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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,  
  
                                Plaintiff,  
  
                                v.  
  
APPROXIMATELY \$25,390.00 in U.S.  
Currency; APPROXIMATELY \$8,000.00  
in U.S. Currency,  
  
                                Defendants.

**1:15-cv-1536 LJO EPG**

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

**(Doc. 10)**

**INTRODUCTION**

In this *in rem* forfeiture action, Plaintiff United States of America (the “government” or “Plaintiff”) filed an Ex Parte Motion for Default Judgment and for Final Judgment of Forfeiture. (Doc. 10). No opposition to the government's motion was filed. The matter was taken under submission without oral argument pursuant to Local Rule 230(g) and the hearing set for this matter was VACATED. (Doc. 11). For the reasons set forth below, the Court RECOMMENDS that Plaintiff's motion be GRANTED.

1 **FACTUAL BACKGROUND**

2 A verified complaint for Forfeiture *In Rem* (hereafter “complaint”) was filed on October  
3 9, 2015. The complaint alleges that the defendant currency constitutes moneys furnished, or  
4 intended to be furnished, in exchange for a controlled substance, or was used or intended to be  
5 used in any manner or part to commit or facilitate the commission of a violation of 21 U.S.C. §  
6 841 *et seq.*, and is therefore subject to forfeiture to the United States pursuant to 21 U.S.C. §  
7 881(a)(6). (Doc. 1, at ¶ 1).

9 More specifically, on December 19, 2014, at 10:52 a.m., a California Highway Patrol  
10 Canine Unit Officer (hereinafter, “CHP officer,” or “officer”) made a traffic enforcement stop of  
11 a green Buick Lacrosse at Highway 33 and Interstate 5 in Merced, California. (Doc. 1, at ¶ 5).  
12 Alec Barbour (hereinafter, “Barbour”) was the driver of the vehicle and Gabriel Adler  
13 (hereinafter, “Adler”) was the passenger. *Id.*

15 During the initial contact, the officer observed Barbour exhibiting signs of extreme  
16 nervousness, which included shaking hands, trembling voice, an inability to focus and maintain a  
17 conversation with the officer, and continually looking around. (Doc. 1, at ¶ 6). The officer further  
18 observed several indicators of criminal activity including the odor of marijuana coming from  
19 within the vehicle. *Id.* The officer asked Barbour if there was any marijuana, cocaine,  
20 methamphetamine, heroin, or large amounts of currency in the vehicle. Barbour stated there was  
21 not. *Id.*

23 The officer then interviewed Barbour and Adler separately about their travel plans and  
24 each gave a different story. Barbour stated he was traveling from New Mexico to Humboldt,  
25 California, to visit the University because he was planning to transfer there. (Doc. 1, at ¶ 7).  
26 Adler, in contrast, told the officer that they were traveling from New Mexico and going to stay in  
27 San Francisco for a four day vacation. (Doc. 1, at ¶ 8).

1           Based on all of the above indicators of criminal activity, the officer, accompanied by a  
2 second assisting CHP officer, initiated a probable cause search of the vehicle. (Doc. 1, at ¶ 9).  
3 During the initial search, the initiating officer utilized his sophisticated drug detecting canine  
4 named “Laika” to conduct a sniff search of the vehicle. (Doc. 1, at ¶10). Laika showed a distinct  
5 change in behavior indicating an alert to the odor of narcotics as she sniffed the area at the seam  
6 of the driver’s side door where it meets the leading edge of the right rear door. *Id.* Inside of the  
7 car, the officer observed marijuana debris scattered throughout the vehicle including, one large  
8 marijuana bud on the floor next to the right side of the right front passenger seat. *Id.*

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10           On the right side of the rear passenger seat, the officer located a black backpack which  
11 was found to contain the defendant currency (later determined to be a total of \$33,390.00 in U.S.  
12 currency) along with a quarter of an ounce of marijuana. (Doc. 1, at ¶ 11). The defendant  
13 currency was in four bundles held together by rubber bands in denominations of \$5’s, 10’s, 20’s,  
14 50’s and 100’s. *Id.*

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16           In the trunk, the officer located a suitcase that contained an electric heat sealer, four rolls  
17 of aluminum foil, a box of plastic gloves, Febreze air freshner, dryer sheets, two rolls of plastic  
18 heat seal bags, and two hair pressing irons. (Doc.1, at ¶ 12). The officer immediately recognized  
19 these items as common tools used to package narcotics for distribution. *Id.* The officer also  
20 located a note pad that contained detailed records of narcotics transactions including names,  
21 prices, and weights. *Id.*

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23           In addition, both Barbour and Atler have criminal histories. (Doc. 1, at ¶ 13). In March  
24 2015, Barbour was arrested for the sale of distribution of marijuana in Humboldt County,  
25 California; and again in May 2015 for possession of concentrated cannabis in Humboldt County,  
26 California. *Id.* Atler was arrested in April 2008 in Albuquerque, New Mexico, for shooting at or  
27 from a motor vehicle and was charged in December 2012 for drug distribution. *Id.*

1 **PROCEDURAL BACKGROUND**

2 Based the allegations in complaint, the Court issued a Warrant of Arrest of Articles *In*  
3 *Rem* for the defendant currency. (Doc. 4). The Warrant for the Arrest was executed on the  
4 defendant currency on October 23, 2015. (Doc. 5). Public notice of the action and the arrest of  
5 the defendant currency was published via the official internet government forfeiture site,  
6 www.forfeiture.gov, on October 24, 2015, for 30 consecutive days. This publication is consistent  
7 with Local Rule 500(d) via Supplemental Rule G(4)(a), and proof of such publication was filed  
8 with the Court on December 30, 2015. (Doc. 6).

9  
10 In addition to providing notice by publication, on or about October 21, 2015, copies of the  
11 Complaint, Warrant for Arrest of Articles In Rem, Order Setting Mandatory Scheduling  
12 Conference, Standing Order in All Civil Cases Assigned to District Court Judge O’Neill, Notice  
13 of Availability Magistrate Judge, Notice of Availability Voluntary Dispute Resolution, Order of  
14 Reassignment of Magistrate Judge and notice of forfeiture letter dated October 21, 2015, were  
15 sent by first class mail and certified mail receipt number 7012 3460 0001 6702 2023 to Alec  
16 Barbour at his last known address of 119 Arizona Sunset Road in Rio Rancho, New Mexico  
17 87124-2546. On or about November 18, 2015, the United States received the unsigned and  
18 undated return receipt for this mailing. (Docs. 7-1, at pg. 2).

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21 On or about October 21, 2015, copies of the above-listed documents were sent by first  
22 class mail and certified mail receipt number 7012 3460 0001 6702 0623 to Gabriel Adler at his  
23 last known address of 8401 Pan American Freeway NE, Unit 125 in Albuquerque, New Mexico  
24 87113-1893. To date, the government has not received any returned mail. *Id.* On or about  
25 October 21, 2015, copies of the above-listed documents were sent to David Celli, the attorney of  
26 record, who filed a claim on behalf of Alec Barbour in the administrative forfeiture action. *Id.* On  
27 or about November 5, 2015, the government received correspondence from David Celli advising  
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1 that, “Mr. Barbour is abandoning his claim to the contested funds.” (Doc. 7-1, pg. 3).

2 There have been no additional claims filed by or on behalf of Alex Barbour and Gabriel  
3 Atler to the defendant currency. Moreover, time for any other claimant or entity to file a claim  
4 and answer has expired. Accordingly, pursuant to Rule 55(a) of the Federal Rules of Civil  
5 Procedure, on January 6, 2016, a default was entered against Alex Barbour and Gabriel Atler.  
6 (Doc. 8).  
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## 8 DISCUSSION

### 9 A. Legal Standard

10 Federal Rule of Civil Procedure 55(b)(2) provides that a court has discretion to enter  
11 default judgment against a party and provides as follows:

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13 (2) By the Court. In all other cases, the party must apply to the  
14 court for default judgment. A default judgment may be entered  
15 against an infant or incompetent person only if represented by a  
16 general guardian, committee, conservator, or other like fiduciary  
17 who has appeared. If the party against whom default judgment is  
18 sought has appeared personally or by a representative, that party or  
19 its representative must be served with written notice of the  
20 application at least 3 days before the hearing. The court may  
21 conduct hearings or make referrals - preserving any federal  
22 statutory right to a jury trial - when, to enter or effectuate judgment,  
23 it needs to : (A) conduct an account; (B) determine the amount of  
24 damages; (C) establish the truth of any allegation by evidence; or  
25 (D) investigate any other matter.

26 Upon default, the well-pleaded allegations of the complaint relating to liability are taken  
27 as true. *Dundee Cement Co. v. Highway Pipe & Concrete Products, Inc.* 722 F.2d 1319, 1323  
28 (7th Cir. 1983); *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-918 (9th Cir. 1987).

29 In the context of an *in rem* forfeiture action, a court considering default judgment should  
30 also consider the procedural requirements set forth by the Civil Asset Forfeiture Reform Act of  
31 2000, 18 U.S.C. § 983; the Supplemental Rules of Certain Admiralty and Maritime Claims

1 (“Supplemental Rules”); and the court's Local Rules for Admiralty and *in rem* actions. *See,*  
2 *United States v. \$191,910.00*, 16 F.3d 1051, 1069 (9th Cir.1994) (explaining that, because civil  
3 forfeiture is a “harsh and oppressive procedure which is not favored by the courts,” the  
4 government carries the burden of demonstrating its strict adherence to procedural rules),  
5 *superseded by statute on other grounds.*

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7 **B. Procedural Requirements**

8 **1. Sufficiency of the Complaint**

9 Pursuant to the Supplemental Rules, the government must file a verified complaint that  
10 states the grounds for jurisdiction and venue, describes the property being forfeited, identifies the  
11 statute under which the forfeiture action is brought, and includes sufficient factual detail to  
12 support a reasonable belief that the government will be able to meet its burden of proof at trial.  
13 Fed.R.Civ.P. Supp. R. G(2). With regard to the sufficiency of the factual detail of the verified  
14 complaint, the government is not required to show a relationship between the proceeds of a drug  
15 crime and a specific drug transaction. Rather, circumstantial evidence may support the forfeiture  
16 of the proceeds of a drug crime. *See United States v. \$11,500.00 in United States Currency, in*  
17 *rem, et al.*, 710 F. 3d 1006, 1013 (9th Cir. 2013) (The government may meet its burden that  
18 property is subject to forfeiture with sufficiently strong circumstantial evidence linking the  
19 currency to drug trafficking generally); *United States v. Currency, U.S. \$42,500.00*, 283 F. 3d  
20 977, 984 (9th Cir. 2002) (affirming government’s motion for summary judgment in light of  
21 substantial circumstantial evidence that currency was connected to drug trafficking, and where  
22 claimant refused to disclose the source of the currency or provide any other evidence that the  
23 source was legitimate); *see also, United States v. \$30,670.00*, 403 F.3d 448, 467–70 (7th Cir.  
24 2005) (concluding that the totality of the circumstances demonstrated that an airline passenger's  
25 cash hoard was connected to drug trafficking and subject to forfeiture); *United States v.*  
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1 \$242,484.00, 389 F.3d 1149, 1160 (11th Cir. 2004) (applying totality of the circumstances to  
2 determine that cash carried by airline passenger was the proceeds of, or traceable to, an illegal  
3 drug transaction).

4 The verified complaint states the grounds for *in rem* subject matter jurisdiction and venue,  
5 describes the currency seized and the circumstances surrounding the seizure, and identifies the  
6 relevant statutes. (Doc. 1). The government contends that the verified complaint establishes  
7 circumstantial evidence that the defendant currency was furnished or intended to be furnished in  
8 exchange for a controlled substance or listed chemical, and is subject to forfeiture pursuant to 21  
9 U.S.C. § 881(a)(6). (Doc. 10, pgs. 5-6).

10 In the absence of assertion of interests in the defendant currency, the Court will not  
11 question the facts supporting its forfeiture. As alleged, the facts provide a sufficient connection  
12 between the defendant property and illegal drug activity to support a forfeiture. Additionally, the  
13 Court notes that Mr. Barbour has abandoned his claim to the contested funds. (Doc. 7-1, pgs. 2-  
14 3).

## 15 **2. Notice by Publication**

16 Subject to certain exceptions not present here, the Supplemental Rules also require that  
17 the government publish notice of the forfeiture in a manner that is reasonably calculated to notify  
18 potential claimants of the action. Fed. R. Civ. P. Supp. R. G(4)(a)(iv). The content of the notice  
19 must describe the property with reasonable particularity, state the times to file a claim and to  
20 answer the complaint, and identify the name of the government attorney to be served with the  
21 claim and answer. Fed. R. Civ. P. Supp. R. G(4)(a)(ii)(A)-(C). If the property is in the United  
22 States, publication in a newspaper generally circulated in the district where the action is filed,  
23 where the property is seized, or where property that was not seized is located. Fed. R. Civ. P.  
24 Supp. R. G(4)(a)(iv)(A). In lieu of newspaper publication, the government may publish notice by  
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1 posting on an official internet government forfeiture site for at least thirty consecutive days. Fed.  
2 R. Civ. P. Supp. R.G(4)(a)(iv)(C). Claims must be made within 30 days after the completion of  
3 the publication. Fed. R. Civ. P. Supp. R.G(5).

4 Here, publication occurred on the official internet government forfeiture site  
5 www.forfeiture.gov on October 24, 2015, for 30 consecutive days. (Doc. 6). A Declaration of  
6 Publication was filed on December 30, 2015. *Id.* Accordingly, the requirements for notice by  
7 publication pursuant to Local Rule 500(d) and Supplemental Rule G have been satisfied. Further,  
8 the notice provided the name of the attorney to be served with any claim and answer. *Id.* Thus, the  
9 Supplemental Rule's notice by publication requirements have been satisfied.

11 **3. Personal Notice**

12 When the government knows the identity of the property owner, the Due Process Clause of  
13 the Fifth Amendment requires “the Government to make a greater effort to give him notice than  
14 otherwise would be mandated.” *United States v. Real Property*, 135 F.3d 1312, 1315 (9th Cir.  
15 1998). In such cases, the government must attempt to provide actual notice by means reasonably  
16 calculated under all circumstances to apprise the owner of the pendency of the forfeiture action.  
17 *Dusenbery v. United States*, 534 U.S. 161, 168 (2002); *see also* Fed.R.Civ.P. Supp. R. G(4)(b).  
18 “Reasonable notice, however, requires only that the government attempt to provide actual notice;  
19 it does not require that the government demonstrate that it was successful in providing actual  
20 notice.” *Mesa Valderrama v. United States* 417 F.3d 1189, 1197 (11th Cir. 2005); *Real Property*,  
21 135 F.3d at 1316.

22 Supplemental Rule G(4)(b) mirrors this requirement, providing for notice to be sent by  
23 means reasonably calculated to reach the potential claimant. Fed. R. Civ. P. Supp. R. G(4)(b)(i).  
24 The notice must contain the following information: the date when the notice is sent; a deadline for  
25 filing a claim that is at least 35 days after the notice is sent; that an answer or a motion under Rule  
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1 12 must be filed no later than 21 days after the filing of the claim; and the name of the  
2 government attorney to be served with the claim and the answer. *Id.* Here, the government  
3 provided notice of the forfeiture action by mailing copies of the required documentation to Alex  
4 Barbour and Gabriel Adler at their last known addresses.

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6 **4. *The Time to File a Claim or an Answer***

7 Pursuant to the Supplemental Rules, any person who asserts an interest in or a right in a  
8 forfeiture action must file a claim with the Court within the time specified by the direct notice.  
9 Fed.R.Civ.P. Supp. G(4)(b)(ii)(B), (5)(a)(ii)(A). Failure to comply with the procedural  
10 requirements for opposing the forfeiture precludes a person from establishing standing in the  
11 forfeiture proceeding. *Real Property*, 135 F.3d at 1317. Here, more than 30 days have passed  
12 since the completion of publication, and more than 35 days have passed since the date that the  
13 known potential claimants were provided direct notice of the United States' complaint in this  
14 action. Accordingly, the time to file a claim has expired, and pursuant to Rule 55(a) of the Federal  
15 Rules of Civil Procedure, the Clerk of the Court properly entered defaults against Alec Barbour  
16 and Gabriel Adler.

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18 **5. *Conclusion***

19 The government has met the procedural requirements applicable to civil *in rem* forfeiture  
20 actions as set forth in 18 U.S.C. § 983, the Supplemental Rules, and the Local Rules for the U.S.  
21 District Court for the Eastern District of California. This favors the entry of default judgment and  
22 the issuance of a final judgment in forfeiture to vest in the United States all right, title, and  
23 interest in the defendant currency.

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25 **C. *The Eitel Factors Weigh in Favor of Granting Default Judgment***

26 The government seeks judgment against the interests of Alex Barbour and Gabriel Adler  
27 and also requests that the Court enter a Final Judgment of Forfeiture pursuant to 21 U.S.C. §  
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1 881(a)(6), forfeiting all right, title, and interest in the defendant currency to the United States, to  
2 be disposed of according to law. The Supplemental Rules do not provide a procedure to seek  
3 default judgment in an action *in rem*. Supplemental Rule A provides: “The Federal Rules of Civil  
4 Procedure also apply to the foregoing proceedings except to the extent that they are inconsistent  
5 with these Supplemental Rules.”

6  
7 When considering whether to enter default judgment under Fed. R. Civ. P. 55, courts  
8 consider the following factors: (1) the possibility of prejudice to the plaintiff; (2) the merits of  
9 plaintiff’s substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in  
10 the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was  
11 due to excusable neglect; and (7) the strong policy of favoring decisions on the merits. *Eitel v.*  
12 *McCool*, 782 F.2d 1470, 1471–72 (9th Cir.1986).

13  
14 The discretionary *Eitel* factors outlined above favor granting the government’s motion for  
15 default judgment. First, the government would be prejudiced by the denial of its motion,  
16 spending additional time and effort litigating an action in which the claimants have withdrawn  
17 their claims. Second, the government’s claims appear to have merit. Third, as set forth above, the  
18 government has adhered to the procedural requirements of a forfeiture action *in rem*. Fourth, the  
19 currency that was seized and subject to forfeiture is not of such substantial value as to warrant  
20 denial of the government’s motion. Fifth, there are no genuine disputed issues of material fact.  
21 Sixth, there is no evidence that the failure of any other claimants to answer is due to excusable  
22 neglect. Finally, although merits-based decisions are always preferred, it is not practical, where,  
23 as here, claimants have withdrawn their claims. Accordingly, there is no impediment to default  
24 judgment sought by the government and the Court will recommend that the motion be granted.  
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## 26 **RECOMMENDATIONS**

27 For the reasons discussed above, this Court RECOMMENDS that:  
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1. The government’s Motion for Default Judgment against the interests of Alex Barbour and Gabriel Adler be granted;
2. The Clerk of the Court enter a final judgment of forfeiture pursuant to 21 U.S.C. § 881(a)(6), forfeiting all right, title, and interest in the defendant currency to the United States to be disposed of according to law; and
3. Within ten (10) days of service of an order adopting these findings and recommendations, the United States shall submit a proposed final judgment of forfeiture consistent with the findings and recommendations and order adopting them.

These Findings and Recommendations are submitted to the district judge assigned to this action, pursuant to Title 28 of the United States Code § 636(b)(1)(B). Within **fifteen (15)** days of service of this recommendation, any party may file written objections to these findings and recommendations with the Court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The district judge will review the magistrate judge’s Findings and Recommendations pursuant to Title 28 of the United States Code section 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the district judge’s order. *Wilkerson v. Wheeler*, 772 F. 3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F. 2d 1391, 1394 (9th Cir. 1991); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: March 14, 2016

/s/ Eric P. Shroy  
UNITED STATES MAGISTRATE JUDGE