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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ALLIED WORLD SPECIALTY
INSURANCE COMPANY f/k/a DARWIN
NATIONAL ASSURANCE COMPANY, a
Delaware corporation; ALLIED WORLD
INSURANCE COMPANY, a Delaware
corporation,

Plaintiffs,

v.

JND THOMAS COMPANY, INC., a
California corporation; DENNIS A.
THOMAS, an individual; JULIE THOMAS,
an individual,

Defendants.

Case No. 1:15-cv-01498-DAD-SKO

**FINDINGS AND
RECOMMENDATIONS THAT
PLAINTIFFS' APPLICATION FOR
DEFAULT JUDGMENT BE
GRANTED**

(Doc. No. 13)

OBJECTIONS DUE: 21 DAYS

I. INTRODUCTION

On November 17, 2015, Plaintiffs Allied World Specialty Insurance Company f/k/a Darwin National Assurance Company ("Darwin") and Allied World Insurance Company ("Allied") (collectively, "Plaintiffs") filed an application for default judgment against Defendants JND Thomas Company, Inc. ("JND"), Dennis Thomas, and Julie Thomas (collectively, "Defendants"). (Doc. 13.) No opposition to Plaintiffs' application for default judgment was filed.

1 The Court reviewed Plaintiffs' application and supporting documentation and determined
2 that the matter was suitable for decision without oral argument pursuant to Local Rule 230(g).¹

3 For the reasons set forth below, the undersigned RECOMMENDS that Plaintiffs'
4 application for default judgment be GRANTED against Defendants in the amount of \$1,000,000.

5 II. FACTUAL BACKGROUND

6 Plaintiffs filed a complaint on October 10, 2015, stating claims for breach of contract,
7 declaratory relief, quia timet,² and specific performance. (Doc. 1.) The complaint alleges the
8 Court has diversity jurisdiction as Plaintiffs are corporations formed under the laws of Delaware,
9 with their principal places of business in Massachusetts; Defendant JND is an corporation formed
10 under the laws of California with its principal place of business in Riverdale, California; Dennis
11 and Julie Thomas are both individuals residing within the state of California; and the amount in
12 controversy exceeds \$75,000. The complaint also alleges venue is proper in the Eastern District of
13 California because Defendants Dennis and Julie Thomas reside in Kings County, and Defendant
14 JND has its principal place of business in Fresno County. 28 U.S.C. § 1391(b)(1).

15 Plaintiffs are surety that issue contract surety bonds and other lines of insurance. (Doc. 1,
16 ¶ 5.) On November 14, 2013, Defendants entered into a General Indemnity Agreement ("GIA") in
17 favor of Plaintiffs as sureties who agreed to issue performance and payment bonds to JND in
18 connection with construction work on five projects ("Project Bonds"):

- 19 1. Principal: JND Thomas Company, Inc.
20 Obligee: Carothers Construction, Inc.
21 Bond No.: D00000785 (\$1,500,000)
22 Project: Construct Shopping Center, Ft. Gordon, GA
23 Surety: Darwin National Assurance Company
- 24 2. Principal: JND Thomas Company, Inc.
25 Obligee: Cadell Construction Co. (DE) LLC

26 ¹ Specific to default judgment, a hearing on the issue of damages is not required as long as the court finds there is a
27 basis for the damages specified. *See Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105,
28 111 (2d Cir. 1997); *Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981) (no hearing necessary when documents
show judgment amount based on a definite figure); *see also* Fed. R. Civ. P. 55(b)(2) (the district court has the
discretion to conduct or refuse a hearing on default judgment).

² "Quia timet is the right of a surety to demand that the principal place the surety in funds when there are reasonable
grounds to believe that the surety will suffer a loss in the future because the principal is likely to default on its primary
obligation to the creditor." 74 Am. Jur. 2d, Suretyship § 123 (West 2015).

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Bond No.: D00000799 (\$2,575,000)
Project: Unmanned Aerial Vehicle Complex, Ft. Stewart, GA
Surety: Darwin National Assurance Company

3. Principal: JND Thomas Company, Inc.
Obligee: Cadell Construction Co. (DE) LLC
Bond No.: D00000800 (\$1,388,000)
Project: 1030-0005-SC, Ft. Stewart, GA Digital
Surety: Darwin National Assurance Company

4. Principal: JND Thomas Company, Inc.
Obligee: OHL USA, Inc.
Bond No.: S001-0883 (\$5,000,000)
Project: Machado Lake Ecosystem Rehabilitation Phase 2, Los Angeles, CA
Surety: Allied World Insurance Company

5. Principal: JND Thomas Company, Inc.
Obligee: Monroe County Board of County Commissioner
Bond No.: S001-0871 (\$1,839,905)
Project: Organic Removal, Water Quality Improvement
Surety: Darwin National Assurance Company

Defendants signed the GIA and agreed to indemnify Plaintiffs for any losses or expenses incurred from the Project Bonds. (Doc. 13-2, p. 9.) Among others provisions, Defendants agreed to the following obligations in the GIA:

3.2 INDEMNITY – at all times jointly and severally to indemnify and to hold the Surety harmless from and against any and all liability for any and all Loss, and in such connection, Indemnitors will pay the Surety for all Losses specified or otherwise described in Surety's notice, no later than close of business on the Due Date with respect to such notice, whether or not the Surety has actually made any payment thereon of such due Date.

...

[3.3](a) to deposit with the Surety as collateral, by the Due Date and after receipt of the Surety's written demand, the sum equal to an amount determined by the Surety, to cover liability for Loss covered by Section 3.2, as determined by the Surety. At Surety's sole option, such collateral will be in addition to and not in lieu of any other collateral previously provided to the Surety. Further, if an event of default (as defined in this Agreement below) has occurred, the Surety will be entitled to demand that the Indemnitors place with surety funds equal to the aggregate penal sum of all then-outstanding Bonds, as such sum is determined by the Surety in its sole discretion (regardless of whether any actual liability for Loss exists under any of the Bonds). (b) If indemnitors fail to pay in full the amount demanded pursuant to this Agreement on the Due Date, Indemnitors will pay Interest on such overdue amount from the Due Date up to the date of actual payment to the Surety

1 (Doc. 1, Exhibit A.)

2 After issuing the Project Bonds, Plaintiffs received claims under the Project Bonds from
3 JND's subcontractors and suppliers seeking payment for labor and materials supplied to the
4 Projects. Pursuant to their obligations, Plaintiffs allege they commenced an investigation of these
5 claims and, as of the date of the complaint, they have paid claims totaling \$192,791.63. (Doc. 1,
6 ¶ 14.) In support of Plaintiffs' motion, the declaration of James Keating, Assistant Vice President
7 and counsel for Plaintiffs, was filed. (Doc. 13-2.) Mr. Keating states that Plaintiffs have incurred
8 \$309,791.63 in losses and expenses in connection with the Project Bonds, which includes payment
9 for claims as well as losses in the form of attorneys' and consultants' fees. (Doc. 13-2, Keating
10 Decl., ¶ 16.) Also, Bibler Masonry Contractors, Inc., one of JND's subcontractors and suppliers,
11 recently filed an action in Georgia against Darwin on the Bonds seeking over \$117,000. (Doc. 1,
12 ¶ 16.) Based upon their investigation of the JND projects, Plaintiffs anticipate being exposed to
13 further payment and performance bond losses, including on the two projects at Ft. Stewart; this
14 may include reimbursement to the obligee for costs paid on JND's behalf to a concrete supplier for
15 more than \$500,000. (Doc. 1, ¶¶ 16-17.)

16 On September 21, 2015, pursuant to the terms of the GIA, Plaintiffs sent a letter to
17 Defendants demanding they deposit \$1,000,000 in cash collateral with Plaintiffs to cover actual
18 and anticipated losses on the Bonds. (Doc. 1, ¶ 19; Doc. 13-2, p. 67-68.) Plaintiffs allege
19 Defendants failed to comply with the demand or otherwise fulfill their obligations as set forth
20 under the GIA.

21 Plaintiffs' complaint alleges claims for (1) breach of contract (the GIA) against all
22 Defendants for failure to deposit collateral in any amount with Plaintiffs or indemnify Plaintiffs
23 for their losses; (2) declaratory relief that (a) Defendants are obligated to reimburse Allied and
24 Darwin for the amounts they have incurred and will continue to incur to satisfy JND's obligations
25 on the bonds, including attorneys' fees, costs, and expenses; and (b) Defendants are obligated to
26 deposit collateral in an amount as determined by Plaintiffs to discharge any loss or anticipated
27 loss; (3) quia timet against all Defendants preventing them from transferring assets absent further
28 order of the Court; and (4) specific performance of the terms of the GIA.

1 **III. SERVICE OF PROCESS**

2 On October 8, 2015, Dennis Thomas was personally served with the summons and
3 complaint as the agent for service of process for JND; Dennis Thomas himself was personally
4 served with the summons and complaint on October 8, 2015; and Julie Thomas was personally
5 served with the summons and complaint on October 8, 2015. (Docs. 6, 7, 8.) Plaintiffs requested
6 entries of default against all Defendants on November 9, 2015 (Doc. 9), and each Defendant's
7 default was entered by the Clerk of the Court on November 12, 2015 (Docs. 10-12). Personal
8 service on Defendants meets the requirements of Federal Rule of Civil Procedure 4, and service of
9 process was proper.

10 **IV. DISCUSSION**

11 **A. Legal Standard**

12 Federal Rule of Civil Procedure 55(b) permits a court-ordered default judgment following
13 the entry of default by the clerk of the court under Rule 55(a). It is within the sole discretion of
14 the court as to whether default judgment should be entered. *See Aldabe v. Aldabe*, 616 F.2d 1089,
15 1092 (9th Cir. 1980). A defendant's default by itself does not entitle a plaintiff to a court-ordered
16 judgment. *See id.* Instead, the Ninth Circuit has determined a court should consider seven
17 discretionary factors, often referred to as the "Eitel factors," before rendering a decision on default
18 judgment. *See Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). The *Eitel* factors include
19 (1) the possibility of prejudice to the plaintiff, (2) the merits of the plaintiff's substantive claim,
20 (3) the sufficiency of the complaint, (4) the sum of money at stake in the action (5) the possibility
21 of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and
22 (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the
23 merits. *See id.*

24 A plaintiff is required to prove all damages sought in the complaint. *See Televideo Sys.,*
25 *Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1992). In addition, any relief sought may not be
26 different in kind from, or exceed in amount, what is demanded in the complaint. Fed. R. Civ. P.
27 54(c). If the facts necessary to determine the damages are not contained in the complaint, or are
28

1 legally insufficient, they will not be established by default. *See Cripps v. Life Ins. Co. of N. Am.*,
2 980 F.2d 1261, 1267 (9th Cir. 1992).

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

6 **B. Relief Sought in Application for Default Judgment**

7 Based on the claims pled in the complaint, Plaintiffs seek a judgment in the amount of
8 \$1,000,000 which is comprised of \$309,791.63, the total amount of paid losses and fees, and
9 \$690,208.37, the amount of collateral demanded minus incurred losses and fees. Plaintiffs' motion
10 for default judgment does not address each of the claims pled in the complaint and instead focuses
11 on the monetary relief sought. Plaintiffs' request for monetary relief, however, is awardable based
12 on Plaintiffs' claims for breach of contract and for specific performance seeking enforcement of
13 the security collateral provision in the GIA.³

14 **C. The *Eitel* Factors Favor Entry of Default Judgment**

15 **1. Possibility of Prejudice to Plaintiffs**

16 The first *Eitel* factor considers whether Plaintiffs would suffer prejudice if default is not
17 entered. If Plaintiffs' application for default judgment were denied, it would leave Plaintiffs
18 without a remedy because Defendants have refused to participate in the litigation. Therefore,
19 Plaintiffs would be prejudiced if the Court were to deny their application for default judgment.
20 This factor weighs in favor of default judgment. *See Suretec Ins. Co. v. Orchard Hills Estates,*
21 *LLC*, No. CIV S-09-0110 LKK EFB, 2010 WL 4366205, *5 (E.D. Cal. Oct. 27, 2010); *see also*
22 *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003)
23 ("prejudice" exists where the plaintiff has no "recourse for recovery" other than default judgment).

24 **2. Merits of Plaintiffs' Substantive Claim and Sufficiency of the Complaint**

25 The allegations of Plaintiffs' complaint and the evidence filed in support of the motion for
26 default judgment establish that Defendants breached the indemnity agreement (the GIA) with

27 ³ Plaintiffs do not address their claims for declaratory relief or quia timet in their motion for default judgment, but no
28 relief pursuant to those claims is sought; as such, those claims are not addressed.

1 Plaintiffs. To establish a claim for breach of contract, Plaintiffs must allege (1) a contract, (2)
2 Plaintiffs' performance or excuse for nonperformance, (3) Defendants' breach, and (4) damage to
3 Plaintiffs. *Amelco Elec. v. City of Thousand Oaks*, 27 Cal. 4th 228, 243 (2002) (citing 4 Witkin,
4 Cal. Procedure (4th ed. 1997) Pleading, § 476, p. 570). Under California law, a surety is not
5 required to bring suit or obtain judgment establishing liability of the principal under surety bonds
6 to be entitled to reimbursement under an indemnity agreement or to enforce the indemnity
7 agreement after a breach. *Gen. Ins. Co. of Am. v. Singleton*, 41 Cal. App. 3d 439, 443-44.

8 The GIA is attached to Plaintiffs' complaint and to Mr. Keating's Declaration filed in
9 support of Plaintiffs' motion for default judgment. (Docs. 1, 13-2.) Under the GIA, JND is the
10 Principal, Defendants collectively are the Indemnitors, and Plaintiffs are the Surety. (Doc. 13-2.)
11 The GIA sets forth the obligations of the Indemnitors which include indemnification of Plaintiffs
12 as surety for any losses associated with the Project Bonds. The GIA also contains a collateral
13 security provision:

14 [3.3](a) to deposit with the Surety as collateral, by the Due Date and after receipt of
15 the Surety's written demand, the sum equal to an amount determined by the Surety,
16 to cover liability for Loss covered by Section 3.2, as determined by the Surety. At
17 Surety's sole option, such collateral will be in addition to and not in lieu of any
18 other collateral previously provided to the Surety. Further, if an event of default
19 (as defined in this Agreement below) has occurred, the Surety will be entitled to
20 demand that the Indemnitors place with surety funds equal to the aggregate penal
21 sum of all then-outstanding Bonds, as such sum is determined by the Surety in its
22 sole discretion (regardless of whether any actual liability for Loss exists under any
23 of the Bonds). (b) If indemnitors fail to pay in full the amount demanded pursuant
24 to this Agreement on the Due Date, Indemnitors will pay Interest on such overdue
25 amount from the Due Date up to the date of actual payment to the Surety

26 (Doc. 1, Exhibit A.)

27 Plaintiffs allege Defendants have breached the GIA by failing to reimburse Plaintiffs for
28 payment made to JND's creditors under the Project Bonds and for failing to pay the cash collateral
demanded by Plaintiffs to cover anticipated losses on the Project Bonds. (Doc. 1, ¶¶ 14-19.)
Plaintiffs also allege they have performed their obligations under the GIA, but as a result of
Defendants' breach, Plaintiffs have been monetarily damaged. This is sufficient to state a claim
for breach of the GIA.

1 Plaintiffs also allege a claim for specific performance of the GIA's collateral security
2 provision. When a surety agreement contains a collateral security provision, the surety is
3 generally entitled to specific performance of the collateral security provision, regardless whether it
4 has actually incurred a loss or only anticipates a loss:

5 A collateral security provision provides that once a surety . . . receives a demand on
6 its bond, the indemnitor must provide the surety with funds which the surety is to
7 hold in reserve. If the claim on the bond must be paid, then the surety will pay the
8 loss from the indemnitor's funds; otherwise, the surety must return the funds to the
indemnitor. Sureties are ordinarily entitled to specific performance of collateral
security clauses.

9 *Safeco Ins. Co. of Am. v. Schwab*, 739 F.2d 431, 433 (9th Cir. 1984) (applying California law).
10 Pursuant to section 3.3 of the GIA, Plaintiffs issued a demand letter on September 21, 2015,
11 requiring Defendants to deposit with Plaintiffs \$1,000,000 as cash collateral to cover Plaintiffs'
12 actual and anticipated losses under the Project Bonds, but Defendants failed to respond to the letter
13 or deposit the collateral. Based on these allegations, Plaintiffs have adequately pled a claim for
14 specific performance of section 3.3 of the GIA.

15 In sum, Plaintiffs' claims for breach of contract and specific performance are adequately
16 pled, which weighs in favor of awarding default judgment.

17 **3. The Sum of Money at Stake in the Action**

18 Under this *Eitel* factor, "the court must consider the amount of money at stake in relation to
19 the seriousness of Defendant's conduct." *PepsiCo, Inc.*, 238 F. Supp. 2d 1177. Although the
20 amount Plaintiffs seek is relatively large – \$1,000,000 – Defendants agreed to indemnify Plaintiffs
21 for the fees and expenses incurred on the Project Bonds. The Project Bonds issued were each in
22 excess of \$1,000,000, thus damages of \$1,000,000 was within the contemplation of the parties
23 under the terms of the GIA.⁴ (*See* Doc. 13-2, pp. 34, 47, 53, 62, and 64.)

24
25 _____
26 ⁴ Performance Bond No. S001-0871 was issued in the amount of \$1,839,905.00 (Doc. 13-2, p. 53); Payment Bond No.
27 D00000785 was issued in the amount of \$1,500,000.00 (Doc. 13-2, p. 34); Performance Bond No. D00000800 was
28 issued in the amount of \$1,388,000.00 (Doc. 13-2, p. 47); and Performance Bond No. S001-0883 was issued in the
amount of \$5,000,000.00 (Doc. 13-2, p. 64); and Performance Bond No. D00000799 was issued in the amount of
\$2,575,000.00 (Doc. 13-2, p. 41). The payment and performance bonds for which Defendants agreed to indemnify
Plaintiffs totaled \$12,302,905.00. In that context, the \$1,000,000 security collateral Plaintiffs demanded under the
GIA was well within the contemplation of the parties at the time the bonds were issued.

1 Moreover, the amount of damages is capable of ascertainment from definite figures
2 contained in the declaration of Amanda L. Marutzky, Esq., James Keating, Assistant Vice
3 President and counsel for Plaintiffs, and the supporting materials attached thereto. (Docs. 13-1,
4 13-2.)⁵

5 **4. The Possibility of a Dispute Concerning the Material Facts is Minimal**

6 The court may presume the truth of well-pleaded facts in the complaint (with the exception
7 of damages) following the Clerk's entry of default. As a result, there is a very small likelihood
8 that any genuine issue of material facts exists. *See e.g., Elektra Entm't Grp. Inc. v. Crawford*, 226
9 F.R.D. 388, 393 (C.D. Cal. 2005) ("Because all allegations in a well-pleaded complaint are taken
10 as true after the court clerk enters default judgment, there is no likelihood that any genuine issue of
11 material fact exists."). This factor favors default judgment.

12 **5. No Evidence that Default is Due to Excusable Neglect**

13 Defendants did not respond to Plaintiffs' demand letter and have not made an appearance
14 in this action, despite being properly served. Defendants were also served with the pending
15 motion for default judgment. (Doc. 13, p. 7.) Additionally, Plaintiffs' counsel emailed
16 Defendants' counsel informing counsel of the entry of default. (Doc. 13-1, p. 21, Marutzky Decl.,
17 Exh. G.) This reflects Defendants have voluntarily elected not to defend themselves in this action;
18 thus default was not entered as a result of excusable neglect. This factor weighs in favor of default
19 judgment.

20 **6. Policy Favoring Decisions on the Merits is Not Dispositive**

21 This factor weighs against entry of default judgment in every case, but this policy factor is
22 not dispositive. *PepsiCo, Inc.*, 238 F. Supp. 2d at 1177. Although a decision on the merits is
23 preferable, this policy factor alone does not preclude the entry of default judgment.

24 _____
25 ⁵ While the total collateral demanded by Plaintiffs is based on an estimation of expenses and losses under the Project
26 Bonds, the GIA specifies the collateral demanded is to be determined by the Surety in its discretion. The complaint
27 indicates the cash collateral demanded is based on approximately \$245,471.32 that remains pending in bond payment
28 claims, the suit brought by Bibler Masonry Contractors, Inc. against Darwin that seeks in excess of \$117,000 under a
Project Bond, and Plaintiffs' anticipation that it will be exposed to another payment of \$500,000 from two Project
Bonds at Ft. Stewart. (Doc. 1, ¶¶ 14-17.) As noted above, collateral security provisions such as this within
indemnification agreements are routinely subject to specific performance. *Safeco Ins. Co. of Am.*, 739 F.2d at 433.

1 **V. CONCLUSION AND RECOMMENDATION**

2 Based on the foregoing, IT IS HEREBY RECOMMENDED that Plaintiffs' application for
3 default judgment (Doc. 13) be GRANTED and judgment be entered in favor of Plaintiffs and
4 against Defendants as follows:

5 1. Judgment in the total amount of \$1,000,000.00 in money damages be paid by
6 Defendants to Plaintiffs for:

7 (a) \$309,791.63 for payments made to subcontractors and suppliers related to
8 claims paid on bonds issued by Plaintiffs on behalf of JND Thomas Company, Inc.
9 (“JND”), payments to consultants’ incurred in the investigation of claims against
10 the surety bonds, and attorney’s fees and expenses in the investigation, analysis,
11 and enforcement of Plaintiffs’ rights under its surety bonds;

12 (b) \$690,208.37 as the total amount of collateral demanded minus the above
13 incurred losses referenced in (a); and

14 2. Simple interest that shall accrue as of the date of entry of judgment against
15 Defendants at the applicable Federal rate pursuant to 28 U.S.C. § 1961.

16 These findings and recommendations are submitted to the district judge assigned to this
17 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court’s Local Rule 304. Within twenty-one
18 (21) days of service of this recommendation, any party may file written objections to these
19 findings and recommendations with the Court and serve a copy on all parties. Such a document
20 should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The
21 district judge will review the magistrate judge’s findings and recommendations pursuant to
22 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the
23 specified time may waive the right to appeal the district judge’s order. *Wilkerson v. Wheeler*,
24 772 F.3d 834, 839 (9th Cir. 2014).

25
26 IT IS SO ORDERED.

27 Dated: December 29, 2015

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE