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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

THOMAS E. PEREZ,
Plaintiff,

vs.

**SAMOA AVIATION, INC.; SAMOA
AVIATION, INC. 401(k) PROFIT
SHARING PLAN,**
Defendants.

Case No.: SACV 13-00674-CJC(PLAx)

**ORDER GRANTING PLAINTIFF’S
MOTION FOR DEFAULT
JUDGMENT**

I. INTRODUCTION & BACKGROUND

Plaintiff Thomas Perez, Secretary of Labor, United States Department of Labor (“Plaintiff”) brought this enforcement action under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001–1191c, against Defendants Samoa Aviation, Inc. (“Samoa Aviation”) and Samoa Aviation, Inc. 401(k) Profit Sharing Plan (the “Plan”) (together “Defendants”). (Dkt. No. 1 [“Compl.”].) Plaintiff alleges that Samoa Aviation was the plan administrator for the Plan, which was organized to provide retirement benefits to its participants, employees of Samoa Aviation. (*Id.* ¶¶ 7–8.) When

1 Samoa Aviation declared bankruptcy, it failed to take steps to ensure the continued
2 operation of the Plan. (*Id.* ¶¶ 12–13.) The Plan’s named fiduciaries and trustees cannot
3 be located, leaving it without anyone to manage and control its assets. (*Id.* ¶¶ 14–16.) As
4 a result, Defendants are alleged to be in violation of various provisions of ERISA. (*Id.*
5 ¶¶ 18–19.) Moreover, although the Plan holds \$235,693.44 in assets for its 53
6 participants, (Dkt. No. 9 [“Mot. Default J.”] at 5), its custodial asset trustee, Pershing,
7 LLC, will not authorize distributions of any remaining Plan assets to participants and
8 beneficiaries without direction from a properly-appointed fiduciary or a court-appointed
9 independent fiduciary. (Compl. ¶¶ 15–16.) Plaintiff filed the present action to obtain
10 equitable relief pursuant to 29 U.S.C. § 1132(a)(5). (Compl. at 5.) Specifically, he seeks
11 removal of Samoa Aviation as plan administrator and fiduciary of the Plan, and requests
12 that the Court appoint an independent fiduciary for the Plan. (*Id.*) Because Defendants’
13 failure to appear in this action resulted in their default, Plaintiff now moves the Court for
14 entry of default judgment.¹ For the reasons stated herein, that motion is GRANTED.²

16 **II. ANALYSIS**

17
18 The district court may enter default judgment upon application by a party under
19 Federal Rule of Civil Procedure 55(b). Local Rule 55-1 also requires submission of a
20 declaration with the default application. After a default has been entered by the Clerk of
21 the Court, the well-pleaded factual allegations of the complaint are taken as true, except

23 ¹ On account of the federal government shutdown that began on October 1, 2013, the Court
24 stayed the present case until such time as government appropriations were restored and Plaintiff
25 was able to prosecute the action. (Dkt. No. 8.) Appropriations having been restored, Plaintiff
26 also moves this Court to reopen the case so as to allow resolution of the concurrently filed
27 motion for default judgment. Plaintiff’s motion to reopen the case for purposes of this motion is
28 GRANTED.

² Having read and considered the papers presented by the parties, the Court finds this matter
appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15.
Accordingly, the hearing set for November 25, 2013 at 1:30 p.m. is hereby vacated and off
calendar.

1 for those allegations related to damages. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d
2 915, 917–18 (9th Cir. 1987). Thus, when determining liability, a defendant’s default
3 functions as an admission of the plaintiff’s well-pleaded allegations. Necessary facts not
4 contained in the pleadings, and claims which are legally insufficient, however, are not
5 established by default. *Cripps v. Life Ins. Co.*, 980 F.2d 1261, 1267 (9th Cir. 1992).
6 Rule 55(b)(2) allows, but does not require, the court to conduct a hearing on damages, as
7 long as it ensures that there is an evidentiary basis for the damages awarded in the default
8 judgment. *Action S.A. v. Marc Rich & Co. Inc.*, 951 F.2d 504, 508 (2nd Cir. 1991).
9 Relief may not differ in kind from, or exceed in amount, that which is specifically
10 demanded in the complaint. Fed. R. Civ. P. 54(c).

11 12 **A. Procedural Requirements**

13
14 Plaintiff satisfied the procedural requirements for default judgment provided in
15 Federal Rule of Civil Procedure 55 and Local Rule 55-1. Pursuant to Rule 55(a),
16 Plaintiff obtained a default against Samoa Aviation on August 14, 2013. (Dkt. No. 5.) In
17 accordance with Local Rule 55-1, Plaintiff submitted a signed declaration indicating that
18 Samoa Aviation defaulted on the Complaint by failing to respond to it within the time
19 permitted by law, that it is not an infant or incompetent person, and that the
20 Servicemembers Civil Relief Act does not apply. (Dkt. No. 9-2, [“Doherty Decl.”] ¶¶ 4,
21 10–11.) Finally, Plaintiff’s motion complies with Rule 54(c) because it does not seek
22 relief that differs in kind from, or exceeds in amount, what was originally demanded in
23 the Complaint.³ (See Compl. at 5–6.)
24

25
26 ³ Plaintiff has not requested the Clerk enter default against the Plan, nor has Plaintiff moved for
27 default judgment against the Plan. However, like Samoa Aviation, the Plan also failed to appear
28 in this action after being properly served. Therefore, so as to expedite resolution of this matter,
the Court hereby directs entry of default against the Plan. Further, because the Court is satisfied
that the procedural requirements of Local Rule 55-1 can be met with respect to the Plan, the
Court will evaluate Plaintiff’s present motion for default judgment as to the Plan as well.

1 **B. The *Eitel* Factors**

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3 Because Plaintiff has satisfied the procedural requirements necessary for default
4 judgment to issue, the Court now addresses the merits of his motion. A defendant’s
5 default does not automatically entitle a plaintiff to judgment; rather, entry of judgment is
6 based on the court’s discretion. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980).
7 The Ninth Circuit has articulated that the following factors may be considered by the
8 court in exercising its discretion to award a default judgment: (1) the possibility of
9 prejudice to the plaintiff, (2) the merits of the plaintiff’s substantive claims, (3) the
10 sufficiency of the complaint, (4) the sum of money at stake in the action, (5) the
11 possibility of a dispute concerning material facts, (6) whether the default was due to
12 excusable neglect, and (7) the strong policy of the Federal Rules that favors decisions on
13 the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). Upon
14 consideration of the *Eitel* factors, the Court finds that default judgment against
15 Defendants is appropriate.

16
17 As to the first and sixth factors, Defendants have failed to appear in this action or
18 otherwise communicate any intent to do so. Such failure does not appear to have been
19 the result of excusable neglect, but has severely prejudiced Plaintiff. Without entry of
20 default judgment, Plaintiff — and more importantly, the Plan participants and
21 beneficiaries for whose benefit he brings suit — would be left without the ability to
22 obtain distribution of the Plan assets to which the Plan participants and beneficiaries are
23 entitled. The first and sixth factors therefore strongly counsel in favor of the entry of
24 default judgment.

25
26 The second and fifth *Eitel* factors, the merits of Plaintiff’s claim and the possibility
27 of a dispute concerning material facts, also support the entry of default judgment.
28 Pursuant to § 1132(a)(5), Plaintiff is entitled to sue for appropriate equitable relief where

1 a retirement plan's fiduciary has breached its duty with respect to the plan. Here,
2 Plaintiff alleges that Samoa Aviation, as fiduciary for the Plan, violated three provisions
3 of ERISA. First, Samoa Aviation violated § 1103(a)(1)(A) by failing to act solely in the
4 interest of the participants and beneficiaries of the Plan and for the exclusive purpose of
5 providing benefits to participants and their beneficiaries and defraying reasonable
6 expenses of Plan administration. Second, Samoa Aviation failed to act with the care,
7 skill, prudence, and diligence required of a fiduciary by § 1104(a)(1)(A). Third, Samoa
8 Aviation failed to act in accordance with the documents and instruments governing the
9 Plan, thereby violating § 1104(a)(1)(D). Plaintiff additionally alleges that because the
10 Plan does not have named fiduciaries or trustees with exclusive authority and discretion
11 to manage and control its assets, it exists in violation of § 1102(a) and § 1103(a). Taking
12 the facts alleged in Plaintiff's Complaint as true, the Court finds that Defendants have
13 violated various provisions of ERISA, and that Plaintiff is entitled to the equitable relief
14 he seeks. Further, the Court finds that a dispute as to material facts is unlikely.

15
16 Finally, the fourth *Eitel* factor, the amount of money at stake, also counsels in
17 favor of entry of default judgment. Plaintiff only seeks equitable relief in this action.
18 While the Plan for which he seeks appointment of an independent fiduciary does contain
19 \$235,693.44 in assets, a large sum of money, it is money that belongs to Plan participants
20 and beneficiaries, who are currently being deprived of it because there is no fiduciary for
21 the Plan. Defendants will not personally lose that money by the Court's entry of default
22 judgment.

23
24 Ultimately, only the seventh *Eitel* factor, which encourages consideration of the
25 Federal Rules' policy favoring resolution on the merits, counsels against entry of default
26 judgment. As described above, however, that factor is strongly outweighed by each of
27 the other *Eitel* factors. Therefore, the Court will enter default judgment against
28 Defendants.

C. Remedy

ERISA specifically provides for the removal of a plan fiduciary who “breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by [Title I of ERISA].” 29 U.S.C. § 1109(a). The Act additionally allows the Secretary of Labor to bring an action for equitable relief in order “to enjoin any act or practice that violates any provision of [Title I], or to obtain other appropriate equitable relief to redress such violation or to enforce any provision of [Title I].” 29 U.S.C. § 1132(a)(5). Appropriate equitable relief can include the appointment of an independent fiduciary to administer and manage the plan. *See Donovan v. Mazzola*, 716 F.2d 1226, 1238–39 (9th Cir. 1983); *Solis v. Vigilance, Inc.*, No. C 08–05083 JW, 2009 WL 20331767, at *3 (N.D. Cal. July 9, 2009).

Here, Plaintiff seeks the removal of Samoa Aviation as plan administrator and named fiduciary of the Plan, and the appointment of Thomas A. Dillon, Esq. as the independent fiduciary to the Plan. (Mot. Default J. at 4.) Mr. Dillon would be responsible for “marshalling, paying out, and administering all of the Plan’s assets and taking further action with respect to the Plan as appropriate, including terminating the Plan when all of its assets are distributed to all eligible participants and beneficiaries,” and would have a fiduciary responsibility to the Plan. (*Id.* at 4–5.) In return for his appointment, Mr. Dillon would receive up to \$5,000 in reasonable fees and expenses, payable from the Plan’s assets. (*Id.* at 5.)

Plaintiff alleges that appointment of Mr. Dillon is necessary because without a court-appointed independent fiduciary, the Plan’s custodial trustee will not release any Plan funds to participants and beneficiaries. (Compl. ¶¶ 15–16.) Plaintiff supports his request for relief through the declaration of Department of Labor investigator Robyn Mallon, who took carried out an investigation into the Plan. (Dkt. No. 9-3 [“Mallon

1 Decl.”] ¶ 2.) Ms. Mallon’s investigation led her to conclude that Samoa Aviation’s
 2 corporate rights, powers, and responsibilities were suspended by the California Franchise
 3 Tax Board in 2002, that Samoa Aviation filed for bankruptcy in 2003, and that it did not
 4 appoint any successor to provide administrative services to the Plan. (*Id.* ¶ 5b.) She
 5 further concluded that the Plan’s discretionary trustee, Andre Lavigne cannot be located,
 6 and that no other person was appointed to succeed him as Plan trustee. (*Id.* ¶ 5c.)
 7 Finally, Ms. Mallon notes that based on her consultations with several independent
 8 fiduciaries and her own professional experience, a \$5,000 fee to Mr. Dillon to serve as
 9 the Plan’s trustee is reasonable. (*Id.* ¶¶ 7–8.)

10
 11 Based on the above, the Court finds that the equitable remedy sought by Plaintiff,
 12 to remove Samoa Aviation from its position as plan administrator and named fiduciary of
 13 the Plan, and appoint in its place Thomas Dillon, is warranted. The Court further finds
 14 that the \$5,000 fee proposal for Mr. Dillon’s service is reasonable.

15
 16 **III. CONCLUSION**

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 18 For the foregoing reasons, Plaintiff’s motion for default judgment is GRANTED.
 19 As stated in the Judgment issued concurrently with this Order, Samoa Aviation, Inc. will
 20 be removed from its position as plan administrator and named fiduciary of the Plan, and
 21 Thomas Dillon will be appointed in its place as the independent fiduciary of the Plan.

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 24 DATED: November 21, 2013



25 CORMAC J. CARNEY
 26 UNITED STATES DISTRICT JUDGE
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