

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

Attorneys Liability Protection Society,)
Inc.,

No. CV-12-218-PHX-SMM

10

Plaintiff,

**MEMORANDUM OF DECISION AND
ORDER**

11

v.

12

Mary Wynne, et al.,

13

Defendants.

14

15

16

Before the court is Plaintiff’s Motion for Summary Judgment or, in the Alternative, Default Judgment. (Doc. 29.) Defendants Mary Wynne and Daniel Gargan have not responded to the motion, and the deadline for them to do so has passed, making the matter fully briefed. After consideration, the Court will grant the motion for default judgment.

20

BACKGROUND

21

Plaintiff is Attorneys Liability Protection Society, Inc., a provider of professional liability insurance. Plaintiff brought this action against Mary Wynne, d/b/a Wynne Law Firm, and Wynne’s husband Daniel Gargan (collectively “Defendants”).

24

I. The Underlying Lawsuits

25

Wynne was a licensed attorney in the states of North Dakota, South Dakota, and Washington during the time period relevant to this suit, and represented Ms. Sandra Evans in probate proceedings related to the death of Ms. Evans’ father William Wapato Evans in 2003. These probate proceedings involved Ms. Evans’ dispute with her three nephews

28

1 regarding the division of William Wapato Evans' property, including interests in federal
2 Indian trust real property, specifically his 100% interest in the Moses Allotment No. 10
3 ("MA-10"). These probate issues were resolved by a settlement agreement in 2005, whereby
4 Ms. Evans was to receive a 100% interest in William Wapato Evans' interest in MA-10, and
5 for a period of five years loan 35% of her annual MA-10 income to her nephews through
6 their company, Wapato Heritage, LLC. The settlement agreement was approved by
7 November, 2005.

8 Some time prior to December 17, 2005, Ms. Evans retained Defendant Gargan to
9 provide services as a financial advisor, and executed a power of attorney granting Gargan
10 authority to act on her behalf with respect to financial matters. In April of 2006, Gargan
11 instructed the Bureau of Indian Affairs to transfer Evans' MA-10 income from her Individual
12 Indian Money account to a business account in the name of Wynne Law Firm at a Wells
13 Fargo Bank branch in Mission, South Dakota. Both Wynne and Gargan had signatory
14 authority over this account. Between April 2006 and August 2007, \$1,259,255.56 of Evans'
15 income was transferred from her Individual Indian Money account to the Wells Fargo
16 Account.

17 Neither Wynne nor Gargan took any steps to ensure that the required 35% of the WA-
18 10 income was paid to Wapato Heritage. Instead, between April 2006 and August 2007,
19 Gargan paid Evans an allowance of \$340,000, paid himself a salary of \$225,000, paid for half
20 of the expenses for his and Wynne's residence in Chandler, Arizona, and paid the Wynne
21 Law Firm \$75,000. In October of 2007, Wapato Heritage and Ms. Evans' nephews filed a
22 lawsuit ("the MA-10 lawsuit") against Evans for her failure to loan the required 35% of the
23 MA-10 income to Wapato Heritage pursuant to the settlement agreement.

24 Later that same month, First Phoenix International, Inc. was incorporated by Evans,
25 Wynne, and Gargan as a "development company." In October of 2008, Wynne entered
26 appearance on behalf of Ms. Evans in the MA-10 lawsuit. In correspondence dated that same
27 day, attorney R. Bruce Johnston, counsel for the nephews and Wapato Heritage, requested
28 that Wynne withdraw her appearance in the MA-10 lawsuit, in part due to Wynne's conflict

1 of interest in representing Evans because Evans had potential claims against Wynne
2 associated with the improper use of moneys from the MA-10 account by Wynne and Gargan.

3 On November 13, 2008, Wynne submitted an application for professional liability
4 insurance to Plaintiff. Wynne's application did not disclose any information regarding
5 Johnston's assertions in the October, 2008 letter that Evans may have had claims against
6 Wynne arising out of her representation of Evans in executing the probate settlement.

7 In December of 2008, attorney Leslie Weatherhead of the firm Witherspoon, Kelley,
8 Davenport & Toole, P.S. ("Witherspoon Kelley") entered an appearance on behalf of Evans
9 in the MA-10 lawsuit. In a January 2009 letter addressed to Evans and copied to Wynne,
10 Witherspoon Kelley agreed to represent Evans with respect to matters related to the MA-10
11 lawsuit, but explicitly excluded from the scope of its representation any possible claims
12 Evans may have had against Wynne. The letter specifically referenced Johnston's repeated
13 suggestions that Evans may have had claims against Wynne and/or Gargan.

14 In October of 2009, Wapato Heritage and Evans' nephews filed a motion to disqualify
15 Wynne as counsel for Evans in the MA-10 lawsuit, asserting that she had irreconcilable
16 conflicts of interest with Evans and had committed unethical acts. The court granted the
17 motion to disqualify Wynne in part.

18 Wynne subsequently submitted a Solo Renewal Application to Plaintiff for renewal
19 of her professional liability insurance in December of 2009. In her application and
20 supplementary information, she stated that she had "received no notification of any potential
21 claims against me or the Firm for acts or failures to act in my professional capacity as an
22 attorney, during the year 2009 or in any prior year when I have practiced law." (Doc. 21 ¶
23 39.) Two days later, Wynne submitted to Plaintiff two separate faxes containing additional
24 information, which finally revealed the potential that she may have been liable to Wapato
25 Heritage and Evans' nephews due to her management of the Wells Fargo account, though
26 Wynne did not mention the assertions that she had engaged in unethical conduct, nor did she
27 disclose the Johnston letter or the Witherspoon Kelley letter. Plaintiff thereupon issued a
28 renewal of Wynne's insurance policy, albeit with a revised quote, based on the information

1 contained in her renewal application and the supplemental information she provided.

2 On February 19, 2010, the Blackstone Corporation, a wholly owned subsidiary of
3 Witherspoon Kelley, filed suit (“the Blackstone suit”) against Evans for attorneys’ fees and
4 costs incurred on her behalf in the MA-10 lawsuit. Evans responded by filing a third-party
5 complaint against attorney Weatherhead and the firm of Witherspoon Kelley. Weatherhead
6 and Witherspoon Kelley then filed a fourth-party complaint against Wynne and Gargan,
7 seeking contribution and/or apportionment based on Wynne’s representation of Evans in the
8 MA-10 lawsuit and Gargan’s provision of financial advice to Evans. Evans thereafter
9 amended her third-party complaint to add claims against Wynne and Gargan alleging
10 breaches of their duties to her in connection with both the MA-10 lawsuit and the
11 management of the MA-10 funds.

12 At the same time, Wapato Heritage served Wynne with a summons and copy of a
13 complaint in a separate suit (“the Wapato Heritage suit”). The Wapato Heritage suit asserted
14 claims for conversion, unjust enrichment, constructive trust, and legal malpractice based on
15 Wynne’s representation of Evans, and Gargan’s provision of financial advice to Evans.
16 Thus, the claims asserted against Defendants in both of the underlying suits (the Blackstone
17 suit and the Wapato Heritage suit) relate only to the disposition of Evans’ MA-10 income and
18 the exclusive control Wynne and Gargan exercised over those funds, and these suits sought
19 the return of such funds.

20 Plaintiff accepted Wynne’s tender of the defense of both lawsuits, subject to a
21 complete reservation of its rights to deny coverage and seek reimbursement of amounts paid
22 in defense of non-covered claims. Plaintiff also accepted the defense of Gargan in the
23 underlying suits subject to the same complete reservation of rights. Plaintiff eventually paid
24 \$194,503.38 in attorneys’ fees and costs in defense of Wynne and Gargan against the
25 underlying suits, up until the point at which defense counsel in those actions withdrew from
26 their representation of Wynne and Gargan for failure to assist and cooperate in their defense.

27 **II. The 2009-2010 Liability Insurance Policy**

28 The 2009-2010 policy issued to Wynne by Plaintiff defines an “insured” in relevant

1 part as a non-attorney “who is or was an employee of the Named Insured,” but “solely for
2 claims arising from actions within the scope of such person’s duties as an employee of the
3 Named Insured” “and arising from the provision of professional services by the Named
4 Insured.” (Doc. 21-5.) The policy agreement also provides as a condition precedent to
5 coverage that “at the effective date of this policy, no Insured knew or reasonably should have
6 known or foreseen that the act, error, omission or personal injury might be the basis of a
7 claim.” (Id.)

8 The policy further states that

9 The Company shall not have a duty to defend or to pay such
10 expenses as to any claim not covered under this policy, and shall
11 have the right to seek reimbursement from any Insured, who
12 shall promptly provide such reimbursement, for any amount
13 paid by the Company in defending any such non covered claim,
14 including any amount paid in defending a non-covered claim
15 that is asserted together with one or more covered claims.

16 (Id.)

17 **III. Procedural Background**

18 Plaintiff filed its Amended and Supplemental Complaint (“ASC”) in this action on
19 October 18, 2012. Plaintiff seeks reimbursement of the attorneys’ fees and costs paid to
20 defend Defendants in the underlying suits, and a judgment declaring that: (1) Gargan is not
21 an insured under the 2009-2010 policy with respect to the underlying suits; (2) the policy
22 does not afford coverage for the underlying suits; and (3) Plaintiff has no duty to defend or
23 indemnify Defendants with respect to the underlying suits. (Doc. 21.)

24 Plaintiff served Wynne with summons and a copy of the ASC on November 7, 2012,
25 and served Gargan on November 14, 2012. (Docs. 25, 26.) Neither Wynne nor Gargan filed
26 any answer or response to the ASC, and the Clerk entered default against Defendants on
27 December 13, 2012. (Doc. 28.) To date, Defendants have filed no appearance in this Court.

28 **STANDARDS OF REVIEW**

I. Default Judgment

Federal Rule of Civil Procedure 55(a) provides that “[w]hen a party against whom a
judgment for affirmative relief is sought has failed to plead or otherwise defend as provided

1 by these rules . . . the clerk shall enter the party’s default.” After a default has been entered
2 and the defendant fails to appear or move to set aside the default, the court may, on the
3 plaintiff’s motion, enter a default judgment. Fed. R. Civ. P. 55(b)(2).

4 Granting default judgment is within the court’s discretion. See Aldabe v. Aldabe, 616
5 F.2d 1089, 1092 (9th Cir. 1980) (considering lack of merit in plaintiff’s substantive claims,
6 the court did not abuse its discretion in declining to enter a default judgment). When
7 deciding whether to grant default judgment, the court considers the following factors: (1) the
8 possibility of prejudice to the plaintiff; (2) the merits of the plaintiff’s substantive claim; (3)
9 the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the
10 possibility of a dispute concerning material facts; (6) whether the default was due to
11 excusable neglect; and, (7) the strong policy underlying the Federal Rules of Civil Procedure
12 favoring decisions on the merits. Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

13 Having considered Plaintiff’s motion for entry of default judgment, the Court finds
14 that default judgment is appropriate under the Eitel factors, as set forth below.

15 **A. The First, Fourth, Fifth, Sixth, and Seventh Eitel Factors**

16 The first, sixth, and seventh Eitel factors weigh in favor of default judgment in this
17 case. The first factor considers whether Plaintiff will suffer prejudice if default judgment is
18 not entered. Pepsico, Inc. v. Cal. Sec. Cans., 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002).
19 Defendants have failed to appear or otherwise defend this action. In the absence of a default
20 judgment, Plaintiff “would be without other recourse for recovery,” to which it is entitled.
21 See Philip Morris, 219 F.R.D. at 499.

22 The sixth factor considers whether the default was due to excusable neglect. There
23 is no evidence that Defendants’ failure to appear or otherwise defend was the result of
24 excusable neglect. Rather, the record reflects that Defendants failed to appear after being
25 served by mail and by personal service with the ASC. Thus, the sixth Eitel factor weighs in
26 favor of default judgment.

27 Under the seventh factor, the Court must also consider the policy considerations that,
28 whenever possible, cases should be tried on the merits. Eitel, 782 F.2d at 1472. The

1 existence of Rule 55(b), however, indicates that the preference for resolving cases on the
2 merits is not absolute. PepsiCo, Inc., 238 F. Supp. 2d. at 1177. Because Defendants have
3 not appeared or responded in this action, deciding this case on the merits is “impractical,”
4 if not impossible. Id. Thus, the seventh factor weighs in favor of default judgment.

5 The fourth and fifth Eitel factors are neutral in this case. The fourth factor balances
6 the amount of money at stake in relation to the seriousness of the defendant’s conduct. Eitel,
7 782 F.2d at 1471-72. Here, Plaintiff seeks compensatory damages of \$194,503.38,
8 representing the amount paid by Plaintiff in attorneys’ fees and costs in defense of Wynne
9 and Gargan against the underlying suits. Although these are sizeable amounts, considering
10 the seriousness of the allegations and the need to deter such behavior in the future, the
11 amount at stake is not necessarily excessive. Thus, the fourth factor is neutral.

12 The fifth factor considers the possibility that material facts may be in dispute. Eitel,
13 782 F.2d at 1471-72. Because Defendants have failed to respond in this action, and thus
14 have not asserted that there are material facts in dispute, the Court cannot adequately weigh
15 this factor. Thus, this factor is neutral.

16 **B. The Second and Third Eitel Factors**

17 The second and third Eitel factors consider the merits of the plaintiff’s claims and the
18 sufficiency of the complaint. As set forth below, after considering Plaintiff’s claims for
19 declaratory judgment and compensatory damages, the Court finds that these factors also
20 support default judgment in this case.

21 **1. Plaintiff’s claim for declaratory judgment of non-coverage.**

22 Plaintiff seeks a declaration from the Court that the underlying suits are outside the
23 coverage afforded by the 2009-2010 policy. (Doc. 29 at 9.) Plaintiff argues that coverage
24 is precluded because Defendants knew or reasonably should have known that their conduct
25 might be the basis of a claim, but did not give Plaintiff notice prior to the effective date of
26 the policy. (Id. at 10.) Plaintiff argues also that coverage is precluded because: the
27 underlying suits did not seek “damages” as required by the policy; Defendants triggered the
28 conversion/misappropriation exclusion of the policy; and Defendants triggered the “return

1 of fees or other funds” exclusion of the policy. (Id. at 10-13.)

2 The Court finds that Plaintiff’s complaint sufficiently pleads the claim for a
3 declaration of non-coverage, and that the claim is meritorious. Plaintiff alleges that at the
4 time Wynne applied for her 2008-2009 liability insurance policy, she had knowledge of
5 potential claims against her regarding her misuse of the MA-10 funds. Rather than disclosing
6 the fact of these potential claims, Wynne withheld that information from Plaintiff. By failing
7 to report this information at the time of her application, Wynne thus clearly violated the
8 policy agreement’s provision making it a condition precedent to coverage that “at the
9 effective date of this policy, no Insured knew or reasonably should have known or foreseen
10 that the act, error, omission or personal injury might be the basis of a claim.” (Doc. 21-5.)

11
12 Wynne subsequently submitted a Solo Renewal Application to Plaintiff for renewal
13 of her professional liability insurance in December of 2009. At that time, Wynne again failed
14 to provide information on the potential claims against her – despite the fact that she knew
15 even more certainly of the possibility she would be sued, as evidenced by the superior court’s
16 October 2009 grant of the nephews’ motion to disqualify Wynne from representing Evans
17 in the MA-10 lawsuit due to her conflict of interest and the alleged unethical management
18 of Evans’ MA-10 funds. Instead of giving Plaintiff this information at the time of her
19 renewal application, she stated in her application that she had “received no notification of
20 any potential claims against me or the Firm for acts or failures to act in my professional
21 capacity as an attorney, during the year 2009 or in any prior year when I have practiced law.”
22 (Doc. 21 ¶ 39.)

23 Even when Wynne supplemented her application two days later, finally providing
24 information concerning the potential for these claims against her, she informed Plaintiff only
25 that she might be liable to Wapato Heritage and the nephews because she “assigned, in
26 writing, a Law Firm bank account to [Evans], but did not change the name on the account,
27 in or about June of 2005.” (Doc. 29 at 4.) She did not mention the assertions that she had
28 engaged in unethical conduct, nor did she disclose the Johnston letter or the Witherspoon

1 Kelley letter.

2 Through this concealment, Wynne clearly violated the terms of the insurance
3 agreement. The Court therefore finds that Defendants' conduct and knowledge prior to
4 November 21, 2009 (the start-date of the policy) preclude coverage for the underlying suits.
5 Accordingly, Plaintiff was and is under no obligation to defend Defendants in the underlying
6 suits nor indemnify Defendants for liability in the underlying suits. Because the Court finds
7 that the underlying suits were excluded from coverage under the policy on this basis, the
8 Court needs not address Plaintiff's additional alternative arguments in support of this
9 conclusion.

10 **2. Plaintiff's claim for declaratory judgment of non-insured status of**
11 **Defendant Gargan.**

12 The 2009-2010 policy defines "Insured" in relevant part as "[t]he Named Insured
13 listed in Item 1 of the Declarations," which is Wynne Law Firm, and "[a] non-attorney who
14 is or was an employee of the Named Insured . . . , solely for claims arising from actions
15 within the scope of such person's duties as an employee of the Named Insured." (Doc. 21-5.)

16 Plaintiff argues that Gargan is not an insured under the policy. The underlying suits
17 allege counts against Gargan for conversion and unjust enrichment based on his handling of
18 the Wapato Heritage Funds. (Doc. 21-2 at 5-9; Doc. 21-4.) As such, Plaintiff argues, the
19 underlying suits asserted claims against Gargan based on his provision of services to Evans
20 as a financial advisor and as her attorney-in-fact. Therefore, Plaintiff argues, the claims
21 against Gargan were based upon actions not within the scope of his duties as an employee
22 of Wynne Law Firm, and Gargan is thus not an "Insured" under the policy language.

23 The Court finds Plaintiff's argument on this point only cursory, and thus insufficient
24 for the Court to conclude that all claims in the underlying suits against Gargan were for
25 actions not within the scope of his employment with Wynne Law Firm. However, the Court
26 finds that a declaration of Gargan's status as a non-insured under the policy is unnecessary
27 and redundant in light of the Court's finding that the policy provides no coverage for the
28 underlying suits due to Defendants' actions, as discussed above.

