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UNITED STATES DISTRICT COURT
For the Northern District of California

UNITED STATES DISTRICT COURT
Northern District of California

BAY AREA PAINTERS AND TAPERS
PENSION TRUST FUND, *et al.*,

No. C 10-0851 JSW (MEJ)

Plaintiffs,

**REPORT AND RECOMMENDATION
RE: PLAINTIFF’S MOTION FOR
DEFAULT JUDGMENT (DKT. #25)**

v.

INTERIOR PARTITIONS, INC., a California
Corporation, and JOHN HENRY KOOGLE,
an individual,

Defendants.

_____ /

I. INTRODUCTION

Before the Court is Plaintiff Bay Area Painters and Tapers Pension Trust Fund and its trustees’ (“Plaintiffs”) motion for default judgment. (Dkt. #25.) On September 15, 2010, Plaintiffs’ motion was referred to the undersigned to prepare a report and recommendation. (Dkt. #30.) Based on Plaintiffs’ papers, relevant legal authority, and good cause appearing, the undersigned RECOMMENDS the Court GRANT Plaintiffs’ motion as follows.

II. BACKGROUND

Plaintiffs, an employee benefit plan and its trustees, entered into a collective bargaining agreement (“Agreement”) with Defendant Interior Partitions, Inc. (“Defendant”) on September 7, 2003. (Williams Decl. ¶¶ 2, 3, Exs. A, B, Dkt. #26.) The Agreement requires Defendant to make contributions to Plaintiffs based on the hours worked by employees of Defendant. (Williams Decl.

1 ¶¶ 3, 4, Ex. B, Dkt. #26.) The Agreement incorporates the terms of the Trust Agreements of the
2 District Council 16 Northern California Health & Welfare Trust Fund (“Trust Fund”), which
3 requires Defendant to pay benefit contributions to Plaintiffs and lays out the penalties for failing to
4 do so. (Williams Decl. ¶ 4, Ex. C, Dkt. #26.)

5 The Agreement also provides that all payroll deductions and benefit contributions are due on
6 or before the fifteenth day of the following month, and will be considered delinquent if not received
7 by the end of the month. (Williams Decl., Ex. B Sec. 4(b), Dkt. #26.) If a contribution is
8 delinquent, the Agreement and Trust Fund mandate that Defendant pay Plaintiffs interest on the
9 delinquent contributions, attorney’s fees, and liquidated damages. (Williams Decl., Ex. B Sec. 4(c),
10 Ex. C Sec 3(c), Dkt. #26.)

11 Under the Agreement and specified in the Trust Fund, liquidated damages shall be an amount
12 equal to either 20% of the delinquent contributions, or \$150, whichever is greater. (Williams Decl.,
13 Ex. C Sec. III (C)(2), Dkt. #26.) Interest on delinquent contributions is also due under the
14 Agreement, at a rate of 5% per annum. (Williams Decl. ¶ 5, Ex. B Sec. 4(c), Dkt. #26.) Further, the
15 Agreement provides for reimbursement of attorney’s fees and costs, as well as any other expenses
16 incurred in connection with the delinquency. (Williams Decl., Ex. C Sec. III (E), Dkt. #26.)

17 In October 2009, Plaintiffs retained Lindquist LLP to conduct an audit of Defendant’s
18 payroll records. (Dominguez Decl. ¶¶ 1, 3, 4, Dkt. #27.) Lindquist sent the report to Defendant to
19 dispute the findings, which it did not, and subsequently made the report final on November 25, 2009,
20 and sent it to Plaintiffs. *Id.* at ¶¶ 4, 5. The audit revealed that Defendant failed to report 80
21 reportable hours, resulting in an under payment of \$1,170.40, interest on the underpayment in the
22 amount of \$229.34, and liquidated damages in the amount of \$150, totaling \$1,549.74. (Dominguez
23 Decl., Ex. A, Dkt. #27.) Further, Lindquist LLP discovered there were shortages on contributions
24 for the hours worked by Defendant’s employees during the month of August 2009 in the amount of
25 \$518.70. (Pls.’ Mot. 2:4-9, Dkt. #25.)

26 Plaintiffs sent three letters to Defendant requesting payment in the above amount. (Williams
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1 Decl. ¶¶ 7-9, Exs. F, G, H, Dkt. #26.) On February 10, 2010, John Koogle¹ responded to Plaintiffs
 2 on behalf of Defendant, stating that the individual in question in the audit may not be an employee
 3 of Defendant and requesting an extension on the payment due. (Williams Decl. ¶ 10, Ex. J, Dkt.
 4 #26.) Plaintiffs sent additional letters and documentation to Koogle, confirming that the individual
 5 in question was an employee of Defendant, and requesting payment. *Id.* at ¶¶ 11-13, Exs. K, L, M.

6 Payment not forthcoming, on March 1, 2010, Plaintiffs filed their Complaint. (Dkt. #1.) On
 7 May 19, 2010, the Clerk of Court entered default against Defendant, (Dkt. #14), and Plaintiff filed
 8 the present motion for default judgment on September 15, 2010. (Dkt. #25.)

9 All told, Plaintiffs seek compensation as follows:

| | | | | |
|----|-----------------|------------------------|------------|-------------------|
| 10 | Audit | Contribution | | \$1,170.40 |
| 11 | | Underpayments | | |
| 12 | | Liquidated Damages | | \$150.00 |
| 13 | | Interest | | <u>\$229.34</u> |
| 14 | | | | \$1,549.74 |
| 15 | 7/09 | 20% Liquidated Damages | \$608.58 | |
| 16 | | 5% Interest | \$16.67 | |
| 17 | | | | \$625.25 |
| 18 | 8/09 | Contribution shortage | \$518.70 | |
| 19 | | 20% Liquidated Damages | \$1,256.64 | |
| 20 | | 5% Interest | \$34.43 | |
| 21 | | | | \$1,809.77 |
| 22 | 9/09 | 20% Liquidated Damages | \$184.70 | |
| 23 | | 5% Interest | \$.38 | |
| 24 | | | | \$185.08 |
| 25 | Subtotal | | | \$2,620.10 |

26 ¹Plaintiffs’ motion for default is against Defendant Interior Partitions, Inc. only, as Defendant
 27 Koogle filed a Chapter 7 Bankruptcy Petition and Plaintiffs filed a Notice of Automatic Stay as to
 28 Koogle. Accordingly, all references to “Defendant” throughout this Report and Recommendation
 are to Defendant Interior Partitions.

| | | |
|---|--------------------|--------------------|
| 1 | Audit Testing Fees | \$2,354.25 |
| 2 | Attorney's Fees | \$6,454.00 |
| 3 | Costs | \$1,073.56 |
| 4 | TOTAL | \$14,051.65 |

5 (Pls.' Mot. 2:13-23, Dkt. #25.)

6 On November 14, 2010, the undersigned held a hearing on Plaintiffs' motion. Defendant did
7 not appear at the hearing and has not otherwise responded.

8 **III. DISCUSSION**

9 In their motion for default judgment, Plaintiffs argue that they are entitled to delinquent
10 contribution payments, reimbursement of audit fees, liquidated damages at 20%, interest on
11 delinquent and unpaid contributions, as well as attorney's fees and costs as a matter of law pursuant
12 to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"),
13 specifically 29 U.S.C. § 1132(g). (Pls.' Mot. 4:16-5:6, Dkt. #25.)

14 **A. Legal Standard**

15 Federal Rule of Civil Procedure ("FRCP") 55(b)(2) permits a court, following a default by a
16 defendant, to enter a final default judgment in a case. The court has discretion in determining
17 whether to grant or deny a motion for entry of default judgment. *Draper v. Coombes*, 792 F.2d 915,
18 924 (9th Cir. 1986) (citing *Aldabe v. Aldabe*, 616 F.2d 1089, 1092-93 (9th Cir. 1980) ("The district
19 court's decision whether to enter a default judgment is a discretionary one.")).

20 The Ninth Circuit has enumerated several factors which the court may consider in exercising
21 its discretion as to whether an entry of default judgment is proper: (1) the possibility of prejudice to
22 the plaintiff; (2) the merits of the plaintiff's substantive claim and the sufficiency of the complaint;
23 (3) the sum of money at stake; (4) the possibility of dispute concerning material facts; (5) whether
24 default was due to excusable neglect; and (6) the strong policy underlying the Federal Rules of Civil
25 Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir.
26 1986).

27 In applying this discretionary standard, the factual allegations contained in the plaintiff's
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1 complaint will be taken as true, except for those relating to the amount of damages. *Televideo*
2 *Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir.1987); *see also Kingvision Pay-Per-View,*
3 *Ltd. v. Rivers*, 2000 WL 356378, *1 (N.D. Cal. 2000) (“Generally, upon an entry of default, the
4 factual allegations of the plaintiff’s complaint will be taken as true.”).

5 Where a default judgment is granted, the scope of relief is limited by Federal Rule of Civil
6 Procedure 54(c): “A default judgment must not differ in kind from, or exceed in amount, what is
7 demanded in the pleadings.”

8 **B. Jurisdiction**

9 When considering whether to enter a default judgment, a court has “an affirmative duty to
10 look into its jurisdiction over both the subject matter and the parties.” *In re Tuli*, 172 F.3d 707, 712
11 (9th Cir. 1999) (“To avoid entering a default judgment that can later be successfully attacked as
12 void, a court should determine whether it has the power, i.e., the jurisdiction, to enter the judgment
13 in the first place.”) Here, the District Court has subject-matter jurisdiction pursuant to 29 U.S.C.
14 §1132, which provides that plan fiduciaries can bring civil actions to enforce the terms of the plan,
15 in that Plaintiffs seek to enforce the provisions of ERISA and the terms of their plans, seek to enjoin
16 the acts and practices of Defendant which violate ERISA, seek equitable relief to redress such
17 violations, and seek all other appropriate relief under ERISA. (Compl. ¶ 6, Dkt. #1.) Further,
18 jurisdiction exists in this Court over all claims by virtue of the Labor Management Relations Act, 29
19 U.S.C. §141 *et seq.* (“LMRA”) specifically 29 U.S.C. §185², in that Plaintiffs seek to enforce the
20 terms and conditions of a collective bargaining agreement. *Id.* at ¶ 7.

21 Personal jurisdiction exists over Defendant, as it is a California Corporation and an employer
22 by virtue of 29 U.S.C. § 1002(5)³, and the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*,

24 ²This LMRA section discusses venue and jurisdiction, and provides that “[s]uits for violation
25 of contracts between an employer and a labor organization . . . may be brought in any district court
26 of the United States having jurisdiction of the parties, without respect to the amount in controversy
or without regard to the citizenship of the parties.”

27 ³ “[A]ny person acting directly as an employer, or indirectly in the interest of an employer, in
28 relation to an employee benefit plan; and includes a group or association of employers acting for an

1 (“NLRA”), specifically 29 U.S.C. § 152(2)⁴. Defendant entered into the Agreement, which requires
2 the payment of dues to the Union, and contributions to be made to Plaintiffs and other funds more
3 fully described in the Agreement. (Williams Decl. Ex. B, Dkt. #26.) Defendant has a statutory duty
4 to timely make the required payments to Plaintiffs under 29 U.S.C. §1145⁵ and 29 U.S.C. §185(a)⁶.
5 By failing to make the required payments to the Plaintiffs, Defendant breached the Agreement and is
6 in violation of the above statutes.

7 **C. Application to the Case at Bar**

8 1. Prejudice to Plaintiffs

9 Under the first *Eitel* factor, the Court must examine whether Plaintiffs will suffer prejudice if
10 default judgment is not granted. *Eitel*, 782 F.2d at 1471-72. It appears to the undersigned that
11 Plaintiffs’ claims against Defendant for infringing the Agreement and Trust Fund are sound and well
12 plead. If the Court were to deny plaintiffs’ motion for default judgment, Plaintiffs would have no
13 other avenue for recovery. *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal.
14 2002). This action has already been stayed against Defendant Koogle following his filing of a
15 personal bankruptcy action. Further delay in securing a judgment in favor of Plaintiffs only serves to
16 increase the chances that Plaintiffs will not be able to recover the amounts due by Defendant.
17 Consequently, the first *Eitel* factor weighs in favor of granting default judgment.

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19 employer in such capacity.”

20 ⁴ “[A]ny person acting as an agent of an employer, directly or indirectly”

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22 ⁵This ERISA section contemplates delinquent contributions and provides that “[e]very
23 employer who is obligated to make contributions to a multiemployer plan under the terms of the plan
24 or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with
25 law, make such contributions in accordance with the terms and conditions of such plan or such
26 agreement.”

27 ⁶This LMRA section discusses proper venue, and provides that “[s]uits for violation of
28 contracts between an employer and a labor organization representing employees in an industry
affecting commerce as defined in this chapter, or between any such labor organizations, may be
brought in any district court of the United States having jurisdiction of the parties, without respect to
the amount in controversy or without regard to the citizenship of the parties.”

1 2. Sufficiency of the Complaint and Likelihood of Success on the Merits

2 The second *Eitel* factor addresses the sufficiency of Plaintiffs’ complaint and the probability
3 of success on the merits of its underlying claim. *Walters v. Statewide Concrete Barrier, Inc.*, 2006
4 WL 2527776, at *4 (N.D. Cal. 2006) (“A party seeking default judgment must state a valid claim
5 upon which it may recover.”).

6 With regard to this factor, 29 U.S.C. § 1145 provides that every employer who is obligated to
7 make contributions under a collective bargaining agreement shall make them in accordance with the
8 terms of such agreement. As stated above, Defendant is an employer by virtue of ERISA and the
9 NLRA, and is a signatory to the Agreement. In an action to enforce Section 1145, Section 1132 of
10 the same title provides that the plan is entitled to the unpaid contributions, interest thereon,
11 reasonable attorney’s fees and costs, and liquidated damages. 29 U.S.C. § 1132(g)(2). Section
12 1132(g)(2)(C)(ii), the liquidated damages provision, applies when: (1) the fiduciary obtains a
13 judgment in favor of the plan; (2) unpaid contributions exist at the time of suit; and (3) the plan
14 provides for liquidated damages. *Idaho Plumbers & Pipefitters Health & Welfare Fund v. United*
15 *Mech. Contractors, Inc.*, 875 F.2d 212, 215 (9th Cir. 1989); *Operating Eng’s Pension Trust v. A-C*
16 *Co.*, 859 F.2d 1336, 1342 (9th Cir. 1988). Once subsection (ii) is triggered, liquidated damages
17 become mandatory. *Idaho Plumbers*, 875 F.2d at 215. Here, the undersigned finds that all the *Idaho*
18 *Plumbers* factors are satisfied. All unpaid contributions due by Defendant existed at the time the
19 complaint was filed, and the Agreement and Trust Fund (which is incorporated into the Agreement)
20 specifically provide for liquidated damages. (*See Williams Decl.* ¶ 4, Dkt. #26.)

21 Thus, 29 U.S.C. § 1132(g)(2), including its liquidated damages provision, is applicable in
22 this matter, which makes the likelihood of Plaintiffs’ success on the merits relatively high. All
23 allegations in the Complaint have been properly pled. Plaintiffs have submitted declarations from
24 their counsel and the Trust Funds’ auditor in support of the factual allegations contained in the
25 complaint and motion for default judgment. Therefore, this factor weighs in favor of granting the
26 motion for default judgment.

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1 3. The Sum of Money at Stake in the Action

2 The third *Eitel* factor assesses the reasonableness of the potential award if a default judgment
3 is entered against Defendant. In making this assessment, the Court must take into account the
4 amount of money at stake in relation to the seriousness of Defendant’s conduct. *Eitel*, 782 F.2d at
5 1471. If the sum of money at issue is reasonably proportionate to the harm caused by the
6 defendant's actions, properly documented, and contractually justified, then default judgment is
7 warranted. *Board of Trustees of Cal. Metal Trades v. Pitchometer Propeller*, 1997 WL 797922, at
8 *2 (N.D. Cal. 1997). However, default judgment is disfavored when a large amount of money is
9 involved or is unreasonable in light of the defendant’s actions. *Truong Giang Corp. v. Twinstar Tea*
10 *Corp.*, No. C 06-3594 JSW, 2007 WL 1545173, at *12 (N.D. Cal. May 29, 2007). In determining if
11 the amount at stake is reasonable, the court may consider plaintiffs’ declarations, calculations, pay
12 stubs, and other documentation of damages. *Id.*

13 a. *Unpaid and Underpaid Contributions, Liquidated Damages, and Interest*

14 The amount of required contributions, as well as rates for liquidated damages and
15 interest, are set forth in the Agreement and Trust Fund to which Defendant is signatory. The amount
16 Defendant owes to Plaintiffs has been established in the declarations of Plaintiffs’ counsel and
17 auditor. Thus, the undersigned finds that the amount requested is reasonable.

18 b. *Attorney Fees, Audit Fees, and Costs of Suit*

19 Section 1132(g) of ERISA requires the Court to award Plaintiffs “reasonable attorney’s fees
20 and costs of the action” when plaintiffs obtain a judgment in their favor or otherwise obtain the relief
21 sought. 29 U.S.C. § 1132(g)(2)(D); *Nw. Adm’rs, Inc. v. Albertson’s, Inc.*, 104 F.3d 253, 258 (9th
22 Cir. 1996). Similarly, the Agreement and Trust Fund provide that attorney’s fees and auditor fees
23 are justified if a contribution is not made or if amounts are found due and owing to the Plaintiffs
24 during the course of an audit. (Williams Decl., Ex. B Sec. 4, Ex. C III (C), Dkt. #26.) Here,
25 Plaintiffs seek reimbursement for \$6,454.00 in attorney’s fees and \$1,073.56 in costs, representing
26 hours worked by several attorneys and a paralegal in seeking to recoup Defendant’s debt to
27 Plaintiffs. (Williams Decl. ¶ 15, Dkt. #26.) Plaintiffs’ attorney has submitted a declaration
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1 summarizing the tasks completed and indicating the hours each person spent on this case along with
2 their hourly rates. *Id.* Further, Plaintiffs’ auditors have submitted a declaration in support of
3 amounts found due on the audit and costs incurred during the course of the audit, totaling \$2,354.25.
4 (Dominguez Decl. ¶ 6, Dkt. #27.) It appears to the undersigned that all amounts incurred in
5 pursuing Defendant’s debts are reasonable and should be awarded to Plaintiffs upon default
6 judgment.

7 4. Possibility of Dispute Concerning Material Facts

8 The fourth *Eitel* factor considers the possibility of dispute as to any material facts of the case.
9 Here, Defendant has not filed an answer, so no dispute concerning material facts has arisen.
10 However, the Williams Declaration illustrates that Defendant was aware of the debts due to
11 Plaintiffs, as Koogle spoke numerous times with counsel for Plaintiffs regarding the debts, on behalf
12 of Defendant. (Williams Decl. ¶¶ 10-13, Dkt. #26.) Further, as the Clerk of Court has already
13 entered default, the Court must take all well pleaded facts, except those pertaining to damages, as
14 true. *TeleVideo Systems*, 826 F.2d at 917-18. Additionally, the evidence submitted by Plaintiffs in
15 support of their motion supports Plaintiffs’ account of the events. The record reflects that little
16 possibility of dispute as to Defendant’s liability for damages exists.

17 5. Possibility of Excusable Negligence

18 The fifth *Eitel* factor contemplates the possibility that Defendant’s default was the result of
19 excusable neglect. Under this analysis, the Court considers whether Defendant was put on adequate
20 notice to apprise them of the pendency of the action brought against it. *Phillip Morris USA, Inc. v.*
21 *Castworld Products, Inc.*, 219 F.R.D. 494, 500 (C.D. Cal. 2003). In addition, the Court also
22 considers whether the circumstances surrounding Defendant’s failure to answer the complaint are
23 sufficient to excuse or justify its default. *Shanghai Automation Instrument Co. v. Kuei*, 194
24 F.Supp.2d 995, 1005 (N.D. Cal. 2001) (Default cannot be attributed to excusable neglect where
25 defendants were properly served with the complaint, the notice of entry of default, and the papers in
26 support thereof).

27 Here, there is little possibility of excusable neglect. As noted in the Williams Declaration
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1 and Plaintiffs' motion, Defendant was duly served with the complaint and summons in this Action.
2 (Williams Decl. ¶ 15, Dkt. #26; Pls.' Mot. 3:3-13, Dkt. #25; Dkt. ##4, 9.) Plaintiffs likewise sent
3 Defendant the notice of default and informed Defendant of the default judgment hearing, and of the
4 undersigned's Notice of Referral and deadline to file any opposition to the motion. (Dkt. ## 12, 15,
5 20, 24, 29.) Despite this, Defendant did not file any opposition, and has not otherwise made an
6 appearance in this action.

7 6. Policy for Deciding on the Merits

8 Under the final *Eitel* factor, the Court must consider the strong policy of the federal courts in
9 favoring decisions on the merits. However, this policy is not dispositive; rather, the Court still has
10 great latitude in exercising its discretion with regards to the relative weight of the remaining *Eitel*
11 factors. *PepsiCo, Inc. v. California Security Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002).
12 Furthermore, the "defendant's failure to answer the plaintiff's complaint makes a decision on the
13 merits of a case impractical, if not impossible." *Id.* As a consequence, the policy of favoring
14 decisions on the merits does not necessarily preclude a court from granting a default judgment when
15 the defendant fails to respond. *Walters*, 2006 WL 2527776, at *6.

16 Here, Defendant has refused to participate in the proceedings brought against it, despite
17 adequate notice and opportunity to do so. Thus, default judgement is appropriate despite the strong
18 policy of the federal courts in favoring decisions on the merits.

19 **IV. CONCLUSION**

20 Based on the foregoing, the undersigned RECOMMENDS that the Court GRANT Plaintiffs'
21 motion for default judgment and award Plaintiffs \$14,051.65 as follows:

- 22 (1) \$1,549.74, the sum of contribution underpayments and liquidated damages and interest
23 thereon; plus
24 (2) \$625.25 in liquidated damages and interest accrued in July 2009; plus
25 (3) \$1,809.77, the sum of the contribution shortage in August 2009 and liquidated damages
26 and interest accrued; plus
27 (4) \$185.08 in liquidated damages and interest accrued in September 2009; plus
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(5) \$2,354.25 in audit testing fees; plus

(6) \$6,454.00 in attorney's fees and \$1,073.56 in costs.

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b)(2), a party may serve and file objections to this Report and Recommendation 14 days after being served.

IT IS SO RECOMMENDED.

Dated: November 5, 2010



Maria-Elena James
Chief United States Magistrate Judge