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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST ADMINISTRATORS, INC.,)	CASE NO. C10-0194-MAT
)	
Plaintiff,)	
)	
v.)	ORDER GRANTING
)	PLAINTIFF'S MOTION FOR
ACE PAVING CO., INC.,)	SUMMARY JUDGMENT
)	
Defendant.)	
_____)	

INTRODUCTION

15
16 Plaintiff Northwest Administrators, Inc. moves the Court for summary judgment
17 against defendant Ace Paving Co., Inc. (Dkt. 8.) This matter was brought pursuant to the
18 Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. (ERISA), to recover
19 remittance reports, trust fund contributions, liquidated damages, interest, attorney's fees, and
20 courts costs from defendant based on its labor agreement with Teamsters Local 589, the
21 Teamsters Construction Industry Welfare Trust Agreement (TCWT), and the Western
22 Conference of Teamsters Pension Trust Agreement (WCTPT). Plaintiff is the authorized

01 agreement entitled the Heavy Construction Compliance Agreement. (Dkt. 9, Ex. B.) In so
02 doing, defendant agreed to be bound by the June 1, 2003 through May 31, 2007 collective
03 bargaining agreement between the Associated General Contractors of America, Inc., and
04 several Teamsters Locals, including Local 589, and any successor collective bargaining
05 agreements. (*Id.*) It also agreed to be bound by the TCWT. (*Id.* and Ex. A.) Defendant
06 and Local 589 are currently parties to a collective bargaining agreement effective June 1, 2007
07 through May 31, 2012. (*Id.*, Ex. C.) The agreement requires defendant to make contributions
08 to the Teamsters Construction Industry Fund for all employees covered by the agreement on or
09 before the tenth day of the month following the month in which the relevant hours were worked.
10 (*Id.* at 13 (Section 7.2.1.))

11 Pursuant to the TCWT, a participating employer who makes delinquent contributions is
12 required to pay liquidated damages in an amount equal to twenty percent of the delinquent
13 contributions owed and interest on those delinquent contributions at the rate of twelve percent
14 per annum from the date the contributions became due and payable until the contributions are
15 paid. (*Id.*, Ex. A (Amendment to TCWT).) (*See also* Dkt. 4, ¶7 (defendant admits in its
16 Answer “that the Trust Agreements between Defendant and the Plaintiff Trusts contain
17 provisions providing for payment of interest and liquidated damages under certain
18 circumstances.”)) It also requires the payment of reasonable attorney’s fees, costs, and other
19 reasonable expenses incurred in the collection of delinquent contributions. (Dkt. 9, Ex. A.)

20 Plaintiff, as the TCWT’s authorized agent and assignee, receives monthly remittance
21 reports from employers setting forth contributions owing for that month. (*Id.*, ¶ 20.) It did
22 not receive any such reports from defendant for the months of November and December 2009.

01 (*Id.*, ¶¶ 20-22.) By letter dated January 27, 2010, counsel for plaintiff requested from
02 defendant the monthly reports and contribution payments for the period of November 2009 and
03 beyond. (*Id.*, Ex. D.) It thereafter, on February 1, 2010, filed the lawsuit under consideration.
04 (Dkt. 1.) On February 10, 2010, plaintiff received the TCWT remittance reports and
05 contributions owed from defendant for November and December 2009. (Dkt. 9, ¶ 24 and Ex.
06 E.) Defendant did not submit associated liquidated damages. (*Id.*, ¶ 27; Dkt. 13, ¶10.)

07 DISCUSSION

08 Summary judgment is appropriate when “the pleadings, depositions, answers to
09 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
10 genuine issue as to any material fact and that the moving party is entitled to a judgment as a
11 matter of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
12 The moving party is entitled to judgment as a matter of law when the nonmoving party fails to
13 make a sufficient showing on an essential element of his case with respect to which he has the
14 burden of proof. *See Celotex*, 477 U.S. at 322-23.

15 Genuine issues of material fact that preclude summary judgment are “disputes over
16 facts that might affect the outcome of the suit under the governing law[.]” *Anderson v. Liberty*
17 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding a summary judgment motion, the Court
18 must view all facts and inferences therefrom in the light most favorable to the nonmoving party.
19 *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). “[A] party opposing a
20 properly supported motion for summary judgment may not rest upon mere allegation or denials
21 of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.”
22 *Anderson*, 477 U.S. at 256 (citing Fed. R. Civ. P. 56(e)).

01 Plaintiff here seeks liquidated damages, interest, and attorney's fees based on
02 defendant's failure to timely submit its TCWT contributions for the months of November and
03 December 2009. Defendant objects to plaintiff's motion, contending the damages sought are
04 unenforceable and void as a penalty, and that ERISA does not mandate such damages until the
05 entry of a judgment.² As discussed below, both of defendant's contentions lack merit.

06 A. Law Governing Liquidated Damages

07 Defendant states that it was not provided an opportunity to negotiate any of the
08 provisions of the TCWT prior to entering into the agreement or provided any explanation as to
09 the relation of the liquidated damages provision to any actual damages suffered as the result of
10 unpaid contributions. (Dkt. 13, ¶¶ 6-7.) Defendant also states that the damages it has been
11 forced to pay over the past two years, as a result of the downturn in the economy and resulting
12 loss in revenues, has forced the delay in its ability to make required contributions. (*Id.*, ¶¶ 8-9.)

13 Defendant posits that the TCWT liquidated damages provision is unenforceable as a
14 penalty under both state and federal common law. *See, e.g., Walter Implement, Inc. v. Focht*,
15 107 Wn.2d 553, 558-59, 730 P.2d 1340 (1987) (“A provision in a contract which bears no
16 reasonable relation to actual damages will be construed as a penalty.”); applying a two part test
17 to determine whether a liquidated damages clause may be enforced: “First, the amount fixed
18 must be a reasonable forecast of just compensation for the harm that is caused by the breach.
19 Second, the harm must be such that it is incapable or very difficult of ascertainment.”) (quoting
20

21 ² In summarizing the “issues presented” in its brief, defendant states that there are genuine issues of
22 material fact regarding both the legality of the liquidated damages provision at issue in this case and the
availability of liquidated damages under ERISA. (Dkt. 12 at 3.) However, defendant did not
thereafter identify any particular factual dispute.

01 *Northwest Collectors, Inc. v. Enders*, 74 Wn.2d 585, 594, 446 P.2d 200 (1968)); *Idaho*
02 *Plumbers & Pipefitters Health & Welfare Fund v. United Mech. Contractors, Inc.*, 875 F.2d
03 212, 215 (9th Cir. 1989) (for a liquidated damages provision to be deemed void as a penalty
04 under federal common law it must meet two conditions: “First, the harm caused by a breach
05 must be very difficult or impossible to estimate. Second, the amount fixed must be a reasonable
06 forecast of just compensation for the harm caused.”) (citations omitted). However, for the
07 reasons asserted by plaintiff and discussed below, this argument fails.

08 ERISA obligates participating employers to make contributions to a multi-employer
09 trust fund in accordance with the contract and trust agreement. *See* ERISA Section 515, 29
10 U.S.C. § 1145. It provides, at § 1132(g)(2), specific remedies for delinquent contributions,
11 including, in addition to the unpaid contributions, liquidated damages, interest, attorney’s fees,
12 and costs. As noted, defendant is also bound by a trust agreement containing terms as to
13 damages owed as a result of delinquent contributions. (Dkt. 9, Exs. A-C.)

14 “Section 1132(g)(2) is ‘mandatory and not discretionary.’” *Northwest Adm’rs Inc. v.*
15 *Albertson’s, Inc.*, 104 F.3d 253, 257 (9th Cir. 1996) (quoting *Operating Eng’rs Pension Trust v.*
16 *Beck Eng’g & Surveying, Co.*, 746 F.2d 557, 569 (9th Cir. 1984)). Entitlement to a mandatory
17 § 1132(g)(2) award requires that: “(1) the employer must be delinquent at the time the action is
18 filed; (2) the district court must enter a judgment against the employer; and (3) the plan must
19 provide for such an award.” *Id.* (citing *Idaho Plumbers & Pipefitters Health & Welfare*
20 *Fund*, 875 F.2d at 215).

21 Here, it is undisputed that defendant was delinquent in making its contributions at the
22 time plaintiff filed this suit and that the trust agreement provides for liquidated damages,

01 interest, attorney’s fees, and courts costs. Also, as discussed further below, “mandatory fees
02 are available under § 1132(g)(2) ‘notwithstanding the defendant’s post-suit, pre-judgment
03 payment of the delinquent contributions themselves.’” *Id.* at 258 (quoting *Carpenters*
04 *Amended & Restated Health Benefit Fund v. John W. Ryan Constr. Co.*, 767 F.2d 1170, 1175
05 (5th Cir. 1985)). Plaintiff is, accordingly, entitled to liquidated damages, interest, and
06 attorney’s fees under § 1132(g)(2).

07 Defendant’s reliance on state and federal common law is unavailing. ERISA contains
08 an expansive preemption provision. *See generally* 29 U.S.C. § 1144 (a) (ERISA “shall
09 supersede any and all State laws insofar as they may now or hereafter relate to any employee
10 benefit plan” covered by ERISA) and (c)(1) (“‘State law’ includes all laws, decisions, rules,
11 regulations, or other State action having the effect of law[.]”); *Egelhoff v. Egelhoff*, 532 U.S.
12 141, 146 (2001) (observing that ERISA’s preemption provision is “‘clearly expansive.’”) (sources omitted); *General Am. Life Ins. Co. v. Castonguay*, 984 F.2d 1518, 1521 (9th Cir.
14 1993) (“ERISA’s preemption clause is one of the broadest ever enacted by Congress, and it
15 preempts even generally applicable laws, not just laws aimed exclusively at employee benefit
16 plans[.]”) (internal citations omitted).

17 Section 1132(g)(2)(C)(ii) specifically allows for a grant of “liquidated damages
18 provided for under the plan in an amount not in excess of 20 percent[.]” Defendant fails to
19 support the contention that the liquidated damages provision at issue here, allowing for twenty
20 percent of delinquent contributions owing (Dkt. 9, Ex. A), may escape preemption.

21 Indeed, plaintiff entirely ignores the issue of preemption, focusing instead on
22 distinguishable and inapplicable state and federal common law. For instance, in the Ninth

01 Circuit decision relied upon by plaintiff, *Idaho Plumbers & Pipefitters Health & Welfare*
02 *Fund*, 875 F.2d at 215, the Court noted that § 1132(g)(2) did not apply because there were no
03 unpaid contributions at the time the suit in that case was filed. *See also, e.g., Board of Trustees*
04 *of Local 41, Int'l Bhd. of Elec. Workers Health Fund v. Zacher*, 771 F. Supp. 1323, 1332
05 (W.D.N.Y. 1991) (same); *Walter Implement, Inc.*, 107 Wn.2d at 555-59 (considering contract
06 claim under state law). The Ninth Circuit also read the legislative history to indicate that
07 “Congress intended only to preempt laws limiting liquidated damages to an amount below the
08 20% level *when the terms of § 1132(g)(2) are satisfied.*” *Idaho Plumbers & Pipefitters Health*
09 *& Welfare Fund*, 875 F.2d at 217 (emphasis in original). Here, as stated above and discussed
10 further below, the terms of § 1132(g)(2) are satisfied. The state and federal common law cases
11 relied on by defendant are, therefore, inapposite, and plaintiff is entitled to the liquidated
12 damages, interest, and attorney’s fees sought.

13 B. Liquidated Damages Award Prior to Judgment

14 Section 1132(g)(2)(C)(ii) provides for an award of liquidated damages “in an action to
15 recover delinquent contributions . . . in which a judgment in favor of the plan is awarded[.]”
16 Defendant avers that this provision, therefore, allows for liquidated damages only once a
17 judgment has been awarded. *See Idaho Plumbers & Pipefitters Health & Welfare Fund*, 875
18 F.2d at 215 (§ 1132 (g)(2)(C)(ii) “applies when (1) the fiduciary *obtains a judgment* in favor of
19 the plan, (2) unpaid contributions exist at the time of suit, and (3) the plan provides for
20 liquidated damages.”) (emphasis added). Relying on a Sixth Circuit decision supporting this
21 reading of § 1132(g)(2), defendant maintains that, because it paid all contributions owing,
22 plaintiff’s action – seeking liquidated damages alone – necessarily fails. *In re Michigan*

01 *Carpenters Council Health & Welfare Fund*, 933 F.2d 376, 388 (6th Cir. 1991) (concluding
02 that § 1132(g)(2)(A) and (B) “apply only if there were unpaid contributions on the date of the
03 award” because § 1132(g)(2) “provides that upon ‘a *judgment* in favor of the plan’ the court
04 shall award the plan ‘*the* unpaid contributions’ and ‘interest on *the* unpaid contributions.’”) (quoting § 1132(g)(2)(A) and (B)) (emphasis added by court). However, defendant fails to
05 support this reading of § 1132(g)(2) under Ninth Circuit law.
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07 As stated above, the Ninth Circuit has held that “mandatory fees are available under §
08 1132(g)(2) ‘notwithstanding the defendant’s post-suit, pre-judgment payment of the delinquent
09 contributions themselves.’” *Northwest Adm’rs Inc.*, 104 F.3d at 258 (quoting *Carpenters*
10 *Amended & Restated Health Benefit Fund*, 767 F.2d at 1175). In so doing, the Ninth Circuit
11 rejected the contention that an employer was not obligated to pay liquidated damages and
12 attorney’s fees on contributions voluntarily paid prior to the entry of a judgment. *Id.*

13 It appears that, excluding the Sixth Circuit, every Court of Appeals to consider the issue
14 concurs with the Ninth Circuit. See *UAW Local 259 Soc. Sec. Dep’t v. Metro Auto Ctr.*, 501
15 F.3d 283, 288-89 (3d Cir. 2007) (§ 1132(g)(2) remedies apply to all contributions unpaid at the
16 time a suit is filed, even if the debts are partially satisfied before judgment); *Operating Eng’rs*
17 *Local 139 Health Benefit Fund v. Gustafson Constr. Corp.*, 258 F.3d 645, 654 (7th Cir. 2001)
18 (“The interest and liquidated-damages provisions of ERISA apply . . . only to contributions that
19 are unpaid at the date of suit (not the date of judgment, as argued by the defendant.”); *Iron*
20 *Workers Dist. Council v. Hudson Steel Fabricators & Erectors, Inc.*, 68 F.3d 1502, 1507 (2d
21 Cir. 1995) (“[T]he provisions of § 1132(g)(2)(B) and (C) make reference to unpaid
22 contributions not to establish a limit on qualifying judgments, but rather because the amount of

01 an award of interest or liquidated damages should logically be predicated upon the amount of
02 the unpaid contributions originally at issue, whether or not outstanding at the time of judgment,
03 since that amount correctly measures the damage caused by the delinquency.”) *See also*
04 *Carpenters & Joiners Welfare Fund v. Gittleman Corp.*, 857 F.2d 476, 478 (8th Cir. 1988)
05 (agreeing that “unpaid contributions” accounted for in § 1132(g)(2) means “contributions
06 unpaid at the time suit was filed[.]”)

07 These decisions reflect the intention that an employer not “escape its statutory liability
08 for interest, liquidated damages or double interest, attorney fees, and costs simply by paying the
09 delinquent contributions before entry of judgment in a § 1132(g)(2) action brought to recover
10 delinquent contributions.” *Iron Workers Dist. Council*, 68 F.3d at 1506. As stated by one
11 court: “Permitting delinquent employers to avoid paying § 1132 penalties after suit is filed . . .
12 would largely thwart the purpose of § 1132(g)(2) to provide plan fiduciaries with an effective
13 weapon against delinquent employers. It would also anomalously cause only employers with
14 legitimate legal arguments (. . . awaiting final judgment) to pay ancillary relief.” *Id.* at 1508
15 (internal citations omitted). *Accord UAW Local 259 Soc. Sec. Dep’t*, 501 F.3d at 289 (“The
16 payment of interest compensates plans for one kind of cost[] incurred in connection with
17 delinquencies, that is, the loss of interest. The purpose of the provision would be defeated if
18 we allowed employers to avoid paying interest simply by satisfying their debt moments before
19 the court issues judgment.”) (quotation marks and quoted sources omitted).

20 Defendant unsuccessfully distinguishes the applicable, binding case law. It notes that
21 *Northwest Adm’rs*, unlike this case, involved the entry of a judgment for unpaid contributions.
22 *See* 104 F.3d at 258 (noting judgment entered in the amount of \$60,037.60, including

01 \$42,821.62 in delinquent contributions). However, it remains that the Ninth Circuit in that
02 case awarded liquidated damages and attorney’s fees associated with both contributions that
03 remained deficient *and* those paid prior to the entry of judgment. *Id.* at 257-58. The Court
04 also explicitly rejected the contention that the mandatory fees provided for in § 1132(g)(2) may
05 not be awarded in the absence of a judgment. *Id.* at 258 (“fees may be awarded even though
06 there is no judgment on the merits or when the dispute has become moot because relief is
07 otherwise obtained.”) (quoting *Lads Trucking Co. v. Board of Trustees of W. Conference of*
08 *Teamsters Pension Trust Fund*, 777 F.2d 1371, 1375 (9th Cir. 1985)).

09 At least one district court within the Ninth Circuit has applied the ruling in *Northwest*
10 *Adm’rs* to a case, like this one, in which unpaid contributions were voluntarily paid in full prior
11 to the entry of judgment. *Trustees of the Constr. Indus. v. B Witt Concrete Cutting, Inc.*, 685 F.
12 Supp. 2d 1158, 1163 (D. Nev. 2010) (finding an award of damages pursuant to § 1132(g)(2)
13 mandatory even where delinquent contributions were paid prior to judgment; stating that the
14 Ninth Circuit has “squarely rejected” the interpretation of the Sixth Circuit on this issue) (citing
15 *Northwest Adm’rs*, 104 F.3d at 258, and *In re Michigan Carpenters Council Health & Welfare*
16 *Fund*, 933 F.2d at 388).³ See also *Fanning v. Langenfelder Marine, Inc.*, No. 07-2182 (PLF),
17 2010 U.S. Dist. LEXIS 29827 at *4-6 (D. D.C. Mar. 29, 2010) (finding employer who paid all
18 delinquent contributions after suit filed liable for twenty percent of the amount due pursuant to
19 § 1132(g)(2)). As with cases involving partial payments of delinquent contributions, the

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21 ³ Plaintiff provides several unpublished district court decisions from the Ninth Circuit recognizing that
22 liquidated damages may be awarded even where unpaid contributions are tendered prior to the entry of
judgment. (Dkt. 16, Exs. A-C.) However, those cases also involved other outstanding unpaid
contributions. (*See id.*)

01 conclusion that liquidated damages may be collected following the full payment of delinquent
02 contributions supports the underlying purpose of § 1132(g)(2) and avoids the possibility that an
03 employer may evade its obligations under this provision simply by paying delinquent
04 contributions at some point prior to the entry of a judgment. Defendant's contention that §
05 1132(g)(2) is inapplicable because it paid all outstanding delinquent contributions prior to the
06 entry of a judgment, therefore, fails.

07 CONCLUSION

08 In sum, the Court finds no issues of fact regarding either the enforceability of the
09 collective bargaining and trust agreements at issue in this case or plaintiff's entitlement to the
10 total amount of liquidated damages, interest, and attorneys' fees sought. Accordingly,
11 plaintiff's motion for summary judgment is hereby GRANTED and plaintiff awarded
12 liquidated damages in the amount of \$3,329.17, interest in the amount of \$1.99, and attorney's
13 fees in the amount of \$6,361.75.

14 DATED this 7th day of September, 2010.

15 /s/ Mary Alice Theiler
16 MARY ALICE THEILER
17 United States Magistrate Judge
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