

- 1 1. GRANT the Government default judgment and to ENTER final forfeiture judgment to
- 2 vest in the Government all right, title and interest in the Defendant Property; and
- 3 2. ORDER the Government, within ten (10) days of service of an order adopting these
- 4 findings and recommendations, to submit a proposed default and final forfeiture
- 5 judgment consistent with these findings and recommendations.

7 **FACTUAL BACKGROUND¹**

8 ***Seizure of Defendant Property***

9 On August 6, 2008, a Fresno Police Department (“FPD”) Major Narcotics officer spoke with a
10 confidential reliable source (hereafter “informant”), who informed the officer that s/he had spoken with
11 a female subject that s/he suspected to be involved in the sales of large quantities of marijuana. The
12 female subject was later identified as Maria Horta. Maria had quoted the informant a price \$1,500.00
13 per pound.

14 The FPD officer met with the informant on August 7, 2008, and pursuant to direction, the
15 informant called Maria Horta and advised that s/he and the officer - whom was now acting in an
16 undercover capacity - were in the area of Herndon Avenue and Golden State Boulevard in Fresno and
17 wished to meet and discuss a transaction. At about 10:00 a.m., while the officer waited inside the
18 Yukon Jacks restaurant, the informant waited outside. At about 10:13 a.m., Maria Horta and a male
19 subject later identified as Rafael Horta arrived at the restaurant. Vehicle surveillance units observed
20 Maria and Rafael entered the restaurant and sit down next to the officer. In response to an inquiry
21 regarding how he wished to complete the transaction, Rafael asked the officer how he intended to
22 transport the marijuana, and further advised that it would not all fit in one vehicle.

23 At 10:30 a.m., the parties left the restaurant, with Rafael advising that the transaction would be
24 completed at the Horta residence. Rafael instructed the officer to enter a vehicle; once inside, Rafael
25 pointed to a gray bag containing two pounds of marijuana. He told the officer to open the bag and “take

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28 ¹The facts are taken primarily from the Government’s application at pages 2 through 3, and from
this Court’s records.

1 a good look.” The marijuana was wrapped in clear plastic. The officer advised Rafael that he would
2 send the informant with Rafael, and then would bring the money to Rafael’s home.

3 About thirty minutes later, surveillance units observed Maria Horta arrive at 24740 Gardenia
4 Drive in Madera. At 11:10 a.m., the officer and a detective with the FPD led a “take-down team” to the
5 Horta residence on Gardenia Drive. Rafael Horta was standing in front of the residence talking to the
6 informant and was ordered to the ground and handcuffed. A search of the entertainment room in the
7 residence yielded two large boxes containing marijuana. Additionally, two pounds of marijuana in a
8 silver bag, two small bottles containing marijuana, and approximately \$2,500 in United States currency,
9 were found in Christian Horta’s bedroom, the adult son of Rafael and Maria Horta.

10 Later, in a statement to law enforcement, Rafael Horta indicated that he owned Horta Trucking,
11 and had for the past seven years. The trucking company consists of one refrigerated tractor trailer and
12 is operated out of the Horta residence. Rafael estimated a combined gross income for he and Maria of
13 \$150,000.00 in 2007, and indicated that the mortgage on the Gardenia Drive residence was about
14 \$375,000.00.

15 The Hortas’ 2007 tax returns indicate the family’s sole source of income is Horta Trucking.
16 After business expenses, Horta Trucking earned \$20,940.00, a sum significantly less than the sum
17 reported to law enforcement.

18 ***The Government’s Claims***

19 On January 27, 2009, the Government filed its complaint for forfeiture in rem to claim:
20 (1) that the Defendant Property is subject to forfeiture to the Government under Title 21 of the United
21 States Code section 881(a)(6) in that the vehicle constitutes moneys or other things of value furnished
22 or intended to be furnished in exchange for a controlled substance, all proceeds traceable to such an
23 exchange and/or were used or intended to be used to facilitate one or more violations of Title 21 of the
24 United States Code section 841, *et seq.* (Doc. 1.)

25 On February 4, 2009, based upon the allegations set forth in the Complaint (Doc. 1), the Clerk
26 of the Court issued a Warrant for Arrest of Articles *In Rem* for the Defendant Property (Doc. 5). The
27 warrant was executed on February 18, 2009. (*See* Doc. 7.)

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1 ***Notice of Forfeiture Action***

2 On February 4, 2009, this Court authorized publication of the forfeiture action via the internet
3 forfeiture website at www.forfeiture.gov for at least thirty (30) days. (Doc. 4.) On April 14, 2009, the
4 Government filed its Declaration of Publication. (Doc. 11.) On August 14, 2009, the Government filed
5 its Amended Declaration of Publication. (Doc. 21.)²

6 On February 5, 2009, copies of the complaint, arrest warrant, publication order and other related
7 papers were served via United States Mail to Maria, Christian and Rafael Horta, at their last known
8 address located at 24740 Gardenia Drive in Madera, California. (Doc. 22 at 4, ¶¶ 1-3.)

9 On February 18, 2009, the Government personally served Maria Horta with copies of the
10 complaint, arrest warrant, publication order and other papers related to this action. (Doc. 8; *see also*
11 Doc. 22 at 4, ¶ 4.)

12 On February 19, 2009, the Government personally served Christian Horta with copies of the
13 complaint, arrest warrant, publication order and other papers related to this action. (Doc. 9; *see also*
14 Doc. 22 at 4, ¶ 5.)

15 On March 2, 2009, the Government personally served Rafael Horta with copies of the
16 complaint, arrest warrant, publication order and other papers related to this action. (Doc. 10; *see also*
17 Doc. 22 at 4, ¶ 6.)

18 ***Default Entries***

19 At the Government’s request, the Clerk of the Court entered defaults in this action as to Maria,
20 Rafael and Christian Horta on April 17, 2009. (Docs. 15-17.)

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27 ²Notice of the forfeiture action in this matter was published for the period between February 20
28 and March 21, 2009. (Docs. 11 & 21.)

1 connected to illegal drug trafficking and properly subject to forfeiture); *United States v. \$242,484.00*,
2 389 F.3d 1149, 1160 (11th Cir. 2004) (court applied totality of circumstances to determine “more than
3 enough cause” to believe that forty pounds of cash carried by airline passenger and alerted to by
4 narcotics-detecting dog was the proceeds of, or traceable to, illegal drug transaction).

5 As the Government contends, the Hortas’ 2007 tax returns reveal a gross income of \$20,940.00
6 from Horta Trucking, which stands, as the Government contends, in “stark contrast to the annual
7 expenditures admitted by Rafael and Maria Horta.” (Doc. 22 at 5.) In the totality, it is reasonable to
8 determine that an annual income of approximately \$21,000 does not typically lend itself to ownership
9 of a \$375,000 home and a luxury SUV.

10 ***Notice Requirements***

11 The Government contends that it provided required notice for the forfeiture of the Defendant
12 Property. The Fifth Amendment’s Due Process Clause prohibits the Government from deprivation of
13 property without “due process of law.” Individuals whose property interests are at stake are entitled to
14 “notice and an opportunity to be heard.” *United States v. James Daniel Good Real Property*, 510 U.S.
15 43, 48, 114 S. Ct. 492 (1993).

16 **1. Notice by Publication**

17 Supplemental Rule G(4) sets forth the rules for publication of the notice of action in federal
18 forfeiture proceedings. Rule G(4)(a)(iv)(C) provides that in lieu of newspaper publication, the
19 Government may publish notice “by posting notice on an official internet government forfeiture site for
20 at least 30 consecutive days.” Local Admiralty and *In Rem* rules further provide that the Court shall
21 designate by order the appropriate newspaper or other vehicle for publication. *See* Local Rules A-530
22 & 83-171.

23 Here, pursuant to this Court’s February 4, 2009, Order, the Government accomplished such
24 notice with publication by way of the official internet government forfeiture site www.forfeiture.gov for
25 a period of at least thirty (30) days. (*See* Doc. 22, Magee Declaration, ¶ 11 & exhibits.)

26 **2. Personal Notice**

27 When the Government knows of an owner of defendant property, however, the owner has a
28 constitutional right of due process to require "the Government to make a greater effort to give him

1 notice than otherwise would be mandated by [publication]." *United States v. Real Property*, 135 F.3d
2 1312, 1315 (9th Cir. 1998). For such persons, the Government must attempt to provide actual notice by
3 means "'reasonably calculated under all circumstances' to apprise [the person] of the pendency of the
4 cash forfeiture[.]" *Dusenberry v. United States*, 534 U.S. 161, 168, 122 S. Ct. 694 (2002). The
5 Government must provide such notice "as one desirous of actually informing the absentee might
6 reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315,
7 70 S. Ct. 652 (1950). "Reasonable notice, however, requires only that the government attempt to
8 provide actual notice; it does not require that the government demonstrate that it was successful in
9 providing actual notice." *Mesa Valderrama v. United States*, 417 F.3d 1189, 1197 (11th Cir. 2005).

10 Supplemental Rule G(4)(b) mirrors this requirement, providing for notice to be "sent by means
11 reasonably calculated to reach the potential claimant." Additionally, this Court's Local Rule A-540
12 addresses notice to persons known to have an interest in property subject to forfeiture. The rule
13 requires that a party seeking default judgment in an action *in rem* to show to the Court's satisfaction that
14 due notice and arrest of the property has been given by: (1) publication; (2) by personal service on the
15 person having custody of the property; (3) if the property is in the hands of a law enforcement officer,
16 by personal service on the person having custody prior to its possession by law enforcement agency or
17 officer; and (4) by personal service or certified mail, return receipt requested, to every other person who
18 has not appeared in the action and is known to have an interest in the property; provided that failure to
19 give actual notice to such other person may be excused upon a satisfactory showing of diligent efforts to
20 give such notice without success. Local Rule A-540(a).

21 Notwithstanding the Supplemental Rules and Local Rule A-540(a), the Government provides
22 sufficient notice if such notice complies with Federal Rule of Civil Procedure 4 requirements. *See* Fed.
23 R. Civ. P. 4(n)(1) (when a federal statute authorizes forfeiture, "[n]otice to claimants of the property
24 shall then be sent in the manner provided by statute or by service of a summons under this rule").

25 Here, the Government personally served Maria, Christian and Rafael Horta, on February 18 and
26 19 and March 2, 2009, respectively, with the complaint, arrest warrant, publication order and other
27 papers regarding this action. (*See* Docs. 15-17 & Doc. 22 at 7.) The Government notes that the
28 Defendant Property was seized from the Horta's residence and is legally registered to Christian Horta

1 who resided at the residence located at 24740 Gardenia Drive in Madera. Thus, Rafael Horta, Maria
2 Horta and Christian Horta are the only claimants requiring personal service. In sum, no notice issues
3 arise as to the Defendant Property's forfeiture.

4 ***Failure to File Claim or Answer***

5 The Government contends that this Court's clerk properly entered defaults against Maria Horta,
6 Christian Horta, and Rafael Horta. Supplemental Rule G(5) addresses responsive pleadings in civil
7 forfeiture actions such as this and requires a person who asserts an interest in or right against the subject
8 property to file a claim in this court within thirty-five (35) days after the date of service of the
9 Government's complaint or thirty (30) days after final publication of newspaper notice. Supplemental
10 Rules G(4)(b) & G(5). Failure to comply with procedural requirements for opposing the forfeiture
11 precludes a person from establishing standing as a party to a forfeiture action. *United States v. Real*
12 *Property*, 135 F.3d at 1317.

13 As outlined above, the Government personally served Maria Horta, Christian Horta and Rafael
14 Horta, with copies of the complaint, arrest warrant, publication order and other papers related to this
15 action on February 18, February 19 and March 2, 2009, respectively. (Doc. 22 at 8.)

16 More than thirty days have passed since completion of publication notice and more than thirty-
17 five days have passed since service of the complaint on Maria Horta, Christian Horta and Rafael Horta.
18 This Court's clerk properly entered defaults upon failure of the potential claimants to respond to the
19 Government's complaint and notices.

20 ***Default Judgment***

21 The Government seeks judgment against the interests of Maria Horta, Christian Horta and
22 Rafael Horta, and final forfeiture judgment to vest in the Government all right, title and interest in the
23 Defendant Property. The Supplemental Rules do not provide a procedure to seek default judgment in
24 an action *in rem*. Supplemental Rule A provides: "The Federal Rules of Civil Procedure also apply to
25 the foregoing proceedings except to the extent that they are inconsistent with these Supplemental
26 Rules."

27 Pursuant to the Federal Rules of Civil Procedure, default entry is a prerequisite to default
28 judgment. Federal Rules of Civil Procedure, Rule 55(a) governs entry of default: "When a party

1 against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and
2 that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Generally, the
3 default entered by the clerk establishes a defendant's liability:

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

7 *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-918 (9th Cir. 1987) (internal citations &
8 quotation marks omitted).

9 As noted above, the Government properly obtained default entries against the interests of Maria
10 Horta, Christian Horta and Rafael Horta. There is no impediment to default judgment sought by the
11 Government as to them. The Government properly seeks judgment against the interests of the entire
12 world, that is, a final forfeiture judgment to vest in the Government all right, title and interest in the
13 defendant currency. "A judgment in rem affects the interests of all persons in designated property. . . .
14 [T]he plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or
15 establish the nonexistence of similar interests of particular persons." *Hanson v. Denckla*, 357 U.S. 235,
16 246, n.12, 78 S. Ct. 1228 (1958).

17 In light of the defaults, a final forfeiture judgment is in order for the Government.

18 **RECOMMENDATIONS AND ORDER**

19 For the reasons discussed above, this Court RECOMMENDS to:

- 20 1. GRANT plaintiff United States of America default judgment against the interests of
21 Maria Horta, Christian Horta and Rafael Horta in the Defendant Property;
- 22 2. ENTER final forfeiture judgment to vest in Plaintiff United States of America all right,
23 title and interest in the Defendant Property; and
- 24 3. ORDER Plaintiff United States of America, within ten (10) days of service of an order
25 adopting the findings and recommendations, to submit a proposed default and final
26 forfeiture judgment consistent with the findings and recommendations and order
27 adopting them.

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