

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BOARD OF TRUSTEES OF THE
LABORERS HEALTH AND WELFARE
TRUST FUND FOR NORTHERN
CALIFORNIA, et al.,

Plaintiffs,

v.

CEM BUILDERS, INC., a California
corporation doing business as TUCKER
ENGINEERING,

Defendant.

Case No. [5:18-cv-00685-EJD](#)

**ORDER GRANTING PLAINTIFFS'
MOTION FOR DEFAULT JUDGMENT**

Re: Dkt. No. 41

In this ERISA enforcement action, Plaintiffs Board of Trustees of the Laborers Health and Welfare Trust Fund for Northern California, Board of Trustees of the Laborers Pension Trust Fund for Northern California, Board of Trustees of the Laborers Vacation-Holiday Trust Fund for Northern California, and Board of Trustees of the Laborers Training and Retraining Trust Fund for Northern California collectively (“Plaintiffs”) move for entry of default judgment against Defendant CEM Builders, Inc., doing business as Tucker Engineering (“Defendant”). Having reviewed Plaintiffs’ submissions, the motion is GRANTED for the reasoning below.

I. BACKGROUND

The four trust funds (hereinafter “Trust Funds”) are multi-employer employee benefit plans within the meaning of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1002(3) and 1002(37). “Each of the Trust Funds is an express trust created by written Trust Agreements pursuant to collective bargaining agreements between the Northern California District Council of Laborers and an employer association representing construction industry employers

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1 doing business in Northern California.” Lauziere Decl. ¶ 4. The Trust Funds consist of all
2 employee fringe benefit contributions that are to be made by employers pursuant to collective
3 bargaining agreements as well as all returns on contributions and any other property received or
4 held by the Trust Funds. Id. ¶ 10, Exs. A, B. The trust agreements for the Trust Funds contain
5 identical terms and conditions. Id. ¶ 11.

6 The duties of the Plaintiffs to the Trust Funds include ensuring that employers who are
7 signatories to the collective bargaining agreements comply with the terms and conditions of their
8 collective bargaining agreements, namely, making payments and contributions to the trust funds
9 on behalf of the covered employees. The trust agreements permit Plaintiffs to seek judicial relief
10 to recover prompt payment of contributions due, including the recovery of delinquent
11 contributions, and further, to seek all attorneys’ fees and costs incurred in a lawsuit to recover the
12 delinquent contributions. Id. ¶ 13, Ex. D. The trust agreements further provide that employers
13 must submit to an audit by the Plaintiffs. Id. ¶ 14, Ex. E.

14 The Laborers Pension Trust Fund for Northern California also established an Annuity
15 Fund and Annuity Plan. Id. ¶ 12, Ex. C. Section 13 of the Laborers Pension Trust Fund for
16 Northern California designates the trustees of the Annuity Fund as named fiduciaries with
17 exclusive authority to control, manage and administer the Annuity Fund and Plan. Id.

18 On June 8, 2006, Defendant executed a Memorandum Agreement with the Northern
19 California District Council of Laborers (“Laborers Union”) and became bound to a written
20 collective bargaining agreement with the Laborers Union entitled the Laborers’ Master Agreement
21 for Northern California (“Master Agreement”). Id. ¶ 6, Ex. F. Section 28 of the Master
22 Agreement requires employers to make contributions to the Trust Funds based on the hours that
23 their respective employees worked as laborers. Id. ¶ 16, Ex. G. Employers are to pay the
24 employee fringe benefit contributions on or before the 25th day of the month immediately
25 succeeding the month in which the employee’s work was performed. Id. In the event that the
26 employer fails to make the monthly installments on or before the 25th day of the month in which
27 the employee fringe benefit contributions are due, the employers are subject to interest at the rate

1 of 1.5% per month as well as liquidated damages. *Id.* Liquidated damages are set at \$150 for each
2 month that the contribution is delinquent. *Id.* ¶ 16, Ex. H.

3 Plaintiffs filed this action on January 31, 2018 seeking damages for breach of the Master
4 Agreement, recovery of unpaid trust fund contributions, and injunctive relief. Dkt. No. 1. The
5 Court granted Plaintiffs’ motion for a right to attach order and a writ of attachment. Dkt. No. 19.
6 Plaintiffs personally served the Summons and Complaint on Defendant on April 30, 2018. Dkt.
7 No. 32. The Clerk entered default on June 7, 2018. Dkt. No. 35. On July 30, 2018, Plaintiffs
8 filed this Motion for Default Judgment. Dkt. No. 41. Defendant has neither appeared nor filed an
9 opposition to the motion, and the time for such opposition has expired. Civ. L.R. 7-3(a).

10 **II. DISCUSSION**

11 **A. Jurisdiction**

12 Courts have an affirmative duty to examine their own jurisdiction—both subject matter
13 and personal jurisdiction—when entry of judgment is sought against a party in default. *In re Tuli*,
14 172 F.3d 707, 712 (9th Cir. 1999). Here, the Court has subject matter jurisdiction pursuant to 29
15 U.S.C. § 1132(e), which bestows jurisdiction to United States district courts over civil
16 enforcement of ERISA violations. Personal jurisdiction arises from service upon Defendant in
17 California. Dkt. No. 32. *Burnham v. Sup. Ct.*, 495 U.S. 604, 610-11 (1990). Venue is also proper
18 as contributions are made to, and benefits are paid from, a corporate co-trustee bank in the
19 Northern District (Dkt. No. 1, ¶ 2) and because Defendant has its principal place of business in
20 Campbell, California. Dkt. No. 1, ¶ 7.

21 **B. Legal Standard**

22 Pursuant to Federal Rule of Civil Procedure 55(b), the Court may enter default judgment
23 against a defendant who has failed to plead or otherwise defend an action. “The district court’s
24 decision whether to enter default judgment is a discretionary one.” *Aldabe v. Aldabe*, 616 F.2d
25 1089, 1092 (9th Cir. 1980). The Ninth Circuit has provided seven factors for consideration by the
26 district court in determining whether to enter default judgment: (1) the merits of plaintiff’s
27 substantive claim; (2) the sufficiency of the complaint; (3) the possibility of prejudice to the

1 plaintiff; (4) the sum of money at stake in the action; (5) the possibility of dispute concerning
2 material facts; (6) whether default was due to excusable neglect; and (7) the strong policy
3 underlying the Federal Rules of Civil Procedure favoring decisions on the merits. *Eitel v.*
4 *McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). When assessing these factors, all factual
5 allegations in the complaint are taken as true, except those with regard to damages. *Televideo*
6 *Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

7 **C. The Eitel Factors**

8 As to the first and second Eitel factors, Plaintiffs' Complaint sets forth substantive and
9 meritorious claims. Plaintiffs allege that Defendant violated ERISA by failing to pay
10 contributions to the Trust Funds. Dkt. No. 1, ¶¶ 8-24. Pursuant to 29 U.S.C. § 1132(g)(2),
11 Plaintiffs are entitled to unpaid contributions, interest thereon, liquidated damages, and reasonable
12 attorneys' fees and costs. *Id.* ¶¶ 8-24.

13 The third Eitel factor weighs in favor of granting default judgment. If the motion were
14 denied, "Plaintiffs will likely be without other recourse for recovery." *PepsiCo, Inc. v. Cal. Sec.*
15 *Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002).

16 The fourth Eitel factor to consider is the sum of money at stake. "When the money at stake
17 in the litigation is substantial or unreasonable, default judgment is discouraged." *Bd. of Trs. v.*
18 *Core Concrete Const., Inc.*, 2012 WL 380304, at *4 (N.D. Cal. Jan. 17, 2012). But "where the
19 sum of money at stake is tailored to the specific misconduct of the defendant, default judgment
20 may be appropriate." *Id.* (citing *Bd. of Trs. of the Sheet Metal Workers Health Care Plan v.*
21 *Superhall Mechanical, Inc.*, 2011 WL 2600898 at *2 (N.D. Cal. Jun. 30, 2011)). Here, Plaintiffs
22 have asked for unpaid contributions, interest for the unpaid contributions and contributions paid
23 late, as well as attorneys' fees for a total judgment of approximately \$420,736.12. The sum in
24 controversy in this case is tailored to the misconduct of Defendant and weighs in favor of entering
25 default judgment.

26 Fifth, there is no possibility of a dispute of material fact because Defendant has not made
27 an appearance in the action. Furthermore, all material facts are verifiable: the contributions sought

1 are based on the hours reported to Plaintiffs by Defendant.

2 Sixth, it is unlikely that default was the result of excusable neglect. This action was filed
3 nearly eleven months ago and, as noted, Defendant was properly served. Plaintiffs have also
4 mailed Defendant subsequent case management orders and the motion for default judgment.
5 Defendant is aware of the payment obligations for which it is responsible.

6 Seventh, although federal policy generally disfavors the entry of default judgment, all the
7 Eitel factors weigh in favor of a default judgment here. Therefore, the motion to enter default
8 judgment will be GRANTED.

9 **D. Damages**

10 Plaintiffs' action is based on the statutory duty provided by Section 515 of ERISA, which
11 states that an employer who is obligated to make contributions to a multi-employer plan must do
12 so in accordance with the terms and conditions of such plan or such agreement. 29 U.S.C. § 1145.
13 Section 502(g) of ERISA states that in an action to enforce section 1145, the court shall award the
14 plan unpaid contributions, interest on the unpaid contribution, liquidated damages, reasonable
15 attorney's fees and costs, and equitable relief as the court deems appropriate. 29 U.S.C.
16 § 1132(g)(2).

17 1. Unpaid Contributions Claim

18 Plaintiffs first seek payment for unpaid contributions plus interest for a total of
19 **\$362,717.52.**

20 Defendant reported contributions due and owing for the period May – August, November –
21 December 2017 and January 2018, but failed to pay all the contributions due and owing for these
22 months. According to the Declaration of Michelle Lauziere, the principal amount of unpaid
23 contributions is \$286,393.72. This amount represents hours worked and contributions due for
24 covered employees as reported by Defendant. Lauziere Decl. ¶ 18. Attached as Exhibit J to the
25 Lauziere Declaration is the Statement of Contributions Due Laborers Trust Funds, a summary of
26 the contributions reported, but not paid, as prepared by the Fund Office. Pursuant to
27

1 29 U.S.C. § 1132(g)(2)(A), Plaintiffs Trust Funds are entitled to an award of the unpaid principal
2 balance of the contributions totaling **\$286,393.72**.

3 Defendant submitted its Employer Reports of Contributions for these months detailing, as
4 required, hours of covered work under the collective bargaining agreement and contributions due
5 on behalf of the covered workers.

6 For May 2017, Defendant reported 2,237.5 hours of covered work and \$49,493.57 in
7 contributions owed. Id. ¶ 21, Exs. J, K. Defendant paid contributions in the amount of \$35,176.17,
8 leaving a balance of **\$14,317.40**. Id., Ex. K.

9 For June 2017, Defendant reported 2,936 hours of covered work and \$64,944.40 in
10 contributions owed. Id. ¶ 22, Ex. J. Defendant paid contributions in the amount of \$36,230.62,
11 leaving a balance of **\$28,356.57**. Id., Ex. M.

12 For July 2017, Defendant reported 4,056.5 hours of covered work and \$94,192.04 in
13 contributions owed. Id. ¶ 23, Exs. J, P. Defendant paid contributions in the amount of \$48,474.61,
14 of **\$45,208.11**. Id., Exs. J, O.

15 For August 2017, Defendant reported 3,140 hours of covered work and \$72,910.90 in
16 contributions owed. Id. ¶ 24, Exs. J, Q. Defendant paid contributions in the amount of \$34,901.84,
17 leaving a balance of **\$37,643.80**. Id., Exs. J, Q.

18 For November 2017, Defendant reported 5,064.5 hours of covered work and \$117,597.84 in
19 contributions owed. Id. ¶ 25, Exs. J, S. Defendant paid contributions in the amount of \$17,310.52,
20 leaving a balance of **\$99,682.65**. Id., Exs. J, S.

21 For December 2017, Defendant reported 2,878.5 hours of covered work and \$66,838.84 in
22 contributions owed. Id. ¶ 26, Exs. J, U. Defendant paid contributions in the amount of \$6,327.40,
23 leaving a balance of **\$60,146.56**. Id., Exs. J, U.

24 For January 2018, Defendant reported 45 hours of covered work and \$1,038.61 in
25 contributions owed. Id. ¶ 27, Exs. J, X. For January 2018, Defendant paid no contributions. Thus,
26 the total amount still owed is **\$1,038.61**. Id., Exs. J, X.

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1 Pursuant to the Master Agreement the employers are subject to interest at the rate of 1.5%
2 per month, as well as liquidated damages, set at a flat rate of \$150 for each month that the
3 contribution is delinquent. Interest was calculated at 1.5% per month from the month in which
4 each delinquent contribution for each Trust Fund was recorded and accumulated, through January
5 24, 2018. The total interest due is **\$38,161.90**. See the Statement of Interest and Liquidated
6 Damages Due [Reported/Not Paid], prepared by the Fund Office and attached as Exhibit W to the
7 Lauziere Decl. ¶ 27.

8 Pursuant to 29 U.S.C. § 1132(g)(2)(C), Plaintiffs are entitled to an additional award in an
9 amount equal to the greater of the interest on the unpaid contributions or liquidated damages at the
10 contract rate. The trust agreement provides for liquidated damages assessed for the contributions
11 not paid amount to \$1,050. Lauziere Decl. ¶ 29, Ex. W. Because liquidated damages are less than
12 interest, Plaintiffs have selected the additional award of interest at **\$38,161.90**. 29 U.S.C.
13 § 1132(g)(2)(C).

14 Accordingly, based on the above, for contributions reported, but not paid, plaintiffs are
15 entitled to an award under 29 U.S.C. §§1132(g)(2)(A), (B) and (C) in the following amount:

- 16 • § 1132(g)(2)(A) unpaid contributions: \$286,393.72
 - 17 • § 1132(g)(2)(B) interest: \$38,161.90
 - 18 • § 1132(g)(2)(C)(i) interest: \$38,161.90
- 19 Sub-Total: **\$362,717.52**

20 2. Untimely Paid Contributions

21 Second, Plaintiffs seek payment for contributions paid, but not paid on time, plus
22 liquidated damages.

23 Section 502 of ERISA provides that the Court may award “such other legal and equitable
24 relief as the court deems appropriate.” 29 U.S.C. § 1132(g)(2)(E). This “other legal and equitable
25 relief” includes interest and liquidated damages on employee fringe benefit contributions that were
26 paid but paid late. Idaho Plumbers & Pipefitters Health and Welfare Fund v. United Mechanical
27 Contractors, Inc., 875 F.2d 212, 215 n.1 (9th Cir. 1989) (finding that interest and liquidated

1 damages could be awarded for contributions that were paid but paid late).

2 During the period June – December 2015; January – September, and December 2016; and
3 January – April, September – October 2017 Defendant paid employee fringe benefit contributions
4 as reported but failed to pay the employee fringe benefit contributions on time, i.e., prior to the
5 25th of the month immediately succeeding the month in which the employee’s work was
6 performed. For example, for the June 2015 contributions due and owing, payment of the
7 contributions is due on before the 25th of July 2015. In each instance, Defendant failed to pay
8 contributions on time. Liquidated damages and interest on contributions that were paid but paid
9 late amount to **\$11,864.13** as of January 24, 2018. Id. ¶ 17. Plaintiffs provide a summary of
10 liquidated damages and interest, as calculated by the Fund Office. Id., Ex. I.

11 Accordingly, Defendant is liable to Plaintiffs for liquidated damages on contributions that
12 were paid, but paid late, in the amount of **\$11,864.13**.

13 3. *Injunctive Relief Compelling an Audit of Defendant’s Books and Records*

14 Plaintiffs request a mandatory injunction compelling Defendant to submit to an audit of its
15 financial records for the period January 1, 2013 through the last completed quarter prior to the
16 entry of judgment, to determine the full amount of employer contributions owed to the Trust
17 Funds.

18 The trust agreement contractually obligates Defendant to submit to an audit of financial
19 records by Plaintiffs. Id. ¶ 14, Ex. E. Furthermore, the right of employee benefit plans to enforce
20 such power to audit is long and well established. See generally Cent. States, Southeast &
21 Southwest Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 571 n.12 (1985). An audit is
22 “well within the authority of the trustees as outlined in the trust documents” and is part of “proper
23 plan administration.” Id. at 581.

24 Based on the above, Plaintiffs are entitled to an audit of Defendant’s books and records for
25 the period January 1, 2013 through the last completed quarter prior to entry of judgment.

26 4. *Attorneys’ Fees and Costs*

27 Section 502(g)(2)(D) of ERISA and the trust agreement at Article IV, Section 3 (Id. ¶ 13,

1 Ex. D) provide that the employer is to reimburse the Trust Funds for attorneys' fees and costs
2 incurred in a suit to enforce payment of outstanding contributions. The law of firm of Bullivant
3 Houser Bailey PC, counsel for Plaintiffs, charged attorneys' fees and costs for this lawsuit in the
4 amount of \$46,753.12. Norris Decl. ¶¶ 3-6, Ex. Y. Having reviewed the supporting time entries
5 and descriptions, the Court concludes that Plaintiffs are entitled to recover attorneys' fees and
6 costs against Defendant in the amount of **\$46,154.47**.

7 **III. CONCLUSION AND ORDER**

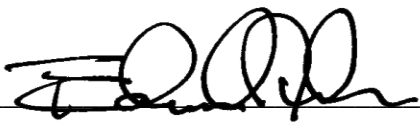
8 Based on the above, Plaintiffs are entitled to judgment in favor of Plaintiffs and against
9 Defendant under the First and Second Claims for Relief, in the following amounts:

| | | |
|----|--|---------------------|
| 10 | Liquidated Damages and Interest On | |
| 11 | Contributions Paid, But Paid Late: | \$11,864.13 |
| 12 | Contributions Reported, But Not Paid: | |
| 13 | • § 1132(g)(2)(A) unpaid contributions: | \$286,393.72 |
| 14 | • § 1132(g)(2)(B) interest: | \$38,161.90 |
| 15 | • § 1132(g)(2)(C)(i) interest: | <u>\$38,161.90</u> |
| 16 | Sub-total (reported, but not paid): | \$374,581.65 |
| 17 | Attorneys' Fees and Costs: | <u>\$46,154.47</u> |
| 18 | GRAND TOTAL: | \$420,736.12 |

19 In addition, Plaintiffs are entitled to a mandatory injunction compelling defendant to
20 produce its books and records for the period January 1, 2013 through the last completed quarter
21 prior to entry of judgment. Lauziere Decl. ¶ 14, Ex. E. Accordingly, a mandatory injunction shall
22 issue forthwith. The Clerk shall close this file.

23 **IT IS SO ORDERED.**

24 Dated: November 14, 2018

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26 _____
27 EDWARD J. DAVILA
28 United States District Judge