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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CERTAIN UNDERWRITERS AT  
LLOYDS, LONDON,

Plaintiff,

No. CIV. S-10-116 MCE DAD

v.

TRIDUANUM FINANCIAL, INC.,  
JOHNNY E. GRIVETTE, J.R.,  
CHRISTOPHER JARED WARREN,  
and SCOTT EDWARD CAVELL,

FINDINGS AND RECOMMENDATIONS

Defendants.

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This matter came before the court on June 10, 2011, for hearing on plaintiff  
Certain Underwriters at Lloyds, London's ("plaintiff") motion for default judgment (Doc. No.  
47). Ted Smith, Esq. appeared for plaintiff. No appearance was made by or on behalf of  
defendants Triduanum Financial, Inc. ("Triduanum") and Scott Edward Cavell ("Cavell")  
(sometimes collectively, "defendants").

After considering plaintiff's argument and all written materials submitted in  
connection with plaintiff's motion and for the reasons set forth below, the undersigned  
recommends that the motion be granted and that default judgment be entered against defendants.

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1 without a damages hearing. Dundee, 722 F.2d at 1323. Unliquidated and punitive damages,  
2 however, require “proving up” at an evidentiary hearing or through other means. Dundee, 722  
3 F.2d at 1323-24; see also James v. Frame, 6 F.3d 307, 310-11 (5th Cir. 1993).

4 Granting or denying default judgment is within the court’s sound discretion.

5 Draper v. Coombs, 792 F.2d 915, 924-25 (9th Cir. 1986). The court is free to consider a variety  
6 of factors in exercising its discretion. Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

7 Among the factors that may be considered by the court are

8 (1) the possibility of prejudice to the plaintiff, (2) the merits of  
9 plaintiff’s substantive claim, (3) the sufficiency of the complaint,  
10 (4) the sum of money at stake in the action, (5) the possibility of a  
11 dispute concerning material facts, (6) whether the default was due  
12 to excusable neglect, and (7) the strong policy underlying the  
13 Federal Rules of Civil Procedure favoring decisions on the merits.

14 Eitel, 782 F.2d at 1471-72 (citing 6 Moore’s Federal Practice ¶ 55-05[2], at 55-24 to 55-26).

## 15 ANALYSIS

### 16 I. Propriety of Entering Default Judgment

17 The factual allegations of plaintiff’s complaint, taken as true pursuant to the entry  
18 of default against defendants, establish the following. On August 13, 2008, defendant  
19 Triduanum submitted an Application for Mortgage Bankers Professional Liability Insurance,  
20 Mortgagee’s E&O Insurance and a Mortgage Bankers Fidelity Bond (the “Application”) to  
21 plaintiff. Warren has admitted that, as Executive Vice President of Triduanum, he signed and  
22 submitted the Application to plaintiff. (Warren Stip., Doc. No. 37 at 2:1-3.) Although the  
23 Application also shows that Grivette, the former President of defendant Triduanum, also signed  
24 the Application, Grivette denies that he signed the Application and asserts that his signature is a  
25 forgery made without his knowledge or approval. (Grivette Stip., Doc. No. 41 at 2:7-9.) Based  
26 on answers provided by defendant Triduanum in the Application, plaintiff issued a Mortgage  
Bankers and Mortgage Brokers Professional Liability Policy, No. MB5913, with a policy period  
beginning October 1, 2008 and expiring October 1, 2009 (“the Policy”). (Ex. B to Compl (Doc.

1 No. 1.) Also, based on answers provided by defendant Triduanum in the Application, plaintiff  
2 issued a Mortgage Bankers Fidelity Bond under Bond No. MB59514 with a bond period  
3 beginning October 1, 2008 and expiring October 1, 2009 (“the Bond”). (Ex. C to Compl. (Doc.  
4 No. 1).) The Application was attached to and made part of both the Policy and the Bond.

5 The Application included the following questions:

6 Question No. 69: “Has the Applicant or its predecessors in  
7 business or any person proposed to be insured ever been the subject  
8 of any claim or lawsuit with regard to the coverage’s being applied  
9 for?”

10 Question No. 70: “Does any person or entity proposed to be  
11 insured have knowledge or information of any act, error or  
12 give rise to a claim(s), suit(s), investigation(s) or action(s) under a Professional  
13 Liability Policy, Mortgagee’s E&O Policy and/or Fidelity Bond  
14 Policy?”

15 Question No. 75: “Have there been or are there now pending, any  
16 claim(s), suit(s) or action(s) (including but not limited to, any  
17 investigation) against any person or entity proposed for insurance  
18 under the proposed coverage forms in connection with mortgage  
19 lending products, practices or activities?”

20 In response to the foregoing questions, defendant Triduanum answered “no.”

21 The Policy provided that: “All the statements and representations in the  
22 application are deemed to be material to the risk assumed by the insurer, form the basis of this  
23 policy, and are incorporated into and have become a part of this policy.” (Ex. B to Compl. (Doc.  
24 No. 1), Policy at ¶ 21.) Similarly, under the General Agreements of the Bond, Section “C”  
25 Representation of Insured stated as follows: “The Insured represents that the information  
26 furnished in the application for this bond is complete, true and correct. Such application  
constitutes part of this bond. Any misrepresentation, omission, concealment or incorrect  
statement of material fact, in the application or otherwise, shall be grounds for the rescission of  
this bond.” (Ex. C to Compl. (Doc. No. 1).) Finally, the Application provided that the applicant  
further agrees that if the information supplied on the Application changes between the date of the

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1 Application and the time when the policy/bond is issued, the applicant will immediately notify  
2 the company of the change.

3           On August 25, 2008, after the Application was submitted to plaintiff on August  
4 13, 2008, but before the inception date of the Policy and Bond on October 1, 2008, Grivette was  
5 named as a defendant in a lawsuit entitled Allen C. Daniels v. Lawrence Loomis, et al., No. SCV  
6 23522, Superior Court of the State of California, County of Placer. (Grivette Stip., Doc. No. 41  
7 at 2:24-26.) Defendant Triduanum never disclosed the Daniels lawsuit to plaintiff, even though  
8 that information is material and pertinent to Question Nos. 69, 70 and 75 described above.

9           Additionally on September 2, 2008, also after the Application date but before the  
10 inception date of the Policy and Bond, Warren was interviewed by Special Agent Christopher S.  
11 Fitzpatrick of the Treasury Department, Internal Revenue Service-Criminal Investigation with  
12 respect to his involvement with Loomis Wealth Solutions and Nationwide Lending Group.  
13 Specifically, Warren was questioned about his knowledge and involvement in alleged  
14 mortgage fraud involving himself, defendant Cavell and others. (Warren Stip., Doc. No. 37 at  
15 2:22-23; Ex. E to Compl. (Doc. No. 1), Criminal Compl. against Warren). Defendant Triduanum  
16 never disclosed this criminal investigation to plaintiff, even though such information is material  
17 and pertinent to Question No. 75 of the Application. (Kirk Decl. (Doc. No. 48) at ¶ 14.)

18           Within a few weeks after the Policy and Bond were issued to defendant  
19 Triduanum, defendant Cavell was interviewed on October 21, 2008 by Agent Fitzpatrick with  
20 respect to his knowledge and involvement in alleged mortgage fraud. (Ex. F to Compl. Doc. No.  
21 1), Criminal Compl. against Cavell.)

22           Thereafter in February 2009, the U.S. Attorneys Office filed criminal complaints  
23 against Warren and defendant Cavell. On February 2, 2009, defendant Triduanum's website  
24 displayed a letter entitled "Restoring International Confidence in American MSB/CMBS/ABS  
25 Investment System by Christopher Jared Warren." (Grivette Stip. (Doc. No. 41) at 3:1-3 and Ex.  
26 B.) In the letter, Warren admits to engaging in mortgage fraud since the age of nineteen,

1 including through the companies of Loomis Wealth Solutions and Nationwide Lending Group,  
2 for which Warren and defendant Cavell were the subject of criminal investigation and later  
3 criminal charges.

4 In March 2009, an indictment was filed against Warren and defendant Cavell with  
5 respect to defendant Triduanum's business dealings with Taylor Bean & Whitaker Mortgage  
6 Corporation. (Ex. G to Compl.)

7 Weighing the Eitel factors, the undersigned finds that the material allegations of  
8 the complaint set forth above support plaintiff's claims. Defendants have had ample notice of  
9 plaintiff's intent to pursue judgment against them, yet they continue to fail to respond to the  
10 complaint or otherwise appear in the action. There has been no showing that defendants' failure  
11 to respond is due to excusable neglect. Under such circumstances, there is no reason to doubt the  
12 merits of plaintiff's substantive claims, nor is there any apparent possibility of a dispute  
13 concerning the material facts underlying this action. Since plaintiff only seeks rescission and  
14 declaratory relief, the amount of money at stake is not at issue. Finally, plaintiff will be  
15 prejudiced if default judgment is denied because plaintiff will be forced to continue its defense of  
16 defendants in the Underlying Lawsuit. Because each of these factors weigh in plaintiff's favor,  
17 the undersigned, while recognizing the public policy favoring decisions on the merits, will  
18 recommend that default judgment be granted.

19 II. Terms of Judgment to be Entered

20 After determining that entry of default judgment is warranted, the court must next  
21 determine the terms of the judgment. As indicated above, plaintiff does not seek the award of  
22 money damages. Rather, plaintiff seeks only rescission of the Policy issued to defendants and  
23 declaratory relief regarding that rescission. Plaintiff is entitled to the requested relief. California  
24 Insurance Code §§ 331, 359 and 10380 allow an insurer to rescind an insurance contract when

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1 the insured has concealed or misrepresented material facts.<sup>1</sup> See Security Life Ins. Co. of  
2 America v. Meyling, 146 F.3d 1184, 1187 (9th Cir. 1998). Materiality is determined subjectively  
3 by looking to the effect of the representation on the insurer. See Cal. Ins. Code § 334  
4 ("Materiality is to be determined not by the event, but solely by the probable and reasonable  
5 influence of the facts upon the party to whom the communication is due, in forming his estimate  
6 of the disadvantages of the proposed contract, or in making his inquiries."); Imperial Casualty &  
7 Indemnity Co. v. Sogomonian, 198 Cal. App. 3d 169, 181 (1988). A fact is material if, as  
8 alleged in this case, the insurer specifically sought the information in question. Thompson v.  
9 Occidental Life Ins. Co., 9 Cal. 3d 904, 916 (1973) ("The fact that the insurer has demanded  
10 answers to specific questions in an application for insurance is in itself usually sufficient to  
11 establish materiality as a matter of law.")

12 Here, plaintiff alleges that it would not have issued the subject policy but for the  
13 representations on defendants' Application for the Policy. Plaintiff has established that  
14 defendants failed to disclose material facts in the Application, including the Daniels lawsuit, in  
15 which Grivette was a named defendant, and the law enforcement investigation of Warren,  
16 thereby materially misrepresenting facts pertinent to plaintiff's decision to issue the Policy and  
17 Bond to defendants. (See generally Kirk Decl.) Plaintiff has also shown that Grivette's signature  
18 was forged on the Application and provided without his approval, thereby establishing an  
19 alternative basis for rescission of the Policy. Therefore, based on the allegations of the complaint  
20 and the further evidence submitted in support of the instant motion, the undersigned finds that  
21 plaintiff is entitled to an order entering judgment in its favor against defendants.

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22 <sup>1</sup> California Insurance Code § 331 ("Concealment, whether intentional or  
23 unintentional, entitles the injured party to rescind insurance."); § 359 ("If a representation is false  
24 in a material point, whether affirmative or promissory, the injured party is entitled to rescind the  
25 contract from the time the representation becomes false."); and § 10380 ("The falsity of any  
26 statement in the application for any policy covered by this chapter shall not bar the right to  
recovery under the policy unless such false statement was made with actual intent to deceive or  
unless it materially affected either the acceptance of the risk or the hazard assumed by the  
insurer.").





1 within seven days after service of the objections. The parties are advised that failure to file  
2 objections within the specified time may, under certain circumstances, waive the right to appeal  
3 the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 DATED: November 29, 2011.

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8 DALE A. DROZD  
9 UNITED STATES MAGISTRATE JUDGE

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