



1 **I. Procedural History**

2 On January 14, 2010, Plaintiff filed its complaint against Helen Mebane, individually and as  
3 trustee of the Dwight and Helen Mebane Trust. (Doc. 1). An amended complaint was filed by  
4 Plaintiff on July 1, 2010, against Dwight Mebane, Helen Mebane, the Dwight and Helen Mebane  
5 Trust (“the Trust”), Justin J. Mebane, Chet B. Mebane, Melisa J. Warner, and ABC Company. (Doc.  
6 18). Plaintiff alleged breach of contract, conversion, conspiracy to commit conversion and for  
7 specific performance of the Standstill Agreement entered into by Defendants, the Trust and Plaintiff.  
8 *Id.* at 7-8.

9 Defendants were properly served with the complaint, but failed to respond within the time  
10 prescribed by the Federal Rules of Civil Procedure. Defendants Chet Mebane and Justin Mebane  
11 filed their answer to the complaint on August 3, 2010. (Doc. 21). Defendant Melissa J. Warner filed  
12 her answer on August 26, 2010. (Doc. 30). Though a summons has issued to the Trust, no proof of  
13 service has been returned demonstrating proper service to this defendant.

14 Upon application of Plaintiff, default was entered against Dwight Mebane and Helen Mebane  
15 on November 4, 2010. (Doc. 35). Plaintiff filed its motion for default judgment on December 9,  
16 2010. (Doc. 38). On January 3, 2011, Plaintiff filed a supplemental brief in support of its motion in  
17 accord with the Court’s order, addressing whether default judgment should be granted while other  
18 defendants remain in the action. (Doc. 44). The Individual Defendants filed their partial opposition  
19 to the motion on January 4, 2011. (Doc. 45)

20 On January 11, 2011, the Court heard argument on the matter. At the hearing, Plaintiff  
21 conceded that default judgment should not be entered as to Counts II and III and withdrew its request  
22 for entry of default judgment as to Count I. In addition, Plaintiff moved the Court to amend the First  
23 Amended Complaint to strike Count IV as to defendant, the Dwight and Helen Mebane Trust. The  
24 Court granted this request.

25 **II. Legal Standards for Default Judgment**

26 The Federal Rules of Civil Procedure govern applications to the Court for issuance of default  
27 judgment. Where a default has been entered because “a party against whom a judgment for relief is  
28 sought has failed to plead or otherwise defend,” the party seeking relief may apply to the court for a

1 default judgment. Fed.R.Civ.P. 55(a)-(b). After the entry of default, well-pleaded factual allegations  
2 regarding liability are taken as true, but allegations regarding the amount of damages must be  
3 proven. *Pope v. United States*, 323 U.S. 1, 22 (1944); *see also Geddes v. United Financial Group*,  
4 559 F.2d 557, 560 (9th Cir. 1977).

5 The entry of default “does not automatically entitle the plaintiff to a court-ordered judgment.  
6 *Pepsico, Inc. v. Cal. Sec. Cans*, 238 F.Supp.2d 1172, 1174 (C.D. Cal 2002), *accord Draper v.*  
7 *Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986). In addition, granting or denying a motion for default  
8 judgment is within the discretion of the Court. *Aldabe v. Aldabe*, 616 F.2d 1089, 1980 (9th Cir.  
9 1980). The Ninth Circuit opined,

10 Factors which may be considered by courts in exercising discretion as to the entry of a  
11 default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits  
12 of plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4) the sum of  
13 money at stake in the action, (5) the possibility of a dispute concerning material facts, (6)  
whether the default was due to excusable neglect, and (7) the strong policy underlying  
the Federal Rules of Civil Procedure favoring decisions on the merits.

14 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). As a general rule, the issuance of default  
15 judgment is disfavored. *Id.* at 1472.

### 16 **III. Discussion and Application of Eitel Factors**

17 Plaintiff alleges it agreed to provide Dwight Mebane and the Trust with a revolving line of  
18 credit in the principal amount of \$1.5 million in 2005. (Doc. 1 at 3). According to the terms of the  
19 agreement executed on March 10, 2005, Dwight Mebane and the Trust promised to pay the sum of  
20 \$1.5 plus interest, on or before March 1, 2006. *Id.* In December 2005, Dwight Mebane, Helen  
21 Mebane, and the Trust requested an increase in the revolving line of credit to \$4 million and a  
22 second line of credit of \$4 million, which Plaintiff agreed to on the condition “that Borrowers agreed  
23 to be jointly and severally liable for all indebtedness” under the two lines of credit. *Id.* In January  
24 2006, Plaintiff agreed to consolidate the two lines into a new credit line and extend the due date;  
25 Dwight Mebane, Helen Mebane, and the Trust agreed to pay \$6 million on or before December 31,  
26 2007. *Id.* at 4. In December 2007, Plaintiff agreed to increase the principal amount to \$8 million  
27 and extend the due date to November 30, 2008. *Id.* The due date was extended again in 2008. *Id.*

1 Using these funds, over 13,000 head of cattle were purchased. (Doc. 1 at 5). Plaintiff held a  
2 security interest in these cattle, and proceeds from the sale of any cattle, commercial security  
3 agreements dated March 10, 2005; December 8, 2005; January 18, 2007; December 13, 2008; and  
4 December 17, 2008. *Id.* at 4. Plaintiff “properly perfected and continued its security interest by  
5 filing appropriate financing statements and continuation statements in the State of California.” *Id.* at  
6 4; *see also id.* at 5.

7 Defendants and the Trust defaulted on the new line of credit. (Doc. 1 at 5). To address the  
8 default, Plaintiff, Defendants, and the Trust entered into a “Standstill Agreement,” under which  
9 Plaintiff “agreed to forebear from taking legal action” as long as the principal amount of the loan was  
10 reduced to \$5 million by October 2009, and Defendants and the Trust provided Plaintiff with first  
11 mortgages or deeds of trust on three specified parcels of real property located in Kern County,  
12 California.” *Id.* at 5-6. However, Dwight Mebane, Helen Mebane, and the Trust failed to reduce the  
13 principal amount and failed to provide Plaintiff with the first mortgages or deeds of trust against the  
14 parcels of land. *Id.* at 6. Further, proceeds of cattle sales were not remitted to Plaintiff. *Id.*

15 Applying the factors articulated by the Ninth Circuit in *Eitel* to the facts above, the Court  
16 finds as follows:

17 A. Prejudice to Plaintiff

18 Plaintiff has no other alternative by which to recover damages suffered as a result of  
19 Defendant’s piracy. *See J & J Sports Prods. v. Rodriguez*, 2010 U.S. Dist. LEXIS 20288, at \* 7  
20 (E.D. Cal. March 5, 2010). Therefore, the Court finds that Plaintiff would be prejudiced if a default  
21 judgment is not granted.

22 B. Merits of Plaintiff’s claims and sufficiency of the complaint

23 The Court will consider the merits of Plaintiff’s substantive claims and the sufficiency of the  
24 complaint together. The Ninth Circuit has suggested that when these factors are combined, together  
25 they require a plaintiff to “state a claim on which the plaintiff may recover.” *Pepsico, Inc.*, 238  
26 F.Supp.2d at 1175, *citing Kleopping v. Fireman’s Fund*, 1996 U.S. Dist. LEXIS 1786, at \*6 (N.D.  
27 Cal. Feb. 14, 1996); *see also Abney v. Alameida*, 334 F.Supp.2d 1221, 1235 (C.D. Cal. 2004)  
28 (“default judgment may not be entered on a legally insufficient claim”).



1 Standstill Agreement, and performed as required. The requested performance is identical to the  
2 contractual terms, and there was mutuality of remedies. Further, Plaintiff's argues that its legal  
3 remedy is inadequate because Defendants "are insolvent and do not have the financial resources to  
4 pay [Plaintiff] the amounts due." *Id.* Therefore, Plaintiff has sufficiently stated a claim for specific  
5 performance of the Standstill Agreement, which requires Defendants to provide Plaintiffs with  
6 mortgages or deeds of trust against the named parcels of land.

### 7 *Conversion*

8 As recognized by the Ninth Circuit, conversion has three elements under California law:  
9 "ownership or right to possession of property, wrongful disposition of the property right and  
10 damages." *G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Services, Inc.*, 958 F.2d 896, 906 (9th  
11 Cir. 1992); *see also Greka Integrated, Inc. v. Lowrey*, 133 Cal. App. 4th 1572, 1581, 35 Cal. Rptr.  
12 3d 684 (2005) ("elements of a conversion are the plaintiff's ownership or right to possession of the  
13 property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of  
14 property rights; and damages"). Plaintiff has alleged that it held a property right in the cattle sold by  
15 Defendants, which was "wrongfully transferred and/or sold . . . to a number of persons and entities,"  
16 with Defendants retaining the proceeds. (Doc. 1 at 8). Therefore, the elements of conversion are  
17 met. (Doc. 1 at 8).

### 18 *Conspiracy to commit conversion*

19 Conspiracy establishes joint and several liability by conspirators for an underlying tort. *See*  
20 *Entm't Research Group v. Genesis Creative Group*, 122 F.3d 1211, 1228 (9th Cir. 1997). Therefore,  
21 a conspiracy to commit a tort requires commission of the underlying tort. Generally, liability for  
22 civil conspiracy requires an agreement to commit wrongful acts, commission of the act, and damages  
23 to the plaintiff. *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11, 869 P.2d  
24 454 (1994). As established above, Plaintiff establishes a claim of conversion, and damages. In  
25 addition, Plaintiff alleges Defendants "colluded and conspired to convert the Cattle Collateral and  
26 the proceeds from the sale of the Cattle Collateral." By these facts, Plaintiff establishes a conspiracy  
27 to commit conversion by Defendants.

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1           C. Sum of money at stake

2           In considering this factor, the Court “must consider the amount of money at stake in relation  
3 to the seriousness of Defendants’ conduct.” *Pepsico, Inc.*, 238 F.Supp.2d at 1176. Here, Plaintiff is  
4 entitled to recover \$8,801,963.88, minus the \$74,560.24 received when 154 head of cattle were  
5 recovered and sold at auction on Plaintiff’s account. (Doc. 39 at 8; Doc. 40 at 4-5; *see also* Doc. 1 at  
6 8). Thus, the damages sought are proportional to Defendants’ conduct.

7           D. Possibility of dispute concerning material facts

8           The Court also considers the possibility of dispute as to any material facts in the case.  
9 Generally, there is little possibility of dispute concerning material facts because (1) based on the  
10 entry of default, the Court accepts allegations in Plaintiff’s Amended Complaint as true and (2)  
11 Defendants have not made any effort to challenge the Complaint or otherwise appear in this case.  
12 However, because other defendants remain to defend in the action, they may challenge whether a  
13 breach of the loan agreements, promissory notes and commercial security agreements related to the  
14 new revolving line of credit or whether any conversion or conspiracy took place.<sup>1</sup> Therefore, this  
15 factor weighs against entry of default judgment.

16           E. Whether default was due to excusable neglect

17           Generally, the Court will consider whether Defendants’ failure to answer is due to excusable  
18 neglect. *See Eitel*, 782 F.2d at 1472. Here, defendants were properly served with the Summons and  
19 Amended Complaint. Given these circumstances, it is unlikely that failure to answer, and the  
20 resulting defaults entered by the Clerk of Court were a result of excusable neglect. *See Shanghai*  
21 *Automation Instrument Co., Ltd. v. Kuei*, 194 F. Supp. 2d 995, 1005 (N.D.Cal. 2001) (finding no  
22 excusable neglect because the defendants “were properly served with the Complaint, the notice of  
23 entry of default, as well as the papers in support of the instant motion”).

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26           <sup>1</sup> The claim for breach of contract was made against Dwight Mebane, Helen Mebane, and the Trust as was the claim  
27 for specific performance based upon the breach of the Standstill Agreement. (Doc 18 at 7). However, as noted above,  
28 Plaintiff moved to strike the claim for specific performance against the Trust. The claims for conversion and conspiracy to  
commit conversion were made against all defendants in the action. *Id.* at 7-8.

1           F. Policy disfavoring default judgment

2           As noted above, default judgments are disfavored because “[c]ases should be decided on their  
3 merits whenever reasonably possible. *Eitel*, 782 F.2d at 1472. However, failure to answer the First  
4 Amended Complaint makes a decision on the merits against the defaulting Defendants impractical.  
5 On the other hand, a decision on the merits for the claims of breach of contract, conversion and the  
6 conspiracy to commit conversion may be favorable to the other defendants who remain to defend in  
7 the action, as discussed below by the Court. Consequently, the policy underlying the Federal Rules  
8 of Civil Procedure favoring decisions on the merits weighs against Plaintiff.

9           **IV. Default Judgment against Defendants While Others Remain**

10           Plaintiff seeks judgment against only Dwight Mebane and Helen Mebane, though the  
11 Individual Defendants remain in the case and have filed answers. Under the Federal Rules of Civil  
12 Procedure, “[w]hen an action presents more than one claim for relief . . . or when multiple parties are  
13 involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims  
14 or parties only if the court expressly determines that there is no just reason for delay.” Fed. R. Civ.  
15 P. 54(b). Therefore, the Court has discretion to decline entry of default judgment where a just reason  
16 exists to delay entry of a final judgment to Defendants.

17           The Supreme Court warned that “absurdity might follow” in instances where a court “can  
18 lawfully make a final decree against one defendant . . . while the cause was proceeding undetermined  
19 against the others.” *Frow v. De La Vega*, 82 U.S. 552, 554 (1872). The Ninth Circuit has  
20 summarized the *Frow* standard as follows: “[W]here a complaint alleges that defendants are jointly  
21 liable and one of them defaults, judgment should not be entered against the defaulting defendant  
22 until the matter has been adjudicated with regard to all defendants. *In re First T.D. & Investment,*  
23 *Inc.*, 253, F.3d 520, 532 (9th Cir. 2001). In addition, the Ninth Circuit extended the rule beyond only  
24 jointly liable parties to those who are “similarly situated.” *Id.*

25           Plaintiff argues that “default judgment can be entered against the Mebanes without creating a  
26 risk of inconsistent judgments.” (Doc. 44 at 1-2). According to Plaintiff, “Ordering the Mebanes to  
27 provide [Plaintiff] with the additional collateral required under the Standstill Agreement can have no  
28 adverse effect on any of the other Defendants.” *Id.* at 3. Further, Plaintiff asserts its claim for the

1 balance due on the line of credit does not create the risk of independent judgments because the  
2 liability is both joint and several as to Defendants and the Trust. *Id.* With regard to the remaining  
3 causes of action, Plaintiff argued in its papers that default judgment against Dwight Mebane and  
4 Helen Mebane “for converting the Mebane cattle and proceeds and conspiring with each other to  
5 perpetrate this misconduct does not preclude a judgment in favor of any of the other Defendants for  
6 not taking part in the conversion and conspiracy.” *Id.*

7 The Individual Defendants argue that default judgment as to the conversion and conspiracy to  
8 commit conversion claims should not be entered because of the possibility of inconsistent  
9 judgments. (Doc 45 at 2, citing *Frow*, 82 U.S. at 552; *Johnson v. Cate*, 2009 U.S. Dist. LEXIS  
10 57942, at \*5 (E.D. Cal June 23, 2009)). Individual Defendants assert that there is a “risk of  
11 inconsistent results factually and legally,” because they may challenge whether a conversion claim  
12 has been stated at all, and a default judgment for conversion “would clearly be inconsistent with a  
13 subsequent finding that no conversion occurred and, therefore, there was no tort to act as a predicate  
14 for the liability of [Individual] Defendants (in conspiracy or otherwise) or that plaintiff’s claim failed  
15 to state a claim as a matter of law.” *Id.* at 3-4. Consequently, Individual Defendants argue entry of  
16 default judgment would be prejudicial to their case.<sup>2</sup> *Id.* at 4.

17 When cases involve multiple claims or parties, “[c]onsiderations of fairness and sound  
18 administration of justice are also applicable to the entry of default judgment.” *Johnson*, 2009 U.S.  
19 Dist LEXIS 57942, at \*2. In the supplemental briefing, Plaintiff argued that the default judgment  
20 would not preclude a judgment in favor of the Individual Defendants, but Plaintiff failed to address  
21 the *possibility* of inconsistent judgments regarding the claims for conversion and conspiracy, which  
22 is the test under *Frow* of whether default should be entered while parties remain in an action to  
23 defend. *See Frow*, 82 U.S. at 554. In this case, if default judgment is entered, the Defendants are  
24 adjudged liable of the claims of conversion and conspiracy. However, if Individual Defendants  
25 prevail at trial, there may be a finding of fact that no such conversion or conspiracy took place, and

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26  
27 <sup>2</sup> Notably, Individual Defendants “have taken no position and lodged no Objection” regarding the entry of default  
28 judgment for the contract claim against Dwight Mebane, Helen Mebane, and the Trust. (Doc. 45 at 4, n. 4). Their objection  
rests on the prejudice to Individual Defendants and the possibility of inconsistent results on the claims of conversion and  
conspiracy to commit conversion. *See id.* at 4.

1 there is a possibility of inconsistent judgments as to these claims if default judgment is entered  
2 against Defendants Dwight and Helen Mebane. Moreover, the Trust has yet to be properly served in  
3 the matter, and is named as a defendant in the breach of contract claim. At the hearing, Plaintiff  
4 conceded the position taken by the Individual Defendants that there exists a possibility of  
5 inconsistent judgments if default is entered against Defendants at this time.

6 Therefore, even if some of the *Eitel* factors had not weighed as heavily against Plaintiff, it is  
7 in the interest of justice to deny default judgment on Counts I, II and III against defendants Dwight  
8 Mebane and Helen Mebane while others remain to defend and the Trust has yet to be served.  
9 However, due to the motion to amend the First Amended Complaint to strike the Trust from Count  
10 IV, there exists no possibility of an inconsistent judgment if default judgment as to this Count is  
11 entered at this time.

12 Therefore, the Court will recommend that, as to Counts I, II and III, the motion for default  
13 judgment be **DENIED**. As to Count IV, the Court recommends that the motion for default judgment  
14 be **GRANTED**. This recommendation will be made without prejudice to Plaintiff's re-filing the  
15 motion at a later time.

#### 16 **V. Findings and Recommendations**

17 Given the issues discussed above, and the strong policy of favoring decisions on the merits,  
18 the Court would be acting within its discretion in denying entry of default judgment as to the claims  
19 involving parties other than the defaulting defendants. *See Aldabe*, 616 F.2d at 1092. Accordingly,  
20 the Court RECOMMENDS the following:

- 21 1. Plaintiff's motion to amend the First Amended Complaint to strike Count IV as to the  
22 Dwight and Helen Mebane Trust is **GRANTED**;
- 23 2. Plaintiff's request for entry of default judgment as to Count IV for specific  
24 performance of the Standstill Agreement be **GRANTED**;
- 25 3. Plaintiff's request for entry of default judgment for its claims of breach of contract,  
26 conversion, and conspiracy to commit conversion be **DENIED WITHOUT**  
27 **PREJUDICE**.

1           These Findings and Recommendations are submitted to the United States District Judge  
2 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the  
3 Local Rules of Practice for the United States District Court, Eastern District of California. Within  
4 14 days after being served with these Findings and Recommendations, any party may file written  
5 objections with the court. Such a document should be captioned “Objections to Magistrate Judge’s  
6 Findings and Recommendations.” Replies to any objections shall be filed within 14 days of the  
7 filing of the objections. The parties are advised that failure to file objections within the specified  
8 time may waive the right to appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th  
9 Cir. 1991).

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11 IT IS SO ORDERED.

12 Dated: January 12, 2011

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE

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