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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	1:09-cv-00284-OWW-SMS
	)	
Plaintiff,	)	ORDER VACATING HEARING ON
v.	)	PLAINTIFF'S MOTION FOR DEFAULT
	)	JUDGMENT AND DEEMING MATTER
Approximately \$24,546.25 in	)	SUBMITTED FOR DECISION (DOC. 23)
U.S. Currency Seized from	)	
Farmers and Merchants Bank of	)	<b>Vacated hearing date:</b>
Central California Account	)	<b>October 30, 2009</b>
#547155701, Held in the Name	)	<b>Time: 9:30 a.m.</b>
of Steven Walter Butts and	)	
Karen Jean Freyling, et al.,	)	FINDINGS AND RECOMMENDATION RE:
	)	PLAINTIFF'S MOTION FOR DEFAULT
Defendants.	)	JUDGMENT (DOC. 23)
	)	
	)	ORDER TO PLAINTIFF TO SERVE
	)	FINDINGS AND RECOMMENDATIONS RE:
	)	PLAINTIFF'S MOTION FOR DEFAULT
	)	JUDGMENT ON ALL POTENTIAL
	)	CLAIMANTS AND TO FILE PROOF OF
	)	SERVICE

Plaintiffs are proceeding with a civil action in this Court. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rules 72-302 and 72-303. Pending before the Court is Plaintiff's ex parte motion for default judgment filed on August 7, 2009, with a supporting memorandum of points and authorities and a supporting declaration of Elisa Rodriguez, which the Court has reviewed.

1           I. Vacating the Hearing on the Motion

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

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

12           II. Directions to Plaintiff to Serve Findings and  
13                 Recommendations

14           The analysis, findings, and recommendations that follow  
15 constitute the Court's findings and recommendations with respect  
16 to Plaintiff's motion for default judgment (Doc. 23).

17           Plaintiff IS DIRECTED to serve the findings and  
18 recommendations on all potential claimants to Defendant property,  
19 including Steven Butts and Karen Jean Freyling, and to file proof  
20 of such service no later than ten days after the date of service  
21 of this order.

22           III. Motion for Default Judgment

23                 A. Notice by Publication

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

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

22 Supplemental Rule G(4) (a) provides that a judgment of  
23 forfeiture may be entered only if the government has published  
24 notice of the action within a reasonable time after filing the  
25 complaint or at a time the court orders. The rule sets forth the  
26 required contents of the notice, frequency of publication, and  
27 means of publication.

28 Here, the amended declaration of publication of Elisa M.

1 Rodriguez filed on May 6, 2009 (Doc. 15), establishes that a  
2 notice with the required contents was published on the official  
3 government internet site for thirty consecutive calendar days.  
4 Thus, the Plaintiff has demonstrated publication that is  
5 sufficient pursuant to Supplemental Rule G(4) (a).

6 B. Notice to Known Potential Claimants

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

14 Here, it is alleged in the verified complaint that the  
15 government proceeds pursuant to 18 U.S.C. § 981(a) (1) (A) and  
16 (a) (1) (C), and that the specified properties, including Defendant  
17 currency (amounting to over \$25,000 in four accounts identified  
18 in ¶ 1 of the Complaint), Defendant electronic equipment (thirty-  
19 five (35) items of miscellaneous electronic equipment itemized in  
20 Exhibit A to the complaint), and Defendant vehicles (four  
21 vehicles described by VIN and license numbers in ¶ 1 of the  
22 complaint), which were seized in October 2008, in Turlock,  
23 California, constitute proceeds from and/or property used to  
24 facilitate a conspiracy to commit, or are traceable to, a  
25 violation of 18 U.S.C. § 1956; therefore, the Defendant property  
26 is subject to forfeiture pursuant to 18 U.S.C. § 981(a) (1) (A) and  
27 (a) (1) (C). (Cmplt. ¶¶ 1-3.)

28 Investigation by the FBI and United States Postal Service

1 (USPS) in 2008 revealed that Steve Butts, Karen Lobue or Karen  
2 Jean Freyling, and Kenny J. or Kenneth Shipman were using  
3 specified websites and a specified post office box in Denair,  
4 California, to distribute and sell to customers pirated,  
5 counterfeit/copyright-protected digital video discs (DVD's) in  
6 violation of copyright laws; they and their activities were  
7 further associated with the five specific vehicles. The business  
8 generated about \$80,000.00 in sales per month, involved the  
9 provision to customers of products that lacked security seals or  
10 booklet stories, and included the knowing deposit of counterfeit  
11 motion pictures and video formats/materials in official USPS  
12 collection receptacles/facilities with the intention that the  
13 USPS would deliver them, the willful infringement of copyrighted  
14 works, and the knowing trafficking of counterfeit labels affixed  
15 or designed to be affixed to a copy of a visual work. (Id. at ¶¶  
16 6-9.) Controlled buys revealed that the products sold lacked  
17 appropriate serial numbers and that the content was "pressed" on  
18 to the disc as by a computer with DVD recordable media, as  
19 opposed to having been "burned." (Id. ¶ 10.)

20 Further, investigation of the bank records of Butts and  
21 Freyling revealed hundreds of deposits from the illicit business  
22 operations in the various accounts between 2006 and 2008 totaling  
23 over \$300,000; California EDD records revealed that the last  
24 reported wages for Butts were for the second quarter of 2007, and  
25 Freyling was receiving Social Security benefits on the basis of  
26 claimed disability. (Id. ¶¶ 9-16, 23.) Butts, Freyling, and  
27 others were indicted in October 2008 for various wire and mail  
28 fraud violations, criminal copyright and trademark violations,

1 and theft of government money. (Cmplt. ¶ 24.)

2 With respect to potential claimant Steve Butts, the  
3 declaration of Rodriguez (¶ 3, Ex. A) establishes that on  
4 February 17, 2009, copies of the pertinent documents were served  
5 on attorney Eric Fogderude by mail, and were received on behalf  
6 of Fogderude on February 18, 2009. This notice was sufficient  
7 pursuant to Supp. R. G(4)(b)(iii)(B), which permits notice to be  
8 sent to the attorney representing the potential claimant with  
9 respect to the related criminal case. The Court takes judicial  
10 notice of the docket in United States v. Karen Jean Freyling, et  
11 al., 1:08-cr-00384-OWW, which reflects that Eric K. Fogderude is  
12 attorney for Defendant Steven Walter Butts in the related  
13 criminal case. Further, the Court notes that Butts 1) was served  
14 by certified mail sent on April 15, 2009, and the letter was  
15 received on April 16, 2009, by David J. Lober (Decl. Of Rodriguez  
16 in suppt. of request for entry of default, Doc. 20-2, ¶ 6, Ex.  
17 B); and 2) was served by the Marshal on March 18, 2009, via the  
18 Marshal's leaving the pertinent documents with Karen Jean  
19 Freyling, girlfriend of Butts, and a person of suitable age and  
20 discretion then residing in Butts' usual place of abode.  
21 Accordingly, the Court concludes that the notice given to  
22 potential claimant Steve Butts complied with Supp. Rule G(4)(b).

23 Local Rule A-540(a)(3) requires that if the property, as in  
24 this case, is in the hands of a law enforcement officer, then  
25 notice of the action must be given by personal service to the  
26 person having custody prior to its possession by the law  
27 enforcement agency or officer. If this is interpreted to include  
28 potential claimant Steve Butts, then the action of the Marshal in

1 serving Butts via leaving documents with co-resident Karen Jean  
2 Freyling, reflected in the marshal's certificate dated March 18,  
3 2009, should be sufficient. This service constitutes legally  
4 sufficient service of process within the meaning of Fed. R. Civ.  
5 P. 4(e)(2)(B). Fed. R. Civ. P. 4(n) expressly provides that the  
6 Court may assert jurisdiction over property if authorized by a  
7 federal statute, and that notice to claimants of the property  
8 must be given as provided in the statute or by serving a summons  
9 under Rule 4. The notice given to Butts complies with Fed. R. Civ.  
10 P. 4(n) and thus should be legally sufficient.

11 With respect to potential claimant Karen Jean Freyling, the  
12 certificate of the Marshal establishes that Freyling was  
13 personally served with the pertinent documents on March 18, 2009.  
14 (Doc. 8.)

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

18 C. Notice of Judgment Sought and of Motion for  
19 Default Judgment

20 1. Judgment Sought

21 The Court concludes that the notice given of the judgment  
22 sought satisfied Fed. R. Civ. P. 55(d) and 54(c), which require  
23 that a judgment by default shall not be different in kind from  
24 the relief sought, or exceed in amount that prayed for, in the  
25 demand for judgment. Plaintiff expressly sought in the complaint  
26 the types of relief sought by the instant application for default  
27 judgment, including a judgment of forfeiture of the Defendant  
28 properties to the Plaintiff United States. (Cmplt. p. 8, ll. 9-

1 14.)

2 2. Motion for Default Judgment

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

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

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

17 D. Default and Entry of Default

18 \_\_\_\_\_ The declarations and the Court's docket demonstrate that no  
19 person or entity made a claim or answered the complaint within  
20 the requisite thirty-day period for filing a claim of 18 U.S.C. §  
21 983(a)(4)(A) and Supp. R. G(5), and/or within the twenty-day  
22 period set forth in Supp. R. G(5) for filing an answer  
23 thereafter. Therefore, the Clerk appropriately entered the  
24 default of potential claimant Karen Jean Freyling on May 19,  
25 2009, and of potential claimant Steven W. Butts on May 22, 2009.

26 E. Legal Sufficiency of the Complaint

27 1) Legal Standards

28 A default judgment generally bars the defaulting party from



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

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

19 Supp. Rule G(2) requires that the complaint in a forfeiture  
20 action in rem arising from a federal statute be verified; state  
21 the grounds for subject-matter jurisdiction, in rem jurisdiction  
22 over the Defendant property, and venue; describe the property  
23 with reasonable particularity; identify the statute under which  
24 the forfeiture action is brought; and state sufficiently detailed  
25 facts to support a reasonable belief that the government will be  
26 able to meet its burden of proof at trial.

## 27 2. The Complaint

28 The complaint filed in this action was verified.

1           The bases for jurisdiction are identified as 28 U.S.C. §§  
2 1345 and 1355 (jurisdiction of civil proceedings commenced by the  
3 United States or an agency or officer thereof, and of actions to  
4 recover or enforce penalties or forfeitures under acts of  
5 Congress, respectively) and 18 U.S.C. § 981(a)(1)(A) and  
6 (a)(1)(C) (subjecting to forfeiture all property involved in a  
7 transaction or attempted transaction in violation of 18 U.S.C. §  
8 1956, and any property which constitutes or is derived from  
9 proceeds traceable to a violation of various statutes or  
10 specified unlawful activity as defined in § 1956(c)(7), or a  
11 conspiracy to commit such an offense). (Cmplt. ¶¶ 1-4.)

12           The basis of venue is identified as 28 U.S.C. § 1395  
13 (placing venue for a civil forfeiture proceeding where the  
14 property is found). (Cmplt. ¶ 5.)

15           The property is described with reasonable particularity.

16           The review of the allegations of the complaint set forth  
17 hereinabove in connection with notice to potential claimants  
18 reflects that the Defendant properties were subject to  
19 forfeiture. In the complaint there are alleged sufficiently  
20 detailed facts to support a reasonable belief and inference that  
21 the government would be able to meet its burden of proof at trial  
22 that the properties were either involved in a transaction or  
23 attempted transaction in violation of 18 U.S.C. § 1956, used to  
24 facilitate a conspiracy to commit such a violation, were proceeds  
25 of such a conspiracy and/or violations, or were derived from  
26 proceeds traceable to such a conspiracy and/or violations. The  
27 use of the vehicles and the electronic equipment in the unlawful  
28 enterprise, and the identification and tracing of the unlawful

1 enterprise as the source of the funds of the deposits made into  
2 the bank accounts, demonstrate a substantial connection between  
3 the property and the offenses.

4 F. Propriety of Default Judgment

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

1 the Federal Rules of Civil Procedure that favors decisions on the  
2 merits, id.

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

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

17 G. Form of the Judgment

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

23 IV. Recommendation

24 Accordingly, it is hereby RECOMMENDED that:

- 25 1. Plaintiff's motion for default judgment be GRANTED;  
26 2. Plaintiff is entitled to, and the Clerk be directed to  
27 enter, a judgment that:

28 (a) The interest/s of Karen Jean Freyling and Steven W.

1 Butts in the Defendant properties are CONDEMNED and FORFEITED to  
2 the United States of America; and

3 (b) The right, title, and interest of all potential  
4 claimants in the Defendant property, including but not limited to  
5 Karen Jean Freyling and Steven W. Butts, are FORFEITED to the  
6 United States of America pursuant to , and are VESTED in the  
7 United States; and,

8 (c) All persons claiming any right, title, or interest  
9 in or to the Defendant property have DEFAULTED and no longer have  
10 any right, title, or interest in the Defendant property  
11 whatsoever; and,

12 3. The Clerk of Court ENTER final judgment of forfeiture for  
13 Plaintiff United States of America.

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

1 appeal the District Court's order. Martinez v. Ylst, 951 F.2d  
2 1153 (9th Cir. 1991).

3

4 IT IS SO ORDERED.

5 **Dated: October 22, 2009**

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE

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