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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

CASE NO. 1:11-cv-00179-LJO-SMS

Plaintiff,

v.

**FINDINGS AND RECOMMENDATIONS  
RECOMMENDING THE GRANT OF  
PLAINTIFF’S *EX PARTE* APPLICATION  
FOR DEFAULT JUDGMENT**

APPROXIMATELY \$1,707.00 IN U.S.  
CURRENCY,

(Doc. 17)

Defendant.

In this civil forfeiture action, Plaintiff United States of America (“Government”) seeks (1) default judgment against the interests of Jairo Fernandez and Jorge Palenzuela in approximately \$1,707.00 and (2) entry of a final forfeiture judgment to vest in the Government all right, title and interest in the defendant currency. The Government’s motion has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rule 72-302(c)(19) and is considered in accordance with Local Rule A-540(d).

This Court has reviewed the papers and has determined that this matter is suitable for decision without oral argument pursuant to Local Rule 78-230(h). Having considered all written materials submitted, the undersigned recommends that the District Court grant the Government default judgment, enter final forfeiture judgment to vest in the Government all right, title and interest in the defendant currency, and order the Government, within ten (10) days of service of an order adopting these findings and recommendations, to submit a proposed default and final forfeiture judgment consistent with these findings and recommendations.

1 **I. Factual Background**<sup>1</sup>

2 On August 3, 2010, a central investigator for Home Depot advised the United States  
3 Secret Service (“Secret Service”) that individuals identified as Jorge Palenzuela and Yuri Perez  
4 Machado sought to defraud Home Depot on multiple occasions by opening false business  
5 accounts. Perez and Machado would apply in person at a Home Depot store, falsely representing  
6 themselves as authorized charge account users for legitimate businesses with which they falsely  
7 claimed to be affiliated. On August 5, 2010, the Organized Retail Theft Manager for Lowe’s  
8 advised the Secret Service that Palenzuela, Machado, and a third individual named Jairo  
9 Fernandez were using the same scheme to defraud Lowe’s. Amounts stolen through the  
10 fraudulent accounts at both stores totaled \$202,843.59.

11 In connection with the investigation, on August 19, 2010, agents exercised a federal  
12 search warrant at 2628 Bernice Drive, Bakersfield, California. In the garage, agents found three  
13 LG washers, three LG dryers, and three LG pedestals obtained from Home Depot, as well as  
14 other items. Agents found the defendant currency in Fernandez’s wallet.

15 **II. Procedural Background**

16 This is a civil action *in rem* to forfeit to the United States of America approximately  
17 \$1,707.00 in U.S. currency (“defendant currency”). Because the defendant currency is derived  
18 from proceeds traceable to one or more violations of 18 U.S.C. § 1014 (credit card application  
19 fraud), 18 U.S.C. § 1014 (identification fraud), 18 U.S.C. § 1029 (access device fraud), and 18  
20 U.S.C. § 1343 (wire fraud), it is subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C).

21 On February 1, 2011, the Government filed its complaint for forfeiture in rem, alleging  
22 that \$1707.00 of the defendant currency was subject to forfeiture to the Government under 21  
23 U.S.C. § 981(a)(1)(C) because it was derived from proceeds traceable to one or more violations  
24 of 18 U.S.C. § 1014 (credit card application fraud), 18 U.S.C. § 1014 (identification fraud), 18  
25 U.S.C. § 1029 (access device fraud), and 18 U.S.C. § 1343 (wire fraud). On February 4, 2011,  
26 based on the allegations of the amended complaint, the Clerk of the Court issued a Warrant for  
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28 <sup>1</sup> These facts were derived from the Government’s application and from the Court’s records.

1 Arrest of Articles In Rem for the Defendant Currency. The warrant was executed on March 8,  
2 2011.

3 On February 8, 2011, this Court authorized publication of the forfeiture action via the  
4 internet forfeiture website [www.forfeiture.gov](http://www.forfeiture.gov) for at least thirty days. According to the  
5 Government's Declaration of Publication, a Notice of Civil Forfeiture was published on the  
6 official government internet site ([www.forfeiture.gov](http://www.forfeiture.gov)) for thirty days beginning on February 10,  
7 2011.

8 On March 14, 2011, Fernandez was personally served with notice of this action by the  
9 U.S. Secret Service. The agent was unable to personally serve Palenzuela, who did not return to  
10 his former residence following his August 2010 arrest. To date, no claim or answer has been  
11 filed on behalf of Palenzuela or Fernandez.

12 As part of the Government's Requests for Entry of Default, the United States Attorney  
13 declared under penalty of perjury that on information and belief, neither Fernandez nor  
14 Palenzuela was in the military service or was an infant or incapacitated person. Neither potential  
15 claimants Fernandez nor Palenzuela, nor any other potential claimant, filed an answer or  
16 otherwise defended the action. The Clerk entered default as to Fernandez on April 11, 2011, and  
17 as to Palenzuela on April 18, 2010. The Government moved for Default Judgment on May 2,  
18 2011.

## 19 DISCUSSION

### 20 **I. Sufficiency of the Complaint**

21 The Government contends that the allegations set forth in the verified complaint for  
22 Forfeiture In Rem and the cited facts provide ample grounds for forfeiture of the defendant  
23 currency. A complaint's sufficiency is one factor for consideration in deciding whether to grant  
24 default judgment. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9<sup>th</sup> Cir. 1986). Money or other  
25 things of value are subject to forfeiture if they are derived from proceeds traceable to one or more  
26 violations of 18 U.S.C. § 1014 (credit card application fraud), 18 U.S.C. § 1014 (identification  
27 fraud), 18 U.S.C. § 1029 (access device fraud), and 18 U.S.C. § 1343 (wire fraud). 21 U.S.C. §  
28 981(a)(1)(C).

1           The Government’s verified complaint alleges that the defendant currency is subject to  
2 forfeiture since it was derived from proceeds traceable to one or more violations of 18 U.S.C. §  
3 1014 (credit card application fraud), 18 U.S.C. § 1014 (identification fraud), 18 U.S.C. § 1029  
4 (access device fraud), and 18 U.S.C. § 1343 (wire fraud). 21 U.S.C. § 981(a)(1)(C). As set forth  
5 above and in the verified complaint, the Secret Service seized the defendant currency on August  
6 19, 2010, at 2628 Bernice Drive, Bakersfield, California.

7           The complaint meets the requirements of Rule G of the Supplemental Rules for  
8 Admiralty or Maritime Claims and Asset Forfeiture Actions, Federal Rules of Civil Procedure, in  
9 that it is verified; states the grounds for subject matter jurisdiction, in rem jurisdiction, and  
10 venue; describes the property seized and the circumstance of its seizure; and identifies the  
11 relevant statutes. In the absence of assertion of interests in the defendant currency, this Court is  
12 not in a position to question the facts supporting its forfeiture. As alleged, the facts set forth a  
13 sufficient connection between the defendant currency and illegal drug activity to support a  
14 forfeiture.

15 **II.    Notice Requirements**

16           The Fifth Amendment’s Due Process Clause prohibits the Government from taking  
17 property without due process of law. Individuals whose property interests are at stake are  
18 entitled to notice and an opportunity to be heard. The requisite notice was provided to Fernandez  
19 and Palenzuela.

20           **A.    Notice by Publication**

21           Supplemental Rule G(4) provides that in lieu of newspaper publication, the Government  
22 may publish notice “by posting notice on an official government forfeiture site for at least 30  
23 consecutive days.” Local Admiralty and In Rem rules further provide that the Court shall  
24 designate by order the appropriate vehicle for publication. Local Rules A-530 and 83-171. On  
25 February 8, 2011, this Court authorized publication of the forfeiture action via the internet  
26 forfeiture website [www.forfeiture.gov](http://www.forfeiture.gov) for at least thirty days. According to the Government’s  
27 Declaration of Publication (Doc. 10), a Notice of Civil Forfeiture was published on the official  
28 government internet site ([www.forfeiture.gov](http://www.forfeiture.gov)) for thirty days beginning on February 10, 2010.

1 Accordingly, the Government satisfied the requirements for notice to Fernandez and Palenzuela  
2 by publication.

3 **B. Personal Notice**

4 When the Government knows the identity of the property owner, due process requires  
5 “the Government to make a greater effort to give him notice than otherwise would be mandated  
6 by publication.” *United States v. Real Property*, 135 F.3d 1312, 1315 (9<sup>th</sup> Cir. 1998). In such  
7 cases, the Government must attempt to provide actual notice by means reasonably calculated  
8 under all circumstances to apprise the owner of the pendency of the forfeiture action. *Dusenbery*  
9 *v. United States*, 534 U.S. 161, 168 (2002) (*quotations omitted*). *See also Mullane v. Central*  
10 *Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (requiring such notice “as one desirous of  
11 actually informing the absentee might reasonably adopt to accomplish it”). “Reasonable notice,  
12 however, requires only that the government attempt to provide actual notice; it does not require  
13 that the government demonstrate that it was successful in providing actual notice.” *Mesa*  
14 *Valderrama v. United States*, 417 F.3d 1189, 1197 (11<sup>th</sup> Cir. 2005).

15 Supplemental Rule G(4)(b) mirrors this requirement, providing for notice to be sent by  
16 means reasonably calculated to reach the potential claimant. Local Rule A-540 also requires that  
17 a party seeking default judgment in an action in rem demonstrate to the Court’s satisfaction that  
18 due notice of the arrest of the property has been given both by publication and by personal  
19 service of the person having custody of the property, or if the property is in the hands of a law  
20 enforcement officer, by personal service on the person who had custody of the property before its  
21 possession by a law enforcement agency or officer. Notice must also be provided by personal  
22 service or certified mail, return receipt requested, on every other person who has appeared in the  
23 action and is known to have an interest in the property, provided that failure to give actual notice  
24 to such other person may be excused upon a satisfactory showing of diligent efforts to provide  
25 notice without success. L.R. A-540(a). Notwithstanding the Supplemental Rules and L.R. A-  
26 540(a), the Government provides sufficient notice when the notice complies with the  
27 requirements of F.R.Civ.P. 4. *See* F.R.Civ.P. 4(n)(1) (providing that when a federal statute

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1 authorizes forfeiture, “[n]otice to claimants of the property shall then be sent in the manner  
2 provided by statute or by service of a summons under this rule”).

3 Here, the Government personally served Fernandez with the complaint, arrest warrant,  
4 publication order, and other related documents on February 24, 2011. Although the Government  
5 was unable to personally serve Palenzuela, who had abandoned his home, it demonstrated  
6 diligent efforts to personally serve him.

7 **C. Failure to File Claim or Answer**

8 Supplemental Rule G(5) requires any person who asserts an interest in or right against the  
9 defendant currency to file a claim with the Court within 35 days after service of the  
10 Government’s complaint or 30 days after the final publication of notice. Supplemental R.  
11 G(4)(b) & (5). Failure to comply with the procedural requirements for opposing the forfeiture  
12 precludes a person from establishing standing as a party to the forfeiture action. *Real Property*,  
13 135 F.3d at 1317. The Clerk of Court properly entered default against Fernandez on April 11,  
14 2011, and against Palenzuela on April 18, 2011.

15 **D. Default Judgment**

16 The Government seeks judgment against the interests of Fernandez and Palenzuela, and  
17 final forfeiture judgment to vest in the Government all right, title and interest in the defendant  
18 currency. The Supplemental Rules do not set forth a procedure to seek default judgment in rem.  
19 Supplemental Rule A provides, “The Federal Rules of Civil Procedure also apply to the  
20 foregoing proceedings except to the extent that they are inconsistent with these Supplemental  
21 Rules.”

22 Pursuant to the Federal Rules of Civil Procedure, default entry is a prerequisite to default  
23 judgment. “When a party against whom a judgment for affirmative relief is sought has failed to  
24 plead or otherwise defend, and the failure is shown by affidavit or otherwise, the clerk must enter  
25 the party’s default.” F.R.Civ.P. 55(a). Generally, the default entered by the clerk establishes a  
26 defendant’s liability.

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

5 *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9<sup>th</sup> Cir. 1987)  
6 (*internal citations and quotation marks omitted*).

7 As noted above, the Government properly obtained default entries against the interests of  
8 Fernandez and Palenzuela. There is no impediment to default judgment sought by the  
9 Government against them. The Government properly seeks judgment against the interests of the  
10 entire world, that is, a final forfeiture judgment to vest in the Government all right, title, and  
11 interest in the defendant currency. “A judgment in rem affect the interests of all persons in  
12 designated property . . . . [T]he plaintiff is seeking to secure a pre-existing claim in the subject  
13 property and to extinguish or establish the nonexistence of similar interests of particular  
14 persons.” *Hanson v. Denckla*, 357 U.S. 235, 246 n. 12 (1958). Because of Fernandez and  
15 Palenzuela’s defaults, the Government is entitled to a final forfeiture judgment.

#### 16 **RECOMMENDATIONS**

17 In light of the reasons discussed above, this Court recommends that

- 18 1. The District Court grant Plaintiff United States of America default  
19 judgment against the interests of Jairo Fernandez and Jorge Palenzuela;
- 20 2. The Clerk of Court enter final forfeiture judgment to vest in Plaintiff  
21 United States of America all right, title and interest in the defendant  
22 currency; and
- 23 3. The District Court order Plaintiff United States of America, within ten  
24 (10) days of service of an order adopting these findings and  
25 recommendations, to submit a proposed default and final forfeiture  
26 judgment consistent with the findings and recommendations and the order  
27 adopting them.

28 These findings and recommendations are submitted to District Judge Lawrence J. O’Neill  
pursuant to 28 U.S.C. § 636 (b)(1)(B) and Local Rule 72-304. Within fifteen (15) court days of  
service of this recommendation, any party may file written objections to these findings and

1 recommendations with the Court and serve a copy on all parties. Such document should be  
2 captioned "Objections to Magistrate Judge's Findings and Recommendations." The district  
3 judge will review these findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C).  
4 The parties are advised that failure to file objections within the specific time may waive the right  
5 to appeal the district judge's order. *Martinez v. Ylst*, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

6  
7 IT IS SO ORDERED.

8 **Dated: June 21, 2011**

**/s/ Sandra M. Snyder**  
UNITED STATES MAGISTRATE JUDGE