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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 BOARD OF TRUSTEES OF THE SAN
12 DIEGO ELECTRICAL PENSION
13 TRUST, et al.,
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15 Plaintiffs,
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17 v.
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19 MY ELECTRICIAN, INC., a California
20 Corporation,
21
22 Defendant.

Case No.: 19-cv-1500-GPC-AHG

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

[ECF No. 24]

19 Before this Court is Plaintiffs' Motion for Summary Judgment ("MSJ"), ECF No.
20 24. Defendant filed a Response, ECF No. 27, and Plaintiffs filed a Reply, ECF No. 29.
21 For reasons discussed below, the Court **GRANTS IN PART and DENIES IN PART**
22 Plaintiffs' Motion. Specifically, the Court finds Defendant liable under the Employee
23 Retirement Income Security Act of 1974 ("ERISA"), and thus Plaintiffs are summarily
24 entitled to \$16,192.25 in damages and \$4,822.44 in litigation costs. However, Plaintiffs
25 have failed to meet their burden of proof in demonstrating that the suggested \$22,705.00
26 in attorney's fees is reasonable.
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1 **1. Obligations**

2 Employers contributing to the Trust Funds receive Contribution Report Forms to
3 self-report the hours worked by their employees for the month. Each month, the
4 employer must complete the Contribution Report Form with all hours worked by its
5 employees, and submit the Form along with the resultant monthly contribution payments.
6 *See id.* UF Nos. 7, 8. Specifically, the Inside Agreement requires the employer to self-
7 report monthly fringe benefit contributions to the Trust Funds based on the hours worked
8 by the employees for “on-site construction work of the type covered by this Agreement.”
9 *See id.* UF No. 22; *see also* Decl. Andy Berg Ex. F at 7–8, ECF No. 24-1 (Article II,
10 Section 2.06(a) of the Inside Agreement).

11 To ensure that the contributing employers properly pay all necessary contributions,
12 the Trust Funds conduct audits of the employers’ payroll records through an independent
13 audit firm. UF No. 11, ECF No. 28. The terms of the Trust Agreements require the
14 contributing employers to comply with the audit requests by the Trust Funds. *Id.* UF No.
15 12; *see also* Decl. Andy Berg Ex. A at 34, ECF No. 24-1 (Article X, Section 5 of the
16 H&W Trust Agreement).

17 **2. Penalties**

18 The Trust Agreements authorize the trustees of the Trust Funds to adopt collection
19 and audit procedures. Accordingly, the trustees of the Trust Funds have adopted the
20 Audit Policy and Procedures, and the Collection Policy and Procedures. *Id.* UF Nos. 5,
21 13. Under the Audit Policy and Procedures, if the audit determines that there are
22 contribution deficiencies amounting to \$1,000 or greater, the contributing employers shall
23 be billed for the audit fees. *Id.* UF No. 13; *see also* Decl. Andy Berg Ex. D at 11, ECF
24 No. 24-1 (Section IX.(C)).

25 If the audit discloses any underreporting by the employer, the employer shall be
26 chargeable for the underreported amount and any delinquency charges. UF No. 24, ECF
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1 No. 28. Pertaining to the employer’s potential monetary charges, the Collection Policy
2 and Procedures discuss the collection of: (1) delinquent contributions; (2) the assessment
3 of liquidated damages and interests; and (3) the recovery of attorney’s fees and audit fees.
4 *Id.* UF No. 5.

5 Liquidated damages are assessed at the greater of \$150 or 10% of the monthly
6 contribution delinquency or any unpaid portion thereof, not to exceed \$750 per month.¹
7 And if the Trust Funds file a lawsuit, liquidated damages are assessed at the greater of
8 \$150 or 20% of the delinquency, with no maximum. *Id.* UF No. 9; *see also* Decl. Andy
9 Berg Ex. C, ECF No. 24-1 (Section II.(E) of the Collection Policy and Procedures).

10 Unpaid contributions incur interest at the annual rate of ten percent (10%) per
11 annum, starting from the delinquency date until the date the payment is received. UF No.
12 10, ECF No. 28; *see also* Decl. Andy Berg Ex. C, ECF No. 24-1 (Section II.(F) of the
13 Collection Policy and Procedures).

14 Finally, Section VIII of the Collection Policy and Procedures discusses attorney’s
15 fees: “Whenever attorney’s fees are incurred as a result of a Contributing Employer’s
16 failure to pay contributions, interest, or liquidated damages, such Contributing Employer
17 shall be held liable for any attorney’s fees and costs and audit fees incurred.” Decl. Andy
18 Berg Ex. C, ECF No. 24-1.

19 **C. The Audit Over Defendant’s Reports and the Alleged Deficiencies**

20 Defendant submitted its Contribution Report Forms and the related contribution
21 payments for the covered work under the PSA, specifically for the months of July 2017
22 through May 2018. UF No. 25, ECF No. 28. Defendant reported a total of four (4) hours
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25 ¹ While UF No. 9 states “any paid portion therefore,” ECF No. 28, the underlying
26 document supporting the UF indicates that “any unpaid portion thereof” is correct. Decl.
27 Andy Berg Ex. C, ECF No. 24-1 (discussing how liquidated damages shall be assessed of
28 the monthly delinquent contribution “or any unpaid portion thereof”).

1 of covered work, attributed to Mr. Brian Alston as an “Inside Wireman,” *id.*, a job
2 generally considered as requiring the reporting of hours under the Inside Agreement, *id.*
3 UF Nos. 22, 26, 41. Mr. Alston, a certified journeyman electrician, owns the Defendant
4 corporation. He is also Defendant corporation’s Responsible Managing Officer, CEO,
5 and President. *Id.* UF No. 16.

6 In September 2018,² the Trust Funds referred Defendant to Alsweet Associates
7 (“Alsweet”) for an audit of Defendant’s payroll records. Initially the audit was over the
8 period October 2017 through December 2017. The audit later expanded to July 2017
9 through May 2018. *Id.* UF No. 29.

10 As declared by the main auditor involved in this dispute, Alsweet’s standard
11 procedure for auditing project agreements such as the PSA is to review the employer’s
12 certified payroll records that were submitted to the California Labor Commissioner and
13 the California Department of Industrial Relations. *Id.* UF No. 32. At first, complications
14 existed in obtaining Defendant’s certified payroll records, and the parties dispute the
15 cause of the complications. *See id.* UF Nos. 35, 36. In August 2019, Plaintiffs filed their
16 Complaint. ECF No. 1. Subsequently, Defendant provided the certified payroll records,
17 and Alsweet reviewed the records as part of the audit. *See* UF Nos. 37–39, ECF No. 28.

18 Alsweet determined that while Defendant properly reported its employees’ hours
19 to the Trust Funds, Defendant under-reported the hours for Mr. Alston. *Id.* UF No. 40.
20 According to Alsweet, Defendant should have reported the hours Mr. Alston worked
21 under the PSA, especially since Mr. Alston classified himself in the payroll records as an
22 “Inside Wireman.” *Id.* UF No. 41.

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25 ² While UF No. 29 states the referral occurred in “September 2019,” ECF No. 28, the
26 underlying document supporting the UF indicates that the correct date was September
27 2018. Decl. Zachary Gelbart ¶ 6, ECF No. 24-5.

1 Defendant challenges the above conclusion. According to Defendant, no
2 obligation existed for Mr. Alston to report his hours under the PSA at all since all of his
3 work was non-manual and supervisory in nature. In fact, Defendant averred that Mr.
4 Alston’s self-classification of “Inside Wireman” on the payroll records was a mistake.
5 *Id.* UF No. 43.

6 On December 4, 2020, Plaintiffs moved for summary judgment. MSJ, ECF No.
7 24. On December 31, 2020, Defendant filed its Response,³ and on January 13, 2021,
8 Plaintiffs filed their Reply. ECF Nos. 27, 29. Plaintiffs ultimately argue that they are
9 entitled to \$43,719.69. Part of the entitlement is \$22,705.00 in attorney’s fees. MSJ
10 Mem. 25, ECF No. 24. Defendant does not dispute the calculations reached that are
11 based on Plaintiffs’ theory of liability. Instead, Defendant primarily challenges the
12 underlying theory of liability, i.e. the nature of the work performed by Mr. Alston. *See*
13 *Resp.* 9, ECF No. 27. In addition, Defendant argues that the attorney’s fees, amounting
14 to “nearly 343% of the under-reported contributions,” are unreasonable. *Id.* at 14.

15 **II. LEGAL STANDARD**

16 Summary judgment is appropriate under Federal Rule of Civil Procedure 56(c) “if
17 the pleadings, depositions, answers to interrogatories, and admissions on file, together
18 with the affidavits, if any, show that there is no genuine issue as to any material fact and
19 that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v.*
20 *Catrett*, 477 U.S. 317, 322 (1986). A fact is material when it “might affect the outcome
21 of the suit.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

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25 ³ The Court declines to grant Defendant’s Request for Judicial Notice, ECF No. 27-1,
26 since the Court did not need to rely on the underlying documents. *See* Fed. R. Evid. 1002
27 (discussing the Best Evidence Rule).

1 The initial burden of establishing the absence of any genuine issues of material fact
2 falls on the moving party. *Celotex*, 477 U.S. at 323. The movant can satisfy this burden
3 in two ways: (1) by presenting evidence that negates an essential element of the non-
4 moving party’s case; or (2) by demonstrating that the non-moving party failed to make a
5 showing sufficient to establish an element essential to that party’s case on which that
6 party will bear the burden of proof at trial. *See id.* at 322–23. In such cases, “there can
7 be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning
8 an essential element of the nonmoving party’s case necessarily renders all other facts
9 immaterial.” *Id.*

10 Once the moving party has satisfied its initial burden, the non-moving party cannot
11 rest on the mere allegations or denials of its pleading. The non-moving party must “go
12 beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to
13 interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a
14 genuine issue for trial.’” *Id.* at 324. The non-moving party may meet this requirement by
15 presenting evidence from which a reasonable jury could find in its favor, viewing the
16 record as a whole, in light of the evidentiary burden the law places on that party. *See*
17 *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221–22 (9th Cir. 1995). In
18 determining whether there are any genuine issues of material fact, the court must “view[]
19 the evidence in the light most favorable to the nonmoving party.” *Fontana v. Haskin*,
20 262 F.3d 871, 876 (9th Cir. 2001) (citation omitted).

21 **III. DISCUSSION**

22 The parties agree on most of the issues. First, all parties agree that ERISA applies
23 to this dispute, since within the meaning of ERISA, the Trust Funds are “employee
24 benefit plans” and “multi-employer plans,” and Defendant is an “employer.” *See* UF
25 Nos. 1, 14, ECF No. 28. The Court agrees too. *See* 29 U.S.C. § 1002(3), (5), (37)(A).
26 Further, the parties agree that ERISA presents a statutory duty to make all required
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1 contribution payments, MSJ Mem. 11, ECF No. 24; Resp. 10, ECF No. 27:

2 Every employer who is obligated to make contributions to a multiemployer
3 plan under the terms of the plan or under the terms of a collectively
4 bargained agreement shall, to the extent not inconsistent with law, make
5 such contributions in accordance with the terms and conditions of such plan
or such agreement.

6 29 U.S.C. § 1145. Finally, as discussed *supra* Section I.B, the parties agree that
7 Defendant must adhere to the terms of the Trust Agreements, which list Defendant's
8 obligations and potential monetary penalties if Defendant failed to comply. One of those
9 obligations is that on-site work, such as working with tools in the capacity as an "inside
10 wireman" and in contrast to a non-manual supervisory position, is "covered" work and
11 therefore must be reported to the Trust Funds. *See* Resp. 8, 10, 12–13, ECF No. 27.

12 There are three core disagreements in this case: (1) whether Defendant "under-
13 reported" Mr. Alston's hours; (2) the circumstances behind the auditor's inability to
14 initially review the records; and (3) the reasonableness of Plaintiffs' requested attorney's
15 fees. Upon addressing each, the Court concludes that Plaintiffs are entitled to damages
16 resulting from Defendant under-reporting 496.5 hours, which amount to \$16,192.25.
17 Further, the Court concludes that Plaintiffs are entitled to the litigation costs amounting to
18 \$4,822.44, as such costs were required to prosecute the case. However, the Court sides
19 with Defendant that Plaintiffs failed to meet their burden justifying \$22,705.00 in
20 attorney's fees.

21 **A. "Under-Reporting" Mr. Alston's Work and the Burden of Proof**

22 The first dispute concerns whether Mr. Alston under-reported his hours when
23 Defendant claims those hours were not included because they were non-manual
24 supervisory work. Pursuant to the shifting burden of proof established under ERISA and
25 for summary judgment, Defendant must provide a credible record to demonstrate that
26 under-reporting has not occurred. Since Defendant failed to meet this burden, Plaintiffs
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1 are entitled to damages relating to the under-reported hours by Defendant.

2 The Ninth Circuit has adopted a burden-shifting framework for ERISA disputes
3 over the records of the employee's working hours. *Brick Masons Pension Tr. v. Indus.*
4 *Fence & Supply, Inc.*, 839 F.2d 1333, 1337–39 (9th Cir. 1988); *see also Estate of Barton*
5 *v. ADT Sec. Servs. Pension Plan*, 820 F.3d 1060, 1068 (9th Cir. 2016) (citing *Brick*
6 *Masons*, 839 F.2d at 1337–39). The burden-shifting framework stems from ERISA's
7 requirement under 29 U.S.C. § 1059(a)(1) for employers to keep records sufficient to
8 determine the benefits due. *Brick Masons*, 839 F.2d at 1338.

9 And under this framework, once Plaintiffs prove the fact of damages and
10 Defendant's failure to keep adequate records, the burden shifts to Defendant to present
11 evidence of the extent of covered work performed by its employees. *Id.* at 1338–39; *cf.*
12 *Motion Picture Indus. Pension & Health Plans v. N.T. Audio Visual Supply, Inc.*, 259
13 F.3d 1063, 1066 (9th Cir. 2001) (applying the *Brick Masons* standard: “once [Plaintiffs]
14 show 1) that [Defendant] failed to keep adequate records, and 2) that there exist some
15 employees who (a) performed covered work that was (b) unreported to the trust funds,
16 then the burden shifts to [Defendant] to show the extent of the unreported covered work
17 for those employees”).

18 Here, Plaintiffs have met the initial burden. Plaintiffs have presented a Declaration
19 from the lead auditor in the instant audit.⁴ Decl. Zachary Gelbart, ECF No. 24-5. The
20 auditor has articulated: his credentials, his methodology, his basis for relying on the
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23 ⁴ Defendant initially presents a two-sentence assertion possibly challenging the credibility
24 of the auditor. Resp. 7, ECF No. 27 (“The Auditor is not a third party mediator let alone
25 an administrative body. The Auditor works on behalf of the Trust Funds.”). But
26 Defendant fails to provide any further explanation or evidence demonstrating the
27 auditor's bias or partiality. In fact, Defendant concurs with the auditor's competence.
28 *See id.* at 11. Absent more, the Court declines to disclaim the auditor's declaration.

1 certified payroll records over other record documents, the information that these records
 2 provide (including the type of work of the individual), the alleged discrepancy in the
 3 reported hours, and the damages calculations resulting from the under-reporting. *See*,
 4 *e.g., id.* ¶¶ 1–5, 17–21, 27, 29.

5 Defendant’s response to ERISA’s burden-shifting framework and Plaintiffs’
 6 demonstration of the initial burden is that the certified payroll records, daily reports,
 7 timecards, and contribution records prove that adequate records exist, and that the auditor
 8 disregarded the documents other than the certified payroll records. Resp. 11, ECF No.
 9 27. Yet Defendant has not provided any evidentiary support for its response, such as why
 10 these other records are adequate or more persuasive than the certified payroll records.
 11 Defendant’s brief merely asserts so. Not only does this fail to meet the burden of
 12 persuasion under *Brick Masons*, it fails to meet the evidentiary standard for Defendant to
 13 survive summary judgment. *Cf. Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055,
 14 1063 (9th Cir. 2012) (“[C]onclusory, self-serving affidavit[s], lacking detailed facts and
 15 any supporting evidence,’ are insufficient to create a genuine issue of material fact.”
 16 (alterations in original) (quoting *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168,
 17 1171 (9th Cir. 1997)).

18 In fact, Defendant’s own descriptions and recollections of these documentations
 19 prove the auditor’s (and by extension, Plaintiffs’) point: the certified payroll records are
 20 far more reliable because these forms are submitted to the government, signed by the
 21 submitting employer under penalty of perjury as to their accuracy. Decl. Zachary Gelbart
 22 ¶ 4, ECF No. 24-5. In contrast, the other submitted documents are:

- 23 1. Missing particular periods of time, *see* Decl. Tino X. Do Ex. J (Dep.
 24 Brian M. Alston) at 46:15–20, ECF No. 24-4; Resp. 12, ECF No. 27
 25 (“My Electrician has acknowledged that it cannot locate all Daily
 26 Reports, it is only missing a few.”);

- 1 2. Subject to the supervisor’s discretion as to the contents, *see* Decl.
2 Tino X. Do Ex. J (Dep. Brian M. Alston) at 55:13–23, ECF No. 24-4
3 (“There’s some days where I’ll show up in the morning and I’ll leave.
4 However, I’ll still write my name down for that project because I want
5 my time allotted to that particular project.”); *see also id.* at 63:3–64:8;
- 6 3. Inconsistent and conflicting with each other due to Mr. Alston’s
7 position in the Defendant corporation, *see id.* at 61:3–12 (discussing
8 how the time stated in the daily reports for Mr. Alston will vary from
9 the separate time cards); *see also id.* at 64:9–14 (“I [Mr. Alston] don’t
10 believe the daily reports apply to me because they’re not an accurate
11 assessment of what I do during the day.”); and
- 12 4. Of questionable accuracy and completeness, *see, e.g., id.* at 58:8–15
13 (“I could have been [at the Morse project site on November 13, 2017]
14 or I could have not been. I’m not sure.”).

15 Given the host of concerns over Defendant’s other documents, Defendant’s
16 challenge to the certified payroll records is unavailing. Defendant attempts to distinguish
17 the employee’s payment versus the nature of the work performed by that employee. *See*
18 Resp. 6, ECF No. 27 (“The CPRs merely state what was paid to and on behalf of the
19 employee listed in the report, not the nature of the work actually performed.”). The
20 problem, however, is that Defendant provides the Court with no alternative basis to
21 assess how much time Mr. Alston actually worked in his non-supervisory capacity—
22 which he clearly did at least occasionally, *see, e.g., id.* at 11–13 (“Brian Alston does from
23 time to time perform work in the field.”). The other documents provide zero guidance
24 due to defects discussed in the previous paragraph, and Defendant admits that no direct
25 document exists to assess the extent of Mr. Alston’s supervision during the project (so
26 that the Court can clearly distinguish supervision from on-site work), *id.* at 9.

1 The issue is not whether Defendant had an obligation to report Mr. Alston’s
 2 supervisory work to Plaintiffs. *Cf. id.* at 8. Instead, to the extent that Mr. Alston
 3 performs both supervisory duties and on-site work, Defendant should be able to present
 4 credible evidence that partitions the two functions and itemizes the hours accordingly.
 5 Defendant’s brief presents no such evidence other than those that even Defendant
 6 admitted are imprecise due to Mr. Alston’s position in the corporation.

7 With no other way to assess how long Mr. Alston worked in his “inside wireman”
 8 capacity, the Court must rely on the certified payroll records (which provides the most
 9 credible framing of the events),⁵ or conclude that no “adequate” record exists on the
 10 hours Mr. Alston worked under his “employee” role, *see Brick Masons*, 839 F.2d at 1337.
 11 Either way, Defendant has failed to meet its burden of persuasion—both under the *Brick*
 12 *Masons* framework and the legal standard for summary judgment on a disputed issue, *see*
 13 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (requiring Defendant to show
 14 “specific facts” beyond the pleadings to prove a genuine factual dispute at the summary
 15 judgment phase). Therefore, there is no genuine dispute that Plaintiffs are entitled to the
 16 damages resulting from Defendant under-reporting 496.5 hours of Mr. Alston’s work.

17 **B. The Auditors’ Ability to Review Defendant’s Records**

18 Next, the Court addresses Defendant’s assertion that the auditor was at fault in the
 19 initial inability to review Defendant’s records. *See* Resp. 6, 9, 14, ECF No. 27. This is a
 20 material issue that the Summary Judgment Order must address, because the Court’s
 21 decision on it will directly impact what Defendant owes to Plaintiffs. That is, if the
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 24 ⁵ The fact that the secretary who prepared the certified payroll records was unaware of the
 25 nature of Mr. Alston’s work, *see* Resp. 13, ECF No. 27, also does not help Defendant’s
 26 cause. Mr. Alston had the option to certify that he worked as a “Supervisor,” but he
 27 chose not to. UF No. 55, ECF No. 28. Ultimately, Mr. Alston has certified under penalty
 28 of perjury that he was compensated as an “Inside Wireman.”

1 trouble behind Alsweet’s access to Defendant’s payroll records was wholly Alsweet’s
2 fault, the justification behind Plaintiffs’ lawsuit would become more tenuous. *See* Decl.
3 Andy Berg Ex. C, ECF No. 24-1 (compelling the employer to pay all attorney’s fees and
4 audit fees if the Trust Fund “is required to file a lawsuit to enforce [the employer’s]
5 obligation to comply with an audit,” under Section VIII of the Collection Policy and
6 Procedures); UF No. 9, ECF No. 28 (discussing liquidated damages assessed at a greater
7 amount upon the Trust Funds filing a lawsuit).

8 But again, Defendant’s brief only cites to Plaintiffs’ own MSJ Memorandum, and
9 does not provide evidentiary support: (1) that “the Auditor failed to schedule a visit to
10 review My Electrician’s records,” Resp. 6, ECF No. 27, (2) that “The Auditor failed to
11 appear or coordinate a time for the review of the records,” *id.* at 9, or (3) that “Defendant
12 made all records available to the Auditors prior to the commencement of this action and
13 the Auditor refused and/or failed to come to My Electrician’s office to review the
14 records,” *id.* at 14.

15 In contrast, the auditor from Alsweet has declared he received emails that twice
16 declined to provide access to Defendant’s certified payroll records, which was the reason
17 he canceled the scheduled audit and declined to schedule one later. Decl. Zachary
18 Gelbart ¶¶ 9, 11, ECF No. 24-5. The auditor has testified why the certified payroll
19 records are essential to the audit. *See id.* ¶ 4–5. Therefore, it makes sense that Alsweet
20 cancelled the scheduled audits when the records essential to conduct the audit were
21 unavailable to them. Defendant’s “attempts” to coordinate an audit are hollow gestures
22 when the auditor has explained why an audit without the certified payroll records would
23 have been meaningless.

24 Accordingly, Defendant owes Plaintiffs attorney’s fees, audit fees, and the 20%
25 liquidated damages since the complications relating to the audit arose from Defendant
26 denying access to the certified payroll records. Whether Defendant ultimately cooperated
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1 with Plaintiffs and provided the certified payroll records matters little in the Court’s
 2 decision. After the lawsuit commenced, Defendant had an obligation to comply with
 3 discovery.

4 **C. Plaintiffs’ Entitled Award**

5 The final issue between the parties is how much Defendant owes Plaintiffs.
 6 Specifically, Defendant challenges the amount Plaintiffs are asking in attorney’s fees.
 7 Resp. 14, ECF No. 27. The Court agrees with Plaintiffs that they are entitled to
 8 \$16,192.25 in damages and \$4,822.44 in litigation costs. However, Plaintiffs have failed
 9 to meet their burden of proof for summary judgment on attorney’s fees. Providing an
 10 itemized breakdown of each task performed by the attorneys and paralegals, in addition
 11 to an explanation on the reasonableness of the paralegals’ rates, are needed for the Court
 12 to summarily determine the reasonableness of the attorney’s fees.

13 **1. Damages**

14 “Defendant does not dispute that the Auditor reached its conclusion through the
 15 means and methods described in Plaintiffs’ Motion.” Resp. 9, ECF No. 27. With the
 16 Court agreeing with Plaintiffs’ theory of liability, *supra* Sections III.A, B, it also agrees
 17 with the auditor’s damages calculations:

Contributions	\$6,604.70
Dues	\$966.31
Liquidated Damages (20% of Delinquent Contributions)	\$1,320.94
Audit Fee	\$5,250.00
Interest (10% through 12/4/20)	\$2,050.30
Total Amount Due	\$16,192.25

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 24 Decl. Zachary Gelbart ¶ 30, ECF No. 24-5; MSJ Mem. 25, ECF No. 24. The award listed
 25 above is mandatory and not discretionary. 29 U.S.C. § 1132(g)(2) (discussing how the
 26 court “shall” award unpaid contributions, interest, liquidated damages, and “such other
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1 legal or equitable relief”); *Operating Engineers Pension Tr. v. Beck Eng’g & Surveying*
 2 *Co.*, 746 F.2d 557, 569 (9th Cir. 1984) (citation omitted) (“It is settled Ninth Circuit law
 3 that this provision [Section 1132(g)(2)] is mandatory and not discretionary.”). Further,
 4 Defendant is contractually obliged to pay such amount under the Trust Agreements.

5 **2. Attorney’s Fees and Costs**

6 Plaintiffs also seek \$22,705.00 in attorney’s fees, and \$4,822.44 in costs expended
 7 over the litigation. MSJ Mem. 20, ECF No. 24. Defendant describes such attorney’s fees
 8 as unreasonable. Resp. 14, ECF No. 27. Under the legal standard for a summary
 9 judgment motion and for demonstrating the reasonableness of attorney’s fees, the movant
 10 bears the burden of proof. However, Plaintiffs have failed to (1) provide an itemized, by-
 11 the-hour description of the work performed by counsel and the paralegals; and (2) justify
 12 the reasonableness of the paralegal rates. As such, the Court finds that Plaintiffs have
 13 failed to meet their initial burden. Further, as argued by Defendant, attorney’s fees
 14 almost 3.5 times greater than the originally challenged contribution amount are
 15 unreasonable on the record before the Court.

16 In the instant ERISA lawsuit to enforce delinquent contributions to a multi-
 17 employer plan, the Court must award “reasonable attorney’s fees and costs of the action,
 18 to be paid by the defendant.”⁶ 29 U.S.C. § 1132(g)(2)(D). Upon reviewing the litigation
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21 ⁶ Plaintiffs imply that the Inside Agreement and the Trust Agreement may provide an
 22 independent basis for attorney’s fees. *See* MSJ Mem. 20, ECF No. 24. After all, Section
 23 VIII of the Collection Policy and Procedures states that if the Trust Funds are “required
 24 to file a lawsuit to enforce a Contributing Employer’s obligation to comply with an
 25 audit,” the employer must pay “all” the attorney’s fees and audit fees incurred, “even if
 26 no amounts are found due on the audit.” Decl. Andy Berg Ex. C, ECF No. 24-1. With
 27 no additional support for such claim, however, the Court declines to award attorney’s
 28 fees on this basis. Plaintiffs have not articulated whether such unilateral attorney’s fees
 provisions are enforceable under California law. *Cf. Monster, LLC v. Superior Court*, 12

1 costs, *see* Decl. Tino X. Do Ex. M, ECF No. 24-4, the Court agrees that Plaintiffs are
2 entitled to \$4,822.44, as such fees were necessary to proceed with the lawsuit.

3 As to an attorney’s fees award, its reasonableness is first determined by calculating
4 the lodestar amount. “The ‘lodestar’ is calculated by multiplying the number of hours the
5 prevailing party reasonably expended on the litigation by a reasonable hourly rate.”
6 *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996) (citation omitted),
7 *opinion amended on denial of reh’g*, 108 F.3d 981 (9th Cir. 1997). “The party seeking
8 fees bears the burden of documenting the hours expended in the litigation and must
9 submit evidence supporting those hours and the rates claimed.” *Welch v. Metro. Life Ins.*
10 *Co.*, 480 F.3d 942, 945–46 (9th Cir. 2007) (citation omitted).

11 At the same time, the Court may deviate from the lodestar figure upon considering
12 twelve guideline factors. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.
13 1975), *abrogated on other grounds*. After all, the trial court’s “superior understanding of
14 the litigation” puts it in the best position to determine the reasonableness of the fees and
15 potentially reduce the final attorney’s fees awarded. *Van Gerwen v. Guarantee Mut. Life*
16 *Co.*, 214 F.3d 1041, 1047 (9th Cir. 2000). The Court only needs to discuss the *Kerr*
17 factors that are relevant to the Court’s decision to deviate from the lodestar amount.
18 *D’Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1386 (9th Cir. 1990), *overruled*
19 *on other grounds*.

20 With the above principles in mind, the Court starts with reviewing the lodestar
21 amount presented by Plaintiffs. Plaintiffs’ counsel has provided the calculation below:

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26 Cal. App. 5th 1214, 1225 (2017) (discussing that the purpose of California Civil Code §
27 1717 is “to prevent the oppressive use of one-sided attorney fee provisions”).

1 1. Attorney Fees:

2 Attorney Name	Rate/Hour	Dates Worked	Billed Hours	Total Fees
3 Matthew P. Minser	\$230–245	4/18/19 to 10/31/20	10.50	\$2,458.00
4 Tino X. Do	\$230–245	4/17/19 to 10/31/20	78.60	\$18,430.00
Total:			89.10	\$20,888.00

5 2. Paralegal Fees:

6 Paralegal Name	Rate/Hour	Dates Worked	Billed Hours	Total Fees
7 Nargis Shaghasi	\$135	4/18/19 to 9/20/19	2.60	\$351.00
8 Alicia Wood	\$135–145	10/9/20 to 10/31/20	10.70	\$1,466.00
Total:			13.30	\$1,817.00

9 3. **Total** from adding the attorney fees and paralegal fees: **\$22,705.00.**

10 Decl. Tino X. Do Ex. L, ECF No. 24-4; *see also* UF No. 47, ECF No. 28.

11 The Court first concludes that the attorney rates billed to Plaintiffs are reasonable.
12 In ERISA cases, “billing rates ‘should be established by reference to the fees that private
13 attorneys of an ability and reputation comparable to that of prevailing counsel charge
14 their paying clients for legal work of similar complexity.’” *Welch v. Metro. Life Ins. Co.*,
15 480 F.3d 942, 946 (9th Cir. 2007) (citations omitted). The Court finds the attorney’s fees
16 ranging from \$210 to \$250 per hour to be well-grounded, given that cases of similar
17 complexity have set the attorney’s fees at such rates.⁷ *Cf. Bd. of Trustees of the*
18 *Boilermaker Vacation Tr. v. Skelly, Inc.*, 389 F. Supp. 2d 1222, 1228 (N.D. Cal. 2005)
19 (finding \$210 per hour in an ERISA default judgment case reasonable); *Trs. ex rel.*
20 *Teamsters Benefit Tr. v. Casey’s Office Moving & Servs.*, No. C-05-4157MHP (EMC),
21 2007 U.S. Dist. LEXIS 24722 (N.D. Cal. Mar. 30, 2007) (adopting the magistrate judge’s
22 recommendation of an hourly rate at \$250 in an ERISA default judgment case).

25 ⁷ Given that the charged rates are reasonable, it is unnecessary to determine whether \$345
26 and \$450 per hour rates that Plaintiffs have presented in their briefs are reasonable, *see*
27 MSJ Mem. 22, ECF No. 24.

1 However, in contrast to the hourly billing rates, the Court lacks the evidentiary
2 basis to conclude that the 89.10 attorney hours billed to Plaintiffs are reasonable. The
3 Court understands that the hours billed spanned a period from April 17, 2019 through
4 October 31, 2020, a bit over a year and a half. But with no breakdown of how long
5 counsel spent on each assignment, the Court cannot determine whether those hours were
6 reasonable. For example, Plaintiffs’ counsel has provided a description of work
7 performed, Decl. Tino X. Do 6–7, ECF No. 24-4, and some of the work include activities
8 such as “Intra-office conferences,” or “communications with Trustees regarding
9 settlement proposal.” These are certainly core parts of a lawsuit, but the Court has no
10 way to determine if more hours on this were spent than necessary. Plaintiffs have failed
11 to demonstrate an “essential element” in meeting its burden to justify attorney’s fees, i.e.
12 the reasonableness of the hours. *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23
13 (1986). Indeed, a billing record that breaks down each task by the hour would be
14 necessary. *See* MSJ Mem. 24, ECF No. 24 (“The Trust Funds are not opposed to
15 producing their billing records, if requested by the Court.”).

16 The fees billed on behalf of the paralegals face the same problem. *See id.* at 7–8
17 (“Intra-office conferences”). Further, Plaintiffs have failed to provide any briefing on
18 whether the \$135 to \$145 rates of the paralegals are reasonable or whether such rates
19 correspond to the market compensation. Thus, the Court lacks the evidentiary support to
20 conclude that the \$1,817.00 in paralegal fees is reasonable as well.

21 Since the Court lacks the evidentiary basis to set a reasonable lodestar amount, it
22 would be premature to consider the *Kerr* factors for any potential deviation. *See Van*
23 *Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000) (discussing the
24 need to establish the lodestar amount first, because “[t]he lodestar amount is
25 presumptively the reasonable fee amount”). However, to guide the parties on any
26 potential settlement or follow-up motions, the Court observes that “(2) the novelty and
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1 difficulty of the questions involved, . . . (8) the amount involved and the results obtained,
2 . . . and (12) awards in similar cases” are salient factors the Court would consider in
3 deciding a subsequent attorney’s fees dispute. *See Kerr*, 526 F.2d at 70.

4 Plaintiffs’ explanations behind the reasonableness of the attorney’s fees is not
5 convincing, at least at the summary judgment stage. Lawsuits take time, so the length
6 alone (or the fact that Defendant was responsible for such protracted lawsuit) cannot
7 establish reasonableness.


8 While it is true that ERISA does not require attorney’s fees to be proportional to
9 the total recovery, the fees must still be reasonable. *Operating Engineers Pension Trusts*
10 *v. B & E Backhoe, Inc.*, 911 F.2d 1347, 1355 (9th Cir. 1990). And in determining such
11 reasonableness, the Ninth Circuit expressly permits considering proportionality. *Id.* at
12 1355–56 (discussing how the plaintiffs received reduced attorney’s fees in part “because
13 the recovery was so disproportionate to the amount sought”). On the record before the
14 Court, there is reason to believe that attorney’s fees (\$22,705.00) almost 1.4 times greater
15 than the damages award itself (\$16,192.25) would be disproportionate, and therefore
16 unreasonable.

17 **IV. CONCLUSION**

18 For reasons discussed above, the Court **GRANTS IN PART and DENIES IN**
19 **PART** Plaintiffs’ Motion for Summary Judgment. Under this Order, Plaintiffs are
20 summarily entitled to \$16,192.25 in damages and \$4,822.44 in litigation costs. The Court
21 hereby **VACATES** the hearing on this matter scheduled for January 29, 2021.

22 **IT IS SO ORDERED.**

23 Dated: January 26, 2021

24 
25 Hon. Gonzalo P. Curiel
26 United States District Judge