

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OPERATING ENGINEERS' HEALTH
AND WELFARE TRUST FUND FOR
NORTHERN CALIFORNIA, et al.,

Plaintiffs,

v.

VORTEX MARINE CONSTRUCTION
INC.,

Defendant.

Case No. 17-cv-03614-KAW

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT**

Re: Dkt. No. 66

On June 22, 2017, Plaintiffs filed the instant case against Defendant Vortex Marine Construction, Inc., alleging that Defendant failed to pay contributions for hours worked by its employees, as required by the Bargaining and Trust Agreements and the Employee Retirement Income Security Act ("ERISA"). (Compl. ¶¶ 15, 20.) Pending before the Court is Plaintiffs' motion for summary judgment, seeking interest and liquidated damages on late-paid contributions, as well as reasonable attorney's fees and costs. (Plfs.' Mot. for Summary Judgment, Dkt. No. 66.)

Upon consideration of the parties' filings and relevant legal authorities, as well as the arguments presented at the August 29, 2019 hearing, and for the reasons stated below, the Court GRANTS IN PART and DENIES IN PART Plaintiffs' motion for summary judgment.

I. BACKGROUND

Plaintiffs are employee benefit plans and their respective trustees. (Minser Decl. ¶ 2, Dkt. No. 67.) Defendant is an employer, and a member of the Dredging Contractors Association ("DCA") and Associated General Contractors of California, Inc. ("AGC"). (Brown Decl. ¶¶ 4, 6, 8, Exhs. A ("2013 Master Dredging Agreement") at 14, B ("2016 Master Dredging Agreement") at 16, Dkt. No. 68.)

1 **A. Bargaining Agreements**

2 On June 26, 2013, the DCA and the Operating Engineers Local No. 3 of the International
3 Union of Operating Engineers, AFL-CIO (the “Union”) entered into a collective bargaining
4 agreement, the Master Dredging Agreement Clamshell and Dipper Dredge and Hydraulic Suction
5 Dredge Agreement (“2013 Master Dredging Agreement”). (Brown Decl. ¶ 3.) On July 26, 2016,
6 the DCA and the Union entered into the 2016 Master Dredging Agreement. (Brown Decl. ¶ 5.)
7 Both Master Dredging Agreements impose liquidated damages of the greater of \$35.00 or 15% of
8 the amount due and interest at the rate of 12% per annum on unpaid contributions. (2013 Master
9 Dredging Agreement § 15.01.00; 2016 Master Dredging Agreement § 15.01.00.) Payments are
10 due by the 15th day of the month following the month the work was performed, and are
11 considered delinquent if not received by the bank prior to midnight of the 25th day of that month.
12 (2013 Master Dredging Agreement § 12.01.00; 2016 Master Dredging Agreement § 12.01.00.)

13 Additionally, both Master Dredging Agreements state that all contribution payments:

14 shall be made . . . in the manner provided for by the applicable
15 Employer-Union Trust Agreement creating a Trust or, if not a Trust,
16 at the time and in the manner provided for in this agreement. Each
17 Individual Employer is bound by all the terms and conditions of
18 each Trust Agreement and any amendment or amendments thereto
19 which are incorporated by reference herein.

20 (2013 Master Dredging Agreement § 12.01.00; 2016 Master Dredging Agreement § 12.01.00.)

21 Around July 1, 2013, the AGC entered into the 2013-2016 Master Agreement with the
22 Union. (Brown Decl. ¶ 8.) On July 1, 2016, the AGC entered into the 2016-2020 Master
23 Agreement with the Union. (Brown Decl. ¶ 10.) Both Master Agreements state:

24 The parties recognize and acknowledge that the regular and prompt
25 payment of amounts due to the Trust Funds by Individual
26 Employers is essential to the efficient and fair administration of the
27 Trust funds and the maintenance of plan benefits, and that the
28 Boards of the Trustees of the Trust Funds have established a
 reasonable, diligent, and systematic collection process. If Individual
 Employers do not make timely payments, the Trust Funds lose the
 investment return they should have received, and incur additional
 administrative expenses in the form of letters, telephone calls, and
 other collection expenses. In addition, the Trust Funds incur
 additional management expense by reason of time necessary to
 oversee the collection process by the Board of Trustees, Executive
 Director, and others. The Trust Funds are also delayed or prevented

1 from processing claims by employers for benefits under the plan.

2 (Brown Decl., Exh. D (“2013 Master Agreement”) § 12.13.00; Exh. E (“2016 Master Agreement”)
3 § 12.13.00.) To this end, the Master Agreements impose liquidated damages on unpaid
4 contributions in the amount of 10%. (2013 Master Agreement § 12.13.01; 2016 Master
5 Agreement § 12.13.01.) If, however, a lawsuit is filed to collect delinquent contributions, the
6 amount of liquidated damages is typically increased to 20% of the unpaid contributions. (Id.)
7 Additionally, unpaid contributions accrue interest charges at the rate of 10% per year simple
8 interest. (2013 Master Agreement § 12.13.02; 2016 Master Agreement § 12.13.02.) Contributions
9 are due by the 15th day of the month following the month during which work was performed or
10 paid; payments are considered delinquent if not received by the 25th day of the month following
11 the month during which work was performed or paid. (2013 Master Agreement § 12.01.02; 2016
12 Master Agreement § 12.01.02.) Like the Master Dredging Agreements, the Master Agreements
13 incorporate the terms of the applicable Trust Agreement creating a Trust Fund. (2013 Master
14 Agreement § 12.01.03; 2016 Master Agreement § 12.01.03.)

15 On May 24, 2010, the AGC entered into the Seventeenth Amendment to the Trust
16 Agreement establishing Plaintiff Pension Trust Fund for Operating Engineers. (Brown Decl., Exh.
17 F (“Trust Agreement Amendment”) at 1, 3.) The Seventeenth Amendment amended the
18 provisions regarding delinquent contributions. Like the Master Agreements, the Seventeenth
19 Amendment recognizes that when individual employers fail to make timely payments, the Trust
20 Fund suffers certain administrative expenses, similar to those stated by the Master Agreement.
21 (Id. § 10(A).) In recognition of these harms, liquidated damages are set at 10% of the unpaid
22 contributions prior the filing of a lawsuit, and 20% of the unpaid contributions. (Id. § 10(A)(3).)
23 Interest accrues at the rate of 10% per year simple interest. (Id. § 10(A)(4).) Payments are
24 delinquent if not received by the 25th day of the month immediately following the month in which
25 the work was performed. (Id. § 10(A)(2).)

26 **B. Payment and Audit History**

27 Defendant is required to submit two separate contribution reports per month for account
28 numbers 088410-23 and 088409-59. (Brown Decl. ¶ 17.) On June 22, 2017, Plaintiffs filed the

1 instant suit based on Defendant's failure to pay contribution for hours worked by its employees
2 between August 2016 and April 2017. (Compl. ¶ 15.)

3 Plaintiffs have a dedicated lockbox at Fremont Bank in Hayward, California, where
4 employers mail monthly contribution reports and payments for processing. (Supp. Brown Decl. ¶
5 3, Dkt. No. 78.) Upon receipt by the lockbox, every document is imaged and electronically
6 stamped at the top left corner of each payment with the date the document is processed (received)
7 by the bank. Plaintiffs routinely rely on the Fremont Bank deposit images to determine when
8 payments were received by the bank. (Supp. Brown Decl. ¶ 3.)

9 **i. Payment History**

10 Plaintiffs assert that Defendant was delinquent in paying its July 2013, October through
11 December 2013, August 2014, October 2014, March 2015, October 2015 through February 2016,
12 August 2016 through October 2016, November 2016 through December 2016, January 2017
13 through April 2017, July 2017 through December 2017, January 2018, March 2018, and
14 November 2018 contributions late. (Brown Decl. ¶ 18.) In support of their motion, Plaintiff
15 provide a declaration stating the amount due, due date, payment date, and calculated liquidated
16 damages and interest for each of these contributions. (Brown Decl. ¶¶ 19-69.) On reply, Plaintiff
17 also provides copies of the Fremont Bank deposit images indicating when payments were received
18 and processed, as well as occasional envelopes indicating mailing dates. (See Supp. Brown Decl.,
19 Exhs. A-Y.) Additionally, Plaintiff indicates that some contributions were made via partial
20 payments; for many of the contributions, Plaintiffs do not indicate the amount of the partial
21 payment. (See Brown Decl. ¶¶ 49-56, 58, 60-67; Supp. Brown Decl. ¶¶ 21-25, 27-33.)

22 Defendant asserts that its records show different payments between September 2013 and
23 January 2014. Specifically, Defendant states that a \$12,250.66 check was mailed on September 3,
24 2013, a \$38,692.99 check was mailed on November 22, 2013, a \$50,743.77 check was mailed on
25 December 23, 2013, and a \$54,828.45 check was mailed on January 23, 2014. (Fettig Decl. ¶¶ 14-
26 15, Dkt. No. 73.) These check amounts do not match the Fremont Bank deposit images. (E.g.,
27 Supp. Brown Decl., Exh. A (\$40,834.11 check processed on September 16, 2013), B (\$53,411.87
28 check processed on January 21, 2014), C (\$43,435.10 check processed on November 29, 2013).)

1 All outstanding contribution payments have been paid. (Fettig Decl. ¶ 12; Minser Decl. ¶
2 25, Dkt. No. 67.)

3 **ii. January 1, 2014 through December 31, 2015 Audit**

4 At an unknown time, an audit of Defendant's records was conducted for the period
5 between January 1, 2014 and December 31, 2015. (Fettig Decl. ¶ 3; Williams Decl. ¶ 4, Dkt. No.
6 75.) Although the auditor requested complete payroll records, only W2s were provided.
7 (Williams Decl. ¶ 5.) The audit was conducted primarily by comparing the W2s to the fringe
8 benefit contributions reported by Defendant. (Williams Decl. ¶ 6.) The audit results were
9 provided to Defendant on October 27, 2017. (Fettig Decl. ¶ 3; Williams Decl. ¶ 4.)

10 Defendant asserts that it found the results were false because employees disclosed in the
11 audit report did not actually work for Defendant during that period. (Fettig Decl. ¶ 3.) Shortly
12 thereafter, Defendant's CEO, Blaise Fettig, invited Trustee Dave Harrison to review the payroll
13 records. (Fettig Decl. ¶ 4.) Trustee Harrison reviewed the records and agreed that the audit results
14 were false. (Fettig Decl. ¶ 5.) Plaintiffs, however, continued to include amounts from the audit in
15 their claimed amounts. (Fettig Decl. ¶ 6.) Mr. Fettig told Trustee Harrison that he would be
16 willing to make payments reserving the right to dispute the audit, and Trustee Harrison "indicated
17 that he would pass along [the] offer to their attorney." (Fettig Decl. ¶¶ 7-8.) Defendant received
18 no response. (Fettig Decl. ¶ 8.) Although Defendant was willing and able to make timely
19 payments in 2017 and 2018, it believed it "could not reasonably make the payments, as such
20 [payments] could have been applied to false and disputed sums stemming from the audit." (Fettig
21 Decl. ¶ 9.)

22 Plaintiff responds that on May 10, 2018, Mr. Fettig directly e-mailed Plaintiff's counsel,
23 Matthew Minser, asking for more information about the audit. (Supp. Minser Decl., Exh. A, Dkt.
24 No. 76.) Mr. Fettig stated: "You have indicated that \$25,040.15 was underpaid for that period but
25 our records do not agree. Can you please provide greater detail on this issue?" (Id.) That same
26 day, Mr. Minser sent the audit report to Defendant's counsel. (Supp. Minser Decl., Exh. B.) On
27 May 21, 2018, Defendant's counsel responded that Defendant believed the audit results were
28 incorrect, and asked how to reconcile the discrepancy. (Supp. Minser Decl., Exh. C.) Mr. Minser

1 explained that “dispute documentation (including any backup to substantiate the dispute) should
2 be submitted directly” to Mr. Minser, who would forward it to the auditor. (Supp. Minser Decl.,
3 Exh. D.) Mr. Minser did not receive the audit dispute documentation. (Supp. Minser Decl. ¶ 6.)
4 On October 31, 2018, the day before the parties’ mediation session, Mr. Misner e-mailed
5 Defendant’s counsel, requesting that Defendant bring the dispute documentation. (Supp. Minser
6 Decl., Exh. E.)

7 On November 1, 2018, the parties attended a mediation session. (Williams Decl. ¶ 8.)
8 Plaintiffs’ auditor confirmed that the documentation provided “reduced the amount owed . . . to
9 zero.” (Williams Decl. ¶ 8.) Plaintiffs’ auditor states that the mediation session was the first time
10 the documents were provided to her, and that the documents had been requested at the original
11 audit. (Williams Decl. ¶ 8.)

12 **C. Procedural History**

13 On June 27, 2019, Plaintiffs filed the instant motion for summary judgment. On July 11,
14 2019, Defendant filed its opposition. (Def.’s Opp’n, Dkt. No. 70.) On July 25, 2019, Plaintiffs
15 filed their reply. (Plfs.’ Reply, Dkt. No. 74.)

16 **II. LEGAL STANDARD**

17 “A party may move for summary judgment, identifying each claim or defense—or the part
18 of each claim or defense—on which summary judgment is sought.” Fed. R. Civ. P. 56(a).
19 Summary judgment is appropriate when, after adequate discovery, there is no genuine issue as to
20 material facts and the moving party is entitled to judgment as a matter of law. *Id.*; see *Celotex*
21 *Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Material facts are those that might affect the
22 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a
23 material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for
24 the nonmoving party. *Id.*

25 A party seeking summary judgment bears the initial burden of informing the court of the
26 basis for its motion and of identifying those portions of the pleadings and discovery responses that
27 demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Where the
28 moving party will have the burden of proof at trial, it must affirmatively demonstrate that no

1 reasonable trier of fact could find other than for the moving party. *Southern Calif. Gas. Co. v.*
2 *City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).

3 On an issue where the nonmoving party will bear the burden of proof at trial, the moving
4 party may discharge its burden of production by either (1) “produc[ing] evidence negating an
5 essential element of the nonmoving party’s case” or (2) after suitable discovery, “show[ing] that
6 the nonmoving party does not have enough evidence of an essential element of its claim or defense
7 to discharge its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd., v.*
8 *Fritz Cos., Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000); see also *Celotex*, 477 U.S. at 324-25.

9 Once the moving party meets its initial burden, the opposing party must then set forth
10 specific facts showing that there is some genuine issue for trial in order to defeat the motion. See
11 *Fed. R. Civ. P. 56(e)*; *Anderson*, 477 U.S. at 250. “A party opposing summary judgment may not
12 simply question the credibility of the movant to foreclose summary judgment.” *Far Out Prods.,*
13 *Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001). “Instead, the non-moving party must go beyond
14 the pleadings and by its own evidence set forth specific facts showing that there is a genuine issue
15 for trial.” *Id.* (citations and quotations omitted). The non-moving party must produce “specific
16 evidence, through affidavits or admissible discovery material, to show that the dispute exists.”
17 *Bhan v. NMS Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991). Conclusory or speculative
18 testimony in affidavits and moving papers is insufficient to raise a genuine issue of material fact to
19 defeat summary judgment. *Thornhill Publ’g Co., Inc. v. Gen. Tel. & Electronics Corp.*, 594 F.2d
20 730, 738 (9th Cir. 1979).

21 In deciding a motion for summary judgment, a court must view the evidence in the light
22 most favorable to the nonmoving party and draw all justifiable inferences in its favor. *Anderson*,
23 477 U.S. at 255; *Hunt v. City of Los Angeles*, 638 F.3d 703, 709 (9th Cir. 2011).

24 III. DISCUSSION

25 There is no dispute that Defendant has paid all outstanding contributions due. (Plf.’s Mot.
26 for Summary Judgment at 6; Minser Decl. ¶ 25; Fettig Decl. ¶ 12.) Rather, the parties dispute the
27 amount of liquidated damages and interest due, if any, as well as reasonable attorney’s fees.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A. Audit Dispute

Defendant argues that Plaintiffs cannot seek interest and liquidated damages related to late payments caused by Plaintiffs' erroneous audit results. (Def.'s Opp'n at 4-5.) Defendant contends Plaintiffs knew the audit results were false as of November 2017, but did not remove the disputed amounts. This resulted in Defendant not making payments for other owed, undisputed contributions until October 2018, as Defendant was concerned that its payments would have "been applied to the disputed amounts arising from the erroneous audit result." (Id. at 5.)

Although there is no dispute that the audit results were incorrect, there is a factual dispute as to when Plaintiffs knew the results were incorrect. Regardless, Defendant cites no authority that it was permitted to withhold owed, undisputed contributions until the disputes over unrelated amounts were resolved. Indeed, other courts have found that employers had a contractual obligation to pay the amounts due even when the trust fund had erred.

In *Fanning v. S.M. Lorusso & Sons*, the trust fund sent the employer computer-generated forms detailing the contributions owed. Civil Action No. 02-cv-11859-RGS, 2004 U.S. Dist. LEXIS 881, at *4 (D. Mass. Jan. 26, 2004). The forms, however, erroneously included a 2,080 hour cap, which had been eliminated in the applicable bargaining agreement. *Id.* After the trust fund conducted an audit and discovered that the employer had been underpaying due to the 2,080 hour cap, the employer paid the deficient contributions in full, but refused to pay liquidated damages, interest, and audit costs. *Id.* at *6-7. The employer argued that it should not be required to pay penalties and interest because it had relied on the information provided by the trust fund. *Id.* at *12. The district court disagreed, finding that while both parties were at fault for the error, "ultimately, the apportionment of fault is irrelevant. As a matter of law, the Fund is seeking what is contractually due regardless of who is to blame." *Id.* at *13. Additionally, to the extent the employer asserted equitable estoppel, the district court recognized that "the law has limited the legal and equitable defenses available to employers in delinquent contribution cases" *Id.* at *14; see also *Carpenters Health & Welfare Trust Fund v. Bla-Delco Constr., Inc.*, 8 F.3d 1365, 1369 (9th Cir. 1993) ("Congress and the courts have restricted the availability of contract defenses in trust fund collection actions because 'millions of workers depend upon the employee benefit

1 trust funds for their retirement security.’’).
2

3 Here, there is no dispute that Defendant owed the amounts due, and failed to timely pay.
4 Defendant had a contractual obligation to make the payments due, and Defendant’s assertion that
5 it was concerned about payments being applied to the distributed contributions does not negate
6 Defendant’s obligation to pay the amounts it knew were due. Accordingly, the Court finds that
7 Defendant cannot rely on the audit dispute to justify its failure to timely pay contributions due.

8 **B. Plaintiffs’ Damages Calculation and Payment Application**

9 Next, Defendant argues that there is a dispute over the validity of Plaintiffs’ calculations.
10 (Def.’s Opp’n at 5.) First, Defendant points to a conflict in the payments reported by Plaintiffs
11 and Defendant’s record of payments, specifically a \$12,250.66 check mailed on September 3,
12 2013, a \$38,692.99 check mailed on November 22, 2013, a \$50,743.77 check mailed on December
13 23, 2013, and a \$54,828.45 check mailed on January 23, 2014. (Id. at 6; Fettig Decl. ¶¶ 14-15.)
14 Plaintiff’s records show no payments in these amounts during this time period. (Supp. Brown
15 Decl., Exhs. A-D.)

16 As Plaintiff correctly points out, the date a payment is sent does not affect whether
17 liquidated damages and interest are due, as all applicable agreements require receipt of payment
18 by the 25th of the month following the month that work was performed. (2013 Master Dredging
19 Agreement § 12.01.00; 2016 Master Dredging Agreement § 12.01.00; 2013 Master Agreement §
20 12.01.02; 2016 Master Agreement § 12.01.02; Trust Agreement Amendment § 10(A)(2).)
21 Plaintiffs have also provided affirmative evidence that their bank images and electronically stamps
22 checks when they are received by the bank. (Supp. Brown Decl. ¶ 3.) Defendant, however, has
23 established a dispute as to the amounts sent between September 2013 and January 2014, which
24 affects the July 2013 and October through December 2013 contributions only. Thus, there is a
25 factual dispute as to when these specific contributions were paid, affecting the interest and
26 liquidated damages due. This dispute does not affect later contributions due, as Defendant
27 provides no affirmative evidence that Plaintiffs improperly processed (or failed to process) any
28 other payment.

Second, Defendant argues that Plaintiffs’ interest calculations are ambiguous as to the

1 October 2013, November 2013, December 2016, January 2017, February 2017, March 2017, April
2 2017, August 2017, September 2017 (as to account 088409-59 only), October 2017, November
3 2017, December 2017, January 2018, and March 2018 contributions because each of these
4 involved partial payments on different dates, but Plaintiffs failed to state the amount of partial
5 payments applied on each date. (Def.’s Opp’n at 6.) The Court agrees. Interest accrues on a daily
6 basis, and the amount of daily interest is dependent on the amount of principle owed. Without
7 knowing the amount of each partial payment, the Court cannot determine whether Plaintiffs’
8 interest calculations for these contributions are correct. Accordingly, the Court finds that Plaintiff
9 has failed to establish the interest due for these contributions.

10 Third, Defendant contends that based on its calculation, the interest calculation should be
11 \$8,716.88. (Def.’s Opp’n at 7.) Defendant provides no basis for that calculation. (See Fettig
12 Decl. ¶ 16.) Such conclusory statements are not competent evidence creating a factual dispute as
13 to the amount of interest owed.

14 Notwithstanding, the Court finds that a factual dispute exists as to the July and October
15 through December 2013, December 2016, January 2017, February 2017, March 2017, April 2017,
16 August 2017, September 2017 (as to account 088409-59 only), October 2017, November 2017,
17 December 2017, January 2018, and March 2018 contributions, such that the Court cannot
18 determine the interest due.

19 **C. Usurious Interest Rates**

20 Defendant argues that the 12% interest rate set forth in the Master Dredging Agreements is
21 usurious and void per California Constitution Article XV, § 1, which provides that parties cannot
22 contract for interest rates of more than 10% “[f]or any loan or forbearance of any money, goods,
23 or things in action” By its plain terms, Article XV applies to loans. *Se Wishnev v. Nw. Mut.*
24 *Life Ins. Co.*, 880 F.3d 493, 496 (9th Cir. 2018) (“The amendment, now Article XV, lowered the
25 maximum interest rate that could be charged by covered **lenders.**”) (emphasis added). No loan is
26 at issue in this case. Therefore, Article XV does not apply.

27 Even if Article XV did apply in this case, Plaintiffs do not seek to enforce the 12% interest
28 rate in the Master Dredging Agreements, but the **10%** interest rate of the Trust Agreement

1 Amendment. Thus, Plaintiff is permitted to apply the 10% interest rate.

2 **D. Conflicting Rates**

3 Defendant contends that there are conflicting terms between the contracts because the
4 Master Dredging Agreements have different interest and liquidated damages rates than the Master
5 Agreements and Trust Agreement Amendment. (Def.’s Opp’n at 8.) Defendant suggests this
6 creates a question as to which contract applies. (Id.) The Master Dredging Agreements, however,
7 are clear that payments must be made “in the manner provided for by the applicable Employer-
8 Union Trust Agreement creating a Trust,” and that the “Individual Employer is bound by all the
9 terms and conditions of each Trust Agreement and any amendment or amendments thereto which
10 are incorporated by reference herein.” (2013 Master Dredging Agreement § 12.01.00; 2016
11 Master Dredging Agreement § 12.01.00.) Thus, the Trust Agreement terms with respect to
12 payment supersede the Master Dredging Agreement terms. No conflict exists, and it is clear that
13 the Trust Agreement Amendment applies to establish the interest and liquidated damages rates.

14 **E. Liquidated Damages**

15 Finally, Defendant argues that Plaintiff cannot collect certain liquidated damages. (Def.’s
16 Opp’n at 9.) Here, there are four categories of late payments: (1) contributions that were late but
17 paid before the instant case was filed, (2) contributions that were due but not paid when the case
18 was filed, (3) contributions that were due but partially paid when the lawsuit was filed, and (4)
19 contributions that became due after the lawsuit was filed.

20 **i. Statutory Right to Liquidated Damages**

21 Defendant contends there is no statutory right to liquidated damages to contributions that
22 were late but paid before the case was filed, as well as contributions that became due after the
23 lawsuit was filed. (Def.’s Opp’n at 9-10.)

24 29 U.S.C. § 1132(g)(2) “applies when (1) the fiduciary obtains a judgment in favor of the
25 plan, (2) unpaid contributions exist at the time of suit, and (3) the plan provides for liquidated
26 damages.” *Idaho Plumbers & Pipefitters Health & Welfare Fund v. United Mech. Contractors,*
27 *Inc.*, 875 F.2d 212, 215 (9th Cir. 1989); see also *Parkhurst v. Armstrong Steel Erectors, Inc.*, 901
28 F.2d 796, 797 (9th Cir. 1990) (“unpaid contributions must exist at the time of suit for statutory

1 liquidated damages to be awarded”). There is, however, a “conflict within this District on the
2 specific meaning of the unpaid contributions requirement” Trustees of Bricklayers Local No.
3 3 Pension Trust v. Huddleston, Case No. 10-1708-JSC 2013 WL 2181532, at *5 (N.D. Cal. May
4 20, 2013). “Some decisions have interpreted the language quite literally . . . in that as long as any
5 unpaid contributions exist at the time of filing, the door is open for all damages assessed to an
6 employer’s account, regardless of whether the contributions were eventually paid or remain
7 outstanding.” Id. “[O]ther decisions allowed statutory liquidated damages only for those
8 payments that were actually unpaid when the suit was filed.” Id. The Huddleston court found the
9 latter approach was “most consistent with the language of section 1132(g) and Idaho Plumbers.
10 Section 1132(g) requires liquidated damages on the amount of unpaid contributions for which a
11 judgment is obtained.” Id. Thus, the plaintiffs were “entitled to statutory liquidated damages
12 under section 1132(g) as to those payments which were unpaid at the time this suit was filed.” Id.

13 Here, Plaintiffs are only claiming statutory liquidated damages on contributions that were
14 due but unpaid as of the filing of the suit. (Plfs.’ Reply at 11 (“As set forth in Huddleston, if
15 unpaid contributions exist at the time the lawsuit is filed, liquidated damages assessed on those
16 unpaid contributions are mandatory under the statute notwithstanding whether the contributions
17 are subsequently paid prior to judgment.”).) At the hearing, Defendant argued that Plaintiffs are
18 not entitled to statutory liquidated damages on contributions that were due but not paid by the time
19 the lawsuit was filed. The cases relied on by Defendant do not support its argument. Board of
20 Trustees v. Udovch only addressed statutory “liquidated damages for delinquent contributions
21 which have been paid by the time the suit is filed,” while Board of Trustees v. Davidson
22 Plastering, Inc. found that the plaintiffs were entitled to statutory liquidated damages as to
23 “contributions that became due before the suit was filed but were paid after the filing of the
24 action.” 771 F. Supp. 1044, 1047 (N.D. Cal. 1991); Case No. 15-cv-2386-PJH (DMR), 2016 WL
25 2937462, at *5 (N.D. Cal. Mar. 22, 2016).] Thus, the Court finds that as a matter of law, Plaintiff
26 is only entitled to statutory liquidated damages on contributions that were due but unpaid as of the
27 filing of the suit. As discussed below, however, there is a dispute as to the rate that can be applied
28 to these amounts.

1 **ii. Contractual Right to Liquidated Damages**

2 Defendant also argues that there is no contractual right to liquidated damages. (Def.’s
3 Opp’n at 11.)

4 As an initial matter, Defendant contends that for contributions that were due but partially
5 paid prior to the lawsuit being filed, Plaintiffs may only recover 10% liquidated damages on the
6 amounts that were late paid, but not the 20% on the amounts that were not paid. (Def.’s Opp’n at
7 11-12.) Defendant cites to the Master Agreements, which state: “the amount of liquidated
8 damages to the Trust Funds resulting from any Individual Employer’s default . . . shall be 10% of
9 the unpaid contributions as of the delinquent date. However, if a lawsuit to collect delinquent
10 contributions has been filed, the amount of liquidated damages on the unpaid contributions shall
11 be increased to an amount equal to . . . 20% of the unpaid contributions.” (2013 Master
12 Agreement § 12.13.01; 2016 Master Agreement § 12.13.01.) Based on this provision, Defendant
13 argues that Plaintiffs “may only request 10% liquidated damages for that late-paid (but partially
14 paid before the filing of the action) contributions.” (Def.’s Opp’n at 12.) The Court disagrees.
15 These provisions clearly permit 20% liquidated damages on the portion that was unpaid; thus, to
16 the extent that part of the contribution was unpaid at the time the lawsuit was filed, the contract
17 imposes 20% liquidated damages.

18 Defendant primarily focuses on whether the contractual rate of 20% for liquidated damages
19 is enforceable. (Def.’s Opp’n at 12-13.) At the hearing, Defendant clarified that it was
20 challenging the 10% liquidated damages rate as well. A contractual liquidated damages provision:

21 must meet two conditions for enforceability. First, the harm caused
22 by a breach must be very difficult or impossible to estimate.
23 Second, the amount fixed must be a reasonable forecast of just
24 compensation for the harm caused. The parties’ intentions
 determine whether this second requirement is satisfied. They must
 make a good faith attempt to set an amount equivalent to the
 damages they anticipate.

25 Idaho Plumbers, 875 F.2d at 217. In Idaho Plumbers, the Ninth Circuit would not enforce a 20%
26 liquidated damages provision, noting that “[e]ven taking account of lost investment interest and
27 increased administrative costs, these damages are not a reasonable forecast of just compensation.
28 The trust funds provide no explanation for the increase from 10% to 20%. They do not suggest

1 that it corresponded to an increase in administrative or other costs.” Id. at 218.

2 Defendant does not dispute that the first requirement – that the harm is very difficult or
3 impossible to estimate – is satisfied. Rather, Defendant argues Plaintiffs have not met their burden
4 to show that the liquidated damages amount is “a reasonable forecast.” (Def.’s Opp’n at 12-13.)
5 As part of its reply, Plaintiffs provide a declaration from Plaintiffs’ counsel, stating that in 2009,
6 the Board of Trustees’ independent auditor, Hemming Morse, conducted a reasonableness study.
7 (Stafford Decl. ¶ 2, Dkt. No. 77.) “The aim of the reasonableness study was to evaluate the harm
8 caused to the Trust Funds by delinquencies and devise percentage amounts of liquidated damages
9 that bore a rational relationship to the harm.” (Id.) Hemming Morse completed the study and
10 advised the Trustees as to the results, after which the Board of Trustees approved the current
11 percentage amounts of liquidated damages. (Id.) The reasonableness study is not provided.

12 The Court cannot determine if either the 10% or 20% rate is reasonable based on the record
13 before it.¹ Plaintiffs have not provided the reasonableness study, or explained what its auditor
14 found with respect to the recommended rates and expected harm. Plaintiffs’ cases are
15 distinguishable in that respect; for example, in *Tragni v. Souther Electric Inc.*, the plaintiffs
16 submitted the reasonableness study, allowing the district court to determine that the plaintiffs had
17 “demonstrated their good faith efforts to set a fair liquidated damages amount” Case No. 09-
18 cv-32-RS, 2009 U.S. Dist. LEXIS 86818, at *12 (N.D. Cal. Sept. 2, 2009). In *Board of Trustees v.*
19 *El Camino Paving, Inc.* the plaintiffs explained that the auditor’s reasonableness study “found that
20 the flat rate was appropriate as the actual cost of collections exceeded that amount.” Case No. 10-
21 cv-708-EDL, 2012 U.S. Dist. LEXIS 120687, at *10 (N.D. Cal. Aug. 1, 2012). Similarly, in
22 *Board of Trustees v. Protech Services*, the plaintiffs explained that a \$150 monthly flat rate was
23 “less than the actual cost to the Trust Funds of collecting unpaid contributions.” Case No. 12-cv-
24 1047-MEJ, 2013 U.S. Dist. LEXIS 183309, at *26 (N.D. Cal. Nov. 4, 2013). No such information

25
26 ¹ Prior to the hearing, it was unclear Defendant was challenging both the 10% and 20% liquidated
27 damages rate, as Defendant appeared to state that Plaintiff could request the 10% rate. (See Def.’s
28 Opp’n at 12 (“Plaintiff may only request 10% liquidated damages” for certain amounts). As
Defendant has now made clear that it is challenging both rates, and Plaintiff has not provided the
reasonableness study or other evidence necessary to determine the propriety of either rate, the
Court must reconsider the tentative findings made at the oral argument.

1 was provided here, such that the Court cannot find that the liquidated damages rates are a
2 “reasonable forecast of just compensation for the harm caused.” Idaho Plumbers, 875 F.2d at 217.

3 **F. Reasonable Attorney’s Fees and Costs**

4 Finally, Defendant contends that Plaintiffs have failed to establish the reasonableness of
5 their attorney’s fees and costs. (Def.’s Opp’n at 13.) Defendant challenges the hours spent, not
6 the hourly rates. In support of the motion for summary judgment, Plaintiffs provide a declaration
7 stating the total number of hours worked by each attorney and paralegal, and the tasks that each
8 individual worked on. (Minser Decl. ¶¶ 36-40.) No billing records are provided, and no
9 information is provided on how much time was spent on each task.

10 On this record, the Court cannot determine whether Plaintiffs’ attorney’s fees are
11 reasonable. Without information on the amount of time each individual spent on specific tasks,
12 the Court cannot find that the hours were reasonably spent. Additionally, while Plaintiffs offer to
13 allow the Court to conduct an in camera review of the records, this prevents Defendant from
14 challenging particular hours. (See Plf.’s Reply at 15.) In any case, because there are still issues of
15 fact in dispute, attorney’s fees and costs are premature at this time.

16 **G. Interest Due**

17 Having considered the parties’ filings, the Court finds that disputes of fact remain as to: (1)
18 when the July and October through December 2013 contributions were paid, affecting the amount
19 of interest and liquidated damages due; (2) the amount of the partial payments as to the October
20 2013, November 2013, December 2016, January 2017, February 2017, March 2017, April 2017,
21 August 2017, September 2017 (as to account 088409-59 only), October 2017, November 2017,
22 December 2017, January 2018, and March 2018, affecting the amount of interest; (3) whether
23 Plaintiff may apply a 10% liquidated damages rate; (4) whether Plaintiff may apply a 20%
24 liquidated damages rate; and (5) the reasonableness of the attorney’s fees and costs claimed.

25 The Court finds no dispute as to the interest due for the contribution periods of August
26 2014, October 2014, December 2014, March 2015, October 2015, November 2015, December
27 2015, January 2016, February 2016, August 2016, September 2016, October 2016, November
28 2016, July 2017, September 2017 (as to account 088410-23 only), and November 2018. There is

1 no material dispute of fact as to the amounts due and the specific payments that were made,
2 allowing the Court to verify Plaintiffs' interest calculations as follows:

Contribution	Account No.	Amount Due	Date past due	Date paid	Days Late	Annual Interest	Daily Interest	Total Interest
Aug-14	088410-23	\$27,579.75	9/26/2014	10/23/2014	27	\$2,757.98	\$7.56	\$204.01
Aug-14	088409-59	\$23,923.35	9/26/2014	10/23/2014	27	\$2,392.34	\$6.55	\$176.97
Oct-14	088410-23	\$21,574.81	11/26/2014	12/8/2014	12	\$2,157.48	\$5.91	\$70.93
Oct-14	088409-59	\$14,627.28	11/26/2014	12/8/2014	12	\$1,462.73	\$4.01	\$48.09
Dec-14	088410-23	\$36,017.70	1/26/2015	2/24/2015	29	\$3,601.77	\$9.87	\$286.17
Dec-14	088409-59	\$13,691.70	1/26/2015	2/24/2015	29	\$1,369.17	\$3.75	\$108.78
Mar-15	088410-23	\$33,638.66	4/26/2015	4/30/2015	4	\$3,363.87	\$9.22	\$36.86
Mar-15	088409-59	\$10,246.50	4/26/2015	4/30/2015	4	\$1,024.65	\$2.81	\$11.23
Oct-15	088410-23	\$32,166.99	11/26/2015	11/27/2015	1	\$3,216.70	\$8.81	\$8.81
Oct-15	088409-59	\$15,309.68	11/26/2015	11/27/2015	1	\$1,530.97	\$4.19	\$4.19
Nov-15	088410-23	\$18,040.59	12/26/2015	3/15/2016	80	\$1,804.06	\$4.94	\$395.41
Nov-15	088409-59	\$7,172.10	12/26/2015	3/15/2016	80	\$717.21	\$1.96	\$157.20
Dec-15	088410-23	\$14,876.90	1/26/2016	3/15/2016	49	\$1,487.69	\$4.08	\$199.72
Dec-15	088409-59	\$4,091.65	1/26/2016	3/15/2016	49	\$409.17	\$1.12	\$54.93
Jan-16	088410-23	\$2,854.71	2/26/2016	3/1/2016	4	\$285.47	\$0.78	\$3.13
Jan-16	088409-59	\$735.60	2/26/2016	3/1/2016	4	\$73.56	\$0.20	\$0.81
Feb-16	088410-23	\$2,795.85	3/26/2016	4/14/2016	19	\$279.59	\$0.77	\$14.55
Aug-16	088410-23	\$6,086.00	9/26/2016	10/20/2016	24	\$608.60	\$1.67	\$40.02
Aug-16	088410-23	\$1,217.20	9/26/2016	10/22/2017	391	\$121.72	\$0.33	\$130.39
Sep-16	088410-23	\$8,307.39	10/26/2016	12/1/2016	36	\$830.74	\$2.28	\$81.94
Oct-16	088410-23	\$10,954.80	11/26/2016	3/23/2017	117	\$1,095.48	\$3.00	\$351.15
Oct-16	088410-23	\$973.60	11/26/2016	11/30/2017	369	\$97.36	\$0.27	\$98.43
Oct-16	088409-59	\$1,048.00	11/26/2016	3/23/2017	117	\$104.80	\$0.29	\$33.59
Nov-16	088410-23	\$13,267.66	12/26/2016	11/21/2018	695	\$1,326.77	\$3.63	\$2,526.31
Jul-17	088410-23	\$4,401.54	8/26/2017	8/31/2017	5	\$440.15	\$1.21	\$6.03
Sep-17	088410-23	\$1,231.20	10/26/2017	11/30/2017	35	\$123.12	\$0.34	\$11.81
Nov-18	088410-23	\$1,939.38	12/26/2018	1/4/2019	9	\$193.94	\$0.53	\$4.78
Total:								\$5,066.24

Bold indicates Partial Payments

17 Thus, the Court concludes that Plaintiffs are entitled to summary judgment as to the
18 interest for these specific contributions, in the amount of \$5,066.24.

IV. CONCLUSION

20 For the reasons stated above, the Court GRANTS IN PART and DENIES IN PART
21 Plaintiffs' motion for summary judgment. The Court finds that Plaintiffs have established their
22 entitlement to interest in the amount of \$5,066.24. As there are material disputes of fact as to the
23 remaining amounts of interest and all liquidated damages, as well as attorney's fees and costs,
24 these amounts are reserved for trial.

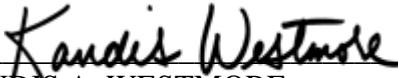
25 At the hearing, the parties agreed to attend a settlement conference with a magistrate judge.
26 The Court REFERS the parties to Judge Hixson for a settlement conference, to occur within 60
27 days or as soon thereafter as his schedule permits. In the meantime, the Court VACATES all pre-
28 trial dates, including the pre-trial filings deadline, the pre-trial conference, and the trial date. The

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Court will reset those deadlines if the parties are unable to resolve the case at settlement.

IT IS SO ORDERED.

Dated: September 4, 2019


KANDIS A. WESTMORE
United States Magistrate Judge