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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 vs. )  
 2007 BMW Convertible 650i, )  
 VIN: WBAEK13577CN80379, )  
 License Number 6CBS415, )  
 Defendant. )

1:09-cv-00009-OWW-SMS  
ORDER VACATING HEARING ON  
PLAINTIFF'S MOTION FOR DEFAULT  
JUDGMENT AND DEEMING MATTER  
SUBMITTED FOR DECISION (DOC.  
28)  
**Vacated hearing date:**  
**October 30, 2009**  
**Time: 9:30 a.m.**

FINDINGS AND RECOMMENDATIONS  
RE: PLAINTIFF'S MOTION FOR  
DEFAULT JUDGMENT (Doc. 28)  
  
ORDER DIRECTING PLAINTIFF TO  
SERVE THESE FINDINGS AND  
RECOMMENDATIONS ON ALL  
POTENTIAL CLAIMANTS AND FILE A  
PROOF OF SERVICE

Plaintiff is proceeding with an action for forfeiture in  
this Court. Pending before the Court is Plaintiff's ex parte  
motion for default judgment, filed on August 7, 2009, with a  
supporting declaration of Elisa Rodriguez, which proceeds before

1 a Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rule  
2 72-302(c) (19).

3 I. Vacating the Hearing on the Motion

4 Pursuant to Rule 78-230(h) of the Local Rules of Practice  
5 for the United States District Court, Eastern District of  
6 California, the Court finds that the Plaintiff's ex parte motion  
7 for default judgment is a matter that may appropriately be  
8 submitted upon the record and briefs, including the Plaintiffs'  
9 motion, supporting memorandum of points and authorities, and  
10 declaration of Elisa Rodriguez filed on August 7, 2009.

11 Accordingly, the hearing on the motion, presently set for  
12 October 30, 2009, IS VACATED, and the motion IS DEEMED SUBMITTED  
13 to the Court for decision.

14 II. Service of the Findings and Recommendations

15 The remainder of this document constitutes the Court's  
16 findings and recommendations with respect to Plaintiff's motion  
17 for default judgment.

18 Plaintiff IS DIRECTED to serve the findings and  
19 recommendations on all potential claimants to Defendant property,  
20 including Jorge Leal, Elisa Leal, Johanna Leal, and Vanessa Leal,  
21 and to file proof of such service no later than ten days after  
22 the date of service of this order.

23 III. Motion for Default Judgment

24 A. Legal Standards

25 A court has the discretion to enter a default judgment  
26 against one who is not an infant, incompetent, or member of the  
27 armed services where the claim is for an amount that is not  
28 certain on the face of the claim and where (1) the defendant has

1 been served with the claim; (2) the defendant's default has been  
2 entered for failure to appear; (3) if the defendant has appeared  
3 in the action, the defendant has been served with written notice  
4 of the application for judgment at least three days before the  
5 hearing on the application; and, (4) the court has undertaken any  
6 necessary and proper investigation or hearing in order to enter  
7 judgment or carry it into effect. Fed. R. Civ. P. 55(b); Alan  
8 Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392 (9<sup>th</sup>  
9 Cir. 1988). Factors that may be considered by courts in  
10 exercising discretion as to the entry of a default judgment and  
11 as to setting aside a default include the nature and extent of  
12 the delay, Draper v. Coombs, 792 F.2d 915, 924-925 (9<sup>th</sup> Cir.  
13 1986); the possibility of prejudice to the plaintiff, Eitel v.  
14 McCool, 782 F.2d 1470, 1471-72 (9th Cir.1986); the merits of  
15 plaintiff's substantive claim, id.; the sufficiency of the  
16 allegations in the complaint to support judgment, Alan Neuman  
17 Productions, Inc., 862 F.2d at 1392; the amount in controversy,  
18 Eitel v. McCool, 782 F.2d at 1471-1472; the possibility of a  
19 dispute concerning material facts, id.; whether the default was  
20 due to excusable neglect, id.; and, the strong policy underlying  
21 the Federal Rules of Civil Procedure that favors decisions on the  
22 merits, id.

23         With respect to default judgments in proceedings that are in  
24 rem actions for forfeiture, both the general Federal Rules of  
25 Civil Procedure and the Supplemental Rules for Certain Admiralty  
26 and Maritime Claims (Supp. R.) apply, but the latter rules  
27 prevail if there is an inconsistency. Supp. R. A(1). Supp. R.  
28 G(1) provides that the rule governs a forfeiture action in rem

1 arising from a federal statute; to the extent that Rule G does  
2 not address an issue, Supp. Rules C and E also apply.  
3 Supplemental Rule G, which took effect on December 1, 2006,  
4 incorporates a common-sense approach to notice grounded in  
5 defined and recognized principles of due process of law. Supp.  
6 Rule G, Adv. Comm. Note on 2006 Adoption. The Advisory Committee  
7 Note indicates that the rule was added to bring together the  
8 central procedures governing civil forfeiture actions; it also  
9 states that the rule generally applies to actions governed by the  
10 Civil Asset Forfeiture Reform Act of 2000 (CAFRA) as well as  
11 those excluded from it; thus, the intended scope of application  
12 is very broad. The rule permits flexibility as to the time of  
13 service of any warrant and supplemental process. Id. The  
14 provisions for notice incorporate the traditional means of  
15 publication and adopt the general principle that notice should be  
16 effectuated by means reasonably calculated to reach potential  
17 claimants at a cost reasonable in the circumstances, and actual  
18 notice precludes a challenge to the government's failure to  
19 comply with the specific requirements of the rule set forth in  
20 Rule G (4) (b). Id.

21 B. The Court's Findings

22 1. Notice

23 The declaration of publication of Elisa Rodriguez (Doc. 24)  
24 filed on June 3, 2009, establishes that a notice with the  
25 contents required by Supp. R. G(4) (a) was published on the  
26 official government internet site for thirty consecutive calendar  
27 days as required by Supp. R. G(4) (a) (iv) (C).

28 With respect to the notice to persons reasonably appearing

1 to be potential claimants that is required by Supp. R. G(4)(B),  
2 the verified complaint identifies Defendant vehicle as one that  
3 was seized on or about August 13, 2008, by the FBI, at 28542  
4 Pittman Hill Road in Clovis, California, and that is presently in  
5 the custody of the United States Marshal. (Cmplt. ¶¶ 1-2.)

6 With respect to Jorge Leal, who resided at both 28542  
7 Pittman Hill Road and 1656 Barstow Avenue in Clovis, and was the  
8 primary user of Defendant vehicle (Cmplt. ¶¶ 8, 12), the  
9 declaration of Elisa Rodriguez and the Marshal's return of  
10 service (Doc. 28-2, ¶ 11, Ex. I) establish that Jorge Leal was  
11 personally served with the pertinent documents on January 26,  
12 2009. Thus, the notice to Jorge Leal complied with the  
13 requirements of Supp. R. G(4)(b).

14 With respect to the other potential claimants,<sup>1</sup> it does not  
15 appear that notice amounting to service of process that would be  
16 legally sufficient to constitute service under Fed. R. Civ. P. 4  
17 was effected upon Elisa, Johanna, or Vanessa Leal. However, they  
18 were given notice that either complies with Supp. R. G(4) or  
19 constitutes actual notice that forecloses objection to the notice  
20 given. The appropriate documentation was delivered by the Marshal  
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22  
23 <sup>1</sup>Elisa Leal was the wife of Jorge Leal; she stated to law enforcement  
24 officers that she had been on disability since January 2007, the Defendant  
25 vehicle belonged to a family member named Guadalupe Avina from Los Angeles,  
26 and Elisa had picked up the vehicle about six months previously and had been  
27 driving it because she had no other vehicle. (Cmplt. ¶¶ 9, 14). Johanna Leal  
28 was the adult daughter of Jorge Leal; she was an unemployed, full-time  
student, and she stated that her mother had brought the Defendant vehicle over  
to the house on Pittman Hill Road, the formal ownership of which was in  
Johanna's name; in the house was found a receipt for approximately \$72,063.00  
for the cash purchase of the Defendant vehicle by Maria Guadalupe Avina  
residing at Pittman Hill Road in Clovis, although surveillance revealed that  
Jorge Leal was the primary user of the Defendant vehicle. (Cmplt. ¶¶ 12, 15-  
16.) Vanessa Leal was another adult daughter who had not worked for the past  
two years. (Cmplt. ¶ 18.)

1 to the door of the house at the Pittman address (the last known  
2 address of Elisa, Johanna, and Vanessa Leal and of Guadalupe  
3 Avina) for all four persons on January 22, 2009. (Decl. Of  
4 Rodriguez, ¶¶ 7-10.) The documents were mailed to the four  
5 persons at the Pittman Hill Road address on January 14, 2009.  
6 (Rodriguez Decl., ¶¶ 3-6.) This notice was sent by means  
7 reasonably calculated to reach to potential claimants and  
8 complies with Supp. R. G(4)(b)(iii)(A), (D), and (E).

9 Further, the internal documentation of the United States  
10 attorney's Office and the Marshal's Service are consistent with  
11 the receipt of actual notice. The supporting declaration of Elisa  
12 Rodriguez, based on personal knowledge, details the contact by  
13 the Marshal's Service with Johanna and Vanessa Leal, which  
14 resulted in the Leals' confirmation that all parties had received  
15 copies of the relevant process. (Decl. ¶ 13.) Further, a memo to  
16 file dated February 12, 2009, from Anne Gaskins, Deputy United  
17 States Marshal, reflects that on February 11, 2009, Deputy  
18 Gaskins called Johanna and Vanessa Leal at a specified telephone  
19 number, and they both confirmed that all parties received copies  
20 of the process. (Decl., Ex. K.) An additional notation reflected  
21 that paralegal Autumn Magee at the Assistant United States  
22 Attorney's Office in Fresno had confirmed to Gaskins in a  
23 telephone conversation that Magee received a call from the Leals  
24 indicating that they did receive the paperwork. (Decl., Ex. K.)  
25 With respect to Johanna Leal, a confirming letter to her from  
26 Autumn Magee reflects that on or about February 4, 2009, the  
27 government granted Johanna Leal's request for an extension of  
28 time to March 6, 2009, in which to file a claim and answer.

1 (Decl. Rodriguez, ¶ 12, Ex. J.)

2 The Court finds that Jorge Leal was personally served as  
3 required by Local Rule A-540(a), and the other potential  
4 claimants received actual notice and thus, pursuant to Supp. R.  
5 G(4) (b) (v), may not oppose or seek relief from forfeiture because  
6 of a failure of notice.

7 The Court concludes that Plaintiff has demonstrated that it  
8 has given notice by publication and the notice required to be  
9 given to potential claimants by Rule G(4).

10 2. Notice of Judgment Sought and of Motion for  
11 Default Judgment

12 a. Judgment Sought

13 The Court concludes that the notice given of the judgment  
14 sought satisfied Fed. R. Civ. P. 55(d) and 54(c), which require  
15 that a judgment by default shall not be different in kind from  
16 the relief sought, or exceed in amount that prayed for, in the  
17 demand for judgment. Plaintiff expressly sought in the complaint  
18 the types of relief sought by the instant application for default  
19 judgment, including a judgment of forfeiture of the Defendant  
20 currency to the Plaintiff United States. (Cmplt. p. 7.)

21 b. Motion for Default Judgment

22 The application for default judgment before the Court was  
23 filed on an ex parte basis and thus was not served on the  
24 Defendant property or on any persons who might reasonably appear  
25 to be potential claimants.

26 Here, although there was informal contact between the  
27 government and potential claimant Johanna Leal, the contact  
28 related only to an extension of time to file any claim or answer.

1 No claim or answer was filed, and there are no later indications  
2 that Johanna or any other potential claimant sought or intended  
3 to defend this action on the merits. Accordingly, no notice  
4 pursuant to Fed. R. Civ. P. 55(b)(2) is necessary. See, In re  
5 Roxford Foods v. Ford, 12 F.3d 875, 879-81 (9<sup>th</sup> Cir. 1993).

6                   3. Default and Entry of Default

7       The declarations and the Court's docket demonstrate that no  
8 person or entity made a claim or answered the complaint within  
9 the requisite thirty-day period for filing a claim of 18 U.S.C. §  
10 983(a)(4)(A) and Supp. R. G(5), and/or within the twenty-day  
11 period set forth in Supp. R. G(5) for filing an answer  
12 thereafter. Therefore, the Clerk appropriately entered the  
13 default of all five potential claimants on April 2, 2009.

14                   4. Legal Sufficiency of the Complaint

15                   a. Legal Standards

16       A default judgment generally bars the defaulting party from  
17 disputing the facts alleged in the complaint, but the defaulting  
18 party may argue that the facts as alleged do not state a claim.  
19 Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392.  
20 Thus, well pleaded factual allegations, except as to damages, are  
21 taken as true; however, necessary facts not contained in the  
22 pleadings, and claims which are legally insufficient, are not  
23 established by default. Cripps v. Life Ins. Co. of North America,  
24 980 F.2d 1261, 1267 (9<sup>th</sup> Cir. 1992); TeleVideo Systems, Inc. v.  
25 Heidenthal, 826 F.2d 915, 917 (9<sup>th</sup> Cir. 1987).

26       Under the Civil Asset Forfeiture Reform Act (CAFRA), which  
27 applies to this case, the government must prove by a  
28 preponderance of evidence that the property is subject to



1 forfeiture. 18 U.S.C. § 983(c)(1). Further, if the government's  
2 theory of forfeiture is that the property was used to commit or  
3 facilitate the commission of a criminal offense, or was involved  
4 in the commission of a criminal offense, the government shall  
5 establish that there was a substantial connection between the  
6 property and the offense. § 983(c)(3).

7       Supp. Rule G(2) requires that the complaint in a forfeiture  
8 action in rem arising from a federal statute be verified; state  
9 the grounds for subject-matter jurisdiction, in rem jurisdiction  
10 over the Defendant property, and venue; describe the property  
11 with reasonable particularity; identify the statute under which  
12 the forfeiture action is brought; and state sufficiently detailed  
13 facts to support a reasonable belief that the government will be  
14 able to meet its burden of proof at trial.

15                               b. The Complaint

16       The complaint filed in this action was verified. (Cmplt p.  
17 8.)

18       The bases for jurisdiction are identified as 28 U.S.C. §§  
19 1345 and 1355 (jurisdiction of civil proceedings commenced by the  
20 United States or an agency or officer thereof, and of actions to  
21 recover or enforce penalties or forfeitures under acts of  
22 Congress, respectively) and 21 U.S.C. § 881(a)(6) (subjecting to  
23 forfeiture, among other things, all things of value furnished or  
24 intended to be furnished by any person in exchange for a  
25 controlled substance or listed chemical, and all proceeds  
26 traceable to such an exchange). (Cmplt. ¶¶ 1, 3.)

27       The bases of venue are identified as 28 U.S.C. § 1395  
28 (placing venue for a civil forfeiture proceeding where the

1 property is found) and 21 U.S.C. § 881(j) (placing venue in the  
2 place where there is found the owner of property who is charged  
3 with a violation that is the basis for forfeiture of the property  
4 or where the criminal prosecution is brought). (Cmplt. ¶ 4.)

5 The property is described with reasonable particularity.

6 It is stated that the Plaintiff United States proceeds  
7 pursuant to 21 U.S.C. § 881(a)(6), and that the Defendant  
8 properties, seized in August 2008 in Clovis, California,  
9 constitute things of value furnished or intended to be furnished  
10 in exchange for a controlled substance of listed chemical,  
11 proceeds traceable to such an exchange, and/or things used or  
12 intended to be used to facilitate one or more violations of 21  
13 U.S.C. § 841 et seq. (Cmplt. ¶¶ 1-2.)

14 In the complaint there are alleged sufficiently detailed  
15 facts to support a reasonable belief that the government would be  
16 able to meet its burden of proof at trial. The complaint detailed  
17 two controlled buys of large quantities of methamphetamine from  
18 Jorge Leal at his residence in December 2007 involving \$11,000.00  
19 and \$16,000.00 worth of crystal methamphetamine; follow-up  
20 investigation and surveillance; and a search of the two  
21 residences of the Leals, which revealed over seventeen grams of  
22 methamphetamine and a loaded firearm at the Barstow residence,  
23 and materials concerning manufacture of methamphetamine at the  
24 Pittman Hill Road residence. (Cmplt. ¶¶ 5-13.) EDD records  
25 revealed that Jorge Leal had not worked for two years, Elisa had  
26 been receiving disability compensation for the past year, and  
27 neither Johanna nor Vanessa had worked for two years; tax  
28 documents, public records, and evidence at the homes revealed

1 that the Leal family would not be able to afford luxury vehicles  
2 without drug proceeds as income. (Cmplt. ¶ 18.)

3 These facts support a reasonable inference that the  
4 expensive vehicle was subject to forfeiture as proceeds/property  
5 traceable to proceeds or as property intended to be used to  
6 facilitate other violations. The totality of the circumstances  
7 reflects that a substantial connection between the property and  
8 the related drug offenses (violations of 21 U.S.C. §§ 841() (1)  
9 and 841(b) (1) (A)) was demonstrated.

10 5. Status of Potential Claimants and  
11 Discretionary Factors

12 Here, no one has claimed an interest in the Defendant  
13 property or otherwise responded to the complaint despite adequate  
14 notice. It does not appear that there is any risk of mistake or  
15 excusable neglect on the part of anyone with a potential interest  
16 in the property or of a dispute as to a material fact essential  
17 to the government's case. No just cause for delay appears. It is  
18 apparent from the declarations submitted to the Court that none  
19 of the potential claimants is an infant, incompetent, or member  
20 of the armed services. There does not appear to be any reason why  
21 the general policy in favor of a decision on the merits would  
22 warrant refusing to enter the requested default judgment.

23 Accordingly, the Court finds that Plaintiff has shown its  
24 entitlement to a default judgment of forfeiture.

25 6. Form of the Judgment

26 A successful plaintiff in a forfeiture action is entitled to  
27 a judgment against the property, Waterloo Distilling Corp. v.  
28 U.S., 282 U.S. 577, 581 (1931), affecting the interests of all

1 persons in the property, Hanson v. Denkla, 357 U.S. 235, 246 n.12  
2 (1958).

3 IV. Recommendation

4 Accordingly, it is hereby RECOMMENDED that:

5 1. Plaintiff's motion for default judgment be GRANTED;

6 2. Plaintiff is entitled to, and the Clerk be directed to  
7 enter, a judgment that:

8 (a) The interest/s of Guadalupe Avina, Jorge Leal,  
9 Elisa Leal, Johanna Leal, and Vanessa Leal in the Defendant  
10 property are CONDEMNED and FORFEITED to the United States of  
11 America; and

12 (b) The right, title, and interest of all potential  
13 claimants in the Defendant property, including but not limited to  
14 Guadalupe Avina, Jorge Leal, Elisa Leal, Johanna Leal, and  
15 Vanessa Leal, are FORFEITED to the United States of America  
16 pursuant to 21 U.S.C. § 881(a)(6), and are VESTED in the United  
17 States; and,

18 (c) All persons claiming any right, title, or interest  
19 in or to the Defendant property have DEFAULTED and no longer have  
20 any right, title, or interest in the Defendant property  
21 whatsoever; and,

22 3. The Clerk of Court ENTER final judgment of forfeiture for  
23 Plaintiff United States of America.

24 These findings and recommendation are submitted to the  
25 United States District Judge assigned to the case, pursuant to  
26 the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304 of  
27 the Local Rules of Practice for the United States District Court,  
28 Eastern District of California. Within **thirty (30) days** after

1 being served with a copy, any party may file written objections  
2 with the court and serve a copy on all parties. Such a document  
3 should be captioned "Objections to Magistrate Judge's Findings  
4 and Recommendation." Replies to the objections shall be served  
5 and filed within ten (10) court days (plus three days if served  
6 by mail) after service of the objections. The Court will then  
7 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636  
8 (b) (1) (C). The parties are advised that failure to file  
9 objections within the specified time may waive the right to  
10 appeal the District Court's order. Martinez v. Ylst, 951 F.2d  
11 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: October 26, 2009

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE