

1 Presently before the Court is Plaintiffs’ Motion for Default Judgment (hereafter, “Motion,”
2 Dkt. No. 19). The Court conducted a hearing on October 7, 2010. Defendant did not oppose the
3 motion or appear at the hearing. Based on some inconsistencies in the damages calculations
4 originally submitted by Plaintiffs, the Court requested that Plaintiffs submit a revised damages
5 calculation. Plaintiffs filed an Amended Declaration supporting their motion for default on
6 October 26, 2010. *See* Dkt. No. 21. Based on the arguments presented and the papers submitted
7 by Plaintiffs, Plaintiffs’ Motion for Default Judgment is hereby GRANTED.

8 Because the Plaintiffs filed two declarations containing confidential employee information
9 (Dkt. Nos. 19, Ex. 1, and 21), Plaintiffs are hereby ORDERED to submit a Motion to Remove
10 Incorrectly Filed Document with a Proposed Order seeking replacement of these filings with
11 properly redacted versions. The redacted versions shall be prepared by Plaintiffs and shall redact
12 employee confidential information.

13 **II. BACKGROUND**

14 **a. Factual Background**

15 In a Complaint filed on January 16, 2009, Plaintiffs allege as follows:

16 The San Mateo Electrical Workers Health Care Trust, San Mateo County Electrical
17 Construction Industry Retirement Trust, and San Mateo Electrical Workers Education and Training
18 Plan (collectively, “Funds”) are multi-employer employee benefit plans pursuant to ERISA 29
19 U.S.C. §§ 1002(3), (37) and 29 U.S.C. § 1132(d)(1) and jointly trustee employee benefit trusts
20 pursuant to the LMRA, 29 U.S.C. § 186(c)(5). Compl. ¶ 3. Dominic Nolan is a trustee and
21 fiduciary of the Funds under ERISA and LMRA. Compl. ¶ 4. Defendant ACS Controls
22 Corporation is an “employer” “engaged in an industry or activity affecting commerce” (electrical
23 wiring installation) within the meaning of 29 U.S.C. § 152 and 29 U.S.C. §§ 1002-03. Compl. ¶ 5.

24 At all relevant times, Defendant was a signatory to a Letter of Assent binding it to the
25 Inside Wireman’s Agreement, a written collective bargaining agreement between Plaintiffs
26 International Brotherhood of Electrical Workers Local Union 617 (a union) and National Electrical
27 Contractors Association (an employers association). The Inside Wireman’s Agreement also
28 requires Defendant to be bound by applicable Fund agreements, which established the Funds. The

1 Inside Wireman’s Agreement requires a monthly payment to each Fund. *See* Gordon Decl., Ex. A
2 at 22-29 (Inside Wireman’s Agreement, Art.’s VI, VII). These requirements are consistent with the
3 calculations on the payroll slips approved by Defendant’s bookkeeper. *See, e.g.* Gordon Decl., Ex.
4 A at 25 (Inside Wireman’s Agreement, Section 7.3, providing that the San Mateo County Electrical
5 Construction Industry Retirement Trust receives \$6.00 per employee hour worked, plus an
6 additional \$3.00 or \$6.00 per hour if a vested participant so desires); Am. Gordon Decl., Ex. A at
7 1-2 (payment obligations calculated and acknowledged by Defendant’s bookkeeper Judy Still,
8 specifically “Local Pension - Total Column 5” at 2 and Cols. 4-5 at 3).

9 The Inside Wireman’s Agreement provides for the possibility of payment levels changing at
10 the recommendation of the Funds’ trustees. *See* Gordon Decl., Ex. A at 26, 27 (Inside Wireman’s
11 Agreement, Sections 7.4, 7.6(c)). Payments to the San Mateo Electrical Workers Health Care
12 Trust and the San Mateo Electrical Workers Education and Training Plan have increased from the
13 levels provided in the Inside Wireman’s Agreement. Although Plaintiffs have provided no contract
14 documentation other than the Inside Wireman’s Agreement, Defendant’s own payroll slips, signed
15 by Defendant’s bookkeeper document the increases. *See, e.g.* Am. Gordon Decl., Ex. A at 1
16 (“Health & Welfare - \$7.70 per hour” from April 2009); Gordon Decl., Ex. A at 26 (Section 7.4,
17 providing payment of \$6.70 per hour to San Mateo Electrical Workers Healthcare Trust, effective
18 June 2006). Both the Fund Agreements and the Inside Wireman’s Agreement provide for prompt
19 payment of all employer contributions to the Funds and provide for the payment of liquidated
20 damages and attorney’s fees in case of late or missed payments. Plaintiffs allege that the
21 agreements also provide for interest at a simple annual rate of 8%, although the cited sections of
22 the Agreement contain no such provision. Compl. ¶¶ 7, 8 (quoting Inside Wireman’s Agreement,
23 Sections 7.7-7.8.)

24 Plaintiffs allege that Defendant breached the agreements in the following ways. First,
25 Defendant untimely paid for the months of June 2008, October 2008 through March 2009, and
26 May 2009 through July 2009. Second, Defendant failed to pay altogether for the months of August
27 2009 through July 2010. Compl. ¶ 9; Stephenson Decl., Ex. A at 1.

1 On the basis of the allegations outlined above, Plaintiffs allege two causes of action. First,
2 Plaintiffs allege failure to make obligatory payments to a multiemployer plan under the terms of a
3 collective bargaining agreement in violation of ERISA. Compl. ¶ 12. Second, Plaintiffs allege
4 breach of Articles VI and VII of the Inside Wireman’s Agreement in violation of LMRA. Compl.
5 ¶ 16; *see* Gordon Decl., Ex. A at 22-29.

6 **b. Procedural History**

7 On November 20, 2009, Plaintiffs filed this suit. *See* Dkt. No. 1. On March 8, 2010,
8 Plaintiffs served Defendant with the summons and complaint. *See* Dkt. Nos. 1, 2, 5. On March 10,
9 2010 and again on April 15, 2010, the initial case management conference was continued at
10 Plaintiffs’ request, pending informal settlement talks with Defendant. *See* Dkt. Nos. 6, 8. Pursuant
11 to Fed. R. Civ. P. 12(a)(1), Defendant’s Answer was due on March 28, 2010. *See* Dkt. No. 5. On
12 April 27, 2010, as a result of Defendant’s failure to answer the complaint, Plaintiffs filed a motion
13 for entry of default. *See* Dkt. No. 9. On April 29, 2010, the Clerk of Court entered default. *See*
14 Dkt. No. 10. Presently before the Court is Plaintiffs’ Motion for Default Judgment.

15 **III. LEGAL STANDARDS**

16 Pursuant to Fed. R. Civ. P. 55(b)(2), when the defendant fails to timely answer a complaint,
17 the plaintiff may move the court for an entry of default judgment. The grant of a default judgment
18 is within the discretion of the court. *Draper v. Coombs*, 792 F.2d 915, 924 (9th Cir. 1986). In the
19 Ninth Circuit, the district court must consider seven factors: (1) the possibility of prejudice to the
20 plaintiff; (2) the merits of plaintiff’s substantive claim; (3) the sufficiency of the complaint; (4) the
21 sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6)
22 whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal
23 Rules of Civil Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-
24 72 (9th Cir. 1986).

25 **IV. ANALYSIS**

26 Plaintiffs move the Court to enter default judgment against Defendant for unpaid contributions,
27 liquidated damages for unpaid contributions, interest for unpaid contributions, liquidated damages
28

1 for contributions that were late, but paid before the complaint was brought, and attorney's fees and
2 costs. Mot. at 3-4.

3 **a. Default Judgment**

4 Plaintiffs have presented proof of adequate service of process, and Defendant has failed to
5 timely answer, leading the Clerk of Court to enter default against Defendant. See Dkt. Nos. 5, 10.
6 The Court thus has discretion to grant or deny a default judgment under Fed. R. Civ. P. 55(b). See
7 *Eitel*, 782 F.2d at 1471- 72. Although strong public policy favors decisions on the merits, in light
8 of Defendant's refusal to litigate, the Court must examine whether default judgment is appropriate
9 in this case under *Eitel*.

10 Here, Defendant has not presented a defense or otherwise communicated with the Court at
11 all. Thus, Defendant has not shown excusable neglect. If Plaintiffs are not granted default
12 judgment, the Unions and Funds cannot recover the contributions owed to them. See *Bay Area*
13 *Painters and Tapers Pension Trust Fund v. Lombardi*, No. 10-0709 SC, 2010 WL 3749401, at *3
14 (N.D. Cal. Sept. 23, 2010). The Court finds that Defendant's failure to demonstrate excusable
15 neglect, measured against the possibility of prejudice to Plaintiffs, favors default judgment.

16 Once the Clerk of Court enters default, all well-pleaded allegations regarding liability are
17 taken as true except as to the amount of damages. *Fair Hous. of Marin v. Combs*, 285 F.3d 899,
18 906 (9th Cir. 2002); *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977). Here, the
19 Clerk of Court entered default on April 29, 2010. Upon review of Plaintiffs' Complaint, and
20 pursuant to ERISA § 502, Plaintiffs have standing to enforce provisions of ERISA or obtain
21 appropriate equitable relief to redress certain violations. 29 U.S.C. § 1132. Further, the Court finds
22 that Plaintiffs have adequately alleged a violation of § 515 of ERISA by showing that Defendants
23 did not contribute to the Funds as required by the Fund Agreements. 29 U.S.C. § 1145. Thus, the
24 merits of Plaintiffs' claims are deemed valid. Because the allegations are taken as true, there is no
25 possibility of a dispute concerning material facts. These factors favor granting default judgment
26 for Plaintiffs.

27 A large sum of money in dispute weighs against granting default judgment. See *Eitel*, 782
28 F.2d at 1472 (affirming denial of default judgment for claim to \$3M). Here, Plaintiffs seek

1 \$43,573.31 (plus less than \$10 daily interest after October 7, 2010), inclusive of attorneys' fees and
2 costs. Mot. at 6. This is a small amount when compared to "the potential loss of benefits by
3 Defendant's employees as a result of Defendant's conduct." See *Bd. of Tr. of the N. Cal. Sheet*
4 *Metal Workers, et al. v. Peters*, No. C-00-0395, 2000 U.S. Dist. Lexis 19065, at *5 (N.D. Cal. Dec.
5 29, 2000). Thus, the Court finds this factor in favor of default judgment.

6 In sum, the Court finds that the *Eitel* factors favor granting default judgment. Accordingly,
7 the Court GRANTS Plaintiffs' Motion for Default Judgment.

8 **b. Remedy**

9 Plaintiffs contend that Defendant should pay delinquent contributions, liquidated damages,
10 and interest to the Funds. Mot. at 3-4. Plaintiffs also contend that Defendant should pay Plaintiffs'
11 attorneys fees and costs. Mot. at 4.

12 This action was brought by Plaintiff Nolan, the fiduciary of the Trusts, to enforce
13 Defendant's duties to make regular contributions to the Trusts under 29 U.S.C. § 1145.
14 Accordingly, the Court is obligated to award the unpaid contributions, interest on the contributions,
15 the greater of interest on the unpaid contributions or liquidated damages as provided by the plan,
16 and reasonable attorney's fees and costs. 29 U.S.C. § 1132(g)(2).

17 The Ninth Circuit has held that this provision is mandatory, and not discretionary, when (1)
18 defendant was delinquent when the action was filed, (2) the court is entering a judgment against
19 defendant and (3) the Trust Agreements provide for these awards. *Nw. Admin., Inc. v. Albertson's,*
20 *Inc.*, 104 F.3d 253, 257 (9th Cir. 1996).

21 Under the Inside Wireman's Agreement, delinquent contributors are liable for liquidated
22 damages of 10% on late contributions and for attorney's costs and fees incurred enforcing
23 collection by the Funds. Plaintiffs also allege that the Trust Agreements provide for 8% per annum
24 simple interest on all unpaid contributions, but without documentary support for this figure. The
25 terms of these agreements are in accordance with 29 U.S.C. § 1132(g)(2). However, the Court will
26 not award the 8% interest without documentary support that this is the contractual interest rate.

27 Plaintiffs claim that \$44,816.24 in contributions was either delinquent at commencement of
28 this action or became delinquent between commencement of this action and the October 7, 2010

1 hearing on the Motion for Default Judgment. However, Plaintiffs credit Defendant with payments
2 made since the suit was brought, of \$1,500.00 on December 15, 2009, \$1,500.00 on January 20,
3 2010, \$4,000.00 on July 2, 2010, and \$7,830 on July 8, 2010. Thus, the delinquent principal
4 requested is \$29,986.24. Mot. at 3-4; Stephenson Decl. ¶ 25, Ex. A at 1; Am. Gordon Decl., Ex. B
5 at 1.

6 As liquidated damages, Plaintiffs seek 10% of the entire \$44,816.24 (\$4,481.62), per the
7 Inside Wireman's Agreement. *See id.* This is an appropriate application of 29 U.S.C. §
8 1132(g)(2). *See Roofers Local Union No. 81 v. Wedge Roofing, Inc.*, 811 F. Supp. 1398, 1401-02
9 (N.D. Cal. 1991).

10 Plaintiffs seek 8% simple interest per annum on each contribution within the \$44,816.24.
11 Interest is calculated from the due date of each payment until either the principal was paid (July 8,
12 2010) or until the hearing on Plaintiffs' Motion for Default Judgment (October 7, 2010). The
13 calculated total is \$2,526.86. Plaintiffs overstate Defendant's liability by \$32.50 when they
14 mistakenly apply the July 2 payment on July 8 in their interest calculations and fail to apply
15 \$1370.55 from the July 8 payment. *See* Motion at 3-4; Stephenson Decl. at 6, Ex. A at 1.
16 However, Plaintiffs also understate Defendant's liability by \$71.67 when they fail to request
17 interest for the \$1,500.00 paid late on December 15, 2009 and the \$1,500.00 paid late on January
18 20, 2010. *See* Am. Stephenson Decl., Ex. B at 1. Thus, the corrected total interest is \$2566.03.
19 However, the Court will not award the 8% interest without documentary support that this is the
20 contractual interest rate.

21 Plaintiffs also request 10% liquidated damages on payments that were late, but were paid
22 before the complaint was filed. These liquidated damages total \$3,045.85. *See* Stephenson Decl.
23 ¶¶ 2-10. ERISA may not be used as a vehicle to obtain late fees. *See Idaho Plumbers & Pipefitters*
24 *Health & Welfare Fund v. United Mech. Contractors*, 875 F.2d 212, 215 (9th Cir. 1989); *Parkhurst*
25 *v. Armstrong Steel Erectors, Inc.*, 901 F.2d 796, 797 (9th Cir. 1990). However, although recovery
26 of liquidated damages for contributions that were late, but paid before the complaint was brought is
27 inappropriate under Plaintiffs' ERISA claim, contract remedies are not precluded by ERISA.
28 *Idaho Plumbers* at 216; *Parkhurst* at 798. Thus, liquidated damages for Defendant's late payments

1 may be awarded under LMRA, 29 U.S.C. § 185(a). The Court finds that the liquidated damages in
2 the uncontested Fund Agreements are a reasonable estimate of difficult-to-quantify harm, and
3 therefore appropriate contractual remedy for breach of the collective bargaining agreement.

4 Plaintiffs also request \$5030.32 in attorney's fees and \$447.42 in attorney's costs, up to but
5 not including the default judgment motion. Gordan Decl. at 3. Plaintiffs' counsel further estimates
6 unbilled fees to be \$555.00 based on their hourly rate of \$185 and unbilled work researching,
7 writing, and arguing this Motion. *Id.* These fees and costs total \$6032.47. Under 29 U.S.C. §
8 1132(g)(2)(D), the Court finds these fees and costs to be reasonable.

9 The unpaid principal, corrected interest, liquidated damages, and attorney's fees described
10 above total \$46,112.48. Plaintiffs filed their Motion for Default Judgment on September 2, 2010.
11 Plaintiffs later received payment of \$1,000.00 on September 8, 2010, and \$1,500.00 on October 6,
12 2010. Am. Gordon Decl. ¶ 7, Ex. B at 1. These payments reduce Defendant's liability to
13 \$43,612.48. *See* Am. Gordon Decl. ¶ 8, Ex. B at 1.

14 Plaintiffs also seek 8% simple interest on this total from October 7, 2010 until the judgment
15 is entered. Am. Gordon Decl. ¶ 8. 29 U.S.C. § 1132(g)(2)(B) does not provide for interest on
16 liquidated damages and attorney's fees. *Bd. of Tr. of the Boilermaker Vacation Tr. v. Skelly, Inc.*,
17 389 F.Supp.2d 1222, 1227 (N.D. Cal. 2005). Thus, only interest on the unpaid principal is
18 appropriate, or \$6.02 per day. However, the Court will not award the 8% interest without
19 documentary support that this is the contractual interest rate.

20 In their Motion for Default Judgment, Plaintiffs cite to the liquidated damages provision in
21 support of the alleged provision for 8% interest. *See* Mot. at 5 (citing Gordan Decl., ¶ 3, Ex. A at
22 27). The Court has been unable to find reference to this 8% figure in the Inside Wireman's
23 Agreement entered into evidence. *See* Gordan Decl., Ex. A. Thus, notwithstanding the use of the
24 8% interest figure in the damages calculations by Sandy Stephenson. Stephenson Decl. ¶¶ 11-23,
25 the Court currently finds insufficient evidentiary basis for the award of 8% interest on the
26 principal; however, 29 U.S.C. § 1132(g)(2) entitles Plaintiffs to interest on the unpaid principal.
27 The Court therefore instructs Plaintiffs to submit evidence of their entitlement to interest at the
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1 specific rate of 8% by December 1, 2010. If this evidence is not submitted, Defendant will *not* be
2 liable for \$6.02 daily simple interest.

3 **V. CONCLUSION**

4 The Court GRANTS Plaintiffs' Motion for Default Judgment and AWARDS Plaintiffs
5 \$43,612.48 in unpaid principal, interest, liquidated damages, and attorney's fees and costs, along
6 with \$6.02 per day interest on unpaid principal from October 7, 2010 until entry of judgment, for a
7 total of \$43,883.38, conditional upon Plaintiffs submission to the Court of 8% interest provisions in
8 the Fund Agreements by November 29, 2010. Absent submission by this deadline, Plaintiffs are
9 awarded \$41,046.45.

10 Because the Plaintiffs filed two declarations containing confidential employee information
11 (Dkt. Nos. 19, Ex. 1, and 21), Plaintiffs are hereby ORDERED to submit a Motion to Remove
12 Incorrectly Filed Document with a Proposed Order seeking replacement of these filings with
13 properly redacted versions. The redacted versions shall be prepared by Plaintiffs and shall redact
14 employee confidential information. Counsel for Plaintiffs are further ordered to notify the affected
15 employees that their confidential information was made publicly available by Counsels' public
16 filing of this information by December 1, 2010.

17 **IT IS SO ORDERED.**

18 Dated: November 22, 2010

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21 LUCY H. KOH
22 United States District Judge
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