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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

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BR NORTH 223, LLC,

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Plaintiff,

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vs.

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BERNARD GLIEBERMAN, both
individually and as trustee of BERNARD
GLIEBERMAN REVOCABLE LIVING
TRUST dated June 8, 2001 as amended,

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Defendant.

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I. INTRODUCTION

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On October 27, 2011, Plaintiff BR North 223, LLC (“Plaintiff”) filed the present motion for default judgment against Defendant Bernard Gliberman, individually and as trustee of the Bernard Gliberman Revocable Living Trust (collectively referred to as “Gliberman”). Gliberman did not file an opposition. The motion was referred to this Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. The Court deemed the matter suitable for decision without oral argument pursuant to Local Rule 230(g), and vacated the hearing scheduled for December 15, 2011. Having considered the moving papers, declarations and exhibits attached thereto, as well as the Court’s file, the Court issues the following order:

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. Plaintiff's Claims**

3 On November 16, 2010, Plaintiff filed a Verified Complaint for breach of a guaranty contract
4 ("Plaintiff's Complaint") against Gliberman in this action. (Doc. 1.) Gliberman has not answered
5 or otherwise made an appearance in this action.

6 Plaintiff's Complaint alleges, *inter alia*, loans were extended to a limited liability company
7 named "Crosswinds at Bellevue Ranch North, LLC" ("Crosswinds"). (Pl.'s Compl., ¶ 4, Doc. 1.)
8 Bernard Gliberman is alleged to own Crosswinds in whole or in part. (Pl.'s Compl., ¶ 4, Doc. 1.)
9 Bernard Gliberman is also alleged to have guarantied the loans to Crosswinds - both in his
10 individual capacity and as trustee of The Bernard Gliberman Revocable Living Trust. (Pl.'s
11 Compl., ¶ 4, Doc. 1.) The loans were offered to finance a real estate development project located in
12 Merced County, California. (Pl.'s Compl., ¶ 4, Doc. 1.) Crosswinds failed to complete the real
13 estate development project and subsequently defaulted on the loan. (Pl.'s Compl., ¶ 4, Doc. 1.)

14 **1. The Original Loan and Guaranty**

15 On November 7, 2006, Crosswinds entered into a loan agreement whereby Plaintiff agreed to
16 makes advances to Crosswinds up to a maximum principal amount of \$27,950,000.00 on terms set
17 forth in the loan agreement (The "Original Loan"). (Pl.'s Compl., ¶ 4, Doc. 1; Declaration of Steven
18 Darak ("Darak Decl."), Attach. 1, Doc. 43.) That same day, Bernard Gliberman, in his individual
19 capacity and as trustee of The Bernard Gliberman Revocable Living Trust, executed an
20 Unconditional Loan Guaranty of the obligations of Crosswinds under the Original Loan (the
21 "Original Guaranty"). (Pl.'s Compl., ¶ 13, Doc. 1; Darak Decl., Attach. 5, Doc. 43.)

22 **2. The Amended Loan and Guaranty**

23 On May 24, 2007, Crosswinds and Plaintiff executed an Amended and Restated Construction
24 Loan Agreement (the "Amended Loan"). (Pl.'s Compl., ¶ 7, Doc. 1; Darak Decl., Attach. 6, Doc.
25 43.) The purpose of the Amended Loan was to increase the loan amount and allow Crosswinds to
26 borrow up to a maximum principal of \$53,450,000.00. (Pl.'s Compl., ¶¶ 7, 15, Doc. 1.) On May 30,
27 2007, Bernard Gliberman, in his individual capacity and as trustee of The Bernard Gliberman
28 Revocable Living Trust, executed an Amended and Restated Unconditional Loan Guaranty of the

1 obligations of Crosswinds under the Amended Loan (the “Amended Guaranty”). (Pl.’s Compl., ¶ 14,
2 Doc. 1; Darak Decl., Attach. 9, Doc. 43.) The Amended Guaranty states in pertinent part:

3 In order to induce Creditor to modify the Loan and enter into and make that certain
4 Loan in the amount of up to \$53,450,000 to Debtor . . . Guarantor [Glieberman]
5 unconditionally guarantees the due and punctual payment and performance of the debt
and other related obligations by the debtor . . .

6 (Darak Decl., Attach. 9, ¶ 2, Doc. 43.)

7 **3. The Default**

8 The Amended Loan matured on November 22, 2008. (Pl.’s Compl., ¶ 17, Doc. 1; Darak
9 Decl., ¶ 18, Doc. 43.) At this time, the outstanding principal balance on the Amended Loan was
10 \$39,291,542.28, and the outstanding amount of unpaid interest on the Amended Loan was
11 \$13,101,449.72. (Pl.’s Compl., ¶ 18, Doc. 1; Darak Decl., ¶¶ 23, 24, Attach. 11, 12, Doc. 43.) As
12 Crosswinds had not tended full payment of outstanding principal and interest on the maturity date,
13 the Amended Loan was deemed to be in default. (Pl.’s Compl., ¶ 17, Doc. 1; Darak Decl., ¶ 18, Doc.
14 43.) On March 25, 2010, Plaintiff made a demand for payment in full on Crosswinds and
15 Glieberman under the Amended Guaranty. (Darak Decl., ¶ 20, Attach. 10, Doc. 43.) Crosswinds
16 and Glieberman did not thereafter tender payment of the entire unpaid balance under the terms of the
17 Amended Loan and Amended Guaranty. (Darak Decl., ¶ 21, Doc. 43.) The Amended Loan remains
18 in default.

19 In the event of a default, the Amended Loan provided a default interest rate of 24% on the
20 outstanding principal balance. (Darak Decl., ¶ 26, Attach. 13, Doc. 43.) As of the date Plaintiff’s
21 Motion was filed, the amount of unpaid interest at the default rate is \$25,726,351.42. (Darak Decl., ¶
22 26, Attach. 13, Doc. 43.)¹ Plaintiff additionally claims entitlement to late charges pursuant to the
23 Amended Loan in the amount of \$9,000,035.65 (Darak Decl., ¶¶ 30-31, Attach. 13, Doc. 43), and
24 internal enforcement fees in the amount of \$50,862.67. (Darak Dec., ¶ 32, Attach. 13, Doc. 43.)

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27 ¹ In Plaintiff’s total damage request, the amount of default interest was reduced by Plaintiff’s \$2,700,000.00 credit
28 bid at a non-judicial foreclosure sale of the subject property held on March 3, 2011. (Darak Dec., ¶¶ 28-29, Attach. 11, Doc.
43.)

1 In sum, as of October 21, 2011, Plaintiff claims a total amount due and owing to Plaintiff
2 under the Amended Loan of \$81,170,331.74.² (Darak Decl., ¶ 32, Doc. 43.)

3 **B. Summary of Plaintiff's Default Efforts**

4 On February 24, 2011, Plaintiff moved for a default judgment against Glieberman. (Doc.
5 12.) In findings and recommendations dated May 9, 2011, United States Magistrate Judge Dennis L.
6 Beck recommended Plaintiff's motion for default judgment be denied. (Doc. 22.) Judge Beck's
7 findings and recommendations were adapted in full by Chief United States District Judge Oliver W.
8 Wanger.³

9 Judge Beck's recommendation to deny Plaintiff's motion for default judgment was based on
10 insufficient service of process. (Doc. 22, 3: 16-25.) Judge Beck noted that Plaintiff had submitted a
11 proof of service purporting to establish that Glieberman was served by substituted service at the
12 office of Glieberman's legal counsel, Fredrick Elias. (Doc. 22, 3: 16-19.) Specifically, Plaintiff's
13 process server stated that Glieberman's attorney (Mr. Elias) contacted him and indicated that his
14 office would accept the service. (Doc. 22, 2: 6-8.) Judge Beck ruled that the process server's
15 statement that "the subject's attorney called . . . and stated his office would accept the service" was
16 insufficient to establish Mr. Elias was a designated or authorized agent to receive service of process
17 pursuant to Fed. R. Civ. P. 4(e). (Doc. 22, 3: 20-23.)

18 On June 9, 2011, Plaintiff sent a letter to Mr. Elias to request express written authorization to
19 allow Mr. Elias, or an agent of his law firm, to accept service of process on Glieberman's behalf.
20 (Declaration of Jeffrey E. Mitchell ("Mitchell Decl.") ¶ 6, Attach. 1, Doc. 44.) The letter attached an
21 Authorization of Substitution of Service of Process for Glieberman's signature that requested
22 Glieberman's express authorization to permit Mr. Elias, or an agent of his law firm, to accept service
23 on his behalf. (Mitchell Decl., ¶ 7, Attach. 1, Doc. 44.) On June 16, 2011, Mr. Elias returned an
24 original executed Authorization of Substitution of Service of Process signed by Glieberman.

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26 ² The Court has not received notice that Glieberman has filed for any bankruptcy protection such that the automatic
27 stay would preclude action by this Court.

28 ³ These proceedings were subsequently reassigned to United States Magistrate Judge Barbara A. McAuliffe (Doc.
37), and United States District Judge Lawrence J. O'Neill (Doc. 48).

1 (Mitchell Decl., ¶ 8, Attach. 2, Doc. 44.) On June 28, 2011, David Ingber, Esq., as an agent of Mr.
2 Elias' law firm, accepted service of process on behalf of Glieberman. (Mitchell Decl., ¶ 9.) On July
3 14, 2011, Plaintiff filed a Proof of Service of Summons with this Court. (Doc. 30.)

4 On August 12, 2011, Plaintiff requested a Clerk's entry of default against Glieberman, which
5 was granted on August 16, 2011. (Doc. 31, 33.) Plaintiff filed this motion for default judgment on
6 October 27, 2011.⁴ On December 12, 2011, the Court issued a minute order requesting additional
7 briefing on the issue of usury interest and on Plaintiff's privity with the original lender.⁵ (Doc. 49.)
8 Plaintiff submitted this additional briefing on January 20, 2012. (Doc. 50-52.)

9 III. DISCUSSION

10 A. Adequacy of Service of Process

11 As a general rule, and of particular importance considering the procedural history of this case,
12 the Court considers the adequacy of service of process before evaluating the merits of Plaintiff's
13 Motion for Default Judgment. *See Katzakian v. Check Resolution Service, Inc.*, No. 10-cv-00716-
14 AWI-GSA, 2010 WL 5200912, *2 (E.D. Cal. Dec. 15, 2010). Under Fed. R. Civ. P 4(e), an
15 individual such as Glieberman may be served by:

16 (1) following state law for serving a summons in an action brought in courts of
17 general jurisdiction in the state where the district court is located or where service is
18 made; or

18 (2) doing any of the following:

19 (A) delivering a copy of the summons and of the complaint to the
20 individual personally; or

21 (B) leaving a copy of each at the individual's dwelling or usual place of
22 abode with someone of suitable age and discretion who resides there;
23 or

23 (C) delivering a copy of each to an agent authorized by appointment or
24 by law to receive service of process.

25 ⁴ The motion for default judgment was served on Glieberman's counsel. (Doc. 46.)

26 ⁵ The Original and Amended Loans were extended by IMH Secured Loan Fund, LLC ("IMH Secured"). (Darak
27 Decl., ¶ 3, Doc. 43.) IMH Secured subsequently assigned its rights and interests to the subject Loans to IMH Special Asset
28 NT 157, LLC ("IMH Special Asset"). (Darak Decl., ¶ 3, Doc. 43.) IMH Special Asset subsequently changed its name to BR
North 223, LLC. (Darak Decl., ¶ 3, Doc. 43.) The current assignee and loan holder, BR North 223, LLC, filed this action.

1 Fed. R. Civ. P. 4(e).

2 In this case, Plaintiff effectuated service pursuant to Rule 4(e)(2)(C). Plaintiff filed a proof of
3 service stating that David Inger, Esq., an attorney with Ellias & Elias, P.C., was served with the
4 summons and complaint on Gliberman's behalf. (Doc. 30.) Bernard Gliberman expressly
5 authorized Ellias and Elias to accept service on Gliberman's behalf.⁶ (Mitchell Decl., ¶ 8, Attach.
6 2, Doc. 44.) Service was accomplished by serving attorney David Inger, an attorney with Ellias &
7 Elias, P.C.⁷ The evidence satisfies the Court that the law firm of Ellias and Elias, and the agents
8 thereof, were authorized to accept service of process on Gliberman's behalf. Accordingly, service
9 was proper pursuant to Rule 4(e)(2)(C).

10 **B. Legal Standard on Motions for Default Judgment**

11 Whether to grant or deny default judgment is within the discretion of the court. *See Aldabe v.*
12 *Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In exercising this discretion, the court considers the
13 following factors: (1) the possibility of prejudice to the plaintiff if relief is denied; (2) the substantive
14 merits of plaintiff's claims; (3) the sufficiency of the claims raised in the complaint; (4) the sum of
15 money at stake; (5) the possibility of a dispute concerning material facts; (6) whether the default was
16 due to excusable neglect; and (7) the strong policy favoring decisions on the merits when reasonably
17 possible. *See Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

18 Where a defendant has failed to respond to the complaint, the court presumes that all
19 well-pleaded factual allegations relating to liability are true. *See Geddes v. United Financial Group*,
20 559 F.2d 557, 560 (9th Cir. 1977); *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th
21 Cir. 1987). Therefore, when determining liability, a defendant's default functions as an admission of
22 the plaintiff's well-pleaded allegations of fact. *See Panning v. Lavine*, 572 F.2d 1386 (9th Cir. 1978).

24 ⁶ A document signed by Bernard Gliberman, dated June 14, 2011, states: "I, Bernard Gliberman, both personally
25 and as trustee of the Bernard Gliberman Living Trust dated June 8, 2001, hereby expressly authorize Frederick D. Elias,
26 Esq., or an agent of his law firm, Ellias & Elias, P.C., may accept service on my behalf with respect to a lawsuit filed by BR
north 223, LLC in the Eastern District of California (1: 10-cv-02153-OWW-DLB).

27 ⁷ The proof of service states that, on June 28, 2011, David Inger, esq., Ellias & Elias, P.C. was served at 33493
28 Fourteen Mile Road, Suite 80, Farmington Hills, MI 48331 a copy of the summons, verified complaint and scheduling
conference order. (Doc. 30.)

1 While factual allegations concerning liability are deemed admitted upon a defendant's default, the
2 court does not presume that any factual allegations relating to the amount of damages suffered are
3 true. *See Geddes*, 559 F.2d at 560; *TeleVideo Sys., Inc.*, 826 F.2d at 917-18. The court must ensure
4 that the amount of damages awarded is reasonable and demonstrated by the evidence. Fed. R. Civ.
5 P. 55(b)(2)(C); *Geddes*, 559 F.2d at 560; *TeleVideo Sys., Inc.*, 826 F.2d at 917-18.

6 **1. The Possibility of Prejudice to Plaintiff if Relief is Denied**

7 The first *Eitel* factor “considers whether plaintiff would suffer prejudice if default judgment
8 is not entered[,]” and whether such potential prejudice militates in favor of granting a default
9 judgment. *See PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F.Supp. 2d 1172 (C.D. Cal. 2002). If a refusal
10 to enter a default judgment would leave a plaintiff “without other recourse for recovery,” the plaintiff
11 will likely suffer prejudice. *Philip Morris USA, Inc. v. Castworld Products, Inc.*, 219 F.R.D. 494,
12 499 (C.D. Cal. 2003).

13 Here, Plaintiff would likely suffer prejudice if the Court did not enter a default judgment.
14 Glieberman has not responded to the complaint and has not performed on the loan obligations.
15 Absent entry of a default judgment, Plaintiff would be without other recourse for recovery. These
16 circumstances militate in favor of granting a default judgment.

17 **2. The Substantive Merits of Plaintiff’s Claims and the Sufficiency of the Claims**
18 **Raised in the Complaint**

19 The Court considers the merits of plaintiff’s substantive claims and the sufficiency of the
20 complaint together because of the relatedness of the two inquiries. *See Joe Hand Promotions, Inc. v.*
21 *Mannor*, No. 11-cv-01426-WBS-KJN, 2012 WL 113792 *3 (E.D. Cal., Jan. 13, 2012). The Ninth
22 Circuit has suggested that these two factors require that a plaintiff “state a claim on which the
23 [plaintiff] may recover.” *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978). Thus, in order to
24 weigh these two factors the Court must turn to Plaintiff’s Complaint.

25 Plaintiff alleges a claim for breach of a guaranty contract. (Doc. 1.) The elements of a claim
26 for breach of contract are (1) the existence of a contract, (2) plaintiff’s performance thereof or an
27 excuse for nonperformance, (3) defendant’s breach, and (4) damages resulting therefrom. *Reichert v.*
28 *General Ins. Co. Of America*, 68 Cal. 2d 822, 830 (1968); *Acoustics, Inc. v. Trepte Construction Co.*,

1 14 Cal. App. 3d 887, 913 (1971). Similarly, in California the breach of a written guaranty is a
2 contractual cause of action that requires proof of the same elements as breach of contract. *Bank of*
3 *Sierra v. Kallis*, No. 05-cv-1574-AWI-SMS, 2006 WL 3513568, at *7 (E.D. Cal. Dec. 6, 2006);
4 *Acoustics, Inc. v. Trepte Constr. Co.*, 14 Cal. App. 3d 887, 913, 92 Cal. Rptr. 723 (1992).

5 In its Complaint, Plaintiff avers each of the elements required for a breach of the guaranty
6 contract. Plaintiff alleges the existence of an Original and Amended Guaranty (Pl.'s Compl., ¶ 4,
7 Doc. 1) and attached copies of those documents to Plaintiff's Motion for Default Judgment. (Darak
8 Decl., Attach. 5, 9, Doc. 43.) Plaintiff alleges Glieberman signed and delivered each of the loan
9 guaranties. (Pl.'s Compl., ¶¶ 13,14, Doc. 1.) Plaintiff alleges it performed the obligations connected
10 to the Original and Amended Guaranties, as specified in the Original and Amended Loan documents,
11 when it loaned Crosswinds the money. (Pl.'s Compl., ¶ 13, 14, Doc. 1.) Lastly, Plaintiff's Complaint
12 alleges both default and damages (Pl.'s Compl., ¶ 17-18, Doc. 1) and provides evidentiary support
13 for these claims in its Motion for Default Judgment. (Darak Decl., ¶¶ 18, 23, 24, 26, 30-32, Attach.
14 11, 12, 13, Doc. 43). Plaintiff alleges Glieberman has not repaid the loan and that Plaintiff has been
15 damaged as a result. (Pl.'s Compl., ¶¶ 17, 18, Doc. 1.) Accordingly, the factual allegations and
16 substantive merits of Plaintiff's claims are well-taken. This factor supports entry of default.

17 **3. The Sum of Money at Stake**

18 The Court must consider "the amount of money at stake in relation to the seriousness of
19 defendant's conduct." *Board of Trustees of the N. Cal. Sheet Metal Workers v. Peters*, No. 00-cv-
20 0395 VRW, 2000 U.S. Dist. LEXIS 19065, *5 (N.D. Cal., Dec. 29, 2000). The Court considers
21 Plaintiff's declarations, calculations, and other documentation of damages in determining if the
22 amount at stake is reasonable. *See Walters v. Shaw/Guehnemann Corp.*, No. 03-cv-04058-WHA,
23 2004 U.S. Dist. LEXIS 11992 at *3-4 (N.D. Cal., Sept. 04, 2007.) In general, the fact that a large
24 sum of money is at stake is a factor disfavoring default judgment. *See Eitel*, 782 F.2d at 1472; *Totten*
25 *v. Hurrell*, No. 00-cv-2718, 2001 U.S. Dist. LEXIS 20259, *2 (N.D. Cal. Nov. 28, 2001) (stating that
26 "the 'sum of money at stake' factor [under Eitel] is meant to focus on the size of the award
27 requested, as courts are hesitant to enter default judgments where large sums of money are at stake").
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1 However, if the requested amounts have evidentiary support, are specifically tailored to the
2 misconduct of the defendant, and are otherwise proportionate to the defendant’s offenses, default
3 should not be refused merely because the amount sought is substantial. *Board of Trustees of the*
4 *Sheet Metal Workers Health Care Plan v. Superhall Mechanical, Inc.*, No. 10-cv-2212-EMC, 2011
5 WL 2600898 at *2 (N.D. Cal., June 30, 2011) (the sum of money for unpaid contributions, liquidated
6 damages, and attorneys fees were appropriate as they were supported by adequate evidence provided
7 by Plaintiffs); *Stellmacher v. Guerrero*, No. 10-cv-1357-JAM-KJM, 2010 WL 2889771 (E.D. Cal.,
8 July 21, 2010) (Granting a motion for default judgment requesting damages of \$467,610,138.00
9 where the “amount sought is supported by the affidavits . . . and is properly calculated. . . .”);
10 *Facebook, Inc. v. Wallace*, No. 09-cv-798 JF-RS, 2009 WL 3617789 (N.D. Cal., Oct. 29, 2009)
11 (Granting a motion for default judgment requesting damages of \$711,237,650.00, which was
12 “proportionate to [Defendant’s] offenses”); *Facebook, Inc. v. Fisher*, No. 09-cv-05842-JF-PSG,
13 2011 WL 250395 (N.D. Cal., Jan. 26, 2010) (Awarding damages upon default in the amount of
14 \$360,500,000.00, which was viewed as “proportionate to the gravity of Defendants’ acts.”)

15 Plaintiff seeks monetary damages for breach of contract in the amount of \$81,170,331.74. In
16 support of this request, Plaintiff has submitted the declaration of Steven T. Darak, Plaintiff’s Chief
17 Financial Officer. Attached to the Darak Declaration are authenticated copies of the Original Loan,
18 the Amended Loan, as well as the Amended Guaranty. The Darak Declaration also attached the
19 historical accounting spreadsheets regarding the subject loan which detail the accrued principal,
20 interest, late fees and costs. (Darak Decl., Attach. 11, 12, 13, Doc. 43.)

21 **i. Outstanding Principal Damages**

22 Plaintiff represents evidence that at the time of Glieberman’s default, the outstanding
23 principal balance on the Amended Loan was \$39,291,542.28. (Pl.’s Compl., ¶ 18, Doc. 1; Darak
24 Decl., ¶¶ 23, Attach. 11, 12, Doc. 43.) This amount is broken down as follows:

- 25 • Initial funding of \$22,955,944.80;
- 26 • Modification funding of \$2,783,835.56. This amount is comprised of \$2,699,573.00
27 in fees to BR North, \$7,000.00 in appraisal fees, \$360.00 in search fees, \$25,000.00 in
28 attorney fees, \$26,902.56 in title fees and \$25,000 in referral fees;

- 1 • Interest reserve payments of \$8,650,688.00. The loan documents created an Interest
2 Reserve Account to pay monthly interest payments due until the reserve was depleted.
3 The account was established by \$1,650,688.00 in initial funding, \$5,500,000.00 in
4 loan modification funding in May of 2007 and \$1,500,000.00 in additional loan
5 modification funding in June of 2008;
- 6 • Construction and entitlement costs in the amount of \$4,848,246.25 and protective
7 advances of \$52,777.67. BR North incurred various costs in preparation of
8 development, including land engineering, traffic engineering, architects, land
9 planning, dry utility services, permits, design services, environmental consulting,
10 geotechnical consulting, property taxes, property grading, weed abatement and legal
11 fees.
- 12 (Pl.'s Compl., ¶ 18, Doc. 1; Darak Decl., ¶¶ 23, Attach. 11, 12, Doc. 43.)

13 **ii. Contract Interest Damages**

14 Plaintiff represents that at the time of Gliberman's default, the outstanding amount of unpaid
15 contract-rate interest on the Amended Loan was \$13,101,449.72. (Darak Decl., ¶ 25, Attach. 11,
16 Doc. 43.) This figure represents the total amount of contract rate interest (\$21,755,556.72) less the
17 amounts received from Crosswinds (\$372,170.93) and the interest payments made from the Interest
18 Reserve Account (\$8,281,936.07). (Darak Decl., ¶ 25, Attach. 11, Doc. 43.)

19 **iii. Default Interest Damages**

20 Under the terms of the Amended Loan, in the event of Crosswind's default, a default interest
21 rate of 24% per annum would apply.⁸ (Darak Decl., ¶ 26, Attach. 13, Doc. 43.) Crosswinds

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23 ⁸ On December 12, 2011, the Court issued a minute order requesting additional briefing as to why this default rate
24 of interest was not usurious. (Doc. 49.) Plaintiff's supplemental briefing argued that the Original and Amended Loans are
25 exempt from usury interest rate limitations under California law pursuant to Cal. Civ. Code Section 1916.1, which provides
26 that "[t]he restrictions upon rates of interest contained in Section 1 of Article XV of the California Constitution shall not apply
27 to any loan or forbearance made or arranged by any person licensed as a real estate broker by the State of California, and
28 secured, directly or collaterally, in whole or in part by liens on real property.") Plaintiff's supplemental briefing submits
evidence that the Original and Amended Loan were solicited, negotiated and arranged by two California-licensed real estate
brokers: Douglas Esteves (the Original Loan) and Investors Mortgage Holdings California, Inc. (The Amended Loan) (Pl.'s
Supp. Briefing, 2: 8-10; Supplemental Declaration of Steven Darak ("Darak Sup. Decl.") ¶ 5, Doc. 51-52.) Both the Original
and Amended Loans identify Mr. Esteves and Investors Mortgage Holdings California, respectively, as a licensed California
real estate broker. (Supp. Darak Decl., ¶¶ 6, 10, Doc. 51.) The Original and Amended Loan Agreements also expressly refer

1 defaulted on the Amended Loan in November of 2008, at which point a default interest rate of 24%
2 per annum applied against the principal balance, which continued to accrue to the date of Plaintiff's
3 Motion.⁹ Accordingly, the amount of unpaid interest at the default rate was \$25,726,351.42¹⁰ as of
4 the date Plaintiff's motion for default judgment was filed. (Darak Decl., ¶ 26, Attach. 13, Doc. 43.)

5 **iv. Late Charge and Internal Enforcement Damages**

6 Plaintiff additionally claims entitlement to late charges pursuant to the Amended Loan, which
7 provides that if Crosswinds failed to make a payment of principal or interest on the due date, a daily
8 late charge equal to \$2,000.00 per day for each day the payment is past due would be assessed.
9 (Darak Decl., ¶ 30, Attach. 13, Doc. 43.) Additionally, the Amended Note provides that, if any
10 amount were to remain unpaid after the maturity of the Amended Loan, Crosswinds and/or
11 Gliberman would be required to pay late charges equal to .5% of the outstanding principal balance
12 each month until the final payment is received. (Darak Decl., ¶ 30, Attach. 13, Doc. 43.) Here,
13 Plaintiff requests total late charge damages in the amount of \$9,000,035.65. (Darak Decl., ¶¶ 30-31,
14 Attach. 13, Doc. 43.) This figure represents \$2,124,000.00 in daily late fees (calculated at \$2,000.00
15 per day) and \$6,876,035.65 in monthly late fees (calculated at .5% of the outstanding principal
16 balance each month since the Loan's maturity date). (Darak Decl., ¶¶ 30-31, Attach. 13, Doc. 43.)

17 Plaintiff also claims damages relating to the non-judicial foreclosure of the subject property.
18 (Darak Decl., ¶¶ 30-31, Attach. 13, Doc. 43.) Specifically, Plaintiff claims \$1,810.62 in enforcement
19 fees, and \$49,052.05 in legal fees. (Darak Decl., ¶ 32, Attach. 13, Doc. 43.)

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23 to the origination and processing fees payable to Mr. Esteves and Investors Mortgage Holdings California with respect to
24 their brokerage services. ("Supp. Darak Decl., ¶¶ 7, 11, Doc. 51.) Plaintiff additionally argues that the Original and Amended
25 Loan were secured by real property, as evidenced by the deed of trust, assignment of rents, security agreement and fixture
26 filing dated November 7, 2006 (Darak Supp. Dec. ¶ 12, Doc. 52; Darak Decl ¶¶ 11, 12, 16, Attach. 3, 4, 8, Doc. 43.) The
27 Court is persuaded that Plaintiff's default interest rate is not usurious under California law.

28 ⁹ Arguably, default interest damages would continue to accrue until judgment is entered. However, Plaintiff's
Motion for Default Judgment does not request accrued default interest damages for the time between the filing of the motion
for default judgment and Court's order entering default judgment.

¹⁰ The total default interest damage calculation was reduced by Plaintiff's \$2,700,000.00 credit bid at a non-judicial
foreclosure sale of the subject property held on March 3, 2011. (Darak Decl., ¶¶ 28-29, Attach. 11, Doc. 43.)

1 In sum, as of October 21, 2011, Plaintiff claims a total amount due and owing to Plaintiff
2 under the Amended Loan of \$81,170,331.74. (Darak Decl., ¶ 32, Doc. 43) Based on the evidence
3 presented, the court concludes that the damages sought are consistent with the terms of the
4 agreements, supported by sufficient evidence and are otherwise appropriate in light of Crosswinds'
5 default and Gliberman's guaranty of the Loans. This factor therefore weighs in favor of entry of
6 default judgment.

7 **4. The Possibility of a Dispute Concerning Material Facts**

8 The fifth *Eitel* factor considers the possibility that material facts may be in dispute. *Pepsico*,
9 238 F.Supp.2d at 1177; *see also Eitel*, 782 F.2d at 1471-72. There is no evidence indicating any
10 facts are in dispute. The Loans and Guaranty were executed by Gliberman, but were not repaid.
11 Moreover, Gliberman has failed to appear in this action or to contest the material facts alleged in
12 Plaintiff's Complaint. *See Pepsico*, 238 F. Supp. 2d at 1177 ("Upon entry of default, all well-pleaded
13 facts in the complaint are taken as true, except those relating to damages," citing *TeleVideo Sys., Inc.*
14 *v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir.1987)). Plaintiff has supported its claims with
15 evidence of the Loans, the Guaranties as well as Gliberman's non-payment. As Gliberman has
16 made no attempt to challenge the accuracy of the allegations in the Complaint, no factual disputes
17 exist that preclude the entry of default judgment.

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

19 The sixth *Eitel* factor considers whether Gliberman's default may have been the product of
20 excusable neglect. *See Pepsico*, 238 F. Supp. 2d at 1177; *see also Eitel*, 782 F.2d at 1471-72. Here,
21 Plaintiff has twice put Gliberman on notice regarding the instant lawsuit by serving Gliberman's
22 counsel. Plaintiff's most recent service demonstrates that Gliberman, through counsel, was aware
23 of this lawsuit. (Mitchell Decl., ¶¶ 6-9, Attach. 1- 2, Doc. 44.) Indeed, even after a responsive
24 pleading was overdue, Plaintiff provided Gliberman additional notice via email that Plaintiff would
25 seek a default judgment if Gliberman did not respond to Plaintiff's Complaint. (Mitchell Decl., ¶
26 12, Attach. 4, Doc. 44.)

27 The evidence before the Court indicates Gliberman was aware of these proceedings, and
28 made a conscious decision in refusing to respond to Plaintiff's Complaint or otherwise participate in

1 this case. There is little chance that Gliberman's default was the result of excusable neglect.
2 Accordingly, this factor favors default.

3 **6. The Strong Policy Favoring Decisions on the Merits**

4 “Cases should be decided upon their merits whenever reasonably possible.” *Eitel*, 782 F.2d
5 at 1472. The fact that Rule 55(b) has been enacted, however, indicates that “this preference, standing
6 alone, is not dispositive.” *Pepsico*, 238 F. Supp. 2d at 1177 (quoting *Kloepping v. Fireman's Fund*,
7 1996 WL 75314 at *3 (N.D. Cal. 1996)). Rule 55(a) allows a court to decide a case before the merits
8 are heard if defendant fails to appear and defend. *See Pepsico*, 238 F.Supp.2d at 1177 (“Defendant's
9 failure to answer plaintiffs' complaint makes a decision on the merits impractical, if not
10 impossible”). Since Gliberman failed to respond to plaintiff's claims, the seventh *Eitel* factor does
11 not preclude the entry of default judgment against it.

12 Based on the evaluation of the above-referenced factors, an entry of default judgment is
13 appropriate.

14 **7. Attorney's Fees and Costs**

15 Plaintiff additionally requests an award of attorney's fees.¹¹ (Pl.'s Mot., 11: 6-20, Doc. 42.)
16 California Civil Code § 1717 states that attorney's fees, “[i]n any action on a contract, where the
17 contract specifically provides that attorney's fees and costs, which are incurred to enforce that
18 contract, shall be awarded either to one of the parties or to the prevailing party.” California Code of
19 Civil Procedure § 1021 “recognizes that attorney fees incurred in prosecuting or defending an action
20 may be recovered as costs ... when they are otherwise authorized by statute or by the parties'
21 agreement.” *Santisas v. Goodin*, 17 Cal.4th 599, 71 Cal. Rptr. 2d 830 (1998).

22 Plaintiff makes this request pursuant to a provision in the Amended Guaranty which provides
23 for recovery of attorney fees:

24 If any lawsuit, reference or arbitration is commenced which arises out of, or which
25 relates to this Guaranty, or the other Loan Documents, the prevailing party shall be
entitled to recover from each other party such sums as the court . . . may adjudge to be

26
27 ¹¹ Plaintiff has not provided a specific monetary request for attorney's fees. Rather, Plaintiff has represented that,
28 should the Court find an award of attorney's fees to be proper, Plaintiff will submit an appropriate fee petition for attorney's
fees and costs. (Pl.'s Mot., 11: 14-17, Doc. 42.)

1 reasonable attorney's fees (including the allocated costs for service of in-house
2 counsel) in the action or proceeding, in addition to costs and expenses otherwise
allowed by law.

3 (Darak Decl., ¶ 17, Attach. 9, ¶ 15(j), Doc. 43.)

4 The parties' agreements provide for the recovery of attorneys' fees to the prevailing party.
5 Attorneys' fees are authorized Cal. Civ. Code § 1717 when the parties' agreement authorizes
6 attorneys' fees. By successfully obtaining a default judgment against Gliberman in this breach of
7 contract action, Plaintiff is the "prevailing party" under Cal. Civ. Code § 1717 and is entitled to
8 reasonable attorney's fees and costs. An award of reasonable attorney's fees and costs is also
9 authorized under Cal. Code. Civ. P. § 1021.

10 **CONCLUSION AND RECOMMENDATIONS**

11 For the above reasons, the Court RECOMMENDS as follows:

- 12 1. Plaintiff's Motion for Default Judgment be GRANTED;
- 13 2. Judgment be entered in favor of the Plaintiff in the amount of **\$81,170,331.74** against
14 Defendants Bernard Gliberman, individually and as trustee of the Bernard Gliberman
15 Revocable Living Trust;
- 16 3. Post-judgment interest as set forth in 28 U.S.C. § 1961(c) shall accrue from the time of entry
17 of judgment until the judgment is satisfied in full;
- 18 4. Plaintiff is entitled to an award of attorney fees. Plaintiff shall submit a detailed, itemized
19 petition for attorney's fees and costs within 30 days of the date of this Order.

20 These findings and recommendations are submitted to the district judge assigned to this
21 action, pursuant to Title 28 of the United States Code section 636(b)(1)(B) and this Court's Local
22 Rule 304. Within fifteen (15) days of service of this recommendation, any party may file written
23 objections to these findings and recommendations with the Court and serve a copy on all parties.
24 Such a document should be captioned "Objections to Magistrate Judge's Findings and
25 Recommendations." The district judge will review the magistrate judge's findings and
26 recommendations pursuant to Title 28 of the United States Code section 636(b)(1)(C).

1 The parties are advised that failure to file objections within the specified time may waive the right to
2 appeal the district judge's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 IT IS SO ORDERED.

4 **Dated: February 24, 2012**

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE

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