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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FREEDOM MORTGAGE CORPORATION,

Plaintiff,

v.

SEILA MADARIAGA,

Defendant.

No. 2:19-cv-2432-DC-SCR

FINDINGS AND RECOMMENDATIONS

Plaintiff Freedom Mortgage Corporation has filed a motion for default judgment against Defendant Seila Madariaga.<sup>1</sup> ECF No. 107. Magistrate Judge Barnes heard the motion on June 13, 2024 and took it under submission. This action was reassigned to the undersigned on August 6, 2024. ECF No. 117. The motion for default judgment is before the undersigned pursuant to Local Rule 302(c)(19). Plaintiff’s motion implicates the apparently novel question of whether default judgment against one defendant should be entered when the court declined to grant summary judgment against another defendant and the complaint refers to the two defendants

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<sup>1</sup> Defendant Seila Madariaga’s name was misspelled by Plaintiff in earlier filings as “Siela”. District Judge Mueller in a February 28, 2024 order (ECF No. 106) directed the Clerk to correct the spelling on the docket.

1 collectively and does not distinguish their culpability. The undersigned hereby recommends that  
2 the motion be DENIED for the reasons set forth herein, including because the Court declined to  
3 grant summary judgment against a similarly situated co-defendant.

#### 4 **BACKGROUND and PROCEDURAL HISTORY**

5 Plaintiff initiated this matter by filing a complaint on December 4, 2019. ECF No. 1.  
6 Plaintiff brought several state law claims against Defendants Christina Madariaga and Seila  
7 Madariaga arising from a real estate transaction. ECF No. 1. Plaintiff was the loan servicer for  
8 Defendants' mortgage. *Id.* at 1-2. Among other things, Plaintiff alleges that Defendants, after  
9 selling the property in question and having payoff funds wired to Plaintiff, unlawfully induced  
10 Plaintiff to return those funds to them. *Id.* at 3-4. Plaintiff raises claims for conversion, unjust  
11 enrichment, fraud, and civil theft and sought \$104,652 in damages plus statutory damages and  
12 attorneys' fees and costs. ECF No. 1 at 4-6.

13 Christina<sup>2</sup> appeared pro se and filed an Answer and Counterclaim. ECF Nos. 6 & 7. On  
14 June 15, 2020, Plaintiff requested entry of default against Seila—who has never made an  
15 appearance on the docket—and default was entered on June 18, 2020. ECF Nos. 16 & 17.  
16 Plaintiff then moved for a preliminary injunction against Christina seeking to have the Court  
17 order her to pay \$104,652 into the registry of the Court. ECF No. 22. That motion was denied.  
18 ECF Nos. 32 & 33. Judge Barnes found that Plaintiff did not make a showing of irreparable  
19 harm. ECF No. 32 at 6.

20 Plaintiff then moved for summary judgment. ECF No. 35. The motion for summary  
21 judgment was denied without prejudice because the parties had conducted no discovery. ECF  
22 No. 49 at 4-5. Plaintiff filed a second motion for summary judgment (“MSJ”) on February 7,  
23 2022. ECF No. 56. The second MSJ was also denied. ECF Nos. 61 & 66. In recommending the  
24 MSJ be denied, Judge Barnes noted Plaintiff’s proffered evidence was “slight, contradictory, and  
25 falls far short of satisfying Plaintiff’s burden of establishing a lack of dispute as to any material  
26 fact.” ECF No. 61 at 9.

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27  
28 <sup>2</sup> Defendants will be referred to hereafter by their first names for clarity.



1 concerning material facts; (6) whether the default was due to  
2 excusable neglect, and (7) the strong policy underlying the Federal  
3 Rules of Civil Procedure favoring decisions on the merits.

4 *Eitel*, 782 F.2d at 1471-72 (citing 6 Moore’s Federal Practice ¶ 55-05[2], at 55-24 to 55-26).

## 5 ANALYSIS

### 6 I. Service

7 Plaintiff argues that the Court should enter default judgment against Seila because she was  
8 properly served, never responded to the complaint, and the *Eitel* factors weigh in favor of default  
9 judgment. ECF No. 107-1 at 10. Plaintiff contends that Seila was personally served with the  
10 summons and complaint on January 21, 2020. ECF No. 4. The Clerk entered default on June 18,  
11 2020. ECF No. 17. The return of service states that “Siela Madariaga” was served. The Complaint  
12 and Summons also misspelled Seila’s first name. ECF Nos. 1 & 2. This slight error in spelling  
13 does not invalidate otherwise proper service. *See Sakaguchi v. Sakaguchi*, 173 Cal.App.4th 852  
14 (Cal. Ct. App. 2009) (first name spelled “Takechi” instead of “Takeshi” of no consequence when  
15 documents were received and no prejudice is identified). The Clerk’s entry of default also  
16 contained the incorrect spelling. ECF No. 17. The Court finds an adequate showing of service  
17 and will proceed to the *Eitel* factors.

### 18 II. The *Eitel* Factors

#### 19 A. Possibility of Prejudice to the Plaintiff

20 The first *Eitel* factor contemplates the possibility of prejudice to the plaintiff if a default  
21 judgment is not entered. *Eitel*, 782 F.2d at 1471. Prejudice can be established where failure to  
22 enter a default judgment would leave plaintiff without a proper remedy. *Pepsico, Inc. v. Cal. Sec.*  
23 *Cans*, 238 F.Supp.2d 1172, 1177 (C.D. Cal 2002). Here, one of the two defendants (Christina)  
24 appeared and defended the action. Plaintiff was unable to satisfy the burden of obtaining  
25 summary judgment against that defendant. A plaintiff’s difficulty in establishing liability against  
26 one defendant might suggest a general weakness in the plaintiff’s case and therefore a lower  
27 probability of prejudice, on the theory that a plaintiff is not substantially prejudiced by losing out  
28 on a case that has questionable merit to begin with. Nevertheless, because Plaintiff would

1 apparently have no remedy absent default judgment, this first factor weighs lightly in favor of  
2 default judgment.

### 3 **B. Merits of Plaintiff’s Substantive Claims and Sufficiency of the Complaint**

4 The second and third *Eitel* factors “relating to the merits of Plaintiffs’ claims and the  
5 sufficiency of the complaint, can be discussed in tandem.” *Ramirez v. Michael Cookson Const.,*  
6 *Inc.*, 2023 WL 4743050 (E.D. Cal. July 25, 2023) (internal citation omitted). Because this case  
7 involves two defendants, one of whom appeared and defended the action, the undersigned first  
8 examines applicable doctrine concerning motions for default judgment in multi-defendant cases.

#### 9 **1. Default Judgment in Actions Involving Multiple Defendants**

10 “The leading case on the subject of default judgments in actions involving multiple  
11 defendants is *Frow v. De La Vega*, 82 U.S. 552 (1872).” *In re First T.D. & Inv., Inc.* 253 F.3d  
12 520, 532 (9th Cir. 2001). Under *Frow*, “where a complaint alleges that defendants are jointly  
13 liable and one of them defaults, judgment should not be entered against the defaulting defendant  
14 until the matter has been adjudicated with regard to all defendants.” *Id.* at 532. “It follows that if  
15 an action against the answering defendants is decided in their favor, then the action should be  
16 dismissed against both answering and defaulting defendants.” *Id.* The Ninth Circuit observed it  
17 would be “incongruous and unfair” to allow a party to prevail against defaulting defendants on a  
18 theory that was rejected by the court as to answering defendants. *Id.*

19 Courts have expanded the *Frow* doctrine beyond its original context of jointly liable co-  
20 defendants. It also applies to co-defendants who “are ‘similarly situated,’ such that the case  
21 against each rests on the same legal theory.” *Garamendi v. Henin*, 683 F.3d 1069, 1082 (9th Cir.  
22 2012), citing *In re First T.D. & Inv., Inc.*; see also *Moore v. Booth*, 122 F.4th 61, 67 (2nd Cir.  
23 2024) (“We, along with the majority of federal appellate courts, have held that the *Frow* principle  
24 is not limited to cases of joint liability but more generally prohibits a default judgment that is  
25 inconsistent with a judgment on the merits.”) (internal citation and quotation omitted).

26 In this case, the Complaint does not differentiate between the Defendants. In the opening  
27 paragraph Christina and Seila are defined collectively as the “Defendants.” ECF No. 1 at 1.  
28 Thereafter, there are no separate allegations concerning the actions of Christina or Seila. Rather,

1 each factual allegation is against them collectively. The two Defendants are clearly similarly  
2 situated based on the allegations in the complaint.

3 Despite the joining of Christina and Seila in the complaint, there is no risk of an  
4 inconsistent judgment because Plaintiff voluntarily dismissed Christina. As such, the expanded  
5 *Frow* doctrine does not squarely apply. However, entering default judgment in favor of Plaintiff  
6 would be in some tension with the Court’s earlier summary judgment ruling as to Christina. After  
7 engaging in discovery, Plaintiff unsuccessfully sought summary judgment against Christina. This  
8 situation certainly touches on a core premise of the *Frow* doctrine: when “facts are proved that  
9 exonerate certain defendants and that as a matter of logic preclude the liability of another  
10 defendant,” the plaintiff should not be allowed to obtain a default judgment against that non-  
11 participating defendant. *Moore*, 122 F.4th at 67-68. Here, the Court did not enter judgment as to  
12 Christina, but it found the evidence presented inadequate to establish her liability. Accordingly,  
13 the undersigned does not find that the *Frow* doctrine precludes default judgment, but will proceed  
14 through the second and third *Eitel* factors informed by the principles underlying that doctrine.

15 **2. The Second and Third Factors Weigh Against Default Judgment Where**  
16 **the Court Declined to Enter Summary Judgment Against Christina and**  
17 **the Complaint Alleges that the Two Defendants Are Similarly Situated**

18 Plaintiff alleges that Christina and Seila unlawfully obtained and deprived FMC of funds  
19 owed to FMC for satisfaction of a Note and Mortgage on real property. ECF No. 1 at ¶ 1. All of  
20 the allegations in the complaint are against Christina and Seila jointly as “Defendants.” It is  
21 alleged that Defendants executed a note secured by a deed of trust on real property in April 2009.  
22 *Id.* at ¶ 6. FMC alleges it became the loan servicer in 2015. *Id.* at ¶ 7. Plaintiff claims  
23 Defendants made a payment of \$4,232 in June 2019, then requested a payoff quote, which FMC  
24 issued before the \$4,232 payment was rescinded for insufficient funds. *Id.* at ¶¶ 8-9. Plaintiff  
25 claims this resulted in Defendants receiving an artificially low payoff quote. Defendants sold the  
26 property on June 11, 2019, using Old Republic as the closing agent and Old Republic wired FMC  
27 in the amount of \$114,568 (the Funds) as part of the closing, but the Funds were insufficient to  
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1 pay off Defendants' loan. Defendants then made calls to FMC asking that the Funds be returned  
2 to Old Republic. *Id.* at ¶ 13. Defendants however provided wiring instructions to an account at  
3 Wells Fargo that belonged to Defendants. *Id.* at ¶ 14. Plaintiff refused to transfer the Funds.  
4 However, "Defendants further manipulated FMC" by providing new wiring instructions to  
5 transfer the Funds back to Bank of the West, which is the bank Old Republic had used. However,  
6 FMC alleges, based on information and belief, that the Bank of the West account was controlled  
7 by Defendants. *Id.* at ¶ 16.

8 In Count I, Plaintiff claims the Funds were converted when "Defendants unlawfully  
9 mislead FMC" into transferring the Funds without FMC's consent. *Id.* at ¶¶ 20-24. Count II  
10 alleges unjust enrichment. *Id.* at ¶¶ 25-29. Count III alleges fraud, and Count IV alleges "civil  
11 theft." Plaintiff alleges: "Defendants obtained the Funds knowing they were stolen or obtained  
12 through in a manner constituting theft." *Id.* at ¶ 37. Plaintiff asserts that Cal. Penal Code §  
13 496(c) authorizes recovery of treble damages and attorney fees. *Id.* at ¶ 40. Plaintiff's motion for  
14 default judgment argues the Counts for conversion, unjust enrichment, and civil theft support the  
15 entry of a default judgment.<sup>3</sup> ECF No. 107-1 at 12-14.

16 The Second *Eitel* factor looks at the merits of the substantive claims. Typically on a  
17 motion for default judgment, this involves evaluating merely the sufficiency of the pleading  
18 because the case has not proceeded beyond the pleadings. As explained above, this is a  
19 seemingly novel situation where the basic premise of the *Frow* doctrine, as expanded in modern  
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21 <sup>3</sup> Plaintiff does not seek default judgment on the fraud count, perhaps an implicit concession that  
22 it is insufficiently pled. Federal Rule of Civil Procedure 9(b)'s particularity requirement applies  
23 to state law causes of action. *Vess v. Ciba-Geigy Corp.*, 307 F.3d 1097, 1103 (9th Cir. 2003).  
24 This is true even where the Court's jurisdiction is based on diversity. *Id.* ("We therefore reject  
25 [plaintiff's] argument that we should refuse to apply Rule 9(b) to his state-law causes of action in  
26 this diversity case."). In order to meet the heightened pleading standard, "a party must state the  
27 particularity of the circumstances constituting fraud," meaning that the "pleading must identify  
28 the who, what, when, where, and how of the misconduct charged." *United States ex rel. Cafasso*  
*v. Gen. Dynamics*, 637 F.3d 1047, 1055 (9th Cir. 2011) (internal citations and quotation omitted).  
A party must also plead what is false or misleading about the purportedly fraudulent statement.  
*Id.* The fraud allegation is that "Defendants" collectively, made "numerous false representations  
and omissions." ECF No. 1 at ¶ 31. There is no allegation about a specific statement Seila made  
that was fraudulent.

1 times to similarly situated defendants, informs assessment of the merits and analysis of the second  
2 and third *Eitel* factors. Plaintiff unsuccessfully sought summary judgment against Christina, and  
3 then voluntarily dismissed Christina.

4 In reviewing the evidence presented at summary judgment, Judge Barnes found that  
5 “much of that evidence directly contradicts plaintiff’s argument.” ECF No. 61 at 10. Judge  
6 Barnes discussed documentary evidence that she found unconvincing, including the declaration of  
7 Reginald Watkins, account notes, and a document entitled “Wire from Old Republic.” *Id.* at 10-  
8 11. Judge Barnes also stated that she had expected Plaintiff would submit “bank records  
9 establishing ownership of the Bank of the West account, as well as perhaps transaction details.”  
10 *Id.* at 10. The undersigned recognizes that Plaintiff has now submitted approximately 200-pages  
11 of account statements covering a two-year period. ECF No. 107-2. These records establish that  
12 Seila had an account at Bank of the West and they show there were large incoming wire transfers  
13 consistent with the transfers alleged in the Complaint. *See for example* ECF No. 107-2 at 10, 38,  
14 39. But these are just statements of account showing credits and debits. These bank statements,  
15 taken alone, do not demonstrate fraud, conversion, or theft.

16 Judge Barnes further reviewed audio recordings of twenty-one phone calls between  
17 individuals purported to be Defendants and Plaintiff’s account representatives. ECF No. 61 at 11.  
18 Judge Barnes stated, “the tenor of those phone calls is routinely one of the defendants calling with  
19 questions or concerns regarding billing disputes and plaintiff’s representatives sharing the  
20 defendant’s confusion or concerns.” *Id.* Judge Barnes discussed in detail some of the phone calls  
21 and concluded that Plaintiff’s “evidence contradicts plaintiff’s assertions that the defendants  
22 intentionally misled plaintiff.” *Id.* at 13.

23 Plaintiff obtained two extensions of time to respond to Judge Barnes’ Findings and  
24 Recommendations, and then did not file objections.<sup>4</sup> ECF Nos. 62-66. The Findings and  
25 Recommendations were then adopted. ECF No. 66. In evaluating the second *Eitel* factor, which  
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28 <sup>4</sup> “Failure to object to a magistrate judge’s recommendation waives all objections to the  
magistrate judge’s findings of fact.” *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998).

1 is the substantive merit of Plaintiff’s claims, the Court finds relevant the evidence presented and  
2 findings of this Court upon the summary judgment record.

3 In evaluating the third factor, the sufficiency of the pleadings, the Court finds this factor  
4 less weighty than the second factor, given that the prior summary judgment proceedings. Plaintiff  
5 is proceeding on claims of conversion, unjust enrichment, and civil theft. The elements of  
6 conversion under California law are: 1) the plaintiff’s ownership or right to possession of the  
7 property; 2) the defendant’s conversion by wrongful act or disposition of property rights; and 3)  
8 damages. *Hass v. Travelex Ins. Servs.*, 555 F.Supp.3d 970, 982 (C.D. Cal. 2021). The elements  
9 of a claim for unjust enrichment are the receipt of a benefit and the unjust retention of the benefit  
10 at the expense of another. *Peterson v. Cellco Partnership*, 164 Cal.App.4th 1583, 1593 (Cal. Ct.  
11 App. 2008).

12 To state a claim under Cal. Penal Code § 496(c) concerning receipt of stolen property, a  
13 plaintiff must plead three elements: 1) the property was stolen; 2) the defendant was in possession  
14 of it; and 3) defendant knew it was stolen. *Hueso v. Select Portfolio Serv., Inc.*, 527 F.Supp.3d  
15 1210, 1229 (S.D. Cal. 2021). Obtaining money through fraudulent means does not necessarily  
16 state a claim under the statute. In *Hueso*, the court found that a misapplication of funds as part of  
17 real estate transaction did not fall under § 496(c). *Id.* at 1231-1232. This is because some courts  
18 have found that in in order to constitute “stolen” property, when the property in question comes  
19 into defendant’s hands, it must already have the character of having been stolen. *See Grouse*  
20 *River Outfitters v. NetSuite*, 2016 WL 5930273 at \*14 (N.D. Cal. 2016) (finding plaintiff’s money  
21 was not stolen when defendant allegedly defrauded plaintiff of it).

22 Although the complaint is brief and somewhat conclusory, it is generally sufficient as to  
23 the counts for conversion and unjust enrichment, and as Plaintiff is not seeking treble damages in  
24 this MDJ, the Court will not address whether the § 496(c) claim is cognizable under the alleged  
25 facts. However, as touched upon above in the *Frow* discussion, the complaint is somewhat  
26 lacking to the extent that it refers at all times collectively to “Defendants.” *See Gotshalk v.*  
27 *Hellwig*, 2014 WL 4699497 at \*2 (D. Nevada 2014) (declining to enter default judgment based on  
28 the *Frow* doctrine where the complaint alleged claims against defendants collectively and failed

1 to distinguish culpability of conduct). There are no facts alleged as to specific actions taken by  
2 Seila, and at the summary judgment stage Judge Barnes found that “plaintiff’s evidence  
3 contradicts plaintiff’s assertions that the defendants intentionally misled plaintiff.” ECF No. 61 at  
4 13. Judge Barnes found not only that the evidence at summary judgment failed to meet the  
5 burden of proof, but that it undermined some of the Complaint’s allegations. Thus, although the  
6 claims of conversion and unjust enrichment are sufficiently pled, upon consideration of the  
7 totality of the second and third *Eitel* factors—and in consideration of the principles underlying the  
8 *Frow* doctrine and the summary judgment record—the undersigned finds that application of the  
9 second and third *Eitel* factors weigh against the entry of default judgment.

### 10 **C. Sum of Money at Stake**

11 In weighing the fourth *Eitel* factor, “the court must consider the amount of money at stake  
12 in relation to the seriousness of the defendant’s conduct.” *PepsiCo, Inc.*, 238 F.Supp.2d at 1176-  
13 77. The factor weighs against default judgment when a large sum of money is at stake. *Eitel*, 782  
14 F. 2d. at 1472. Here, Plaintiff seeks a relatively moderate award of approximately \$100,000 in  
15 damages. The undersigned finds this factor does not weigh either for or against the entry of  
16 default judgment.

### 17 **D. Possibility of Disputed Material Facts**

18 The fifth *Eitel* factor examines whether a dispute regarding material facts exists. *Eitel*,  
19 782 F.2d. at 1471-72. Here, Seila has not appeared in the action, but her co-Defendant Christina  
20 did appear and defended the action. Generally, when a party fails to appear there is no possibility  
21 for a dispute of material fact. *See Elektra Entm’t Group, Inc. v. Crawford*, 226 F.R.D. 388, 393  
22 (C.D. Cal. 2005) (“Because all allegations in a well-pleaded complaint are taken as true after the  
23 court clerk enters default judgment, there is no likelihood that any genuine issue of material fact  
24 exists”). However, in this case, the allegations in the Complaint are against the Defendants  
25 collectively, and Christina did defend the motion for summary judgment. The Court found  
26 Plaintiff failed to establish its right to summary judgment. Judge Barnes stated: “[P]laintiff has  
27 failed to meet the burden of proving the absence of a genuine issue of material fact.” ECF No. 61  
28 at 14. Accordingly, this factor weighs against the entry of a default judgment.



1 quotation and citation omitted). As discussed above, the undersigned finds that those two factors  
2 weigh against the entry of default judgment. “In general, entry of default judgment is not  
3 appropriate where the second and third factors weigh against plaintiff.” *United States v. Salazar*,  
4 2024 WL 3858714 (E.D. Cal. Aug. 19, 2024). The undersigned finds that in considering the  
5 totality of the *Eitel* factors, they weigh against the entry of a default judgment for Plaintiff.

6 Should the Court adopt these findings and recommendations, it is not necessarily the end  
7 of the road for Plaintiff. Plaintiff might again review the evidence gathered to date and summary  
8 judgment record, seek leave to file an amended complaint specifically addressing Seila’s liability  
9 based on that evidence and record, and then again seek default if Seila has not appeared to defend  
10 against the allegations in an amended complaint.

11 **IT IS HEREBY RECOMMENDED** that:

12 Plaintiff’s motion for default judgment (ECF No. 107) be **DENIED**.

13 These findings and recommendations are submitted to the United States District Judge  
14 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)  
15 days after these findings and recommendations are filed, any party may file written objections  
16 with the court. A document containing objections should be titled “Objections to Magistrate  
17 Judge’s Findings and Recommendations.” Any reply to the objections shall be served and filed  
18 within 14 days after service of the objections. The parties are advised that failure to file  
19 objections within the specified time may, under certain circumstances, waive the right to appeal  
20 the District Court’s order. *See Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

21 Dated: March 7, 2025

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25 SEAN C. RIORDAN  
26 UNITED STATES MAGISTRATE JUDGE  
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