

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8  
9 Carpenter Crest 401,

10 Plaintiff,

11 v.

12 Rebekah Converti, et al.,

13 Defendants.  
14

No. CV-15-02004-PHX-JZB

**ORDER**

15 Pending before the Court is Plaintiff Douglas Lane Probstfeld's Amended Motion  
16 for Entry of Default Judgment. (Doc. 17.) Defendants Rebekah Converti and The 2-  
17 Acorns, Inc. (collectively, Defendants) were served with Summons and the Complaint on  
18 January 27, 2016. (Doc. 11.) On March 7, 2016, after Defendants failed to respond,  
19 Plaintiff filed a Motion for Entry of Default Judgment, which the Court construed as a  
20 Motion for Entry of Default. (Docs. 12, 13, 14.) On March 8, 2016, the Clerk entered  
21 default against Defendants. (Doc. 13.) On April 22, 2016, the Court ordered Plaintiff to  
22 file supplemental briefing addressing the factors identified by the Ninth Circuit Court in  
23 *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). (Doc. 14.) On May 6, 2016,  
24 Plaintiff filed a Motion for Entry of Default Judgment against Defendants pursuant to  
25 Rule 55(b) of the Federal Rules of Civil Procedure. (Doc. 15.) Due to several errors in  
26 Plaintiff's damage calculations, the Court denied Plaintiff's Motion without prejudice.  
27 (Doc. 16.) On November 28, 2016, Plaintiff filed an Amended Motion for Entry of  
28 Default Judgment. (Doc. 17.) For the reasons set forth below, the Court will grant

1 Plaintiff's Amended Motion.<sup>1</sup>

2 **I. Background**

3 On October 6, 2015, Plaintiff Douglas Lane Probstfeld, Trustee of the Carpenter  
4 Crest 401(k) PSP, a tax-exempt profit-sharing plan and trust, filed his Complaint in this  
5 action, alleging that Defendants Rebekah Converti and The 2-Acorns, Inc. violated  
6 A.R.S. § 44-1991 (Arizona securities fraud), and 15 U.S.C. § 78j (Federal securities  
7 fraud). (Doc. 1 ¶¶ 45-58.) Plaintiff also asserts claims against Defendants for: (1) fraud,  
8 fraudulent inducement, intentional misrepresentation; (2) negligent misrepresentation; (3)  
9 breach of contract; (4) breach of the implied covenant of good faith and fair dealing; and  
10 (5) conversion. (*Id.* ¶¶ 59-93.)<sup>2</sup>

11 In support of his claims, Plaintiff alleges that in September 2013, Defendant  
12 “Converti solicited investments in a home ‘fix and flip’ project through her website and  
13 through contacts with various financial advisors.” (*Id.* ¶ 11.) One of those advisors,  
14 Joshua Sharp, informed Plaintiff that with an investment of \$350,000 to cover  
15 improvements to a home, Plaintiff would receive either a 15% return on the investment or  
16 a 30% net profit share from the home. (*Id.* ¶¶ 13-17; Doc. 1-1 at 2.) On October 4, 2013,  
17 Plaintiff informed Sharp of his interest in the investment opportunity. (Doc. 1 ¶ 21.) On  
18 October 6, 2013, Defendant Converti signed a Promissory Note on behalf of The 2-  
19 Acorns, Inc., secured by a deed of trust, stating that Plaintiff’s \$350,000 would be repaid  
20 upon the resale of the home. (*Id.* ¶ 24; Doc. 1-1 at 5.) The Promissory Note further  
21 states that “[b]orrower agrees to pay monthly interest payments, due the sixth of each  
22 month starting April 6th 2014, in the amount of [\$4,666.67] if the loan is not paid in full  
23

---

24 <sup>1</sup> Because Defendants have not appeared or consented to Magistrate Judge  
25 jurisdiction, this Court issues an Order on Plaintiff’s pending Amended Motion for Entry  
of Default Judgment. *See* General Order 11-03.

26 <sup>2</sup> Plaintiff also names John Doe Converti, the fictitious name of Rebekah  
27 Converti’s husband, as a Defendant in this action. (Doc. 1.) Plaintiff claims in the  
28 Complaint that it is unknown whether Rebekah Converti is married, and, to date, Plaintiff  
has not further identified or served this fictitiously-named Defendant. (*Id.* ¶ 6.) The  
Court’s reference to “Defendant Converti” throughout this Order refers only to Rebekah  
Converti.

1 by April 1[], 2014.” (Doc. 1-1 at 5.)

2 Plaintiff also alleges that “[o]n October 8, 2013, [he] authorized a wire transfer of  
3 \$350,000 from the Carpenter Crest 401(k) Plan and Trust to an account designated by  
4 The 2-Acorns, Inc.” (Doc. 1 ¶ 30.) However, Plaintiff discovered, after wiring the  
5 money, that a majority of the original investment was used to purchase the home rather  
6 than for renovations to the home, and the balance of the money was distributed to  
7 Defendants. (*Id.* ¶¶ 31-32, 92.) On March 7, 2014, Sharp informed Plaintiff that the  
8 home would be placed on the market in April; however, Plaintiff received no  
9 communications from Defendant Converti, Defendant The 2-Acorns, Inc., or Sharp until  
10 May 28, 2014. (*Id.* ¶¶ 33-35.)

11 On May 28, 2014, Defendant Converti informed Plaintiff that none of the  
12 renovations were complete and the home would be foreclosed if Plaintiff did not provide  
13 more money. (*Id.* ¶ 35.) Plaintiff demanded an explanation for what happened to his  
14 money. (*Id.* ¶ 36.) Defendant Converti explained in a June 3, 2014 email that only  
15 \$100,000 of Plaintiff’s investment was used to remodel the home, and the rest of the  
16 investment was used to purchase the home and for closing costs. (*Id.* ¶ 36.) Defendant  
17 Converti further told Plaintiff that “[i]t was my fault for closing the deal before it was  
18 100% financed knowing I could not finish the deal without the additional funds.” (*Id.* ¶  
19 40.)

20 Plaintiff also alleges that Defendant Converti told Plaintiff the contractor she  
21 allegedly hired “ripped her off.” (*Id.* ¶ 37.) However, Plaintiff asserts that Defendants  
22 did not make any effort to engage a contractor to renovate the property, never sought a  
23 construction permit, and did not complete any remodeling or renovations on the property.  
24 (*Id.* ¶¶ 38-39.) Defendants did not contribute additional funds to avoid a foreclosure on  
25 the property and did not make any payments to Plaintiff at any time. (*Id.* ¶¶ 41, 44.)  
26 Plaintiff further asserts that although Sharpe represented otherwise, Defendants did not  
27 have any “slush” funds “at any time either to acquire or renovate the home or to make  
28 payments to the first lien holder.” (*Id.* ¶¶ 14, 42.) As a result, Plaintiff claims, “[o]n June

1 26, 2014, the first lien holder foreclosed on the home, and it was sold at a trustee sale  
2 pursuant to A.R.S. § 33-801 et seq.” (*Id.* ¶ 43.)

3 On January 27, 2016, Plaintiff served the Summons and Complaint on Defendants.  
4 (Doc. 11.) Neither Defendant answered the Complaint or otherwise appeared within the  
5 time frame required by Rule 12 of the Federal Rules of Civil Procedure. On March 7,  
6 2016, Plaintiff filed his Motion for Entry of Default against Defendants. (Doc. 12.) On  
7 March 8, 2016, the Clerk entered default against Defendants. (Doc. 13.) On April 22,  
8 2016, the Court ordered Plaintiff to file supplemental briefing. (Doc. 14.) Plaintiff  
9 subsequently filed a Motion for Default Judgment. (Doc. 15.) The Court denied  
10 Plaintiff’s Motion without prejudice based on numerous errors in Plaintiff’s damage  
11 calculations. (Doc. 16.) On November 28, 2016, Plaintiff filed an Amended Motion for  
12 Entry of Default Judgment. (Doc. 17.) Plaintiff asks the Court to enter judgment in his  
13 favor for (1) \$350,000 in principal; (2) \$102,666.74 in unpaid monthly interest payments  
14 (22 months); and (3) \$4,666.67 in additional monthly interest payments until the principal  
15 amount of \$350,000, plus all accrued interest, has been paid in full to Plaintiff. (*Id.*)

## 16 **II. Discussion**

### 17 **a. Jurisdiction**

18 “When entry of judgment is sought against a party who has failed to plead or  
19 otherwise defend, a district court has an affirmative duty to look into its jurisdiction over  
20 both the subject matter and the parties.” *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999).  
21 (stating that where the Court properly raised, *sua sponte*, the issue of whether it could  
22 exercise personal jurisdiction over Iraq before deciding whether it could enter default  
23 judgment against it in an effort to “avoid ent[ry of] a default judgment that can later be  
24 successfully attacked as void”). As detailed below, the Court finds that it has both  
25 subject matter jurisdiction over this action and personal jurisdiction over the parties.

#### 26 **1. Subject Matter Jurisdiction**

27 Plaintiff alleges Defendants violated 15 U.S.C. § 78j. (Doc. 1 ¶¶ 54-58.)  
28 Therefore, pursuant to 28 U.S.C. § 1331, this Court has federal question jurisdiction over

1 Plaintiff's federal claims. *See* 28 U.S.C. § 1331 (“The district courts shall have original  
2 jurisdiction of all civil actions arising under the Constitution, law, or treaties of the  
3 United States.”). Furthermore, the Court has supplemental jurisdiction over Plaintiff’s  
4 related state law claims. *See* 28 U.S.C. § 1367(a) (. . . in any civil action of which the  
5 district courts have original jurisdiction, the district courts shall have supplemental  
6 jurisdiction over all other claims that are so related to claims in the action within such  
7 original jurisdiction that they form part of the same case or controversy under Article III  
8 of the United States Constitution.”). Therefore, the Court is satisfied that it has subject  
9 matter jurisdiction over this action.

10 **2. Personal Jurisdiction**

11 **i. Defendant Converti**

12 Personal jurisdiction over a defendant may be acquired “by personal service of  
13 that defendant or by means of a defendant’s ‘minimum contacts’ with the jurisdiction.”  
14 *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992). Here, Plaintiff  
15 alleges that Defendant Converti is a resident of Maricopa County, Arizona and was  
16 personally served on January 27, 2016, at a residence in Gilbert, Arizona. (Doc. 11.)  
17 Thus, the Court is satisfied that it has personal jurisdiction over Defendant Converti.

18 **ii. Defendant The 2-Acorns, Inc.**

19 Plaintiff’s Complaint alleges that at all relevant times, Defendant The 2-Acorns,  
20 Inc. was a non-resident, Nevada corporation. (Doc. 1 ¶ 4.) Plaintiff alleges that  
21 Defendant Converti is the managing agent of The 2-Acorns, Inc. and, therefore, the  
22 corporation was properly served under Rule 4 of the Federal Rules of Civil Procedure.  
23 (Doc. 1 ¶¶ 8, 25; Doc. 12 at 2-3.)

24 Rule 4(h) of the Federal Rules of Civil Procedure provides that a corporation is  
25 properly served by “delivering a copy of the summons and of the complaint to an officer,  
26 a managing or general agent, or any other agent authorized by appointment or by law to  
27 receive service of process . . . .” Defendant Converti was served with the Summons and  
28 Complaint for The 2-Acorns, Inc. (Doc. 11.) However, personal service of a corporate

1 agent within the forum state, alone, is not necessarily sufficient to establish that this  
2 Court has personal jurisdiction over a nonresident corporation. *See Martinez v. Aero*  
3 *Caribbean*, 764 F.3d 1062, 1066 (9th Cir. 2014) (“A court may exercise general personal  
4 jurisdiction over a corporation only when its contacts ‘render it essentially at home’ in the  
5 state.”).

6 The Court finds, however, that it has personal jurisdiction over The 2-Acorns, Inc.  
7 with regard to Plaintiff’s federal claim pursuant to 15 U.S.C. § 78aa. Jurisdiction for  
8 claims brought under the Securities Exchange Act is governed by Section 27 of the Act.  
9 *See* 15 U.S.C. § 78aa. “So long as a defendant has minimum contacts with the United  
10 States, Section 27 of the Act confers personal jurisdiction over the defendant in any  
11 federal district court.” *Sec. Inv’r Prot. Corp. v. Vigman*, 764 F.2d 1309, 1316 (9th Cir.  
12 1985). Thus, because, as detailed below, the Court finds that Plaintiff has sufficiently  
13 stated a claim against The 2-Acorns, Inc. for violations of 15 U.S.C. § 78j, Section 27  
14 applies, and Plaintiff need only have alleged Defendant The 2-Acorns, Inc. has minimum  
15 contacts with the United States. *See Vigman*, 764 F.2d at 1316; *Go-Video, Inc. v. Akai*  
16 *Elec. Co.*, 885 F.2d 1406, 1416 (9th Cir. 1989) (“[W]e adhere to our decision in *Vigman*  
17 that, when a statute authorizes nationwide service of process, national contacts analysis is  
18 appropriate.”).

19 Here, Plaintiff asserts that Defendant is a Nevada corporation, which solicited  
20 Plaintiff for an investment property in Arizona. (Doc. 1 ¶¶ 4, 9, 20.) Plaintiff served  
21 The 2-Acorns through its agent, Defendant Converti, in Arizona. (Doc. 11.) Therefore,  
22 the Court finds that Plaintiff has alleged sufficient contacts within the United States to  
23 allow this Court to exercise personal jurisdiction over Defendant The 2-Acorns, Inc. with  
24 regard to Plaintiff’s federal Securities Act claim.

25 The Court further finds that it has pendent personal jurisdiction over Plaintiff’s  
26 related state law claims. *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d  
27 1174, 1176 (9th Cir. 2004). Under the pendent personal jurisdiction doctrine, if a district  
28 court has personal jurisdiction over federal claims, “then it may, in its discretion, exercise

1 pendent personal jurisdiction over the state-law claims contained in the same complaint.”  
2 *Id.* For such jurisdiction to be proper, Plaintiff’s state law claims must “arise[ ] out of a  
3 common nucleus of operative facts” as the federal claim over which the court has  
4 personal jurisdiction. *Id.* at 1180. “Pendent personal jurisdiction is typically found  
5 where one or more federal claims for which there is nationwide personal jurisdiction are  
6 combined in the same suit with one or more state or federal claims for which there is not  
7 nationwide personal jurisdiction.” *Id.* at 1180-81. The decision to exercise pendent  
8 personal jurisdiction is within the discretion of the district court and depends on  
9 ““considerations of judicial economy, convenience and fairness to litigants.”” *Id.* at 1181  
10 (quoting *Oetiker v. Jurid Werke, G.m.b.H.*, 556 F.2d 1, 5 (D.C. Cir. 1977)).

11 Here, all of Plaintiff’s claims arise from the same nucleus of operative facts.  
12 (Doc. 1 ¶¶ 11-44.) Therefore, in the interests of judicial economy, convenience, and  
13 fairness, the Court finds it appropriate to exercise pendent personal jurisdiction over  
14 Plaintiff’s state law claims against The 2-Acorns, Inc.

15 **b. Standard for Entry of Default Judgment**

16 **i. Rule 55 of the Federal Rules of Civil Procedure**

17 Rule 55(a) of the Federal Rules of Civil Procedure provides that “[w]hen a party  
18 against whom a judgment for affirmative relief is sought has failed to plead or otherwise  
19 defend, and that failure is shown by affidavit or otherwise, the clerk must enter the  
20 party’s default.” A party must apply to the court for a default judgment, according to  
21 Rule 55(b)(2), however, the district court has discretion to grant default judgment. *See*  
22 *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (considering lack of merit in  
23 plaintiff’s substantive claims, the court did not abuse its discretion in declining to enter a  
24 default judgment). Here, the Clerk has entered Defendants’ default. Thus, the Court may  
25 consider Plaintiff’s request for default judgment against Defendants.

26 **ii. The *Eitel* Factors**

27 When deciding whether to grant default judgment, the Court considers the  
28 following “*Eitel*” factors: “(1) the possibility of prejudice to the plaintiff[;] (2) the merits

1 of the plaintiff's substantive claim[;] (3) the sufficiency of the complaint[;] (4) the sum of  
2 money at stake in the action; (5) the possibility of a dispute concerning material facts; (6)  
3 whether the default was due to excusable neglect[;] and (7) the strong policy underlying  
4 the Federal Rules of Civil Procedure favoring decisions on the merits." *Eitel v. McCool*,  
5 782 F.2d 1470, 1471–72 (9th Cir. 1986). In applying the *Eitel* factors, "the factual  
6 allegations of the complaint, except those relating to the amount of damages, will be  
7 taken as true." *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977).  
8 As detailed below, the Court finds that the factors weigh in favor of granting Plaintiff's  
9 Amended Motion for Entry of Default Judgment against Defendants.

### 10 **1. Possible Prejudice to Plaintiff**

11 The first *Eitel* factor weighs in favor of granting Plaintiff's Amended Motion.  
12 Plaintiff served Defendants on January 27, 2016. (Doc. 11.) Defendants have not  
13 answered the Complaint or otherwise appeared in this action. In view of Defendants'  
14 default, Plaintiff has no alternative means by which to resolve his claims against  
15 Defendants. *See Pepsico, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal.  
16 2002). Therefore, Plaintiff will be prejudiced if a default judgment is not entered.

### 17 **2. Merits of Plaintiff's Claims and the Sufficiency of the** 18 **Complaint**

19 Considering the relationship between the second and third *Eitel* factors, the Court  
20 considers the merits of Plaintiff's substantive claims and the sufficiency of the Complaint  
21 together. The Ninth Circuit Court has suggested that, when combined, these factors  
22 require a plaintiff to "state a claim on which the plaintiff may recover." *Id.* at 1175  
23 (citation omitted).

24 Plaintiff asserts eight separate Counts against Defendants: (1) Arizona securities  
25 fraud pursuant to A.R.S. § 44-1991; (2) federal securities fraud pursuant to 15 U.S.C. §  
26 78j; (3) fraud, fraudulent inducement, intentional misrepresentation; (4) negligent  
27 misrepresentation; (5) breach of contract; (6) breach of the implied covenant of good  
28 faith and fair dealing; (7) conversion against Defendants for using Plaintiff's funds



1 towards the closing costs of the home; and (8) conversion against Defendants for  
2 withholding the remainder of the \$350,000 for Defendant Converti's personal use. (Doc.  
3 ¶¶ 45-93.) The Court addresses these claims below.

4 **a. Claims Pursuant to A.R.S. § 44-1991**

5 Plaintiff asserts claims against Defendants under A.R.S. § 44-1991 for securities  
6 fraud. A.R.S. § 44-1991(A) provides the following:

7 A. It is a fraudulent practice and unlawful for a person, in  
8 connection with a transaction or transactions within or from  
9 this state involving an offer to sell or buy securities, or a sale  
10 or purchase of securities, including securities exempted under  
section 44-1843 or 44-1843.01 and included transactions  
exempted under section 44-1844, 44-1845 or 44-1850,  
directly or indirectly to do any of the following:

11 1. Employ any device, scheme or artifice to defraud.

12 2. Make any untrue statement of material fact, or omit  
13 to state any material fact necessary in order to make the  
14 statements made, in the light of the circumstances under  
which they were made, not misleading.

15 3. Engage in any transaction, practice or course of  
business which operates or would operate as a fraud or deceit.

16 A.R.S. § 44-1991(A). A plaintiff's "burden of proof [for claims pursuant to 44-  
17 1991(A)(2)] requires only that [he or she] demonstrate that the statements were material  
18 and misleading." *Aaron v. Fromkin*, 994 P.2d 1039, 1042 (Ariz. Ct. App. 2000).

19 Here, Plaintiff asserts that Defendants, through their agent Sharp, made the  
20 following false statements to Plaintiff in connection with an offer to buy or sell a  
21 security: (1) the \$350,000 would be applied solely toward renovating the home; (2)  
22 Defendants had a "slush fund" to cover unforeseen contingencies; (3) Defendants would  
23 hire licensed professionals to remodel the home; and (4) Defendants would abide by the  
24 terms of the Promissory Note. (Doc. 1 ¶ 49.) Plaintiff also alleges that Defendants' false  
25 misrepresentations caused Plaintiff to invest money in Defendants' flip scheme and to  
26 suffer an economic loss. (*Id.* ¶¶ 24-28, 47-53.) Plaintiff further alleges that Defendants  
27 were willful and malicious in making the false statements, and the statements were false  
28 at the time they were made. (*Id.* ¶ 49.) Based on these alleged facts, the Court finds that

1 Plaintiff has sufficiently stated claims under A.R.S. § 44-1991(A)(2).

2 **b. Claims Pursuant to 15 U.S.C. § 78j**

3 Plaintiff also alleges in his Complaint that Defendants are liable for federal  
4 securities fraud pursuant to 15 U.S.C. § 78j(b). (Doc. 1 ¶¶ 54-58.) 15 U.S.C. § 78j(b)  
5 provides that:

6 It shall be unlawful for any person, directly or indirectly, by  
7 the use of any means or instrumentality of interstate  
8 commerce or of the mails, or of any facility of any national  
9 securities exchange –

10 . . .

11 (b) To use or employ, in connection with the purchase or sale  
12 of any security registered on a national securities exchange or  
13 any security not so registered, or any securities-based swap  
14 agreement[,] any manipulative or deceptive device or  
15 contrivance in contravention of such rules and regulations as  
16 the Commission may prescribe as necessary or appropriate in  
17 the public interest or for the protection of investors.

18 Rule 10b-5 implements § 78j by making it unlawful:

19 (a) To employ any device, scheme, or artifice to defraud,

20 (b) To make any untrue statement of a material fact or to omit  
21 to state a material fact necessary in order to make the  
22 statements made, in the light of the circumstances under  
23 which they were made, not misleading, or

24 (c) To engage in any act, practice, or course of business  
25 which operates or would operate as a fraud or deceit upon any  
26 person, in connection with the purchase or sale of any  
27 security.

28 17 C.F.R. § 240.10b-5. To state a claim for relief under 15 U.S.C. § 78j, Plaintiff must  
allege: “(1) a material misrepresentation or omission of fact, (2) scienter, (3) a connection  
with the purchase or sale of a security, (4) transaction and loss causation, and (5)  
economic loss.” *In re Daou Sys., Inc.*, 411 F.3d 1006, 1014 (9th Cir. 2005). Plaintiff  
must show both elements of causation—transaction causation and loss causation. *Nuveen  
Mun. High Income Opportunity Fund v. City of Alameda*, 730 F.3d 1111, 1118 (9th Cir.  
2013). “Transaction causation is akin to reliance; it focuses on the time of the transaction  
and ‘refers to the causal link between the defendant’s misconduct and the plaintiff’s

1 decision to buy or sell securities.” *Id.* (quoting *Emergent Capital Inv. Mgmt., LLC v.*  
2 *Stonepath Grp., Inc.*, 343 F.3d 189, 197 (2d Cir. 2003)). “Loss causation is simply ‘a  
3 causal connection between the material misrepresentation and the loss.” *Id.* at 1119  
4 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005)). “[A] plaintiff can  
5 satisfy loss causation by showing that ‘the defendant misrepresented or omitted the *very*  
6 *facts* that were a substantial factor in causing the plaintiff’s economic loss.” *Id.* at 1120  
7 (quoting *McCabe v. Ernst & Young, LLP*, 494 F.3d 418, 425 (3d Cir. 2007)).

8 The Court finds that Plaintiff’s Complaint sufficiently states claims for relief  
9 against Defendants under 15 U.S.C. § 78j(b). Plaintiff alleges that Defendants’  
10 intentional misrepresentations, through their agent Sharp, caused Plaintiff to invest in the  
11 flip scheme under the terms of the Promissory Note. (Doc. 1 ¶¶ 56-58.) Plaintiff further  
12 alleges that Defendants’ misrepresentation of the funds available to purchase the property  
13 and for contingencies caused Plaintiff’s economic loss. (*Id.* ¶¶ 42-43, 47-53.) More  
14 specifically, Plaintiff asserts that because Defendants in fact did not have a slush fund to  
15 fully acquire or renovate the home, the first lien holder foreclosed on the home and it was  
16 sold at a trustee sale, causing Plaintiff a loss of his initial investment and any expected  
17 return. (*Id.* ¶¶ 35, 39-40, 42-43.) Therefore, the Court finds that Plaintiff has sufficiently  
18 stated claims for relief against Defendants pursuant to 15 U.S.C. § 78j.

### 19 c. Fraud and Negligent Misrepresentation Claims

20 Plaintiff also asserts claims for fraud and negligent misrepresentation against  
21 Defendants. (Doc. 1 ¶¶ 59-75.) In Arizona, to state a common law fraud claim, a  
22 plaintiff must sufficiently plead: (1) a representation, (2) its falsity, (3) its materiality, (4)  
23 the speaker’s knowledge of its falsity or ignorance of its truth, (5) the speaker’s intent  
24 that it be acted upon by the recipient in the manner reasonably calculated, (6) the hearer’s  
25 ignorance of its falsity, (7) the hearer’s reliance on its truth, (8) the right to rely on it, and  
26 (9) a consequent and proximate injury. *Arnold & Associates, Inc. v. Misys Healthcare*  
27 *Systems, a div. of Misys, PLC*, 275 F. Supp. 2d 1013, 1027 (D. Ariz. 2003). Negligent  
28 misrepresentation “is committed by the giving of false information intended for the

1 guidance of others and justifiably relied upon by them causing damages if the giver of the  
2 false information fails to exercise reasonable care or competence in obtaining or  
3 communicating the information.” *St. Joseph’s Hosp. & Med. Ctr. v. Reserve Life Ins.*  
4 *Co.*, 742 P.2d 808, 813 (Ariz. 1987).

5 Here, Plaintiff alleges that: (1) Defendants, through their agents, made false  
6 representations as described above; (2) the false representations were material because  
7 Plaintiff only agreed to transfer the money based on the terms set forth by Sharp (Doc. 1  
8 ¶¶ 16-23, 50, 51); (3) Defendants intended Plaintiff to rely on the representations to  
9 obtain Plaintiff’s money (*id.* ¶¶ 13-18); and (4) Plaintiff reasonably relied on the  
10 representations because Defendant Converti “held herself out as a real estate expert who  
11 had prior experience in these types of ‘fix and flip’ opportunities” (*id.* ¶ 65). Plaintiff  
12 further asserts that Defendants’ misrepresentations were willful and malicious, with the  
13 intent to harm. (*Id.* ¶ 53.) Finally, Plaintiff alleges that “[a]s a direct, proximate and  
14 foreseeable result of Defendant’s negligent [and fraudulent] acts and omissions, Plaintiff  
15 suffered, and continues to suffer, damages, in the amount of \$350,000 plus the monthly  
16 interest payments and late charges, in an amount not yet fully determined.” (*Id.* ¶¶ 66,  
17 74.) Based on these allegations, the Court finds that Plaintiff has sufficiently stated  
18 claims for fraud and negligent misrepresentation.

#### 19 **d. Conversion**

20 Plaintiff also alleges that Defendants are liable for conversion. Conversion is  
21 defined as “an act of wrongful dominion or control over personal property in denial of or  
22 inconsistent with the rights of another.” *Sears Consumer Fin. Corp. v. Thunderbird*  
23 *Prods.*, 802 P.2d 1032, 1034 (Ariz. Ct. App. 1990). To maintain an action for  
24 conversion, a plaintiff must have had the right to immediate possession of the personal  
25 property at the time of the alleged conversion. *Case Corp. v. Gehrke*, 91 P.3d 362, 365  
26 (Ariz. Ct. App. 2004) (citing *Sears Consumer Fin. Corp.*, 802 P.2d at 1034). To maintain  
27 an action for conversion of money, a plaintiff must establish that “the money can be  
28 described, identified or segregated, and an obligation to treat it in a specific manner is

1 established.” *Gehrke*, 91 P.3d at 365 (quoting *Autoville*, 510 P.2d at 403).

2 Here, Plaintiff alleges that Defendants applied \$190,474.45 of Plaintiff’s  
3 investment toward the down payment and closing costs, and kept the remainder of the  
4 investment for Defendant Converti’s personal use, even though Defendants, through their  
5 agreement, had an obligation to use that money to renovate the purchased home. (Doc. 1  
6 ¶¶ 82-93.) Plaintiff asserts that when the home was foreclosed, Plaintiff lost his  
7 \$350,000. (*Id.* ¶¶ 86, 90.) And, under the terms of the Promissory Note, Defendants  
8 were obligated to return Plaintiff’s investment upon closing on the sale of the home.  
9 Under these facts, the Court finds that Plaintiff has sufficiently stated claims for  
10 conversion.

#### 11 e. Breach of Contract

12 To state a claim for breach of contract, a plaintiff is required to prove the existence  
13 of a contract, its breach, and the resulting damage. *Coleman v. Watts*, 87 F. Supp. 2d  
14 944, 955 (D. Ariz. 1998). Plaintiff alleges that “Defendants breached the terms of the  
15 Promissory Note” and that “Plaintiff suffered, and continues to suffer direct and  
16 consequential damages” as a result of the breach. (Doc. 1 ¶¶ 77-78.) A Promissory Note  
17 “is a contract that evidences the loan and the [borrower’s] duty to repay.” *Hogan v. Wash*  
18 *Mut. Bank, N.A.*, 277 P.3d 781, 784 (Ariz. 2012). Although the Promissory Note was  
19 executed by Defendant Converti on behalf of The 2-Acorns, Inc., Plaintiff asserts that  
20 The 2-Acorns, Inc. is the alter ego of Defendant Converti and, therefore, Defendant  
21 Converti is personally liable for the conduct of the corporation. (Docs. 1 ¶¶ 8, 68; Doc.  
22 1-1 at 5.)

23 Under Arizona law, “[t]he corporate fiction will be disregarded when the  
24 corporation is the alter ego or business conduit of a person.” *Dietel v. Day*, 492 P.2d 455,  
25 457 (Ariz. Ct. App. 1972). In assessing unity of control between a corporation and its  
26 shareholders, the Court considers: “payment of salaries and expenses of the corporation  
27 by shareholders; failure to maintain corporate formalities; undercapitalization;  
28 commingling of corporate and personal finances; plaintiff’s lack of knowledge about a

1 separate corporate existence; owners' making of interest-free loans to the corporation;  
2 and diversion of corporate property for personal use." *Great Am. Duck Races, Inc. v.*  
3 *Intellectual Solutions, Inc.*, 2:12-cv-00436-JWS, 2013 U.S. Dist. LEXIS 36190, at \*7 (D.  
4 Ariz. Mar. 15, 2013) (citing *Deutsche Credit Corp. v. Case Power & Equip. Co.*, 876  
5 P.2d 1190, 1195 (Ariz. Ct. App. 1994)).

6 Here, Plaintiff alleges the following in his Complaint:

7 The 2-Acorns is an alter ego of Converti because Converti  
8 treated The 2-Acorns as her alter ego and used it for her own  
9 improper purposes and her personal benefit. Upon  
10 information and belief, Converti in the transaction described  
11 in this Complaint acted as the corporation's sole agent and  
12 controlling person. Upon information and belief, The 2-  
13 Acorns was never appropriately capitalized or otherwise  
14 financed, did not act in accordance with its own corporate  
15 formalities and organic documents, and was used by Converti  
16 as a device to engage in one or more fraudulent schemes.

17 . . . .

18 Converti is personally liable to Plaintiff because she was at all  
19 relevant times the alter ego of The 2-Acorns, Inc., and it was  
20 her fraudulent acts and omissions that induced [Plaintiff] to  
21 invest \$350,000.

22 (Doc. 1 ¶¶ 8, 68.) Plaintiff also alleges that Converti controlled the money paid to The 2-  
23 Acorns, Inc., applying the \$190,474.45 to the down payment and closing costs of the  
24 home and keeping the additional \$159,525.45 for her own personal use. (*Id.* ¶¶ 83-93.)  
25 The Court finds that Plaintiff's allegations are sufficient to assert an alter ego theory of  
26 liability.

27 Plaintiff alleges that Defendants breached the Promissory Note when they  
28 defaulted on making payments owed to Plaintiff, failed to pay Plaintiff any of the money  
owed, and the breach caused Plaintiff damage. (Doc. 1 ¶¶ 26-28, 44, 78; Doc. 1-1 at 5.)  
Based on these allegations, the Court finds that Plaintiff has sufficiently stated claims for  
breach of contract against Defendants.

**f. Breach of the Implied Covenant of Good Faith and Fair Dealing**

Finally, Plaintiff asserts claims against Defendants for breach of the implied  
covenant of good faith and fair dealing. All contracts as a matter of law include the

1 implied duties of good faith and fair dealing, and contract damages are available for their  
2 breach. *Wells Fargo Bank v. Ariz. Laborers, Tamsters & Sement Masons Local No. 395*  
3 *Pension Trust Fund*, 38 P.3d 12, 28-29 (Ariz. 2002). The implied covenant of good faith  
4 and fair dealing prohibits a party from doing anything to prevent other parties to the  
5 contract from receiving the benefits and entitlements of the agreement. *Wells Fargo*  
6 *Bank*, 38 P.3d at 28.

7 Here, as detailed above, Plaintiff alleges that Defendants failed to hire a contractor  
8 to renovate the purchased home, did not use the money Defendant paid for renovations of  
9 the home, and misrepresented that there were “slush” funds available related to the  
10 project. Plaintiff further alleges that Defendants’ conduct as detailed above was in bad  
11 faith, and resulted in denying Plaintiff a return of \$350,000 plus interest and late fees. (*Id.*  
12 ¶ 81.) Based on these allegations, the Court finds that Plaintiff has sufficiently stated  
13 claims for breach of implied covenant of good faith and fair dealing against Defendants.

### 14 **3. Amount of Money at Stake**

15 Under the fourth *Eitel* factor, “the court must consider the amount of money at  
16 stake in relation to the seriousness of [the d]efendant’s conduct.” *PepsiCo, Inc.*, 238 F.  
17 Supp. 2d at 1177. Here, this factor weighs in favor of entering default judgment.  
18 Plaintiff has submitted a copy of the signed Promissory Note, which provides the amount  
19 of money that was transferred to Defendants (\$350,000), as well as the terms for repaying  
20 Plaintiff, including the amount of monthly interest payments. (Doc. 1-1 at 5.) Notably,  
21 Plaintiff asserts tort claims, but only requests his initial investment along with the interest  
22 owed to him as stated in the Promissory Note. (Doc. 17.) Therefore, the Court finds this  
23 factor weighs in favor of entering default judgment.

### 24 **4. Possibility of Dispute Concerning Material Facts**

25 Here, there is little possibility of a dispute concerning the material facts as to  
26 Defendants. Plaintiff provided a signed copy of the Promissory Note. Further,  
27 Defendants, although being served over a year ago, have failed to appear and defend this  
28 action. Thus, the fifth *Eitel* factor weighs in favor of entering default judgment.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

The sixth *Eitel* factor considers whether the default was due to excusable neglect. There is no evidence that Defendants’ failure to appear or otherwise defend was the result of excusable neglect. Plaintiff has prosecuted this matter since its inception, while Defendants have failed to appear and defend this action. Thus, the sixth *Eitel* factor weighs in favor of entering default judgment.

**6. Policy Disfavoring Default Judgment**

Under the seventh *Eitel* factor, the Court considers the policy that, whenever possible, cases should be tried on the merits. *Eitel*, 782 F.2d at 1472. The existence of Rule 55(b), however, indicates that the preference for resolving cases on the merits is not absolute. *PepsiCo, Inc.*, 238 F. Supp. 2d. at 1177. Because Defendants have neither appeared nor responded in this action, deciding this case on the merits is “impractical,” if not impossible. *Id.* Thus, the seventh *Eitel* factor does not preclude the entry of default judgment.

On balance, the Court finds that the *Eitel* factors weigh in favor of entering default judgment against Defendants.

**c. Damages**

Having found that entry of a default judgment is proper here, the issue becomes one of damages. In contrast to the other allegations in the Complaint, allegations pertaining to damages are not taken as true. *See TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir.1987). As a result, “Plaintiff is required to prove all damages sought in the complaint.” *Philip Morris USA Inc. v. Castworld Products, Inc.*, 219 F.R.D. 494, 498 (C.D. Cal. 2003). “The plaintiff is required to provide evidence of its damages, and the damages sought must not be different in kind or amount from those set forth in the complaint.” *Amini Innovation Corp. v. KTY Int’l Mktg.*, 768 F. Supp. 2d 1049, 1054 (C.D. Cal. 2011); Fed. R. Civ. P. 54(c). “In determining damages, a court can rely on the declarations submitted by the plaintiff[.]” *Philip Morris USA*, 219 F.R.D. at 498.



1 Plaintiff's requested damages in this case are specifically provided for in the  
2 Promissory Note. (Doc. 1-1 at 5.) The Promissory Note explains that a default on  
3 payments to Plaintiff by Defendants will result in "the whole sum of principal and  
4 interest [becoming] immediately due and payable at the option of the holder of this Note,  
5 with interest from date of such default on the entire unpaid principal and accrued  
6 interest." (*Id.*) Plaintiff has explained the amount owed by Defendants, totaling  
7 \$452,666.74 (\$350,000 original investment plus \$102,666.74 in 22 months of unpaid  
8 interest payments). (Doc. 17.) Plaintiff also seeks payment of additional monthly  
9 interest payments of \$4,666.67 until the principal amount of \$350,000, plus all accrued  
10 interest, has been paid in full, which is specifically provided for in the Promissory Note.  
11 (Doc. 1-1 at 5.) The Court is satisfied as to the methodology and justification for  
12 calculating damages, and will award Plaintiff damages of \$452,666.74, plus the  
13 additional monthly interest payments of \$4,666.67.

14 **III. Conclusion**

15 Because the Court has subject matter jurisdiction over this action and personal  
16 jurisdiction over Defendants, and the application of the *Eitel* factors weigh in favor of the  
17 entry of default judgment, the Court will exercise its discretion to grant Plaintiff's  
18 Amended Motion for Entry of Default Judgment against Defendants.

19 Accordingly,

20 **IT IS ORDERED** that Plaintiff's Amended Motion for Entry of Default Judgment  
21 (Doc. 17) is granted.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

