

1 between Show Ready and the Tradeshow and Sign Crafts Union Local Union 831
2 (“Local 831”). The Trust Funds filed this suit against Defendants on November 18,
3 2016. Neither Defendant responded to the Complaint. On February 7, 2017, the
4 Clerk entered a default against both Defendants. The Trust Funds now move for entry
5 of a default judgment against both Defendants. For the reasons discussed below, the
6 Court **GRANTS** the Motion as to Show Ready but **DENIES** the Motion as to
7 Murphy. (ECF No. 24.)¹

8 **II. FACTUAL BACKGROUND**

9 Show Ready and Local 831 entered into CBAs covering the periods of
10 September 1, 2002, to August 31, 2005; September 1, 2005, to August 31, 2008;
11 September 1, 2008, to August 31, 2011; September 1, 2011, to August 31, 2014; and
12 September 1, 2014, to August 31, 2017. (Compl. ¶ 9, ECF No. 1.) Under the CBAs,
13 Show Ready was required to send monthly reports and to pay employee benefit plan
14 contributions to the Trust Funds. (*Id.* ¶ 10.)

15 On December 1, 2011, the Trust Funds’ auditing firm, Alsweet Associates,
16 audited Show Ready’s records from August 1, 2008, to August 31, 2011. (Compl. ¶
17 13.) The audit revealed that Show Ready underpaid health and welfare contributions
18 in the amount of \$13,108.95 for that period. (*Id.*; *see also* Armstrong Decl. ¶ 5, ECF
19 No. 28.) On July 25, 2013, Alsweet Associates performed a second audit of Show
20 Ready’s records for the period of August 1, 2011, to June 28, 2013, which indicated
21 that Show Ready underpaid additional health and welfare contributions in the amount
22 of \$20,340.71. (Compl. ¶ 14; *see also* Armstrong Decl. ¶ 6.) In March 2015, Alsweet
23 Associates sent two letters to Show Ready, which indicated the amount the company
24 owed to the Trust Funds for each audited period. In the letters, Alsweet Associates
25 requested that Show Ready mail the overdue payments to the Trust Fund or, in the
26 alternative, notify the firm of any disagreements with the audit results within ten days

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28 ¹ After considering the moving papers, the Court deemed the matter appropriate for decision
without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

1 from the date of the letters. (Armstrong Decl. ¶¶ 2, 7, Ex. B, ECF Nos. 25, 28.)
2 Defendants, however, refused to pay the above amounts. (Compl. ¶ 16.) Show Ready
3 has not been audited for the months after June 2013, but the Trust Funds contend that
4 Show Ready has also underpaid contributions for the period of June 2013 to October
5 2015. (Compl. ¶ 15; *see also* Moreno Decl. ¶ 8, ECF No. 27.)

6 On November 18, 2016, the Trust Funds filed a complaint against both
7 Defendants requesting payment of the underpaid contributions, interest, liquidated
8 damages, audit expenses, and reasonable attorneys' fees and costs. (ECF No. 1.) The
9 Trust Funds served the Complaint on Show Ready on January 11, 2017, and on
10 Murphy on November 28, 2016. (ECF Nos. 9, 10.) Neither Defendant filed a timely
11 response to the Complaint. Fed. R. Civ. P. 12(a)(1)(A)(i). On February 6, 2017, the
12 Trust Funds requested that the Clerk enters a default against both Defendants. (ECF
13 No. 16.) The Clerk entered a default on February 7, 2017. (ECF No. 17.) On
14 February 16, 2017, the Trust Funds filed this instant Motion for Default Judgment
15 with the Court. (ECF No. 24).

16 **III. LEGAL STANDARD**

17 Federal Rule of Civil Procedure 55(b) authorizes a district court to grant a
18 default judgment after the Clerk enters a default under Rule 55(a). Fed. R. Civ. P.
19 55(b). Before a court can enter a default judgment against a defendant, the plaintiff
20 must satisfy the procedural requirements set forth in Federal Rules of Civil Procedure
21 54(c) and 55, as well as Local Rule 55-1 and 55-2. Fed. R. Civ. P. 54(c), 55; C.D.
22 Cal. L.R. 55-1, 55-2. Local Rule 55-1 requires that the movant submit a declaration
23 establishing (a) when and against which party default was entered; (b) identification of
24 the pleading to which default was entered; (c) whether the defaulting party is a minor,
25 incompetent person, or active service member; and (d) that the Servicemembers Civil
26 Relief Act, 50 U.S.C. § 3931, does not apply; and that (e) the defaulting party was
27 properly served with notice, if required under Rule 55(b)(2). C.D. Cal. L.R. 55-1.
28 Finally, if the plaintiff seeks unliquidated damages, Local Rule 55-2 requires the

1 plaintiff to give notice to the defaulting party of the amount sought. C.D. Cal. L.R.
2 55-2; *Unliquidated Damages*, Black’s Law Dictionary (10th ed. 2014) (defining
3 “unliquidated damages” as “[d]amages that cannot be determined by a fixed
4 formula”).

5 If these procedural requirements are satisfied, a district court has discretion to
6 enter default judgment. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In
7 exercising its discretion, a court must consider several factors, including: (1) the
8 possibility of prejudice to a plaintiff; (2) the merits of plaintiff’s substantive claims;
9 (3) the sufficiency of the complaint; (4) the sum of money at stake; (5) the possibility
10 of a dispute concerning material facts; (6) whether the defendant’s default was due to
11 excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil
12 Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471–72
13 (9th Cir. 1986). Upon entry of default, the defendant’s liability generally is
14 conclusively established, and the well-pleaded factual allegations in the complaint are
15 accepted as true. *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–19 (9th Cir.
16 1987) (per curiam) (citing *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir.
17 1977)).

18 IV. DISCUSSION

19 A. Procedural Requirements

20 The Court finds that the Trust Funds have complied with the relevant
21 procedural requirements for the entry of a default judgment as to Show Ready but not
22 as to Murphy. Counsel submits a declaration attesting that: (a) the Clerk entered a
23 default against both Defendants on February 7, 2017;(b) the default was entered on the
24 original Complaint filed by the Trust Funds on November 18, 2016; (c) Show Ready
25 is not an infant or competent person; (d) Show Ready is not covered under the
26 Servicemembers Civil Relief Act; and (e) the Trust Funds served both Defendants
27 with notice of this Motion. (Ancheta Decl. ¶¶ 2–4, ECF No. 26.) The declaration
28 fails to address Local Rule 55-1(c) and (d) with respect to Murphy. Thus, while the

1 Trust Funds have complied with the procedural requirements for entry of default as to
2 Show Ready, it has not done so as to Murphy. This alone warrants denial of the
3 Motion as to Murphy.

4 **B. *Eitel* Factors**

5 The Court finds that the *Eitel* factors weigh in favor of entering a default
6 judgment. The Court will discuss each factor in turn.

7 1. Plaintiffs Would Suffer Prejudice

8 Because Defendants have failed to appear in the action, if default judgment
9 were denied, the Trust Funds would be unable to recover the delinquent contributions
10 owed by Show Ready. Therefore, this factor favors entry of a default judgment.

11 2. Plaintiffs Has Adequately Pleaded a Meritorious Claims

12 The second and third *Eitel* factors “require that a plaintiff ‘states a claim on
13 which [it] may recover.’” *Eitel*, 782 F.2d at 1475 (citations omitted); *Philip Morris*
14 *USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003). The Trust
15 Funds assert a claim for delinquent contributions under the Employee Retirement
16 Income Security Act (“ERISA”). (Compl. ¶ 13.) Under ERISA, “[e]very employer
17 who is obligated to make contributions to a multiemployer plan under the terms of the
18 plan or under the terms of a collectively bargained agreement shall, to the extent not
19 inconsistent with law, make such contributions in accordance with the terms and
20 conditions of such plan or such agreement.” 29 U.S.C. § 1145; *see also Winterrowd*
21 *v. David Freedman & Co., Inc.*, 724 F.2d 823, 826 (9th Cir. 1984) (holding that
22 employer’s failure to contribute agreed-upon amount to pension fund covering
23 agricultural workers was an ERISA violation). If the employer fails to do so, the plan
24 or a plan fiduciary may bring an action to recover the unpaid contributions. 29 U.S.C.
25 § 1132(d)(1); *Bd. of Trs. of Bay Area Roofers Health & Welfare Tr. Fund v. Westech*
26 *Roofing*, 42 F. Supp. 3d 1220, 1224 (N.D. Cal. 2014).

27 Here, pursuant to the CBAs, Show Ready must make monthly contributions to
28 the Trust Funds no later than ten days after the close of each calendar month. (*See*,

1 e.g., Mot., Ex. A, ¶¶ 18.3, 19.4, 20.8, 21.5.) The audit statements, however, indicate
2 that Show Ready underpaid these required contributions from August 2008 to June
3 2013. (See Armstrong Decl. ¶¶ 2, 7, Ex. B.) As an employer obligated under the
4 terms of the CBAs to make contributions to the Trust Funds, a multiemployer plan,
5 Show Ready’s failure to make such contributions constitutes a violation of ERISA
6 section 515. See 29 U.S.C. § 1145.

7 The Trust Funds also allege that Murphy is personally liable for the delinquent
8 contributions under several theories. First, the Trust Funds point to California
9 Corporations Code section 17703.04,² which provides: “A member of a limited
10 liability company shall be subject to liability under the common law governing alter
11 ego liability, and shall also be personally liable under a judgment of a court or for any
12 debt, obligation, or liability of the limited liability company . . . under the same or
13 similar circumstances and to the same extent as a shareholder of a corporation may be
14 personally liable for any debt, obligation, or liability of the corporation.” Cal. Corp.
15 Code § 17703.04(b). However, the Trust Funds present no evidence or even an
16 allegation that Murphy is a member of Show Ready; they merely allege that he is the
17 “President” of Show Ready. (Compl. ¶ 6.) Thus, this statute does not establish
18 Murphy’s personal liability for Show Ready’s debts.

19 Second, the Trust Funds argue that the CBA specifically provides that the
20 “Employer” shall be held “personally responsible to the[ir] employees” for any unpaid
21 benefits. (Mot., Ex. A.) This also does not help the Trust Funds. The CBA defines
22 “Employer” as Show Ready. (*Id.*) This cannot be construed to include the President
23 of Show Ready, who may not even have an ownership interest in the company.
24 Moreover, this provision holds the employer responsible to the “employees” for
25 unpaid contributions, not the Trust Funds. Thus, the Trust Funds’ argument fails.

26 Finally, the Trust Funds make various amorphous suggestions that this Court
27 should hold Murphy liable under an alter ego theory or a veil piercing theory. These

28 ² The Trust Funds erroneously cite this statute as section 17101.

1 arguments are insufficiently developed to preserve them. *See, e.g., Greenwood v.*
2 *F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994). Moreover, the Court does not agree with
3 them on the merits. The common element to all types of veil piercing or alter ego
4 theories is that one entity is essentially an artifice for another entity (or person) to
5 wrongfully escape liability. *See, e.g., Seymour v. Hull & Moreland Eng'g*, 605 F.2d
6 1105, 1111 (9th Cir.1979); *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465,
7 1472 (9th Cir. 1994). Here, while the Trust Funds argue in their moving papers that
8 this is the case as between Show Ready and Murphy, there are no allegations in the
9 complaint and no evidence submitted with the Motion to this effect. Without any such
10 allegations or evidence, the Trust Funds cannot establish on a motion for default
11 judgment that some sort of veil piercing is appropriate. In sum, this factor thus
12 weighs in favor of granting default judgment only as to Show Ready.

13 3. The Amount at Stake Weighs in Favor of Default Judgment

14 To determine whether the damages sought are proper for the scope of default
15 judgment, “the court must consider the amount of money at stake in relation to the
16 seriousness of [d]efendant’s conduct.” *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp.
17 2d 1172, 1176–77 (C.D. Cal. 2002). The Trust Funds request a total reimbursement
18 of \$128,099.5, including delinquent health and welfare contributions in the amount of
19 \$91,245.15, delinquent working dues contributions of \$1,603.76, liquidated damages
20 of \$12,013.32, interest of \$16,299.77, and audit fees of \$6,937.50. Given that the
21 evidence before the Court shows that Defendants failed to make benefit contributions
22 to the Trust Funds as required under the CBAs, thereby violating § 1145, and that the
23 judgments the Trust Funds request are allowed under § 1132, this factor weighs in
24 favor of default judgment. *See* 29 U.S.C § 1145; 29 U.S.C § 1132(g).

25 4. There is No Possibility of Dispute as to Material Facts

26 As illustrated in the discussion of the second *Eitel* factor, the Trust Funds
27 sufficiently allege that Show Ready failed to make benefit contributions as required
28 under the CBAs. It is well established that “[u]pon entry of default, all well-pleaded

1 facts in the complaint are taken as true, except those relating to damages.” *PepsiCo*,
2 238 F. Supp. 2d at 1177. Because Defendants never responded to the Complaint and
3 introduced no evidence to counter the Trust Funds’ claims, “no factual disputes exist
4 that would preclude the entry of default judgment.” *Vogel v. Rite Aid Corp*, 992 F.
5 Supp. 2d 998, 1013 (C.D. Cal. 2014).

6 5. There is Little Possibility Default was Due to Excusable Neglect

7 The Trust Funds effected proper service under Federal Rule of Civil Procedure
8 4(e)(1) and California Code of Civil Procedure section 415.20(b) by substituted
9 service to Murphy’s mailing address, and proper service under Federal Rule of Civil
10 Procedure 4(h)(1)(B) by serving Show Ready’s authorized agent. In addition, the
11 Trust Funds served both Defendants with an Amended Request for Entry of Default
12 on February 6, 2017. (Mot. at 14-16.) As such, there is no evidence of excusable
13 neglect because Defendants were not only notified of the lawsuit, but also a possible
14 entry of a default judgment. Therefore, this factor also weighs in favor of default
15 judgment.

16 6. Policy for Deciding on the Merits Weighs in Favor of Granting
17 Default Judgment

18 In *Eitel*, the court maintained that “[c]ases should be decided upon their merits
19 whenever reasonably possible.” *Eitel*, 782 F.2d at 1472. While this factor will always
20 disfavor the entry of judgment, it alone does not outweigh the other factors that clearly
21 favor entry of judgment. The Court thus concludes that the *Eitel* factors favor the
22 Court entering a default judgment against Show Ready. However, because the Trust
23 Funds have not shown a meritorious case against Murphy, the Court declines to enter
24 a default judgment against him.

25 **C. Amount of Judgment**

26 **1. Damages**

27 In an action to recover delinquent contributions, the Court must award the
28 following:

- 1 (A) the unpaid contributions,
- 2 (B) interest on the unpaid contributions,
- 3 (C) an amount equal to the greater of--
 - 4 (i) interest on the unpaid contributions, or
 - 5 (ii) liquidated damages provided for under the plan in an amount
6 not in excess of 20 percent (or such higher percentage as may be
7 permitted under Federal or State law) of the amount determined by
8 the court under subparagraph (A),
- 9 (D) reasonable attorney’s fees and costs of the action, to be paid by the
10 defendant, and
- 11 (E) such other legal or equitable relief as the court deems appropriate.

12 29 U.S.C. § 1132(g)(2). The Ninth Circuit has held that audit costs are recoverable
13 under § 1132(g)(2)(E). *Operating Eng’rs Pension Tr. v. A-C Co.*, 859 F.2d 1336,
14 1343 (9th Cir. 1988).

15 A plaintiff cannot rely solely on allegations to establish damages, for “even a
16 defaulting party is entitled to have its opponent produce some evidence to support an
17 award of damages.” *LG Elecs., Inc. v. Advance Creative Comput. Corp.*, 212 F. Supp.
18 2d 1171, 1178 (N.D. Cal. 2002); *see also Wecosign, Inc. v. IFG Holdings, Inc.*, 845 F.
19 Supp. 2d 1072, 1079 (C.D. Cal. 2012) (“[A]llegations of the amount of damages
20 suffered are not necessarily taken as true.”). For the purposes of a default judgment in
21 an ERISA action, audit reports are sufficient to establish the amount of underpaid
22 contributions, interest, and liquidated damages. *See Cent. Cal. IBEW/NECA Pension*
23 *Trust v. Ozzimo Elec., Inc.*, No. C 13-03800 JSW, 2015 WL 1883906, at *4 (N.D. Cal.
24 Apr. 22, 2015); *Bd. of Trs. of Laborers Health & Welfare Tr. Fund for N. Cal. v. C &*
L Coatings, Inc., No. C 12-1368 PJH MEJ, 2012 WL 7748318, at *7 (N.D. Cal. Dec.
18, 2012); *Bd. of Trs. v. KMA Concrete Const. Co.*, No. C-10-05774 JCS, 2011 WL
7446345, at *3 (N.D. Cal. Dec. 20, 2011).

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1 As far as the Court can tell, the Trust Funds seek the following amount in
 2 damages:

	Aug. 2008 – July 2011	Aug. 2011 – June 2013	June 2013 – Oct. 2015	TOTAL
Delinquent Health and Welfare Contributions	\$13,108.95	\$20,340.71	\$57,795.49	\$91,245.15
Delinquent Working Dues Contributions	\$650.78	\$952.98	-	\$1,603.76
Interest	\$5,340.07	\$4,849.3	\$6,110.40	\$16,299.77
Liquidated Damages	\$1,310.9	\$2,034.07	\$8,668.35	\$12,013.32
Audit Fees	\$1,350	\$1,012.5	\$4,575	\$6,937.50
TOTAL	\$21,760.7	\$28,189.56	\$77,149.24	<u>\$128,099.50</u>

22 The audit reports submitted by the Trust Funds are sufficient to establish their
 23 entitlement to recover underpaid contributions, interest, and liquidated damages for
 24 the periods of August 2008 to July 2011 and August 2011 to June 2013.

25 The amounts owed between June 2013 and October 2015, however, is more
 26 complex. An employee of the Trust Funds submitted a declaration attesting that they
 27 have not conducted a formal audit of the amounts owed for that period. (Moreno
 28 Decl. ¶ 8.) Nonetheless, that same employee attests as to the total amount in

1 delinquent contributions, interest, liquidated damages, and audit fees that are
2 outstanding for the two audit periods and the June 2013 to October 2015 period. (*Id.*
3 ¶¶ 9–10, 12.) Thus, by subtracting from this total amount the damages owed for the
4 two audit periods, the Court has calculated that the Trust Funds seek outstanding
5 contributions for the June 2013 to October 2015 period in the amount of \$57,795.49,
6 audit fees in the amount of \$4,575, and interest and liquidated damages on such
7 underpaid contributions amount to \$6,110.40 and \$8,668.35, respectively. The
8 employee declares that Show Ready submitted monthly payroll reports for certain
9 months after June 2013,³ which presumably enabled the Trust Funds to calculate the
10 contributions due for those months. However, the amount in outstanding
11 contributions for those months totals only \$40,532.18. Thus, it is unclear how the
12 Trust Funds calculated the remaining \$17,263.31 in outstanding contributions.
13 Conclusory declarations alone are insufficient to support the amount of damages in a
14 default judgment, *see Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981); *Rubicon*
15 *Glob. Ventures, Inc. v. Chongqing Zongshen Grp. Imp./Exp. Corp.*, 630 F. App'x
16 655, 658 (9th Cir. 2015), and thus the Court does not award this \$17,263.31 in
17 outstanding contributions. The Court thus concomitantly reduces the interest and
18 liquidated damages for the June 2013 to October 2015 period to \$4,285.24 and
19 \$6,079.14, respectively. Accordingly, the Court awards the Trust Funds damages in
20 the total amount of \$101,847.45.

21 Finally, although attorneys' fees and costs are generally recoverable in ERISA
22 actions, the Trust Funds here have not requested an award of either fees or costs in
23 their Motion. Thus, the Court does not award any such fees or costs.

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28 ³ Those months include July 2013, October 2013, January 2014, February 2014, May 2014, June 2014, and July 2014. (Moreno Decl. ¶ 8.)

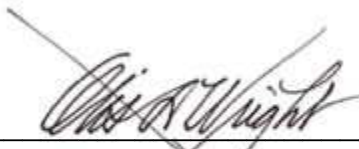
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V. CONCLUSION

For the reasons discussed above, the Court **GRANTS** Plaintiffs' Motion for Default Judgment as to Defendant Show Ready, and **DENIES** the Motion as to Defendant Murphy.

IT IS SO ORDERED.

July 10, 2017



OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE