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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA – FRESNO DIVISION

EL SOBRANTE DEVELOPMENT, LLC,
et al.,

Plaintiffs,

v.

NATIONAL ASSURANCE GROUP, et al.,

Defendants.

CASE NO. 1:08-cv-00455-AWI-SKO

**FINDINGS AND
RECOMMENDATIONS THAT
PLAINTIFFS' MOTION FOR
DEFAULT JUDGMENT AND
ATTORNEYS' FEES BE DENIED**

(Docket No. 78)

OBJECTIONS DUE: 15 DAYS

I. INTRODUCTION

On April 16, 2010, Plaintiffs filed a motion for default judgment against defendant, Andrew Geiss. Specifically, Plaintiffs request that the default judgment provide for the cancellation of a promissory note in favor of Andrew Geiss in the sum of \$810,000, that any junior deed of trust in favor of Andrew Geiss be extinguished at a trustee's sale, and that the Plaintiffs be awarded \$123,630.02 in costs and attorneys' fees. Andrew Geiss was served with the First Amended Complaint on May 1, 2008, but has not responded. *See* Doc. 31. The Clerk's Entry of Default was entered on October 30, 2008. Doc. 43. Defendant Geiss has not filed an opposition to this motion. It is this motion for default judgment and attorneys' fees that is currently pending before the Court.

1 **II. BACKGROUND**

2 Plaintiffs filed suit on March 31, 2008, alleging violations of state foreclosure laws,
3 violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), fraud, and
4 breach of contract against numerous defendants. On May 12, 2008, the complaint was amended
5 to add, *inter alia*, a cause of action for elder abuse against all defendants.

6 The allegations in the May 12, 2008, First Amended Complaint ("FAC") do not present a
7 particularly cohesive rendition of the dispute in this case. While the details are by no means
8 clear, the gravamen of the FAC appears to be that Plaintiffs have an interest in real property
9 located in El Sobrante, California, and that at least some defendants have wrongfully attempted
10 to foreclose on the property.

11 Plaintiffs consist of a limited liability corporation named El Sobrante Development, LLC
12 ("El Sobrante, LLC"), and individuals who assert they are the intestate heirs of John Walsh.¹
13 Plaintiffs allege that defendants National Assurance Group, Western Christian Foundation,
14 National Foreclosure Service, WinRidge, Inc., National Asset Guaranty Corporation, Paul
15 Winter, and Michael Winter (collectively, the "Winter Group Defendants") arranged a loan to
16 John Walsh on March 15, 2006, the terms of which were modified on May 31, 2006. This loan
17 was secured by an interest in real property located near El Sobrante, California (Accessor Parcel
18 Number ("APN") 432-040-005-06) (the "Property"), which was apparently owned by John
19 Walsh.

20 Plaintiffs assert that on January 8, 2007, another loan in the amount of \$810,000, secured
21 by what appears to be the Property, was arranged between El Sobrante, LLC, and Defendants
22 Integra Investment Co., JLS Investments LLC, Jack Louie, C.A. Winetrout III, and Pamela Blair
23 (collectively, the "Blair Group Defendants") on January 8, 2007.² See FAC ¶ 40. A deed of
24

25 ¹John Walsh apparently died at some point before this suit was filed, though Plaintiffs do not allege when
26 this occurred or how John Walsh or the individual Plaintiffs have any relationship to El Sobrante, LLC.

27 ²Neither the promissory note nor the deed of trust securing the note was attached to the complaint. The
28 respective interests of El Sobrante, LLC and John Walsh in this property are not asserted – yet, it appears that both
the promissory notes between John Walsh and the Winter Defendants and the promissory note between El Sobrante,
LLC, and the Blair Defendants were secured by the Property.

1 trust encumbering the Property was apparently executed between Andrew Geiss as the
2 beneficiary and El Sobrante, LLC, as the Trustor, with Alliance Title Company as Trustee.
3 Neither El Sobrante, LLC's interest in the Property nor El Sobrante, LLC's relationship to John
4 Walsh is alleged in the FAC. Plaintiffs assert that El Sobrante, LLC, never received the
5 consideration for the promissory note between the Blair Group Defendants and El Sobrante,
6 LLC.

7 Subsequently, the Winter Group Defendants allegedly sought to proceed with a
8 foreclosure sale of the Property in April 2008 based upon the deed of trust between the Winter
9 Group Defendants and John Walsh. There is no indication in the FAC that the Blair Group
10 Defendants participated in this foreclosure attempt or even to what degree this foreclosure sale
11 implicated the January 8, 2007, deed of trust. Additionally, Andrew Geiss's relationship to the
12 Winter Group Defendants and the Blair Group Defendants is not stated. The Court notes that,
13 although Plaintiffs assert that the Blair Group Defendants executed the January 8, 2007, deed of
14 trust, only Andrew Geiss (and not any of the Blair Group Defendants) is listed as a beneficiary of
15 the deed of trust.³

16 In an attempt to halt the pending April 2008 foreclosure sale, Plaintiffs filed suit on
17 March 31, 2008. The Winter Group Defendants retained Robert Martin Daniels as counsel; only
18 the Winter Group Defendants answered the FAC on July 3, 2008. The other named defendants
19 (Integra Investment Company, JLS Investments, LLC, Jack Louie, C.A. Winetrout, III, Paula
20 Winetrout, Andrew Geiss, and Pamela Blair), were not represented by counsel and did not make
21 an appearance in the matter.

22 Individual defendant Pamela Blair was dismissed from the suit pursuant to Federal Rule
23 of Civil Procedure 4(m) on September 22, 2009. *See* Doc. No. 57. Default was entered on
24 October 30, 2008, as to defendant Geiss. *See* Doc. No. 43. On August 4, 2008, defendant

25
26 ³Attached as an exhibit to the Declaration of Henry Nunez, counsel for Plaintiffs, is a copy of the January 8,
27 2007, deed of trust. None of the asserted "Blair Group Defendants" is named in the deed of trust. Further, the
28 January 8, 2007, deed of trust appears to be signed by John Walsh, although his authority to enter into this deed of
trust on behalf of El Sobrante, LLC, is entirely unknown and unstated. The deed of trust appears to be executed by
John Walsh in his individual capacity, yet the document itself purports that the deed of trust was entered into by El
Sobrante, LLC.

1 JLS Investments, LLC, was dismissed under Federal Rule of Civil Procedure 41(a)(1). *See* Doc.
2 Nos. 36, 39.

3 On October 27, 2009, Plaintiffs filed a request for dismissal of Defendants Integra
4 Investment Company, Jack Louie, C.A. Winetrout, III, and Pamela Winetrout (referred to
5 collectively in other Court documents as the "Oregon Defendants").

6 Plaintiffs and the Winter Group Defendants participated in mediation on November 17,
7 2008. *See* Doc. No. 52. As a result of mediation, a settlement among these parties was reached.
8 *See id.* The settlement was approved by the Court on October 28, 2009. Following the
9 settlement, the only remaining defendant is Andrew Geiss.

10 On April 7, 2010, the Court ordered Plaintiffs to show cause why the action should not be
11 dismissed with regard to Andrew Geiss, as the other defendants were dismissed and the docket
12 had been inactive for nearly a year. Doc. 75. Plaintiffs responded on April 16, 2010, by filing a
13 motion for default judgment, and requesting attorneys' fees and costs against Andrew Geiss.

14 A review of the FAC indicates a general lack of facts regarding Plaintiffs' claims against
15 Defendant Geiss. In their motion for default judgment, Plaintiffs assert that paragraphs 40
16 through 42 of the FAC allege that Andrew Geiss arranged for a loan to El Sobrante, LLC, in the
17 sum of \$810,000, secured by a deed of trust on the Property. Plaintiffs assert that the FAC sets
18 forth that Plaintiffs did not receive any of the funds from the transaction and no adequate
19 consideration was provided pursuant to the deed of trust. Plaintiffs, therefore, request that the
20 promissory note dated January 8, 2007, in the amount of \$810,000 "in favor of Andrew Geiss
21 [be] cancelled [as] invalid, and void."

22 The FAC provides the following:

23 40. On or about January 8, 2007 defendants Integra Investment Co; JLS
24 Investments L.L.C.; Jack Louie C.A. Winetrout III, Pamela Blair
25 hereinafter called the "Blair Group Defendants" allegedly arranged and
26 loaned El Sobrante Development, L.L.C. the sum of \$810,000.00. The
loan was to be secured by a Deed of Trust on 165 acres of land located in
El Sobrante, California. APN 432-040-005-06.

27 41. On March 15, 2007 a Deed of Trust was recorded as Instrument No: 2007-
28 0076259-00 of official records in the County of Contra Costa California by
the Blair Group, Defendants.

42. Plaintiff[s] assert that adequate and proper consideration was not received

1 by El Sobrante Development, L.L.C. pursuant to the Promissory Note and
2 Deed of Trust. Plaintiff[s] further assert that the Blair Group Defendants
3 actions were not proper, were fraudulent, wrongful and in violation of
4 California and Federal statutes which include but is not limited to:
5 (a) failure to fund the loan to El Sobrante Development, L.L.C.
6 (b) charging excessive fees, interest and cost in violation of the usury
7 statutes,
8 (c) misrepresentation of the terms, conditions, and use of the funds
9 wherein the funds were used to benefit the Blair Group Defendants
10 and not El Sobrante Development, L.L.C.

11 These allegations do not support Plaintiffs' motion for default judgment against Andrew
12 Geiss. First, these paragraphs only relate to the Blair Group Defendants; Andrew Geiss is not
13 alleged to be one of the Blair Group Defendants. Second, as noted above, the deed of trust dated
14 January 8, 2007, is attached as Exhibit E to the Declaration of Henry Nunez in support of the
15 motion for default judgment and appears to be in conflict with the allegations of ¶¶ 40-42 set
16 forth above in that it was executed between El Sobrante, LLC, and Andrew P. Geiss, not El
17 Sobrante, LLC, and the Blair Group Defendants. Also, the actual promissory note between El
18 Sobrante, LLC, and Andrew Geiss (or any Blair Group Defendant) has not been filed with the
19 Court.⁴

20 The relief prayed for in the complaint includes the following:

- 21 1. A temporary restraining order staying the Winter Group defendants from
- 22 2. commencing with their trustees sale scheduled for April 4, 2008;
- 23 3. In the alternative, for the sum of \$25,000,000.00, as economic damages;
- 24 4. In the alternative, for general damages according to proof;
- 25 5. In the alternative, for punitive damages;
- 26 6. For a jury trial on the issues tendered herein;
- 27 7. That plaintiffs be awarded their attorneys fees and costs incurred herein;
- 28 8. For permanent injunction to prevent defendants from continuing their
unfair business practices in violation of California Business and
Professions Code § 17200; and
- That other and further relief this Court deems proper and just in the
premises.

⁴A promissory note between National Assurance Group, Inc., and John Walsh in the amount of \$1,855,953, executed February 14, 2006, is attached as Exhibit F to the declaration of Henry Nunez. This does not appear to be the promissory note allegedly entered between El Sobrante, LLC, and Andrew Geiss.

1 **III. DISCUSSION**

2 **A. Legal Standard**

3 Federal Rule of Civil Procedure 55(b) permits a court-ordered default judgment following
4 the entry of default by the clerk of the court under Rule 55(a). It is within the sole discretion of
5 the court as to whether default judgment should be entered. *See Aldabe v. Aldabe*, 616 F.2d
6 1089, 1092 (9th Cir. 1980). A defendant's default by itself does not entitle a plaintiff to a court-
7 ordered judgment. *See id.* Instead, the Ninth Circuit has determined that a court should consider
8 seven discretionary factors, often referred to as the "*Eitel* factors," before rendering a decision on
9 default judgment. *See Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). The *Eitel*
10 factors include the following: (1) the possibility of prejudice to the plaintiff, (2) the merits of the
11 plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in
12 the action, (5) the possibility of a dispute concerning material facts, (6) whether the default was
13 due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil
14 Procedure favoring decisions on the merits. *See id.*

15 A plaintiff is required to prove all damages sought in the complaint. *See Televideo Sys.,*
16 *Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1992). In addition, any relief sought may not
17 be different in kind from, or exceed in amount, what is demanded in the complaint. Fed. R. Civ.
18 P. 54(c). If the facts necessary to determine the damages are not contained in the complaint, or
19 are legally insufficient, they will not be established by default. *See Cripps v. Life Ins. Co. of N.*
20 *Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992).

21 Finally, once the court clerk enters a default, the well-pleaded factual allegations of the
22 complaint are taken as true, except for those allegations relating to damages. *See Televideo Sys.,*
23 *Inc.*, 826 F.2d at 917.

24 **B. Analysis**

25 First, Plaintiffs' motion for default judgment against Andrew Geiss requests that the Court
26 order the cancellation of the January 8, 2007, promissory note apparently executed between
27 Andrew Geiss and El Sobrante, LLC. This promissory note is not attached to Mr. Nunez's
28 declaration filed in support of the motion for default judgment or the FAC. Moreover,

1 cancellation of this January 8, 2007, promissory note is not the kind of relief sought in the FAC.
2 Therefore, default judgment against Defendant Andrew Geiss cannot be granted in the manner
3 requested by Plaintiffs because it is different in kind from that prayed for in the FAC.⁵ See Fed.
4 R. Civ. P. 54(c) ("A default judgment must not differ in kind from, or exceed in amount, what is
5 demanded in the pleadings."). Plaintiffs also request that the Court order that any junior deed of
6 trust in favor of Defendant Geiss be extinguished at a trustee's sale pursuant to the terms of the
7 Winter Group Defendants' settlement agreement with Plaintiffs. This relief is also not prayed for
8 in the FAC and cannot be awarded through default judgment.

9 Second, even if the relief sought in Plaintiffs' motion was the same as that sought in the
10 FAC, the allegations of the FAC are entirely insufficient to state a claim against Andrew Geiss.
11 Considering this and the other relevant *Eitel* factors, which are discussed below, the Court finds
12 that default judgment with regard to Andrew Geiss is not appropriate.

13 **1. Application of the *Eitel* Factors**

14 **a. Possibility of Prejudice to Plaintiffs**

15 All defendants aside from Andrew Geiss have been terminated from this matter. Before
16 their termination from this case, the Winter Group Defendants filed an answer to the FAC. Doc.
17 38. Plaintiffs cannot, therefore, as a matter of course, amend the entire complaint. Fed. R. Civ.
18 P. 15(a)(1), (2). Further, there are no claims alleged that relate only to Andrew Geiss, such that
19 those claims could be amended as a matter of course. *Id.* As set forth below, the FAC is
20 insufficient to state a claim against Andrew Geiss; Plaintiffs may amend the complaint as to
21 Andrew Geiss with leave of Court. The Court recommends that Plaintiffs be allowed to amend
22 the complaint with respect to Andrew Geiss. Accordingly, there is no risk of prejudice to
23 Plaintiffs if their motion for default judgment is denied.

24 **b. Merits of Plaintiffs' Substantive Claims and Sufficiency of Complaint**

25 The next relevant *Eitel* factors include the merits of the substantive claims pled in the
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27 ⁵As set forth above, the relief requested in the complaint included a temporary restraining order against the
28 Winter Group Defendants and a permanent injunction against all defendants; alternatively, Plaintiffs prayed for
general damages, punitive damages, or \$25,000,000 in economic damages as well as attorneys' fees.

1 complaint as well as the general sufficiency of the complaint. In considering the adequacy of the
2 complaint, courts consider whether it is sufficient to state a claim that supports the relief sought.
3 *See Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978); *see also DIRECTV, Inc. v. Huynh*,
4 503 F.3d 847, 854 (9th Cir. 2007) ("[A] defendant is not held to admit facts that are not well-
5 pleaded or to admit conclusions of law") (internal quotations omitted). Here, Plaintiffs' motion
6 for default judgment requests that the Court order cancellation of a promissory note apparently
7 entered into between El Sobrante, LLC, and Andrew Geiss in the amount of \$810,000 secured by
8 a January 8, 2007,⁶ deed of trust recorded in Contra Costa County on March 15, 2007. Setting
9 aside that the relief sought in Plaintiffs' motion was not prayed for in the FAC, the FAC is
10 entirely insufficient to adequately state a cause of action against Andrew Geiss. With respect to
11 Defendant Geiss, the Court considers the sufficiency of each of Plaintiffs' claims below.

12 (i) **First and Second Claims for Relief: Fraud and Deceit Based on**
13 **Concealment; Fraud and Deceit Based on Intentional**
14 **Misrepresentations**

15 Under California law the elements for an action for fraud and deceit based on
16 concealment are as follows: (1) the defendant concealed or suppressed a material fact, (2) the
17 defendant was under a duty to disclose the fact to the plaintiff, (3) the defendant intentionally
18 concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff was
19 unaware of the fact and would not have acted as he did if he had known of the concealed or
20 suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff
21 sustained damage. *Hahn v. Mirda*, 147 Cal. App. 4th 740, 748 (2007) (internal quotations
22 omitted). Furthermore, Federal Rule of Civil Procedure 9(b) applies to this claim of fraud and
23 commands a heightened pleading burden of specificity.

24 The allegations in the FAC relating to this claim appear to involve a modification to a
25 deed of trust between John Walsh and the Winter Group Defendants. Andrew Geiss is not
26 alleged to be one of the Winter Group Defendants. In fact, according to the FAC, he is not

27 ⁶The deed of trust recites that it is "made January 8, 2007," between El Sobrante, LLC, as trustor and
28 Andrew P. Geiss as beneficiary. The second page is signed by John Walsh, although his relationship (e.g., managing
member) to El Sobrante, LLC, is not asserted. John Walsh's signature was notarized on December 29, 2006.

1 alleged to have participated in any deed of trust. *See* FAC ¶¶ 40-42. The January 8, 2007, deed
2 of trust attached to the declaration of Henry Nunez in support of the motion for default judgment
3 is the only document that sets forth the participation of Andrew Geiss in any transaction with
4 Plaintiffs – and this conflicts with the allegations of the FAC.⁷ FAC ¶¶ 40-42. Further, there is
5 no allegation how Andrew Geiss participated in the modification of any deed of trust or contract
6 between John Walsh and the Winter Group Defendants. There is no allegation as to how
7 Andrew Geiss participated in fraud and deceit based on concealment as it might relate to the
8 January 8, 2007, deed of trust. Thus, as to Andrew Geiss, this claim is entirely insufficient to
9 support a cause of action.

10 A claim for fraud and deceit based on intentional misrepresentations requires the
11 following allegations: (1) misrepresentation (false representation, concealment, or
12 nondisclosure), (2) knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5)
13 resulting damages. As with the fraud and deceit claim based on concealment, the FAC fails to
14 allege any conduct on the part of Andrew Geiss that adequately sets forth a claim for fraud and
15 deceit based on intentional misrepresentation. Thus, the allegations are also insufficient to
16 support this cause of action against Andrew Geiss.

17 **(ii) Third and Fourth Claims for Relief: Negligent Misrepresentation and**
18 **Wrongful Foreclosure**

19 In California, negligent misrepresentation requires allegations that a person made false
20 statements without reasonable ground for such belief. *See Colaprico v. Sun Microsystems, Inc.*,
21 758 F. Supp. 1335, 1337 (N.D. Cal. 1991). Here, all allegations related to negligent
22 misrepresentation pertain to the Winter Group Defendants. Andrew Geiss is not alleged to be
23 one of the Winter Group Defendants. Further, no participation by Andrew Geiss is alleged.
24 Thus, this claim is insufficient as it relates to Andrew Geiss.

25 As to the wrongful foreclosure claim, there is no allegation that the January 8, 2007, deed
26 of trust was foreclosed upon or that Andrew Geiss participated in the attempted foreclosure of the

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28 ⁷The FAC states the deed of trust was entered into between El Sobrante, LLC, and the Blair Group
Defendants – not Andrew Geiss.

1 Property. The allegations specifically state that "[t]he Winter Group defendants started
2 nonjudicial foreclosure proceedings on the El Sobrante property." FAC ¶ 78. As Andrew Geiss
3 is not alleged to be a Winter Group Defendant, the claim is wholly insufficient against him.

4 **(iii) Fifth Claim for Relief: Slander of Title**

5 As the FAC does not state how Andrew Geiss participated in the foreclosure under any
6 deed of trust, there are no allegations relating to how Andrew Geiss participated in the slander of
7 title in the course of the wrongful foreclosure. Again, this claim is entirely insufficient as it
8 relates to Defendant Andrew Geiss.

9 **(iv) Sixth and Seventh Claims for Relief: RICO 18 U.S.C. §§ 1962(c) and
10 1962(d)**

11 Title 18 of the U.S. Code, § 1962(c) provides the following:

12 It shall be unlawful for any person employed by or associated with any enterprise
13 engaged in, or the activities of which affect, interstate or foreign commerce, to
14 conduct or participate, directly or indirectly, in the conduct of such enterprise's
15 affairs through a pattern of racketeering activity or collection of an unlawful debt.

16 This section renders unlawful the direct or indirect conducting of or participation in a RICO
17 "enterprise's affairs through a pattern of racketeering activity" by any person employed by or
18 associated with any enterprise engaged in interstate commerce. *United Energy Owners Comm.
19 Inc. v. U.S. Energy Mgmt. Sys., Inc.*, 837 F.2d 356, 359 n.5 (9th Cir. 1988). This section of
20 RICO contains strict pleading requirements:

21 For the purposes of section 1962(a), RICO plaintiffs must allege a defendant – the
22 "person" or "persons" – who is distinct from the "enterprise" whose business the
23 defendant is conducting. Under RICO, an "enterprise" is a being different from,
24 not the same as or part of, the person whose behavior the act was designed to
25 prohibit.

26 *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1533-34 (9th Cir. 1992).

27 Here, Plaintiffs allege an "enterprise" as being composed of the "Winter Group
28 Defendants." FAC ¶ 101. Plaintiffs further allege that "[a]ll the defendants employed by or
associated with an enterprise, did so conduct or participate, directly or indirectly, engaged in a
pattern of racketeering activity within the meaning of 18 U.S.C. §§ 1961(1)(B) and 1961(E) and
1961(5) and 1962[(c)]" FAC ¶ 102. To state a §1962(c) RICO claim as to Andrew Geiss,

1 Andrew Geiss's role as a "person" who acted in conjunction with the "enterprise" must be
2 alleged. As noted above, Andrew Geiss is not alleged to be a Winter Group Defendant or
3 associated with the Winter Group Defendants in any manner.

4 Although it may be inferred from the FAC that Andrew Geiss somehow conspired with
5 the Winter Group Defendants to foreclose upon real property in which Plaintiffs have an interest
6 (*see* FAC ¶ 30), Geiss's relationship to the Winter Group Defendants is not alleged. The
7 complaint does not allege whether, for example, Geiss worked for the Winter Group Defendants
8 or set forth the nature of his participation in the foreclosure or attempted foreclosure of the
9 Property. In fact, the FAC specifically states that the alleged RICO violations were committed by
10 the Winter Group Defendants, not all the named defendants. FAC ¶ 103. Further, Plaintiffs
11 allege that it was the Winter Group Defendants who attempted to foreclose on the Property in
12 April 2008, not any other defendants. Andrew Geiss's alleged role is a single vague allegation
13 that he somehow participated in a conspiracy with the other named defendants. FAC ¶ 30.

14 Moreover, there is no allegation that Andrew Geiss attempted to foreclose on the January
15 8, 2007, deed of trust which lists him as beneficiary. In fact, although Andrew Geiss appears to
16 be the beneficiary under this deed of trust, Plaintiffs contrarily and confusingly allege that the
17 "Blair Group Defendants" – of which Andrew Geiss is not alleged to be a part – arranged to loan
18 El Sobrante, LLC, the sum of \$810,000 secured by a deed of trust. *See* FAC ¶ 40. There is no
19 allegation that Andrew Geiss participated in this loan, yet he is named as the beneficiary on the
20 deed of trust that Plaintiffs assert was entered into by the Blair Group Defendants.

21 Because Andrew Geiss's role or participation in the RICO enterprise is not alleged and he
22 does not appear to be involved in the alleged wrongful activities, at least as far as the allegations
23 of the FAC are pled, the RICO claim against Andrew Geiss is not sufficient to state a cause of
24 action against him.

25 The same deficiencies apply to Plaintiffs' § 1962(d) RICO claim: Andrew Geiss's role or
26 participation in the racketeering activities of the enterprise is completely lacking. Thus, the
27 allegations as to Andrew Geiss are insufficient to state a RICO claim against him.

1 **(v) Eighth Claim for Relief: Unfair Business Practices**

2 Plaintiffs allege an unfair business practices claim as to all defendants. These allegations
3 relate to the alleged wrongful foreclosure of real property that was the subject of a deed of trust
4 between John Walsh and the Winter Group Defendants. However, none of these allegations
5 relates to Andrew Geiss, states his participation in the asserted wrongful foreclosure, or alleges
6 how he committed unfair business practices as a result of the foreclosure action. Again, these
7 allegations are insufficient to support a cause of action against Andrew Geiss.

8 **(vi) Ninth and Tenth Claims for Relief: Breach of Contract and Breach of**
9 **the Covenant of Good Faith and Fair Dealing**

10 These claims relate to deed of trust modifications between John Walsh and the Winter
11 Group Defendants during 2006. There is no allegation that the January 8, 2007, deed of trust,
12 which names Andrew Geiss as beneficiary, was included in the modification. In fact, the
13 modification complained of was alleged to have occurred on May 31, 2006, before execution of
14 the deed of trust on January 8, 2007. Therefore, by its terms, the January 8, 2007, deed of trust
15 cannot have been part of a modification that occurred nearly a year earlier. Moreover, none of
16 the allegations states how Andrew Geiss participated in the modification or the foreclosure of the
17 Property or how he breached any terms of any contract to which he was a party. Thus, these
18 claims are insufficient as to Andrew Geiss.

19 **(vii) Eleventh Claim for Relief: Injunctive Relief**

20 The claim for injunctive relief to prevent foreclosure is only alleged against the Winter
21 Group Defendants. Andrew Geiss is not alleged to be a Winter Group Defendant. Thus, this
22 claim does not relate to Andrew Geiss.

23 **(viii) Twelfth Claim for Relief: Elder Abuse**

24 Patricia and John Walsh are alleged to have been victims of elder abuse perpetrated by all
25 the defendants. Defendant Geiss's conduct in relation to this claim is completely lacking in the
26 FAC. There is no allegation regarding Andrew Geiss's relationship to the Winter Group
27 Defendants or the Blair Group Defendants, or any conduct on the part of Andrew Geiss sufficient
28 to state a claim for elder abuse against him.

1 In summary, the allegations of the FAC are entirely insufficient to state a claim against
2 Andrew Geiss. His role in the alleged wrongful activities is completely lacking. In fact, other
3 than the deed of trust attached to the declaration of Henry Nunez which lists Andrew Geiss as a
4 beneficiary, there is absolutely no indication why Andrew Geiss is even named as a defendant.
5 For all of the reasons stated above, none of the claims asserted in the FAC are adequate to state a
6 claim against Andrew Geiss. This factor weighs dispositively against granting default judgment
7 against Andrew Geiss.

8 **c. The Sum of Money at Stake in the Action**

9 One of the alternative prayers for relief stated in the FAC requests \$25,000,000 in
10 economic damages. However, Plaintiffs are not seeking a judgment in that amount against
11 Andrew Geiss. Instead, Plaintiffs seek cancellation of a January 8, 2007, promissory note.
12 Setting aside that cancellation of this promissory note is not the kind of relief requested in the
13 FAC and that the promissory note has never been filed with the Court, the note represents a debt
14 of \$810,000. This is a substantial amount of money that weighs in favor of resolving the dispute
15 on the merits rather than through default judgment.

16 **d. The Possibility of a Dispute Concerning the Material Facts**

17 Because the FAC as to Andrew Geiss is insufficient to state a cause of action against him,
18 none of the facts may be taken as true. *See Cripps*, 980 F.2d at 1267 (if facts are legally
19 insufficient to state a claim, they will not be established as true for purposes of default
20 judgment). Therefore, there is a likelihood that genuine issues of material fact exist. *See Elektra*
21 *Entm't Group Inc. v. Crawford*, 226 F.R.D. 388, 393 (C.D. Cal. 2005) (where the complaint is
22 well-pled, the facts are taken as true upon entry of default, and there is no likelihood that any
23 genuine issue of material fact exists). As the complaint is not well-pled with respect to Andrew
24 Geiss, the allegations against him cannot be taken as true, and the Court finds that this weighs
25 against awarding default judgment.

26 **e. Whether Default Was Due to Excusable Neglect**

27 There are no facts regarding why Andrew Geiss has defaulted; thus, the Court is
28 prevented from weighing this factor.

1 **f. The Strong Policy Underlying the Federal Rules of Civil Procedure**
2 **Favors Decisions on the Merits**

3 Where a complaint is legally insufficient, as it is here, the policy favoring decisions on
4 the merits protects against a judgment where one may not be warranted. Due to the complete
5 insufficiency of the FAC with respect to Andrew Geiss, it would be unjust to award default
6 judgment without a full consideration of the merits of Plaintiffs' claims, such as they might be.
7 This factor decidedly weighs in favor of denying default judgment against Andrew Geiss.

8 In conclusion, the Court finds that default judgment is not appropriate in this case. The
9 FAC is not well-pled with regard to Andrew Geiss, and none of the allegations should be taken
10 as true. The amount of money at stake is \$810,000 – a large sum which weighs in favor of
11 resolving the matter on the merits. There is strong public policy that favors resolution of disputes
12 on the merits, rather than by default judgment. Given the insufficiency of the FAC with regard to
13 Andrew Geiss, resolution on the merits is even more important in this case. The Court
14 recommends that Plaintiffs be allowed to amend their complaint only as to Andrew Geiss,
15 incorporating no new causes of action against him. If Plaintiffs fail to amend the Complaint, the
16 Court will recommend that the matter be dismissed. As the Court finds that default judgment is
17 not appropriate, Plaintiffs' request for attorneys' fees should also be denied.

18 **IV. RECOMMENDATION**

19 Based on consideration of the declarations, pleadings, and exhibits to the present motion,
20 the Court hereby RECOMMENDS that:

- 21 1. Plaintiffs' Motion for Default Judgment be DENIED;
- 22 2. Plaintiffs' Request for Attorneys' Fees be DENIED;
- 23 3. Plaintiffs be permitted thirty (30) days to amend the complaint with regard to
24 Defendant Geiss, adding no new causes of action; and
- 25 4. If Plaintiffs fail to amend the complaint within thirty (30) days, that the complaint
26 against Andrew Geiss be dismissed.

27 These findings and recommendations are submitted to the district judge assigned to this
28 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within fifteen (15)

1 days of service of this recommendation, any party may file written objections to these findings
2 and recommendations with the Court and serve a copy on all parties. Such a document should be
3 captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge
4 will review the magistrate judge's findings and recommendations pursuant to 28 U.S.C.
5 § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time
6 may waive the right to appeal the district judge's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.
7 1991).

8
9 IT IS SO ORDERED.

10 **Dated:** August 10, 2010

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE