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

VINCENT SIPE,
Plaintiff,
v.
COUNTRY WIDE BANK, et al.,
Defendants.

Case No. 1:09-cv-00798 JLT
ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S APPLICATION FOR ENTRY OF DEFAULT JUDGMENT
(Doc. 83)

Plaintiff Vincent Sipe ("Plaintiff") seeks the entry of default judgment against defendants John Norberg ("Norberg") and Carol DeSilva ("DeSilva"). (Doc. 83). The Court reviewed Plaintiff's motion and supporting documents, and heard oral argument on May 24, 2012. Although Plaintiff was given the opportunity to submit additional evidence in support of his motion, he failed to do so.¹

Based upon the Court's order dismissing the matter against Defendant DeSilva, the motion for default judgment as to defendant Carol DeSilva is DENIED as MOOT. For the following reasons, Plaintiff's motion for default judgment as to defendant John Norberg is **GRANTED IN PART** and **DENIED IN PART**.

///

¹ This is just the latest failure in a string of failures to comply with Court orders and to prosecute this action. (Docs. 76, 79, 81, 84, 86, 91)

1 **I. Procedural History**

2 On May 4, 2009, Plaintiff filed his initial complaint against multiple defendants, including
3 John Norberg and his employer Financial Advantage, Inc.² (Doc. 1). Plaintiff amended the
4 complaint twice after the Court granted several defendants' motions to dismiss; thus, the Second
5 Amended Complaint is the operative complaint. (Docs. 8, 13, 15, 16, 39, 42, 43, 56). As to
6 Norberg, the only remaining defendant, Plaintiff alleges causes of action for fraud, breach of
7 contract, breach of the implied covenant of good faith and fair dealing, negligence, breach of
8 fiduciary duty, violations of California Business and Professions Code §17200, et seq. Plaintiff
9 premises his causes of action against Norberg on the fact that Norberg sold Plaintiff the mortgage
10 at issue in the case, as Norberg was the real estate broker of record for the lending company used
11 by Plaintiff. (Doc. 41 at 4).

12 Norberg failed to respond to the Complaint within the time prescribed by the Federal
13 Rules of Civil Procedure. Plaintiff filed a request for entry of default judgment as to Carol
14 DeSilva, Financial Advantage, Inc., and John Norberg on November 1, 2010. (Doc. 61).
15 Pursuant to Fed.R.Civ.P. 55(a), default was entered against Norberg on November 2, 2010. (Doc.
16 62). However, Plaintiff's Request for Entry of Default was declined as to the other defendants, as
17 Plaintiff had not filed a proof of service on them with the Court. (Doc. 63 and 64). A prove up
18 hearing was held on April 18, 2011 against Defendant Sierra Pacific Mortgage ("SPM") only, as
19 Plaintiff had represented to the Court that he intended to dismiss Defendants Norberg and
20 DeSilva. (Doc. 74 and 76). At that time, the Court requested documentation to show Plaintiff
21 was entitled to a default judgment. The Court therefore granted Plaintiff's oral request to submit
22 calculations and a default package to the Court. (Id.)

23 Plaintiff submitted his application for default judgment on August 1, 2011. (Doc. 75). On
24 September 21, 2011, the Court denied Plaintiff's Application for Default Judgment. (Doc. 76).
25 The Court explained in his order that at the prove-up hearing that default judgment had not been
26 entered against SPM and that SPM had actually been dismissed without leave to amend nearly a

27 _____
28 ² All Defendants, with the exception of Norberg, have been dismissed. (See Docs. 53, 56, 70, 86, and 91).

1 year before the prove up hearing. (Id.) The Court noted also that the application made no
2 mention of SPM and, despite the fact the default judgment was requested against Norberg, the
3 application only contained evidence against DeSilva. (Doc. 76 at 2). In all, the Court found the
4 application wholly insufficient to establish default judgment as to any defendant. (Id.) The
5 Court instructed Plaintiff that if he wished to pursue default judgment against any remaining
6 defendant, he **must** submit his motion within thirty days of service of the Court’s September 21,
7 2011 order. (Id.)

8 Plaintiff did not file his instant Application for Default Judgment until January 10, 2012,
9 nearly four months after the date ordered by the Court and Plaintiff failed to set the matter for
10 hearing. (Doc. 83). Thus, the Court set Plaintiff’s motion for default judgment for May 17, 2012
11 and ordered Plaintiff to serve Norberg with the motion and notice of hearing by May 2, 2012 and
12 file the proof of service with the Court at least 5 days before the hearing. (Doc. 87). On April 27,
13 2012, Plaintiff filed a Certificate of Service with the Court which indicated that he served a
14 “Proof of Service of Notice of Hearing on Application for Default Judgment by Court;
15 Memorandum of Points and Authorities” on John Norberg via U.S. mail. This Court later
16 continued the hearing to May 24, 2012. (Doc. 93).

17 At the May 24, 2012 hearing, the Court noted that Plaintiff’s motion failed to set forth the
18 lawful measure of damages. Rather than seeking the damages that flowed from the wrongful loan,
19 Plaintiff sought the value of the wrongful loan and all payments made toward that loan. (Doc.
20 94). In essence, Plaintiff sought a windfall. Counsel admitted this was not the proper damage
21 amount and requested additional time to provide evidence, in the form of an expert declaration,
22 which would set forth Plaintiff’s lawful damages. Plaintiff’s additional evidence was due on July
23 6, 2012. (Doc. 94)

24 On July 5, 2012, Plaintiff filed a declaration seeking 90 days additional to submit
25 supplemental evidence. (Doc. 95) At that time, Counsel for Plaintiff reported that he had met
26 with various experts but had not yet been able to obtain the needed declarations. Id. The Court
27 granted Plaintiff’s request, in part, and allowed Plaintiff an additional 60 days to file the
28 necessary declaration(s). (Doc. 96). Plaintiff failed to file any additional evidence in the time

1 frame ordered by the Court. Based upon the evidence before this Court, the Court **GRANTS IN**
2 **PART** and **DENIES IN PART**, Plaintiff's motion for default judgment.

3 **II. Legal Standards for Default Judgment**

4 When default was entered because "a party against whom a judgment for relief is sought
5 has failed to plead or otherwise defend," the party seeking relief may apply to the court for a
6 default judgment. Fed.R.Civ.P. 55(a)-(b). Upon the entry of default, well-pleaded factual
7 allegations regarding liability are taken as true, but allegations regarding the amount of damages
8 must be proven. Pope v. United States, 323 U.S. 1, 22 (1944); *see also* Geddes v. United
9 Financial Group, 559 F.2d 557, 560 (9th Cir. 1977). In addition, "necessary facts not contained
10 in the pleadings, and claims which are legally insufficient, are not established by default." Cripps
11 v. Life Ins. Co. of North Am., 980 F.2d 1261, 1267 (9th Cir. 1992) (citing Danning v. Lavine,
12 572 F.2d 1386, 1388 (9th Cir. 1978)).

13 Granting or denying a motion for default judgment is within the discretion of the Court.
14 Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). The entry of default "does not
15 automatically entitle the plaintiff to a court-ordered judgment. Pepsico, Inc. v. Cal. Sec. Cans,
16 238 F.Supp.2d 1172, 1174 (C.D. Cal 2002), accord Draper v. Coombs, 792 F.2d 915, 924-25 (9th
17 Cir. 1986). The Ninth Circuit opined,

18 Factors which may be considered by courts in exercising discretion as to the entry of
19 a default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the
20 merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the
21 sum of money at stake in the action, (5) the possibility of a dispute concerning
material facts, (6) whether the default was due to excusable neglect, and (7) the strong
policy underlying the Federal Rules of Civil Procedure favoring decisions on the
merits.

22 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). As a general rule, the issuance of
23 default judgment is disfavored. Id. at 1472.

24 **III. Plaintiff's Second Amended Complaint**

25 According to Plaintiff, DeSilva, Norberg, and Financial sold Plaintiff the mortgage at
26 issue here. (Dco. 41 at 4). DeSilva was the loan officer, Defendant Norberg was the real estate
27 broker, and Financial was the lending institution. (Id.) Plaintiff alleges that Financial and
28 Norberg placed Plaintiff into a predatory loan with "toxic" terms to force him to refinance his

1 loan in the near future. (Doc. 41 at 7). Plaintiff contends that Norberg and Financial did this for
2 their financial gain. (Doc. 41 at 7).

3 Plaintiff contends that on March 1, 2008, DeSilva approached Plaintiff, identified herself
4 as a loan officer for Financial and “solicited” him to refinance his residence. (Doc. 41 at 8).
5 DeSilva told Plaintiff she could get him the “best deal” and the “best interest rates” available on
6 the market. (Doc. 41 at 8, Doc. 83 at 3).

7 Plaintiff asserts that during the application process, he submitted accurate documentation
8 of his income, but alleges that DeSilva overstated his income on the loan application without his
9 knowledge or permission. (Doc. 41 at 8; Doc. 83 at 3). The loan documents stated his income as
10 \$7,800 per month, when it was actually \$4,800 per month. (Doc. 41 at 8.; (Doc. 83 at 4).
11 Plaintiff claims DeSilva did this in order to qualify Plaintiff for the refinance, as he would not
12 have qualified at his actual income level.

13 Plaintiff alleges that DeSilva told him he could get 100% financing. He later learned that
14 instead of a loan with 100% financing, DeSilva sold him a predatory loan: the loan for
15 \$286,000.00 had an initial interest rate of 2.0% for one month, then adjusted to 9.95% “based
16 upon a 12 month MTA index) plus 2.9%, negatively amortized 115%.” (Doc. 41 at 8). Plaintiff’s
17 fully amortized payment was \$2,083.43. (Id.).

18 Plaintiff alleges DeSilva received \$4,290 in yield spread premiums and \$1,840 in
19 origination fees for Plaintiff’s loan. Plaintiff claims DeSilva told him that if the loan ever became
20 unaffordable, she would refinance it into an affordable loan. (Doc. 41 at 9).

21 Before closing, Plaintiff did not receive any of the loan documents nor was he allowed to
22 review the documents. Plaintiff alleges that the loan was subject to finance charges and contained
23 added costs that were not proper under the terms of the Note or law. Plaintiff also claims
24 Norberg, as an agent of the Lender, should have provided Plaintiff with disclosures to inform him
25 of these terms. Plaintiff further contends that he was not given the required copies of a proper
26 notice of cancellation. Plaintiff asserts that the specific facts regarding the loan were purposefully
27 hidden from him to prevent him from learning of the true nature of the loan.

28 Plaintiff completed the loan on the property on June 1, 2006.

1 **IV. Application of Eitel Factors**

2 Applying the factors articulated by the Ninth Circuit in Eitel to the facts above, the Court
3 finds the factors weigh in favor of granting Plaintiff’s motion for default judgment.

4 **A. Prejudice to Plaintiff**

5 The first factor the Court considers is whether Plaintiff would suffer prejudice if default
6 judgment is not entered. *See Pepsico, Inc.*, 238 F.Supp.2d at 1177. Potential prejudice to a
7 plaintiff militates in favor of granting a default judgment. *Id.* In general, where default has been
8 entered against a defendant, a plaintiff has no other alternative by which to recover damages. *Id.*;
9 *J & J Sports Productions v. Rodriguez*, 2010 U.S. Dist. LEXIS 20288, at * 7 (E.D. Cal. March 5,
10 2010). With the exception of Norberg, all of the previously named defendants have been
11 dismissed by the Court. Since Norberg has not appeared, it appears that Plaintiff has no
12 opportunity to litigate the case on its merits and therefore has no other avenue by which he may
13 recover damages.

14 **B. Merits of Plaintiff’s Claims and Sufficiency of the Complaint**

15 Given the kinship of these factors, the Court considers the merits of Plaintiff’s substantive
16 claims and the sufficiency of the complaint together. *See J & J Sports Productions v. Hernandez*,
17 2010 U.S. Dist. LEXIS 48191, at *3, n. 4 (E.D. Cal. May 17, 2010). The Ninth Circuit has
18 suggested that, when combined, these factors require a plaintiff to “state a claim on which the
19 plaintiff may recover.” *Pepsico, Inc.*, 238 F.Supp.2d at 1175 (citing *Kleopping v. Fireman’s*
20 *Fund*, 1996 U.S. Dist. LEXIS 1786, at *6 (N.D. Cal. Feb. 14, 1996)).

21 **1. Fraud**

22 Plaintiff relies on California Civil Code section 1709 to support his claim that Defendant
23 Norberg deceived Plaintiff and induced Plaintiff to proceed with a loan on terms that were not
24 favorable to Plaintiff. (Doc. 83 at 6). Plaintiff contends that Norberg is liable for damages
25 because Plaintiff would not have entered into the loan, if he had properly disclosed the terms of
26 the loan. (*Id.*)

27 Under California law, Plaintiff must show the following to establish fraud: “a false
28 representation, knowledge of its falsity, intent to defraud, justifiable reliance, and damages.”

1 Moore v. Brewster, 96 F.3d 1240, 1245 (9th Cir. 1996); *see also* Cal. Civ. Code § 1572. The
2 burden to establish fraud is “heavy,” Robi v. Five Platters, Inc., 918 F.2d 1439, 1444 (9th Cir.
3 1990), because “when fraud is alleged, ‘a party must state with particularity the circumstances
4 constituting fraud.” Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009), quoting Fed.
5 R. Civ. P. 9(b).

6 Here, Plaintiff makes the following general allegations:

7 . . . that Defendants Desilva, Norberg, and Financial, each made false representations
8 to Plaintiff regarding material facts, including but not limited to, [sic] interest rate
9 attached to the Plaintiff’s loan, financing options, availability of refinancing, and
Plaintiff’s qualification for this loan, at the inception of this transaction, designed to
fraudulently to induce Plaintiff to enter into this transaction

10 (Doc. 41 at 12).

11 However, the only specific statements and assurances about the loan set forth in the Second
12 Amended Complaint are attributed to DeSilva. (Doc. 41 at 12-14.) Despite this, Plaintiff’s
13 Application for Default Judgment attributes DeSilva’s statements to Norberg as well. (Doc. 83).
14 Plaintiff’s Application claims that because Defendant John Norberg was DeSilva’s supervisor,
15 Norberg was working “directly with Defendant DeSilva” at the time DeSilva solicited Plaintiff to
16 refinance his home. (Doc. 83 at 3).

17 The allegations for fraud against Defendant Norberg have not been plead with specificity
18 sufficient to meet the standards of Rule 9(b), because “[a]verments of fraud must be accompanied
19 by ‘the who, what, when, where, and how’ of the misconduct charged.” Kearns, 576 F.3d at
20 1124, citing Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1120 (9th Cir. 2003); *see also*
21 Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2004) (allegations of fraud must include “an
22 account of the time, place, and specific content of the false representations as well as the
23 identities of the parties to the misrepresentations”) (internal quotation marks and citation
24 omitted). Plaintiff’s SAC fails to allege when or by what means Defendant Norberg made
25 knowingly false representations to Plaintiff. He seems to set forth several assurances that were
26 made by Carol DeSilva, and merely attributes those same statements to Norberg based on his
27 supervisory role. While Plaintiff alleges he suffered economic damages as a result of entering
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1 into the loan, he has not set forth facts to demonstrate “justifiable reliance” or “intent to deceive”
2 by Defendant Norberg. Thus, Plaintiff has failed to state a claim for fraud against Norberg.

3 **2. Breach of Contract**

4 To establish breach of contract under California law, Plaintiff must establish that there was
5 a contract under which Plaintiff performed or had an excuse for non-performance, and that
6 Norberg breached the contract, which resulted in damages to Plaintiff. Wall Street Network, Ltd.
7 v. New York Times, Co., 164 Cal.App.4th 171, 178, 80 Cal.Rptr.3d 6 (2008) (“The standard
8 elements of a claim for breach of contract are: (1) the contract, (2) plaintiff’s performance or
9 excuse for non-performance, (3) defendant’s breach, and (4) damage to plaintiff therefrom.”).

10 With respect to an oral contract to restructure the terms of a loan, the agreement must
11 embody definite terms, capable of enforcement, in order to constitute a legal contract. Wong v.
12 Am. Servicing Co., Inc., 2009 WL 5113516 *10 (E.D. Cal. Dec. 18, 2009) (citing Price v. Wells
13 Fargo Bank, 213 Cal.App.3d 465, 483 (1st Dist.1989) (noting that “the terms of a restructuring
14 agreement obviously may vary as widely as the terms of the original agreement”). “Preliminary
15 negotiations or an agreement for future negotiations are not the functional equivalent of a valid,
16 subsisting agreement.” Wong, 2009 WL 5113516 *10. (quoting Kruse v. Bank of Am., 202
17 Cal.App.3d 38, 59, 248 Cal.Rptr. 217 (1st Dist.1988)). Moreover, the mere “understanding” that a
18 loan or mortgage would be restructured is insufficient to state a claim for breach of contract.
19 Wong, 2009 WL 5113516 *10.

20 Plaintiff does not allege that the terms of the contract were ambiguous. Rather, he claims
21 that Norberg wrongfully induced him to enter into a contract with unfair terms and failed to
22 provide adequate assistance during the formation of the contract. Specifically, Plaintiffs alleges
23 that Norberg breached the loan agreement with him when he misled Plaintiff as to the type of loan
24 and the monthly payments. Despite such allegations in the Application, Plaintiff fails to identify
25 any contract that obligated Norberg to conduct himself in a particular manner with respect to
26 these allegations. *See* Wong, 2009 WL 5113516 *10. Accordingly, Plaintiff has failed to state a
27 claim for breach of contract claim against Norberg.

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3. Breach of Implied Covenant of Good Faith and Fair Dealing

Plaintiff's SAC alleges the following:

Defendants DESILVA, FINANCIAL, NORBERG, and each of them, breached the implied duty of good faith and fair dealing owed to Plaintiff by, among other things, performing acts and failing to act as alleged herein, and by failing to perform the duties specifically enumerated herein. Defendants further breached the duty of good faith and fair dealing by:

- a. Failing to pay at least as much regard to Plaintiff's interests as to Defendants' interests;
- b. Failing to disclose to Plaintiff the true nature of the loan that is the subject of this action;
- c. Failing to give Plaintiff the requisite notice and disclosures;
- d. Directing Plaintiff into a toxic loan.

(Doc. 41 at 21).

"The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties." Wong, 2009 WL 5113516 *11 (quoting Smith v. City & County of San Francisco, 225 Cal.App.3d 38, 49, 275 Cal.Rptr. 17 (1990). "To establish a breach of an implied covenant of good faith and fair dealing, a plaintiff must establish the existence of a contractual obligation, along with conduct that frustrates the other party's rights to benefit from the contract." Wong, 2009 WL 5113516 *11 Fortaleza v. PNC Fin. Servs. Group, Inc., 2009 U.S. Dist. LEXIS 64624, at 15-16, 2009 WL 2246212 (N.D.Cal. July 27, 2009). The "implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract." Wong, 2009 WL 5113516 *11 (quoting Pasadena Live, LLC v. City of Pasadena, 114 Cal.App.4th 1089, 1093-1094, 8 Cal.Rptr.3d 233 (2004)).

Under California law, "no cause of action for the tortious breach of the implied covenant of good faith and fair dealing can arise unless the parties are in a 'special relationship' with 'fiduciary characteristics.'" Lingad v. Indymac Fed. Bank, 682 F. Supp. 2d 1142, 1154-55 (E.D. Cal. 2010) (quoting Pension Trust Fund v. Federal Ins. Co., 307 F.3d 944, 955 (9th Cir.2002) (applying California law and citing Mitsui Mfrs. Bank v. Superior Court, 212 Cal.App.3d 726,

1 730, 260 Cal.Rptr. 793 (1989)). Further, the implied covenant “does not require parties to
2 negotiate in good faith prior to any agreement.” McClain, 159 Cal.App.4th at 799, 71 Cal.Rptr.3d
3 885.

4 This claim fails for the same reason the contract claim above fails. Plaintiff’s SAC failed
5 to plead facts to identify the existence of a valid contract between Plaintiff and Norberg other
6 than the loan agreement, Plaintiff has failed to state that any of these alleged contractual duties
7 were incorporated into the specific terms of the loan agreement, and Plaintiff has not alleged the
8 existence of any “special relationship” between him and Norberg to invoke the implied covenant.
9 See Lingad, 682 F. Supp. 2d at 1155. Accordingly, Plaintiff has failed to state a claim against
10 Norberg under the implied covenant of good faith and fair dealing.

11 **4. Negligence**

12 The fifth cause of action in Plaintiff’s SAC alleges that all defendants Financial, Norberg,
13 and DeSilva were negligent in directing Plaintiff into a loan that he may not have qualified for by
14 industry standards, resulting in unnecessarily increased fees, which defendants knew were in
15 excess of what Plaintiff could afford. (Doc. 41 at ¶138).

16 The elements of a cause of action for negligence are (1) a legal duty to use reasonable
17 care, (2) breach of that duty, and (3) proximate [or legal] cause between the breach and (4) the
18 plaintiff’s injury.” Wong, 2009 WL 5113516 *6 (citing Mendoza v. City of Los Angeles, 66
19 Cal.App.4th 1333, 1339, 78 Cal.Rptr.2d 525 (1998). “The question of the existence of a legal
20 duty of care ... presents a question of law which is to be determined by the courts alone.” First
21 Interstate Bank of Ariz., N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 987 (9th Cir.2000).
22 “Absent the existence of duty ..., there can be no breach and no negligence.” Nichols v. Keller, 15
23 Cal.App.4th 1672, 1683, 19 Cal.Rptr.2d 601 (1993); Nymark v. Heart Fed. Savings & Loan
24 Assn., 231 Cal.App.3d 1089, 1096, 283 Cal.Rptr. 53 (3d Dist.1991) (“The existence of a duty of
25 care owed by a defendant to a plaintiff is a prerequisite to establishing a claim for negligence.”)
26 (citations omitted).

27 Plaintiff alleges that as Plaintiff’s real estate broker, Norberg owed him a fiduciary duty.
28 (Doc. 41 at ¶13). Given the facts alleged by Plaintiff in his claim for Breach of Fiduciary duty,

1 Plaintiff has pled sufficient facts to support a claim for negligence against Norberg. (See Breach
2 of Fiduciary Duty section, discussed below).

3 **5. Breach of Fiduciary Duty**

4 “The elements of a cause of action for breach of fiduciary duty are: 1) the existence of a
5 fiduciary duty; 2) a breach of the fiduciary duty; and 3) resulting damage.” Brewer v. Indymac
6 Bank, 609 F. Supp. 2d 1104, 1119-20 (E.D. Cal. 2009) (citing Pellegrini v. Weiss, 165
7 Cal.App.4th 515, 524, 81 Cal.Rptr.3d 387 (2008)). A mortgage broker owes a fiduciary duty to
8 their client. *See* Cal. Civ. Code § 2079.24; Brewer, 609 F. Supp. 2d at 1119 (citing Zimmer v.
9 Nawabi, 566 F.Supp.2d 1025 (E.D.Cal.2008)). Under California law, a mortgage broker acts in a
10 fiduciary capacity that “not only imposes upon him the duty of acting in the highest good faith
11 toward his principal but also precludes the agent from obtaining any advantage over the principal
12 in any transaction had by virtue of his agency.” Brewer, 609 F. Supp. 2d at 1119 (citing Wyatt v.
13 Union Mortgage Co., 24 Cal.3d 773, 782, 157 Cal.Rptr. 392, 598 P.2d 45 (1979) and Batson v.
14 Strehlow, 68 Cal.2d 662, 674-75, 68 Cal.Rptr. 589, 441 P.2d 101 (1968)). This duty obligates
15 brokers to “make a full and accurate disclosure of the terms of a loan to borrowers and to act
16 always in the utmost good faith toward their principals.” Brewer, 609 F. Supp. 2d at 1119 (citing
17 Wyatt, 24 Cal.3d at 782, 157 Cal.Rptr. 392, 598 P.2d 45 and Rattray v. Scudder, 28 Cal.2d 214,
18 223, 169 P.2d 371 (1946)). Accordingly, a broker is liable to his principal for secret profits.
19 Brewer, 609 F. Supp. 2d at 1119 (citing Roberts v. Lomanto, 112 Cal.App.4th 1553, 5
20 Cal.Rptr.3d 866 (2003)).

21 Accepting the allegations of Plaintiff’s SAC as true, Norberg was Plaintiff’s mortgage
22 broker and thus owed Plaintiff a fiduciary duty. (Doc. 41 at ¶13). Plaintiff alleges that Norberg
23 breached his fiduciary duty by obtaining a loan for him with unfavorable terms that he could not
24 afford, by failing to disclose the negative consequences of the loan, and securing secret profits.
25 (Doc. 41 at ¶150). Plaintiff further alleges he suffered harm as a proximate result of Norberg’s
26 breach. (Id. at ¶156). Finally, Plaintiff alleges that by deliberately breaching his fiduciary duty,
27 Norberg acted with malice, fraud, wantonness, oppression, and entire want of care to Plaintiff’s
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1 rights. (Id. at ¶157). As such, Plaintiff has sufficiently alleged that Norberg intentionally and
2 fraudulently breached fiduciary duties owed to him.

3 **6. California Business and Professions Code §17200, et seq.**

4 Under §17200, unfair competition includes any “unlawful, unfair, or fraudulent business
5 act or practice.” Cal. Bus. & Prof. Code § 17200. Therefore, there are three prongs under which
6 a claim may be established under §17200. Daro v. Superior Court, 151 Cal.App.4th 1079, 1093
7 (2007) (“Because section 17200 is written in the disjunctive, a business act or practice need only
8 meet one of the three criteria—unlawful, unfair, or fraudulent—to be considered unfair
9 competition”); Lozano v. AT&T Wireless Servs., 504 F.3d 718, 731 (9th Cir. 2007) (“[e]ach
10 prong . . . is a separate and distinct theory of liability”). Further, a claim under § 17200 must rest
11 on a violation of another law. Farmers Ins. Exch. v. Superior Court, 2 Cal.4th 377, 383, 6
12 Cal.Rptr.2d 487, 826 P.2d 730 (1992). Here, Plaintiff claims Norberg’s “negligence, breach of
13 fiduciary duty, fraud, breach of contract and breach of the implied covenant of good faith and fair
14 dealing” constitute unlawful, unfair, and/or fraudulent business under California Business &
15 Professions Code § 17200. (Doc. 41 at ¶166).

16 **a. Unlawful act or practice**

17 Actions prohibited by § 17200 include “any practices forbidden by law, be it civil or
18 criminal, federal, state, or municipal, statutory, regulatory, or court-made.” Saunders v. Superior
19 Court, 27 Cal.App.4th 832, 838-39, 33 Cal.Rptr.2d 438 (1994). Thus, the “unlawful” prong
20 requires an underlying violation of law. Krantz v. BT Visual Images, 89 Cal.App.4th 164, 178,
21 107 Cal.Rptr.2d 209 (2001). Here, as detailed above, Plaintiff has established Norberg violated
22 breached a fiduciary duty owed to Plaintiff.

23 **b. Unfair act or practice**

24 A claim under the “unfair” prong requires “conduct threatening incipient violation of
25 antitrust laws, or violates the policy or spirit of those laws . . . , or otherwise significantly
26 threatens or harms competition.” Cal-Tech Communications v, Inc. v. Los Angeles Cellular
27 Telephone Co., 20 Cal.4th 163, 187, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999). In this case,
28 Plaintiff has not alleged a violation of antitrust laws. Likewise, he has not shown the actions of

1 Norberg threatened or harmed competition.

2 c. Fraudulent act or practice

3 A “fraudulent” act under § 17200 is “one which is likely to deceive the public,” and “may
4 be based on misrepresentations . . . which are untrue, and also those which may be accurate on
5 some level, but will nonetheless tend to mislead or deceive.” McKell v. Washington Mutual, Inc.,
6 142 Cal.App.4th 1457, 1474, (2006). Thus, the term “fraudulent” under §17200 “does not refer
7 to the common law tort of fraud,” Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal.App.4th
8 638, 645 (Ct. App. 2008), but still requires allegations that the misrepresentation was directly
9 related to injurious conduct, and that the claimant actually relied on the alleged misrepresentation.
10 In re Tobacco II Cases, 46 Cal.4th 298, 36-27 (2009). Nevertheless, claims based upon the
11 “fraudulent” prong of §17200 remain subject to the heightened pleading requirements of Rule
12 9(b). Kearns, 567 F.3d at 1124-25; Meridian Project Sys., 404 F.Supp.2d at 1219. Because
13 Plaintiff failed to plead the circumstances surrounding fraud with particularity, his claim for
14 fraudulent practices under § 17200 fails as well.

15 **C. Sum of Money at Stake**

16 In considering this factor, the Court “must consider the amount of money at stake in
17 relation to the seriousness of Defendant’s conduct.” Pepsico, Inc., 238 F.Supp.2d at 1176. Here,
18 Plaintiff prays for judgment in the amount of \$429,456.34. Plaintiff breaks down this amount as
19 follows:

- 20 1) \$374,648.64 for compensatory damages including,
21 a. \$286,000.00 for the amount of the loan;
22 b. \$5,093.59 for out of pocket closing costs paid by Plaintiff;
23 c. \$8,887.45 for “out of pocket costs Defendants DeSilva and Norberg received
24 from the loans sold to Plaintiff;
25 d. \$74,016.60 in payments made by Plaintiff on the current loan;
26 e. \$651 in pre-payment penalties associated with the prior loan Plaintiff
27 refinanced
28 2) \$410.00 for costs of litigation (including filing fee and fee for service on

1 defendant;

2 3) \$5005.00 for attorney fees; and

3 4) \$49,392.70 for pre-judgment interest

4 Given the substantial amount of money at stake, this factor weighs against the entry of
5 default judgment. *See, e.g., Joe Hand Promotions v. Streshly*, 655 F.Supp.2d 1136 (S.D. Cal.
6 2009) (proposed award amount of \$100,975 was “manifestly excessive under existing law”); *J &*
7 *J Sports Productions v. Cardoze*, 2010 U.S. Dist. LEXIS 74606, at * 12-13 (N.D. Cal. July 9,
8 2010) (“a large sum of money at stake would disfavor default damages,” such as damages totaling
9 \$114,200); *but see Hernandez*, 2010 U.S. Dist. LEXIS 48791, at *15 (“the statutes involved
10 contemplate such an award under certain circumstances,” and the factor did not weigh against
11 entry of default judgment).

12 **1) Prejudgment Interest**

13 The Prayer for Damages alleged in Plaintiff’s SAC does not request pre-judgment interest.
14 Therefore Plaintiff cannot recover any amount for pre-judgment interest. *See Landstar Ranger,*
15 *Inc. v. Parth Enterprises, Inc.*, 725 F. Supp. 2d 916, 923 (C.D. Cal. 2010) (citing Fed.R.Civ.Proc.
16 54(c) (“A default judgment must not differ in kind from, or exceed in amount, what is demanded
17 in the pleadings”) and *Silge v. Merz*, 510 F.3d 157, 160-61 (2d Cir.2007) (affirming the denial of
18 prejudgment interest in connecting with a default judgment where plaintiff did not expressly pray
19 for prejudgment interest in the complaint, and stating that, “[b]y limiting damages to what is
20 specified in the ‘demand for judgment,’ [Rule 54(c)] ensures that a defendant who is considering
21 default can look at the damages clause, satisfy himself that he is willing to suffer judgment in that
22 amount, and then default without the need to hire a lawyer”).

23 **2) Compensatory Damages, Attorney’s Fees, and Costs**

24 California law explains Plaintiff’s measure of damages as follows:

25 For the breach of an obligation not arising from contract, the measure of damages,
26 except where otherwise expressly provided by this code, is the amount which will
27 compensate for all the detriment proximately caused thereby, whether it could have
28 been anticipated or not.

28 Cal. Civ. Code § 3333 (West).

1 Contrary to Plaintiff's request for relief, the Court finds the proper measurement of
2 damages for Norberg's breach of fiduciary duty is the difference paid by Plaintiff due to the
3 increased interest rate as calculated over the entire 30 year term of the loan. *See* Smith v. Home
4 Loan Funding, Inc., 192 Cal. App. 4th 1331, 121 Cal. Rptr. 3d 857 (2011), as modified on denial
5 of reh'g (Mar. 28, 2011). To award Plaintiff the full value of the loan that Plaintiff received, plus
6 the payments he made on the new loan would serve as a complete windfall to Plaintiff.

7 Based upon the Closing Documents, it appears Plaintiff's prior loan had an interest rate of
8 8.625%, but Plaintiff has not provided the Court with the monthly payment he had prior to the
9 loan at issue. Because Plaintiff has failed to produce evidence of the increased amount Plaintiff
10 paid in interest over the term of the loan due to the new interest rate(s), if any, the Court lacks
11 evidence to support any award of damages to Plaintiff for out-of-pocket expenses related to his
12 payments under the new loan. To award Plaintiff the full value of the loan that he received, plus
13 the payments he made on the new loan would serve as a windfall.

14 Additionally, Plaintiff alleges expenses of \$5,093.59 for out of pocket closing costs paid
15 by Plaintiff; however, the Court is unable to locate this amount in the closing documents provided
16 to the Court. (Doc. 83-1). Likewise, the Court has identified the \$4,290 yield spread premium,
17 but has not been able to locate the \$8,887.45 for "out of pocket costs Plaintiff claims Defendants
18 DeSilva and Norberg received from the loans sold to Plaintiff." (*Id.* at 2-4, 7 and 10). Plaintiff
19 also claims \$651 in pre-payment penalties associated with the prior loan Plaintiff refinanced;
20 however the closing documents only seem to indicate \$350 for prepayment penalty (*Id.* at 6).
21 Plaintiff was given an opportunity to supplement his evidence in order to clarify these issues and
22 has failed to do so. (Doc. 94 and 96). With regard to the out-of-pocket expenses described
23 above, the evidence before this Court only supports an award of \$350 for the pre-payment
24 penalty.

25 Finally, Plaintiff's request for costs of litigation at \$410.00 (including filing fee and fee
26 for service) on Defendant appears appropriate. On the other hand, Plaintiff's prayer for relief,
27 which requests \$5005.00 for attorney fees (for 14 hours at \$350.00 per hour) is not reasonable in
28 light of the failure detailed in footnote 1 above and the extremely limited success in this case due

1 to counsel's lack of diligence. Counsel's request for fees that are more 10 times the amount of the
2 recovery is unconscionable especially in light of the fact that the size of the recovery is due, it
3 appears, to counsel's mismanagement of this case. Thus, the Court **DENIES** the request for fees.

4 **D. Possibility of Dispute Concerning Material Facts**

5 The Court also considers the possibility of dispute as to any material facts in the case.
6 Generally, where a defendant is in default there is little possibility of dispute concerning material
7 facts because (1) based on the entry of default, the Court accepts allegations in Plaintiff's
8 Complaint as true and (2) though properly served, the defendant has not made any effort to
9 challenge the Complaint or otherwise appear in this case. See Pepsico, Inc., 238 F.Supp.2d at
10 1177. Therefore, this factor weighs in favor of granting default judgment.

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

12 Generally, the Court will consider whether Mr. Norbert's failure to answer is due to
13 excusable neglect. See Eitel, 782 F.2d at 1472. Here, Mr. Norbert was properly served with the
14 Summons and Complaint. (Doc. 61-62). Moreover Norberg received notice of the initial hearing
15 on Plaintiff's motion for default judgment and did not respond. (Doc. 92). Given these
16 circumstances, it is unlikely that Norberg's failure to answer, and the resulting defaults entered by
17 the Clerk of Court, was a result of excusable neglect. See Shanghai Automation Instrument Co.,
18 Ltd. v. Kuei, 194 F.Supp.2d 995, 1005 (N.D. Cal. 2001) (finding no excusable neglect because
19 the defendants "were properly served with the Complaint, the notice of entry of default, as well as
20 the papers in support of the instant motion"). As a result, this factor does not weigh against
21 default judgment.

22 **F. Policy disfavoring default judgment**

23 As noted above, default judgments are disfavored because "[c]ases should be decided on
24 their merits whenever reasonably possible." Eitel, 782 F.2d at 1472. Mr. Norbert's failure to
25 answer the Complaint makes a decision on the merits somewhat impractical. However, the policy
26 underlying the Federal Rules of Civil Procedure favors decisions on the merits and therefore
27 weighs against Plaintiff.

28 **VI. Conclusion**

1 Given the issues discussed above, the Court **GRANTS IN PART AND DENIES IN**
2 **PART** Plaintiff's request for entry of default judgment against John Norbert, individually, and
3 awards the following:

4 1. Plaintiff's request for the full value of the loan and the payments made on the loan
5 is **DENIED**;

6 2. Plaintiff is **AWARDED** costs of litigation in the amount of \$410.00;

7 3. Plaintiff's request attorneys' fees in the amount of \$5005.00 is **DENIED**;

8 4. Plaintiff is **AWARDED** reimbursement for a pre-payment penalty in the amount
9 of \$350.00; and

10 5. Plaintiff's request for pre-judgment interest is **DENIED**.

11 IT IS SO ORDERED.

12 Dated: September 12, 2012

13 /s/ Jennifer L. Thurston
14 UNITED STATES MAGISTRATE JUDGE