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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8  
9 United States of America

No. CV12-0105-PHX-DGC

10 Plaintiff,

**ORDER**

11 v.

12 \$2,164,341 in US Currency

13 Defendant.

14 Before the Court is the motion for discovery sanctions and entry of judgment by  
15 Plaintiff United States of America. Doc. 34. Before ruling on the fully briefed motion,  
16 the Court requested additional briefing on the issue of discovery sanctions. Doc. 37.  
17 Both Plaintiff and Claimant Leonardo Cornejo–Reynoso (“Claimant”) submitted  
18 additional memoranda. Docs. 39, 40. For the reasons set forth below, the Court will  
19 grant in part Plaintiff’s motion.<sup>1</sup>

20 **I. Background.**

21 Plaintiff’s complaint seeking forfeiture of \$2,164,341 in United States currency  
22 was filed on January 17, 2012. Doc. 1. Claimant’s answer claiming an interest in the  
23 money was filed on February 8, 2012. Doc. 7.

24 Plaintiff served a notice of Claimant’s deposition on February 14, 2012. Doc. 9.  
25 The attorneys agreed that the deposition would occur on March 15, 2012. When

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27 <sup>1</sup> Claimant’s request for oral argument is denied. The parties’ briefings and other  
28 submissions have amply addressed the issues raised by the motion, and the Court  
concludes that oral argument will not aid its decision. *See* Fed. R. Civ. P. 78(b);  
*Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 Claimant had difficulty obtaining a visa to enter the United States, the deposition was  
2 rescheduled to April 4, 2012. Doc. 18. Plaintiff arranged for Claimant, who lives in  
3 Mexico and is not a U.S. citizen, to be paroled into the United States for purposes of the  
4 deposition, but Claimant asserted that the parole documentation was received too late and  
5 that he could not appear for the deposition. The parties agreed to reschedule the  
6 deposition for May 4, 2012. *Id.*

7 Subsequent efforts to secure parole documents on a schedule that would work for  
8 the parties were largely unsuccessful, and the parties ultimately agreed to seek an  
9 extension of the discovery schedule in this case, which the Court approved. Doc. 16.  
10 Counsel for Plaintiff was able to obtain parole documents for the month of August 2012,  
11 and the parties agreed Claimant's deposition would occur on August 30, 2012. But when  
12 Claimant subsequently took the position that he needed assurances that he would not be  
13 arrested upon entering the United States (presumably for criminal charges related to  
14 seizure of the currency) and Plaintiff stated that no such assurances could be given, the  
15 parties were unable to agree that the deposition would go forward. Plaintiff filed an  
16 emergency motion to compel the deposition and Claimant filed an emergency motion for  
17 a protective order. Docs. 18, 19.

18 The Court held a telephone conference with the parties on August 27, 2012.  
19 Doc. 21. As a result of that conference, the Court declined to require Plaintiff to depose  
20 Claimant by videoconference in Mexico as requested by Claimant's counsel. The Court  
21 also held that Claimant, having invoked the jurisdiction of the Court to assert his claim,  
22 could not refuse to appear in this District for his deposition. Because the date of the  
23 deposition was imminent and Claimant's counsel sought additional time for Claimant to  
24 consider carefully whether he would enter this country to give the deposition, the Court  
25 put in place a schedule for the parties to complete the deposition. Doc. 22. The Court's  
26 order required Claimant, by September 19, 2012, to advise Plaintiff whether Claimant  
27 was able to obtain a visa to enter the United States and, if so, how soon he could enter the  
28 country for purposes of a deposition. Doc. 22 at 2. If Claimant was not able to obtain a

1 visa, the Court's order stated that Plaintiff should make arrangements for Claimant to be  
2 paroled into the country to complete his deposition no later than November 30, 2012. *Id.*  
3 The Court ordered that Claimant "shall appear for his deposition in this District on or  
4 before November 30, 2012." *Id.*

5 Claimant did not comply with the Court's order. He did not notify Plaintiff by  
6 September 19, 2012 whether he could obtain a visa to enter the country. Plaintiff's  
7 counsel nonetheless took steps to obtain parole documents and schedule the deposition.  
8 On September 11, 2012, Plaintiff's counsel wrote to Claimant's counsel and proposed  
9 several deposition dates between mid-September and early November 2012. Doc. 27-1 at  
10 2. Claimant's counsel did not respond to the proposed dates until October 5, 2012, when  
11 Claimant's Counsel wrote a letter requesting that the deposition occur in the second half  
12 of November, and stating that Claimant had recently discovered that a criminal case was  
13 pending against him in Coconino County Superior Court. Doc. 26-1 at 1. Plaintiff  
14 scheduled Claimant's deposition for October 23, 2012 (Doc. 25), and in response  
15 Claimant filed an emergency motion for a protective order (Doc. 26).

16 The Court held a telephone conference with the parties on October 19, 2012.  
17 Doc. 28. As a result of that conference, the Court denied Claimant's motion for a  
18 protective order and ordered Claimant to appear for his deposition on October 24, 2012.  
19 Docs. 29, 32. Claimant failed to appear. Doc. 33.

## 20 **II. Discussion.**

### 21 **A. Fugitive Disentitlement Doctrine.**

22 Plaintiff submits that the Court may enter judgment in its favor under the fugitive  
23 disentitlement provision of the Civil Asset Forfeiture Reform Act of 2000, 28 U.S.C.  
24 § 2466(a) ("CAFRA"). Doc. 24 at 9-13. The Ninth Circuit has adopted the following  
25 five-part test for determining whether a fugitive may be disentitled: "(1) a warrant or  
26 similar process must have been issued in a criminal case for the claimant's apprehension;  
27 (2) the claimant must have had notice or knowledge of the warrant or process; (3) the  
28 criminal case must be related to the forfeiture action; (4) the claimant must not be

1 confined or otherwise held in custody in another jurisdiction; and (5) the claimant must  
2 have deliberately avoided criminal prosecution by leaving the United States, declining to  
3 enter or reenter the country, or otherwise evading the criminal court's jurisdiction."  
4 *United States. v. \$6,190.00 in U.S. Currency*, 581 F.3d 881, 886 (9th Cir. 2009) (citations  
5 omitted). "Section 2466 does not mandate disentitlement once these five elements have  
6 been satisfied. Rather, it provides that "[a] judicial officer *may* disallow a person from  
7 using the resources of the courts of the United States." *Id.* (quoting 28 U.S.C.  
8 § 2466 (emphasis added)).

9 Plaintiff has failed to satisfy the five elements of § 2466. Plaintiff has not  
10 presented clear evidence that a warrant has been issued for Claimant's arrest or that the  
11 action pending in Coconino County Superior Court is related to this action. The Court  
12 therefore will deny Plaintiff's motion for judgment under the fugitive disentitlement  
13 doctrine.

#### 14 **B. Discovery Sanctions.**

15 Plaintiff has been seeking diligently to take Claimant's deposition since February  
16 of 2012. Three times Plaintiff has completed the difficult process of arranging for  
17 Claimant to be paroled into the United States for his deposition, and three times Claimant  
18 has declined to appear. Claimant has twice failed to comply with orders of this Court:  
19 Claimant failed to advise Plaintiff on or before September 19, 2012, whether Plaintiff  
20 was able to obtain a visa to enter the United States (as ordered in Doc. 22), and Claimant  
21 failed to appear for his deposition on October 24, 2012 (as ordered in Doc. 32).  
22 Sanctions are warranted.

23 Plaintiff asks the Court to strike Claimant's answer and enter judgment in its  
24 favor. Before case-terminating sanctions can be imposed, however, the Court must  
25 consider five factors: "(1) the public's interest in expeditious resolution of litigation;  
26 (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking  
27 sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the  
28 availability of less drastic sanctions." *Hester v. Vision Airlines*, 687 F.3d 1162, 1169 (9th

1 Cir. 2012) (citations omitted). “[W]here a court order is violated, factors 1 and 2 support  
2 sanctions and 4 cuts against case dispositive sanctions, so 3 and 5 . . . are decisive.”  
3 *Valley Eng’rs, Inc. v. Electric Eng’g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998).

4 The third factor looks to whether Claimant’s behavior “impaired [Plaintiff’s]  
5 ability to go to trial or threatened to interfere with the rightful decision of the case.”  
6 *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994) (quoting *United States ex.*  
7 *Rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co.*, 857 F.2d 600, 604 (9th Cir. 1988)).  
8 Although Claimant has responded to some written discovery, his deposition is clearly the  
9 most important discovery step in this case. Claimant professes to own the more than \$2  
10 million seized from his truck, and it is his assertion of ownership that Plaintiff must  
11 overcome to obtain forfeiture. Claimant’s steadfast refusal to appear for his deposition in  
12 the District clearly has impaired Plaintiff’s ability to go to trial. Claimant’s deposition  
13 avoidance also caused the Court to extend the discovery schedule by almost six months,  
14 an extension that ultimately failed in securing his deposition. The Court and Plaintiff are  
15 now faced with a closed discovery period and the prospect of trial on an incomplete  
16 record. Without question, Claimant’s actions have impaired Plaintiff’s ability to go to  
17 trial and the Court’s ability to reach a rightful decision in this case.

18 Factor 5 “involves consideration of three subparts: whether the court explicitly  
19 discussed alternative sanctions, whether it tried them, and whether it warned the  
20 recalcitrant party about the possibility of dismissal.” *Valley Eng’rs*, 158 F.3d at 1057.  
21 Although the Court did address alternative sanctions at some stages of this case, it did not  
22 warn Claimant that failure to appear at his deposition could result in judgment against  
23 him. The Court did extend the time for Claimant to appear, and made efforts to enter a  
24 schedule and procedure that would make his appearance as effective as possible. These  
25 steps did not succeed in securing Claimant’s attendance at his deposition.

26 Although the Court concludes that the entry of judgment against Claimant is not  
27 warranted at this stage, another Rule 37 sanction clearly is warranted. Rule 37 provides  
28 that a court may impose the following sanction for failure to obey an order to provide

1 discovery: “prohibiting the disobedient party from supporting or opposing designated  
2 claims or defenses, or from introducing designated matters in evidence.” Fed. R. Civ. P.  
3 37(b)(2)(A)(ii). The Court imposes the following sanction: Claimant is prohibited from  
4 presenting his own oral or written testimony, in any form, related to the issues in this  
5 case. Claimant cannot submit an affidavit in response to a motion for summary judgment  
6 and cannot testify at trial, remotely or in person. The Court concludes that this sanction  
7 is warranted in light of Claimant’s repeated refusals to appear and submit to a deposition  
8 in this case.

9 Discovery is closed. The discovery period ended on January 22, 2013. Doc. 16.  
10 Dispositive motions are due on February 22, 2013. *Id.* The Court will adhere to this  
11 schedule. Plaintiff may file a motion for summary judgment in support of its claim in  
12 this case, and Claimant cannot oppose the motion with his own testimony, in any form.

13 **IT IS ORDERED** that Plaintiff’s motion for entry of judgment and/or issuance of  
14 terminating sanctions (Doc. 34) is **denied**. As a sanction for failing to comply with the  
15 Court’s orders, Claimant is precluded from testifying, from introducing affidavits  
16 containing his testimony, or from in any way presenting his own testimony in this matter.

17 Dated this 28th day of January, 2013.

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22 David G. Campbell  
23 United States District Judge  
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