporate veil for the purpose of assessing B-Side's
6 liability." Reply at 9. Specifically, B-Side contends that,
7 because the Court pierced ZEI's corporate veil to find Horak
8 individually liable for the judgments against ZEI, the Court
9 should pierce the veil for all purposes, with the result "that B-
10 Side was doing business with a licensed contractor because it is
11 undisputed that the entire time that Horak worked on the subject
12 project he was individually licensed as an electrical contractor."
13 B-Side's Opp. to Counter-Pls.' Mot. for Summ. J. and Cross-Mot.
14 11. However, in its reply, B-Side changes its request, stating
15 that it is not contending that the Court should deem ZEI to be
16 licensed, but instead that, because B-Side knew that Horak was
17 licensed and thought it was doing business with him and not ZEI,
18 the Court should not find that B-Side liable "in the interests of
19 justice."

20 Although B-Side may be able to prevail on its cross-claim for
21 indemnification against Horak, B-Side cites no authority for
22 piercing the corporate veil to thwart section 2750.5. Such a
23 result would contravene clear California law that a corporation is
24 a separate legal entity from its officers and does not gain a
25 license simply because an officer is separately licensed. See,
26 e.g., Opp v. St. Paul Fire & Marine Ins. Co., 154 Cal. App. 4th
27 71, 76-80 (2007) (a corporation may not claim "substantial
28 compliance" with the licensing requirement if it has never been

1 licensed within the state of California, even if its managing
2 officer and sole owner was duly licensed throughout the relevant
3 time period); WSS Indus. Constr., Inc. v. Great West Contractors,
4 Inc., 162 Cal. App. 4th 581, 596 (2008) (reaching the same
5 conclusion, irrespective of the president's licensing history,
6 good faith or competence).

7 Further, to hold that the general contractor could escape
8 obligations to the subcontractor's employees under section 2750.5
9 because the subcontractor acted in bad faith disregards the
10 premise of the statute and places the consequences of Horak and
11 ZEI's misrepresentation onto the employees and trust funds, which
12 would be denied the benefits contributions. Courts have found
13 that, where a subcontractor has falsely represented his licensing
14 status to the general contractor, although the subcontractor may
15 be estopped from denying his independent contractor status, this
16 does not extend to the innocent employees of the subcontractor,
17 who may properly obtain workers' compensation from the general
18 contractor. See Rinaldi v. Workers' Comp. Appeals Bd. (Rinaldi
19 II), 199 Cal. App. 3d 217, 224 (1988); Nick Hagopian Drywall v.
20 Workers' Comp. Appeals Bd., 204 Cal. App. 3d 767, 772-773 (1988).
21 In so holding in Rinaldi II, the court recognized,

22 Although Labor Code section 2750.5 was not designed as a
23 penalty . . . , it is the ultimate hiring contractor,
24 rather than the injured worker or the [state Uninsured
25 Employers Fund], who has the opportunity and incentive
26 to check the credentials of the subcontractors he hires.
27 By failing to do so, the hiring contractor not only aids
28 and abets the unlicensed subcontractor but also sets in
motion the chain of events whereby the injured worker is
robbed of the protection provided to him by the workers'
compensation law.

1 Id. at 1226. Similarly, here, a contrary finding would rob the
2 employees of their benefits under the PLA. Although Horak and ZEI
3 may have attempted to conceal ZEI's unlicensed status from B-Side,
4 and B-Side may not have intended to hire an unlicensed
5 subcontractor, as between B-Side, the employees and the Trust
6 Funds, B-Side was in the best position to investigate ZEI's
7 credentials. The undisputed record shows that B-Side had such
8 opportunities: the bid letter from ZEI clearly stated "Zoom
9 Electric, Inc." and B-Side could have noticed the removal of the
10 license number and the change to ZEI's name in the subcontractor's
11 agreement had it reviewed that more carefully. Allocating
12 equities among the parties does not favor B-Side over the
13 employees and trust funds, which are entitled to the benefits
14 contributions.

15 Finally, B-Side argues that it would be inequitable to hold
16 it liable because it already disbursed to ZEI full payment for the
17 work done at the Roosevelt Middle School job and, if that result
18 is reached, it would be required to pay this amount again. This
19 argument is unavailing. B-Side makes no showing that it was
20 required to do so, and it chose to make the final payments with
21 the knowledge that it might be held liable for this amount.

22 This result is also consistent with certain public policy
23 considerations underlying section 2750.5. In Hunt, the court
24 noted that, at the time it was passed, "the Assembly Committee on
25 Labor, Employment and Consumer Affairs reported that the portion
26 of the bill containing Labor Code section 2750.5 would 'provide
27 criteria for determining whether employers are avoiding payment of
28 their social insurance tax obligations by treating their employees

1 as independent contractors'" and that it "would help end the
2 'subterranean economy' where contractors hire unlicensed
3 subcontractors and pay them in cash, resulting in the 'loss of
4 large sums in taxes, employee social insurance contributions, and
5 employee pension funds.'" 79 Cal. App. 4th at 222 (quoting Assem.
6 Com. on Labor, Employment & Consumer Affairs, Analysis of Assemb.
7 Bill 3249 (1977-1978 Reg. Sess.), 1). In Sanders, the California
8 Court of Appeal observed that the "same public policy
9 considerations regarding the subterranean economy" arise where "an
10 unscrupulous general contractor could collude with an unlicensed
11 subcontractor to cheat workers hired by the subcontractor out of
12 their wages, plus all of the related benefits." 175 Cal. App. 4th
13 at 435.

14 Accordingly, the Court grants Counter-Plaintiffs' motion for
15 summary judgment on the second cause of action and denies B-Side's
16 cross-motion for summary judgment on it.

17 3. Confirmation of the Arbitration Award

18 B-Side argues that the arbitration award cannot be confirmed
19 with respect to it because it was not a party to the arbitration
20 proceedings and did not have an opportunity to contest them.
21 B-Side raises two issues with the arbitration proceedings and
22 award that it contends, had it been part of those proceedings, it
23 would have raised, and argues that this means that the arbitration
24 award should be vacated.

25 First, B-Side suggests that the evidentiary hearing of the
26 JAC was not conducted in compliance with the terms of the PLA.
27 B-Side states that Step One of the grievance procedure provides
28 that first "the Business Representative of the involved Local

1 Union or District Council, or his/her designee, and the
2 representative of the involved Contractor shall confer and attempt
3 to resolve the grievance." B-Side's Opp. to Counter-Pls.' Mot.
4 for Summ. J. and Cross-Mot. 8 (citing PLA § 12.2). Implying that
5 the JAC hearing comprised Step One of the procedure, B-Side
6 complains that the hearing was conducted by Barry Luboviski and
7 Gene Johnson, the latter included as the "contractor." Id.
8 B-Side asserts that Johnson was an employee of a consulting firm,
9 Davallier Sloan, and not a licensed contractor who worked on the
10 project. Id. (citing Kalafati 2nd Decl. ¶ 8).

11 This argument is unavailing for a number of reasons. The JAC
12 hearing was not part of Step One of the grievance process. See
13 PLA § 12.2 ("Step 2: In the event that the representatives are
14 unable to resolve the dispute" in Step One, an involved party may
15 submit the grievance "to the Joint Administrative Committee").
16 The grievance letter that constituted Step One of the procedure
17 was sent by a Union representative, Maloon, to a representative of
18 the involved contractor, Horak, and was also sent to Kalafati, on
19 behalf of B-Side. B-Side cites nothing in the record that
20 requires that one member of the JAC Committee be a contractor.
21 Finally, the only evidence about Johnson's employment or status
22 that B-Side has cited is inadmissible hearsay within Kalafati's
23 declaration.

24 Second, B-Side argues that Horak was an executive or
25 managerial employee and thus that the hours that he worked were
26 not subject to the PLA, such that the JAC's award of fringe
27 benefits to the Union on his behalf was improper. B-Side contends
28 that the JAC simply ignored the provision of the PLA that excluded

1 from its coverage executives and managerial employees. B-Side's
2 Opp. to Counter-Pls.' Mot. for Summ. J. and Cross-Mot. 10-11 n.10.
3 B-Side does not raise the same argument as to the hours worked by
4 the other two employees.

5 B-Side's assertion that the arbitrators ignored this
6 provision is inaccurate. This argument was brought up before the
7 JAC, which considered and rejected it. The JAC found that the PLA
8 excluded from its coverage executive and managerial employees only
9 when they performed work within those job descriptions, not tasks
10 that would normally be performed by a laborer who would be covered
11 by the PLA. The JAC found that ZEI and Horak did not submit
12 credible evidence that any work performed by Horak was actually
13 managerial. This conclusion is a "plausible interpretation" of
14 the PLA and thus is entitled to judicial deference. B-Side
15 presents no such evidence either. Accordingly, B-Side has failed
16 to raise a material dispute of fact that the JAC award should not
17 be confirmed.

18 B-Side contends that it should not be held liable for the
19 portion of the JAC award that was for "Payment on behalf of
20 employees of Zoom Electric, Inc. to the IBEW, 595 Trust Funds
21 totaling \$42,963.36 for hours worked in violation of the PLA."
22 This portion of the award was intended to compensate for the
23 unpaid fringe benefits contributions to the trust funds on behalf
24 of those ZEI employees who actually worked on the Roosevelt Middle
25 School project during the relevant time period, including Horak.
26 As discussed above, by operation of section 2750.5, B-Side is the
27 employer of these three ZEI employees. Accordingly, under the
28 authority discussed above, B-Side is liable for the unpaid

1 benefits contributions that were required to be made on their
2 behalf.

3 B-Side contends that it cannot be held liable for this amount
4 for several reasons. First, it argues that section 2750.5 is
5 meant to operate for the benefit of the employees of the
6 unlicensed subcontractor, so it cannot be used to require B-Side
7 to make payments to the trust funds in the absence of evidence
8 that the trust funds will in fact pay these amounts to those
9 employees. However, B-Side offers no authority to support that
10 only the employees themselves may benefit from section 2750.5 or
11 that evidence must be offered that the employee will directly
12 benefit from its operation. The text of the statute creates no
13 such requirement. As previously stated, section 2750.5 makes B-
14 Side, as the general contractor, the employer of ZEI's employees.
15 Thus, B-Side has the same legal responsibilities with respect to
16 these individuals as it would with respect to any other employees.
17 In addition, part of the intent underlying section 2750.5 was to
18 ensure that the use of unlicensed subcontractors would not result
19 in substantial loss in contributions to employee social insurance
20 and pension funds and to further the public policy of ensuring
21 that such funds are properly funded. See Hunt, 79 Cal. App. 4th
22 at 222-23. Other courts have held that section 2750.5 makes a
23 general contractor liable for unpaid contributions to funds meant
24 to provide benefits for persons who are unemployed through no
25 fault of their own or through injury or sickness. See, e.g., id.
26 at 218. These cases do not discuss any requirement that the fund
27 show the individual employee will directly obtain a benefit
28 immediately or in the future. Unemployment and disability

1 insurance contributions are not earmarked for individuals and
2 there is no guarantee that participating eligible employees will
3 become unemployed or disabled.

4 B-Side also argues that it should not be required to pay the
5 portion of the \$42,963.36 component of the JAC award that is
6 attributable to Horak's labor. It contends that section 2750.5
7 cannot be used to make him its employee because he himself held a
8 contractor's license, even though ZEI did not. However, it is
9 irrelevant to the operation of section 2750.5 here that Horak
10 himself had a license. The code section makes ZEI the employee of
11 the B-Side because it was unlicensed and makes B-Side liable for
12 ZEI's unmet obligations for its employees. The JAC found that ZEI
13 had not met its obligation to pay the benefits contributions on
14 behalf of its employees who worked on the project, including
15 Horak, and, as previously stated, B-Side has offered no evidence
16 to dispute its conclusion. Citing Chin v. Namvar, 166 Cal. App.
17 4th 994, 1004-06 (2008), B-Side also argues that Horak is estopped
18 from collecting compensation from it because he affirmatively
19 represented ZEI's contractor's licensing status. In Chin, the
20 court held, based on estoppel, that an individual who had himself
21 misrepresented his licensing status to a company could not
22 maintain certain causes of action against that company that were
23 dependent on a finding that he was an employee of the company
24 rather than its independent contractor. Chin, 166 Cal. App. 4th
25 at 1002-06. However, B-Side offers no authority that this
26 estoppel extends to trust funds seeking unpaid contributions to
27 employee funds.

28

1 B-Side also disputes its liability for the portion of the JAC
2 award that was for "Payment to workers on the IBEW 595 Available
3 for Work list of 1648 hours totaling \$116,299.36." This portion
4 of the award was intended to compensate workers who would have
5 been eligible to work on the project but who were not employed
6 because of ZEI's failure to abide by the PLA's referral
7 provisions. Thus, it compensated individuals who would have been
8 employees of ZEI but were not, because of ZEI's malfeasance. B-
9 Side argues that section 2750.5 cannot operate to make these
10 individuals its employees because that code section affects the
11 burden of proof for "a worker performing services for which a
12 license is required" and these individuals did not perform
13 services on the Richmond Middle School project. B-Side contends
14 that, as a result, it is not responsible for ZEI's injury to these
15 third parties.

16 However, ZEI did perform services for which a license was
17 required, did not have a license and, by operation of section
18 2750.5, was made an employee of B-Side at the time that it caused
19 the injury to these third parties for which this portion of the
20 award was intended to compensate. On its face, section 2750.5
21 does not affect employment status only in cases seeking recovery
22 of wages and benefits. As pointed out by Counter-Plaintiffs at
23 the hearing, at least one California court has found the code
24 section applicable to tort cases involving injuries to third
25 parties. See Foss v. Anthony Industries, 139 Cal. App. 3d 794
26 (1983) (concluding, however, that it was not retroactive). In
27 Foss, a company hired an unlicensed partnership to excavate a
28 swimming pool site, work for which a license was required. Id. at

1 796-97. A truck driven by an employee of the partnership struck
2 and killed a motorcyclist. Id. at 796. The administrator of the
3 motorcyclist's estate brought suit against the company and the
4 partnership. Id. The trial court concluded that section 2750.5
5 applied only in workers' compensation cases, not in tort, and
6 granted nonsuit in favor of the company. Id. at 797. The Court
7 of Appeal reversed, finding that it applied both to workers'
8 compensation and tort cases. Id. at 797-99. The appellate court
9 noted that it was "clear the basic provisions of the Labor Code on
10 employee status are not limited to cases involving disputes
11 between employer and employee" and that such provisions have long
12 been cited "on employment status in tort cases involving injuries
13 to third parties." Id. at 798. The court recognized that "strong
14 public policy" supported the application of section 2750.5 in such
15 instances because it was "consistent with the reasoning of
16 imposing vicarious liability under the doctrine of respondeat
17 superior" upon an employer for the torts of an independent
18 contractor, including that "he is the party primarily benefited by
19 it, that he selects the contractor, is free to insist upon one who
20 is financially responsible, and to demand indemnity from him."
21 Id. at 799. The court concluded that it was consistent with that
22 policy approach to deny "an employer the opportunity to raise the
23 independent contractor defense if he has hired a worker who has
24 not shown the competence and financial responsibility
25 prerequisites to obtaining a contractor's license." Id.
26 Similarly, here, section 2750.5 applies to make B-Side the
27 employer of ZEI and thus responsible for ZEI's failure to hire
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1 laborers for the project in compliance with the provisions of the
2 PLA, to which both B-Side and ZEI were parties.

3 Accordingly, the Court grants Counter-Plaintiffs' motion for
4 summary judgment on the first cause of action and denies B-Side's
5 cross-motion for summary judgment on it.

6 CONCLUSION

7 For the reasons set forth above, the Court DENIES B-Side's
8 motion to stay (Docket No. 107), GRANTS Counter-Plaintiffs' motion
9 for summary judgment (Docket No. 108) and DENIES B-Side's
10 cross-motion for summary judgment (Docket No. 112).

11 This Order resolves all remaining claims in this action,
12 except for those brought by B-Side against Counter-Defendant and
13 Cross-Defendant Vieko Horak. Because Counter-Defendant and Cross-
14 Defendant Vieko Horak has filed for bankruptcy, the claims against
15 him are stayed pursuant to 11 U.S.C. § 362. Finding no just
16 reason for delaying the other claims during the stay, the Court
17 directs the Clerk to enter partial judgment on the claims that do
18 not involve Horak, including the claims against B-Side and those
19 resolved in the Court's Order of March 20, 2012, the Union's
20 claims against ZEI and ZEI's claim against the Union. Counter-
21 Plaintiffs shall recover their costs from ZEI and B-Side on a
22 joint and several basis.

23 Because the remaining claims are subject to an ongoing
24 automatic bankruptcy stay, there appears to be no further reason
25 to maintain the file as an open one at this time. Accordingly,
26 the Clerk is directed to close the file. Nothing contained in
27 this Order shall be considered a dismissal or disposition of the
28 claims against Horak. Should further proceedings regarding those

1 claims become necessary or desirable, any party may initiate it in
2 the same manner as if this Order had not been entered.

3 IT IS SO ORDERED.

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5 Dated: 2/8/2013

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CLAUDIA WILKEN
United States District Judge