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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

NORTH AMERICAN COMPANY FOR LIFE  
AND HEALTH INSURANCE,

Plaintiff,

v.

NANCY MOUA,

Defendant.

Case No. 1:22-cv-01293-SKO

**FINDINGS AND  
RECOMMENDATIONS THAT  
PLAINTIFF’S APPLICATION FOR  
DEFAULT JUDGMENT BE  
GRANTED; ORDER VACATING  
HEARING**

(Doc. 20)

**OBJECTIONS DUE: 21 DAYS**

Clerk to Assign District Judge

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**I. INTRODUCTION**

On May 25, 2023, Plaintiff North American Company for Life and Health Insurance (“Plaintiff”) filed a motion for default judgment (the “Motion”) against Defendant Nancy Moua (“Defendant”). (Doc. 20.) No opposition to the Motion has been filed. (*See* Docket.) The Motion is therefore deemed unopposed.

After having reviewed the papers and supporting material, the matter is deemed suitable for decision without oral argument pursuant to E.D. Cal. Local Rule 230(g), and the Court will vacate the hearing set for July 12, 2023.

1 For the reasons set forth below, the undersigned RECOMMENDS that the Motion be  
2 GRANTED.

## 3 II. FACTUAL BACKGROUND<sup>1</sup>

4 In April and June 2020, Defendant submitted to Plaintiff an Individual Life Insurance  
5 Application (the “Application”) designating her daughter Sunshine Lee (“Lee”) as the proposed  
6 insured. (Doc. 1 (“Compl.”) ¶¶ 5–7 and Ex. 1 pp. 60–72.) In connection with the Application, Lee  
7 completed a Statement of Health and Insurability (“Statement of Health”). (*Id.* ¶ 8 and Ex. 1 pp.  
8 73–76.) Lee named Defendant as the sole primary beneficiary and her two brothers as contingent  
9 beneficiaries. (*Id.* ¶ 15 and Ex. 1 p. 62.)

10 Based on answers provided by Defendant and Lee in the Application and the Statement of  
11 Health, Plaintiff issued a Flexible Premium Adjustable Universal Life Insurance Policy, bearing  
12 Policy No. XXXXXX9671 (the “Policy”), to Defendant as the owner and Lee as the insured, with  
13 a policy period from June 10, 2020, to June 10, 2122, and a specified amount of \$100,000. (Compl.  
14 ¶¶ 20–22 and Ex. 1 pp. 9–59.)

15 The Application included the following questions:

16 Question No. 19(c): “In the past 10 years, has the Proposed Insured been diagnosed  
17 by a licensed medical professional, treated or recommended to get any treatment  
18 from a licensed medical professional, hospitalized, or presently taking  
19 prescription(s) or medication(s) or had any medical procedures for any of the  
following : . . . c. Stroke, seizures, epilepsy, dizziness, fainting, or dementia?”

20 Question No. 20(a): “Other than indicated above, in the past 12 months, has a  
21 licensed medical professional recommended the Proposed Insured to: a. Have a  
22 check up, EKG, X-ray, blood or urine test or any other diagnostic test that has not  
been performed, or get medical advice or treatment for any reason (excluding HIV  
testing unless such test was in connection for an application for insurance)?”

23 Question No. 20(b): “Other than indicated above, in the past 12 months, has a  
24 licensed medical professional recommended the Proposed Insured to: b. Be  
25 admitted to a hospital, medical facility, nursing home or assisted living facility?”

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26 <sup>1</sup> Upon entry of default, “the factual allegations of the complaint, except those relating to the amount of damages, will  
27 be taken as true.” *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987) (quoting *Geddes v. United*  
28 *Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977)); *see also* Fed. R. Civ. P. 8(b)(6) (“An allegation—other than one relating  
to the amount of damages — is admitted if a responsive pleading is required and the allegation is not denied.”).  
Accordingly, the factual background is based on the allegations of the complaint.

1 (Compl. ¶¶ 9–14 and Ex. 1 p. 71.) The Statement of Health asked the following:

2 Question No. 1: Since the date of the original application or examination,  
3 whichever is earlier, for the above policy, has the person to be covered by the  
4 policy: A. Received medical advice or treatment by a member of the medical  
5 profession for any change in health (list any exceptions)? . . . B. Consulted, been  
6 examined, or treated by a physician or medical practitioner (list any exceptions)?

6 (*Id.* ¶ 18 and Ex. 1 p. 73.) In response to all of these questions, Defendant and Lee answered “No.”

7 (*Id.* ¶¶ 9–14, 18 and Ex. 1 pp. 60–76.)

8 The Application provides the following above the signature line:

9 By my signature affixed below or my electronic signature, which I understand is  
10 attached to this application electronically, I acknowledge that this Agreement has  
11 been read in full to me and that statements and answers in the application, including  
12 statements by the Proposed Insured(s) in any medical questionnaire or supplement  
13 that become part of this application, are complete and true to the best knowledge  
14 and belief of the undersigned.

13 \*\*\*

14 The undersigned FURTHER AGREES to immediately advise the Company of any  
15 change to any of the responses contained in the application, including any change  
16 in the health or habits of any Proposed Insured(s), that arises or is discovered after  
17 completing this application, but before the policy or policy change is effective, as  
18 defined herein.

18 (Compl. ¶ 17 and Ex. 1 p. 72.) Above the signature line on the Statement of Health, it reads:

19 IT IS DECLARED that all the above statements are complete and true, to the best  
20 of my knowledge and belief. Unless all questions are truthfully answered No, it is  
21 understood that no coverage will take effect until the Statement of Health is  
22 reviewed and accepted by the company.

22 (*Id.* ¶ 19 and Ex. 1 p. 74.) Finally, the Policy provides:

23 The entire contract between You and Us consists of this Policy, including any  
24 attached Endorsements or Riders, any attached schedules, the attached application  
25 for this Policy, and any attached supplemental written application(s). Each  
26 statement made in any such application, in the absence of fraud, is deemed a  
27 representation and not a warranty. We will not use any statement made by the  
28 Insured, or on the Insured’s behalf, to contest a claim under this Policy unless it is  
29 contained in an application and attached to this Policy.

Any Endorsement or Rider attached to this Policy is a part of this Policy and is  
subject to the terms of this Policy, unless stated otherwise in the Endorsement or

1 Rider.

2 \*\*\*

3 We cannot contest this Policy, or any Endorsement or Rider attached to it, after it  
4 has been in effect during the lifetime of the Insured for two years from the Policy  
Date or, if reinstated, for two years from the date of Reinstatement.

5 (*Id.* ¶ 23 and Ex. 1 pp. 25.)

6 Lee died in October 2020 within the Policy’s contestable period, and Defendant, as the  
7 primary beneficiary, made a claim on the Policy. (Compl. ¶¶ 24–25.) During Plaintiff’s ensuing  
8 routing claim investigation, it discovered that, in truth, Lee had a significant, undisclosed medical  
9 history that was omitted from the Application for the Policy. (*Id.* ¶ 26.) At no time prior to Lee’s  
10 death did Plaintiff have knowledge of the falsity of Lee’s answers and representations on the  
11 Application for the Policy. (*Id.* ¶ 27.)

12 In April 2022, Plaintiff notified Defendant of the denial of the claim on the Policy and  
13 tendered a full and complete refund of all premiums, plus interest, paid on the Policy via a check to  
14 her in the amount of \$300.75. (Compl. ¶ 28.) Defendant has not cashed that check. (*Id.* ¶ 28.)

15 **III. PROCEDURAL BACKGROUND**

16 Plaintiff initiated this diversity action by filing its complaint against Defendant on October  
17 8, 2022. The complaint asserts one claim for rescission of an insurance policy issued by Plaintiff.  
18 (Compl. ¶¶ 29–35.) Plaintiff does not seek monetary damages.

19 On February 2, 2023, the Court granted Plaintiff leave to serve Defendant by publication  
20 pursuant to Fed. R. Civ. P. 4(m) and Cal. Code Civ. Proc. § 415.50, and extended the time for service  
21 of process to March 20, 2023. (*See* Doc. 16.) Plaintiff completed service by publication and filed  
22 its Notice of Proof of Service by Publication on March 2, 2023, showing that the Summons was  
23 published on February 9, February 16, February 23, and March 2. (*See* Doc. 17.) Defendant did  
24 not appear or otherwise respond to the complaint.

25 Plaintiff requested entry of default against Defendant on April 18, 2023, which was entered  
26 by the Clerk of Court that same day. (*See* Docs. 18, 19.) Plaintiff filed the present Motion on May  
27 25, 2023, requesting relief as to its sole claim in its complaint for rescission. (Doc. 20.) Plaintiff  
28

1 seeks to rescind and set aside the Policy as null and void *ab initio*. (See *id.* at 11; see also Compl.  
2 p. 7.)

#### 3 IV. DISCUSSION

##### 4 A. Legal Standard

5 Federal Rule of Civil Procedure 55(b)(2) permits a court-ordered default judgment following  
6 the entry of default by the clerk of the court under Rule 55(a). It is within the sole discretion of the  
7 court as to whether default judgment should be entered. See *Aldabe v. Aldabe*, 616 F.2d 1089, 1092  
8 (9th Cir. 1980).

9 A defendant's default by itself does not entitle a plaintiff to a court-ordered judgment. See  
10 *Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986). Instead, the Ninth Circuit has determined  
11 a court should consider seven discretionary factors, often referred to as the "*Eitel* factors," before  
12 rendering a decision on default judgment. See *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir.  
13 1986). The *Eitel* factors include (1) the possibility of prejudice to the plaintiff, (2) the merits of the  
14 plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in  
15 the action (5) the possibility of a dispute concerning material facts, (6) whether the default was due  
16 to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure  
17 favoring decisions on the merits. See *id.* "In applying this discretionary standard, default judgments  
18 are more often granted than denied." *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D.  
19 494, 498 (C.D. Cal. 2003) (quoting *PepsiCo, Inc. v. Triunfo-Mex, Inc.*, 189 F.R.D. 431, 432 (C.D.  
20 Cal. 1999)).

##### 21 B. The *Eitel* Factors Favor Entry of Default Judgment

###### 22 1. Possibility of Prejudice to Plaintiff

23 The first *Eitel* factor considers whether Plaintiff would suffer prejudice if default were not  
24 entered. Plaintiff may be prejudiced if the Policy is not rescinded because Defendant obtained the  
25 policy by misrepresenting Lee's health and medical history. See, e.g., *Am. Income Life Ins. Co. v.*  
26 *Lopez*, No. 2:11-CV-2068 JCM (PAL), 2012 WL 4795649, at \*2 (D. Nev. Oct. 9, 2012) (prejudice  
27 to plaintiff-insurer found where the defendant-insured made misrepresentations in his application  
28 for life insurance). If the Motion is not granted, Plaintiff will likely be without other recourse to

1 obtain a remedy for such misrepresentations. *See Philip Morris.*, 219 F.R.D. at 499 (“prejudice”  
2 exists where the plaintiff has no “recourse for recovery” other than default judgment). This factor  
3 weighs in favor of default judgment. *See Maxum Indem. Co. v. Court Servs., Inc.*, No. 2:11-cv-2014  
4 GEB EFB, 2012 WL 2090473, at \*2 (E.D. Cal. June 8, 2012), *adopted by*, 2012 WL 3205069 (E.D.  
5 Cal. Aug. 1, 2012); *Burlington Ins. Co. v. Diamond Partners, Inc.*, No. 1:10-cv-00100-LJO-SKO,  
6 2011 WL 284490, at \*3 (E.D. Cal. Jan. 25, 2011), *adopted by*, 2011 WL 587108 (E.D. Cal. Feb. 9,  
7 2011).

## 8                                   **2.       Merits of Plaintiff’s Substantive Claim and Sufficiency of the** 9                                   **Complaint**

10           The next relevant *Eitel* factors include the merits of the substantive claim pleaded in the  
11 complaint and the general sufficiency of the complaint. In weighing these factors, courts evaluate  
12 whether the complaint is sufficient to state a claim that supports the relief sought. *See Danning v.*  
13 *Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978); *see also DirecTV, Inc. v. Huynh*, 503 F.3d 847, 854  
14 (9th Cir. 2007) (“[A] defendant is not held to admit facts that are not well-pleaded or to admit  
15 conclusions of law.”) (internal quotation marks omitted). Here, Plaintiff’s complaint establishes  
16 that Plaintiff is entitled to rescission.

17           “[A] material misrepresentation or concealment in an insurance application, whether  
18 intentional or unintentional, entitles the insurer to rescind the insurance policy *ab initio*.” *W. Coast*  
19 *Life Ins. Co. v. Ward*, 132 Cal. App. 4th 181, 186–87 (2005). “Materiality is determined solely by  
20 the probable and reasonable effect which truthful answers would have had upon the insurer.”  
21 *Thompson v. Occidental Life Ins. Co.*, 9 Cal. 3d 904, 916 (1973). “The fact that the insurer has  
22 demanded answers to specific questions in an application for insurance is in itself usually sufficient  
23 to establish materiality as a matter of law.” *Id.*

24           Plaintiff’s admitted allegations establish that Defendant and Lee failed to respond accurately  
25 to various questions in the Application for the Policy and the related Statement of Health. They  
26 failed to disclose in these documents Lee’s accurate medical and health history. Plaintiff’s  
27 allegations also establish that if Defendant and Lee had accurately responded to these questions,  
28 Plaintiff would not have issued the Policy to Defendant. In light of the foregoing, Plaintiff is entitled

1 to a judgment against Defendant that the Policy is rescinded and void *ab initio*. See *Certain*  
2 *Underwriters at Lloyds, London v. Triduanum Fin., Inc.*, No. CIV. S–10–116 MCE DAD, 2011 WL  
3 6002916, at \*4 (E.D. Cal. Nov. 30, 2011).

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

5 Under this *Eitel* factor, “the court must consider the amount of money at stake in relation to  
6 the seriousness of Defendant’s conduct.” *PepsiCo, Inc. v. California Sec. Cans*, 238 F. Supp. 2d  
7 1172, 1176–77 (C.D. Cal. 2002). Here, Plaintiff seeks no monetary damages against Defendant, but  
8 requests only that the Court rescind an insurance policy. This factor weighs in favor of entry of  
9 default judgment. See *Am. Gen. Life Ins. Co. v. Johnson*, No. CV 14–4169 DSF (RZx), 2015 WL  
10 13047562, at \*2 (C.D. Cal. Feb. 10, 2015). See also *Certain Underwriters at Lloyds, London*, 2011  
11 WL 6002916, at \*4 (E.D. Cal. Nov. 30, 2011) (“Since plaintiff only seeks rescission and declaratory  
12 relief, the amount of money at stake is not at issue.”).

### 13 **4. The Possibility of a Dispute Concerning the Material Facts**

14 Regarding this factor, no genuine issues of material fact are likely to exist because the  
15 allegations in the complaint are taken as true, *TeleVideo Sys.*, 826 F.2d at 917-18, and Defendant  
16 has submitted nothing to contradict the well-pleaded allegations. See *United Specialty Insurance*  
17 *Co. v. Saleh*, No. 1:16-cv-00632-DAD-MJS, 2016 WL 4434479, at \*2 (E.D. Cal. Aug. 22, 2016)  
18 (“Inasmuch as default serves as an admission of Plaintiff’s well-pled allegations of fact, it must be  
19 concluded that there is no dispute as to any material fact.”) (internal citation omitted). Additionally,  
20 Plaintiff has attached to its complaint the Application, the Statement of Health and the Policy. (See  
21 Compl. Ex. 1.) In light of this, there is a reduced possibility of a dispute concerning the material  
22 facts.

### 23 **5. Whether Default Was Due to Excusable Neglect**

24 There are no facts in the record to suggest, much less demonstrate, Defendant’s failure to  
25 respond to the complaint or defend against the Motion is the result of excusable neglect. This factor,  
26 therefore, favors the entry of default judgment.

### 27 **6. Policy Favoring Decisions on the Merits**

28 This factor weighs against entry of default judgment in every case, but this policy factor is

1 not dispositive, particularly when a defendant fails to appear and defend the action. *PepsiCo, Inc.*,  
2 238 F. Supp. 2d at 1177. Although the Court favors resolving cases on the merits after adversarial  
3 proceedings, it cannot force Defendant to participate. Further, as Plaintiff only seeks to rescind its  
4 insurance policy, rather than seek damages against Defendant, the Court finds that Defendant will  
5 not be overly prejudiced by this default. *See, e.g., United Specialty Insurance Co.*, 2016 WL  
6 4434479, at \*2.

7 **V. CONCLUSION AND RECOMMENDATIONS**

8 Based on the foregoing, the hearing set for July 12, 2023, on the Motion is VACATED, and  
9 IT IS HEREBY RECOMMENDED THAT:

- 10 1. Plaintiff’s motion for default judgment against Defendant (Doc. 20) be granted;
- 11 2. The district court enter judgment against Defendant and order that North American  
12 Company for Life and Health Insurance policy no. XXXXXX9671 issued to  
13 Defendant is rescinded and set aside as null and void *ab initio*; and
- 14 3. The Clerk of Court close this case.

15 The Clerk of Court is DIRECTED to assign a district judge to this action.

16 These findings and recommendations are submitted to the district judge to be assigned to  
17 this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court’s Local Rule 304. Within twenty-  
18 one (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 specified  
23 time may waive the right to appeal the district judge’s order. *Wilkerson v. Wheeler*, 772 F.3d 834,  
24 839 (9th Cir. 2014).

25  
26 IT IS SO ORDERED.

27 Dated: July 7, 2023

Isl. Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE