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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Kenneth C. Taylor,

10 Plaintiff,

11 v.

12 Gouri G. Nair,

13 Defendant.

No. CV-13-01982-PHX-DGC

**ORDER**

14 Plaintiff Kenneth C. Taylor has filed a motion for default judgment pursuant to  
15 Rule 55 of the Federal Rules of Civil Procedure. Doc. 15. The Court will deny the  
16 motion.

17 **I. Background.**

18 Plaintiff filed a complaint against Defendant Gouri G. Nair asserting various  
19 claims arising from Defendant's alleged breach of contract and failure to fulfill her  
20 fiduciary duty by committing fraud. Doc. 1, ¶ 6. Plaintiff's complaint seeks damages of  
21 \$1,500,000 and a permanent injunction preventing Defendant from "performing any act  
22 or duties as a licensed attorney in any court in the United States." *Id.* at 2.

23 Default was entered by the Clerk on February 20, 2014. Doc. 11. On March 6,  
24 2014, Plaintiff filed a motion for default judgment. Doc. 12. Because Plaintiff failed to  
25 address the proper legal standard, the Court denied his motion without prejudice. Doc.  
26 14. Plaintiff has filed a new motion seeking a default judgment. Doc. 15.

27 **II. Legal Standard.**

28 Once a party's default has been entered, the district court has discretion to grant

1 default judgment. *See* Fed. R. Civ. P. 55(b)(2); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092  
2 (9th Cir. 1980). Factors the court may consider include (1) the possibility of prejudice to  
3 the plaintiff, (2) the merits of the claim, (3) the sufficiency of the complaint, (4) the  
4 amount of money at stake, (5) the possibility of a dispute concerning material facts,  
5 (6) whether default was due to excusable neglect, and (7) the strong policy favoring a  
6 decision on the merits. *See Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). In  
7 applying these factors, “the factual allegations of the complaint, except those relating to  
8 the amount of damages, will be taken as true.” *Geddes v. United Fin. Grp.*, 559 F.2d  
9 557, 560 (9th Cir. 1977); *see* Fed. R. Civ. P. 8(d) (“Averments in a pleading to which a  
10 responsive pleading is required, other than those as to the amount of damage, are  
11 admitted when not denied in the responsive pleading.”). “However, necessary facts not  
12 contained in the pleadings, and claims which are legally insufficient, are not established  
13 by default.” *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992).

### 14 **III. Analysis.**

#### 15 **A. Possible Prejudice to Plaintiff.**

16 The Court cannot determine that the first *Eitel* factor favors Plaintiff. Plaintiff,  
17 who is appearing pro se in this action, filed a return of service stating that he served the  
18 complaint on Defendant by certified mail. Doc. 6. The return attached a document  
19 showing that Defendant was served in Vermont. *Id.* at 2.

20 Rule 4 of the Federal Rules of Civil Procedure does not expressly permit service  
21 on an individual defendant by certified mail. Fed. R. Civ. P. 4(e). The rule provides,  
22 however, that service may be completed in accordance with the law of the state where  
23 service is made. *Id.*, Rule 4(e)(1). Thus, if the state where a defendant is located permits  
24 service by certified mail, Plaintiff may use this means of service. *LSJ Inv. Co. v. O.L.D.,*  
25 *Inc.*, 167 F.3d 320, 322 (6th Cir. 1999).

26 Plaintiff does not address the law of Vermont and has made no showing that  
27 service by certified mail is permitted there. The Court’s review of Rule 4(f) of the  
28 Vermont Rules of Civil Procedure suggests that service by certified mail is permitted

1 only in limited circumstances, none of which applies here.<sup>1</sup>

2 In addition, Plaintiff asserts in his motion that Defendant Gouri Nair signed and  
3 acknowledged certified receipt of the summons and complaint. Doc. 15 at 1. The  
4 document attached to the return of service, however, shows that it was signed by a Rewj  
5 Raj. Doc. 6 at 2. Plaintiff has not shown that Defendant received actual notice of this  
6 lawsuit.

7 Because the record before the Court suggests that service may not have been  
8 completed in accordance with law or in a manner that provided actual notice to  
9 Defendant, the Court cannot conclude Plaintiff will be prejudiced if default judgment is  
10 not entered. Prejudice results from a defendant's refusal to participate only when the  
11 defendant is properly served with process.

12 **B. The Merits of the Claim and the Sufficiency of the Complaint.**

13 The second and third *Eitel* factors weigh against entry of a default judgment.  
14 Plaintiff's complaint asserts claims for breach of contract and breach of fiduciary duty.  
15 Both claims are legally insufficient as pled, and the merits cannot be evaluated given the  
16 bare-bone factual allegations in the record.

17 A breach of contract claim contains three elements: (1) the existence of a contract,  
18 (2) its breach, and (3) resulting damages. *Chartone, Inc. v. Bernini*, 83 P.3d 1103, 1111  
19 (Ariz. Ct. App. 2004). Plaintiff's complaint alleges no facts to support any of the  
20 elements of a breach of contract claim. Although his complaint alleges that a contract  
21 existed, it states only that Defendant was "hired by Plaintiff as his legal counsel for a  
22 family court case" and that Defendant breached the "written contract with intentional

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23  
24 <sup>1</sup> Vermont Rule 4(f)(1) provides that "[w]here service cannot with due diligence  
25 be made personally within or outside the state, service of the summons and complaint  
26 may be made by mail upon a person described in subdivision (e) in the following cases:  
27 (A) Where the person to be served has an interest in, title to, or right to the possession of  
28 goods, chattels, rights, credits, land, tenements, or hereditaments in the state which has  
been or on pending motion may be attached or secured by trustee process in the  
commencement of the action, or will be affected by a judgment in the action; (B) Where  
the person to be served is one against whom a judgment for divorce or annulment of  
marriage is sought." Vt. R. Civ. P. 4(f)(1). Plaintiff has made no showing that personal  
service could not be made on Defendant with due diligence, nor is this a divorce or  
annulment case or one where a specific asset may be attached, secured, or affected.

1 negligence by intentionally misrepresenting her co-worker position with her company.”  
2 Doc. 1, ¶¶ 3, 6. Legal conclusions are not facts, and the Court cannot conclude from  
3 facts allegedly admitted in the complaint that Plaintiff has a valid claim.

4 Plaintiff’s claim for breach of fiduciary duty by committing fraud is also legally  
5 insufficient. Claims alleging fraud must be pled with precision. *Neilson v. Union Bank*  
6 *of Cal., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (“It is well established in the  
7 Ninth Circuit that both claims for fraud and negligent misrepresentation must meet  
8 Rule 9(b)’s particularity requirements.”). Rule 9(b) imposes a heightened pleading  
9 standard for fraud claims: “In alleging fraud . . . , a party must state with particularity the  
10 circumstances constituting fraud[.]” Fed. R. Civ. P. 9(b). A plaintiff “must state the  
11 time, place, and specific content of the false representations as well as the identities of the  
12 parties to the misrepresentation.” *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*,  
13 806 F.2d 1393, 1401 (9th Cir. 1986). Plaintiff’s complaint does not meet Rule 9(b)’s  
14 heightened pleading standard and therefore does not provide a body of allegedly admitted  
15 facts from which the Court can determine that Plaintiff has a valid claim for breach of  
16 fiduciary duty.

17 Plaintiff has also failed to plead facts necessary to recover punitive damages. For  
18 punitive damages, “a plaintiff must prove by clear and convincing evidence that the  
19 defendant engaged in aggravated and outrageous conduct with an ‘evil mind.’” *Hyatt*  
20 *Regency v. Winston & Strawn*, 907 P.2d 506, 518 (Ariz. Ct. App. 1995). Plaintiff has not  
21 satisfied this pleading requirement.

22 **C. The Amount of Money at Stake.**

23 The fourth *Eitel* factor weighs against entry of default judgment. The Court must  
24 consider the amount of money at stake in relation to the seriousness of Defendant’s  
25 conduct. *See Pepsico, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d. 1172, 1176 (9th Cir.  
26 2002). Plaintiff seeks \$1,500,000, including \$15,000 in fees paid to Defendant, \$80,000  
27 in lost income since 2011, \$30,000 to compensate for a vehicle lost as a result of a job  
28 loss, \$1,000 for evaluation by court order, \$3,500 in court fees, \$500 in postage fees, and

1 \$1,400,000 in punitive damages for Defendant’s fraudulent conduct that has caused  
2 Plaintiff severe anguish. Doc. 15 at 4-5. Plaintiff has not provided evidence to  
3 substantiate his alleged damages.

4 **D. Possible Dispute Concerning Material Facts.**

5 The fifth *Eitel* factor weighs against entry of default judgment. Plaintiff provided  
6 only threadbare factual allegations in his complaint, and the Court therefore has accepted  
7 very few allegations as true. This fact, plus the potentially defective service discussed  
8 above, make it wholly possible that Defendant, if properly served, would dispute  
9 Plaintiff’s claim to \$1,500,000 and injunctive relief.

10 **E. Whether Default Was Due to Excusable Neglect.**

11 The sixth *Eitel* factor weighs against entry of default. As noted above, the Court  
12 cannot conclude from this record that Defendant was properly served or received actual  
13 notice of this lawsuit. The Court therefore cannot rule out the possibility that  
14 Defendant’s failure to answer was the result of lack of knowledge or excusable neglect.

15 **F. Policy Underlying Federal Rules of Civil Procedure.**

16 The final *Eitel* factor weighs against default. “Cases should be decided upon their  
17 merits whenever reasonably possible.” *Eitel*, 782 F.2d at 1472. Entry of a default  
18 judgment when proper service of process is in doubt would not be consistent with the  
19 policy of the Federal Rules of Civil Procedure.

20 **G. Conclusion.**

21 Having reviewed Plaintiff’s motion and considered the *Eitel* factors, the Court  
22 concludes that entry of default judgment is not appropriate. The Court recognizes that  
23 Plaintiff is proceeding pro se, but the Court cannot overlook the requirements for proper  
24 service. In addition, even if the Court were to find that service was proper, or even if the  
25 current complaint were to be served on Defendant in accordance with Rule 4, the  
26 complaint is too lacking in factual allegations to state a claim or support a default  
27 judgment.

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1 **IV. Further Proceedings.**

2 If Plaintiff wishes to pursue this case, he may file an amended complaint by  
3 **July 3, 2014**. If Plaintiff believes that his original complaint was properly served in  
4 accordance with Rule 4 of the Federal Rules of Civil Procedure, he may send a copy of  
5 the amended complaint to Defendant by any method approved in Federal Rule of Civil  
6 Procedure 5(b). If service was not properly completed, he must serve Defendant in  
7 accordance with Rule 4 by **August 15, 2014**. Plaintiff is warned that failure to file an  
8 amended complaint or to meet this service deadline will result in dismissal of this action  
9 without further order of the Court.

10 For purposes of preparing an amended complaint, the Court provides the following  
11 guidance: Plaintiff must familiarize himself with the elements of each claim that he  
12 wishes assert in his amended complaint. He must then provide specific factual  
13 allegations to support and substantiate each claim. Part III.B of this order outlines  
14 deficiencies in the way Plaintiff pled his claims and can be used as a guide to revise the  
15 complaint.

16 **IT IS ORDERED** that Plaintiff's motion for entry of default judgment (Doc. 15)  
17 is **denied**.

18 Dated this 13th day of June, 2014.

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23 David G. Campbell  
24 United States District Judge  
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