

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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BOARD OF TRUSTEES, in their	)	No.09-2005 SC
capacities as Trustees of the	)	
CEMENT MASONS HEALTH AND WELFARE	)	
TRUST FUND FOR NORTHERN	)	ORDER REQUIRING
CALIFORNIA, CEMENT MASONS PENSION	)	DEFENDANT TO SUBMIT
TRUST FUND FOR NORTHERN	)	TO AUDIT; DENYING
CALIFORNIA, CEMENT MASONS	)	<u>DEFAULT JUDGMENT</u>
VACATION/HOLIDAY TRUST FUND FOR	)	
NORTHERN CALIFORNIA, CEMENT MASONS	)	
APPRENTICESHIP AND TRAINING TRUST	)	
FUND FOR NORTHERN CALIFORNIA,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
S L R CONCRETE CONSTRUCTION, INC.,	)	
A California Corporation,	)	
	)	
Defendant.	)	
	)	
_____	)	

**I. INTRODUCTION**

Before the Court is the Motion for Default Judgment ("Motion") submitted by Plaintiffs Board of Trustees of the Cement Masons Health and Welfare Trust, et al. ("Plaintiffs"). Docket No. 13. Defendant S L R Concrete Construction, Inc. ("SLR"), was duly notified of these proceedings, but has not participated. See Proof of Service, Docket No. 4. An Entry of Default as to SLR has been filed. Docket No. 7.

1           Although the Court concludes that Plaintiffs may be entitled  
2 to default judgment as to the amount at issue, Plaintiffs have  
3 requested that this Court enforce Plaintiffs' contractual right to  
4 audit SLR's records pertaining to a significant amount at issue in  
5 this dispute. The Court concludes that the audit is appropriate,  
6 and ORDERS SLR to comply with an audit by Plaintiffs' auditors.  
7 However, given the need for an audit and the possibility that the  
8 amount due to Plaintiffs might be affected by this audit, the  
9 Court concludes that a final default judgment would be premature.  
10 Plaintiffs may submit a second motion for default judgment after  
11 the audit of SLR's records is complete.

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13 **II. BACKGROUND**

14           In 2005, SLR executed an agreement with Plaintiffs, binding  
15 it to a collective bargaining agreement. See John Hagan Decl.  
16 Exs. A ("CBA"), B ("Mem. of Agreement").<sup>1</sup> Plaintiffs contend that  
17 SLR is bound by the CBA to abide by the Cement Masons Master  
18 Agreement, Hagan Decl. Exs. C, D (collectively, "Master  
19 Agreements"), and the requirements of the Employee Retirement  
20 Income Security Act of 1974 ("ERISA"). Compl., Docket No. 1, at  
21 2. SLR is thereby required to make monthly payments to Plaintiffs  
22 on behalf of SLR's employees, in amounts that are determined  
23 according to the hours worked by SLR's employees. Id. at 3.

24           Plaintiffs allege that SLR has missed a number of payments  
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26           <sup>1</sup> John Hagan ("Hagan"), Accounts Receivable Manager for the  
27 Laborers Funds Administrative Office of Northern California,  
28 submitted a declaration in support of the Motion. Docket No. 15.

1 that have become due under the Master Agreements. Id. at 3-4.  
2 Plaintiffs filed their Complaint in May of 2009, seeking the  
3 payments due, liquidated damages, attorney fees, an order that SLR  
4 submit to a contractually required audit to determine if  
5 additional fees are due, and an order requiring SLR to timely  
6 submit all required monthly contribution reports. Compl. at 6.

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8 **III. LEGAL STANDARD**

9 After entry of default, the Court may enter a default  
10 judgment. Fed. R. Civ. P. 55(b)(2). The default judgment "must  
11 not differ in kind from, or exceed in amount, what is demanded in  
12 the pleadings." Id. 54(c). The Court's decision whether to enter  
13 a default judgment, while "discretionary," Aldabe v. Aldabe, 616  
14 F.2d 1089, 1092 (9th Cir. 1980), is guided by several factors.  
15 First, the Court must "assess the adequacy of the service of  
16 process on the party against whom default is requested." Bd. of  
17 Trs. of the N. Cal. Sheet Metal Workers v. Peters, No. C-00-0395,  
18 2000 U.S. Dist. LEXIS 19065, at \*2 (N.D. Cal. Jan. 2, 2001). If  
19 the Court determines that service was sufficient, it may consider  
20 the following factors, if present, in its decision on the merits  
21 of a motion for default judgment:

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

27 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). "The  
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1 general rule of law is that upon default the factual allegations  
2 of the complaint, except those relating to the amount of damages,  
3 will be taken as true." Geddes v. United Fin. Group, 559 F.2d  
4 557, 560 (9th Cir. 1977). Therefore, for the purposes of this  
5 Motion, the Court accepts as true the facts as alleged in the  
6 Complaint.

7  
8 **IV. DISCUSSION**

9 Plaintiffs properly served SLR with the Complaint and Summons  
10 in this action on May 23, 2009. See Proof of Service. The Proof  
11 of Service indicates that the documents were delivered to Laura  
12 Romanazzi, who is recorded with the California Secretary of State  
13 as SLR's designated agent for service. Id.; Hagan Decl. Ex. E.  
14 This service complies with Rule 4(h)(1)(B) of the Federal Rules of  
15 Civil Procedure.

16 Accepting the allegations in the Complaint as true, as it  
17 must, the Court finds that the Eitel factors favor default  
18 judgment. The Plaintiffs' substantive claims appear solid on the  
19 merits, and are pled sufficiently in the Complaint. Section  
20 502(a) of the Employee Retirement Income Security Act of 1974  
21 ("ERISA") gives the participants and beneficiaries of an ERISA-  
22 governed pension plan a cause of action in federal court where an  
23 employer violates the terms of the plan. See 29 U.S.C. §  
24 1132(a)(1)(B), (a)(3). Plaintiffs have further shown that, by  
25 failing to make timely contributions, SLR has violated the terms  
26 of the CBA and Master Agreements. Mot. at 2. It is unlikely that  
27 there can be a dispute over any of the factual issues that cannot  
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1 be resolved by reference to SLR's own records, which Plaintiffs  
2 now seek to access. Part of the amount of money at issue will be  
3 based upon these records. The rest of the amount that Plaintiffs  
4 are seeking is recorded in the Complaint, which SLR has declined  
5 to challenge; Plaintiffs have demonstrated or will demonstrate  
6 that they are entitled by contract to this amount.<sup>2</sup>

7 SLR's default cannot be said to be the result of excusable  
8 neglect. As previously noted, SLR was properly served. While it  
9 is preferable to decide cases on the merits whenever possible,  
10 this preference is not dispositive. Where a party fails to defend  
11 against a complaint, as SLR has failed to do here, Rule 55  
12 authorizes the Court to enter default judgment. Klopping v.  
13 Fireman's Fund, No. C 94-2684, 1996 U.S. Dist. LEXIS 1786, at \*10  
14 (N.D. Cal. Feb. 14, 1996).

15 Plaintiffs have submitted evidence (based on a prior audit of  
16 SLR's records) that SLR is delinquent in the amount of \$3925.42  
17 for the period between August of 2005 and June of 2007. Mot at 3-  
18 4; Hagan Decl. ¶ 11, Ex. F. Plaintiffs calculate that they are  
19 entitled to liquidated damages and interest totaling \$8125.01 for  
20 this period. Hagan Decl. ¶ 11, Ex. G. Although Plaintiffs have  
21 firmly established that SLR owes the base amount due for this  
22 period (\$3925.42), they have not cited to the portions of the  
23 agreements, or the rate-setting decisions of the various funds,  
24 that set the amount of liquidated damages or interest rates. This  
25 makes it difficult for the Court to independently confirm

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27 <sup>2</sup> The Court notes that Plaintiffs have apparently sought to  
28 enforce less than the full amount stated in the Complaint.

1 Plaintiffs' liquidated damage calculations. When Plaintiffs  
2 submit a second motion for default judgment, they must include  
3 enough information to allow the Court to independently confirm  
4 their liquidated damages calculations.

5 Plaintiffs have also submitted evidence that SLR has reported  
6 that it owes Plaintiffs an additional \$13,151.50 for the period  
7 between December of 2008 and February of 2009. Id. ¶ 13, Ex. H.  
8 The liquidated damages for this period have been calculated at  
9 \$6840.54. Id. ¶ 13, Ex. I. Plaintiffs request that the Court  
10 order SLR to submit to an audit for this period. Plaintiffs have  
11 demonstrated that they are contractually entitled to such an audit  
12 upon a written request by Plaintiffs. See Master Agreements  
13 § 8(g). Under 29 U.S.C. § 1132(g)(2)(E), this Court is authorized  
14 to award whatever equitable relief it deems appropriate. The  
15 Court GRANTS Plaintiffs' request for this injunctive relief.

16 Hagan has attested to the importance of conducting an audit  
17 for the period between December of 2008 and February of 2009.  
18 Hagan Decl. ¶ 18. While the Court believes that Plaintiffs have  
19 submitted sufficient documents to establish that SLR is liable in  
20 the amount of \$17,076.92 (the total base amount due for all  
21 periods at issue), the Court finds it inappropriate to grant  
22 judgment based on this amount before Plaintiffs have completed  
23 their audit. In addition, the Court expects that Plaintiffs will  
24 be able to claim an additional \$14,965.55 in liquidated damages  
25 after they submit further documentary support for this figure;  
26 this amount may also be altered by Plaintiffs' audit of SLR's  
27 records. The Court therefore finds that judgment in this matter

1 -- including Plaintiffs' request for attorney fees -- is  
2 premature.

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4 **V. CONCLUSION**

5 For the foregoing reasons, the Court DENIES Plaintiffs'  
6 Motion for Default Judgment without prejudice. Plaintiffs must  
7 serve SLR with this Order in a manner that complies with the  
8 requirements for service of summons and complaints set out in Rule  
9 4 of the Federal Rules of Civil Procedure.

10 SLR is ORDERED to submit to an audit by the auditors selected  
11 by Plaintiffs at SLR's premises during business hours, or where  
12 the records are kept, by scheduling within twenty (20) days of the  
13 date that SLR is served with this Order, an appointment with  
14 Plaintiffs' auditor, in accordance with the auditors'  
15 availability. SLR shall permit the auditor to review all records  
16 that are relevant to enforcement of the Collective Bargaining  
17 Agreement and Master Agreements. Upon completion of the audit of  
18 SLR's records, Plaintiffs may submit to this Court a second motion  
19 for default judgment. Any request for attorney fees must be in  
20 accordance with the local rules.

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22 IT IS SO ORDERED.

23  
24 December 9, 2009

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27 UNITED STATES DISTRICT JUDGE