

1 **I. BACKGROUND**

2 The SEIU Local 1877 and San Diego County Employers Security Trust Fund is
3 an express trust created by Collective Bargaining Agreements (“CBAs”) between the
4 SEIU Local 1877 (“Union”) and various employers. (*Compl.* ¶ 3 [Doc. 1].) The trust
5 is a multi-employer benefit plan within the meaning of the Employee Retirement
6 Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1002(37)(A). (*Id.*) Plaintiff
7 Trustees are the trustees and fiduciaries of the trust. (*Id.* ¶ 4.) Defendant KBM is a
8 national janitorial and maintenance service company. (*Def.’s Opp’n* 3:3–4 [Doc. 11].)
9 Some of the sites KBM services are union sites, and some of the union members at those
10 union sites are members of the SEIU Local 1877. (*Id.* at 3:5–6.)

11 In 2005, the Union and KBM entered into a CBA effective July 2, 2005 through
12 May 31, 2008. (*See Bautista Decl. Ex. C* [Doc. 9-2].) In 2006, the parties executed a
13 Trust Acceptance and Contract Data Form (“Trust Acceptance”). (*See Bautista Decl.*
14 *Ex. A.*) At the time KBM signed the Trust Acceptance, approximately 35 of its 193
15 total employees were SEIU Local 1877 members covered by the CBA. (*Id.*) In signing
16 the Trust Acceptance, both parties acknowledged the existence of the CBA and
17 “agree[d] to be bound by the Agreement and Declaration of Trust of the SEIU Local
18 1877 and San Diego County Employers Security Trust Fund [“Trust Agreement”]
19 currently in effect, and all changes, amendments, restatements and other alterations
20 thereof, and all the rules and regulations of the Trust Fund.” (*Id.*)

21 The Trust Agreement was drafted in 2002. (*See Bautista Decl. Ex. B* at vi.)
22 Although KBM agreed to be bound by the Trust Agreement when it signed the Trust
23 Acceptance, KBM did not sign the Trust Agreement. (*Def.’s Opp’n* 3:21–25.) KBM
24 also was not provided with a copy of the Trust Agreement or any current or future
25 amendments to it. (*See Tucker Decl. Ex. 9* [Doc. 11-1].)

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1 Article III, Section 6 of the Trust Agreement governs the Trustees' authority to
2 audit employers. (*Bautista Decl. Ex. B* at 9.) Effective January 1, 2006, this section was
3 amended. (*See Bautista Decl. Ex. B.*) The amended section reads in relevant part:

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5 The Board of Trustees has the power to require any Employer,
6 signatory Association, Union, any employee, any medical or other service
7 provider, or any participant or beneficiary under the Benefit Plans, to
8 submit to it any information, data, or documents relevant to and suitable
9 for the purposes of the Board's administration of the Benefit Plans.

10 *The following are only some examples of documents and information*
11 *which are relevant and suitable for the purposes of the Board's administration*
12 *of the Benefit Plans, and must be produced by Employers subject to an employer*
13 *audit by the Trust; such documents and information which must be produced*
14 *include information and records pertaining not only to employees concededly*
15 *covered by the Benefit Plans but those pertaining to persons who the employer*
16 *claims are not so covered: All payroll records and employee records, including*
17 *but not limited to . . . 1099 and 1096 forms, . . . vendor's invoices, . . . [and]*
18 *accounts payable journals . . .*

19 The parties to this Trust Agreement agree that they will use their
20 best efforts to secure compliance with any reasonable request of the Board
21 for any such information, data, reports or documents. The Trustees shall
22 have the right themselves or through any authorized representative, to
23 enter upon the premises of, and audit the books and records of, any Employer
24 as may be necessary to determine if all liabilities of such Employer to the
25 Trustees have been paid, and to determine that the correct contributions
26 have been received for all persons for whom the Employer is required to
27 make contributions. The Employer shall make such books and records
28 available at all reasonable times and places so that such audits may be
conducted.

(*Id.*) (Language added per the 2006 amendment has been italicized.)

20 On May 13, 2010, National Compliance Services ("NCS")—a company hired by
21 the Trustees to audit KBM—sent a letter to KBM requesting documents necessary to
22 complete an audit on behalf of the Union. (*Byerley Decl.* ¶ 2; *Ex. 18* [Doc. 11-3].) From
23 May until September 2010, KBM provided all the documents requested by NCS.
24 (*Byerley Decl.* ¶¶ 3–4.) On September 22, 2010, NCS sent KBM an e-mail requesting
25 three new documents: a complete list of KBM's work locations, a list of KBM's 1099
26 forms, and KBM's vendor list/accounts payable ("the disputed documents"). (*Id.* ¶ 4.)
27 Shortly after receiving NCS's e-mail, KBM received a letter from the Union's counsel
28 dated September 21, 2010. (*Id.* ¶ 5; *Ex. 4.*) The letter requested that KBM send the

1 disputed documents by September 27, 2010, or the Trustees would “initiate a lawsuit
2 against KMB [sic] without further notice.” (*Byerley Decl. Ex. 4.*)

3 KBM was concerned about providing the disputed documents, and wanted to
4 obtain legal advice before producing the documents. (*Byerley Decl. ¶¶ 6, 8.*)
5 Furthermore, KBM’s human services director, who was in charge of responding to the
6 audit, was out of the office for much of the period between September 21, 2010, and
7 October 15, 2010. (*Id. ¶¶ 1, 4, 6.*) Consequently, KBM did not turn over the disputed
8 documents by September 27, 2010. By October 15, 2010, the disputed documents were
9 the only documents requested by NCS that KBM had not yet turned over for the audit.
10 (*Byerley Decl. Ex. 5.*) However, unbeknownst to KBM, the Trustees had filed a
11 complaint on October 12, 2010. (*Id. ¶ 9.*)

12 On November 15, 2010, KBM answered the complaint. On January 3, 2011, an
13 Early Neutral Evaluation (“ENE”) was held before United States Magistrate Judge
14 Bernard G. Skomal. (*Tucker Decl. Ex. 14.*) During the ENE, Magistrate Judge Skomal
15 tentatively recommended that the Trustees and KBM enter into a protective order.
16 (*Id.*) However, the Trustees have resisted efforts to negotiate a protective order.¹ (*See*
17 *id.*)

18 On February 1, 2011, the Trustees filed this summary-judgment motion pursuant
19 to Federal Rule of Civil Procedure 56(c) on the grounds that the plain language of the
20 CBA, Trust Acceptance, and Trust Agreement mandate that KBM submit to the audit
21 and provide the requested documents without the benefit of a protective order. KBM
22 opposes. On February 28, 2011, the Trustees filed a timely reply.

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27 ¹The Trustees indicate in their motion that they would “have no objection to the
28 Court’s order compelling an audit” pursuant to certain “provisions” suggested in the motion;
however, these provisions fail to address the concerns KBM raises.

1 **II. LEGAL STANDARD**

2 Summary judgment is appropriate under Rule 56(c) where the moving party
3 demonstrates the absence of a genuine issue of material fact and entitlement to
4 judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477
5 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it
6 could affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
7 248 (1986); Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997). A dispute about a
8 material fact is genuine if “the evidence is such that a reasonable jury could return a
9 verdict for the nonmoving party.” Anderson, 477 U.S. at 248.

10 A party seeking summary judgment always bears the initial burden of establishing
11 the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving
12 party can satisfy this burden in two ways: (1) by presenting evidence that negates an
13 essential element of the nonmoving party’s case; or (2) by demonstrating that the
14 nonmoving party failed to make a showing sufficient to establish an element essential
15 to that party’s case on which that party will bear the burden of proof at trial. Id. at
16 322–23. “Disputes over irrelevant or unnecessary facts will not preclude a grant of
17 summary judgment.” T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n, 809 F.2d
18 626, 630 (9th Cir. 1987).

19 “The district court may limit its review to the documents submitted for the
20 purpose of summary judgment and those parts of the record specifically referenced
21 therein.” Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1030 (9th Cir.
22 2001). Therefore, the court is not obligated “to scour the record in search of a genuine
23 issue of triable fact.” Keenan v. Allen, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing
24 Richards v. Combined Ins. Co. of Am., 55 F.3d 247, 251 (7th Cir. 1995)). If the moving
25 party fails to discharge this initial burden, summary judgment must be denied and the
26 court need not consider the nonmoving party’s evidence. Adickes v. S.H. Kress & Co.,
27 398 U.S. 144, 159–60 (1970).

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1 If the moving party meets this initial burden, the nonmoving party cannot defeat
2 summary judgment merely by demonstrating “that there is some metaphysical doubt as
3 to the material facts.” Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475
4 U.S. 574, 586 (1986); Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th
5 Cir. 1995) (“The mere existence of a scintilla of evidence in support of the nonmoving
6 party’s position is not sufficient.”) (citing Anderson, 477 U.S. at 242, 252). Rather, the
7 nonmoving party must “go beyond the pleadings” and by “the depositions, answers to
8 interrogatories, and admissions on file,” designate “specific facts showing that there is
9 a genuine issue for trial.” Celotex, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)).

10 When making this determination, the court must view all inferences drawn from
11 the underlying facts in the light most favorable to the nonmoving party. See
12 Matsushita, 475 U.S. at 587. “Credibility determinations, the weighing of evidence, and
13 the drawing of legitimate inferences from the facts are jury functions, not those of a
14 judge, [when] he [or she] is ruling on a motion for summary judgment.” Anderson, 477
15 U.S. at 255.

16 17 **III. DISCUSSION**

18 **A. No Genuine Issue of Material Fact Exists as to KBM’s Contractual** 19 **Obligation to Submit to the Audit.**

20 The Trustees claim in their summary-judgment motion that “KBM does not
21 dispute its contractual obligation to submit to the Trustees’ audit.” (*Mot. for Summ. J.*
22 *2:22–23* [Doc. 9-1]). Indeed, KBM admits that it has “attempted in good faith to
23 comply with *its audit obligations.*” (*Def.’s Opp’n 23:18*) (emphasis added). Since the
24 parties both agree that KBM has a contractual duty to submit to the audit, summary
25 judgment in favor of the Trustees on this narrow issue is appropriate.

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1 **B. KBM Must Provide the Disputed Documents; However, KBM Is**
2 **Entitled to a Protective Order.**

3 The Trustees argue that the plain language of the CBA, the Trust Acceptance,
4 and the Trust Agreement compel KBM to produce the disputed documents without the
5 benefit of a protective order. KBM claims that the requested documents are at least
6 private information, if not trade secrets, and consequently a protective order is
7 appropriate. The Court agrees with KBM.

8 The Supreme Court has held that a court may order an employer to submit to a
9 union’s requested audit—including an audit of documents pertaining to non-covered
10 employees—under ERISA. Cent. States, Se. & Sw. Areas Pension Fund v.
11 Cent. Transp., Inc., 472 U.S. 559, 564, 574 (1985). However, the Court also cautioned
12 that a union’s right to an audit is qualified, since the “right to demand access to
13 employer records does not reach beyond what is appropriate for the proper
14 administration of the plans, and, of course, a court ordering an employer to comply with
15 a particular audit demand could, upon a proper showing by the employer, limit the
16 auditors accordingly.” Id. at 582 n.23.

17 Indeed, the case law is replete with examples of courts ordering audits but placing
18 reasonable limits on access to the requested information in order to protect employers’
19 privacy concerns. For instance, the Sixth Circuit has stated that “[i]f a showing of
20 prospective harm to the Employers were made, the district court could enter a
21 protective order which limits the Trustees to reading the disputed records in the
22 Employer’s office or specifies that an independent accountant view disputed records
23 without disclosing the information to Trustees.” DeMarco v. C & L Masonry, Inc., 891
24 F.2d 1236, 1240 (6th Cir. 1989). The Second Circuit, in affirming a union’s right to an
25 audit, nonetheless confirmed the lower court’s admonition that “the audit should not
26 be wholly unbridled” and acknowledged the defendant’s right to move for a protective
27 order. N.Y. State Teamsters Conf. Pension & Ret. Fund v. Boeing Bros., Inc., 92 F.3d
28 127, 130, 134 (2d Cir. 1996). One district court ordered that an audit be conducted on

1 the employer's premises with the employer and his counsel present, and that the auditor
2 not remove or copy records of non-covered employees nor disclose information to third
3 parties without a court order. Cent. States, Se. & Sw. Areas Pension Fund v. N.E.
4 Friedmeyer-Sellmeyer Distrib. Co., 650 F. Supp. 978, 980–81 (E.D. Mo. 1987). Another
5 district court, discussing the protective measures suggested in Friedmeyer, suggested the
6 employer's privacy concerns could be alleviated by ordering the parties to draft a
7 protective order to be submitted for the court's approval. Trucking Emps. of N. Jersey
8 Welfare Fund, Inc. v. Brockway Fast Motor Freight Co., 130 F.R.D. 314,324 (D.N.J.
9 1989).

10 In sum, this authority stands for the principle that a court may issue a protective
11 order in recognition of an employer's legitimate privacy concerns—despite the fact that
12 the CBA governing the relationship between the union and the employer may not
13 contemplate such a measure—where such a protective order does not interfere with the
14 successful completion of the audit. The Trustees have failed to explain why they or the
15 Union need direct access to the disputed documents; consequently, the Court sees no
16 reason why the audit cannot be successfully completed pursuant to a protective order
17 restricting access to the requested documents to the auditor.

18 Furthermore, since the Trustees hired the auditor, the Court is not concerned
19 that KBM's desire to restrict access to the disputed documents is a way to hide the ball.
20 To the contrary, KBM has complied—with the exception of producing the disputed
21 documents—with the audit request, and KBM has expressed its willingness to hand the
22 disputed documents over to NCS pursuant to a protective order. These actions suggest
23 that KBM is legitimately concerned about protecting its business records and belie any
24 finding of bad faith. In light of these considerations, the Court finds that a protective
25 order is reasonable, despite not being expressly provided for or contemplated in the
26 documents governing the relationship between the Union and KBM.

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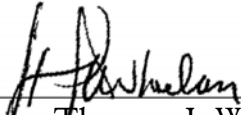
1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court **GRANTS** the Trustees' summary-judgment
3 motion [Doc. 9] on the issue of KBM's contractual obligation to submit to the audit, but
4 **DENIES** the Trustees' request for an order requiring KBM to produce the disputed
5 documents unconditionally.

6 The Court further **ORDERS** that within 30 days of the date of this order, the
7 parties meet and confer regarding the terms and scope of a protective order for the
8 disputed documents. The parties shall then contact United States Magistrate Judge
9 Bernard G. Skomal to formalize the terms of the protective order or to resolve any
10 disputes relating to the protective order.

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12 **IT IS SO ORDERED.**

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14 DATED: July 22, 2011

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18 Hon. Thomas J. Whelan
19 United States District Judge
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