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**United States District Court**  
For the Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

	)	
	)	
BOARD OF TRUSTEES, in their	)	No. 09-2005 SC
capacities as Trustees of the	)	
CEMENT MASONS HEALTH AND WELFARE	)	
TRUST FUND FOR NORTHERN	)	ORDER GRANTING MOTION
CALIFORNIA, CEMENT MASONS PENSION	)	<u>FOR DEFAULT JUDGMENT</u>
TRUST FUND FOR NORTHERN	)	
CALIFORNIA, CEMENT MASONS	)	
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"). ECF No. 28. The Court entered default as to Defendant S L R Concrete Construction, Inc. ("Defendant" or "SLR"). ECF No. 7. The Court ordered SLR to comply with an audit. ECF No. 18 ("Dec. 9, 2009 Order"). Having reviewed the Motion and all supporting papers,

1 the Court GRANTS the Motion.

2  
3 **II. BACKGROUND**

4 SLR is a general building contractor. Hagan Decl. ¶ 8.<sup>1</sup> In  
5 2005, SLR executed an agreement with Plaintiffs, binding it to a  
6 collective bargaining agreement ("CBA"). See Hagan Decl. Exs. A  
7 ("Trust Agreements"), B ("Mem. of Agreement"). Plaintiffs contend  
8 that SLR is bound by the CBA to abide by the Cement Masons Master  
9 Agreement, Hagan Decl. Exs. C, D (collectively, "Master  
10 Agreements"), and the requirements of the Employee Retirement  
11 Income Security Act of 1974 ("ERISA"). Compl., ECF No. 1. SLR is  
12 required to make monthly payments to Plaintiffs on behalf of SLR's  
13 employees in amounts that are determined according to the hours  
14 worked by SLR's employees. Id. at 3.

15 Plaintiffs allege that SLR missed a number of payments due  
16 under the Master Agreements. Id. at 3-4. Plaintiffs filed their  
17 Complaint in May 2009, seeking the payments due, liquidated  
18 damages, attorneys' fees, and an order that SLR submit to an audit  
19 to determine if additional fees were due. Compl. at 6. On  
20 December 9, 2009, the Court denied Plaintiff's first motion for  
21 default judgment as premature, but required SLR to submit to an  
22 audit. See Dec. 9, 2009 Order. The audit was completed on March  
23 24, 2010, covering the period of August 2005 to December 2009.  
24 Mot. at 2. Plaintiffs sent the results of the audit to SLR on May

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26 \_\_\_\_\_  
27 <sup>1</sup> John Hagan ("Hagan"), Accounts Receivable Manager for the  
28 Laborers Funds Administrative Office of Northern California,  
submitted a declaration in support of the Motion. ECF No. 30.

1 11, 2010. Id. SLR has failed to dispute the amounts, and failed  
2 to pay the amounts due. Id. On October 8, 2010, Plaintiffs filed  
3 their renewed Motion for Default Judgment. See Mot.  
4

5 **III. LEGAL STANDARD**

6 After entry of default, the Court may enter a default  
7 judgment. Fed. R. Civ. P. 55(b)(2). The Court's decision whether  
8 to enter a default judgment, while "discretionary," Aldabe v.  
9 Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980), is guided by several  
10 factors. First, the Court must "assess the adequacy of the  
11 service of process on the party against whom default is  
12 requested." Bd. of Trs. of the N. Cal. Sheet Metal Workers v.  
13 Peters, No. C-00-0395, 2000 U.S. Dist. LEXIS 19065, at \*2 (N.D.  
14 Cal. Jan. 2, 2001). If the Court determines that service was  
15 sufficient, it may consider the following factors:

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

26 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). "The  
27 general rule of law is that upon default the factual allegations  
28 of the complaint, except those relating to the amount of damages,  
will be taken as true." Geddes v. United Fin. Group, 559 F.2d  
557, 560 (9th Cir. 1977).

1 **IV. DISCUSSION**

2 **A. Service of Process**

3 Plaintiffs properly served SLR with the Complaint and  
4 Summons. See ECF No. 4 ("Proof of Service"). The Proof of  
5 Service indicates that the documents were delivered to Laura  
6 Romanazzi, who is recorded with the California Secretary of State  
7 as SLR's designated agent for service. Id.; Hagan Decl. Ex. E.  
8 This service complies with Rule 4(h)(1)(B) of the Federal Rules of  
9 Civil Procedure.

10 **B. Default Judgment**

11 Accepting the allegations in the Complaint as true, as it  
12 must, the Court finds that the Eitel factors favor default  
13 judgment. Section 502(a) of ERISA gives the participants and  
14 beneficiaries of an ERISA-governed pension plan a cause of action  
15 in federal court where an employer violates the terms of the plan.  
16 See 29 U.S.C. § 1132(a)(1)(B), (a)(3). By failing to make timely  
17 contributions, SLR has violated the terms of the CBA and Master  
18 Agreements. Therefore, Plaintiffs' substantive claims appear  
19 solid on the merits, and are pled sufficiently in the Complaint.

20 SLR's default cannot be said to be the result of excusable  
21 neglect. As previously noted, SLR was properly served.  
22 Plaintiffs also sent the results of the Court-ordered audit to  
23 SLR. Hagan Decl. ¶ 17. Although federal policy favors a decision  
24 on the merits, Rule 55(b) allows entry of default judgment in  
25 situations where defendants fail to litigate. Courts are less  
26 inclined to enter default judgment if there is a large sum of  
27 money at stake. See Eitel, 782 F.2d at 1472 (denying default  
28

1 judgment where plaintiff sought almost three million dollars).  
2 Here, Plaintiffs seek an award of \$154,122.72. See ECF No. 31  
3 ("Proposed Order"). Mot. at 2-3. Although the amount of money at  
4 stake is substantial, the Court finds that on balance the Eitel  
5 factors favor default judgment.

6 **C. Unpaid Contributions, Liquidated Damages and Interest**

7 Plaintiffs seek an award based on unpaid contributions,  
8 liquidated damages, and interest from August 2005 to December  
9 2009. Mot. at 2. Before this litigation began, Plaintiffs  
10 conducted an audit of SLR's books and records for the period  
11 August 2005 through June 2007. Hagan Decl. ¶ 11. After the Court  
12 ordered SLR to submit to an audit, Plaintiffs conducted another  
13 audit for the period of August 2005 through December 2009 and  
14 found that SLR owed \$87,293.95 in delinquent contributions. Id.  
15 Plaintiffs have provided the Court with a chart summarizing the  
16 results of this audit, and breaking down the amount of  
17 contributions that were due to each of the four trusts. Id. Ex. F  
18 ("Audit Summary and Statement of Contributions Due"). SLR also  
19 self-reported contributions owed to Plaintiffs in the amount of  
20 \$13,151.50 for the period of December 2008 to February 2009, which  
21 were not part of the audit amounts found to be due and owing. Id.  
22 ¶ 12, Ex. H ("Statement of Self-Reported Contributions Due").

23 Based on the amount of delinquent contributions uncovered by  
24 the audits, Plaintiffs assessed liquidated damages and interest in  
25 the amount of \$33,658.67 against SLR. Id. ¶ 11, Ex. G ("Interest  
26 and Liquidated Damages on Unpaid Contributions"). Based on the  
27 amount of self-reported delinquent contributions, Plaintiffs

1 assessed liquidated damages and interest in the amount of \$5786.70  
2 against SLR. Id. ¶ 12, Ex. I ("Interest and Liquidated Damages on  
3 Self-Reported Contributions").

4 Finally, SLR paid contributions for the months of December  
5 2005, and September 2008 through January 2009, but the payments  
6 were late. As a result, Plaintiffs assessed liquidated damages  
7 and interest in the amount of \$4169.75 against SLR. Id. ¶ 13, Ex.  
8 J ("Interest and Liquidated Damages on Late Payments").

9 Both interest and liquidated damages are authorized by  
10 statute. 29 U.S.C. § 1132(g)(2). Unpaid contributions must exist  
11 at the time of suit for statutory liquidated damages to be  
12 awarded. Idaho Plumbers and Pipefitters Health and Welfare Fund  
13 v. United Mech. Contractors, Inc., 875 F.2d 212, 215-16 (9th Cir.  
14 1989). Plaintiffs may also recover liquidated damages on  
15 contributions that became due after the Complaint was filed. See  
16 Roofers Local Union No. 81 v. Wedge Roofing, Inc., 811 F. Supp.  
17 1398, 1401-02 (N.D. Cal. 1992) (finding it would undermine policy  
18 goals of deterring ERISA violations to require plaintiff to file  
19 multiple lawsuits to recover liquidated damages which came due  
20 after complaint was filed).

21 Here, the first audit was conducted before the Complaint was  
22 filed, and based on audits conducted, Plaintiffs found that SLR  
23 owed contributions, liquidated damages and interest. SLR was sent  
24 a copy of the audit results and did not dispute them. Hagan Decl.  
25 ¶ 17. Having failed to respond to this lawsuit, even after its  
26 books were audited as a result of this Court's Order, and based on  
27 the evidence submitted, the Court finds that Plaintiffs are

1 entitled to \$100,445.45 in delinquent contributions (\$87,293.95 +  
2 \$13,151.50), and liquidated damages and interest in the amount of  
3 \$43,615.12 (\$33,658.67 + \$5786.70 + \$4169.75).

4 **D. Attorneys' Fees and Costs**

5 In addition, under ERISA, Plaintiffs are entitled to recover  
6 reasonable attorneys' fees and costs. 29 U.S.C. § 1132(g)(2);  
7 Operating Engineers Pension Trust v. Reed, 726 F.2d 513, 514 (9th  
8 Cir. 1984). The declaration submitted by Plaintiffs' counsel  
9 outlines the billing rates, explains the work performed by  
10 attorneys and one paralegal, and describes the experience of the  
11 attorneys and paralegal who worked on the case. Lozano-Batista  
12 Decl. ¶¶ 4-8.<sup>2</sup> Accordingly, the Court awards Plaintiffs  
13 attorneys' fees of \$9406.25. Plaintiffs' counsel itemized their  
14 incurred costs. Id. ¶ 13. The Court awards costs of \$655.90.

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27 <sup>2</sup> Concepción E. Lozano-Batista, attorney for Plaintiffs, filed  
28 a declaration in support of the Motion. ECF No. 29.

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**V. CONCLUSION**

For the foregoing reasons, the Court GRANTS the Motion for Default Judgment filed by Plaintiffs Board of Trustees, in their capacities as Trustees of the Cement Masons Health and Welfare Trust Fund for Northern California, Cement Masons Pension Trust Fund for Northern California, Cement Masons Vacation/Holiday Trust Fund for Northern California, and Cement Masons Apprenticeship and Training Trust Fund for Northern California.

IT IS SO ORDERED.

December 28, 2010



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UNITED STATES DISTRICT JUDGE