

1 **II. BACKGROUND**

2 **A. Factual Background**

3 On July 26, 2016, Defendant executed a promissory note (“the Note”) in the
4 original principal amount of \$350,000.00. (Compl. ¶ 5; Mot. 2.) The Note was secured
5 by a security agreement signed by Defendant, “in favor of [Plaintiff], . . . pursuant to
6 which [Defendant] granted to [Plaintiff] a security interest in, among other things,”
7 accounts, general intangible things and documents of the Defendant (collectively,
8 “Collateral”). (Mot. 2.) Additionally, on July 20, 2016, Plaintiff “perfected its security
9 interest in the Collateral by filing a UCC financing statement with the California
10 Secretary of State.”² (*Id.*)

11 Defendant has since defaulted in the payment obligations under the Note.
12 (Mot. 3.) Plaintiff alleges that Defendant stills owes Plaintiff \$319,971.51 in
13 outstanding principal, \$11,659.24 of accrued, unpaid interest that continues to accrue at
14 the current rate of \$61.36 per day until the date of judgment, \$1,239.56 in late fees, and
15 \$135.00 in site inspection fees. (Mot. 6–7.)

16 **B. Procedural Background**

17 On February 27, 2018, Plaintiff filed a Complaint against Defendant for three
18 claims: (1) breach of contract; (2) unjust enrichment; and (3) promissory estoppel.
19 (*See* Compl.) Plaintiff seeks payment of the outstanding principal on the Note,³
20 attorneys’ fees and costs, an award of prejudgment interest, and interest upon any
21 judgment entered as provided by law. (Compl. 6.) Defendant waived service of the
22 Summons and Complaint on March 3, 2018. (ECF No. 10.) Defendant failed to plead,
23 respond, or otherwise defend in the present action. (ECF No. 14.) As a result, on May
24 9, 2018, Plaintiff requested entry of default against Defendant, and the Clerk entered

25 ² The Note is also secured by a guaranty executed by Ruth Christine Hershey (“Ruth”), in favor
26 of the Plaintiff. (Mot. 3.) However, on January 31, 2018, Ruth filed a voluntary petition for Chapter
27 7 bankruptcy relief with the U.S. Bankruptcy Court of the Central District of California. (*Id.*) Plaintiff
28 asserts that they seek no recourse against Ruth, but restates and reaffirms its rights under the guaranty.
(*Id.*)

³ This includes accrued interest, late fees, and site inspection fees. (Mot. 6–7.)

1 default on May 10, 2018. (ECF Nos. 13–14.) Shortly thereafter, Plaintiff moved for
2 entry of default judgment against Defendant. (ECF No. 16.) That Motion is now before
3 the Court.

4 **III. LEGAL STANDARD**

5 Federal Rule of Civil Procedure 55(b) authorizes a district court to grant a default
6 judgment after the Clerk enters default under Rule 55(a). Fed. R. Civ. P. 55(b). Before
7 a court can enter a default judgment against a defendant, the plaintiff must satisfy the
8 procedural requirements set forth in Federal Rules of Civil Procedure 54(c) and 55, as
9 well as Local Rules 55-1 and 55-2. Fed. R. Civ. P. 54(c), 55; C.D. Cal. L.R. 55-1, 55-
10 2. Local Rule 55-1 requires that the movant submit a declaration establishing: (1) when
11 and against which party default was entered; (2) identification of the pleading to which
12 default was entered; (3) whether the defaulting party is a minor, incompetent person, or
13 active service member; (4) that the Servicemembers Civil Relief Act, 50 U.S.C. § 3931,
14 does not apply; and that (5) the defaulting party was properly served with notice, if
15 required under Rule 55(b)(2). C.D. Cal. L.R. 55-1. Finally, if the plaintiff seeks
16 unliquidated damages, Local Rule 55-2 requires the plaintiff to give notice to the
17 defaulting party of the amount sought. C.D. Cal. L.R. 55-2; *Unliquidated Damages*,
18 Black’s Law Dictionary (10th ed. 2014) (defining “unliquidated damages” as
19 “[d]amages that cannot be determined by a fixed formula”).

20 If these procedural requirements are satisfied, a district court has discretion to
21 enter default judgment. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In
22 exercising discretion, a court must consider several factors (the “*Eitel* Factors”): (1) the
23 possibility of prejudice to plaintiff; (2) the merits of plaintiff’s substantive claim; (3)
24 the sufficiency of the complaint; (4) the sum of money at stake; (5) the possibility of a
25 dispute concerning material facts; (6) whether the defendant’s default was due to
26 excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil
27 Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471–72
28 (9th Cir. 1986). Generally, upon entry of default, the defendant’s liability is

1 conclusively established, and the well-pleaded factual allegations in the complaint are
2 accepted as true. *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–19 (9th Cir.
3 1987) (per curiam) (citing *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir.
4 1977)).

5 IV. DISCUSSION

6 A. Procedural Requirements

7 Plaintiff has complied with the relevant procedural requirements for the entry of
8 a default judgment by submitting a declaration which states: (1) the Clerk entered a
9 default against Defendant; (2) the default was entered on the original Complaint that
10 Plaintiff filed on February 27, 2018; (3) Defendant is not an infant or incompetent
11 person; (4) Defendant is not covered under the Servicemembers Civil Relief Act; and
12 (5) Defendant was served with the Motion for Default Judgment. (Mot. 4; Decl. of
13 Joshua N. Kastan (“Kastan Decl.”) ¶ 17, ECF Nos. 18–19.) Thus, the Court evaluates
14 the *Eitel* factors.

15 B. The *Eitel* Factors

16 The *Eitel* factors weigh in favor of entering a default judgment. The Court will
17 discuss each factor in turn.

18 1. Plaintiff Would Suffer Prejudice

19 The first *Eitel* factor asks whether the plaintiff will suffer prejudice if a default
20 judgment is not entered. *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177
21 (C.D. Cal. 2002). Here, Defendant has failed to appear in this action and has refused to
22 pay the amount owed. (Mot. 3.) If the Motion is not granted, Plaintiff will be without
23 other recourse to collect compensation from Defendant. (Mot. 5.) Therefore, this factor
24 favors entry of default judgment.

25 2. Plaintiff Has Brought Meritorious Claims

26 The second factor “require[s] that a plaintiff state a claim which [it] may
27 recover.” *PepsiCo*, 238 F. Supp. 2d. at 1175 (citations omitted); *Philip Morris USA,*
28 *Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003). Plaintiff asserts

1 claims for: (1) breach of contract; (2) unjust enrichment; and (3) promissory
2 estoppel. (*See generally* Compl.) The Court dismisses the unjust enrichment claim
3 and the promissory estoppel claim because they are duplicative of the breach of contract
4 claim and do not alter the relief sought by Plaintiff. *See W. Veg-Produce, Inc. v. Lexy*
5 *Grp.*, No. 218CV00180ODWAGR, 2018 WL 1804689, at *5 (C.D. Cal. Apr. 16,
6 2018) (quoting *C & K NuCo, LLC v. Expedited Freightways, LLC*, No. 13 C 4006,
7 2014 WL 4913446, at *12 (N.D. Ill. Sept. 30, 2014) (“The court has discretion to
8 dismiss duplicative claims where they allege the same facts and the same injury.”).
9 Therefore, the Court will only address the breach of contract claim.

10 *i. Plaintiff’s Breach of Contract Claim*

11 To prevail on its breach of contract claim, Plaintiff must prove: (1) the existence
12 of a contract; (2) performance by Plaintiff; (3) breach by Defendant; and (4) damages
13 to Plaintiff as a result of Defendant’s breach. *See Landstar Ranger, Inc. v. Parth*
14 *Enters., Inc.*, 725 F. Supp. 2d 916, 920 (C.D. Cal. 2010). Plaintiff’s Complaint, taken
15 as true, adequately alleges all four elements of a claim for breach of contract. (*See*
16 *generally* Compl.); *see also Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir.
17 1977) (“[U]pon default[,] the factual allegations of the complaint, except those relating
18 to the amount of damages, will be taken as true.”).

19 First, Plaintiff alleges that it entered into a contract with Defendant through the
20 written Note. (Compl. ¶ 5.) The Note was executed and signed by both parties on July
21 27, 2016. (ECF No. 1–1, Ex. A.) Second, Plaintiff alleges it performed its duties and
22 obligations under the Note by lending the Defendant \$350,000.00. (Compl. ¶ 19; ECF
23 No. 1–1, Ex. A.) Third, Defendant breached the agreement, by failing to make monthly
24 payments, as promised in the Note.⁴ (Compl. ¶ 20; ECF No. 1–1, Ex. A.) Fourth,
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26 ⁴ The Note provides that Defendant must repay this loan in 120 payments, to take place on the
27 first of each month, with the final payment date being August 1, 2026, and if a payment is more than
28 10 days late Defendant will be charged 5.00 percent of the unpaid portion of payment. (ECF No. 1–
1, Ex. A.) Additionally, the interest will accrue on the unpaid principal balance at the rate of 6.5
percent until October 1, 2016, after which time it may change and may increase after default on

1 Plaintiff alleges total damages of \$321,346.07, plus prejudgment interest and attorneys’
2 fees that it incurred as a direct result of Defendant’s failure to pay. (Compl. ¶ 21.) Thus,
3 Plaintiff has sufficiently pleaded a meritorious claim for breach of contract against
4 Defendant.

5 3. Plaintiff’s Complaint Was Sufficiently Pled

6 As explained in greater detail above, the Complaint and the breach of contract
7 claim within were sufficiently pleaded and form the basis for a claim on which Plaintiff
8 may recover. Thus, this factor weighs in favor of granting default judgment.

9 4. The Amount at Stake Weighs in Favor of Default Judgment

10 The fourth *Eitel* factor balances “the amount of money at stake in relation to the
11 seriousness of Defendant[’s] conduct.” *PepsiCo*, 238 F. Supp. 2d at 1176. Here, the
12 total amount Plaintiff seeks to recover is \$343,265.42, including attorneys’ fees under
13 the terms of the Note. Defendant agreed to repay the \$350,000.00 borrowed from
14 Plaintiff on July 26, 2016, and now refuses to pay the amount owed. Defendant is
15 contractually obligated to pay \$319,971.51 in outstanding principal, \$11,659.24 of
16 accrued unpaid interest that continues to accrue at the current rate of \$61.36 per day,
17 \$1,239.56 in late fees, and \$135.00 in site inspection fees, along with attorneys’ fees
18 of \$10,260.11. (Mot. 6–7.) The \$343,265.42 at stake is consistent with the terms of
19 the Note, which are further corroborated by Ms. McCall’s declaration. (Decl. of Jeri
20 D. McCall (“McCall Decl.”), ECF No. 17.) This figure is properly documented,
21 contractually justified, and reasonably proportionate to the harm caused by
22 Defendant’s actions. Therefore, this *Eitel* factor weighs in favor of granting default
23 judgment. *See Bd. of Trustees of California Metal Trades v. Pitchometer Propeller*,
24 No. C-97-2661-VRW, 1997 WL 797922, at *1 (N.D. Cal. Dec. 15, 1997) (granting
25 default judgment where the amount was reasonable, properly documented, and
26 contractually justified).

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28 payments. (*Id.*) Furthermore, it also provides that Defendant agrees to pay all expenses of collection,
including but not limited to attorneys’ fees. (*Id.*)

1 5. There is No Possibility of Dispute as to Material Facts

2 The next *Eitel* factor considers the possibility that material facts are in dispute.
3 *Eitel*, 782 F.2d at 1471–72. Because the allegations in Plaintiff’s Complaint are
4 presumed true, Defendant’s failure to oppose the Motion results in a finding that “no
5 factual disputes exist that would preclude entry of default judgment.” *Vogel*, 992 F.
6 Supp. 2d at 1013. Furthermore, there is little concern that the amount awarded will be
7 disputed because the amount is provided for by the contract. Thus, the Court finds this
8 factor favors entry of default judgment.

9 6. There is Little Possibility Default was Due to Excusable Neglect

10 The next factor considers whether a defendant’s default may have resulted from
11 excusable neglect. *Eitel*, 782 F.2d at 1471–72. The possibility of excusable neglect
12 here is remote because Defendant signed the waiver of service, and was mailed a copy
13 of the Application for Default Judgment. (ECF Nos. 10, 13, 19.) Accordingly, this
14 factor weighs in favor of entering default judgment.

15 7. Policy for Deciding on the Merits Weighs in Favor of Granting Default
16 Judgment

17 In *Eitel*, the court maintained that “[c]ases should be decided upon their merits
18 whenever reasonably possible.” *Eitel*, 782 F.2d at 1472. However, where, as is the
19 case here, the defendant fails to answer the plaintiff’s complaint, “a decision on the
20 merits [is] impractical, if not impossible.” *PepsiCo*, 238 F. Supp. 2d at 1177. “Under
21 Fed. R. Civ. P. 55(a), termination of a case before hearing the merits is allowed
22 whenever a defendant fails to defend an action.” (*Id.*) Furthermore, “when a defendant
23 . . . [knows] that he has been sued . . . [it is] the defendant who seeks to prevent an
24 adjudication on the merits.” *Carol Gilbert, Inc. v. Haller*, 179 Cal. App. 4th 852, 865
25 (2009). Accordingly, the Court finds that this factor does not preclude default
26 judgment.

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1 **C. Damages**

2 Plaintiff requests a repayment of \$321,346.07 in principal expenses, and
3 \$11,659.24 in accrued unpaid interest, which will continue to accrue at the rate of
4 \$61.36 per day until the final judgment date. (Mot. 9–10.) Plaintiff also requests
5 award of \$10,260.11 in attorneys’ fees consistent with the schedule of attorney’s fees
6 in Local Rule 55-3. (Mot. 11.)

7 **1. Principal Expenses**

8 Plaintiff seeks \$321,346.07 in principal expenses still owed by Defendant under the
9 Note. (Mot. 7.) This amount includes \$319,971.51 in outstanding principal, \$1,239.56
10 in late fees, and \$135.00 in site inspection fees. (*Id.*) According to the Note, Defendant
11 agreed to pay “the principal sum of \$350,000.00 . . . plus interest from July 26, 2016 on
12 the unpaid [p]rincipal balance until this note matures or this obligation is accelerated.”
13 (ECF No. 1–1, Ex. A.)

14 Therefore, the amount requested by Plaintiff under the Note is legitimate and
15 warranted. Accordingly, the Court awards a total of \$321,346.07, in principal expenses.

16 **2. Prejudgment Interest**

17 Plaintiff contends that it is entitled to the updated and current prejudgment interest
18 amount. (Mot. 10.) Federal Rules of Civil Procedure 54(c) states, “[a] default judgment
19 must not differ in kind from, or exceed the amount, what is demanded in the pleadings.”
20 Fed. R. Civ. Proc. 54(c). However, Plaintiff correctly asserts that where “the plaintiff
21 specifically seeks prejudgment interest in the [c]omplaint, giving meaningful notice to
22 the defendant that such an amount may be awarded, plaintiff is entitled to recover
23 prejudgment interest.” (Mot. 10, (referencing *Gray Ins. Co. v. Lectrfy, Inc.*, No.
24 SACV131411DOCANX, 2014 WL 12689270, at *7 (C.D. Cal. Mar. 3, 2014)
25 (affirming the denial of prejudgment interest in connection with entry of a default
26 judgment where plaintiff did not expressly pray for prejudgment interest in the
27 complaint).) Here, Plaintiff prayed for prejudgment interest in the Complaint, and
28 specifically stated that the interest will continue to accrue daily until the date of final

1 judgment at the rate of \$63.56, thus giving Defendant meaningful notice that such
2 interest would accrue. (Compl. 6.) Accordingly, the Court awards Plaintiff
3 prejudgment interest on the principal balance of \$319,971.51, in the amount of
4 \$13,990.92.⁵

5 **3. Attorneys' Fees**

6 Local Rule 55-3 provides a schedule to calculate attorneys' fees when the fees
7 are recoverable under a promissory note, contract or an applicable statute. C.D. Cal.
8 L.R. 55-3. According to Local Rule 55-3, if the judgment amount is over \$100,000, the
9 Court shall award \$5,600 plus 2% of the amount over \$100,000. *Id.* Therefore, the
10 Court awards Plaintiff \$10,260.11, in attorneys' fees.

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25 ⁵ The Complaint states that as of February 6, 2018, Defendant owed \$4,435.77 of accrued
26 interest, which continued to accrue at the daily rate at the time of \$63.56. Based on this information,
27 the Court finds that the interest began to accrue on or around November 28, 2017. The Motion, filed
28 on June 7, 2018, states that the interest owed on or around that time was \$11,659.24, which continued
to accrue at the current rate of \$61.36. The Note provided for a variable interest rate based on the
prime interest rate.


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V. CONCLUSION

For the reasons discussed above, the Court **GRANTS** Plaintiff's Motion for Default Judgment. (ECF No. 16.) Defendant Hershey Interests, Inc. owes the Plaintiff First Home Bank \$321,346.07 in principal expenses, \$13,990.92 in accrued interest, along with \$10,260.11 in attorneys' fees. Upon entry of judgment, the Clerk of the Court shall close the case.

IT IS SO ORDERED.

July 16, 2018



OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE