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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	1:09-cv-0282-LJO-SMS
	)	
Plaintiff,	)	FINDINGS AND RECOMMENDATION RE:
	)	PLAINTIFF'S MOTION FOR DEFAULT
vs.	)	JUDGMENT (Doc. 20)
	)	
Approximately \$11,258.00 in	)	
U.S. Currency,	)	
	)	
Defendant.	)	
	)	

Plaintiff is proceeding with an action for forfeiture in this Court. Pending before the Court is Plaintiff's motion for default judgment, filed on August 31, 2009, with a supporting declaration of Autumn Magee, which proceeds before a Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rule 72-302(c)(19). By separate order the hearing on the motion has been vacated, and the matter has been submitted to the Court for decision.

I. Default Judgment

A court has the discretion to enter a default judgment against one who is not an infant, incompetent, or member of the

1 armed services where the claim is for an amount that is not  
2 certain on the face of the claim and where (1) the defendant has  
3 been served with the claim; (2) the defendant's default has been  
4 entered for failure to appear; (3) if the defendant has appeared  
5 in the action, the defendant has been served with written notice  
6 of the application for judgment at least three days before the  
7 hearing on the application; and, (4) the court has undertaken any  
8 necessary and proper investigation or hearing in order to enter  
9 judgment or carry it into effect. Fed. R. Civ. P. 55(b); Alan  
10 Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392 (9<sup>th</sup>  
11 Cir. 1988). Factors that may be considered by courts in  
12 exercising discretion as to the entry of a default judgment and  
13 as to setting aside a default include the nature and extent of  
14 the delay, Draper v. Coombs, 792 F.2d 915, 924-925 (9<sup>th</sup> Cir.  
15 1986); the possibility of prejudice to the plaintiff, Eitel v.  
16 McCool, 782 F.2d 1470, 1471-72 (9th Cir.1986); the merits of  
17 plaintiff's substantive claim, id.; the sufficiency of the  
18 allegations in the complaint to support judgment, Alan Neuman  
19 Productions, Inc., 862 F.2d at 1392; the amount in controversy,  
20 Eitel v. McCool, 782 F.2d at 1471-1472; the possibility of a  
21 dispute concerning material facts, id.; whether the default was  
22 due to excusable neglect, id.; and, the strong policy underlying  
23 the Federal Rules of Civil Procedure that favors decisions on the  
24 merits, id.

25         With respect to default judgments in proceedings that are in  
26 rem actions for forfeiture, both the general Federal Rules of  
27 Civil Procedure and the Supplemental Rules for Certain Admiralty  
28 and Maritime Claims (Supp. R.) apply, but the latter rules

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

## 23 II. Notice

### 24 A. Publication

25 Supplemental Rule G(4) (a) provides that a judgment of  
26 forfeiture may be entered only if the government has published  
27 notice of the action within a reasonable time after filing the  
28 complaint or at a time the court orders. The rule sets forth the

1 required contents of the notice, frequency of publication, and  
2 means of publication.

3 Here, the amended declaration of publication of Autumn Magee  
4 filed on August 31, 2009 (Doc. 19) establishes that a notice with  
5 the required contents was published on the official government  
6 internet site for thirty consecutive calendar days. Thus, the  
7 Plaintiff has demonstrated publication that is sufficient  
8 pursuant to Supplemental Rule G(4)(a).

9 B. Notice to Known Potential Claimants

10 Supplemental Rule G(4)(b) provides that the government must  
11 send notice of the action and the complaint to any person who  
12 reasonably appears to be a potential claimant; the rule specifies  
13 the content, means, and time of the notice, and it expressly  
14 provides that a potential claimant who had actual notice of a  
15 forfeiture action may not oppose or seek relief from forfeiture  
16 because of the government's failure to send the required notice.

17 Here, the verified complaint states that Defendant currency  
18 was seized on June 23, 2008, from the right front pants pocket of  
19 potential claimant Peter Warda at the residence of Mr. Warda,  
20 2500 Black Walnut Drive, Modesto, California. (Doc. 1, ¶¶ 5, 8.)

21 With respect to Warda, the declaration of Autumn Magee (Doc.  
22 20-2, ¶ 3) demonstrates that notice was given via mailing of the  
23 pertinent documents to Warda's last-known address at 2500 Black  
24 Walnut Drive, Modesto, California, on February 24, 2009. Further,  
25 on March 11, 2009, the Marshal served Warda by leaving specified  
26 documents with Warda's sister, a person of suitable age and  
27 discretion, at an address described by the marshal as one of his  
28 last known addresses. (Magee Decl., Doc. 20-2, Ex. B; Doc. 8.)

1 Finally, Magee declares that on July 6, 2009, copies of the  
2 pertinent documents were sent by way of United States mail, with  
3 certified mail receipt, to the same secondary last-known address  
4 for Peter Warda, namely, 3275 Wilkesboro Avenue, Modesto,  
5 California; the certified return receipt card was signed by  
6 William Warda on July 8, 2009. (Magee Decl., ¶ 6, Ex. D.)

7 This notice does not appear to comply with Local Rule A-  
8 540(a), which provides:

9 (a) **Notice Required.** A party seeking a default  
10 judgment in an action in rem shall show to the  
11 satisfaction of the Court that due notice of  
12 the action and arrest of the property has been given:

13 (1) By publication, see L.R. A-530;

14 (2) By personal service on the person having custody  
15 of the property;

16 (3) If the property is in the hand of a law  
17 enforcement officer, by personal service on the  
18 person having custody prior to its possession by law  
19 enforcement agency or officer; and

20 (4) By personal service or by certified mail,  
21 return receipt requested, to every other person  
22 who has not appeared in the action and is known  
23 to have an interest in the property; provided,  
24 however, that failure to give actual notice to  
25 such other person may be excused upon a satisfactory  
26 showing of diligent efforts to give such notice  
27 without success.

28 Local Rule A-540(a) by its terms requires that there be "personal  
service" on the person having custody prior to possession by the  
law enforcement agency or officer. Plaintiff appears to admit  
that Peter Warda, from whom the Defendant currency was seized, is  
the only claimant requiring notice pursuant to Local Rule A-  
540(a)(2). (Motion p. 6, ll. 25-26.) Plaintiff claims that actual  
notice has been provided to Warda; however, the documentation  
submitted to the Court does not establish actual notice.

1           However, as Plaintiff points out, Fed. R. Civ. P. 4(n)  
2 provides:

3           (n) **Asserting Jurisdiction over Property or Assets.**

4           (1) **Federal Law.** The court may assert jurisdiction  
5 over property if authorized by a federal statute.  
6 Notice to claimants of the property must be given  
as provided in the statute or by serving a summons  
under this rule.

7 Here, notice was given to Warda in a manner that was sufficient  
8 to constitute service of summons under Rule 4, namely, by leaving  
9 a copy of the summons and complaint at the individual's dwelling  
10 or usual place of abode with someone of suitable age and  
11 discretion pursuant to Fed. R. Civ. P. 4(e) (2) (B).

12           The participation or interest of Adrin Faramarzpour in any  
13 of the events or transactions pertinent to this action is not  
14 described or set forth in either the verified complaint or the  
15 motion for default judgment. However, the Marshal's certificate  
16 reflects that Faramarzpour was personally served with appropriate  
17 notice documents on March 11, 2009. (Doc. 9.) It does not appear  
18 that Faramarzpour qualifies as a person who requires notice  
19 pursuant to Local Rule A-540.

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

23           C. Notice of Judgment Sought and of Motion for  
24           Default Judgment

25           1. Judgment Sought

26           The Court concludes that the notice given of the judgment  
27 sought satisfied Fed. R. Civ. P. 55(d) and 54(c), which require  
28 that a judgment by default shall not be different in kind from

1 the relief sought, or exceed in amount that prayed for, in the  
2 demand for judgment. Plaintiff expressly sought in the complaint  
3 the types of relief sought by the instant application for default  
4 judgment, including a judgment of forfeiture of the Defendant  
5 currency to the Plaintiff United States. (Cmplt. p. 3, ll. 27-  
6 28.)

7                   2. Motion for Default Judgment

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

12           Fed. R. Civ. P. 55(b)(2) requires written notice of an  
13 application for default judgment be served at least three days  
14 prior to the hearing on a defaulting party, or a representative  
15 thereof, who has appeared in the action. An appearance for the  
16 purpose of Rule 55 need not be a formal one and may consist even  
17 of informal contacts made by the defaulting party where the  
18 defaulting party demonstrates a clear purpose to defend the suit.  
19 In re Roxford Foods v. Ford, 12 F.3d 875, 879-81 (9<sup>th</sup> Cir. 1993).

20           Here, there are no indicia of a formal appearance or of  
21 informal contacts. Accordingly, no notice is necessary.

22           III. Default and Entry of Default

23           \_\_\_\_\_The declarations and the Court's docket demonstrate that no  
24 person or entity made a claim or answered the complaint within  
25 the requisite thirty-day period for filing a claim of 18 U.S.C. §  
26 983(a)(4)(A) and Supp. R. G(5), and/or within the twenty-day  
27 period set forth in Supp. R. G(5) for filing an answer  
28 thereafter. Therefore, the Clerk appropriately entered the

1 default of potential claimants Peter Warda and Adrin Faramarzpour  
2 on May 11, 2009.

3 IV. Legal Sufficiency of the Complaint

4 A. Legal Standards

5 A default judgment generally bars the defaulting party from  
6 disputing the facts alleged in the complaint, but the defaulting  
7 party may argue that the facts as alleged do not state a claim.  
8 Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392.  
9 Thus, well pleaded factual allegations, except as to damages, are  
10 taken as true; however, necessary facts not contained in the  
11 pleadings, and claims which are legally insufficient, are not  
12 established by default. Cripps v. Life Ins. Co. of North America,  
13 980 F.2d 1261, 1267 (9<sup>th</sup> Cir. 1992); TeleVideo Systems, Inc. v.  
14 Heidenthal, 826 F.2d 915, 917 (9<sup>th</sup> Cir. 1987).

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

24 Supp. Rule G(2) requires that the complaint in a forfeiture  
25 action in rem arising from a federal statute be verified; state  
26 the grounds for subject-matter jurisdiction, in rem jurisdiction  
27 over the Defendant property, and venue; describe the property  
28 with reasonable particularity; identify the statute under which



1 the forfeiture action is brought; and state sufficiently detailed  
2 facts to support a reasonable belief that the government will be  
3 able to meet its burden of proof at trial.

4 B. The Complaint

5 The complaint filed in this action was verified.

6 The bases for jurisdiction are identified as 28 U.S.C. §§  
7 1345 and 1355 (jurisdiction of civil proceedings commenced by the  
8 United States or an agency or officer thereof, and of actions to  
9 recover or enforce penalties or forfeitures under acts of  
10 Congress, respectively) and 21 U.S.C. § 881 (subjecting to  
11 forfeiture all controlled substances manufactured, distributed,  
12 dispensed, or acquired in violation of the subchapter, as well as  
13 all money used or intended to facilitate any violation or  
14 furnished in exchange therefor or constituting proceeds traceable  
15 thereto). (Cmplt. ¶¶ 1, 3.)

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

22 The property is described with reasonable particularity.

23 It is stated that the Plaintiff United States proceeds  
24 pursuant to 21 U.S.C. § 881(a)(6), and that the Defendant  
25 currency, seized in June 2008 in Modesto, California, constitutes  
26 money or other things of value furnished or intended to be  
27 furnished in exchange for a controlled substance of listed  
28 chemical, proceeds traceable to such an exchange, and/or money

1 used or intended to be used to facilitate one or more violations  
2 of 21 U.S.C. § 841 et seq. (Cmplt. ¶¶ 1-2.)

3 In the complaint there are alleged sufficiently detailed  
4 facts to support a reasonable belief that the government would be  
5 able to meet its burden of proof at trial. It is alleged that the  
6 property was taken in to the custody of United States Marshals  
7 after the Drug Enforcement Administration (DEA) adopted it for  
8 forfeiture proceedings on July 18, 2008. (Cmplt. ¶ 2.) The  
9 currency was seized on June 23, 2008, from the pocket of Peter  
10 Warda at Warda's residence at 2500 Black Walnut Drive in Modesto,  
11 California, where officers of the Modesto Police Department  
12 Narcotics Enforcement Team and Street Crimes Unit executed a  
13 search and found three stolen handguns, one of which was loaded,  
14 as well as over 1,000 Oxycodone pills, over 300 Hydrocodone  
15 pills, and about 98 glass ampules containing liquid steroids.  
16 After his arrest for possession of controlled substances for sale  
17 in violation of state statutes, Warda claimed that the Defendant  
18 currency was for the purchase of vehicles at auction or from the  
19 sale of two cars at Blue Diamond Auto Sales, which Warda claimed  
20 to own with his cousin, but whose name was not on any business  
21 ownership paperwork due to an outstanding debt for past medical  
22 bills, and who could not provide any receipts for the sales of  
23 any cars or a W-2 showing proof of income. Warda claimed that he  
24 was paid "under the table" for car sales and did not file taxes;  
25 EDD records reflected no employment history for Warda since 2006.  
26 (Cmplt. ¶¶ 5-8.)

27 These facts support a reasonable inference that the large  
28 sum of money was subject to forfeiture as proceeds or as money

1 intended to be exchanged for controlled substances or to  
2 facilitate other violations. Because of the amount of money and  
3 the proximity of the money in relation to the quantity of  
4 controlled substances and the multiple stolen handguns, a  
5 substantial connection between the property and the offenses  
6 (possession of the three substances for sale) was demonstrated.

7 V. Status of Potential Claimants and Discretionary Factors

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

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

21 VI. Form of the Judgment

22 A successful plaintiff in a forfeiture action is entitled to  
23 a judgment against the property, Waterloo Distilling Corp. v.  
24 U.S., 282 U.S. 577, 581 (1931), affecting the interests of all  
25 persons in the property, Hanson v. Denkla, 357 U.S. 235, 246 n.12  
26 (1958).

27 VII. Recommendation

28 Accordingly, it is hereby RECOMMENDED that:

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

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

4 (a) The interest/s of Peter Warda and Adrin  
5 Faramarzpour in the Defendant property are CONDEMNED and  
6 FORFEITED to the United States of America; and

7 (b) The right, title, and interest of all potential  
8 claimants in the Defendant property, including but not limited to  
9 Peter Warda and Adrin Faramarzpour, are FORFEITED to the United  
10 States of America pursuant to 21 U.S.C. § 881(a)(6), and are  
11 VESTED in the United States; and,

12 (c) All persons claiming any right, title, or interest  
13 in or to the Defendant property have DEFAULTED and no longer have  
14 any right, title, or interest in the Defendant property  
15 whatsoever; and,

16 3. The Clerk of Court ENTER final judgment of forfeiture for  
17 Plaintiff United States of America.

18 These findings and recommendation are submitted to the  
19 United States District Judge assigned to the case, pursuant to  
20 the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304 of  
21 the Local Rules of Practice for the United States District Court,  
22 Eastern District of California. Within **thirty (30) days** after  
23 being served with a copy, any party may file written objections  
24 with the court and serve a copy on all parties. Such a document  
25 should be captioned "Objections to Magistrate Judge's Findings  
26 and Recommendation." Replies to the objections shall be served  
27 and filed within ten (10) court days (plus three days if served  
28 by mail) after service of the objections. The Court will then

1 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636  
2 (b) (1) (C). The parties are advised that failure to file  
3 objections within the specified time may waive the right to  
4 appeal the District Court's order. Martinez v. Ylst, 951 F.2d  
5 1153 (9th Cir. 1991).

6

7 IT IS SO ORDERED.

8 **Dated: October 20, 2009**

**/s/ Sandra M. Snyder**  
**UNITED STATES MAGISTRATE JUDGE**

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