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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Craig Thompson, an Arizona resident,)

No. CV-10-1885-PHX-LOA

10

Plaintiff,)

**REPORT AND
RECOMMENDATION,
FINDINGS OF FACT, AND
CONCLUSIONS OF LAW**

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vs.)

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StreetSmarts, Inc., a Delaware)
corporation; Dave Batt, an Illinois)
resident,)

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Defendants.)

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A default damages hearing was conducted in open court on April 21, 2011, after entries of default against Defendants StreetSmarts, Inc. and Dave Batt on Plaintiff Craig Thompson’s (“Plaintiff”) September 2, 2010 Complaint. Testifying at the hearing was Plaintiff who voluntarily terminated his employment on August 4, 2010 because Defendants failed to pay his salary and other contractual benefits. Pursuant to General Order 11-3,¹ the undersigned Magistrate Judge recommends that default judgment be entered in favor of Plaintiff against Defendants, jointly and severally, in the amount of \$195,319.41 for the reasons set forth in this Report and Recommendation.

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¹ General Order 11-3, entitled Dismissal of a Civil Case Assigned to a United States Magistrate Judge Absent Voluntary Consent by the Parties Under 28 U.S.C. § 636(c)(1), directs that when a Phoenix Division magistrate judge to whom a civil action has been assigned lacks jurisdiction to proceed, the order or, in this case, the report and recommendation shall be directed to Senior United States District Judge Stephen M. McNamee for ruling. General Order 11-3, www.azd.uscourts.gov at Rules/General Orders.

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1 **I. Background**

2 This is a breach of employment contract and tort action brought by Plaintiff,
3 a 43-year-old computer software engineer, developer and resident of Phoenix, Arizona,
4 arising out of his employment with Defendant StreetSmarts, Inc. (“StreetSmarts”), a
5 Delaware corporation, led by its President and Chief Executive Officer Defendant Dave Batt
6 (“Batt”), an Illinois resident. (Transcript (“Tr.”) of April 21, 2011 hearing at 13) In his
7 Verified Complaint, Plaintiff alleges the following causes of action against both Defendants:
8 treble damages pursuant to Arizona Revised Statute (“A.R.S.”) § 23-353 (Count I) for failure
9 to pay Plaintiff’s wages; fraud and fraudulent misrepresentation (Count II); breach of
10 contract (Count III); breach of the covenant of good faith and fair dealing (Count IV);
11 piercing the corporate veil (Count V); negligent misrepresentation (Count VI); and unjust
12 enrichment (Count VII). (Doc. 1) Plaintiff seeks “direct and consequential damages,”
13 compensatory and punitive damages, reasonable attorney’s fees, costs, and pre-judgment and
14 post-judgment interest. (*Id.* at 17)

15 In his December 6, 2010 default damages hearing memorandum, Plaintiff
16 requests the entry of judgment in the sum of \$333,125.81, calculated as follows:

17 1. \$164,479.56, representing treble damages of unpaid wages (\$54,826.52)
18 pursuant to A.R.S. § 23-355, doc. 23 at 14;

19 2. \$8,333.33, representing the 25,000 shares of stock and 50,000 shares
20 of stock options owed to Plaintiff. Pursuant to a July 1, 2009 email from Defendant Batt
21 to Plaintiff, doc. 23-1, Exh 3 at 10, there are 13,500,000 StreetSmarts’ shares issued and
22 outstanding, and the fair market value of StreetSmarts is \$1.5 million, thus making each
23 share worth \$0.11. According to Plaintiff, 75,000 shares are worth \$8,333.33² at the price
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25 ² The Court’s mathematical calculation of 75,000 shares at \$0.11 per share is
26 \$8,250.00. The exact amount is irrelevant because Plaintiff failed to establish the value of
27 the stock with reasonable certainty and an entitlement to stock options at either Plaintiff’s
28 termination date or the date the stock were supposed to be distributed to Plaintiff as
promised.

1 \$0.11 per share, *id.* at 14-15;

2 3. \$30,922.18 in unpaid employment taxes that Plaintiff believes he is
3 obligated to pay out of any award. According to Plaintiff, employment taxes consist of
4 15.3% of gross wages for FICA, and 3.5% for FUTA and SUTA. Plaintiff argues that,
5 had StreetSmarts paid Plaintiff as agreed, StreetSmarts would have paid employment
6 taxes of 18.8% on all gross wages. If Plaintiff's gross unpaid wages have been trebled,
7 18.8% of \$164,479.56 is equal to \$30,922.18, *id.* at 15;

8 4. \$14,233.55 in simple interest, at the rate of 10%, on the totals in
9 paragraphs 1-3, above, *id.*;

10 5. \$1,190.25 in taxable costs, consisting of the District Court's \$350.00
11 filing fee; \$93.25, \$88.00 and \$39.00 in process server fees; and \$620.00 in Westlaw
12 computer legal research charges, *id.*;

13 6. \$2,925.00 in hourly-based attorneys' fees, consisting of: \$1,075.00 in
14 fees incurred for outside contract attorneys and \$1,850.00 for legal research and writing,
15 *id.*;

16 7. \$111,041.94 for Plaintiff's contingency attorneys' fees. *Id.*

17 Service of the Summons and Complaint on StreetSmarts was made on
18 September 8, 2010 through its statutory agent in Wilmington, Delaware, United States
19 Corporation Agents, Inc., with copies of Plaintiff's Summons and Complaint mailed in
20 accordance with Fed. R. Civ. P. 4(h). (Doc. 7) As discussed later herein, Batt was served
21 with the Summons and Complaint by alternative service on January 13, 2011 due to
22 Batts' significant efforts to evade service of process. (Docs. 26, Exhibits ("Exhs") 1-2;
23 28; 30, Exhs 1-2) No answer or other responsive pleading has been filed by, or on behalf
24 of, StreetSmarts or Batt, and the time to do so has expired. The Clerk of Court entered
25 StreetSmarts' and Batts' defaults on October 8, 2010 and March 17, 2011, respectively.
26 (Docs. 9, 33) On October 22, 2010 and March 31, 2011, Plaintiff filed separate
27 applications for entry of default judgment against each Defendant and requested an
28 evidentiary hearing pursuant to Rule 55(b)(2), Fed.R.Civ.P. (Docs. 16, 35) Because the

1 Complaint requested non-liquidated monetary damages, the Court held a default damages
2 evidentiary hearing on April 21, 2011. *Holtsinger v. Bridle*, 2007 WL 1080112, * 1
3 (E.D.Cal. 2007) (“[w]hen a plaintiff’s damages are unliquidated (i.e. capable of
4 ascertainment from definite figures contained in documentary evidence or in detailed
5 affidavits) or punitive, they require ‘proving up’ through an evidentiary hearing or some
6 other means.”) (citing *Dundee Cement Co. v. Howard Pipe & Concrete Prods.*, 722 F.2d
7 1319, 1323-24 (7th Cir. 1983)). Pre-hearing and post-hearing proposed findings of fact
8 and conclusions of law were filed on December 6, 2010 and May 6, 2011, respectively.³
9 (Docs. 25, 43)

10 **II. Jurisdiction**

11 **A. Magistrate judge jurisdiction**

12 On September 13, 2010, Plaintiff consented in writing to magistrate-judge
13 jurisdiction pursuant to 28 U.S.C. § 636(c)(1). (Doc. 6) Arguably, when a plaintiff
14 consents in writing to a United States magistrate judge, that magistrate judge has juris-
15 diction to conduct a default damages hearing and enter final judgment against a properly-
16 served defendant even though that defendant has neither appeared in the action nor
17 consented to proceed before a magistrate judge. Technically speaking, the defaulted
18 defendant is not a party because he has failed to appear in the action. *United States v.*
19 *Real Property*, 135 F.3d 1312 (9th Cir. 1998); *United States v. 8136 S. Dobson Street*,
20 125 F.3d 1076 (7th Cir. 1997); *EEOC v. West Louisiana Health Svcs., Inc.*, 959 F.2d
21 1277, 1279-80 (5th Cir. 1992); *Giove v. Stanko*, 882 F.2d 1316, 1318 (8th Cir. 1989).
22 Because the Ninth Circuit has not expressly addressed this issue, and, at least, one circuit
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26 ³ Plaintiff’s pre- and post-hearing memoranda were not very helpful, especially in
27 identifying Arizona law and the record supporting Plaintiff’s numerous causes of action and
28 claims. These failures contributed significantly to the delay and difficulty in preparing this
Report and Recommendation.

1 court has found to the contrary,⁴ in an abundance of caution, the undersigned will proceed
2 by Report and Recommendation.

3 **B. Subject matter jurisdiction**

4 Federal courts have subject matter jurisdiction over controversies between
5 citizens of different states. U.S. Const. Art. III, § 2; *Caterpillar Inc. v. Lewis*, 519 U.S. 61,
6 67-68 (1996) (“The Constitution provides, in Article III, § 2, that “[t]he judicial Power [of
7 the United States] shall extend . . . to Controversies . . . between Citizens of different
8 States.”). Pursuant to 28 U.S.C. § 1332(a)(1), a district court has original jurisdiction over
9 all civil actions where the amount in controversy exceeds the sum of \$75,000, and the action
10 is between citizens of different states. 28 U.S.C. § 1332(a)(1). “Diversity jurisdiction requires
11 complete diversity between the parties - each defendant must be a citizen of a different state
12 from each plaintiff.” *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1234 (9th Cir.
13 2008). Thus, in order to properly invoke diversity jurisdiction, Plaintiff must affirmatively
14 allege facts demonstrating that the citizenship of the parties is completely diverse. However,
15 “the diversity jurisdiction statute, 28 U.S.C. § 1332, speaks of citizenship, not of residency.
16 To be a citizen of a state, a natural person must first be a citizen of the United States.”
17 *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001) (citing *Newman-Green,*
18 *Inc. v. Alfonso-Larrain*, 490 U.S. 826, 828 (1989)). “The natural person’s state citizenship
19 is then determined by [the party’s] state of domicile, not [the party’s] state of residence. A
20 person’s domicile is [the party’s] permanent home, where [the party] resides with the
21 intention to remain or to which [the party] intends to return.” *Id.* (citing *Lew v. Moss*, 797
22 F.2d 747, 749 (9th Cir. 1986)). The party seeking to invoke federal jurisdiction under 28
23 U.S.C. § 1332 bears the burden of demonstrating that grounds for diversity exist, diversity
24 is complete, and his claim is supported with “competent proof” by a preponderance of the
25 evidence. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403-04 (9th Cir. 1996); *Indus.*

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27 ⁴ *Henry v. Tri-Services, Inc.*, 33 F.3d 931, 932 (8th Cir. 1994) (“We hold that the
28 magistrate judge lacked authority to enter final judgment because [the defaulted party] did
not consent to have the matter tried to the magistrate judge.”).

1 *Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990).

2 The Complaint alleges that the District Court for the District of Arizona “has
3 [subject matter] jurisdiction over the claims set forth in this Complaint, venue is proper, and
4 the amount in controversy exceeds \$75,000.” (Doc. 1 at 3) It further alleges, and the
5 uncontradicted testimony of Plaintiff confirms, that Plaintiff “is a resident of the County of
6 Maricopa, State of Arizona[;]” Defendant StreetSmarts “was and is a corporation organized
7 and existing under the laws of the State of Delaware[;]” and Defendant Batt “was and is a
8 resident of Cook County, State of Illinois.” (*Id.* at 1-2; Tr. 14-15, 66)

9 Congress and the Supreme Court have provided the meaning of diversity as
10 contemplated by the Constitution when corporations are parties to a lawsuit. Specifically,
11 “the federal diversity jurisdiction statute provides that ‘a corporation shall be a citizen of any
12 state by which it has been incorporated and of the state where it has its principal place of
13 business.’ *Hertz Corp. v. Friend*, ___ U.S. ___, 130 S.Ct. 1181, 1185 (2010) (quoting 28
14 U.S.C. § 1332(c)(1) (abrogating *Tosco Corp. v. Communities for a Better Environment*, 236
15 F.3d 495, 500-502 (9th Cir. 2001) (*per curiam*)). The Supreme Court stated:

16 We conclude that “principal place of business” is best read as referring to the
17 place where a corporation’s officers direct, control, and coordinate the
18 corporation’s activities. It is the place that Courts of Appeals have called the
19 corporation’s “nerve center.” And in practice it should normally be the place
20 where the corporation maintains its headquarters-provided that the
21 headquarters is the actual center of direction, control, and coordination, i.e.,
22 the “nerve center,” and not simply an office where the corporation holds its
23 board meetings (for example, attended by directors and officers who have
24 traveled there for the occasion).

21 *Id.* at 1192. Thus, a corporation may have dual citizenship. “A corporation is deemed to be
22 a citizen of both the State in which it is incorporated and of the State where it has its
23 principal place of business[.]” *Lacombe v. Bullhead City Hosp. Corp.*, 2007 WL 2702005,
24 * 2 (D.Ariz., Sept. 12, 2007) (internal quotation marks omitted). To remain diverse for
25 purposes of diversity jurisdiction, neither the corporation’s state of incorporation nor its
26 principal place of business can be the same as the citizenship of any of the opposing parties.

27 “StreetSmarts is a very small software company, and does not have a
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1 traditional office.” (Docs. 23 at 13; doc. 23-1, Exh 2 at 7, ¶ 3) According to the testimony
2 at the hearing and the record herein, StreetSmarts’ principal place of business is the State of
3 Illinois and its office is located in Batt’s residence where he lives with his parents at 222 May
4 Ave., Glen Ellyn, Illinois which is StreetSmarts’ “nerve center.” (*Id.*; doc. 1-1, Exh. B, at
5 5-9; Tr. at 66) StreetSmarts is also a corporation organized and existing under the laws of
6 the State of Delaware with a registered statutory agent in Delaware, United States
7 Corporation Agents, Inc., located at 1521 Concord Pike # 301, Wilmington, DE 19803. (Doc.
8 1 at 2) The Court concludes that StreetSmarts is a citizen of both Illinois and Delaware.⁵

9 In a prior ruling, the Court found that Defendant Batt was intentionally
10 avoiding service of process and authorized substituted service under Illinois law. (Doc. 28)
11 Plaintiff properly followed Illinois law and served the Summons and Complaint on the
12 authorized statutory agent for StreetSmarts, in Delaware, and provided a copy of the process
13 server’s verified Return of Service to Batt by mailing, postage prepaid, a copy of proof of
14 such service, together with a copy of the Summons and Complaint, to Batt at 17W710
15 Butterfield Rd. # 317, Oakbrook Terrace, Illinois and 222 May Ave., Glen Ellyn, Illinois, as
16 well as mailing a copy of the Return of Service to StreetSmarts’ statutory agent in Delaware.
17 (Doc. 30)

18 The Court concludes that it has subject matter jurisdiction over this case

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20 ⁵ The Complaint fails to affirmatively allege the state of incorporation *and* principal
21 place of business of StreetSmarts. 28 U.S.C. § 1332(c)(1) (“a corporation shall be deemed
22 to be a citizen of any State by which it has been incorporated and of the State where it has
23 its principal place of business . . .”). The hearing testimony, however, unequivocally
24 established that StreetSmarts’ principal place of business is in Illinois. Plaintiff’s defective
25 citizenship allegations are hereby amended to conform to the evidence and cured by the
26 April 21, 2011 hearing testimony pursuant to 28 U.S.C. § 1653 (“Defective allegations of
27 jurisdiction may be amended, upon terms, in the trial or appellate courts.”). *Alfi v.*
28 *Nordstrom, Inc.*, 2010 WL 5093434, * 6 (S.D.Cal., Dec. 8, 2010) (citing *Blue Ridge Ins. Co.*
v. Stonewich, 142 F.3d 1145, 1148 (9th Cir. 1998)).

1 pursuant to 28 U.S.C. § 1332(a)(1) because the amount in controversy exceeds \$75,000 and
2 the parties are completely diverse. Venue is also proper pursuant to 28 U.S.C. § 1391(a)(2)
3 because jurisdiction is founded on diversity of citizenship and a substantial part of the events
4 or omissions giving rise to Plaintiff’s claims occurred in Arizona.

5 **C. Personal jurisdiction**

6 “The Due Process Clause of the Fourteenth Amendment operates to limit the
7 power of a State to assert in personam jurisdiction over a nonresident defendant.”
8 *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984) (citation
9 omitted). If a court determines that a defendant’s contacts with the forum state are sufficient
10 to satisfy the Due Process Clause, then the court may exercise either “general” or “specific”
11 jurisdiction over an out-of-state defendant. *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th
12 Cir. 2008); *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995). Specific
13 jurisdiction exists when a suit arises out of, or is related to, the defendant’s contacts with the
14 forum. *Helicopteros*, 466 U.S. at 414 n. 8. General jurisdiction refers to the authority of a
15 court to exercise jurisdiction even where the cause of action is unrelated to the defendant’s
16 contacts with the forum. *Id.* at 414 n. 9. The nature of the defendant’s contacts with the forum
17 state, therefore, will determine whether a court exercises general or specific jurisdiction over
18 the defendant. *Id.*

19 The Ninth Circuit employs a three-prong test to determine whether a district
20 court has specific jurisdiction over a defendant. *Menken v. Emm*, 503 F.3d 1050, 1057 (9th
21 Cir. 2007) (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir.
22 2004)). First, “the non-resident defendant must purposefully direct his activities or
23 consummate some transaction with the forum or resident thereof; or perform some act by
24 which he purposefully avails himself of the privilege of conducting activities in the forum
25” *Schwarzenegger*, 374 F.3d at 802. In a breach-of-contract action, the court “typically
26 inquire[s] whether a defendant ‘purposefully avail[ed] itself of the privilege of conducting
27 activities’ or ‘consummate[s] [a] transaction’ in the forum, focusing on activities such as
28 delivering goods or executing a contract.” *Yahoo! Inc. v. La Ligue Contre Le Racisme Et*

1 *L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (*en banc*). Second, “the claim must be
2 one which arises out of or relates to the defendant’s forum-related activities.”
3 *Schwarzenegger*, 374 F.3d at 802. Third, “the exercise of jurisdiction must comport with fair
4 play and substantial justice, *i.e.* it must be reasonable.” *Id.* “The plaintiff bears the burden
5 of satisfying the first two prongs of the test.” *Id.* If a plaintiff satisfies the first two burdens,
6 “the burden then shifts to the defendant to present a compelling case that the exercise of
7 jurisdiction would not be reasonable.” *Id.*; *see also, Bancroft & Masters, Inc. v. Augusta Nat.*
8 *Inc.*, 223 F.3d 1082, 1086-87 (9th Cir. 2000) (citing *Cybersell, Inc. v. Cybersell, Inc.*, 130
9 F.3d 414, 417 (9th Cir. 1997)).

10 The Ninth Circuit also directs that seven factors be considered when deter-
11 mining whether exercising specific jurisdiction is reasonable: (1) the extent of defendant’s
12 purposeful interjection into the forum state, (2) the burden on defendant, (3) the conflicts of
13 the law between the forum state and defendant’s home jurisdiction, (4) the forum state’s
14 interest in adjudicating the dispute, (5) the most efficient judicial resolution of the
15 controversy, (6) the plaintiff’s interest in convenient and effective relief, and (7) the
16 existence of an alternative forum. *Terracom v. Valley Nat’l Bank*, 49 F.3d 555, 561 (9th Cir.
17 1995); *BCS & Associates Business Consulting Services, Inc. v. Essentia Health*, 2010 WL
18 1253186, * 5-6 (D.Ariz., March 25, 2010) (In balancing the *Terracom* factors, “this Court
19 finds it reasonable to exercise specific jurisdiction over the non-resident Defendants. The
20 extent of Defendants’ purposeful interjection into Arizona, the minimal burden on
21 Defendants, the lack of conflict with Defendants’ home state, Arizona’s interest in
22 adjudicating the dispute and the Court’s interest in efficiency weigh in favor of finding
23 jurisdiction reasonable.”).

24 The record before the Court sets forth facts sufficient to establish purposeful
25 interjection in Arizona on the part of the defaulted Defendants. It is undisputed that
26 Defendants StreetSmarts and Batt intentionally availed themselves of the privilege of
27 conducting commercial activities in Arizona. According to the hearing testimony and the
28 record herein, Batt telephoned Plaintiff in Arizona from Illinois in November, 2008, the first

1 contact Plaintiff ever had with Batt, at which time Batt offered Plaintiff employment with
2 StreetSmarts. (Tr. at 15, 24) A few days later, on or about November 25, 2008 while
3 Plaintiff was at his residence in Arizona, Plaintiff received a written employment contract
4 from Batts, offering Plaintiff employment with StreetSmarts as its Vice President of
5 Operations. (Docs. 1 at 2; 1-1, Exh A at 2-3) Like all StreetSmarts' employees, Plaintiff
6 would perform, and did perform, all his work for Defendants in and from his Phoenix
7 residence. (Doc. 23-1, Exh 2 at 7, ¶ 4) It is this work for which Plaintiff seeks full
8 compensation and damages in this lawsuit. Thus, Plaintiff's claims arise out of, and result
9 from, Defendants' activities in Arizona. StreetSmarts and Batt intentionally directed their
10 actions into Arizona in order to hire Plaintiff, purposefully sending emails, letters, and an
11 employment contract to Plaintiff, known by Defendants to be an Arizona resident. Plaintiff
12 executed the employment contract in Arizona, and thereafter Plaintiff performed all his
13 services for StreetSmarts and Batt in and from Arizona from November 28, 2008 to August
14 4, 2010. (Doc. 1-1 at 1-13; Tr. at 15-17, 24, 34) Additionally, the effects of Defendants'
15 breach of the employment contract with Plaintiff occurred in Arizona, and the harm to
16 Plaintiff was naturally felt in Arizona. *Moser v. Encore Capital Group, Inc.*, 2007 WL
17 1114097, * 4 (S.D.Cal., March 29, 2007) (“[S]pecific jurisdiction exists where defendants’
18 intentional and allegedly tortious actions outside the forum state were calculated to, and did,
19 have a substantial effect in the forum state.”) (citing *Calder v. Jones*, 465 U.S. 783, 788-90
20 (1984)).

21 The Court finds that the first two prongs of the *Schwarzenegger* test have been
22 established: (1) StreetSmarts and Batt purposefully directed a substantial portion of its
23 activities in Arizona and consummated the transaction in Arizona; and (2) StreetSmarts and
24 Batt performed affirmative acts in Arizona by which they purposefully availed themselves
25 of the privilege of conducting activities in Arizona. *Renteria v. Ramanlal*, 2009 WL 73675,
26 * 2 (D.Ariz., Jan. 9, 2009) (citing, among others, *Decker Coal Co. v. Commonwealth Edison*
27 *Co.*, 805 F.2d 834, 840 (9th Cir. 1986) (stating “if the defendant directly solicits business in
28 the forum state, the resulting transactions will probably constitute the deliberate transaction

1 of business invoking the benefits of the forum state’s laws.”)).

2 The burden has shifted to StreetSmarts and Batt to demonstrate that the
3 District Court’s exercise of specific personal jurisdiction over them in Arizona would be
4 contrary to fair play and substantial justice. *Hammond v. Monarch Investors, LLC*, 2010 WL
5 2674401, * 2 (S.D.Cal., July 10, 2010) (“If plaintiff succeeds in satisfying both prongs, the
6 burden shifts to the defendant to present a ‘compelling case’ that the exercise of jurisdiction
7 would not be reasonable.”) (citing *Schwarzenegger*, 374 F.3d at 802). Defendants have not
8 met their burden in this regard. By contracting with Plaintiff for his extensive personal
9 services performed in Arizona for Defendants, StreetSmarts and Batt purposefully availed
10 themselves of the benefits of doing business in and from Arizona and could reasonably
11 expect to be haled into court in Arizona for failing to honor their promises to compensate
12 Plaintiff for his work performed in Arizona. *Harris Tursky & Co., Inc. v. Bell & Clements*
13 *Ltd.*, 328 F.3d 1122, 1130 (9th Cir. 2003). The exercise of specific jurisdiction over
14 Defendants in the District of Arizona is fair, just and reasonable. *Schwarzenegger*, 374 F.3d
15 at 802 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)); *BCS &*
16 *Associates Business Consulting Services, Inc.*, 2010 WL 1253186 at * 3 (“When a defendant
17 enters into a contract that creates a continuing obligation to a resident of another state, the
18 defendant has purposely availed himself of the benefits and privileges of that state and should
19 reasonably expect to be haled into court there.”) (citing *Ballard v. Savage*, 65 F.3d 1495,
20 1498 (9th Cir. 1995)).

21 **III. Liability Causes of Action, Punitive Damages and Other Issues**

22 “[F]ederal courts sitting in diversity jurisdiction apply state substantive law
23 and federal procedural law.” *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir.
24 2003). Arizona substantive law applies to this diversity action.

25 **A. Treble damages**

26 Count I of the Complaint alleges a cause of action for treble damages pursuant
27 to Arizona Revised Statute (“A.R.S.”) § 23-355 due to Defendants’ willful and wrongful
28 refusal to pay Plaintiff’s wages. (Doc. 1 at 8-9)

1 In Arizona, an employer is required to pay wages due an employee within time
2 periods specified by A.R.S. § 23-353. Under the Arizona Wage Act, A.R.S. § 23-350 *et seq.*,
3 “if an employer fails to pay wages due any employee, ‘such employee may recover in a civil
4 action against an employer or former employer an amount which is treble the amount of the
5 unpaid wages.’” *Gil v. JP Morgan Chase Bank, N.A.*, 2009 WL 1628876, * 8 (D.Ariz., Jun.
6 10, 2009) (quoting A.R.S. § 23-355). “The treble damage statute deters employers from
7 withholding or delaying payment of sums which employees have earned . . . and protects
8 employees from an employer’s groundless refusal to pay compensation which was promised
9 and which was due ‘in return for work performed.’” *Schade v. Diethrich*, 158 Ariz. 1, 12,
10 760 P.2d 1050, 1061 (Ariz. 1988).

11 Arizona Revised Statute § 23-352(3) removes the remedy of treble damages
12 when a good faith dispute regarding the amount of wages exists. *Dalos v. Novaheadinc*,
13 2008 WL 4182996, * 7 (Az.Ct.App., March 18, 2008) (“Here, Sweeney repeatedly
14 acknowledged that Dalos was owed wages but claimed that the company lacked the funds
15 to pay. As in *Sanborn*, its refusal to pay constituted bad faith.”); *Abrams v. Horizon Corp.*,
16 137 Ariz. 73, 669 P.2d 51, 55 (Ariz. 1983).

17 **B. Fraud and fraudulent misrepresentation**

18 Count II of the Complaint alleges causes of action for fraud and fraudulent
19 misrepresentation. (Doc. 1 at 9-11)

20 Arizona requires a plaintiff to “prove the nine elements of fraud in order to
21 prevail.” *Zuniga v. Cowie*, 2007 WL 5462169, * 3 (Az.Ct.App., Dec. 13, 2007). “The
22 elements for fraud or fraudulent misrepresentation are: (1) a representation, (2) its falsity, (3)
23 its materiality, (4) the speaker’s knowledge of its falsity or ignorance of its truth, (5) the
24 speaker’s intent that the information should be acted upon by the hearer and in a manner
25 reasonably contemplated, (6) the hearer’s reliance on its truth, (8) the hearer’s right to rely
26 on it, and (9) the hearer’s consequent and proximate injury. *Id.* (citing *Dillon v. Zeneca*
27 *Corp.*, 202 Ariz. 167, 171-72, 42 P.3d 598, 602-03 (Az.Ct.App. 2002) (fraudulent
28 misrepresentation); *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, 77, 985 P.2d 556, 562

1 (Az.Ct.App. 1998) (fraud). Moreover, each element must be proven by clear and convincing
2 evidence. *Id.*; *Davis v. First Nat'l Bank of Arizona*, 124 Ariz. 458, 465, 605 P.2d 37, 44
3 (Az.Ct.App. 1979) (stating elements for fraudulent misrepresentation). If a claim lacks any
4 of the preceding elements, it is not actionable. *Nielson v. Flashberg*, 101 Ariz. 335, 338, 419
5 P.2d 514, 517 (Ariz. 1966) (“We have held there is no actionable fraud without a
6 concurrence of all the elements thereof.”).

7 Generally, before a representation constitutes actionable fraud, “it must relate
8 to either a past or existing fact. It cannot be predicated on unfulfilled promises, expressions
9 of intention or statements concerning future events unless such were made with the present
10 intention not to perform.” *Staheli v. Kauffman*, 122 Ariz. 380, 384, 595 P.2d 172, 175 (Ariz.
11 1979); *Spudnuts, Inc. v. Lane*, 131 Ariz. 424, 641 P.2d 912, 914 (Az.Ct.App. 1982). The
12 underlying policy is that “a promise to perform in the future is not a representation which can
13 be shown to be true or false at the time it was made, and therefore, a person has no right to
14 rely, in a legal sense, on a representation of a fact not in existence.” *Denbo v. Badger*, 18
15 Ariz.App. 426, 428, 503 P.2d 384, 386 (Az.Ct.App. 1972). “[A] breach of contract is not
16 fraud.” *Trollope v. Koerner*, 106 Ariz. 10, 19, 470 P.2d 91, 100 (Ariz. 1970). “Unkept
17 promises relating to future events are, at most, a breach of contract.” *Moshir v. PatchLink*
18 *Corp.*, 2007 WL 505344, * 5 (D.Ariz., Feb. 12, 2007) (quoting *Ahmed v. Collins*, 23
19 Ariz.App. 54, 56–57, 530 P.2d 900, 902–03 (Az.Ct.App. 1975)).

20 An established exception to Arizona’s general rule is if a promise is “made
21 without present intention to perform,” “the misstatement of the present intention is regarded
22 as a misrepresentation of fact” that will support a claim for fraud. *Id.*; *Employer’s Liability*
23 *Assur. Corp. v. Lunt*, 82 Ariz. 320, 313 P.2d 393 (Ariz. 1957) (“In this jurisdiction it is
24 settled that a fraud may be perpetrated by the giving of a promise to perform a future act
25 made with the present intention not to perform.”) (citations omitted). “It also seems to be
26 accepted that a buyer’s nondisclosure of insolvency constitutes fraud where it is coupled with
27 an intent not to pay” *Id.* (approving federal courts’ finding “it is a fraud for an insolvent,
28 concealing his condition, to buy goods, for which he does not mean to pay.”). “[F]raudulent

1 intent must often be established by circumstantial evidence, and it may be ‘inferred from
2 such circumstances as defendant’s insolvency, his hasty repudiation of the promise, his
3 failure even to attempt performance, or his continued assurances after it was clear he would
4 not perform.’” *Hamilton v. Willms*, 2005 WL 3143712, * (E.D.Cal., Nov. 22, 2005) (*Tenzer*
5 *v. Superscope, Inc.*, 39 Cal.3d 18, 30, 216 Cal.Rptr. 130, 702 P.2d 212 (1985)).

6 **C. Breach of contract**

7 Count III of the Complaint alleges a cause of action for breach of contract.
8 (Doc. 1 at 11-12)

9 Under Arizona law, “[a]n enforceable contract requires ‘an offer, an
10 acceptance, consideration, and sufficient specification of terms so that obligations involved
11 can be ascertained.’” *Richard E. Lambert, Ltd. v. Houston Const. Co., Inc.*, 2009 WL
12 2031920, 2 (Az.Ct.App., July 14, 2009) (quoting *K-Line Builders, Inc. v. First Fed. Sav. &*
13 *Loan Ass’n*, 139 Ariz. 209, 212, 677 P.2d 1317, 1320 (Az.Ct.App. 1983)). “[E]mployment
14 contracts universally imply, if they do not expressly state, that the employee will work where
15 directed and be paid after the service is performed. A promise for a promise is adequate legal
16 consideration to support a contract.” *Knack v. Industrial Commission*, 108 Ariz. 545, 548,
17 503 P.2d 373, 376 (Ariz. 1972) (citation omitted). “The parties must intend to be bound.”
18 *Tabler v. Indus. Comm’n of Ariz.*, 202 Ariz. 518, 521, 47 P.3d 1156, 1159 (Az.Ct.App. 2002).
19 “It is well established that, in an action based on breach of contract, the plaintiff has the
20 burden of proving the existence of a contract, breach of the contract, and resulting damages.
21 *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, 83 P.3d 1103, 1111 (Az.Ct.App. 2004) (citing
22 *Thunderbird Metallurgical, Inc. v. Ariz. Testing Lab.*, 5 Ariz.App. 48, 423 P.2d 124
23 (Az.Ct.App. 1967)).

24 “Generally, contract law enforces the expectancy interests between
25 contracting parties and provides redress for parties who fail to receive the benefit of their
26 bargain.” *Carioca Co. v. Sult*, 2010 WL 2606623, * 4 (Az.Ct.App., June 29, 2010) (quoting
27 *Carstens v. City of Phoenix*, 206 Ariz. 123, 75 P.3d 1081, 1084 (Az.Ct.App. 2003), *rejected*
28 *on other grounds*, *Flagstaff Affordable Housing Ltd. P’ship v. Design Alliance, Inc.*, 223

1 Ariz. 320, 223 P.3d 664 (Ariz. 2010). Damages, however, must be proven with “reasonable
2 certainty.” *Chartone*, 207 Ariz. at 170, 83 P.3d at 1111 (citing *Gilmore v. Cohen*, 95 Ariz.
3 34, 36, 386 P.2d 81, 82 (Ariz. 1963)); *see also* Restatement (Second) of Contracts § 352
4 (1981). “Although ‘reasonable certainty’ does not require ‘certainty in amount,’ ‘the
5 plaintiff’s evidence [must] provide some basis for estimating his loss. [T]he evidence must
6 make an ‘approximately accurate estimate possible.’” *Walter v. Simmons*, 169 Ariz. 229, 237,
7 818 P.2d 214, 222 (Az.Ct.App. 1991) (citations omitted). “An award of damages cannot be
8 based on conjecture or speculation[.]” *Id.*

9 **D. Breach of the covenant of good faith and fair dealing**

10 Count IV of the Complaint alleges a cause of action for breach of the covenant
11 of good faith and fair dealing. Count IV does not specify whether the allegation arises in tort
12 or contract. (Doc. 1 at 12-13)

13 “Arizona law implies a covenant of good faith and fair dealings in every
14 contract, which prohibits a party from doing anything to prevent other parties to the contract
15 from receiving the benefits and entitlements of the agreement.” *Addvensky v. Dysart Unified*
16 *School Dist. No. 89*, 2011 WL 1882289, * 7 (D.Ariz., May 17, 2011) (internal quotation
17 marks omitted) (quoting *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons*
18 *Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 490, 38 P.3d 12, 28 (Ariz. 2002). “Action
19 for breach of the covenant may sound in contract or in tort, but sustaining a tort claim
20 requires a plaintiff to allege and prove a “special relationship between the parties arising
21 from elements of the public interest, adhesion, of fiduciary responsibility.” *Id.*, If a plaintiff
22 attempts to make a bad faith claim in tort, but does not allege and prove the necessary special
23 relationship to support a claim for breach of the implied covenant in tort, the claim fails. *Id.*

24 **E. Piercing the corporate veil**

25 Count V of the Complaint seeks to pierce StateStreets’ corporate veil and
26 impose liability on Batt personally. (Doc. 1 at 13-15)

27 The veil piercing doctrine is not a cause of action in itself; but rather, it is a
28 means to vindicate the interests of parties injured through a breach of contract or a tort. *In*

1 *re Elegant Custom Homes, Inc.*, 2007 WL 1412456, * 5 (D.Ariz., May 14, 2007) (citing
2 *International Financial Services Corp. v. Chromas Technologies Canada, Inc.*, 356 F.3d 731,
3 735-36 (7th Cir. 2004) (“Piercing the corporate veil, after all, is not itself an action; it is
4 merely a procedural means of allowing liability on a substantive claim, here breach of
5 contract.”) and *Gallagher v. Bintliff*, 740 S.W.2d 118, 119 (Tex.App. 1987) (“An attempt to
6 pierce the corporate veil, in and of itself, is not a cause of action but rather is a means of
7 imposing liability on an underlying cause of action such as a tort or breach of contract.”). In
8 diversity cases, federal courts look to state law to determine whether a corporation should
9 be treated as the alter-ego of a person or another entity. *Hambleton Bros. Lumber Co. v.*
10 *Balkin Enters.*, 397 F.3d 1217, 1227 (9th Cir. 2005) (noting that in diversity actions, federal
11 courts must apply state law when evaluating alter-ego status); *Davis v. Metro Prod., Inc.*, 885
12 F.2d 515, 520-21 (9th Cir. 1989).

13 “As a general rule, a corporation will be treated as a legal entity until sufficient
14 reason appears to disregard the corporate form.” *Dietel v. Day*, 16 Ariz.App. 206, 492 P.2d
15 455 (Az.Ct.App. 1972). A corporation is an entity unto itself quite separate from its owners
16 and officers and its “corporate status will not be lightly disregarded.” *Chapman v. Field*, 124
17 Ariz. 100, 102, 602 P.2d 481, 483 (Ariz. 1979). The corporate form, however, “will be
18 disregarded when the corporation is the alter ego of one or more individuals and ‘the
19 observance of the corporate form would sanction a fraud or promote injustice.’” *In re Elegant*
20 *Custom Homes, Inc.*, 2007 WL 1412456, at * 4 (quoting *Employer’s Liability Assurance*
21 *Corporation v. Lunt*, 313 P.2d 393, 395 (Ariz. 1957) (“The corporate fiction will, however,
22 be disregarded upon the concurrence of two circumstances; that is, when the corporation is,
23 in fact, the alter ego of one or a few individuals and when the observance of the corporate
24 form would sanction a fraud or promote injustice.”). A sufficient showing of either fraud or
25 injustice may suffice to disregard the corporate form once the alter ego showing has been
26 made. *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 37, 821 P.2d 725, 728 (Ariz.
27 1991). “Under *Gatecliff*, injustice may suffice to disregard the corporate form once the alter
28 ego showing has been made.” *In re Elegant Custom Homes, Inc.*, 2007 WL 1412456, * 4.

1 To pierce the corporate veil or demonstrate alter-ego status, a “plaintiff[] must
2 prove both (1) unity of control and (2) that observance of the corporate form would sanction
3 a fraud or promote injustice.” *Gatecliff*, 170 Ariz. at 37, 821 P.2d at 728.

4 Alter ego claims in Arizona may arise out of contract. *See, e.g., Dietel*, 492
5 P.2d at 457 (Plaintiff “filed a third-party complaint against Dietel, as the alter ego of Filmlab,
6 Inc., for breach of contract.”). “Although corporate directors and officers may not be held
7 liable for a corporation’s intentional torts merely by virtue of the office they hold, they may
8 be held liable for such torts if they have involvement in the tortious acts.” *Sports Imaging of*
9 *Arizona, L.L.C. v. 1993 CKC Trust*, 2008 WL 4448063, * 12 (Az.Ct.App., Sept. 30, 2008)
10 (citations omitted). “[A] director or officer of a corporation does not incur personal liability
11 for the corporation’s torts merely by reason of his or her official character, but a director or
12 officer who commits a tort, directs the tortious act to be done, or participates or cooperates
13 therein, is liable to third persons injured thereby, even though liability may also attach to the
14 corporation for the tort.” *Id.* (citing *Charles Bloom & Co. v. Echo Jewelers*, 279 N.J.Super.
15 372, 652 A.2d 1238, 1243 (N.J.Super.Ct.App.Div.1995)). Arizona law, however, limits a
16 veil-piercing action to only third parties who deal with a corporation. *Jones v. Teilborg*, 727
17 P.2d 18, 25 (Az.Ct.App. 1986) (denying corporate shareholders the right to pierce a corporate
18 veil to obtain payments from other shareholders).

19 **F. Negligent misrepresentation**

20 Count VI of the Complaint alleges a cause of action for negligent
21 misrepresentation. (Doc. 1 at 15-19)

22 Arizona recognizes the tort of negligent misrepresentation. *Van Buren v. Pima*
23 *Community College District Bd.*, 113 Ariz. 85, 546 P.2d 821 (Ariz. 1976). “A claim for
24 relief for negligent misrepresentation is one governed by the principles of the law of
25 negligence. Thus, there must be ‘a duty owed and a breach of that duty before one may be
26 charged with the negligent violation of that duty.’” *Id.* (quoting *West v. Soto*, 85 Ariz. 255,
27 336 P.2d 153 (1959)). “A negligent misrepresentation claim cannot stand on promises of
28 future conduct and, unlike fraud, cannot even stand on a ‘promise made without present

1 intention to perform.” *Frank Lloyd Wright Foundation v. Kroeter*, 697 F.Supp.2d 1118,
2 1130 (D.Ariz. 2010) (quoting Moshir, 2007 WL 505344 at * 7). “Because the alleged
3 promise made by [defendant’s chairman] that the [defendant] would honor its contractual
4 commitments is clearly a promise of future conduct, the Court will grant the motion to
5 dismiss the negligent misrepresentation claim.” *Frank Lloyd Wright Foundation v. Kroeter*,
6 2008 WL 5111092, * 3 (D.Ariz., Dec. 3, 2008).

7 **G. Unjust enrichment**

8 Count VII of the Complaint alleges a cause of action for unjust enrichment.
9 (Doc. 1 at 16-19)

10 The doctrine of unjust enrichment is a “flexible, equitable remedy available
11 whenever the court finds that ‘the defendant . . . is obliged by the ties of natural justice and
12 equity’ to make compensation for the benefits received.” *Arnold & Assocs., Inc. v. Misys*
13 *Healthcare Systems*, 275 F.Supp.2d 1013, 1024 (D. Ariz. 2003) (quoting *Murdock-Bryant*
14 *Const., Inc. v. Pearson*, 146 Ariz. 48, 53, 703 P.2d 1197, 1202 (Ariz.1985)).

15 “In Arizona, five elements must be proved to make a case of unjust
16 enrichment: (1) an enrichment; (2) an impoverishment; (3) a connection between the
17 enrichment and the impoverishment; (4) absence of justification for the enrichment and the
18 impoverishment; and (5) an absence of a remedy provided by law.” *Community Guardian*
19 *Bank v. Hamlin*, 182 Ariz. 627, 630 898 P.2d 1005, 1008 (Az.Ct.App. 1995). “Where ‘there
20 is a specific contract which governs the relationship of the parties, the doctrine of unjust
21 enrichment has no application.’” *McNutt v. Key Financial Corp.*, 2010 WL 3702509, * 2
22 (D.Ariz., Sept. 9, 2010) (quoting *Brooks v. Valley Nat’l Bank*, 113 Ariz. 169, 174, 548 P.2d
23 1166, 1171 (Ariz. 1976)). A plaintiff is permitted to plead an unjust enrichment claim in the
24 alternative to a breach of contract claim. *Id.* (*Johnson v. KB Home*, 2010 WL 1268144, * 10
25 (D.Ariz., March 30, 2010)).

26 **H. Punitive damages**

27 Plaintiff seeks an award of punitive damages “against Defendants in order to
28 deter similar action against others[.]” (Doc. 1 at 17)

1 Punitive damages, of course, may not be awarded in Arizona for a mere breach
2 of contract. *Continental National Bank v. Evans*, 107 Ariz. 378, 382, 489 P.2d 15, 19 (Ariz.
3 1971) (“[T]he authorities are generally in accord that punitive damages cannot be awarded
4 for . . . a breach of contract.”); *In re Marriage of Benge*, 151 Ariz. 219, 224, 726 P.2d 1088,
5 1093 (Az.Ct.App. 1986) (explaining that “punitive damages may not ordinarily be assessed
6 in contract actions” but that they “may be recoverable where the breach of contract
7 constitutes a tort”); *Lerner v. Brettschneider*, 123 Ariz. 152, 156, 598 P.2d 515, 519
8 (Az.Ct.App. 1979) (“[A]lthough punitive damages do not lie for breach of contract, they are
9 recoverable where the breach of contract constitutes a tort.”).

10 In Arizona, “[p]unitive damages are awarded only in the most egregious of
11 cases, where [a plaintiff proves by clear and convincing evidence that the defendant engaged
12 in] reprehensible conduct and acted with an evil mind.” *Medasys Acquisition Corp. v. SDMS*,
13 *P.C.*, 203 Ariz. 420, 424, 55 P.3d 763, 767 (Ariz. 2002) (internal quotation marks omitted)
14 (quoting *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331-332, 723 P.2d 675, 680-
15 681 (Ariz. 1986)). “For that reason, punitive damages should rarely be awarded. In those
16 cases in which they are appropriate, punitive damages should be available to deter egregious
17 conduct.” *Id.*

18 To obtain punitive damages in Arizona, a plaintiff must prove that
19 defendant’s evil hand was guided by an evil mind. *Rawlings v. Apodaca*, 151 Ariz. 149, 162,
20 726 P.2d 565, 578 (Ariz. 1986). It is the “evil mind” that distinguishes action justifying the
21 imposition of punitive damages. *Linthicum*, 150 Ariz. 326, 331, 723 P.2d 675, 680 (Ariz.
22 1986). “Punitive damages may not be awarded absent a showing of ‘something more’ than
23 mere tortious conduct.” *Piper v. Bear Med. Sys., Inc.*, 180 Ariz. 170, 183, 883 P.2d 407, 417
24 (Az.Ct.App. 1993) (quoting *Linthicum*, 150 Ariz. at 330, 723 P.2d at 679). “The requisite
25 ‘something more,’ or ‘evil mind,’ is established by evidence that defendant either (1)
26 ‘intended to injure the plaintiff . . . [or (2)] consciously pursued a course of conduct knowing
27 that it created a substantial risk of significant harm to others.’” *Gurule v. Illinois Mut. Life*
28 *& Cas. Co.*, 152 Ariz. 600, 602, 734 P.2d 85, 87 (Ariz. 1987) (quoting *Rawlings*, 151 Ariz.

1 at 162, 726 P.2d at 578). “A defendant acts with the requisite evil mind when he intends to
2 injure or defraud, or deliberately interferes with the rights of others, ‘consciously
3 disregarding the unjustifiable substantial risk of significant harm to them.’” *Hyatt Regency*
4 *Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 133, 907 P.2d 506, 518 (Az.Ct.App.
5 1995) (quoting *Linthicum*, 150 Ariz. at 531, 723 P.2d at 680).

6 While the necessary evil mind may be inferred, it is still this evil mind in
7 addition to outwardly aggravated, outrageous, malicious, or fraudulent conduct which is
8 required for punitive damages. *Linthicum*, 150 Ariz. at 331, 723 P.2d at 680. The quality of
9 the defendant’s conduct is relevant only because it provides one form of evidence from
10 which the defendant’s motives may be inferred. *Gurule*, 152 Ariz. at 602, 734 P.2d at 87.
11 The more outrageous or egregious the conduct, the more compelling the inference of an evil
12 mind. *Id.* Nevertheless, the inquiry in every punitive damages case focuses on the
13 defendant’s state of mind, which may be established by either direct or circumstantial
14 evidence. *Id.*

15 “[W]hen supported by clear and convincing evidence, a finding by the jury that
16 a defendant has committed actual fraud is often, though not always, sufficient to support the
17 recovery of punitive damages. *Rowe v. Bankers Life and Cas. Co.*, 2008 WL 5156077, * 9
18 (D.Ariz., Dec. 9, 2008) (citing *Farr v. Occidental Life Ins. Co.*, 145 Ariz. 1, 699 P.2d 376,
19 383 (Az.Ct.App. 1984) (“noting that ‘[f]raud will suffice’ to award punitive damages”); but
20 see *Echols v. Beauty Built Homes*, 132 Ariz. 498, 647 P.2d 629, 632 (Ariz. 1982) (“It does
21 not follow that every case of fraud will support punitive damages.”). Thus, in Arizona,
22 “punitive damages are not recoverable in every fraud case, even though fraud is an
23 intentional tort.” *Surowiec v. Capital Title Agency, Inc.*, 2011 WL 1671925, * (D.Ariz., May
24 4, 2011) (citing *Rawlings*, 726 P.2d at 578 n. 8; *Dawson v. Withycombe*, 216 Ariz. 84, 163
25 P.3d 1034, 1062 & n. 27 (Az.Ct.App. 2007)).

26 **I. Attorney’s Fees**

27 Plaintiff seeks an award of “reasonable attorney’s fees” against Defendants.
28 (Doc. 1 at 17)

1 In Arizona, attorneys' fees may be awarded only when provided for by
2 agreement or statute. *Chavarria v. State Farm Mut. Auto. Ins. Co.*, 165 Ariz. 334, 337, 798
3 P.2d 1343, 1346 (Az.Ct.App. 1990). Pursuant to A.R.S. § 12-341.01(A) (2010), a court may
4 award a prevailing party reasonable attorneys' fees in "any *contested* action arising out of a
5 contract." A.R.S § 12-341.01 (emphasis added). In *Morrison v. Shanwick*, 167 Ariz. 39, 46,
6 804 P.2d 768, 775 (Az.Ct.App. 1990), the Arizona Court of Appeals defined a "contested
7 action" within the context of A.R.S. § 12-341.01(A):

8 We believe a contested action is one in which the defendant has appeared and
9 generally defends against the claims and demands made by the plaintiff.
10 Conversely, an action is not contested, or "uncontested," simply because the
11 defendant admits in his answer the true facts of the case.

12 804 P.2d at 775. Other Arizona federal judges have recognized *Morrison* as determinative
13 of Arizona law, declining an award of attorneys' fees incurred in obtaining an uncontested,
14 default judgment. *BRT Funding, LLC v. Carlsbad Development I, LLC*, 2009 WL 2486008,
15 * 3 (D.Ariz., August 12, 2009) ("[a]ttorneys fees are not recoverable under A.R.S. §
16 12-341.01(A) because this was not a contested action[,]” citing *Morrison*); *Lewis v. Smith*,
17 2009 WL 2106287 * 1 (D.Ariz., July 16, 2009); *BBQ Hut, Inc. v. Maelin Enterprises, LLC*,
18 2008 WL 2687685, at * 2 (D.Ariz., July 3, 2008) ("Because defendants appeared and, at least
19 initially, denied the allegations of the complaint, this was a 'contested action[,]” citing
20 *Morrison*).

21 **J. Interest and Costs**

22 In federal diversity actions, Arizona law generally determines the rate of
23 prejudgment interest but post-judgment interest is governed by federal law. 28 U.S.C. §
24 1961; *Citicorp Real Estate v. Smith*, 155 F.3d 1097, 1107-08 (9th Cir. 1998). As to post-
25 judgment interest, Plaintiff is entitled to post-judgment interest at the federal rate pursuant
26 to 28 U.S.C. § 1961, to be calculated by the Clerk of the Court from the date of the entry of
27 judgment.⁶

28 ⁶ Per 28 U.S.C. § 1961(a), post-judgment interest is calculated "from the date of the
entry of the judgment, at a rate equal to the weekly average 1-year constant maturity

1 Under A.R.S. § 44-1201(A), “[i]nterest on any loan, indebtedness, *judgment*
2 or other obligation shall be at the rate of ten percent per annum, unless a different rate is
3 contracted for in writing” which sets the pre-judgment and post-judgment interest rate
4 at ten percent simple interest per annum. A.R.S. § 44-1201(A) (emphasis added); *Collins v.*
5 *D.R. Horton, Inc.*, 361 F.Supp.2d 1085, 1094 (D. Ariz. 2005), *affirmed by*, 505 F.3d 874 (9th
6 Cir. 2007). Under Arizona law, “prejudgment interest on a liquidated claim is a matter of
7 right.” *AMHS Ins. Co. v. Mut. Ins. Co. of Ariz.*, 258 F.3d 1090, 1103 (9th Cir. 2001)
8 (quoting *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 508, 917 P.2d 222, 237 (Ariz. 1996)
9 (*en banc*)); *Precision Heavy Haul, Inc. v. Trail King Industries, Inc.*, ___ P.3d. ___, 580
10 Ariz. Adv. Rep. 8 (Az.Ct.App. 2010). Arizona authorizes pre-judgment interest on a “debt
11 prior to judgment provided the sum demanded is ‘liquidated,’” *Homes & Son Constr. Co.*
12 *Inc. v. Bolo Corp.*, 22 Ariz.App. 303, 306, 526 P.2d 1258, 1261 (Az.Ct.App. 1974), and
13 “[i]nterest should be calculated from the date the sums became due.” *L. M. White*
14 *Contracting Co. v. St. Joseph Structural Steel Co.*, 15 Ariz.App. 260, 265, 488 P.2d 196, 201
15 (Az.Ct.App. 1971). A claim is liquidated for purposes of pre-judgment interest “if the
16 evidence furnishes data which, if believed, makes it possible to compute the amount with
17 exactness, without reliance upon opinion or discretion.” *Arizona Title Insurance & T. Co. v.*
18 *O’Malley Lbr. Co.*, 14 Ariz.App. 486, 496, 484 P.2d 639, 649 (Az.Ct.App. 1971); *Scottsdale*
19 *Memorial Health Systems, Inc. v. Maricopa County*, 2010 WL 1255719, * 16 (Az.Ct.App.,
20 March 30, 2010) (“All that is necessary is that the evidence furnish data which, if believed,
21 makes it possible to compute the amount with exactness.”) (citation omitted). Prejudgment
22 interest may be awarded by default judgment only if demanded in the complaint. *Wolters v.*
23 *Elwess*, 2005 WL 2002437, * (Az.Super.Ct., April 25, 2005); *Silge v. Merz*, 510 F.3d 157,
24 159-162 (2nd Cir. 2007). Plaintiff requested an award of pre-judgment and post-judgment
25 interest in the Complaint. (Doc. 1 at 17)

26 _____
27 Treasury yield, as published by the Board of Governors of the Federal Reserve System, for
28 the calendar week preceding the date of the judgment.” 28 U.S.C. § 1961(a) (footnote
omitted).

1 The costs of litigation other than attorney’s fees are grouped as non-taxable
2 and taxable. Non-taxable costs are not recoverable under A.R.S. § 12-341.01; *Ahwatukee*
3 *Custom Estates Mgmt. Ass’n, Inc. v. Bach*, 193 Ariz. 401, 402-404, 973 P.2d 106, 107-109
4 (Ariz. 1999). Additionally, the parties’ contract does not address whether the prevailing party
5 is entitled to recover his or its non-taxable expenses and costs. *Schritter v. State Farm Mut.*
6 *Auto. Ins. Co.*, 201 Ariz. 391, 394, n. 5, 36 P.3d 739, 742, n. 5 (Ariz. 2001) (“[u]nder section
7 12-332.A.6, the parties may agree to share [otherwise non-taxable] costs or impose them on
8 the losing party.”). Except for taxable costs as discussed later herein, Plaintiff is not entitled
9 to recover non-taxable costs, such as, the cost of photocopying, delivery charges, local or
10 long distance calls, messenger services, unidentified professional services and other itemized
11 miscellaneous expenses. *CenTrust Mortgage Corp. v. PMI Mortgage Ins. Co.*, 166 Ariz. 50,
12 800 P.2d 37, 45-46 (Az.Ct.App. 1990). Ordinarily, the prevailing party in a contested action
13 arising out of contract would be entitled to recoup his costs of computerized legal research.
14 *Ahwatukee Custom Estates Mgmt. Ass’n*, 973 P.2d at 108-09 (“[a]ttorneys’ fees awards can
15 include the cost of computerized legal research.”). Because recovery of computerized legal
16 research fees is derivative of an award of attorneys’ fees, which will be denied in this case,
17 the Court will also deny Plaintiff’s request for recovery of any computerized legal research
18 fees.

19 Federal law governs Plaintiff’s award of taxable costs. *Aceves v. Allstate Ins.*
20 *Co.*, 68 F.3d 1160, 1167 (9th Cir. 1995). Plaintiff may recover his taxable costs with strict
21 compliance with Fed.R.Civ.P. 54(d)(1), LRCiv 54.1(a) and 28 U.S.C. § 1920.

22 **IV. Default Judgments**

23 Following the entry of default, Rule 55(b)(2), Fed.R.Civ.P., permits a district
24 court to enter final judgment in a case. Entry of default judgment, however, is not a matter
25 of right. “Its entry is entirely within the court’s discretion and may be refused where the court
26 determines no justifiable claim has been alleged or that a default judgment is inappropriate
27 for other reasons.” *Eason v. Indymac Bank, FSB*, 2010 WL 1962309, * 1 (D.Ariz., May 14,
28 2010) (citing *Draper v. Coombs*, 792 F.2d 915, 924 (9th Cir. 1986) and *Aldabe v. Aldabe*,

1 616 F.2d 1089, 1092 (9th Cir. 1980)). “[A]ll well-pleaded facts in the complaint are taken
2 as true, except those relating to damages.” *Black & Decker (U.S.), Inc. v. All Spares, Inc.*,
3 2010 WL 3034887, 2 (D.Ariz., Aug. 3, 2010) (citing *TeleVideo Sys., Inc. v. Heidenthal*, 826
4 F.2d 915, 917 (9th Cir. 1987)); *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th
5 Cir. 1977).

6 In determining damages, a district court can rely on the declarations submitted
7 by the plaintiff or conduct a full evidentiary hearing, Fed. R. Civ. P. 55(b)(2), and “can award
8 only up to the amount prayed for by a plaintiff in its complaint.” *Black & Decker*, 2010 WL
9 3034887 at 3 (citing *Truong Giang Corp. v. Twinstar Tea Corp.*, 2007 WL 1545173, at * 13
10 (N.D.Cal. 2007)). “[P]laintiff’s burden in ‘proving up’ damages on a motion for default
11 judgment is relatively lenient. If proximate cause is properly alleged in the complaint, it is
12 admitted upon default. Injury is established and plaintiff need prove only that the
13 compensation sought relates to the damages that naturally flow from the injuries pled.” *Id.*
14 (citing *Philip Morris USA, Inc. v. Castworld Products, Inc.*, 219 F.R.D. 494, 498 (C.D.Cal.,
15 2003) (citations omitted). “Entry of default judgment is not mandatory upon Plaintiff’s
16 request, and the court has discretion to require some proof of the facts that must be
17 established in order to determine liability.” *Martino v. Chapman*, 2008 WL 110948, * 1
18 (D.Ariz., Jan. 8, 2008) (quoting *Apple Computer Inc. v. Micro Team*, 2000 WL 1897354, at
19 *3 n. 5 (N.D.Cal. 2000) (citing 10A Charles Alan Wright & Arthur R. Miller, *Federal*
20 *Practice and Procedure* § 2688 (3rd ed. 1998)). Fundamental fairness, required by due
21 process of law, limits the scope of relief, which is, undoubtedly, why Rule 54(c),
22 Fed.R.Civ.P., proscribes that a “default judgment must not differ in kind from, or exceed in
23 amount, what is demanded in the pleadings.” *Freemyer v. Kyrene Village II, LLC*, 2011 WL
24 42681, * (D.Ariz., Jan. 6, 2011) (citing *Philip Morris USA*, 219 F.R.D. at 498 and quoting
25 Rule 54(c), Fed.R.Civ.P.).

26 Courts in the Ninth Circuit have held that “doubts about the actual assessment
27 of damages [awarded at a default hearing] will be resolved against the party who frustrates
28 proof of such, and the factfinder may calculate damages at the highest reasonably

1 ascertainable value.” *Taylor Made Golf Co., Inc. v. Carsten Sports, Ltd.*, 175 F.R.D. 658, 663
2 (S.D.Cal. 1997) (quoting *Nintendo v. Ketchum*, 830 F.Supp. 1443, 1445-1446, (M.D.Fla.
3 1993) (cited with approval on other grounds in *Nintendo v. Dragon Pacific International*, 40
4 F.3d 1007 (9th Cir. 1994)).

5 The Ninth Circuit has enumerated seven factors for a district court to consider
6 in determining whether to grant a default judgment: (1) the merits of the plaintiff’s
7 substantive claim; (2) the sufficiency of the complaint; (3) the sum of money at stake in the
8 action; (4) the possibility of prejudice to the plaintiff; (5) the possibility of a dispute
9 concerning material facts; (6) whether the default was due to excusable neglect; and (7) the
10 strong policy underlying the Federal Rules of Civil Procedure favoring a decision on the
11 merits. *Eitel v. McCool*, 782 F.2d 1470 (9th Cir. 1986); *Truong Giany Corp. v. Twinstar Tea*
12 *Corp.*, 2007 WL 1545173 (N.D. Cal. 2007). After considering and balancing all these factors,
13 the undersigned Magistrate Judge finds that they weigh strongly in favor of entering the
14 default judgment recommended herein.

15 Because the Complaint seeks non-liquidated, non-specific damages in excess
16 of \$75,000.00, and not “a sum certain or a sum that [could] be made certain by computation”
17 within the meaning of Rule 55(b), Fed.R.Civ.P., the Court conducted an on-the-record Rule
18 55(b)(2) default damages hearing on April 21, 2011.

19 **V. Findings of Fact⁷**

20 1. Defendant StreetSmarts, Inc. is a Delaware corporation with its principal
21 place of business in the State of Illinois. (Doc. 1-1, Exh. B, at 5-9; Tr. at 66) At all times
22 material herein, its office was located in Defendant Dave Batt’s residence where he lives with
23 his parents at 222 May Ave., Glen Ellyn, Illinois which is StreetSmarts’ nerve center and
24 principal place of business. (*Id.*)

25 2. StreetSmarts is also a corporation organized and existing under the laws of
26 the State of Delaware with a registered statutory agent in Delaware, United States

27
28 ⁷ The findings of fact may also be a mixture of facts and law.

1 Corporation Agents, Inc., located at 1521 Concord Pike # 301, Wilmington, DE 19803. (Doc.
2 1 at 1-2, ¶¶ 2-3)

3 3. StreetSmarts is a citizen of both Illinois and Delaware.

4 4. At all times material herein, Defendant Dave Batt was a resident of Cook
5 County, Illinois, the President, and Chief Executive Officer of Defendant StreetSmarts, Inc.
6 (Doc. 1 at 2, ¶ 4; Tr. 65-66)

7 5. At all times material herein, Plaintiff was a resident of Phoenix, Maricopa
8 County, Arizona. (Doc. 1 at 1, ¶ 1; Tr. 14-15)

9 6. At all times material herein, Defendant Batt was not in military service and
10 was neither an infant nor an incompetent person. (Tr. 25)

11 7. Defendants StreetSmarts and Batt purposefully directed their activities to
12 Plaintiff in Arizona; hired, consummated their contract with, and communicated to Plaintiff
13 in Arizona; benefitted and profited from Plaintiff's services performed by Plaintiff entirely
14 in Arizona; and intentionally availed themselves of the privilege of conducting Defendants'
15 business activities in and from Arizona to warrant Arizona exercising specific personal
16 jurisdiction over Defendants StreetSmarts and Batt. (Doc. 1 at 2, ¶¶ 5-6)

17 8. Plaintiff's claims directly arise out of, and relate to, StreetSmarts' and Batt's
18 forum-related activities. (Doc. 1 at 2; ¶ 5)

19 9. It is fair and reasonable to exercise specific jurisdiction over Defendants
20 StreetSmarts and Batt in Arizona.

21 10. Defendants StreetSmarts and Batt were properly served with process under
22 federal and Illinois procedural law, respectively.

23 11. Defendants StreetSmarts and Batt mailed a written employment contract
24 to Plaintiff at his residence in Phoenix, Arizona. On or about November 25, 2008, Plaintiff
25 signed and accepted an employment contract to be StreetSmarts' Vice President of
26 Operations, in return for an annual salary of \$115,000.00 plus benefits. (Tr. 16-20; doc. 1-1,
27 Exh A at 2-3) Plaintiff was employed by Defendants in Arizona, and Defendants intended
28 that the employment take place in Arizona. (Doc. 1 at 3, ¶ 11)

1 12. The contract provides, in relevant part, that Plaintiff’s annual
2 compensation will be:

3 \$115,000 of which \$75,000 is salary and \$40,000 is deferred and dependent
4 upon the company securing additional working capital. [Plaintiff’s] salary will
5 be paid twice monthly . . . in the gross amount (before taxes and deductions)
6 of \$3,125. The deferred component of your cash compensation is accrued
quarterly and will be paid contingent upon the company securing additional
working capital in the form of angel investment, a meaningful line of credit,
meaningful new customer revenue, or a Series A round of financing.

7
8 (*Id.* at 3-4, ¶ 13)

9 13. The contract required StreetSmarts to pay Plaintiff the \$40,000 “deferred
10 component of [his] cash compensation . . . upon the company securing additional working
11 capital in the form of angel investment, a meaningful line of credit, meaningful new customer
12 revenue, or a Series A round of financing.” (*Id.*)

13 14. StreetSmarts did, in fact, “secur[e] additional working capital in the form
14 of. . . meaningful new customer revenue” in the first and second quarters of 2010, but Batt
15 failed to pay Plaintiff as required under the contract. (Doc. 25 at p. 4, ¶ 18, verified at Tr. 17-
16 20, 22-23, Exh 1)

17 15. Beginning the pay period ending August 31, 2009, Defendants started
18 underpaying Plaintiff by making only partial payments of his salary. (Doc. 1-1, Exh D at 13)
19 On December 15, 2009, Defendants stopped paying Plaintiff entirely. (*Id.*, Tr. at 20-21, 39)
20 Defendant Batt repeatedly reassured Plaintiff that he would be paid in full. (Doc. 1 at 4-5,
21 ¶¶ 18-21) Batt informed Plaintiff that Defendants were just experiencing “a small glitch,”
22 there was nothing to worry about, that the delays were simple misunderstandings,
23 miscommunications, and StreetSmarts was not having any financial difficulties. (*Id.* at ¶ 18)

24 16. From December 2009 to August 4, 2010, Batt repeatedly promised
25 Plaintiff that StreetSmarts would be receiving additional investment capital and payments
26 from customers, and that Plaintiff would be made whole from those funds. (Tr. at 39-42) In
27 fact, Batt promised Plaintiff that Batt would accept personal responsibility for paying all
28 Plaintiff’s unpaid salary and benefits that Plaintiff was owed. (Doc. 1 at 5, ¶ 20) While

1 Plaintiff made repeated complaints to Batt about not being paid and demanded to be paid as
2 promised, Batt assured Plaintiff with promises and representations of forthcoming payment,
3 such that Plaintiff continued working and providing services in reliance upon Batt's
4 assurances, promises and representations. (*Id.*, ¶ 21)

5 17. Batt knew since, at least, October, 2009, that StreetSmarts was insolvent
6 or in significant financial trouble because on or around October 29, 2009, the Arizona
7 Department of Revenue made a demand on StreetSmarts for payment of its employees
8 unpaid withholding taxes. (Doc. 1 at 6, ¶ 26)

9 18. Defendant Batt specifically stated he was offended by the implication that
10 StreetSmarts would fail to pay wages, despite the fact that when StreetSmarts was previously
11 known as Involve Technology, Inc, it had repeated problems paying its employees. (Doc. 1
12 at 4-5, ¶ 19)

13 19. In reliance upon Batt's representations and promises that Plaintiff would
14 be paid in full, Plaintiff continued working for StreetSmarts and Batt forgoing other
15 employment opportunities. (Doc. 43 at 3, ¶ 14, verified at Tr. at 18-20)

16 20. During the entire time Plaintiff worked for StreetSmarts, from November
17 26, 2008 to August 5, 2010, his job performance was always acceptable. (*Id.*, ¶ 9, verified
18 at Tr. at 18-20)

19 21. In June 2010, StreetSmarts received substantial payments from its
20 customers as a direct result of Plaintiff's continued work to implement changes to the
21 programming, but contrary to Batt's promises, Batt did not use that money to pay Plaintiff's
22 unpaid salary and other benefits. (Doc. 1 at 6, ¶ 28) Instead, when Plaintiff complained to
23 Batt about the non-payment, Batt promised Plaintiff a double salary payment for the June
24 28, 2010 payroll period. (Doc. 1 at 6, ¶ 30; Tr. at 20-21) Plaintiff did not receive a double
25 payment in the June 28, 2010 payroll as Batt had promised. (Doc. 1 at 6, ¶ 31)

26 22. In June and July of 2010, StreetSmarts received several large payments
27 from customers but, again, instead of paying Plaintiff as Batt had promised, Batt spent the
28 funds on other items, such as, Batt's personal lawyers representing Batt in a child custody

1 dispute with his ex-wife. (Doc. 1 at 6-7, ¶ 32; Tr. at 68-69)

2 23. Sometime in June 2010, StreetSmarts' request for interim financing was
3 denied and Batt provided Plaintiff no specifics as to why. In fact, Plaintiff was not informed
4 that the interim financing was denied, and Plaintiff continued working for StreetSmarts with
5 the expectation that he would be paid as Batt promised. (Doc. 1 at 7, ¶ 33)

6 24. In July 2010, after Batt had spent all the incoming customer payments on
7 items other than payroll, Plaintiff was informed that StreetSmarts did not have any money
8 to pay Plaintiff's backpay or fund StreetSmarts' payroll going forward. On July 21, 2010,
9 Plaintiff's direct supervisor, Lisa, sent out an email, stating that she was attempting to obtain
10 approval to lay-off all of StreetSmarts' employees. (*Id.* at 7, ¶¶ 34-35)

11 25. On August 5, 2010, Batt sent Plaintiff an email with a letter attached,
12 dated August 4, 2010, claiming Plaintiff was laid-off "retroactively" to July 21, 2010,
13 confirming Defendants' indebtedness to Plaintiff, and, again, promising payment in the
14 future, i.e., "[w]hen the company closes on funding, you will be reimbursed all unpaid
15 earnings and approved expenses." (*Id.* at 7, ¶ 37; doc. 1-1, Exh C, at 11) By this time,
16 however, Plaintiff had experienced too many false promises so Plaintiff voluntarily
17 terminated his employment with StreetSmarts on August 4, 2010. (Tr. at 34)

18 26. With Batt's knowledge, Plaintiff continued to actively perform his work
19 for StreetSmarts while waiting for Batt to approve the lay-off of all StreetSmarts' employees.
20 (Doc. at 7, ¶ 36; doc. 1-1, Exh C, at 11)

21 27. Defendants StreetSmarts and Batt breached the employment contract with
22 Plaintiff, entitling Plaintiff to recover contractual and other damages as alleged in Count III
23 of the Complaint. (Doc. 1 at 11-12)

24 28. When Plaintiff terminated his employment with StreetSmarts on August
25 4, 2010, Defendants owed Plaintiff \$54,826.52 in unpaid salary, which is itemized in Exhibit
26 D to Plaintiff's Complaint. (Doc. 1-1, Exh D, at 13; Tr. at 21-22, 34-35) Treble damages of
27 the \$54,826.52 amounts to \$164,479.56. (Tr. 28, 30-32; doc. 1-1, Exh D)

28 29. At all times material herein, Plaintiff was an "employee" of Defendants

1 and his salary and deferred compensation constitutes “wages” within the meaning of A.R.S.
2 § 23-350(2),(5). *Schade*, 158 Ariz. at 11, 760 P.2d at 1060; A.R.S. § 23-350(2),(5).

3 30. There was no good faith dispute between the parties regarding the amount
4 of wages due Plaintiff.

5 31. Plaintiff is entitled to an award of treble damages of the \$54,826.52 in
6 unpaid salary which amounts to \$164,479.56, jointly and severally, against Defendants.
7 (\$54,826.52 x 3 = \$164,479.56) (Docs. 23 at 14; 1-1, Exh D, at 13; Tr. at 34-35) This
8 amount of money was reasonably proven by Plaintiff at the default damages hearing.

9 32. Defendant StreetSmarts is the “alter ego” of Defendant Batt. There is such
10 a unity of interest and ownership of Defendant StreetSmarts by Batt that the separate
11 personalities of StreetSmarts and Batt ceased to exist.

12 33. At all material times herein, Defendant Batt had complete control of
13 the Defendant StreetSmarts. Batt had ultimate authority over Defendant StreetSmarts as he
14 regularly exercised complete control over all aspects of the day-to-day operation, payroll,
15 and management of StreetSmarts, including how StreetSmarts’ money was spent.

16 34. Defendants StreetSmarts and Batt failed to comply with corporate
17 formalities. For example, Batt never conducted formal meetings of StreetSmarts’
18 shareholders or its board of directors. (Tr. at 65-68) StreetSmarts did not have a formal
19 office except in a location in Batts’ apartment or Batts’ parent’s residence when Batts lived
20 with them.

21 35. Observance of StreetSmarts’ corporate form under the facts and
22 circumstances of this case would sanction a fraud and promote an injustice on Plaintiff.
23 Plaintiff has sufficiently proven that StreetSmarts’ corporate veil should be pierced, imposing
24 joint and several liability on StreetSmarts and Batt for Plaintiff’s damages. (Doc. 1 at 3, ¶ 10)

25 36. While unknown to Plaintiff, Batt knew that StreetSmarts was financially
26 troubled and unable to pay the required payroll withholding taxes. As early as October 2009,
27 Batt knew that StreetSmarts was unable to make the payments he had promised to Plaintiff,
28 but did not inform Plaintiff of that fact, and instead continued making promises that he would

1 pay Plaintiff.

2 37. While Plaintiff has proven most of the other elements of fraud or
3 fraudulent misrepresentation by clear and convincing evidence, Plaintiff failed to prove by
4 clear and convincing evidence that Batt never intended to make the future payments he
5 promised to Plaintiff and Plaintiff's right to rely on Batt's promises. "[A] promise to perform
6 in the future is not a representation which can be shown to be true or false at the time it was
7 made, and therefore, a person has no right to rely, in a legal sense, on a representation of a
8 fact not in existence." *Denbo*, 18 Ariz.App. at 428, 503 P.2d at 386. Plaintiff's claim for
9 fraud or fraudulent misrepresentation fails.

10 38. Plaintiff has proven by a preponderance of the evidence that Batt made
11 numerous promises of future payments to Plaintiff, knowing at the time of such promises
12 StreetSmarts was insolvent and that Batt did so with the intent and express purpose of
13 securing Plaintiff's valuable future services. When sufficient money was received by
14 StreetSmarts to fully pay Plaintiff for his services, Batt wrongfully paid the money on other
15 items, including Batt's personal expenses. Plaintiff has proven by a preponderance of the
16 evidence that Batt breached the covenant of good faith and fair dealing in the contract with
17 Plaintiff. Plaintiff is not, however, entitled to additional contractual damages for the
18 contractual breach of the covenant of good faith and fair dealing because he is awarded
19 herein full damages for breach of contract and the law does not favor a double recovery.
20 *Burkons v. Ticor Title Ins. Co. of Cal.*, 168 Ariz. 345, 355, 813 P.2d 710, 720 (Ariz. 1991)
21 (Ordinarily, a party claiming breach of an implied covenant of good faith and fair dealing is
22 limited to contract damages.); *Calmat Co. v. Westfall Industries, Inc.*, 2008 WL 4138238, *
23 5 (Az.Ct.App., September 8, 2008) ("Contract damages are generally available for breach
24 of the covenant and are part of the prima facie case.").

25 39. Plaintiff failed to allege in the Complaint and prove a special relationship
26 between the parties arising from elements of the public interest, adhesion, or fiduciary
27 responsibility. Because Plaintiff did not allege and prove the necessary special relationship
28 to support a claim for breach of the implied covenant in tort, this claim fails. *Wells Fargo*

1 *Bank*, 201 Ariz. at 491, 38 P.3d at 29.

2 40. Because punitive damages may not be awarded in Arizona for a mere
3 breach of contract, Plaintiff's request for an award of punitive damages fails. *Continental*
4 *National Bank*, 107 Ariz. at 382, 489 P.2d at 19.

5 41. Plaintiff was never given the 25,000 shares of stock promised to Plaintiff
6 in his employment contract. (Doc. 1 at 8, ¶ 42; doc. 1-1, Exh A at 2-3) (“[A]s a special
7 incentive, you are also eligible for a retention bonus program. If you are an employee in good
8 standing with the company as of Feb. 1, 2009, you will be granted 25,000 shares of
9 StreetSmarts, Inc. common stock at the then fair market value.”) (Doc. 1-1, Exh A at 2)

10 42. Plaintiff is not entitled to recover the fair market value of the 50,000 shares
11 of StreetSmarts' stock options promised to Plaintiff in his employment contract because a
12 plain reading of the contract requires Plaintiff to be a StreetSmarts' employee for “over a four
13 year period” before the shares vest to Plaintiff. Plaintiff was not an employee of StreetSmarts
14 for over four years. (*Id.*) Batt's July 13, 2009 letter to Plaintiff, which confirmed Plaintiff's
15 pay raise to \$90,000.00 per year, paid semimonthly in the sum of \$3700.00 gross, did “not
16 alter the stock grant nor the stock option program described in [Batt's] offer letter of
17 11/25/2008.” (Doc. 1-1, Exh B at 5) (language within quotation marks handwritten and
18 initialed by Plaintiff).

19 43. Plaintiff failed to prove the fair market value the 25,000 shares of stock
20 owed to Plaintiff with reasonable certainty.

21 44. Plaintiff's negligent misrepresentation claim cannot stand on Batt's
22 promises of future conduct and, “unlike fraud, cannot even stand on a ‘promise made without
23 present intention to perform.’” *Frank Lloyd Wright Foundation*, 697 F.Supp.2d at 1130.
24 Because Batt's numerous promises that StreetSmarts or Batt would honor their contractual
25 commitments to pay Plaintiff his unpaid wages were clearly promises of future conduct,
26 Plaintiff's negligent misrepresentation claim fails. *Frank Lloyd Wright Foundation*, 2008 WL
27 5111092, * 3 (D.Ariz., Dec. 3, 2008).

28 45. Because Plaintiff had a specific written contract with StreetSmarts which

1 governed the relationship of the parties, Plaintiff's claim of unjust enrichment fails. *McNutt*,
2 2010 WL 3702509 at 2.

3 46. Plaintiff has not demonstrated that he is entitled to an award of \$30,922.18,
4 or any sum of money, in unpaid employment taxes because Plaintiff failed to show, that he,
5 as the employee, is legally obligated to pay StreetSmarts' portion of Plaintiff's employment
6 taxes, FICA, FUTA and SUTA out of any award herein.⁸ *San Francisco Baseball Assoc. L.P.*
7 *v. United States*, 88 F.Supp.2d 1087, 1090-91 (N.D.Cal. 2000) (general discussion of
8 employment taxes).

9 47. The fair and reasonable amount of treble damages that should be awarded
10 to Plaintiff is the sum of \$164,479.56, jointly and severally, against Defendants StreetSmarts
11 and Batt, plus 10% interest pursuant to A.R.S. § 44-1201(A) from August 15, 2009 to June
12 30, 2011 in the amount of \$30,839.85 (10% x. \$164,479.56 = \$16,447.96 divided by 12 =
13 \$1,370.66 per month x. 22.5 months = \$30,839.85), and Plaintiff's costs incurred herein,
14 excluding any attorneys' fees.

15 **VI. Conclusions of Law**

16 1. "[F]ederal courts sitting in diversity jurisdiction apply state substantive law
17 and federal procedural law." *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir.
18 2003). Arizona substantive law applies to this diversity action. The Court makes the
19 following conclusions of law:

20 2. This District Court has jurisdiction over this case pursuant to 28 U.S.C.
21 § 1332(a)(1), because the amount in controversy exceeds \$75,000 and the parties are
22 completely diverse.

23 3. It reasonable to exercise specific jurisdiction over the non-resident
24

25 ⁸ "FICA refers to Social Security or Federal Insurance Contribution Act taxes. FUTA
26 refers to Federal Unemployment Tax Act taxes. SUTA refers to the state analogues of the
27 FUTA taxes. In the case at bar, SUTA will refer to [the Arizona] counterpart to FUTA."
28 *Hathcock v. Acme Truck Lines, Inc.*, 262 F.3d 522, 524 n. 8 (5th Cir. 2001).

1 Defendants in Arizona. The extent of Defendants' purposeful interjection into Arizona, the
2 minimal burden on Defendants, the services performed by Plaintiff in Arizona for
3 Defendants, the lack of conflict with Defendants' home states, the harm occurring in Arizona
4 to Plaintiff, Arizona's interest in adjudicating the dispute, the convenience to Plaintiff to seek
5 redress in Arizona, and the Court's interest in efficiency weigh in favor of finding
6 jurisdiction in Arizona reasonable. Thus, specific personal jurisdiction exists over Defendants
7 StreetSmarts and Batt in Arizona.

8 4. Defendants StreetSmarts and Batt were properly and lawfully served with
9 the Summons and Complaint in accordance with federal and Illinois procedural law,
10 respectively.⁹

11 5. Plaintiff expressly consented in writing to magistrate-judge jurisdiction, doc.
12 6, pursuant to 28 U.S.C. § 636(c) and, therefore, this Magistrate Judge has jurisdiction to
13 issue this Report and Recommendation.

14 6. This Magistrate Judge has authority to recommend a non-final and
15 independent determination of fact and law that default judgment be entered against
16 Defendants without the consent of the Defendants. *Wang v. Masaitis*, 416 F.3d. 992 , 999
17 (9th Cir. 2005) (holding that the magistrate judge was well within her authority to issue an
18 report and recommendation on Wang's habeas petition without Wang's consent for *de novo*
19 review by district judge); 28 U.S.C. § 636(b)(1)(A); LRCiv. 72.2(a)(1).

20 7. Based on the evidence presented and the record herein, there was an offer,
21 an acceptance, consideration, and sufficient specification of the terms of Plaintiff's salary and
22 other benefits to determine Defendants' obligations to pay Plaintiff.

23
24 ⁹ Federal Rule of Civil Procedure 4 contains detailed provisions on the manner in
25 which service should occur, and a plaintiff may utilize the service of process rules that apply
26 in the state in which the federal district court is located or, if service is effected in another
27 state, the rules of that state. Fed.R.Civ.P. 4(e)(1). Therefore, service of process will be
28 upheld if it conforms to either federal or applicable state service of process rules. *Robinson
v. Heritage Elementary School*, 2009 WL 1578313, * 2 (D.Ariz. 2009).

1 8. Defendants StreetSmarts and Batt and Plaintiff executed a binding,
2 enforceable contract for the compensation and other benefits in return for Plaintiff's services
3 for and on behalf of Defendants.

4 9. Defendants StreetSmarts and Batt wilfully and wrongfully breached the
5 employment contract with Plaintiff by failing to pay Plaintiff his full salary and other
6 benefits, entitling Plaintiff to recover contractual and treble damages as alleged in Count I
7 of the Complaint. (Doc. 1 at 11-12)

8 10. At all times material herein, Plaintiff was an "employee" of Defendants
9 and his salary, deferred compensation and other benefits constituted "wages" within the
10 meaning of A.R.S. § 23-350(2),(5). *Schade*, 158 Ariz. at 11, 760 P.2d at 1060.

11 11. Plaintiff is entitled to an award of treble damages of the \$54,826.52¹⁰ in
12 unpaid wages which amounts to \$164,479.56, jointly and severally, against Defendants.
13 (\$54,826.52 x 3 = \$164,479.56) (Docs. 23 at 14; 1-1, Exh D, at 13; Tr. at 34-35) This
14 amount of money was reasonably proven by Plaintiff at the default damages hearing.

15 12. Defendant StreetSmarts is the "alter ego" of Defendant Batt. There is such
16 a unity of interest and ownership of Defendant StreetSmarts by Batt that the separate
17 personalities of StreetSmarts and Batt ceased to exist.

18 13. StreetSmarts' corporate veil should be pierced, imposing joint and several
19 liability on StreetSmarts and Batt for Plaintiff's damages. (Doc. 1 at 3, ¶ 10)

20 14. Plaintiff is the prevailing party in this action. Although this is a harsh,
21 unfair result in this case, Plaintiff's request for an award of its reasonable attorneys' fees
22 incurred in this uncontested action are not allowed under either A.R.S. § 12-341.01(A) or the
23 parties' contract.

24 15. Plaintiff's claims or causes of action for fraud or fraudulent
25 misrepresentation, breach of the implied covenant of good faith and fair dealing in tort,
26

27 ¹⁰ This sum includes the unreimbursed telephones expenses, medical and dental
28 expenses due Plaintiff. (Doc. 1-1, Exh Dat 13)

1 punitive damages, reasonable value of StreetSmarts' stock and stock options, negligent
2 misrepresentation, unjust enrichment, unpaid employment taxes, and an award of attorneys'
3 fees as the prevailing party fail.

4 Accordingly,

5 **IT IS RECOMMENDED** as follows:

6 1. Plaintiff's Applications for Entry of Default Judgment, docs. 16, 35, against
7 Defendants StreetSmarts and Batt be **GRANTED**;

8 2. Plaintiff's Motions for Award of Attorneys' Fees and Costs *etc.*, docs. 24,
9 38, be **DENIED**; and

10 3. Judgment be entered in favor of Plaintiff Craig Thompson and against
11 Defendants StreetSmarts and Batt, jointly and severally, in the amount of \$195,319.41, plus
12 Plaintiff's taxable costs allowed by Rule 54(d)(1), LRCiv 54.1, and 28 U.S.C. § 1920. See,
13 *In re Apollo Group, Inc. Securities Litigation*, 2009 WL 2169178 (D.Ariz., July 17, 2009).
14 The Judgment shall earn interest at the annual federal rate from the date of entry of this
15 Judgment until paid in full.

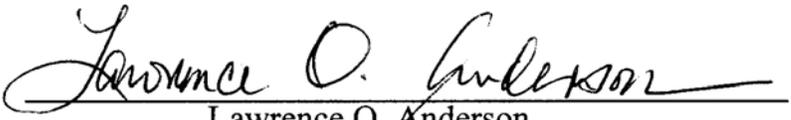
16 **IT IS FURTHER ORDERED** that if this Report and Recommendation is
17 approved by Senior United States District Judge Stephen M. McNamee or if he otherwise
18 directs, the Clerk is kindly directed to enter Judgment consistent with this Order pursuant to
19 Rule 58(a), (b)(2), Fed.R.Civ.P.

20 This recommendation is not an order that is immediately appealable to the
21 Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules
22 of Appellate Procedure, should not be filed until entry of the District Court's judgment. The
23 parties shall have 14 days from the date of service of a copy of this recommendation within
24 which to file specific written objections with the Court. 28 U.S.C. § 636(b)(1), as amended
25 on December 1, 2009¹¹; Rules 72 and 6, Federal Rules of Civil Procedure, as amended on
26 December 1, 2009. Thereafter, the parties have fourteen (14) days within which to file a

27 _____
28 ¹¹ See, Statutory Time-Periods Technical Amendments Act of 2009. H.R. 1626.

1 response to the objections. Rule 72(b)(2), Fed.R.Civ.P. Failure to file timely objections to
2 this Magistrate Judge's Report and Recommendation may result in the acceptance of the
3 Report and Recommendation by the District Judge without further review. *United States v.*
4 *Reyna- Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure to file timely objections to any
5 factual determinations of this Magistrate Judge will be considered a waiver of a party's right
6 to appellate review of the findings of fact in an order or judgment entered pursuant to this
7 Magistrate Judge's recommendations. Rule 72, Federal Rules of Civil Procedure.

8 Dated this 30th day of June, 2011.

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10 
11 Lawrence O. Anderson
12 United States Magistrate Judge
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