UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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EFFINGHAM JAMES ,

Docket No. 05 CV 2593 (TCP)(AKT)

Plaintiff,

- against -

ODRA N. ARANGO, FFFC f/n/o FIRST FRANKLIN FINANCIAL GROUP, NATIONAL CITY HOME LOAN SERVICES INC., A&A GLOBAL RESOURCES INC., aka GLOBAL RESOURCES LTD., ANN ALVAREZ, ALFRED MILLS, DISCOUNT FUNDING ASSOCIATES, WALLY DUVAL, and CHARLES LIECHTUNG a.k.a CHAIM LIECHTUNG,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT FFFC f/n/o FIRST FRANKLIN FINANCIAL GROUP AND NATIONAL CITY HOME LOAN SERVICES INC.'S REQUEST TO VACATE CLERK'S DEFAULT PURSUANT TO FED. R. CIV. P. 55(c) AND IN OPPOSITION TO PLAINTIFF'S REQUEST FOR ENTRY OF DEFAULT JUDGMENT

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PRELIMINARY STATEMENT[1]

Defendants FFFC f/n/o First Franklin Financial Group ("FFFC") and National City Home Loan Services, Inc. ("National City"), by their attorneys, Buchanan Ingersoll PC, respectfully submit this memorandum of law in support of their request for an order: (i) pursuant to Fed. R. Civ. P. 55(c), vacating the Clerk's Entry of Default (the "Clerk's Default") entered on this Court's docket on May 26, 2006 (Court's Dkt. # 26) and (ii) denying the Plaintiff's request for the entry of a default judgment in this action.

This action was brought by the Plaintiff for relief under 18 U.S.C. §§ 1962, *et.seq.* (the "RICO Statute"). Neither FFFC nor National City have had any dealings with the Plaintiff. National City is the holder of a mortgage as an assignee thereof, and FFFC originated the mortgage at the behest and request of the defendant Ordra N. Arango ("Arango"). The mortgage loan application was submitted to FFFC on behalf of Arango through a mortgage broker, the defendants Discount Funding Associates ("Discount") and Alfred Mills ("Mills"). Arango was purchasing the subject premises from the Plaintiff, Effingham James ("James"). Neither FFFC nor National City were put on notice that there was an alleged sale/leaseback of the subject property. The closing of the sale and loan transaction with Arango took place and James and Arango both agreed in writing to the manner in which the loan proceeds were distributed.

As explained more fully below, the alleged default of FFFC and National City in submitting an answer to James' Amended Complaint should be vacated. Indeed, FFFC and National City have filed an Answer to the Amended Complaint in reliance upon and in furtherance of the understanding of James' counsel. Further, FFFC and National City have defenses to this action, and James will suffer no prejudice by litigating the merits of this action.

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[1] References to exhibits annexed to the June 19, 2006 Declaration of Timothy J. Fierst shall be as follows: ("Ex. ___ to the Fierst Decl.", "Fierst Decl., Ex. ___, ¶ ___" or "Ex. ___, at __"), and references to entries on the Court's Docket shall be as follows: ("Court's Dkt. # ___").

Nowhere in the Amended Complaint does James offer anything other than unsupported conclusory statements or set forth any factual detail supporting a claim under the RICO Statute.

Therefore, FFFC and National City respectfully request that the Court grant their request vacating the Clerk's Default and deny James' application for the entry of a default judgment.

THE FACTS RELEVANT TO FFFC AND NATIONAL CITY'S MOTION

The Court is respectfully referred to the Declaration of Timothy J. Fierst, Esq. dated June 19, 2006 (the "Fierst Decl."), the Affidavit of Merit of Vivian Hansen duly sworn to on June 15, 2006 (the "Hansen Affidavit"), the Supplemental Affidavit of Vivian Hansen duly sworn to on June 16, 2006 (the "Supplemental Affidavit") and the Affidavit of Merit of Nailah K. Byrd duly sworn to on June 16, 2006 (the "Byrd Affidavit") for a statement of the facts relevant to FFFC and National City's motion. The definitions contained therein shall be used uniformly throughout this Memorandum of Law.

Those facts are, in brief, summarized as follows. James and Arango entered into a contract for the sale of the premises located at 119-47 166th Street, Jamaica, New York (the "Premises") whereby Arango would purchase the Premises from James. (Ex. A to the Fierst Decl.)

In order to finance the purchase of the Premises, Plaintiff obtained two (2) mortgage loans (the "Mortgages"), both originated by FFFC with information furnished by Discount and Mills. In connection with the closing of the Mortgages, James was represented by counsel, the defendant Wally Duval ("Duval"). At the closing held on May 29, 2002, Arango executed and delivered two (2) Mortgages to FFFC based upon Arango's representation that the Premises was going to be used as her primary residence. *See* ¶ 6 to the Hansen Affidavit. Various funds from the proceeds of the Mortgages were distributed at the request of Arango and with the approval of

Arango and James. Specifically, at the request of James, part of Arango's mortgage proceeds were utilized to satisfy a mortgage loan on the Premises in James's name. The mortgage loan was held by Countrywide and was in foreclosure. Further, part of the proceeds were used to pay certain commissions owed by James. James agreed to these payments in writing. (Ex. E and F to the Fierst Decl.)

The $196,000.00 Mortgage was assigned by FFFC to National City. *See* ¶ 8 to the Hansen Affidavit.

James initially commenced this action on or about May 27, 2005. FFFC and National City filed an answer in response to the complaint. (Court's Dkt. # 3). On December 15, 2005, the Honorable Thomas C. Platt granted a motion filed by Discount, and dismissed the complaint. James was given leave to file an amended complaint within fifty (50) days. (Court's Dkt. # 16).

It appears from the entries on the Court's docket that the amended complaint was not filed until February 4, 2006, the fifty-first (51st) day. (Court's Dkt. #17)

Notwithstanding the fact that FFFC and National City's counsel was in contact with James' counsel on May 23 and 24, 2006, (Ex. J to the Fierst Decl.), James engaged in no activity in the action until May 24, 2006, when James, through his counsel, attempted an act of subterfuge by filing various returns of service of the amended complaint. Moreover, James submitted a request for the entry of a Clerk's Default and a motion for a default judgment. The Clerk's Default was entered on May 26, 2006. (Court's Dkt. #'s 19, 20, 21, 22 and 26).

In reliance upon James' counsel's representations on May 25, 2006, an answer to the amended complaint was filed by FFFC and National City on May 31, 2006. (Court's Dkt. #31). Counsel for James has failed to respond to correspondence to him dated May 31, 2006 which

requested withdrawal of the Clerk's Default in consideration of counsel's agreement of May 25, 2006. (Court's Dkt. # 24).

The purported Affirmation of Service of the amended complaint upon FFFC and National City is silent on the date service was allegedly made. (Ex. K to the Fierst Decl.).

Based upon the forgoing undeniable facts, FFFC and National City neither defaulted nor intended to default in this action. Moreover, it is clear from the Hansen Affidavit, the Supplemental Affidavit and the Byrd Affidavit that FFFC and National City have clear and recognizable defenses to this action. Therefore, it is respectfully submitted that the Clerk's Default should be vacated and James' request for a default judgment should be denied.

STANDARD OF REVIEW

The extreme sanction of a default judgment must remain a weapon of last, rather than first, resort. *Meehan v. Snow,* 652 F.2d 274, 277 (2d Cir. 1981). Indeed, defaults are not favored especially when the case presents issues of fact. Trials on the merits of an action are clearly favored. *Id.; Fariello v. Rodriguez,* 148 F.R.D. 670, 673 (E.D.N.Y. 1993) All inferences should be resolved in favor of the defaulting party. *Harriman v. Internal Revenue Service,* 233 F.Supp.2d 451, 454 (E.D.N.Y. 2002). Opposition to a motion for a default judgment can be treated as a motion to set aside the entry of the Clerk's Default even in the absence of a formal motion. *Fariello v. Rodriguez,* 148 F.R.D. at 673 .

The standard for setting aside the Clerk's Default pursuant to Fed. R.Civ. P. 55(c) is less rigorous than the standard for setting aside a default judgment. *Meehan v. Snow,* 652 F.2d at 276.

Clearly, Fed. R. Civ. P. 55(c) permits the Clerk's Default to be set aside "for good cause shown." Fed. R. Civ. P. 55(c). The principal factors to be considered in determining whether to vacate the Clerk's Default are (i) whether the default was willful, (ii) whether setting it aside would prejudice the adversary and (iii) whether a meritorious defense is presented. The standard is a lenient one. *Meehan v. Snow,* 652 F.2d 274, 277 (2d Cir. 1981); *Harriman v. Internal Revenue Service,* 233 F.Supp.2d 451, 454 (E.D.N.Y. 2002); *Fariello v. Rodriguez,* 148 F.R.D. 670, 673 (E.D.N.Y. 1993); *Kearney v. New York State Legislature,* 103 F.R.D. 625, 629 (E.D.N.Y. 1984).

Willfulness in the context of a default is conduct that is more than merely negligent or careless. *Harriman v. Internal Revenue Service,* 233 F.Supp.2d at 454. The Court will look for evidence of "bad faith" or some willful or deliberate conduct before denying an application to vacate a default. *American Alliance Insurance Co., Ltd. v. Eagle Insurance Co.,* 92 F.3d 57, 59-61 (2d Cir. 1996). Indeed, a good faith belief that a party was not served with process may provide the basis through which a party may be relieved from its default. *Kearney v. New York State Legislature,* 103 F.R.D. at 629.

To satisfy the criterion of a "meritorious defense," the defense need only consist of evidence which if proven at trial would constitute a complete defense. It need not be ultimately persuasive at this time. A defense is meritorious if it is "good at law so as to give the fact-finder some determination to make." *American Alliance Insurance Co., Ltd. v. Eagle Insurance Co.,* 92 F.3d at 61; *Harriman v. Internal Revenue Service,* 233 F.Supp.2d at 454.

Based upon the courts' preference that cases be decided on the merits, prejudice to the adversary will not be found in the case at bar. *Harriman v. Internal Revenue Service,* 233 F.Supp.2d at 455. There must be some affirmative showing of prejudice, and delay alone will

not suffice. *Williams v. King,* 1992 WL 368069 at *5-*6 (E.D.N.Y. 1992) (a copy of which is annexed hereto as Exhibit "A"). Waiting for the resolution of a case through the normal judicial process does not constitute "prejudice." *Id.* at *6.

ARGUMENT

I.

THE DEFAULT SHOULD BE VACATED AND THE AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE IT IS UNTIMELY

As stated within the Fierst Declaration and as indicated within the Court's docket, the amended complaint was to be filed within fifty (50) days from December 15, 2005, *i.e.,* on or before February 3, 2006. (Fierst Decl. ¶ 13; Court's Dkt. # 16).

The amended complaint was not filed until February 4, 2006. (Court's Dkt. #17). Accordingly, James has failed to follow the Court's directive and the filing of the amended complaint is untimely. Accordingly, the Clerk's Default should be vacated, and the amended complaint dismissed.

II.

THE CLERK'S DEFAULT SHOULD BE VACATED

As shown by the Fierst Declaration, the Hansen Affidavit, the Supplemental Affidavit and the Byrd Affidavit, FFFC and National City's default in this action clearly is excusable and the Clerk's Default should be vacated.

A. The Default is not Willful

It is clear that FFFC and National City's default in this action is not willful, but rather resulted from the good faith belief that they were not served with the amended complaint in this action. *Kearney v. New York State Legislature,* 103 F.R.D. 625, 629 (E.D.N.Y. 1984).

On numerous occasions, counsel for James was contacted by counsel for FFFC and National City to advise that a copy of the amended complaint was not received. *See* ¶¶ 21-30 to the Fierst Decl. Counsel for James never responded by serving a copy of the amended complaint upon FFFC or National City.

Indeed, the Affirmation of Service submitted by James is conspicuously silent on the date upon which the amended complaint was allegedly served upon FFFC and National City. (Ex. K to the Fierst Decl.)

Entry of a default must be vacated when it is found to be unsupported by jurisdiction. *Kearney v. New York State Legislature,* 103 F.R.D. 625, 628 (E.D.N.Y. 1984).

Immediately upon speaking with counsel for James and advising him that (i) an amended complaint was never received and (ii) no response was forthcoming from James to Mr. Isser's motion to dismiss, FFFC and National City filed its answer to the amended complaint. *See* ¶ 32 to the Fierst Decl.

Moreover, the fact remains that when FFFC and National City were properly served with the initial complaint in this action, FFFC and National City filed an appropriate answer. (Court's Dkt. #3).

These inescapable facts dictate against a finding of default on the part of FFFC and National City. There is no "bad faith" or deliberate conduct on the part of FFFC and National City in this action. *American Alliance Insurance Co., Ltd. v. Eagle Insurance Co.,* 92 F.3d 57, 59-61 (2d Cir. 1996). In fact, FFFC and National City continued to advise counsel for James of their good faith belief that the amended complaint was not served. (Ex. J to the Fierst Decl.). Yet counsel for James did not respond until he was advised that he failed to appear at a required conference in the Related Action. *See* ¶¶ 29-31 to the Fierst Decl.

Only after counsel for James and counsel for FFFC and National City discussed the amended complaint and an answer thereto did counsel for James rush to the courthouse and in an exercise of subterfuge file the request for the Clerk's Default. *See* ¶ 39 to the Fierst Decl. Such conduct on the part of James' counsel should not be condoned.

Considering the fact that FFFC and National City were in contact with James' counsel regarding service of the amended complaint, that they answered the initial complaint and indeed filed an answer to the amended complaint in accord with the understanding reached with counsel, the Clerk's Default should be vacated.

B. <u>FFFC and National City have Meritorious Defenses to this Action</u>.

This action was commenced under the RICO Statute. James has alleged that FFFC together with AAGR and the other defendants conspired to take title to the Premises away from him and that FFFC and National City knew of the sale-leaseback scheme of which he complains. James also alleges that based upon the situations of two (2) other borrowers, *i.e.,* Alvarez and Sifontes, that FFFC is involved in an enterprise similar to the allegations contained in this action.

Moreover, James alleges that National City is not a holder in due course of the $196,000.00 Mortgage due to an investigation by the New York State Attorney General and post closing knowledge which should be imputed to National City.

The facts and law of this case clearly show that FFFC and National City have meritorious defenses. All inferences should be resolved in favor of the defaulting party. *Harriman v. Internal Revenue Service,* 233 F.Supp.2d 451, 454 (E.D.N.Y. 2002).

As indicated within the Hansen Affidavit, FFFC does not do business with AAGR or A&A Global Resources. Moreover, the application package by which FFFC approved the

Mortgages was submitted by Discount Funding and Mills. Any information which FFFC had with respect to the Mortgages came from those entities. *See* ¶¶ 24-26 to the Hansen Affidavit.

Further, FFFC did not know that the sale of the Premises was part of a "sale-leaseback" scheme. If FFFC knew about the "sale-leaseback" scheme, the Mortgages would not have been originated. *See* ¶ 27-28 to the Hansen Affidavit.

In fact, the deposition testimony of Arango, Charles Liechtung and Michael Besko taken in conjunction with the Related Action at the behest of James' counsel confirms this fact.

Arango testified that she did not inform FFFC that there was a "sale-leaseback" in connection with the Premises. (Ex. M to the Fierst Decl. at pp. 48-49). Moreover, Arango testified that the "lease" was not executed until after the closing of the Mortgages. (Ex. M to the Fierst Decl. at p. 62).

Further, Charles Liechtung, the settlement agent at the closing of the Mortgages, testified that the transaction would have been questioned had he known that Arango was closing with no intention to keep the Premises. Indeed, Mr. Liechtung, the settlement agent, did not know that the Premises was involved in a "sale-leaseback" scheme. (Ex. L to the Fierst Decl. at pp. 32 and 36).

In fact, Michael Besko, an officer of FFFC who was not involved with this transaction, testified at the behest of counsel for James that he reviewed the documents in this transaction and there was nothing to indicate that the sale of the Premises was anything but an arms length transaction. In fact, Mr. Besko's review of the transaction indicates that there is nothing suspicious about the transaction at all. (Ex. N to the Fierst Decl.)

Further, the Supplemental Affidavit clearly shows that James' reliance upon the Alvarez matter and the Sifontes matter are misplaced. There was no proof or finding of wrongdoing on

the part of FFFC or National City. Indeed, the Alvarez mortgage was satisfied in full and the second mortgage in the Sifontes transaction was foreclosed and the property sold to a third party. *See* the Supplemental Affidavit.

It is clear, therefore, that the facts of this case as contained within the Hansen Affidavit, the Supplemental Affidavit and the Byrd Affidavit warrant a finding of a meritorious defense. A defense is meritorious if it is "good at law so as to give the fact-finder some determination to make." *American Alliance Insurance Co., Ltd. v. Eagle Insurance Co.*, 92 F.3d at 61; *Harriman v. Internal Revenue Service,* 233 F.Supp.2d at 454.

Further, the applicable law supports a finding of a defense to this action.

To state a substantive RICO violation pursuant to 18 U.S.C. § 1962(c), a plaintiff must plead "(1) conduct, (2) of an enterprise, (3) through a pattern (4) of racketeering activity." *Anatian v. Coutts Bank (Switzerland) Ltd.,* 193 F.3d 85, 88 (2d Cir. 1999), *cert. denied,* 528 U.S. 1188, 120 S.Ct. 1241, 146 L.Ed.2d 100 (2000); *Moccio v. Cablevision Systems Corporation,* 208 F.Supp.2d 361, 371 (E.D.N.Y. 2002).

As shown within the Hansen Affidavit, the Supplemental Affidavit and the Byrd Affidavit, James has failed to adequately plead that FFFC and/or National City directed the conduct or participation of the alleged enterprise. Moreover, James has failed to: (i) show that FFFC and/or National City committed a pattern of racketeering activity over a sufficient time period; (ii) plead allegations of mail and wire fraud with the required particularity; and (iii) failed to allege an enterprise.

As a prerequisite to RICO liability, one must have some part in directing the affairs of an enterprise. *Reves v. Ernst & Young,* 507 U.S. 170, 179, 122 L.Ed.2d 525 (1993). It is clearly shown within the Hansen Affidavit that FFFC neither knows or participates in the business of

AAGR, Ann Alvarez, Discount Funding or Mills. FFFC merely received loan application packages from mortgage brokers one of which is Discount Funding. *See* ¶¶ 25-29 to the Hansen Affidavit. Moreover, all of the testimony through the depositions in the Related Actions indicate FFFC did not know of the sale-leaseback scheme. (Ex. L, M and N to the Fierst Decl.)

Accordingly, FFFC did not, and cannot, manage the "enterprise."

Moreover, James has failed to adequately plead the "predicate acts" required for RICO liability. 18 U.S.C. § 1962. James' reliance upon Arango, Alvarez and Sifontes as the required predicate acts fails. (Ex. H to the Fierst Decl. ¶¶ 101-114)

As shown, there is no proof or finding or wrongdoing on the part of FFFC or National City with respect to the Alvarez and Sifontes matters. The Alvarez loan was paid in full and the Sifontes matter resulted in the property being foreclosed by the second mortgage holder. James does nothing more than summarily raise the names of these borrowers with conclusory assertions.

Further, James has failed to allege an "enterprise." A RICO enterprise represents a "group of persons associated together for a common purpose of engaging in a common course of conduct . . . proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette,* 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1982). The "enterprise is an entity separate and apart from the pattern of activity in which it engages." *Id.*, 452 U.S. at 583. To determine if such an enterprise exists, it is appropriate to consider whether the enterprise would still exist were the predicate acts removed. *Schmidt v. Fleet Bank,* 16 F.Supp.2d 340, 349 (S.D.N.Y. 1998).

The amended complaint refers to the "FFFC Enterprise," the purpose of which was to "fraudulently dispossess unwary financially distressed home owner victims." (Ex. H to the Fierst

Decl. at ¶ 118). Accordingly, there is no FFFC Enterprise if the predicate acts (Alvarez and Sifontes) are removed from the equation. Therefore, because the enterprise has no structure distinct from the alleged racketeering, it is not the basis of a RICO claim. Simply stated, FFFC is not involved in racketeering activity. James has not pled a RICO conspiracy claim pursuant to section 1962(d) because James has failed to allege an agreement to commit predicate acts. Conclusory allegations of an agreement or conspiracy, as here, are insufficient for a proper RICO conspiracy complaint. *Congregacion de la Mision Provincia de Venezuela v. Curi,* 978 F.Supp. 435, 451 (E.D.N.Y. 1997).

Moreover, National City is indeed a holder in due course of its mortgages. Clearly, neither FFFC nor National City are on notice of any facts which would place them on notice of a claim or defense to the validity of the underlying mortgage at the time of the origination and the assignment. (Ex. H to the Fierst Decl. at ¶¶ 114-115).

A holder in due course is defined under the UCC as the holder of a negotiable instrument, who took that instrument (a) for value, (b) in good faith, and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person. N.Y. U.C.C. § 3-302(1).[2]

Additionally, N.Y. U.C.C. § 3-304(7) provides that "[i]n any event, to constitute a notice of a claim or defense, the purchaser must have knowledge of the claim or defense or knowledge of such facts that his action in taking the instrument amounts to bad faith." Neither FFFC nor National City had such knowledge here at either the time of the origination of the Mortgages or at the time of assignment thereof. *See* ¶ 32 to the Hansen Affidavit; ¶ 4-10 to the Byrd Affidavit.

[2] N.Y. U.C.C. § 3-104(1) defines "negotiable instrument" as a document signed by the maker or drawer, containing an unconditional promise to pay a sum certain in money, payable on demand or at a definite time, and payable to order or to bearer. The Notes and Mortgages here are negotiable instruments. *See In re Apponline.com, Inc.*

It is well settled that a holder in due course is only subject to claims or defenses of which he has *actual* knowledge. As the New York State Court of Appeals has held, "the inquiry is not whether a reasonable banker . . . would have known, or would have inquired . . ., but rather, the inquiry is what [the bank] actually knew." *Chemical Bank of Rochester v. Haskell,* 51, N.Y.2d 85, 92, 432 N.Y.S.2d 478 (1980).

Clearly, neither FFFC nor National City had either constructive or actual notice of any potential claims that James may have had against any party, as James consented to the transfer of the Premises and the payment of the proceeds of the Mortgages. *See* ¶ 37 to the Hansen Affidavit; *see* Ex. F to the Fierst Decl. Indeed, National City, as an assignee of the $196,000.00 Mortgage, had absolutely no dealings with James prior to the assignment, nor are any alleged. FFFC and National City did not in any way induce James to sell the Premises or Arango to purchase the Premises. The amended complaint does not allege any instance in which James had contact with FFFC or National City.

It is settled that by holding the notes and Mortgages in issue, National City qualifies as a holder in due course of the $196,000.00 Mortgage. *In re Apponline.com, Inc.,* 321 B.R. 614, 624-625 (E.D.N.Y. 2003). Indeed, there is no claim or allegation by James to the contrary.

Therefore, FFFC and National City clearly have meritorious defenses to this action.

C. <u>There is no Prejudice in Vacating the Clerk's Default.</u>

Indeed, there would be no prejudice to James by vacating the Clerk's Default.

Based upon the courts' preference that cases be decided on the merits, prejudice to James will not be found. *Harriman v. Internal Revenue Service,* 233 F.Supp.2d at 455. There must be some affirmative showing of prejudice, and delay alone will not suffice. *Williams v. King,* 1992 WL 368069 at *5-*6 (E.D.N.Y. 1992) (a copy of which is annexed hereto as Exhibit "A").

Waiting for the resolution of a case through the normal judicial process does not constitute "prejudice." *Id.* at *6.

James is already on notice that FFFC and National City intend to litigate this matter on the merits by virtue of the fact that they answered the properly served initial complaint in this action. (Court's Dkt. #3)

FFFC and National City's answer to the amended complaint was filed in furtherance of the conversations and understanding reached with James' counsel. To aver otherwise is indicative of bad faith. An approximate four (4) month time-span between the filing of the amended complaint and the filing of the answer to the amended complaint would cause no prejudice, especially considering the outstanding motion to dismiss filed by Mr. Isser on behalf of Liechtung. To date, neither FFFC nor National City have received a copy of any response submitted by counsel for James.

CONCLUSION

For the foregoing reasons, it is respectfully requested that FFFC and National City's request that the Clerk's Default be vacated pursuant to Fed. R. Civ. P. 55(c) be granted and James' request for the entry of a default judgment be denied in its entirety.

Dated: New York, New York
June 19, 2006

BUCHANAN INGERSOLL PC

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