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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LOCALS 302 AND 612 OF THE)	CASE NO. C10-0282-MAT
INTERNATIONAL UNION OF)	
OPERATING ENGINEERS)	
CONSTRUCTION INDUSTRY HEATH)	
AND SECURITY FUND, et al.,)	
)	
Plaintiffs,)	ORDER GRANTING IN PART AND
)	DENYING IN PART PLAINTIFFS'
v.)	MOTION FOR SUMMARY
)	JUDGMENT
DON MORIN, INC.,)	
)	
Defendant.)	
_____)	

INTRODUCTION

17 Plaintiffs – Locals 302 and 612 of the International Union of Operating
18 Engineers-Construction Industry Health & Security Fund, Locals 302 and 612 of the
19 International Union of Operating Engineers-Employers Construction Industry Retirement
20 Fund, Western Washington Operating Engineers-Employers Training Trust Fund (hereinafter
21 collectively “Trust Funds”), and Local 302 of the International Union of Operating Engineers–
22 move the Court for summary judgment against defendant Don Morin, Inc. (Dkt. 9.) This

01 matter was brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. §
02 1001, et seq. (ERISA), to recover delinquent trust fund contributions, liquidated damages,
03 interest, attorney's fees, and costs.

04 Plaintiffs filed this lawsuit in relation to delinquent contributions for the months of
05 December 2009 and January 2010. Defendant paid the December 2009 contributions just
06 prior to the filing of this lawsuit and the January 2010 contributions after the lawsuit was filed.
07 Plaintiffs, therefore, now pursue the payment of liquidated damages, interest, attorney's fees,
08 and costs. Plaintiffs seek liquidated damages in the amount of \$10,708.93, interest in the
09 amount of \$655.80, attorney's fees in the amount of \$3,565.50, and costs in the amount of
10 \$485.74. (*See* Dkts. 11 & 15.)

11 Defendant contends the pleadings on file do not support granting summary judgment
12 and that, even if adequate evidence was offered, the liquidated damages clause at issue in this
13 case is unenforceable as a penalty under Washington law. (Dkt. 13.) For the reasons
14 described below, the Court finds plaintiffs entitled to liquidated damages for the delinquent
15 January 2010 contributions, but not for the delinquent December 2009 contributions. The
16 Court further finds plaintiffs entitled to the interest, attorney's fees, and costs requested.

17 BACKGROUND

18 On April 4, 1996, defendant entered into a compliance agreement wherein it agreed to
19 be bound by the terms and conditions of the Trust Agreements of the three Trust Funds included
20 in this lawsuit. (Dkt. 12, Exs. A, C-E.) The compliance agreement also bound defendant to
21 the collective bargaining agreement between Associated General Contractors of Washington
22 and Locals 302 and 612 of the International Union of Operating Engineers, and any successor

01 matter of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
02 The moving party is entitled to judgment as a matter of law when the nonmoving party fails to
03 make a sufficient showing on an essential element of his case with respect to which he has the
04 burden of proof. *See Celotex*, 477 U.S. at 322-23.

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

13 A. Support for Summary Judgment

14 Defendant first contends that the pleadings on file do not support granting summary
15 judgment. Defendant states that it denied in its Answer the claims alleging breach of contract
16 and asserting damages. It avers that no evidence has been offered, either in the Complaint or in
17 Plaintiffs’ Motion for Summary Judgment, supporting an action on contract for liquidated
18 damages or other remedies. Defendant maintains, therefore, that plaintiffs have failed to
19 demonstrate their entitlement to a judgment as a matter of law under any circumstances.
20 However, the Court, in large part, rejects these contentions.

21 Plaintiffs aver and provide documentation showing that defendant is bound by a
22 collective bargaining agreement, as well as to the terms and conditions of Trust Agreements

01 which require the payment of liquidated damages, interest, attorney's fees, and costs in the
02 event of delinquent contributions. Plaintiffs establish that defendant submitted delinquent
03 contributions for the months of December 2009 and January 2010, the amount of liquidated
04 damages and interest owing as a result of those delinquent contributions under the operative
05 documents, and the attorney's fees and costs incurred as a result of their efforts to recover
06 delinquent contributions and associated damages.

07 Defendant does not dispute that it is bound by the enforceable terms of the operative
08 documents (*see* Dkt. 13 at 5, n.2), that it failed to timely submit its contributions for the months
09 in question, or that the operative documents require the payment of interest, attorney's fees, and
10 costs. Nor does defendant dispute the amounts of liquidated damages, interest, attorney's fees,
11 and costs allegedly incurred under the operative documents. Defendant, instead, argues only
12 that the liquidated damages clause contained within each Trust Agreement is unenforceable as a
13 penalty.

14 For the reasons discussed below, the Court finds plaintiffs entitled to an award of
15 liquidated damages owing for the delinquent January 2010 contributions, interest for both of the
16 months in question, and an award of attorney's fees and costs. The evidence submitted
17 demonstrates that there are no genuine issues as to any material facts and that plaintiffs are
18 entitled to a judgment as a matter of law with respect to these damages. Defendant's
19 contention as to insufficient pleading and a lack of evidence supporting summary judgment on
20 these issues is no more than conclusory and, therefore, insufficient to defeat summary
21 judgment.

22 As also discussed below, however, the Court does not find plaintiffs entitled to

01 summary judgment in relation to all of the damages associated with the delinquent December
02 2009 contributions. That is, plaintiffs fail to submit in their summary judgment motion
03 sufficient argument and evidentiary support for their contention that they are entitled to
04 liquidated damages in relation to those contributions.

05 B. Damages for Delinquent Contributions

06 Defendant contends that the liquidated damages clause at issue in this case is
07 unenforceable as a penalty under Washington law. It points specifically to RCW 62A.2-718,
08 which states:

09 Damages for breach by either party may be liquidated in the agreement but only
10 at an amount which is reasonable in the light of the anticipated or actual harm
11 caused by the breach, the difficulties of proof of loss, and the inconvenience or
nonfeasibility of otherwise obtaining an adequate remedy. A term fixing
unreasonably large liquidated damages is void as a penalty.

12 RCW 62A.2-718(1).

13 Defendant asserts that that the liquidated damages provision at issue, which applies
14 regardless of the length or impact of the delinquency, is clearly a penalty. *See Lind Bldg.*
15 *Corp. v. Pac. Bellevue Dev.*, 55 Wn. App. 70, 79, 776 P.2d 977 (1989) (“[T]he purpose of
16 awarding damages for breach of contract is to place the damaged party, as nearly as possible, in
17 the position he would be in had the contract been performed. He is not entitled to more than he
18 would have received had the contract been performed.”) (citing *Platts v. Arney*, 50 Wn.2d 42,
19 46, 309 P.2d 372 (1957)). It asserts that “[i]nterest is adequate compensation for any loss
20 occasioned by the debtor’s delay[,]” *Aubrey v. Angel Enters.*, 43 Wn. App. 429, 434, 717
21 P.2d 313 (1986) (quoting *Shepherd v. Continental Bank*, 28 Wn. App. 346, 349, 622 P.2d 1310
22 (1981)), and that the imposition of liquidated damages on top of interest accrued constitutes a

01 windfall for plaintiffs. Defendant stresses that plaintiffs have failed to identify any damages
02 sustained in this case as a result of the delinquent contributions. It notes, as an additional
03 consideration, that it had no opportunity to bargain for the terms contained in the Trust
04 Agreements.

05 Plaintiffs counter defendant's contentions by asserting that damages associated with the
06 January 2010 contributions are preempted under ERISA and that they are entitled to the
07 damages associated with the December 2009 contributions under federal common law. As
08 discussed below, the Court agrees with plaintiffs' contention as to liquidated damages for the
09 January 2010 contributions and as to the total amount of interest, attorney's fees, and costs
10 sought, but finds a lack of support as to liquidated damages for the December 2009
11 contributions.

12 1. January 2010 Contributions:

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

19 "Section 1132(g)(2) is 'mandatory and not discretionary.'" *Northwest Adm'rs Inc. v.*
20 *Albertson's, Inc.*, 104 F.3d 253, 257 (9th Cir. 1996) (quoting *Operating Eng'rs Pension Trust v.*
21 *Beck Eng'g & Surveying, Co.*, 746 F.2d 557, 569 (9th Cir. 1984)). Entitlement to a mandatory
22 § 1132(g)(2) award requires that: "(1) the employer must be delinquent at the time the action is

01 filed; (2) the district court must enter a judgment against the employer; and (3) the plan must
02 provide for such an award.” *Id.* (citing *Idaho Plumbers & Pipefitters Health & Welfare*
03 *Fund*, 875 F.2d 212, 215 (9th Cir. 1989)). “[M]andatory fees are available under § 1132(g)(2)
04 ‘notwithstanding the defendant’s post-suit, pre-judgment payment of the delinquent
05 contributions themselves.’” *Id.* at 258 (quoting *Carpenters Amended & Restated Health*
06 *Benefit Fund v. John W. Ryan Constr. Co.*, 767 F.2d 1170, 1175 (5th Cir. 1985)).

07 Here, it is undisputed that defendant was delinquent in making its January 2010
08 contributions at the time plaintiffs filed this suit and that the Trust Agreements provide for
09 liquidated damages, interest, attorney’s fees, and costs. Plaintiffs are, accordingly, entitled to
10 liquidated damages, interest, attorney’s fees, and costs under § 1132(g)(2) in relation to the
11 January 2010 delinquent contributions.

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

21 Section 1132(g)(2)(C)(ii) specifically allows for a grant of “liquidated damages
22 provided for under the plan in an amount not in excess of 20 percent[.]” Defendant fails to

01 support the contention that the liquidated damages provision at issue here, allowing for only
02 twelve percent of delinquent contributions owing, may escape preemption. Indeed, defendant
03 entirely ignores the issue of preemption, focusing instead on distinguishable and inapplicable
04 state law. Because this argument fails and because plaintiffs are entitled to the damages
05 sought in relation to the January 2010 contributions, the Court finds plaintiffs entitled to
06 summary judgment on this issue.

07 2. December 2009 Contributions:

08 Plaintiffs concede receipt of defendant's December 2009 contributions prior to the
09 filing of this lawsuit and, therefore, the inapplicability of § 1132(g)(2) to damages associated
10 with these delinquent contributions. Section 1132(g)(2) does not preempt alternative
11 contractual remedies when its provisions fail to reach the particular situation in question.
12 *Idaho Plumbers*, 875 F.2d at 217. Plaintiffs, accordingly, seek damages for the December
13 2009 contributions based on the terms of the collective bargaining agreement and the Trust
14 Agreements.

15 Under federal common law, in order to be deemed enforceable, and not void as a
16 penalty, a liquidated damages provision must meet two conditions: "First, the harm caused by
17 a breach must be very difficult or impossible to estimate. Second, the amount fixed must be a
18 reasonable forecast of just compensation for the harm caused." *Id.* (citations omitted).¹ "The

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20 1 While the parties dispute whether federal or state law controls this issue, neither identifies a
21 relevant distinction between federal and state law. *Compare Idaho Plumbers*, 875 F.2d at 217
22 (looking to whether the harm caused by a breach is "very difficult or impossible to estimate[]" and
whether the amount fixed is "a reasonable forecast of just compensation for the harm caused."), *with*
RCW 62A.2-718(1) (looking to whether liquidated damages are "reasonable in the light of the
anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience
or nonfeasibility of otherwise obtaining an adequate remedy.") Given the similarity in the criteria

01 parties' intentions determine whether this second requirement is satisfied. They must make a
02 good faith attempt to set an amount equivalent to the damages they anticipate." *Id.* (citations
03 omitted). Where unreasonable, a court will refuse to enforce stipulated damages on public
04 policy grounds. *Id.* (cited sources omitted).

05 Here, plaintiffs state that the December 2009 liquidated damages are enforceable "based
06 on the language of the liquidated damages provision of the Trust Agreements, and the reasons
07 they give for awarding liquidated damages – in part because it's too difficult to determine the
08 exact amount of damages." (Dkt. 14 at 7.) The Trust Agreements state in relevant part:

09 The parties recognize and acknowledge that the regular and prompt
10 payment of employer contributions to the Fund is essential to the efficient and
11 fair administration of the Fund and the Plan and that the Fund will incur extra
12 administrative expenses in addition to and apart from actual legal fees and costs
13 as a result of any failure of any Individual Employer to pay required monthly
14 contributions in full within the time provided; that the amount of such extra
15 expense has a direct relationship to the number of Employees involved, which in
16 turn has a direct relationship to the total contributions due; and that the actual
17 amount of such extra administrative expense is extremely difficult, if not
18 impractical, to establish. The parties wish to establish in advance of any
19 default, the measure for such extra administrative expense as liquidated
20 damages. Accordingly, the parties agree that if any Individual Employer is
21 delinquent in remitting any required contributions, then unless the Trustees, by
22 affirmative action, waive the same for good cause shown, such delinquent
Individual Employer shall be liable for a liquidated damage charge in the sum of
twelve percent (12%) of the amount of his delinquency; provided that such
liquidated damages shall in no event be less than twenty-five dollars (\$25.00)
for each month of contributions which is delinquent.

19 (Dkt. 12, Exs. C-E (Art. II, Section 9).) Plaintiffs also note that the agreements require
20 damages of only twelve percent of the delinquency, rather than the twenty percent rejected by

21 applied, *see id.*, and the fact that courts in the Ninth Circuit appear to apply federal law, *see, e.g., Idaho*
22 *Plumbers*, 875 F.2d at 217, the Court herein applies federal common law in addressing the
enforceability of the liquidated damages provision at issue.

01 the Ninth Circuit in *Idaho Plumbers*.

02 The Court encounters no difficulty in concluding that plaintiffs satisfy the first prong of
03 the above-described two-part test. *See Idaho Plumbers*, 875 F.2d at 217. Courts have
04 recognized the difficulty in estimating damages caused by delinquent trust fund contributions.
05 *See, e.g., Bd. of Trustees v. Udovch*, 771 F. Supp. 1044, 1049 (N.D. Cal. 1991) (“When an
06 employer is delinquent in paying contributions into a fringe benefit trust fund, the fund suffers
07 some kinds of harms that are very difficult to gauge. In order to pursue payment, the trust must
08 engage in a number of activities, such as sending additional collection letters, billing
09 statements, and correspondence, and placing follow-up telephone calls, that are made necessary
10 only by the breach but that are so intertwined with on-going operations that their separate value
11 is most difficult to measure. A trust fund pursuing delinquent contributions suffers additional
12 harm through the diversion of employee and executive time and attention from other business
13 matters. Moreover, the plans are subjected to uncertainty about whether the delinquent
14 contributions will ever be collected and the effect the delinquencies will have on the fund’s
15 ability to pay out benefits.”) In this case, the difficulty in accurately forecasting damages, as
16 averred by plaintiffs and stated explicitly in the Trust Agreements, is apparent.

17 Plaintiffs do not, however, succeed in relation to the second part of the applicable test.
18 *See Idaho Plumbers*, 875 F.2d at 217. In fact, plaintiffs do not make any showing with respect
19 to efforts made to forecast just compensation for the harm caused by delinquent contributions.
20 They proffer no argument or evidence as to the parties’ intentions or the process entailed in the
21 formulation of the liquidated damages provision. Instead, they simply assert that defendant is
22 bound by the plain language of the Trust Agreements and rely on the fact that they seek a lesser

01 amount than that deemed a penalty in a different case. The relevant language within the Trust
02 Agreements does not provide any further explanation, stating only that the Trust Funds “will
03 incur extra administrative expenses” and “that the amount of such extra expense has a direct
04 relationship to the number of Employees involved, which in turn has a direct relationship to the
05 total contributions due[.]” (Dkt. 12, Exs. C-E.)

06 “Without some indication that the liquidated damages provision is a good faith attempt
07 to set an amount reflective of anticipated damages, [the court] will find the provision void as a
08 penalty.” *Parkhurst v. Armstrong Steel Erectors, Inc.*, 901 F.2d 796, 798 (9th Cir. 1990). *See*
09 *also Idaho Plumbers*, 875 F.2d at 218 (rejecting twenty percent liquidated damages provision,
10 leading to damages totaling \$9,245.23 for contributions paid four days late, explaining: “Even
11 taking account of lost investment interest and increased administrative costs, these damages are
12 not a reasonable forecast of just compensation. The trust funds provide no explanation for the
13 increase from 10% to 20%. They do not suggest that it corresponded to an increase in
14 administrative or other costs. The trustees had the opportunity and authority to establish a
15 schedule of damages, but failed to do so. The provision was not a good faith attempt to estimate
16 the amount of damages flowing from the breach.”) This remains true whether the provision
17 calls for twenty percent of the delinquent contributions or some lesser amount. *See, e.g.*,
18 *Parkhurst*, 875 F.2d at 798 (noting appellees’ concession “that the *Idaho Plumbers* penalty
19 analysis would recognize no difference between a 10% or 20% rate[.]” and finding nothing in
20 the record to indicate that liquidated damages provisions at either ten or twenty percent were the
21 result of good faith attempts to forecast damages); *Udovch*, 771 F. Supp. at 1050 (finding ten
22 percent liquidated damages provision unenforceable as a penalty where it was clear it could not

01 “be considered a reasonable forecast of only the otherwise uncompensated harm that breaches
02 were likely to cause.”; also rejecting enforceability of twenty percent figure applied in the event
03 of multiple delinquencies).

04 Because plaintiffs fail to make any showing that the twelve percent liquidated damages
05 provision resulted from a good faith attempt to estimate damages flowing from a breach, the
06 Court has no basis for concluding that the provision is enforceable. *See Parkhurst*, 901 F.2d at
07 798. Plaintiffs, therefore, fail to establish their entitlement to liquidated damages for the
08 delinquent December 2009 contributions.

09 The Court notes, however, that defendant raises no argument as to interest accrued in
10 relation to the December 2009 contributions. Indeed, defendant appears to suggest that the
11 interest constitutes adequate compensation for the harm caused by its failure to timely render its
12 contributions. (*See* Dkt. 13 at 4 and 6.) Defendant likewise appears to recognize its
13 contractual obligation to pay “costs and fees associated with recovery.” (*Id.* at 6.) The Court,
14 therefore, finds defendant liable for the interest accrued in relation to the delinquent December
15 2009 contributions, and attorney’s fees and costs associated with recovering those damages.

16 CONCLUSION

17 In sum, the Court finds plaintiffs entitled to some of the liquidated damages sought, as
18 well as to interest, attorney’s fees, and costs. Accordingly, Plaintiffs’ Motion for Summary
19 Judgment is hereby GRANTED in part and DENIED in part. Plaintiffs are awarded liquidated
20 damages in the amount of \$5,183.12 for the delinquent January 2010 contributions. (*See* Dkt.
21 12, Ex. F.) Plaintiffs are also entitled to the interest, attorneys’ fees, and costs requested, as
22 outlined above. However, because plaintiffs calculated the amount of interest as of March 4,

01 2010 (*id.*) and the amount of attorney's fees and costs as of September 2010 (*see* Dkt. 15), a
02 revised accounting may now be in order. Accordingly, plaintiffs shall submit such
03 information within **ten (10) days** of the date of this Order.

04 DATED this 25th day of October, 2010.

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07 Mary Alice Theiler
08 United States Magistrate Judge
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