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

SUZANNE D. JACKSON,

Plaintiff,

v.

WILLIAM FISCHER., et al.,

Defendants.

Case No.: C11-02753 PJH (JSC)

**ORDER RE: PLAINTIFF'S MOTION
FOR DEFAULT JUDGMENT (Dkt. No.
148)**

In this civil action, Plaintiff Suzanne D. Jackson, moves for Entry of Default Judgment against Defendant Upper Orbit, LLC ("Defendant"), seeking \$13,516,968 in damages. This motion was referred to the undersigned Judge for a report and recommendation. Having reviewed the papers submitted in support of Plaintiff's request for default judgment, the Court orders Plaintiff to submit additional briefing in support of its motion for default judgment.

BACKGROUND

Defendant Upper Orbit is a Minnesota limited liability company. (Second Amended Complaint ("SAC"), Dkt. No. 113, ¶ 13.) Its sole member is co-defendant William Fischer. (Id.) Defendant is one of 20 business entities, executives, and investors sued for misrepresentation and breach of fiduciary duty relating to a series of financial transactions. (Id. ¶¶ 2-21, 72-150.) After Defendant failed to file a responsive pleading to the SAC, Default

United States District Court
Northern District of California

1 was entered against Defendant on September 24, 2012. (Dkt. No. 142 at 1.) The suit against
2 Defendant Fischer, President of Upper Orbit, has been stayed pursuant to a bankruptcy stay in
3 place for him. 11 U.S.C. § 362; (Dkt. No. 124 at 1.)

4 Plaintiff made two loans to Defendant that are the subject of this Motion. (Id. ¶¶ 33,
5 54-71.) First, on February 18, 2008, Plaintiff loaned Defendant \$1,000,000 at an 8% interest
6 rate in exchange for 40% of Defendant’s profits from its trades, loans, and investments. (Id. ¶
7 53.) The “loan was made subject to a Promissory Note (“Note 1”)” and “was due on
8 December 31, 2009.” (Dkt. No. 148 at 4.) Note 1 indicates that the Defendant “agree[d] to
9 make quarterly interest payments” of \$20,000 and that “[i]f any installment under this Note is
10 not paid when due and remains unpaid... the principal and accrued interest thereon shall at
11 once become due and payable at a rate of Five (5%) percent per month thereafter.” (Dkt. No.
12 148-2 at 4.) Plaintiff maintains that these terms provide that “in the event of default[,] interest
13 at the rate of 5% per month would accrue—a term proposed and by [sic] Upper Orbit to
14 assure the plaintiff that it would not default.” (Dkt. No. 148 at 4.) Note 1 was signed by Mr.
15 Fisher as Defendant’s President. (Dkt. No. 148-2 at 4.) Plaintiff “agreed to the proposal”
16 because of Mr. Fischer’s “detailed” and “false” representations of his investing experiencing.
17 (SAC ¶ 54.) Second, on April 25, 2008, Plaintiff loaned Defendant an additional \$140,000 at
18 an 8% interest rate. (Dkt. No. 148 at 4.) The loan was made subject to another Promissory
19 Note (“Note 2”) and “was due on December 31, 2009.” (Id.)

20 Though Defendant made two initial interest payments for Note 1, it went into default
21 on June 6, 2008. (Dkt. No. 148 at 4.) “[N]o payment was ever made” on Note 2. (Id.)

22 In the summer of 2008 Plaintiff requested that her funds be returned. (Id. ¶ 57.)
23 Fischer indicated that he did not have “sufficient liquidity,” and he “proposed a restructuring”
24 of the loans. (Id. ¶ 56 (internal quotations omitted).) Fischer “presented claims of progress to
25 assuage her concerns about her investments.” (Id. ¶ 63.) Plaintiff unsuccessfully tried “to
26 obtain information about the whereabouts and status of her investments.” (Id. ¶ 64-65.).
27 Fisher “made new investments and/or loans in the plaintiff’s behalf” through Defendant until
28 August 2008. (Id. ¶ 56.)

1 Plaintiff now moves for default judgment against Defendant in the amount of
2 \$13,516,968 in damages. (Dkt. No. 148 at 5.)

3 **DISCUSSION**

4 After entry of default, a court may grant default judgment on the merits of the case.
5 See Fed. R. Civ. P. 55. In the Ninth Circuit, a court’s analysis of a motion for default
6 judgment is guided by the standard set forth in *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th
7 Cir. 1986). Plaintiff has not addressed the Eitel factors in her motion for default judgment.
8 Accordingly, Plaintiff is ordered to file a supplemental brief addressing the Eitel factors. See
9 *Alan Neuman Productions, Inc., v. Albright*, 862 F.2d 1388, 1392 (discussing the legal
10 sufficiency of the allegations contained in the complaint necessary for entry of default
11 judgment).

12 The Court requires further briefing regarding two additional aspects of Plaintiff’s
13 motion for default judgment. First, Plaintiff’s counsel submitted an Excel Spreadsheet that
14 “reflects calculations of interest ... made by programing the cells for the principal, interest and
15 relevant dates to produce the calculated totals,” but the Spreadsheet does not show the
16 underlying formulas used to derive those calculations. (Dkt. No. 148-3 at 2, 5.) Regarding
17 Note 1, Plaintiff maintains that Defendant owes \$13,327,289 as of October 3, 2012. (Dkt. No.
18 148 at 4.) Regarding Note 2, Plaintiff maintains Defendant owes \$189,679 as of October 3,
19 2012. (Id. at 4-5.) The Court requires additional information regarding the underlying
20 formulas; specifically, whether the interest rate was calculated by month or by year, and when
21 or at what intervals the interest was compounded. Without this information the record
22 provides an insufficient basis for determining an appropriate award.

23 Second, Plaintiff has not addressed that in this multi-defendant action it only seeks
24 default judgment with respect to Defendant Upper Orbit. See Fed. R. Civ. P. 54(b). In *Frow*
25 *v. De La Vega*, 82 U.S. 552 (1872), the Supreme Court held that “where a complaint alleges
26 that defendants are jointly liable and one of them defaults, judgment should not be entered
27 against the defaulting defendant until the matter has been adjudicated with regard to all
28 defendants.” In *re First T.D. & Inv., Inc.*, 253 F.3d 520, 532 (9th Cir. 2001). Courts take

1 varying views on Frow's injunction against entering default judgments while claims remain
2 pending against other defendants. See Shanghai Automation Instrument Co., Ltd. v. Kuei,
3 194 F.Supp.2d 995, 1008 (N.D. Cal. 2001) (discussing the various approaches courts have
4 taken in these cases). Plaintiff shall address this issue, explain whether Plaintiff intends to
5 hold the non-defaulting defendants jointly and severally liable, and discuss why judgment
6 under Rule 54(b) is proper.

7 **CONCLUSION**

8 Accordingly, Plaintiff shall file a supplemental brief addressing these issues by
9 November 13, 2012. The hearing on Plaintiff's Motion for Default Judgment is reset to
10 November 29, 2012 at 9:00 a.m.

11 Plaintiff has not yet served Defendant with a copy of the motion for default judgment.
12 Plaintiff shall serve a copy of the motion for default judgment and this Order on Defendant
13 within five days of this Order and shall file a proof of service with this Court.

14 **IT IS SO ORDERED.**

15 Dated: November 5, 2012

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18 JACQUELINE SCOTT CORLEY
19 UNITED STATES MAGISTRATE JUDGE
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