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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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)	
BOARD OF TRUSTEES OF THE SHEET)	No. 08-2038 SC
METAL WORKERS LOCAL 104 HEALTH)	
CARE PLAN; BOARD OF TRUSTEES OF)	
THE SHEET METAL WORKERS PENSION)	<u>DEFAULT JUDGMENT</u>
TRUST OF NORTHERN CALIFORNIA;)	
SHEET METAL WORKERS LOCAL 104)	
VACATION, HOLIDAY SAVINGS PLAN;)	
ANTHONY ASHER, TRUSTEE,)	
)	
Plaintiffs,)	
)	
v.)	
)	
TOTAL AIR BALANCE COMPANY, INC.,)	
dba TABCO INC.,)	
)	
Defendant.)	
)	
_____)	

I. INTRODUCTION

Before the Court is the Motion for Default Judgment ("Motion") submitted by Plaintiffs Board of Trustees of the Sheet Metal Workers Local 104 Health Care Plan, et al., ("Plaintiffs"). Docket No. 28. Defendant Total Air Balance Company, Inc., d/b/a T A B C O Inc. ("TABCO"), was duly notified of these proceedings, but has not participated. See Certificate of Service, Docket No. 17. An Entry of Default as to TABCO has been filed. Docket No. 25. The Court previously noted that TABCO had not been timely served with either the Complaint or the Amended Complaint. Show-

1 Cause Order, Docket No. 33. The Court ordered Plaintiffs to show
2 cause as to why the suit should not be dismissed on this basis,
3 id., and the Plaintiffs have submitted a Response, Docket No. 35.

4 The Court concludes that the suit should not be dismissed.
5 For the reasons stated herein, the Court GRANTS Plaintiffs'
6 Motion, and AWARDS Plaintiffs damages, interest, and attorneys'
7 fees and costs in the amount of \$32,405.81.

8
9 **II. BACKGROUND**

10 In 1999, TABCO affirmed an agreement with Plaintiffs, binding
11 it to a collective bargaining agreement. Van Den Heuvel Decl.¹
12 Ex. 1 ("CBA"). Plaintiffs contend that TABCO is bound by the CBA
13 to abide by the Sheet Metal Workers Pension Trust Agreement,
14 Maraia Decl.² Ex. 2 ("Trust Agreement"), and the requirements of
15 the Employee Retirement Income Security Act of 1974 ("ERISA").
16 First Am. Compl., Docket No. 4, ¶¶ 5-6. TABCO is thereby required
17 to make monthly payments to Plaintiffs on behalf of TABCO's
18 employees, in amounts that are determined according to the hours
19 worked by TABCO's employees. Id. ¶ 5.

20 Starting in September of 2007, TABCO allegedly missed several
21 required contributions, thereby violating the CBA and Trust
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24 ¹ Mark Van Den Heuvel, business representative of Sheet Metal
25 Workers Local Union No. 104, submitted a declaration in support of
the Motion. Docket No. 29.

26 ² Bonnie Maraia, fund manager of the Plaintiffs'
27 administrator, submitted a declaration in support of the Motion.
Docket No. 30.

1 Agreement. See Carroll Decl. in Resp. to Order to Show Cause³
2 ("Second Carroll Decl.") ¶ 1. Plaintiffs filed their original
3 Complaint in April of 2008. Docket No. 1. TABCO made
4 contributions for the period specifically described in the
5 Complaint, but failed to make payments due almost immediately
6 thereafter. Plaintiffs amended their Complaint to reflect these
7 changed circumstances. See Am. Compl. ¶ 7. On June 2, 2008,
8 after Plaintiffs had filed their First Amended Complaint, TABCO
9 again paid its overdue contributions. Second Carroll Decl. ¶ 3.
10 However, TABCO continued to miss payment deadlines. TABCO's
11 payment for August of 2008 (due on September 20, 2008) was two
12 days late. See Maraia Decl. Ex. 3 ("Liability Detail Sheet").
13 Then in November of 2008, when the payment for the October 2008,
14 period was due, TABCO allegedly paid \$7354.05 less than the total
15 amount due. Second Carroll Decl. ¶ 5. After receiving this short
16 payment, Plaintiffs finally served the First Amended Complaint
17 upon TABCO on December 5, 2008. Id. ¶ 5-6; Certificate of
18 Service. TABCO was thereafter allegedly late in submitting all of
19 its contributions for November and December of 2008, and late in
20 submitting part of its contributions for January of 2009. See
21 Liability Detail Sheet. Plaintiffs now seek a default judgment
22 against TABCO for the liquidated damages and interest incurred
23 from its late contributions.

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27 ³ Michael Carroll, counsel for Plaintiffs, submitted a
28 declaration in response to the Order to Show Cause. Docket No. 35.

1 **III. LEGAL STANDARD**

2 After entry of default, the Court may enter a default
3 judgment. Fed. R. Civ. P. 55(b)(2). The default judgment "must
4 not differ in kind from, or exceed in amount, what is demanded in
5 the pleadings." Id. 54(c). The Court's decision whether to enter
6 a default judgment, while "discretionary," Aldabe v. Aldabe, 616
7 F.2d 1089, 1092 (9th Cir. 1980), is guided by several factors.
8 First, the Court must "assess the adequacy of the service of
9 process on the party against whom default is requested." Bd. of
10 Trs. of the N. Cal. Sheet Metal Workers v. Peters, No. C-00-0395,
11 2000 U.S. Dist. LEXIS 19065, at *2 (N.D. Cal. Jan. 2, 2001). If
12 the Court determines that service was sufficient, it may consider
13 the following factors, if present, in its decision on the merits
14 of a motion for default judgment:

15 (1) the possibility of prejudice to the plaintiff, (2)
16 the merits of plaintiff's substantive claim, (3) the
17 sufficiency of the complaint, (4) the sum of money at
18 stake in the action, (5) the possibility of a dispute
19 concerning material facts, (6) whether the default was
20 due to excusable neglect, and (7) the strong policy
21 underlying the Federal Rules of Civil Procedure favoring
22 decisions on the merits.

23 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). "The
24 general rule of law is that upon default the factual allegations
25 of the complaint, except those relating to the amount of damages,
26 will be taken as true." Geddes v. United Fin. Group, 559 F.2d
27 557, 560 (9th Cir. 1977). Therefore, for the purposes of this
28 Motion, the Court accepts as true the facts as alleged in the
First Amended Complaint.

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1 **IV. DISCUSSION**

2 **A. Dismissal Under Rule 4(m)**

3 Rule 4(m) of the Federal Rules of Civil Procedure states
4 that, if a defendant is not served within 120 days after a
5 complaint is filed, the district court "must dismiss the action
6 without prejudice against that defendant or order that service be
7 made within a specified time." Fed. R. Civ. P. 4(m). The Rule
8 further states that, should the plaintiff show good cause for the
9 failure to provide timely service, the court "must extend the time
10 for service for an appropriate period." Id. If good cause is
11 later shown, then the "district court may . . . extend time for
12 service retroactively after the 120-day service period has
13 expired." United States v. 2,164 Watches, 366 F.3d 767, 772 (9th
14 Cir. 2004).

15 Plaintiffs filed their original Complaint with the Court on
16 April 18, 2008, and their First Amended Complaint on May 20, 2008.
17 Docket Nos. 1, 4. However, Defendant was not served until
18 December 5, 2008 -- well after the 120 day deadline set out by
19 Rule 4(m). See Certificate of Service. Thus, absent good cause,
20 the Court must dismiss this action. In determining whether
21 Plaintiffs have shown good cause, the Court has broad discretion,
22 and "may consider factors 'like a statute of limitations bar,
23 prejudice to the defendant, actual notice of a lawsuit, and
24 eventual service.'" Efaw v. Williams, 473 F.3d 1038, 1041 (9th
25 Cir. 2007) (quoting Troxell v. Fedders of N. Am., Inc., 160 F.3d
26 381, 383 (7th Cir. 1998)).

27 The Court concludes that Plaintiffs have shown good cause for
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1 the delay. For much of the period prior to service, Plaintiffs
2 believed that the suit would not need to be pressed and could be
3 dismissed. See Second Carroll Decl. ¶ 5. However, TABCO soon
4 resumed its delinquent behavior, and it again began to accumulate
5 liquidated damages. See id. ¶ 5; id. Ex. 3. These facts suggest
6 that late service was not the result of a lack of diligence by the
7 Plaintiffs' counsel. More importantly, there is no basis for
8 finding that TABCO was prejudiced by the delay, as it was clearly
9 and repeatedly made aware of the suit. During the period before
10 the Complaint was filed, and then numerous times thereafter,
11 Plaintiffs were in frequent contact with TABCO. See Carroll Decl.
12 in Supp. of Mot.⁴ ("First Carroll Decl.") Ex. 6; Second Carroll
13 Decl. Exs. 1, 2, 3. These correspondences specifically refer to
14 and cite the current action. For example, a July 16, 2008 letter
15 bore a subject heading with the name and case number for this
16 action, and attached an order from this Court continuing a case
17 management conference. Second Carroll Decl. Ex. 1. These
18 correspondences strongly suggest that TABCO had actual knowledge
19 of the pending suit, and that it was therefore in no way
20 prejudiced by the delay of service. The Court concludes that
21 Plaintiffs have shown good cause for late service, and will not
22 dismiss the action under Rule 4(m).

23 **B. Default Judgment**

24 1. Remedy for Post-Complaint Payments

25 As the facts of this case illustrate, ERISA funds often face

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27 ⁴ Carroll also submitted a declaration in support of the
28 Motion. Docket No. 31.

1 something of a moving target when they seek judicial remedies for
2 late or unpaid fund contributions. Plaintiffs here initially
3 brought suit seeking to recover unpaid contributions for September
4 and November of 2007. See Compl. ¶ 7. Only after Plaintiffs
5 filed this suit in April, 2008, did TABCO finally make these
6 payments. See Second Carroll Decl. ¶¶ 1-2. TABCO then
7 immediately defaulted on its contributions for March of 2008,
8 which came due on April 20, 2008. See id. Plaintiffs thereafter
9 amended their Complaint to cover only the March, 2008,
10 contribution, along with "additional monthly amounts [that] may
11 become due during the course of this litigation." First Am.
12 Compl. ¶ 7. On June 2, 2008, less than two weeks after Plaintiffs
13 submitted their First Amended Complaint, TABCO made its
14 contribution for the period of March, 2008. Second Carroll Decl.
15 ¶ 3. TABCO then resumed its practice of submitting late payments.
16 See Id. ¶ 5, Ex. 3. Rather than continue the process of amending
17 their Complaint, Plaintiffs finally served TABCO in December of
18 2008. Plaintiffs now seek to collect liquidated damages and
19 interest for late payments that have come due between September,
20 2008, and February, 2009. Mot. at 2-3. In short, TABCO has
21 remedied the controversy specifically described in the First
22 Amended Complaint (the contribution for March, 2008), but has
23 continued to accumulate penalties through subsequent late
24 payments, generally described by the First Amended Complaint as
25 "additional monthly amounts [that] bec[a]me due during the course
26 of this litigation." First Am. Compl. ¶ 7. The question before
27 the Court is therefore whether Plaintiffs can now seek a default
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1 judgment to recover liquidated damages that accumulated after the
2 First Amended Complaint was filed, and which were only
3 prospectively described in the First Amended Complaint. See First
4 Am. Compl. ¶ 7.

5 This case is nearly identical to the facts presented by St.
6 Paul Electrical Construction Industry Fringe Benefits Fund v.
7 Martens Electric Co., 485 F. Supp. 2d 1063 (D. Minn. 2007). In
8 his thorough decision, Judge Schiltz discussed a complaint that
9 had been filed by a pension fund against an employer, which sought
10 to collect on a single delinquent contribution, and which prayed
11 for further relief for "damages related to pension contributions
12 that the employer misses in the future." Id. at 1067. These
13 later-missed contributions were described to the Court in later-
14 filed affidavits, and became the basis for damages sought by the
15 pension fund in its motion for declaratory judgment. Id. at 1063.
16 Judge Schiltz expressed "grave concerns" about whether "a default
17 judgment may be granted for relief that was not specifically
18 described in the complaint and that arose out of conduct that did
19 not occur until *after* the complaint was filed and *after* the
20 defendant decided not to defend." Id. at 1068 (emphasis in
21 original). This Court share's Judge Schiltz's concerns.

22 In particular, it is questionable whether the Federal Rules
23 of Civil Procedure allow a court to award a judgment by default
24 that grants relief not specifically described in the complaint.
25 See Fed. R. Civ. P. 54(c) ("A default judgment must not differ in
26 kind from, or exceed in amount, what is demanded in the
27 pleadings."). As Judge Schiltz noted, a vague statement in the
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1 complaint that suggest the possibility of future liability,
2 coupled with a statement of intent to recover on that liability,
3 cannot generally amount to "a short and plain statement of the
4 claim showing that the pleader is entitled to relief." Martens
5 Electric, 485 F. Supp. 2d at 1068; Fed. R. Civ P. 8(a)(2). Worse
6 yet, giving judicial effect to a vague statement that only
7 portends future liability could potentially result in a failure of
8 due process. Generally, after a plaintiff files a complaint, a
9 defendant has the opportunity to make a calculated decision, based
10 on the scope of his liability, as to whether or not it is in his
11 interest to appear or answer. However, if a plaintiff were
12 permitted to file a complaint that merely describes a vague
13 expectation of continuing and increasing liability, and should the
14 defendant default, then the plaintiff could wait months or even
15 years before moving for default judgment. Should the motion be
16 granted, the defendant could face liability far beyond that
17 specifically described by the complaint. See Martens Electric,
18 485 F. Supp. 2d at 1067.

19 In spite of these concerns, Judge Schiltz ultimately granted
20 default judgment in the case before him, because "the protections
21 provided by the Civil Rules, like most other legal protections,
22 can be waived." Id. at 1069. Moreover, the defendant's due
23 process rights were not violated under the facts presented in
24 Martens Electric, because the defendant had been served with all
25 of the papers justifying the pension fund's request and leading up
26 to the final determination. Id. After considering the record,
27 this Court also finds that default judgment as to TABCO is
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1 appropriate, given the specific context presented by TABCO's
2 chronically late payments, and the peculiar history of this
3 litigation.

4 First and foremost, like the pension fund in Martens
5 Electric, Plaintiffs have served TABCO not only with the Complaint
6 and First Amended Complaint, but with many of the subsequent
7 papers that it has filed with the Court, including applications to
8 continue case management conferences, see Docket Nos. 14, 22; see
9 also Second Carroll Decl. Ex. 2, the motion for default, see
10 Docket No. 19, the motion for default judgment with all supporting
11 declarations and attachments, Mot. at 6-7, and even the
12 Plaintiffs' response to the Court's show-cause Order, see Resp. at
13 4. No Federal Rule requires service of these documents, but
14 having been served, they force the conclusion that TABCO has been
15 kept well apprised of this law suit. The papers that Plaintiffs
16 continually served upon TABCO describe in detail the basis and
17 extent of TABCO's growing liability, and the calculations used to
18 justify it. See, e.g., Liability Detail Sheet. Yet TABCO raised
19 no objection.

20 Also significant to the Court's decision is TABCO's previous
21 history of intermittent compliance, and in particular the pattern
22 of payment and nonpayment that has occurred since this suit began.
23 Twice during the course of this litigation, Plaintiffs have filed
24 a Complaint with the Court only to have TABCO pay the
25 contributions specifically described by the Complaint, and then
26 subsequently return to its delinquent behavior. See Compl. ¶ 7;
27 First Am. Compl. ¶ 7; Second Carroll Decl. ¶¶ 1-3. The Court

1 could fairly require Plaintiffs to submit yet another amended
2 complaint, or a supplemental pleading as permitted by Rule 15(d),
3 and to again move for a default under Rule 55(a). However, as the
4 Court has said, TABCO's delinquency has been a moving target.
5 Based on TABCO's previous behavior, the Court recognizes that it
6 is quite likely that the extent and scope of TABCO's delinquency
7 will have changed by the time the amendment or supplementation
8 process had played out, thereby requiring further amendments from
9 the Plaintiffs and further entries of default from court
10 personnel. Rather than allow this process to play out
11 indefinitely, the Court finds it appropriate in this case to
12 consider all damages that had occurred by the time that default
13 was entered against TABCO, and for which TABCO had received fair
14 and full notice from Plaintiffs.

15 In reaching this conclusion, the Court is not granting an
16 award that "differ[s] in kind from, or exceed[s] in amount, what
17 is demanded in the pleadings." Fed. R. Civ. P. 54(c). Although
18 the First Amended Complaint merely includes a prospective
19 description of possible damages, TABCO had notice of this claim
20 and ample time to challenge it. It never did so, despite the fact
21 that it potentially had plausible and compelling grounds for
22 dismissal. This pleading must now "be construed so as to do
23 justice." Fed. R. Civ. P. 8(e). As a party to the CBA and Trust
24 Agreement of the Plaintiffs, and as a contributor to the fund,
25 TABCO had notice of the obligations described in the complaints,
26 and was capable of tracking its liability as the delinquent
27 payments accumulated. It therefore was fully apprised of the

1 scope of liability sought in Plaintiffs' First Amended Complaint,
2 which warned that Plaintiffs would seek "[a]dditional monthly
3 amounts [that] become due during the course of this litigation."
4 First Am. Comp. ¶ 7. The Court finds that it is in the interest
5 of justice to award Plaintiffs' prayer for relief, and will ensure
6 that the award is limited, in kind and in amount, to that
7 generally demanded in the First Amended Complaint.

8 2. Eitel Factors

9 Having decided that Plaintiffs may pursue remedies for
10 damages accrued after the First Amended Complaint was filed, the
11 Court must now consider whether default judgment is appropriate
12 under the Eitel factors. Accepting the allegations in the
13 Complaint as true, as it must, the Court finds that the Eitel
14 factors favor default judgment. As previously discussed, TABCO
15 has had ample notice of the action, including all claims for
16 liability against it that arose after the First Amended Complaint
17 was filed, and it will not be unduly prejudiced by the entry of a
18 default judgment.

19 Plaintiffs' substantive claims have merit. Section 502(a) of
20 ERISA gives the participants and beneficiaries of an ERISA-
21 governed pension plan a cause of action in federal court where an
22 employer violates the terms of the plan. 29 U.S.C. §
23 1132(a)(1)(B), (a)(3). Plaintiffs have further shown that, by
24 failing to make timely contributions, TABCO has violated the terms
25 of the Agreement. Mot. at 3. The sum of money is relatively
26 small -- Plaintiffs are only seeking damages of \$30,855.81, to
27 which they are contractually entitled as liquidated damages and
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1 interest collected on late contributions. See Mot. at 3. Given
2 TABCO's continued failure to respond to the Plaintiffs' rolling
3 updates for this case, there would likely be no dispute concerning
4 material facts.

5 TABCO's default was clearly not the result of excusable
6 neglect. As previously noted, TABCO was properly served.
7 Plaintiffs sent notice to TABCO regarding its contribution
8 payments before the suit was ever filed. See First Carroll Decl.
9 Ex. 6. Plaintiffs thereafter continued to correspond with TABCO
10 regarding the litigation. See Second Carroll Decl. Exs. 1, 2, 3.
11 While it is preferable to decide cases on the merits whenever
12 possible, this preference is not dispositive. Where a party fails
13 to defend against a complaint, as TABCO has failed to do here,
14 Rule 55 authorizes the Court to enter default judgment. Kloeping
15 v. Fireman's Fund, No. 94-2684, 1996 U.S. Dist. LEXIS 1786, at *10
16 (N.D. Cal. Feb. 14, 1996).

17 **C. Remedy**

18 Plaintiffs now seek to recover liquidated damages and
19 interest under the terms of the Trust Agreement. Mot. at 3. The
20 Trust Agreement sets liquidated damages at 20% of the amount of
21 the delinquent payment. See Trust Agreement, Item III § C,
22 Amendment Number Three. Based on information provided to
23 Plaintiffs by TABCO, this amounts to \$29,159.27, covering August
24 of 2008 to January of 2009. See Liability Detail Sheet.
25 Plaintiffs further seek interest for the days during which the
26 payments were late, Mot. at 3, which they are contractually
27 entitled to, see Trust Agreement Item III § C. The interest rate

1 is set by the Board of Trustees, see Trust Agreement Item III § C,
2 and the current rate is 15% annually, see First Carroll Decl. ¶ 7-
3 8, Ex. 7. Plaintiffs seek interest in the amount of \$1696.54.
4 See Liability Details Sheet. The Court GRANTS Plaintiffs' request
5 for interest and liquidated damages.

6 Plaintiffs also request attorneys' fees under 29 U.S.C.
7 § 1132(g)(2)(D), which states that upon a judgment in favor of a
8 plan in a suit such as this, the court shall award the plan
9 reasonable attorneys' fees and costs. Mot. at 4. Plaintiffs are
10 also entitled to fees under the Trust Agreement. Trust Agreement,
11 Item 3, § E. Plaintiffs have submitted a description of their
12 fees and costs totaling \$1550. First Carroll Decl. ¶¶ 2-5. The
13 Court GRANTS Plaintiffs' request for fees and costs.

14
15 **V. CONCLUSION**

16 For the foregoing reasons, the Court GRANTS Plaintiffs
17 default judgment. The Court hereby AWARDS Plaintiffs liquidated
18 damages of \$29,159.27, interest of \$1696.54, plus \$925.00 in
19 attorney fees and \$625.00 in costs, for a total judgment of
20 \$32,405.81.

21
22 IT IS SO ORDERED.

23
24 June 17, 2009

25 

26 UNITED STATES DISTRICT JUDGE