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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	1:09-cv-00012-OWW-SMS
)	
Plaintiff,)	ORDER VACATING HEARING ON
)	PLAINTIFF'S MOTION FOR DEFAULT
vs.)	JUDGMENT AND DEEMING MATTER
)	SUBMITTED FOR DECISION (DOC.
2005 Infiniti QX56, VIN:)	30)
5N3AA08A25N806191, License)	
Number 6AEJ980, et al.,)	Vacated hearing date:
)	October 30, 2009
Defendants.)	Time: 9:30 a.m.

FINDINGS AND RECOMMENDATIONS
RE: PLAINTIFF'S MOTION FOR
DEFAULT JUDGMENT (Doc. 30)

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 (9th
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 (9th 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 amended declaration of publication of Autumn Magee (Doc.
24 31) filed on August 7, 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 vehicles that were
3 seized on or about August 13, 2008, by the FBI, and that are
4 presently in the custody of the United States Marshal, as 1) a
5 2005 Infiniti QX56, VIN 5N3AA08A25N806191 (Defendant Infiniti
6 SUV), seized at 1656 Barstow Avenue, Clovis, California; 2) a
7 2004 BMW 545i, VIN WBANB33564B107506 (Defendant 2004 BMW), seized
8 at 28542 Pittman Hill Road in Clovis, California; and 3) a 2001
9 Mercedes Benz, VIN WDBNG78J21A194676 (Defendant 2001 Mercedes),
10 seized at 28542 Pittman Hill Road in Clovis, California.

11 With respect to Jorge Leal, who resided at both 28542
12 Pittman Hill Road and 1656 Barstow Avenue in Clovis, and who was
13 making payments on the Defendant 2001 Mercedes (Cmplt. ¶¶ 8, 15),
14 the declaration of Elisa Rodriguez (Doc. 30-2) and the Marshal's
15 service return (Decl., Ex. G; Doc. 15) establish that Jorge Leal
16 was personally served with the pertinent documents on January 26,
17 2009. Thus, the notice to Jorge Leal complied with the
18 requirements of Supp. R. G(4)(b).

19 With respect to the other potential claimants,¹ it does not
20 appear that notice amounting to service of process that would be
21 legally sufficient to constitute service under Fed. R. Civ. P. 4
22 was effected upon Elisa, Johanna, or Vanessa Leal. However, they
23 were given notice that complies with Supp. R. G(4). The

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25 ¹Elisa Leal was the wife of Jorge Leal; she had been observed driving
26 the Defendant 2005 Infiniti SUV, and she was the person to whom the 2004 BMW
27 was registered. (Cmplt. ¶¶ 9, 12). Johanna Leal was the adult daughter of
28 Jorge Leal; her personal documents, including a receipt for the cash purchase
of a 2007 BMW convertible for a price of approximately \$72,000, were found at
the Pittman residence along with papers related to her father. Vanessa Leal
was another adult daughter who had not worked for the past two years. (Cmplt.
¶¶ 13-14, 18.)

1 appropriate documentation was delivered by the Marshal to the
2 porch of the house at the Pittman address (the last known address
3 of Elisa, Johanna,, and Vanessa Leal) for all three persons on
4 January 22, 2009. (Doc. 14.) The documents were mailed to the
5 three persons at the Pitman Hill address on January 12, 2009.
6 (Rodriguez Decl., ¶¶ 3-5.) 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 Leal's confirmation that all parties had received
15 copies of the relevant process. (Decl. ¶ 11.) 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. An additional notation reflected that paralegal
21 Autumn Magee at the Assistant United States Attorney's Office in
22 Fresno had confirmed to Gaskins in a telephone conversation that
23 Magee received a call from the Leals indicating that they did
24 receive the paperwork. (Decl., Ex. I.) With respect to Johanna
25 Leal, a confirming letter to her from Autumn Magee reflects that
26 on or about February 4, 2009, the government granted Johanna
27 Leal's request for an extension of time to March 6, 2009, in
28 which to file a claim and answer. (Decl. Rodriguez, ¶ 10, Ex. H.)

1 The Court finds that as to Jorge Leal (from whom the
2 Defendant 2005 Infiniti SUV was seized [Cmplt. ¶ 12]) and as to
3 Johanna Leal (from whom the other Defendant vehicles were seized
4 [Cmplt. ¶¶ 13-14]), Jorge Leal was personally served as required
5 by Local Rule A-540(a), and Johanna Leal received actual notice
6 and thus, pursuant to Supp. R. G(4)(b)(v), may not oppose or seek
7 relief from forfeiture because of a failure of notice. It has
8 likewise been demonstrated that the remainder of the claimants
9 also received actual notice.

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

13 2. Notice of Judgment Sought and of Motion for
14 Default Judgment

15 a. Judgment Sought

16 The Court concludes that the notice given of the judgment
17 sought satisfied Fed. R. Civ. P. 55(d) and 54(c), which require
18 that a judgment by default shall not be different in kind from
19 the relief sought, or exceed in amount that prayed for, in the
20 demand for judgment. Plaintiff expressly sought in the complaint
21 the types of relief sought by the instant application for default
22 judgment, including a judgment of forfeiture of the Defendant
23 currency to the Plaintiff United States. (Cmplt. p. 6.)

24 b. Motion for Default Judgment

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

1 Here, although there was informal contact between the
2 government and potential claimant Johanna Leal, the contact
3 related only to an extension of time to file any claim or answer.
4 No claim or answer was filed, and there are no later indications
5 that Johanna or any other potential claimant sought or intended
6 to defend this action on the merits. Accordingly, no notice
7 pursuant to Fed. R. Civ. P. 55(b)(2) is necessary. See, In re
8 Roxford Foods v. Ford, 12 F.3d 875, 879-81 (9th Cir. 1993).

9 3. Default and Entry of Default

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

17 4. Legal Sufficiency of the Complaint

18 a. Legal Standards

19 A default judgment generally bars the defaulting party from
20 disputing the facts alleged in the complaint, but the defaulting
21 party may argue that the facts as alleged do not state a claim.
22 Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392.
23 Thus, well pleaded factual allegations, except as to damages, are
24 taken as true; however, necessary facts not contained in the
25 pleadings, and claims which are legally insufficient, are not
26 established by default. Cripps v. Life Ins. Co. of North America,
27 980 F.2d 1261, 1267 (9th Cir. 1992); TeleVideo Systems, Inc. v.
28 Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987).

1 Under the Civil Asset Forfeiture Reform Act (CAFRA), which
2 applies to this case, the government must prove by a
3 preponderance of evidence that the property is subject to
4 forfeiture. 18 U.S.C. § 983(c)(1). Further, if the government's
5 theory of forfeiture is that the property was used to commit or
6 facilitate the commission of a criminal offense, or was involved
7 in the commission of a criminal offense, the government shall
8 establish that there was a substantial connection between the
9 property and the offense. § 983(c)(3).

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

18 b. The Complaint

19 The complaint filed in this action was verified.

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

1 The bases of venue are identified as 28 U.S.C. § 1395
2 (placing venue for a civil forfeiture proceeding where the
3 property is found) and 21 U.S.C. § 881(j) (placing venue in the
4 place where there is found the owner of property who is charged
5 with a violation that is the basis for forfeiture of the property
6 or where the criminal prosecution is brought). (Cmplt. ¶ 4.)

7 The property is described with reasonable particularity.

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

16 In the complaint there are alleged sufficiently detailed
17 facts to support a reasonable belief that the government would be
18 able to meet its burden of proof at trial. Controlled buys of
19 large quantities of methamphetamine from Jorge Leal at his
20 residence in December 2007, follow-up investigation and
21 surveillance, and a search of the two residences of the Leals
22 revealed over seventeen grams of methamphetamine and a loaded
23 firearm at the Barstow residence, and materials concerning
24 manufacture of methamphetamine at the Pittman Hill Road
25 residence. (Cmplt. ¶¶ 12-13.) EDD records revealed that Jorge
26 Leal had not worked for two years, Elisa had been receiving
27 disability compensation for the past year, and neither Johanna
28 nor Vanessa had worked for two years; tax documents, public

1 records, and evidence et the homes revealed that the Leal family
2 would not be able to afford the luxury vehicles without drug
3 proceeds as income. (Cmplt. ¶ 18.)

4 These facts support a reasonable inference that the
5 expensive vehicles were subject to forfeiture as
6 proceeds/property traceable to proceeds or as property intended
7 to be used to facilitate other violations. The totality of the
8 circumstances reflects that a substantial connection between the
9 property and the related drug offenses (violations of 21 U.S.C.
10 §§ 841 () (1) and 841(b) (1) (A)) was demonstrated.

11 5. Status of Potential Claimants and
12 Discretionary Factors

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

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

26 6. Form of the Judgment

27 A successful plaintiff in a forfeiture action is entitled to
28 a judgment against the property, Waterloo Distilling Corp. v.

1 U.S., 282 U.S. 577, 581 (1931), affecting the interests of all
2 persons in the property, Hanson v. Denkla, 357 U.S. 235, 246 n.12
3 (1958).

4 IV. Recommendation

5 Accordingly, it is hereby RECOMMENDED that:

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

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

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

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

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

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

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

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

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IT IS SO ORDERED.

Dated: October 26, 2009

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE