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

UNITED STATES OF AMERICA,
Plaintiff,
v.
APPROXIMATELY \$6,000.00 IN
U.S. CURRENCY,
Defendant.

)
) 1:09-CV-01755 AWI GSA
) **FINDINGS AND RECOMMENDATIONS**
) **REGARDING PLAINTIFF’S *EX PARTE***
) **APPLICATION FOR DEFAULT**
) **JUDGMENT**
) (Document 19)

INTRODUCTION

In this civil forfeiture action, Plaintiff United States of America (“Government”) seeks:

- 1. Default judgment against the interests of Luis Cortez and Mariluz Espinoza in approximately \$6,000.00 in United States currency (“Defendant Property”); and
- 2. Entry of a final forfeiture judgment to vest in the Government all right, title and interest in the Defendant Property.

This Court considered the Government’s default and final forfeiture judgment motion on the record and without oral argument on the now vacated February 19, 2010, hearing, pursuant to this Court’s Local Rule 230(g) and 540(d). For the reasons discussed below, this Court RECOMMENDS to:

- 1 1. GRANT the Government default judgment and to ENTER final forfeiture judgment to
2 vest in the Government all right, title and interest in the Defendant Property; and
3 2. ORDER the Government, within ten (10) days of service of an order adopting these
4 findings and recommendations, to submit a proposed default and final forfeiture
5 judgment consistent with these findings and recommendations.

6 **FACTUAL BACKGROUND**

7 ***Seizure of Defendant Property***¹

8 The facts giving rise to this action are set out in detail in the Complaint. Briefly
9 stated, a joint investigation by the Immigration and Customs Enforcement, Drug
10 Enforcement Administration, and Southern Tri County-High Intensity Drug Trafficking
11 Area Task Force was commenced into the drug trafficking activities of the Montenegro
12 Drug Trafficking Organization (hereafter “Montenegro DTO”) based in Porterville,
13 California. Complaint at ¶ 5. Agents discovered a number of subjects involved in the
14 Montenegro DTO, including Luis Alberto Cortez-Mendoza (hereafter “Cortez”) and
15 Olegario Trujillo (hereafter “Trujillo”). *Id.*

16 On or about May 13, 2008, surveillance intercepted a telephone call indicating an
17 exchange methamphetamine for \$4,600.00 that was to take place between Trujillo and
18 Negrete at Negrete’s residence. Complaint at ¶ 6. Surveillance observed a black Nissan
19 pickup arrive at Negrete’s residence and observed two subjects exit the black Nissan
20 pickup and enter Negrete’s residence, only to depart almost 30 minutes later. Complaint
21 at ¶ 7. Surveillance followed the vehicle to Tulare, California where it was stopped by a
22 Tulare Police Department officer. *Id.* The officer identified the driver as Cortez and the
23 passenger as Trujillo. Complaint at ¶ 8. Cortez was detained and cited for not having a
24 valid California driver’s license; the vehicle was impounded. *Id.* An inventory search of
25 the black Nissan resulted in the location of approximately \$4,615.00 in U.S. Currency,
26 consistent with the previously negotiated sales price for the quarter-pound of
27 methamphetamine sold to Negrete. *Id.* A narcotic-detecting canine alerted to the area
28 under the front passenger seat where the money had been located. *Id.*

On May 19, 2008, Trujillo and Cortez arrived at the Tulare Police Department to
have the \$4,615.00 returned to them. Complaint at ¶ 12. During the interview, Trujillo
gave an unreliable story that the money originated from the sales of stereo equipment
from a business owned by Trujillo and Cortez. *Id.* Trujillo provided several purported
copies of handwritten receipts that totaled \$4,600.00 and had Trujillo’s name printed in
the “ship to” and “bill to address” with an address of 538 E. Street, Tulare, California
(Cortez’ residence). *Id.* So that the investigation would not be compromised, the Tulare
Police Department released the \$4,615.00 to Trujillo and Cortez. *Id.*

On December 10, 2008, a federal search warrant was executed at Cortez’
residence where officers located money gram receipts, a day planner, a utility bill for the
residence, and a Mexican birth certificate in the front bedroom. Complaint at ¶¶ 13-14.
A fraudulent resident alien card and a fraudulent social security card both in the name of
Cortez were located in a dresser in the front bedroom. Complaint at ¶ 14. Law
enforcement located a single stack .45 ACP magazine containing seven (7) .45 ACP
rounds in a black Nissan Titan parked in the driveway of the residence. Complaint at ¶

¹The facts are quoted directly from the Government’s application at pages 2 through 3 and
include specific references to the allegations as more fully set forth in the verified complaint.

1 15. Additionally, approximately \$2,900.00 in U.S. Currency and approximately
2 \$2,500.00 in U.S. Currency was located in the closet of the rear bedroom. Complaint at ¶
3 16. An additional approximately \$600.00 in U.S. Currency was located in the front
4 bedroom. *Id.* Officers further located a Ruger Model 10-22 rifle, SN: 121-34616, with an
5 empty magazine on top of the refrigerator. *Id.*

6 On December 11, 2008, Luis Cortez-Mendoza, Olegario Trujillo, and others
7 were indicted by a Grand Jury in the Eastern District of California in *United States v.*
8 *Adrian Negrete-Hernandez, et al.* 1:08-CR-00435-AWI, for violations of 21 U.S.C. §§
9 841(a)(1), (b)(1)(A), and 846 - Conspiracy to Distribute and to Possess with Intent to
10 Distribute Methamphetamine. Complaint at ¶ 17. On August 17, 2009, Cortez entered
11 into a plea agreement. *Id.*

12 ***The Government's Claims***

13 On October 5, 2009, the Government filed its Complaint for forfeiture *in rem* to claim:

14 (1) that the Defendant Property is subject to forfeiture to the Government under Title 21 of the United
15 States Code section 881(a)(6) in that the currency constitutes moneys or other things of value furnished
16 or intended to be furnished in exchange for a controlled substance, all proceeds traceable to such an
17 exchange and/or were used or intended to be used to facilitate one or more violations of Title 21 of the
18 United States Code section 841, *et seq.* (Doc. 1.)

19 On October 6, 2009, based upon the allegations set forth in the Complaint, the Clerk of the
20 Court issued a Warrant for Arrest of Articles *In Rem* for the Defendant Property. (Doc. 5.) The warrant
21 was executed on January 15, 2010. (*See* Docs. 14-15.)

22 ***Notice of Forfeiture Action***

23 On October 8, 2009, this Court authorized publication of the forfeiture action via the internet
24 forfeiture website at www.forfeiture.gov for at least thirty (30) days. (Doc. 8.) On November 10, 2009,
25 the Government filed its Declaration of Publication. (Doc. 10.)

26 On October 14, 2009, via certified mail, copies of the complaint, arrest warrant, publication
27 order and other related papers were served on Daniel L. Harralson, defense counsel for Luis Cortez in
28 the related criminal proceeding. The certified return receipt was executed by Sharon Koriassi on
October 27, 2009. (Doc. 19 at 4, ¶ 1.)

On October 19, 2009, Luis Cortez was personally served with copies of the complaint, arrest
warrant, publication order and other related papers at the Kern County Jail facility. (Doc. 19 at 4, ¶ 2;
see also Docs. 16-17.)

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1 On November 9, 2009, copies of the complaint, arrest warrant, publication order and other
2 related papers were served via certified mail on Mariluz Espinoza at 620 N. Blackstone Street # N in
3 Tulare, California. A certified return receipt was executed by Mariluz Espinoza on November 12,
4 2009. (Doc. 19 at 4, ¶ 3.)

5 On December 2, 2009, the Government personally served Mariluz Espinoza with copies of the
6 complaint, arrest warrant, publication order and other papers related to this action. (Doc. 19 at 4, ¶ 4;
7 *see also* Docs. 16 & 18.)

8 ***Default Entries***

9 At the Government's request, the Clerk of the Court entered defaults in this action as to Luis
10 Cortez and Mariluz Espinoza on January 20, 2010. (Docs. 16-18.)

11 **DISCUSSION**

12 ***Sufficiency of the Complaint***

13 The Government contends that the allegations set forth in the Verified Complaint for Forfeiture
14 *In Rem* and the facts cited "provide ample grounds" for forfeiture of the Defendant Property. A
15 complaint's sufficiency is a factor to consider when deciding whether to grant default judgment. *Eitel v.*
16 *McCool*, 782 F.2d 1470, 1471-1472 (9th Cir. 1986). Title 21 of the United States Code section
17 881(a)(6) provides for the forfeiture of moneys or others things of value that are furnished or intended
18 to be furnished by any person in exchange for a controlled substance, that constitutes proceeds traceable
19 to such an exchange, or that is used or intended to be used to facilitate any violation of the laws
20 governing controlled substances.

21 In its Verified Complaint, the Government alleges that the Defendant Property constitutes
22 money or other things of value furnished or intended to be furnished in exchange for a controlled
23 substance, all proceeds traceable to such an exchange and/or were used or intended to be used to
24 facilitate one or more of the laws governing controlled substances, and is therefore subject to forfeiture.
25 (Doc. 1 at 5.)

26 As referenced above and set forth in the Verified Complaint, a joint law enforcement
27 investigation by the Immigration and Customs Enforcement, Drug Enforcement Administration and
28 Souther Tri County - High Intensity Drug Trafficking Area Task Force into the Montenegro Drug

1 Trafficking Organization eventually culminated in the execution of a federal search warrant at the
2 Cortez residence on “E” Street in Tulare, California, and resulted in the seizure of the approximately
3 \$6,000.00 in United States currency at issue here. (*See also* Doc. 19 at 5.)

4 The complaint meets the requirements of Supplemental Rule G. It is verified, states the grounds
5 for subject matter jurisdiction, *in rem* jurisdiction, and venue, describes the property seized and the
6 circumstances surrounding the seizure, and identifies the relevant statutes. (*See* Doc. 1.) In the absence
7 of assertion of interests in the Defendant Property, this Court is not in a position to question the facts
8 supporting the forfeiture of the currency. The facts as alleged provide a sufficient connection between
9 the Defendant Property and illegal drug activity to support the forfeiture. Case law confirms the
10 Government’s position that circumstantial evidence may support the forfeiture of proceeds of a drug
11 crime and the Government need not show a relationship between the proceeds and a specific drug
12 transaction. *See United States v. \$30,670.00*, 403 F.3d 448, 467-470 (7th Cir. 2005) (totality of
13 circumstances demonstrated that cash hoard of airline passenger was substantially connected to illegal
14 drug trafficking and properly subject to forfeiture); *United States v. \$242,484.00*, 389 F.3d 1149, 1160
15 (11th Cir. 2004) (court applied totality of circumstances to determine “more than enough cause” to
16 believe that forty pounds of cash carried by airline passenger and alerted to by narcotics-detecting dog
17 was the proceeds of, or traceable to, illegal drug transaction).

18 As the Government contends, the earlier pre-arranged drug transaction (to exchange
19 methamphetamine for the sum of \$4,600.00), the subsequent search of the Cortez residence and the
20 positive canine alert to the currency seized is sufficient evidence to support the forfeiture of proceeds of
21 a drug crime. (Doc. 19 at 5.)

22 ***Notice Requirements***

23 The Government contends that it provided required notice for the forfeiture of the Defendant
24 Property. The Fifth Amendment’s Due Process Clause prohibits the Government from deprivation of
25 property without “due process of law.” Individuals whose property interests are at stake are entitled to
26 “notice and an opportunity to be heard.” *United States v. James Daniel Good Real Property*, 510 U.S.
27 43, 48, 114 S. Ct. 492 (1993).

1 **1. Notice by Publication**

2 Supplemental Rule G(4) sets forth the rules for publication of the notice of action in federal
3 forfeiture proceedings. Rule G(4)(a)(iv)(C) provides that in lieu of newspaper publication, the
4 Government may publish notice “by posting notice on an official internet government forfeiture site for
5 at least 30 consecutive days.” Local Admiralty and *In Rem* rules further provide that the Court shall
6 designate by order the appropriate newspaper or other vehicle for publication. *See* Local Rules 171 &
7 530.

8 Here, pursuant to this Court’s October 8, 2009, Order, the Government accomplished such
9 notice with publication by way of the official internet government forfeiture site www.forfeiture.gov for
10 a period of at least thirty (30) days. (*See* Doc. 19 at 6 & Doc. 10 at 4 [10/10/09 -11/8/09].)

11 **2. Personal Notice**

12 When the Government knows of an owner of defendant property, however, the owner has a
13 constitutional right of due process to require "the Government to make a greater effort to give him
14 notice than otherwise would be mandated by [publication]." *United States v. Real Property*, 135 F.3d
15 1312, 1315 (9th Cir. 1998). For such persons, the Government must attempt to provide actual notice by
16 means "'reasonably calculated under all circumstances' to apprise [the person] of the pendency of the
17 cash forfeiture[.]" *Dusenberry v. United States*, 534 U.S. 161, 168, 122 S. Ct. 694 (2002). The
18 Government must provide such notice "as one desirous of actually informing the absentee might
19 reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315,
20 70 S. Ct. 652 (1950). "Reasonable notice, however, requires only that the government attempt to
21 provide actual notice; it does not require that the government demonstrate that it was successful in
22 providing actual notice." *Mesa Valderrama v. United States*, 417 F.3d 1189, 1197 (11th Cir. 2005).

23 Supplemental Rule G(4)(b) mirrors this requirement, providing for notice to be "sent by means
24 reasonably calculated to reach the potential claimant." Additionally, this Court's Local Rule 540
25 addresses notice to persons known to have an interest in property subject to forfeiture. The rule
26 requires that a party seeking default judgment in an action *in rem* to show to the Court's satisfaction that
27 due notice and arrest of the property has been given by: (1) publication; (2) by personal service on the
28 person having custody of the property; (3) if the property is in the hands of a law enforcement officer,

1 by personal service on the person having custody prior to its possession by law enforcement agency or
2 officer; and (4) by personal service or certified mail, return receipt requested, to every other person who
3 has not appeared in the action and is known to have an interest in the property; provided that failure to
4 give actual notice to such other person may be excused upon a satisfactory showing of diligent efforts to
5 give such notice without success. Local Rule 540(a).

6 Notwithstanding the Supplemental Rules and Local Rule 540(a), the Government provides
7 sufficient notice if such notice complies with Federal Rule of Civil Procedure 4 requirements. *See* Fed.
8 R. Civ. P. 4(n)(1) (when a federal statute authorizes forfeiture, "[n]otice to claimants of the property
9 shall then be sent in the manner provided by statute or by service of a summons under this rule").

10 Here, the Government personally served Luis Cortez and Mariluz Espinoza, on October 19 and
11 December 2, 2009, respectively, with the complaint, arrest warrant, publication order and other papers
12 regarding this action. (*See* Docs. 16-18 & Doc. 19 at 7.) The Government additionally notes that the
13 Defendant Property was seized from Luis Cortez and thus Cortez is the only claimant requiring personal
14 service. (Doc. 19 at 7.) In sum, no notice issues arise as to the Defendant Property's forfeiture.

15 ***Failure to File Claim or Answer***

16 The Government contends that this Court's clerk properly entered defaults against Luis Cortez
17 and Mariluz Espinoza. (Doc. 19 at 8.) Supplemental Rule G(5) addresses responsive pleadings in civil
18 forfeiture actions such as this and requires a person who asserts an interest in or right against the subject
19 property to file a claim in this court within thirty-five (35) days after the date of service of the
20 Government's complaint or thirty (30) days after final publication of newspaper notice. Supplemental
21 Rules G(4)(b) & G(5). Failure to comply with procedural requirements for opposing the forfeiture
22 precludes a person from establishing standing as a party to a forfeiture action. *United States v. Real*
23 *Property*, 135 F.3d at 1317.

24 As outlined above, the Government personally served Luis Cortez and Mariluz Espinoza, with
25 copies of the complaint, arrest warrant, publication order and other papers related to this action on
26 October 19 and December 2, 2009, respectively. (Doc. 19 at 8.) More than thirty days have passed
27 since completion of publication notice and more than thirty-five days have passed since service of the
28 complaint on Luis Cortez and Mariluz Espinoza. This Court's clerk properly entered defaults upon

1 failure of the potential claimants to respond to the Government’s complaint and notices. (Docs. 17 &
2 18.)

3 ***Default Judgment***

4 The Government seeks judgment against the interests of Luis Cortez and Mariluz Espinoza, and
5 final forfeiture judgment to vest in the Government all right, title and interest in the Defendant Property.
6 The Supplemental Rules do not provide a procedure to seek default judgment in an action *in rem*.
7 Supplemental Rule A provides: “The Federal Rules of Civil Procedure also apply to the foregoing
8 proceedings except to the extent that they are inconsistent with these Supplemental Rules.”

9 Pursuant to the Federal Rules of Civil Procedure, default entry is a prerequisite to default
10 judgment. Rule 55(a) of the Federal Rules of Civil Procedure governs entry of default: “When a party
11 against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and
12 that failure is shown by affidavit or otherwise, the clerk must enter the party’s default.” Generally, the
13 default entered by the clerk establishes a defendant’s liability:

14 Rule 55 gives the court considerable leeway as to what it may require as a
15 prerequisite to the entry of a default judgment. The general rule of law is that
16 upon default the factual allegations of the complaint, except those relating
to the amount of damages, will be taken as true.

17 *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-918 (9th Cir. 1987) (internal citations &
18 quotation marks omitted).

19 As noted above, the Government properly obtained default entries against the interests of Luis
20 Cortez and Mariluz Espinoza. There is no impediment to default judgment sought by the Government
21 as to them. The Government properly seeks judgment against the interests of the entire world, that is, a
22 final forfeiture judgment to vest in the Government all right, title and interest in the Defendant Property
23 or currency. “A judgment in rem affects the interests of all persons in designated property. . . . [T]he
24 plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish
25 the nonexistence of similar interests of particular persons.” *Hanson v. Denckla*, 357 U.S. 235, 246,
26 n.12, 78 S. Ct. 1228 (1958).

27 In light of the defaults, a final forfeiture judgment is in order for the Government.
28

1 **RECOMMENDATIONS AND ORDER**

2 For the reasons discussed above, this Court RECOMMENDS to:

- 3 1. GRANT plaintiff United States of America default judgment against the interests of Luis
4 Cortez and Mariluz Espinoza in the Defendant Property;
- 5 2. ENTER final forfeiture judgment to vest in Plaintiff United States of America all right,
6 title and interest in the Defendant Property; and
- 7 3. ORDER Plaintiff United States of America, within ten (10) days of service of an order
8 adopting the findings and recommendations, to submit a proposed default and final
9 forfeiture judgment consistent with the findings and recommendations and order
10 adopting them.

11 These findings and recommendations are submitted to the district judge assigned to this action,
12 pursuant to Title 28 of the United States Code section 636(b)(1)(B) and this Court’s Local Rule 304.
13 Within fifteen (15) court days of service of this recommendation, any party may file written objections
14 to these findings and recommendations with the Court and serve a copy on all parties. Such a document
15 should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The district
16 judge will review the magistrate judge’s findings and recommendations pursuant to Title 28 of the
17 United States Code section 636(b)(1)(C). The parties are advised that failure to file objections within
18 the specified time may waive the right to appeal the district judge’s order. *Martinez v. Ylst*, 951 F.2d
19 1153 (9th Cir. 1991).

20
21 IT IS SO ORDERED.

22 **Dated: February 22, 2010**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE