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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

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9 Stillwater Insurance Company,  
10 Plaintiff,

11 v.

12 Sean Fricker; and B.B., a minor, by and  
13 through Erin E. Bertino, parent and legal  
14 guardian of B.B.,

15 Defendants.

No. CV-17-1080-PHX-DGC

**ORDER AND DECLARATORY  
JUDGMENT**

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17 Plaintiff Stillwater Insurance Company has filed a motion for default judgment  
18 against Defendant Sean Fricker. Doc. 20. No response has been filed. For reasons stated  
19 below, default judgment is appropriate.

20 **I. Background.**

21 Stillwater seeks a declaratory judgment that a homeowner's insurance policy it  
22 issued to Fricker provides no coverage for claims and damages sought in an action  
23 currently pending in state court, *B.B. v. Fricker*, No. CV-2017-050691 (Maricopa Cty.  
24 Super. Ct Jan. 6, 2017). Doc. 1. The state court action asserts claims for negligence and  
25 punitive damages based on allegations that B.B. suffered injuries after Fricker gave him  
26 LSD to ingest. Doc. 1-1 at 3-4. Stillwater contends that the policy's intentional act and  
27 controlled substances exclusions bar coverage. Doc. 1 at 5-6.

28 The complaint was served on Fricker in April 2017. Doc. 6. Fricker has failed to

1 answer or otherwise respond to the complaint. The Clerk entered Fricker’s default more  
2 than eight months ago. Doc. 16. On April 19, 2018, Stillwater filed the present motion  
3 for default judgment pursuant to Federal Rule of Civil Procedure 55(b). Doc. 20.<sup>1</sup>

## 4 **II. Default Judgment.**

5 The Court’s “decision whether to enter a default judgment is a discretionary  
6 one.” *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Although the Court should  
7 consider and weigh relevant factors as part of the decision-making process, it “is not  
8 required to make detailed findings of fact.” *Fair Hous. of Marin v. Combs*, 285 F.3d 899,  
9 906 (9th Cir. 2002).

10 The following factors may be considered in deciding whether default judgment is  
11 appropriate under Rule 55(b): (1) the possibility of prejudice to the plaintiff, (2) the  
12 merits of the claims, (3) the sufficiency of the complaint, (4) the amount of money at  
13 stake, (5) the possibility of factual disputes, (6) whether default is due to excusable  
14 neglect, and (7) the policy favoring decisions on the merits. *See Eitel v. McCool*, 782  
15 F.2d 1470, 1471-72 (9th Cir. 1986). In considering the merits and sufficiency of the  
16 complaint, the court accepts as true the complaint’s well-pled factual allegations. *See*  
17 *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977). Having reviewed the  
18 complaint and default judgment motion, the Court finds that the *Eitel* factors favor  
19 default judgment.

### 20 **A. Possible Prejudice to Stillwater.**

21 The first *Eitel* factor weighs in favor of default judgment. Fricker failed to  
22 respond to the complaint or otherwise appear in this action despite being served with the  
23 complaint, the application for default, and the motion for default judgment. If default  
24 judgment is not granted, Stillwater “will likely be without other recourse for recovery.”  
25 *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002). The

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27 <sup>1</sup> Defendant Bertino’s default has also been entered by the Clerk. Doc. 15. To  
28 date, however, Stillwater has not sought default judgment against Bertino. Stillwater  
shall move for default judgment or file an appropriate notice of dismissal by June 22,  
2018.

1 prejudice to Stillwater in this regard supports the entry of default judgment.

2 **B. Merits of the Claims and Sufficiency of the Complaint.**

3 The second and third *Eitel* factors favor default judgment where, as in this case,  
4 the complaint sufficiently states a plausible claim for relief under the Rule 8 pleading  
5 standards. *See id.* at 1175; *Danning v. Lavine*, 572 F.2d 1386, 1388-89 (9th Cir. 1978).  
6 Stillwater seeks relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. Doc. 1  
7 at 1. The Act provides that in a case of actual controversy within its jurisdiction, a  
8 federal court “may declare the rights and other legal relations of any interested party  
9 seeking such declaration, whether or not further relief is or could be sought.” § 2201(a).

10 The merits of Stillwater’s request for a declaratory judgment are clear and not  
11 reasonably subject to dispute. The underlying state court action alleges that Fricker  
12 intentionally provided illicit drugs (LSD) to a minor thereby causing that minor to be  
13 injured. Doc. 1-1 at 3-4. Stillwater’s insurance policy issued to Fricker expressly  
14 excludes coverage for bodily injuries resulting from intentional acts and the delivery and  
15 use of controlled substances such as LSD:

16 Coverages [for personal liability and medical payments to others] do not  
17 apply to the following:

18 **1. Expected or Intended Injury**

19 “Bodily injury” . . . which is expected or intended by an “insured” even if  
20 the resulting “bodily injury” . . . [i]s of a different kind, quality or degree  
21 than initially expected or intended[.]

22 . . . .

23 **8. Controlled Substance**

24 “Bodily injury” . . . arising out of the use, sale, manufacture, delivery,  
25 transfer or possession by any person of a Controlled Substance as defined  
26 by the Federal Food and Drug Law . . . . Controlled Substances include but  
are not limited to cocaine, LSD, marijuana and all narcotic drugs.

27 Doc. 1-2 at 27. The second and third *Eitel* factors favor default judgment.

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1           **C.     Amount of Money at Stake.**

2           Under the fourth *Eitel* factor, the Court considers the amount of money at stake in  
3 relation to the seriousness of the defendant’s conduct. Where the plaintiff’s claim is for  
4 declaratory relief rather than for money damages, some courts have found that this factor  
5 weighs in favor of granting default judgment. *See PepsiCo*, 238 F. Supp. 2d at 1177;  
6 *Pollution Denim & Co. v. Pollution Clothing Co.*, No. CV-07-05208 MMM (JWJx), 2009  
7 WL 10672270, at \*7 (C.D. Ca. Feb. 9, 2009). Where the declaratory relief sought  
8 implicates the parties and merits of a separate action, however, courts have considered  
9 the amount at stake in that separate action while weighing the *Eitel* factors. *See Helwan*  
10 *Cement S.A.E. v. Tahaya Misr Inv., Inc.*, No. 2:17-cv-00543-CAS (AFMx), 2017 WL  
11 2468775, at \*5 (C.D. Cal. June 5, 2017) (citing *Lexington Ins. Co. v. Lennar Sales Corp.*,  
12 No. 11-cv-03411, 2012 WL 12883900, at \*10 (C.D. Cal. Mar. 7, 2012)).

13           Stillwater asserts, for purposes of diversity jurisdiction, that the amount in  
14 controversy exceeds \$75,000. Doc. 1 at 2. But neither party has provided information  
15 from which the Court can discern the amount of money at stake in the state court action.  
16 The Court concludes that the fourth *Eitel* factor is neutral.

17           **D.     Possible Dispute Concerning Material Facts.**

18           Given the sufficiency of the complaint and Fricker’s default, “no genuine dispute  
19 of material facts would preclude granting [Stillwater’s] motion.” *PepsiCo*, 238 F.  
20 Supp. 2d at 1177.

21           **E.     Whether Default Was Due to Excusable Neglect.**

22           Stillwater properly served Fricker with the summons and complaint. Doc. 6.  
23 It therefore is unlikely that Fricker’s failure to answer and the resulting default were due  
24 to excusable neglect. *See Helwan Cement*, 2017 WL 2468775, at \*5; *Gemmel v.*  
25 *Systemhouse, Inc.*, No. CIV 04-187-TUC-CKJ, 2008 WL 65604, at \*5 (D. Ariz. Jan. 3,  
26 2008). This *Eitel* factor weighs in favor of default judgment.

27           **F.     Policy Favoring a Decision on the Merits.**

28           The last factor usually weighs against default judgment given that cases “should

1 be decided on their merits whenever reasonably possible.” *Eitel*, 782 F.2d at 1472. The  
2 mere existence of Rule 55(b), however, “indicates that this preference, standing alone, is  
3 not dispositive.” *PepsiCo*, 238 F. Supp. 2d at 1177. Moreover, Fricker’s failure to  
4 respond to the complaint “makes a decision on the merits impractical, if not impossible.”  
5 *Id.* Stated differently, it is difficult to reach the merits when the opposing party is absent.  
6 The Court therefore is not precluded from entering default judgment against Fricker.  
7 *See id.*; *Gemmel*, 2008 WL 65604, at \*5.

8 **G. Conclusion.**

9 Five of the seven *Eitel* factors favor default judgment, and two factors are neutral.  
10 The Court therefore concludes that default judgment is appropriate.

11 **IT IS ORDERED:**

12 1. Plaintiff Stillwater Insurance Company’s motion for default judgment  
13 (Doc. 20) is **granted**.

14 2. Default judgment is entered in favor of Plaintiff and against Defendant  
15 Sean Fricker on Plaintiff’s claim for declaratory relief as follows: (a) Plaintiff’s  
16 homeowner’s insurance policy does not provide coverage to Defendant Fricker for the  
17 underlying state court action, *B.B. v. Fricker*, CV-2017-050691 (Maricopa Cty. Super. Ct  
18 Jan. 6, 2017); and (b) Plaintiff is not obligated to pay any judgment in favor of Erin  
19 Bertino in the state court action.

20 3. Plaintiff shall move for default judgment or file a notice of dismissal of the  
21 claim against Defendant Bertino on or before June 27, 2018. The Clerk shall terminate  
22 this action without further order of the Court if Plaintiff fails to do so.

23 Dated this 14th day of June, 2018.

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28 David G. Campbell  
United States District Judge