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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

SOCIETE D'EQUIPMENTS  
INTERNATIONAUX NIGERIA, LTD,

Plaintiff,

v.

DOLARIAN CAPITAL, INC., and ARA G.  
DOLARIAN,

Defendants.

Case No. 1:15-cv-01553-GEB-SKO

**AMENDED FINDINGS AND  
RECOMMENDATION GRANTING IN  
PART SOCIETE D'EQUIPMENTS  
INTERNATIONAUX NIGERIA, LTD'S  
MOTION FOR DEFAULT JUDGMENT**

**Objections Due: 14 Days**

(Doc. 32)

**I. INTRODUCTION**

On October 9, 2015, Plaintiff Societe d'Equipments Internationaux Nigeria, Ltd. ("SEI") filed a complaint against Defendants Dolarian Capital, Inc. ("DCI"), and Ara G. Dolarian ("Dolarian") (collectively "Defendants"). (Doc. 1 ("Complaint").) On November 18, 2015, proceeding *pro se*, Dolarian filed an answer "by and for himself and on behalf of [DCI]," a Counterclaim for breach of contract against SEI, and a third-party complaint against Amanda Giovanni, a defense contractor. (Docs. 11 ("Answer"); 12 ("Counterclaim").) On November 30, 2015, this Court struck the answer as to DCI pursuant to Local Rule 183(a), which prohibits a corporation or other business entity from appearing in federal court without counsel, and entered default against DCI, and on January 12, 2016, dismissed the counterclaim pursuant to Fed. R. Civ. P. 12(b)(1). (Docs. 15; 23.)

On November 19, 2015, SEI filed a request for the Clerk of Court to enter default against Defendant DCI, and on November 30, 2015, default was entered. (Docs. 10; 16.) On March 15,

1 2016, SEI filed a motion for default judgment against Defendant DCI pursuant to Federal Rule  
2 Civil Procedure 54(b) seeking damages in the amount of \$8,618,646.57 and costs in the amount of  
3 \$738.43. (Docs. 32; 33). Defendant DCI did not file an opposition. (*See* Docket.) Having  
4 reviewed the parties' papers and all supporting material, the matter was deemed suitable for  
5 decision without oral argument pursuant to Local Rule 230(g), and the April 20, 2016, hearing  
6 was VACATED.

7 For the reasons set forth below, it is RECOMMENDED that SEI's motion for default  
8 judgment be GRANTED.<sup>1</sup>

## 9 II. BACKGROUND

### 10 A. Factual Background

11 SEI is a private limited company organized under the laws of Nigeria operating out of  
12 Abuja, Nigeria. (Compl., ¶ 1; Doc. 35 (Declaration of Hima Aboubakar (Aboubakar Decl.), ¶ 4.)  
13 SEI is "in the business of acquiring various military assets and munitions[,] primarily for the  
14 Nigerian armed services." (Compl., ¶ 8; *see also* Aboubakar Decl., ¶ 7.) SEI contracted with the  
15 Nigerian military to acquire and deliver "various military assets and munitions for the use of the  
16 Nigerian military in its fight against the terrorist organization known as Boko Haram. (Compl.,  
17 ¶ 8; Aboubakar Decl., ¶ 10.)

18 In 2014, SEI contacted DCI's agent Marion Ford, to discuss potential arms transactions  
19 whereby DCI would procure and sell military assets and munitions to SEI for use by the Nigerian  
20 military. (Aboubakar Decl., ¶ 7.) Ford represented to SEI that DCI either had or would be able to  
21 acquire the military assets and munitions the Nigerian military needed, and had contacts and  
22 connections that would enable DCI to export these assets and munitions to Nigeria. (Aboubakar  
23 Decl., ¶¶ 8-9.)

24 DCI and SEI signed several contracts, totaling in value to \$246,433,542.50.<sup>2</sup> One of these  
25 contracts, signed in June 2014, involved the sale and supply of military assets and munitions for  
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27 <sup>1</sup> On May 4, 2016, the Court recommended that Plaintiff's motion for default judgment against DCI be granted on  
all counts. (Doc. 38.)

28 <sup>2</sup> DCI and SEI entered into at least five signed agreements for the sale and supply of military assets and munitions  
between June 4 and August 17, 2014, for a total contractual value of \$246,433,542.50. (*See* Countercl., Exhs. A (sale

1 the sum of \$8,616,042.50. (Aboubakar Decl., Exh. A.) As a condition of the contracts, SEI was  
2 to pay a deposit in the amount of “50% of the contract value” at the time of “signing and sealing of  
3 the contract” and was to provide DCI “with the necessary End User Certificate(s)” for export.

4 SEI made two payments to DCI totaling \$8,618,646.57: an initial payment for  
5 \$4,998,646.57 in June 2014, and, upon assurances from Ford that DCI had the appropriate export  
6 licenses to begin delivering the military assets and munitions upon receipt of the balance of the  
7 contract price, a second payment for \$3,620,000 in September 2014. (Aboubakar Decl., Exhs. C,  
8 D.) DCI acknowledged receipt of the \$8,618,646.57 in a letter to SEI dated September 18, 2014.  
9 (Aboubakar Decl., Exh. D.) These payments were \$2,604.07 in excess of the contract price of  
10 \$8,616,042.50 due to a miscalculation by SEI. (Aboubakar Decl., ¶ 15.)

11 DCI, however, did not deliver *any* military assets or munitions to SEI in accordance with  
12 the June 2014 contract. (Compl., ¶¶ 15, 23, 34; Aboubakar Decl., ¶ 19.) SEI therefore cancelled  
13 the June 2014 contract by letter dated May 7, 2015, based on the “constant delay of execution of  
14 the contract” and DCI’s “[f]ailure to obtain export license[s].” (Compl, Exh. B; Aboubakar Decl.,  
15 Exh. E.) SEI further demanded that DCI return the money already paid. (Compl, Exh. B;  
16 Aboubakar Decl., Exh. E.)

17 By letter dated May 15, 2015, DCI agreed “to cancel [the June 2014 contract] in [the]  
18 amount of \$7,823,646.57” and apply the amount as a credit against another contract entered into  
19 between SEI and DCI. (Aboubakar Decl., Exh. F.) DCI further demanded an additional  
20 \$2,583,890.93 “due and payable” on this second contract. (Aboubakar Decl., Exh. F.) DCI has  
21 continued to refuse and has failed to return any amount of the \$8,618,646.57 it received. (Compl.,  
22 ¶¶ 18, 40; Aboubakar Decl., Exhs. E, F, G.)

23 SEI seeks damages in the amount of \$8,618,646.57 for DCI’s failure to provide the  
24 military assets and munitions pursuant to the June 2014 contract, as well as prejudgment interest

25  
26 of six Mi-24/Mi-35 helicopters); B (sale of six DEFA Type 553 revolver cannons, arming wire for high explosive  
27 bombs, a Marta 155 Type rocket launch pad, 1,000 high explosive bombs, 25,000 rounds of helicopter revolver  
28 autocannons); D (50,000 rounds of autocannon ammunition); E (30 T-72 MBTs (main battle tanks); 20 Zu-23-4 23  
mm 4 lightly armored anti-aircraft tracked vehicles, 400,000 Zu-23-4 ammunition rounds, 13,500 125 mm T-72 high  
explosive rounds, 1,500 125 mm APFSDS-T armor-piercing anti-tank ammunition rounds.)

1 as of May 7, 2015, attorneys' fees, costs, and punitive and exemplary damages. (Compl.)

2 **B. Procedural Background**

3 On October 9, 2015, SEI filed a complaint against DCI and Dolarian, alleging several  
4 claims flowing from DCI's alleged breach of the June 2014 contract. (Compl.) SEI alleges claims  
5 for failure of consideration and breach of contract against DCI alone. (*Id.*, pp. 4-9.) SEI alleges  
6 claims for money had and received, conversion, and fraud against DCI and Dolarian jointly and  
7 severally. (*Id.*)

8 On November 18, 2015, proceeding *pro se*, Dolarian filed an answer "by and for himself  
9 and on behalf of [DCI]," a counterclaim for breach of contract against SEI, and a third-party  
10 complaint against Giovanni. (Answer; Countercl.) Because a corporation or other business entity  
11 may only appear in federal court with counsel, *see, e.g., Rowland v. California Men's Colony*, 506  
12 U.S. 194, 201-02 (1993) (noting that 28 U.S.C. § 1654 does not allow corporations, partnerships,  
13 or associations to appear in federal court other than through a licensed attorney); Local Rule  
14 183(a) ("A corporation or other entity may appear only by an attorney"), on November 30, 2015,  
15 this Court struck the answer as to DCI (Doc. 15) and default was entered against DCI by the Clerk  
16 of Court (Doc. 16). On January 12, 2016, this Court dismissed DCI's counterclaim for lack of  
17 standing. (Doc. 23.)

18 On March 15, 2016, SEI filed the instant motion for default judgment against DCI.  
19 (Doc. 30.) No opposition has been filed. (*See* Docket.)

20 **III. MOTION FOR DEFAULT STANDARD**

21 **A. Fed. R. Civ. P. 55(b)**

22 Pursuant to Rule 55(b)(2), the court may enter a default judgment where the clerk, under  
23 Rule 55(a), has previously entered the party's default based upon failure to plead or otherwise  
24 defend the action. Fed. R. Civ. P. 55(b). Following entry of default, a district court may in its  
25 discretion grant relief upon an application for default judgment. *Aldabe v. Aldabe*, 616 F.2d 1089,  
26 1092 (9th Cir. 1980). Factors that a district court may consider in exercising its discretion include:  
27 (1) the possibility of prejudice to the plaintiff; (2) the merits of the plaintiff's substantive claim;  
28 (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility

1 of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and  
2 (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the  
3 merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

4 Factual allegations detailed in the complaint are taken as true, except for those allegations  
5 relating to damages. *See TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987)  
6 (citing *Geddes v. United Financial Group*, 559 F.2d 557, 560 (1977); *Philip Morris USA v.*  
7 *Castworld Products, Inc.*, 219 F.R.D. 494, 499 (C.D. Cal.2003) (“[B]y defaulting, Defendant is  
8 deemed to have admitted the truth of [Plaintiff’s] averments.”). “A party seeking default judgment  
9 must state a claim upon which it may recover.” *Philip Morris USA*, 219 F.R.D. at 501. A plaintiff  
10 must also prove all damages sought in the complaint. *Id.* at 498; *see also* Fed. R. Civ. P. 55(b)(2)  
11 (“In determining damages, a court can rely on the declarations submitted by the plaintiff”).

12 **B. Fed. R. Civ. P. 54(b)**

13 “When an action presents more than one claim for relief . . . or when multiple parties are  
14 involved, the court may direct entry of a final judgment as to one or more, but fewer than all,  
15 claims or parties only if the court expressly determines that there is no just reason for delay.” Fed.  
16 R. Civ. P. 54(b); *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980) (noting that the  
17 court has discretion to enter a default judgment as to less than all defendants). Under certain  
18 circumstances, however, default judgement is inappropriate. Default judgment should be denied  
19 in those cases where default judgment entered against one defendant would be inconsistent with  
20 judgment on the merits in favor of the remaining answering defendant(s). *See Frow v. De La*  
21 *Vega*, 82 U.S. (15 Wall.) 552 (1872).

22 **IV. DISCUSSION**

23 **A. Threshold Issues**

24 **1. This Court May Exercise Personal Jurisdiction Over DCI.**

25 As an initial matter, SEI has established that this Court may exercise personal jurisdiction  
26 over DCI even though DCI has not yet appeared. First, it is undisputed that on October 14, 2015,  
27 SEI personally served a copy of the complaint upon DCI’s agent for service of process: Dolarian,  
28 the sole shareholder and owner of DCI. (Doc. 4, p. 2.) Although a federal court lacks personal

1 jurisdiction over a defendant until the defendant has been served in accordance with Rule 4, *see*  
2 *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982), “Rule 4 is a flexible rule that should  
3 be liberally construed so long as a party receives sufficient notice of the complaint.” *United Food*  
4 *& Commercial Workers Union, Locals 197, 373, 428, 588, 775, 839, 870, 1119, 1179, and 1532 v.*  
5 *Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984). Here, DCI acknowledged receipt of service  
6 of the complaint, and waived any objection to such service, when it filed the Answer.  
7 (*See Answer*<sup>3</sup>.)

8         Additionally, while simply providing “actual notice” or “naming the defendant in the  
9 complaint” is insufficient to establish personal jurisdiction without “substantial compliance with  
10 Rule 4,” a “general appearance or responsive pleading by a defendant that fails to dispute personal  
11 jurisdiction will waive any defect in service or personal jurisdiction.” *Benny v. Pipes*, 799 F.2d  
12 489, 492 (9th Cir. 1986) (citing *Jackson*, 682 F.2d at 1347); Fed. R. Civ. P. 12(h)(1).  
13 (*See Answer*, p. 3 (admitting jurisdiction and venue).) A general appearance “ordinarily is an  
14 overt act by which the party comes into court and submits to the jurisdiction of the court. This is  
15 an affirmative act involving knowledge of the suit and an intention to appear.” *Id.* (citing 28 Fed.  
16 Proc. (L. Ed.) § 65.137 at 526 (1984)); *see also Wilson v. Moore and Associates, Inc.*, 564 F.2d  
17 366, 368-69 (9th Cir.1977) (informal contact between parties constitutes appearance when  
18 defendant shows “clear purpose to defend the suit”).

19         Here, DCI filed an Answer to the complaint. Though the Answer was stricken by this  
20 Court as to DCI pursuant to Local Rule 183(a) (Doc. 15), the filing of the Answer demonstrates  
21 DCI’s awareness of the suit and intent to defend the suit. Moreover, by failing to raise service or  
22 personal jurisdiction in the Answer (*see Answer*, p. 2) or at any time since, DCI has waived any  
23 defect in such service or personal jurisdiction.

24         Second, based upon the complaint and evidence produced by SEI, this Court’s exercise of  
25 personal jurisdiction over DCI is appropriate under the circumstances. It is undisputed that DCI is  
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27 <sup>3</sup> Though the Answer was stricken as to DCI, the Answer is still admissible and binding as “it is a part of the files  
28 and records of this court, and is an admission as to the facts contained in it.” *In re Oregon Bulletin Printing & Publ’g*  
*Co.*, 18 F. Cas. 773, 776 (D. Or.), *rev’d on other grounds*, 18 F. Cas. 783 (C.C.D. Or. 1876).

1 a corporation organized under the laws of California, with its principal place of business in Fresno,  
2 California. (Compl., ¶ 2; Answer, ¶ 2.) This Court has personal jurisdiction over DCI in this  
3 action.

4 **2. The Contracts at Issue Do Not Violate the AECA.**

5 The export from the United States of arms, munitions, weapons, equipment for military use  
6 and related components, and the technology to design, build, and test such items (“defense articles  
7 and defense services”) is strictly controlled and regulated under federal law.

8 The Arms Export Control Act (“AECA”) authorizes the President of the United States to  
9 control the import and export of defense articles and defense services in furtherance of world  
10 peace, national security, and the foreign policy of the United States and to establish and maintain a  
11 United States Munitions List (the “Munitions List”) for that purpose. 22 U.S.C. § 2778 *et seq.*  
12 The President has delegated the authority to regulate the export of defense articles and defense  
13 services to the Secretary of State. *Id.*

14 The International Traffic in Arms Regulations (“ITAR”) implements the AECA.  
15 22 C.F.R. §§ 120 *et seq.* The Munitions List is a catalog of designated defense articles and  
16 defense services that are subject to export restrictions. *See* 22 C.F.R. § 121. The Department of  
17 State is the licensing authority for items on the Munitions List. *See id.*, §§ 120, 120.1 (referring to  
18 Executive Order 11958, as amended (42 Fed. Reg. 4311)). No defense articles or defense services  
19 designated by the President may be exported without a license for such export from the United  
20 States Department of State. 22 U.S.C. § 2278(b)(2).

21 Though there are “normal commercial use” exceptions in the Munitions List, “[t]he  
22 exemption from a State Department license is limited [ ] to components (not the principal device  
23 of which they form a part), and to components which are in normal commercial use. The ‘plain  
24 language’ of the exception is so clear that any exporter claiming that the exception is applicable to  
25 the principal items covered by (a) or (b) does so at his peril.” *United States v. Gregg*, 829 F.2d  
26 1430, 1438 (8th Cir. 1987). Further, even “nonworking” defense articles that are “inoperable” or  
27 in need of “overhaul, repair, [or] modification” are included in the Munitions List. *See United*  
28 *States v. Fu Chin Chung*, 931 F.2d 43, 45 (11th Cir. 1991); *see also United States v. Sun*, 278 F.3d

1 302, 310 (4th Cir. 2002) (noting that a license is unnecessary if the military item “has been  
2 rendered useless beyond the possibility of restoration to its original identity by means of mangling,  
3 crushing, or cutting”).

4 Here, many of the military munitions and assets that DCI promised to provide to SEI are  
5 listed on the Munitions List. (See Countercl., Exhs. A-E.) It is undisputed that under the contract,

6 [DCI] warrants it is in full compliance with all applicable United States  
7 laws, and regulations and will remain in full compliance with all applicable laws  
8 and legal standards during the term of this Agreement. [DCI] further covenants,  
9 warrants and represents that it shall comply with all applicable United States laws,  
10 including regulations and Executive Orders, applicable to this Agreement and  
11 performance of the obligations herein, including but not limited to any applicable  
12 United States export control laws and trade restrictions, including but not limited  
to the U.S. International Traffic in Arms Regulations (“ITAR”) and Foreign  
Assets Control Regulations (“OFAC Regulations”), which govern the export and  
re-export of U.S. Origin defense articles and technology and goods and  
technology subject to U.S. jurisdiction.

13 [SEI] acknowledges and agrees that the Materials may be subject to  
14 Export Controls. The Parties may not export, re-export or transfer, whether  
15 directly or indirectly, the Materials, or any portion thereof, without first  
complying strictly and fully with any applicable Export Controls regarding the  
Materials.

16 (Compl., Exh. A, ¶¶ 1(a)-(b).) Because the contracts between SEI and DCI included a provision  
17 requiring DCI to obtain the necessary licenses from the State Department in compliance with  
18 ITAR, they do not violate the AECA. Further, SEI alleges that DCI’s failure to obtain the  
19 necessary licenses from the State Department *caused* the breach, supporting an inference that the  
20 parties formed the contract with the express intent to comply with the AECA, and DCI does not  
21 contend that the contracts are unenforceable. SEI has met its burden of demonstrating that the  
22 contracts do not violate the AECA and that damages may be recovered for DCI’s breach.

23 **B. Entry of Default Judgment is Appropriate Pursuant to Rule 55(b)**

24 The *Eitel* factors favor the entry of default judgment against DCI in the amount of  
25 \$8,618,646.57. *Eitel*, 782 F.2d 1470.

26 **1. Prejudice to Plaintiff**

27 Considering the first *Eitel* factor, if SEI’s application for default judgment were denied,  
28 SEI would be left without a remedy because DCI has refused to participate in the litigation. It is

1 undisputed that SEI paid DCI a total of \$8,618,646.57 for the June 2014 contract. (Aboubakar  
2 Decl., Exh. A; *see also* Compl., p. 4.) It is also undisputed that DCI failed to fulfill the terms of  
3 the June 2014 contract, or to return any portion of the \$8,618,646.57 after SEI cancelled the June  
4 2014 contract. (Aboubakar Decl., Exhs. B, C, D, E; *see also* Compl., p. 4.) DCI has further failed  
5 to offer any evidence disputing the allegations of the complaint or opposed the motion for default  
6 judgment. (*See* Docket.) SEI would be left without a remedy and prejudiced were the Court to  
7 deny its application for default judgment. This factor therefore weighs in favor of granting default  
8 judgment. *Philip Morris USA*, 219 F.R.D. at 499 (“prejudice” exists where the plaintiff has no  
9 “recourse for recovery” other than default judgment).

## 10 **2. Merits of the Claims and Sufficiency of the Complaint**

11 Under an *Eitel* analysis, the merits of a plaintiff’s substantive claims and the sufficiency of  
12 the complaint are often analyzed together. These two factors require that the plaintiff’s allegations  
13 “state a claim on which the [plaintiff] may recover.” *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th  
14 Cir. 1978).

### 15 **a. Failure of consideration**

16 The allegations of SEI’s complaint and the evidence filed in support of the motion for  
17 default judgment support a finding that SEI is entitled to relief on its affirmative claim for  
18 rescission for failure of consideration. Material failure of consideration is a ground for rescission  
19 under California law. Cal. Civ. Code § 1689(b)(4). A party to a contract is entitled to rescind the  
20 contract, and seek to be restored to its former position had it not entered into the subject contract,  
21 if “through the fault of the other party the consideration which he was supposed to receive fails in  
22 whole or in a material part[.]” *Wylar v. Feuer*, 85 Cal. App. 3d 392, 403-04 (1978) (“a failure of  
23 consideration must be ‘material,’ or go to the ‘essence’ of the contract before rescission is  
24 appropriate”).

25 Here, it is undisputed that DCI and SEI entered into the June 2014 contract for the  
26 purchase of military assets and munitions, that DCI promised to provide those military assets and  
27 munitions to SEI in exchange for \$8,616,042.50, that SEI paid DCI \$8,618,646.57 in full  
28 performance of its obligations under the June 2014 contract, and that DCI did not provide SEI

1 with *any* military assets or munitions as required under the June 2014 contract. (*See* Aboubakar  
2 Decl., Exhs. A, B, C, D; Compl., ¶¶ 8, 12-13, 15, 19-21.) Further, DCI has admitted that it has not  
3 performed its obligations under the 2014 contract. (Answer, ¶¶ 15, 22; Countercl., ¶¶ 17-21  
4 (stating it was unable to do so because it was unable to procure the necessary licenses from the  
5 State Department to comply with the AECA and ITAR); *see also* Aboubakar Decl., Exhs. E, F,  
6 G.) DCI has refused to return the money paid to it pursuant to the June 2014 contract despite  
7 acknowledging its failure to meet its obligations under the June 2014 contract. (*See* Aboubakar  
8 Decl., ¶¶ 19-23.) Therefore, SEI cannot be restored to its former position had it not entered into  
9 the subject contract absent default judgment against DCI. *See Wyler*, 85 Cal. App. 3d at 403-04.

10 SEI has properly stated a claim for rescission for failure of consideration, and default  
11 judgment is appropriate on this claim.

12 **b. Breach of Contract**

13 The allegations of SEI's complaint and the evidence filed in support of the motion for  
14 default judgment establish that DCI breached the June 2014 contract with Plaintiff. To establish a  
15 claim for breach of contract, a plaintiff must allege (1) a contract, (2) plaintiff's performance or  
16 excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff. *Amelco Elec. v.*  
17 *City of Thousand Oaks*, 27 Cal. 4th 228, 243 (2002) (citing 4 Witkin, Cal. Procedure (4th ed.  
18 1997) Pleading, § 476, p. 570); *Gautier v. Gen. Tel. Co.*, 234 Cal. App. 2d 302, 305 (1965).

19 Here, it is undisputed that DCI and SEI entered into the June 2014 contract for the  
20 purchase of military assets and munitions, that DCI promised to provide those military assets and  
21 munitions to SEI in exchange for \$8,616,042.50, that SEI paid DCI \$8,618,646.57 in full  
22 performance of its obligations under the June 2014 contract, that DCI did not provide SEI with  
23 *any* military assets or munitions as required under the June 2014 contract, and that DCI has  
24 retained all monies paid under the June 2014 contract without performing its contractual  
25 obligations. (*See* Aboubakar Decl., Exhs. A, B, C, D, E, F, G; Compl., ¶¶ 8, 12-13, 15, 19-21;  
26 Answer, ¶¶ 15, 22; 12 ¶¶ 17-21.) Therefore, SEI has established the existence of the contract, its  
27 own performance and DCI's nonperformance under the contract, and damages resulting from its  
28 own performance and DCI's nonperformance.

1 SEI has properly stated a claim for breach of contract, and default judgment is appropriate  
2 on this claim.

3 **c. Money Had and Received**

4 SEI fails to state a cognizable claim for money had and received. “The foundation of an  
5 action for conversion on a money had and received count is the unjust enrichment of the  
6 wrongdoer, and in order for plaintiff to recover in such action she must show that a definite sum,  
7 to which she is justly entitled, has been received by defendant.” *Bastanchury v. Times-Mirror*  
8 *Co.*, 68 Cal. App. 2d 217, 236 (1945). A plaintiff must plead that the defendant “is indebted to the  
9 plaintiff in a certain sum for money had and received by the defendant for the use of the plaintiff.”  
10 *Schultz v. Harney*, 27 Cal.App.4th 1611, 1623 (1994) (citation and internal quotation marks  
11 omitted).

12 A claim for money had and received operates by imposing an implied or quasi-contract on  
13 the parties in order to avoid unjust enrichment. *Gerawan Farming, Inc. v. Rehrig Pac. Co.*, No.  
14 1:11-cv-01273-LJO, 2012 WL 691758, at \*11 (E.D. Cal. Mar. 2, 2012), *aff’d*, 587 F. App’x 654  
15 (Fed. Cir. 2014). *See Paracor Finance, Inc. v. GE Capital Corp.*, 96 F.3d 1151, 1167 (9th  
16 Cir.1996). An implied or quasi-contract cannot be imposed where there is already a valid, express  
17 contract defining the rights of the parties; the two are mutually exclusive. *Berkla v. Corel Corp.*,  
18 302 F.3d 909, 918 (9th Cir. 2002); *Paracor*, 96 F.3d at 1167. Therefore, a claim for unjust  
19 enrichment or money had and received *cannot* hinge upon the existence of a valid, express  
20 contract. *See, e.g., Gerlinger v. Amazon, Inc.*, 311 F.Supp.2d 838, 856-57 (N.D.Cal. 2004)  
21 (plaintiff cannot bring a claim for unjust enrichment while relying on the existence of a valid  
22 contract to establish standing).

23 As set forth more fully above, it is undisputed that DCI and SEI entered into the June 2014  
24 contract for the purchase of military assets and munitions, that DCI promised to provide those  
25 military assets and munitions to SEI in exchange for \$8,616,042.50, that SEI paid DCI  
26 \$8,618,646.57 in full performance of its obligations under the June 2014 contract, and that DCI  
27 admits it did not perform as agreed. (*See* Aboubakar Decl., Exhs. A, B, C, D; Compl., ¶¶ 8-28;  
28 Answer, ¶¶ 15, 22; Countercl., ¶¶ 17-21 (stating it was unable to do so because it was unable to

1 procure the necessary licenses from the State Department to comply with the AECA and ITAR).)  
2 Because SEI relies on the existence of the June 2014 contract to show that it was entitled to  
3 performance of the agreed upon terms, “it cannot then turn around and argue that no agreement  
4 exists such that an implied or quasi-contract should now be imposed” to state a claim for  
5 rescission for money had and received. *Rasmussen v. Dublin Rarities*, No. C 14-1534 PJH, 2015  
6 WL 1133189, at \*12 (N.D. Cal. Feb. 27, 2015); *Paracor*, 96 F.3d at 1167; *Gerlinger*, 311  
7 F.Supp.2d at 856; *Gerawan Farming*, 2012 WL 691758, \* 12 (noting that “[t]his tension within  
8 [plaintiff]’s claim is fatal to the claim’s viability”).

9 Accordingly, the Court does not recommend a judgment for money had and received  
10 against DCI.

11 **d. Conversion**

12 SEI has also sufficiently demonstrated it is entitled to default judgment on its claim for  
13 conversion. The elements of a conversion claim are: (1) plaintiff’s ownership or right to possess  
14 the property at issue; (2) defendant’s conversion by wrongful act or disposition of property rights;  
15 and (3) damages. *Burlesci v. Petersen*, 68 Cal. App. 4th 1062, 1066 (1998). Conversion is any act  
16 of dominion wrongfully exerted over another’s property in denial of or inconsistent with the rights  
17 therein. *Fischer v. Machado*, 50 Cal. App. 4th 1069, 1072 (1996). Money may be the subject of a  
18 conversion action if it involves a specific sum capable of identification. *Weiss v. Marcus*, 51 Cal.  
19 App. 3d 590, 599 (1975).

20 As discussed above, it is undisputed that DCI and SEI entered into the June 2014 contract,  
21 that DCI promised to perform its obligations in exchange for \$8,616,042.50, that SEI paid DCI  
22 \$8,618,646.57 in full performance of its own obligations under the June 2014 contract, that DCI  
23 failed to perform its obligations under the June 2014 contract, and that DCI has retained all monies  
24 paid to it under the June 2014 contract despite its nonperformance. (*See* Aboubakar Decl., Exhs.  
25 A, B, C, D, E, F, G; Compl., ¶¶ 8, 12-13, 15, 19-21; Answer, ¶¶ 15, 22; 12 ¶¶ 17-21.) Until such  
26 time as DCI fully performed its obligations under the June 2014 contract, SEI was the rightful  
27 owner and had a right to possession of the \$8,618,646.57 it had paid to DCI. (*See id.*, ¶¶ 38-39.)  
28 It is undisputed that DCI has interfered with SEI’s personal property rights by knowingly retaining

1 and refusing to return the \$8,618,646.57 despite its non-performance and SEI's demands (*see id.*,  
2 ¶¶ 18, 22, 29, 30, 35-36, 39-41). (Aboubakar Decl., Exhs. E, F, G.)

3 Therefore, SEI has established DCI's unlawful conversion of the \$8,618,646.57, and  
4 default judgment is appropriate on this claim.

5 **e. Fraud**

6 Finally, SEI has sufficiently demonstrated it is entitled to default judgment on its claim for  
7 fraud. Common law elements of fraud which give rise to the tort action for deceit under California  
8 law are (1) misrepresentation of a material fact (consisting of false representation, concealment or  
9 nondisclosure); (2) knowledge of falsity; (3) intent to deceive and induce reliance; (4) justifiable  
10 reliance on the misrepresentation; and (5) resulting damage. *Sacramento E.D.M., Inc. v. Hynes*  
11 *Aviation Indus., Inc.*, 965 F. Supp. 2d 1141, 1151 (E.D. Cal. 2013) (citing *City of Atascadero v.*  
12 *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal.App.4th 445, 481 (1998)).

13 Here, it is undisputed that DCI and its agents made repeated material representations to  
14 SEI regarding DCI's ability to obtain all necessary governmental regulatory approvals for the  
15 acquisition and export of military assets and munitions to Nigeria. (Aboubakar Decl., ¶¶ 8-9, 11-  
16 13; Compl., ¶¶ 46-51.) SEI has alleged that these statements were knowingly false at the time  
17 they were made and were meant to intentionally deceive SEI and induce SEI's reliance, and that  
18 SEI justifiably relied on these statements in entering the June 2014 contract with DCI.  
19 (Aboubakar Decl., ¶¶ 8-10; Compl., ¶¶ 51, 52.) DCI has offered no evidence to the contrary. (*See*  
20 *Docket.*)

21 It is further undisputed that SEI has been damaged because it paid DCI \$8,618,646.57 in  
22 full performance of its obligations under the June 2014 contract and that DCI thereafter failed to  
23 perform its own obligations under the June 2014 contract. (*See* Aboubakar Decl., ¶¶ 11, 14-18;  
24 Compl., ¶¶ 52-58; *see also* Answer, ¶¶ 15, 22; Countercl., ¶¶ 17-21 (admitting DCI did not  
25 perform its obligations under the June 2014 contract).) Therefore, SEI has adequately articulated a  
26 claim for fraud, and default judgment is appropriate on this claim.

27 //

28 //

1                   **f.       Default Judgment is Favored**

2           Having demonstrated the merits of its four valid claims, the sufficiency of the complaint  
3 and the fact that it will suffer prejudice in the absence of a default judgment because it would  
4 otherwise lack recourse for recovery, SEI has established that these factors favor the granting of  
5 default judgment as to its claims for failure of consideration, conversion, breach of contract, and  
6 fraud.

7                   **3.       Amount of Money at Stake**

8           Under the fourth *Eitel* factor, “the court must consider the amount of money at stake in  
9 relation to the seriousness of Defendant’s conduct.” *PepsiCo Inc. v. Cal. Sec. Cans*, 238 F. Supp.  
10 2d 1172 (C.D.Cal.2002); *see also Eitel*, 782 F.2d at 1471-72. Although the amount SEI seeks is  
11 relatively large -- \$8,618,646.57 -- it is undisputed that SEI and DCI entered into the June 2014  
12 contract for \$8,616,042.50, and SEI paid \$8,618,616.57 to DCI in two installments in fulfillment  
13 of the June 2014 contract. (*See Aboubakar Decl., Exhs. B, C, D.*) Therefore, damages of  
14 \$8,618,646.57 were within the contemplation of the parties under the terms of the June 2014  
15 contract. (*See Aboubakar Decl., Exh. A; Compl., Exh. A.*)

16           Moreover, the amount of damages is capable of ascertainment from definite figures  
17 contained in the declaration of Hima Aboubakar, Director of SEI, and Christopher E. Dominguez,  
18 counsel for SEI, and the supporting materials attached thereto. (*Aboubakar Decl.; Doc. 34*  
19 (*Declaration of Christopher Dominguez.*) Accordingly, this factor favors granting default  
20 judgment.

21                   **4.       Potential Disputes of Material Fact**

22           The fifth *Eitel* factor considers the possibility of dispute as to any material facts in the case.  
23 Upon entry of default, all well-pleaded facts in the complaint are taken as true, except those  
24 relating to damages. *TeleVideo Sys., Inc.*, 826 F.2d at 917-18; *Elektra Entm’t Grp. Inc. v.*  
25 *Crawford*, 226 F.R.D. 388, 393 (C.D. Cal. 2005) (“Because all allegations in a well-pleaded  
26 complaint are taken as true after the court clerk enters default judgment, there is no likelihood that  
27 any genuine issue of material fact exists”). As a result, there is a very small likelihood that any  
28 genuine issue of material facts exists. *See e.g., Landstar Ranger, Inc. v. Parth Enterprises, Inc.*,

1 725 F. Supp. 2d 916, 922 (C.D. Cal. 2010) (where a plaintiff “has supported its claims with ample  
2 evidence, and defendant has made no attempt to challenge the accuracy of the allegations in the  
3 complaint, no factual disputes exist that preclude the entry of default judgment”); *accord*  
4 *Kloopping v. Fireman’s Fund*, No. C 94-2684 TEH, 1996 WL 75314, at \*3 (N.D. Cal. Feb. 13,  
5 1996) (a “plaintiff’s presumptively accurate factual allegations leave little room for dispute,”  
6 especially where the “defendant had the opportunity to dispute the facts alleged, but has avoided  
7 and utterly failed to respond to plaintiff’s allegations”).

8 Here, SEI filed a well-pleaded complaint alleging the facts necessary to establish its  
9 claims, and the court clerk entered default against DCI. DCI’s Answer failed to materially refute  
10 any of the specific allegations in the complaint. (*See Answer.*) The Answer has been stricken  
11 from the docket as to DCI pursuant to Local Rule 183(a) (Doc. 15) and it failed to dispute that  
12 DCI entered into the June 2014 contract with Plaintiff, was paid by SEI, and failed to return any  
13 portion of the money paid to it by SEI. Thus, no dispute has been raised regarding the material  
14 averments of the complaint, and the likelihood that any genuine issue may exist is, at best, remote.  
15 This factor favors default judgment.

16 **5. No Evidence that Default is Due to Excusable Neglect**

17 There is no evidence in the record that DCI’s failure to appear or otherwise oppose the  
18 motion to strike and the motion for default judgment is the result of excusable neglect. Rather,  
19 since filing the Answer, Dolarian, the sole owner and shareholder of DCI, has filed his consent to  
20 magistrate judge jurisdiction (Doc. 31) and a notice of change of address for both himself and DCI  
21 (Doc. 25), and has appeared for a scheduling conference (Doc. 29). Dolarian has adequately  
22 demonstrated that DCI’s failure to oppose the motion for default is not the result of excusable  
23 neglect. This factor, therefore, favors the entry of default.

24 **6. Strong Policy Favoring Decisions on the Merits**

25 Although the Federal Rules espouse a preference for resolving cases on their merits, *see*  
26 *Eitel*, 782 F.2d at 1472; *PepsiCo, Inc.*, 238 F. Supp. 2d at 1177, DCI’s failure to comply with the  
27 judicial process makes a decision on the merits likely impossible. DCI, having never been  
28 represented by counsel, has never made an appearance recognized under the federal or local rules.

1 Although a decision on the merits is preferable, the seventh *Eitel* policy factor alone does not  
2 preclude the entry of default judgment.

3 **C. Exercise of the Court’s Discretion to Enter Default Judgment Against Fewer Than**  
4 **All Defendants is Appropriate.**

5 Plaintiff seeks judgment against DCI, even though Dolarian answered the complaint and  
6 remains in the action. Thus, the question arises as to whether the Court should enter default  
7 judgment against fewer than all of the defendants.

8 “When an action presents more than one claim for relief . . . or when multiple parties are  
9 involved, the court may direct entry of a final judgment as to one or more, but fewer than all,  
10 claims or parties only if the court expressly determines that there is no just reason for delay.” Fed.  
11 R. Civ. P. 54(b). Therefore, the Court has discretion to deny entry of default judgment where a  
12 just reason exists to delay entry of a final judgment as to DCI. *Id.*; *see also Shanghai Automation*  
13 *Instrument Co. v. Kuei*, 194 F. Supp. 2d 995, 1005 (N.D. Cal. 2001); *Curtiss-Wright Corp. v. Gen.*  
14 *Elec. Co.*, 446 U.S. 1, 8 (1980) (noting that the court has discretion to enter a default judgment as  
15 to less than all defendants).

16 As discussed above, the factors that militate in favor of entering a default judgment here  
17 would also tend to indicate that “there is no just reason for delay.” However, in *Frow v. De La*  
18 *Vega*, 82 U.S. (15 Wall.) 552 (1872), the Supreme Court held that under certain circumstances, the  
19 court should not enter a default judgement against one or more defendants that is, or is likely to  
20 be, inconsistent with judgment on the merits in favor of the remaining answering defendant(s).

21 **1. Frow Standard**

22 The Supreme Court warned that “absurdity might follow” in instances where a court “can  
23 lawfully make a final decree against one defendant . . . while the cause was proceeding  
24 undetermined against the others.” *Frow*, 82 U.S. at 554. The Ninth Circuit has summarized the  
25 *Frow* standard as follows: “[W]here a complaint alleges that defendants are *jointly* liable and one  
26 of them defaults, judgment should not be entered against the defaulting defendant until the matter  
27 has been adjudicated with regard to all defendants.” *In re First T.D. & Investment*, 253 F.3d 520,  
28 532 (9th Cir. 2001) (citing *Frow*, 82 U.S. at 554); 10A Charles Alan Wright, Arthur R. Miller &

1 Mary Kay Kane, Federal Practice and Procedure: Civil 3D § 2690 (2001) (noting that *Frow* stands  
2 for the proposition that “when one of several defendants who is alleged to be jointly liable  
3 defaults, judgment should not be entered against that defendant until the matter has been  
4 adjudicated with regard to all defendants, or all defendants have defaulted”). The rule is designed  
5 to avoid inconsistent judgments against defaulting defendants and the remaining defendants.  
6 *Shanghai Automation*, 194 F. Supp. 2d at 995 (citing *Frow*, 82 U.S. at 554-55).

7 “While *Frow* ‘undoubtedly stands for the proposition that in certain circumstances it is  
8 inappropriate to enter a default judgment against one defendant when other defendants in the same  
9 case have prevailed,’ subsequent courts have pointed out that the precise holding of what those  
10 circumstances are is unclear.” *Shanghai Automation*, 194 F. Supp. 2d at 1006 (quoting *Farzetta v.*  
11 *Turner & Newall, Ltd.*, 797 F.2d 151, 154 (3d Cir. 1986) (noting that the *Frow* court did not  
12 identify what the Court intended to be “certain circumstances,” largely in part due to the Court’s  
13 ambiguity and failure to identify the relationship between the co-defendants)).

14 “As a result, the scope of *Frow*’s injunction against entering default judgments while  
15 claims are pending against other defendants has been stated variously. Some courts have focused  
16 on whether the complaint seeks to hold defendants *jointly* liable -- such as where a tortious act is  
17 committed by several persons acting in concert wherein each tortfeasor is entirely responsible for  
18 the resulting damage -- in contrast to cases in which there is ‘several’ or ‘joint and several’  
19 liability wherein a finding of liability as to one defendant is consistent with a finding of no liability  
20 as to others.” *Shanghai Automation*, 194 F. Supp. 2d at 1006 (collecting cases). Further, some  
21 courts have held that *Frow* “is not limited to claims asserting joint liability, but extends to certain  
22 circumstances in which the defendants have closely related defenses or are otherwise similarly  
23 situated.” *Id.* (collecting cases). “Most jurisdictions have narrowly construed *Frow* to bar entry of  
24 default judgment against one of several defendants only if ‘the theory or recovery is one of true  
25 joint liability, such that, as a matter of law, no one defendant may be liable unless all defendants  
26 are liable, or the nature of the relief demanded is such that, in order to be effective, it must be  
27 granted against each and every defendant.” *Phoenix Renovation Corp. v. Gulf Coast Software,*  
28 *Inc.*, 197 F.R.D. 580, 582-83 (E.D. Va. 2000).

1 The two lines of cases “are not at odds but reflect a more general principle[:] *Frow*’s  
2 applicability turns not on labels such as ‘joint liability’ or ‘joint and several liability,’ but rather on  
3 the key question of whether under the theory of the complaint, liability of all the defendants must  
4 be uniform. . . . [W]here uniformity of liability is not logically required by the facts and theories  
5 of the case, the risk of inconsistent judgments is not sufficiently extreme to bar entry of default  
6 judgment as a matter of law.” *Shanghai Automation*, 194 F. Supp. 2d at 1008-09.

7 **2. *Frow* Does Not Preclude Entry of Default Judgment Against DCI**

8 SEI alleges claims for conversion and fraud against both DCI<sup>4</sup> and Dolarian:

- 9
- 10 • **Count 4: Conversion:** SEI alleges it was the rightful owner and had a  
11 right to possession of the \$8,618,646.57 sent to defendants until such  
12 time as defendants performed the June 2014 contract, defendants have  
13 knowingly and intentionally retained and refused to return the  
14 \$8,618,646.57 as demanded by SEI, defendants’ retention of the  
15 \$8,618,646.57 has substantially interfered with SEI’s personal  
16 property rights over the money, and SEI has been harmed and  
17 damaged by defendants’ conduct in retaining the \$8,618,646.57 since  
18 the date of conversion, May 7, 2015.
  - 19 • **Count 5: Fraud:** SEI alleges Dolarian, on his own behalf and on  
20 behalf of DCI, made numerous false representations to SEI to induce  
21 SEI to sign the June 2014 contract with DCI, pay DCI, and delay  
22 demand for the return of the money paid to DCI, and that defendants  
23 repeatedly misrepresented the state of DCI’s ability to perform the  
24 requirements of the June 2014 contract, the status of governmental  
25 approvals required for performance of the June 2014 contract. SEI  
26 alleges the statements made by defendants were knowingly false at the  
27 time they were made and intentionally made to induce SEI’s reliance  
28 in entering into the June 2014 contract and in paying defendants  
\$8,618,646.57.

21 (See Compl., pp. 4-9.) As SEI’s allegations show, SEI brings these claims against DCI and  
22 Dolarian under a theory of joint and several liability. Thus, while Dolarian may be found jointly  
23 liable if he directed DCI’s actions, a finding that Dolarian is *not* jointly liable would *not* be

24 //

25 \_\_\_\_\_  
26 <sup>4</sup> SEI also alleges claims for failure of consideration (Count 1) and breach of contract (Count 3) against DCI alone,  
27 which do not implicate the *Frow* analysis under Rule 54(b). As discussed above, *see supra* at IV(B)(2)(c), the  
28 undersigned declines to recommend default judgment be entered against DCI for money had and received (Court 2) as  
the claim is *not* viable against either defendant. *Rasmussen*, 2015 WL 1133189, at \*12; *Gerawan Farming*, 2012 WL  
691758, at \*12, *aff’d*. Therefore, SEI’s claim for money and received also does not implicate the *Frow* analysis under  
Rule 54(b).

1 inconsistent with a judgment against DCI.<sup>5</sup> Put another way, SEI's claims for conversion and  
2 fraud can stand against DCI without necessarily finding Dolarian individually liable as well.<sup>6</sup> *See*,  
3 *e.g.*, *Shanghai Automation*, 194 F. Supp. 2d at 1009 (claim for conversion can stand against other  
4 defendants without necessarily finding individual liable as well); *Provident Land Corp. v. Bartlett*,  
5 72 Cal. App. 2d 672, 687 (1946) (noting a corporate officer or agent may also be held liable to a  
6 third party injured by the corporation's fraud or deceit, "if they assist or participate knowingly or  
7 recklessly without knowledge, in obtaining property by fraud or deceit").

8 Given that SEI's claims against Dolarian and DCI are predicated on joint and several  
9 liability, *Frow* does not preclude the entry of default judgment against DCI alone. *See Shanghai*  
10 *Automation*, 194 F. Supp. 2d at 1008 (citing *Douglas v. Metro Rental Servs., Inc.*, 827 F.2d 252,  
11 254-55 (7th Cir. 1987) (observing that the *Frow* rule applies to cases where all the defendants  
12 were claimed to be jointly, not severally, liable)). As explained by the *Shanghai Automation*  
13 court, "[t]he result in *Frow* was clearly mandated by the Court's desire to *avoid logically*  
14 *inconsistent adjudications as to liability.*" *Id.* (quoting *In re Uranium Antitrust Litigation*, 617  
15 F.2d 1248, 1257 (7th Cir. 1980)). The Court continued:

16 Rule 54(b) was amended in 1961 to permit entry of judgment in multiple party  
17 litigation in order the deal with the problem of hardship resulting from delay in  
18 waiting until completion of the entire case. The purpose of Rule 54(b) which  
19 post-dates *Frow* by nearly a century,<sup>FN9</sup> is to "strike a balance between premature  
20 decision-making and the pragmatic needs of the litigants in complex multiple-  
21 party actions." Preserving the Court's discretion in balancing those competing  
22 interests comports with other provisions of the Federal Rules which weigh the  
policy against inconsistent judgments against the pragmatic consideration of the  
hardship to existing parties in the litigation. **To hold that the mere possibility of  
inconsistent judgment divests the Court of its discretion under Rule 54(b)  
would imply that whenever there are multiple defendants who raise similar**

23 <sup>5</sup> As of the time of issuance of these findings and recommendation, no party has pled that "there exists a unity of  
24 interest and ownership" between Dolarian and DCI "such that any separateness between them has ceased to exist."  
25 *Cf. Pharmaplast S.A.E. v. Zeus Medical Holdings, LLC*, No. 2:15-cv-JAD-PAL, 2016 WL 923092 (D. Nev. Mar. 10,  
26 2016) (holding that where plaintiff sought relief against "all defendants collectively, for jointly undertaken action, and  
based primarily on unity-of-interest [alter ego] theories," the *Frow* doctrine "cautions against entering a default  
judgment against [the corporate entity] while its management co-defendants continue to actively defend these jointly  
targeted claims").

27 <sup>6</sup> For example, while SEI may be entitled to judgment on its claim against DCI for fraud based upon DCI and its  
28 agents' repeated material misrepresentations, *see supra* at IV(B)(2)(e), Dolarian may be able to prove he did not make  
any material misrepresentations as an individual or as an agent on behalf of DCI. *See Shanghai Automation*, 194 F.  
Supp. 2d at 1009.

1            **defenses, the court could never enter a default judgment until conclusion of**  
2            **the entire case regardless of the substantial prejudice likely to be suffered by**  
3            **the plaintiff as a result of the delay. Such a rule would contravene the**  
4            **purpose of the 1961 amendment to Rule 54(b).**

5            [. . .]

6            FN9 The Second Circuit has suggested but not held that it is unlikely  
7            that *Frow* retains any force subsequent to the adoption of Rule 54(b). *See*  
8            *International Controls Corp. v. Vesco*, 535 F.2d 742, 746-47 n.4 (2d Cir.  
9            1976).

10           *Id.* at 1008-09 (internal citations omitted) (emphasis added).

11           In sum, *Frow* does not preclude the entry of default judgment against DCI alone. *See*  
12           *Shanghai Automation*, 194 F. Supp. 2d at 1008 (citing *Douglas*, 827 F.2d at 254-55 (observing  
13           that the *Frow* rule applies to cases where all the defendants were claimed to be jointly, not  
14           severally, liable)).

### 15           **3. The Court Should Enter Default Judgment under These Circumstances**

16           Here, like *Shanghai Automation*, “because differing judgments would not necessarily be  
17           illogical, *Frow* does not apply, and the Court retains discretion to enter default judgments against  
18           less than all defendants under Rule 54(b). This is an appropriate case to exercise such discretion.”  
19           *Id.* at 1009-10.

20           There are strong reasons favoring entry of a default judgment against DCI even though  
21           defendant Dolarian will remain in the case. Nearly all the factors enumerated in *Eitel v. McCool*,  
22           militate in SEI’s favor. *See supra*. Further weighing in favor of granting default judgment at this  
23           stage is the danger that any damages awarded is likely to become increasingly uncollectible with  
24           the passage of time. *Cf. In re Uranium Antitrust Litig.*, 473 F. Supp. 382, 390 (N.D. Ill. 1979)  
25           (plaintiff faced the possibility that the “defaulting defendants, which are all foreign corporations,  
26           may conceal or transfer their assets which are subject to execution by United States Courts”).  
27           There is significant risk of prejudice if entry of judgment against DCI is delayed, in that the  
28           damages sought are significant, and defendant Dolarian has previously represented to the Court  
                 that the United States government has seized some or all of the funds paid to DCI by SEI under  
                 the June 2014 contract (*see Answer*, ¶ 18 (stating that “Defendants admit that they have not  
                 returned funds provided by SEI, as those funds have been improperly seized by the United States

1 Government and [ ] are not in Defendants’ possession, custody, or control”)). Regardless of the  
2 reason the money has been seized, SEI has sufficiently demonstrated the risk of prejudice by a  
3 delayed grant of default against DCI.

4 Accordingly, IT IS RECOMMENDED that default judgment be GRANTED against  
5 defaulting defendant Dolarian Capital, Inc., in the amount of \$8,618,646.57.

6 **E. Damages and Attorney’s Fees**

7 As stated above, SEI seeks a total award of \$8,618,646.57 -- the total sum of money paid  
8 to DCI under the June 2014 contract. California law provides that, “[f]or the breach of an  
9 obligation arising from contract, the measure of damages, except where otherwise expressly  
10 provided by this Code, is the amount which will compensate the party aggrieved for all the  
11 detriment proximately caused thereby, or which, in the ordinary course of things, would be likely  
12 to result therefrom.” Cal. Civ. Code § 3300. In addition, breach of contract damages must be  
13 “clearly ascertainable in both their nature and origin.” *Id.*, § 3301.

14 Here, SEI has provided evidence demonstrating it has been damaged in the amount of  
15 \$8,618,646.57. (*See* Aboubakar Decl. and exhibits attached thereto.) It is RECOMMENDED that  
16 Plaintiff’s request for damages be GRANTED.

17 Further, SEI has incurred costs of \$738.43 in connection with pursuing default judgment  
18 against DCI. (*See* Dominguez Decl., ¶ 9.) This cost is recoverable under Fed. R. Civ. P. 54(d). It  
19 is therefore RECOMMENDED that Plaintiff’s request for costs be GRANTED.

20 **V. CONCLUSION AND RECOMMENDATION**

21 For the reasons set forth above, the undersigned RECOMMENDS that:

22 1. Plaintiff Societe d’Equipments Internationaux Nigeria, Ltd.’s motion for default  
23 judgment be GRANTED against Defendant Dolarian Capital, Inc., on Plaintiff’s claims for failure  
24 of consideration, breach of contract, conversion, and fraud;

25 2. Plaintiff Societe d’Equipments Internationaux Nigeria, Ltd.’s motion for default  
26 judgment be DENIED against Defendant Dolarian Capital, Inc., on Plaintiff’s claim for money  
27 had and received as it fails to state a claim upon which relief may be granted against any  
28 defendant;

1           3.       Defendant Dolarian Capital, Inc., be ORDERED to pay damages in the amount of  
2 \$8,618,646.57 to Plaintiff Societe d'Equipments Internationaux Nigeria, Ltd.; and

3           4.       Defendant Dolarian Capital, Inc., be ORDERED to pay costs in the amount of  
4 \$738.43 to Plaintiff Societe d'Equipments Internationaux Nigeria, Ltd.

5           These findings and recommendations are submitted to the district judge assigned to this  
6 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within fourteen  
7 (14) days of service of this recommendation, any party may file written objections to these  
8 findings and recommendations with the Court and serve a copy on all parties. The document  
9 should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The  
10 district judge will review the magistrate judge's findings and recommendations pursuant to  
11 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the  
12 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,  
13 839 (9th Cir. 2014).

14  
15 IT IS SO ORDERED.

16 Dated: August 17, 2016

*/s/ Sheila K. Oberto*  
UNITED STATES MAGISTRATE JUDGE

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