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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

CASE NO. 1:09-cv-00470-LJO-SMS

Plaintiff,

v.

**FINDINGS AND RECOMMENDATIONS  
REGARDING PLAINTIFF’S *EX PARTE*  
APPLICATION FOR DEFAULT  
JUDGMENT**

APPROXIMATELY \$14,985.00 IN U.S.  
CURRENCY,

Defendant.

(Doc. 23)

In this civil forfeiture action, Plaintiff United States of America (“Government”) seeks (1) default judgment against the interests of Marcos Fernandez and Maria Teresa Garcia in approximately \$14,985.00 and (2) entry of a final forfeiture judgment to vest in the Government all right, title and interest in the defendant currency. The Government’s motion has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rule 72-302(c)(19) and is considered in accordance with Local Rule A-540(d).

This Court has reviewed the papers and has determined that this matter is suitable for decision without oral argument pursuant to Local Rule 78-230(h). Having considered all written materials submitted, the undersigned recommends that the District Court grant the Government default judgment, enter final forfeiture judgment to vest in the Government all right, title and interest in the defendant currency, and order the Government, within ten (10) days of service of an order adopting these findings and recommendations, to submit a proposed default and final forfeiture judgment consistent with these findings and recommendations.

1 **I. Factual Background**<sup>1</sup>

2 On September 25, 2008, a California Highway Patrol (CHP) officer stopped a Honda  
3 Accord for a code violation at Crystal and Olive Avenue at Highway 99 in Fresno, California.  
4 Marcos Fernandez, the driver and sole occupant, denied the officer’s request for a consent search,  
5 stating that the car was not his. The officer requested the assistance of a drug-sniffing dog from  
6 the Fresno County Sheriff’s Department Narcotics Enforcement Team.

7 A detective and “Cody” responded. After the detective explained in Spanish who he was  
8 and how Cody was to sniff for the odor of narcotics, Fernandez again denied a request for a  
9 consent search, again stating that the car did not belong to him. The detective and Cody searched  
10 both outside and inside the car. Cody alerted to the front center air vents and the dashboard,  
11 which appeared to have been tampered with. Fernandez and the car were then transported to the  
12 CHP central office where the search continued. There, CHP personnel located a hidden  
13 compartment within the dash board containing the defendant currency, approximately 216.7  
14 grams of methamphetamine, and 25.6 grams of cocaine.

15 After hearing his *Miranda* rights, Fernandez told officers that the cart belonged to his  
16 sister-in-law, Maria Garcia, who lived in Riverside County. Fernandez initially stated that he had  
17 flown Alaska Airlines to Riverside County from Washington State that morning. But after  
18 officers asked whether Alaska Airlines would have a record of his flight, Fernandez stated that he  
19 had flown the previous Saturday.

20 When officers asked whether Fernandez had left any personal belongings in the car,  
21 Fernandez replied that he had left his cell phone. He denied knowledge of the cash or drugs that  
22 had been found in the search. He then decided to exercise his right to remain silent. Thereafter,  
23 Fernandez was detained in the Fresno County Jail, charged with violating California Health and  
24 Safety Code § 11352(a), Transportation/Sale of Narcotics/Controlled Substances.

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28 <sup>1</sup> These facts were derived from the Government’s application and from the Court’s records.

1 **II. Procedural Background**

2 On March 12, 2009, the Government filed its complaint for forfeiture in rem, alleging  
3 that the defendant currency was subject to forfeiture to the Government under 21 U.S.C. §  
4 881(a)(6) because it constituted moneys furnished or intended to be furnished in exchange for a  
5 controlled substance or listed chemical, all proceeds traceable to such an exchange, and was used  
6 or intended to be used to facilitate one or more violations of 21 U.S.C. § 841, *et seq.* On March  
7 19, 2009, based on the allegations of the complaint, the Clerk of the Court issued a Warrant for  
8 Arrest of Articles In Rem for the defendant currency. The warrant was executed on March 26,  
9 2009.

10 On March 19, 2009, this Court authorized publication of the forfeiture action via the  
11 internet forfeiture website [www.forfeiture.gov](http://www.forfeiture.gov) for at least thirty days. According to the  
12 Government's Declaration of Publication, a Notice of Civil Forfeiture was published on the  
13 official government internet site ([www.forfeiture.gov](http://www.forfeiture.gov)) for thirty days beginning on April 3, 2009.

14 On April 2, 2009, the U.S. Marshals Service served Fernandez personally. The U.S.  
15 Marshals Service was unable to locate Garcia to serve her personally. Despite a diligent search,  
16 Garcia's whereabouts are unknown.

17 As part of the Government's Request for Entry of Default against Fernandez, FSA  
18 Paralegal Autumn Magee declared under penalty of perjury that on information and belief,  
19 Fernandez was neither the military service nor was an infant or incapacitated person. As part of  
20 the Government's Request for Entry of Default against Garcia, FSA Paralegal Elisa M.  
21 Rodriguez declared under penalty of perjury that on information and belief, Garcia was neither  
22 the military service nor was an infant or incapacitated person. Neither potential claimants  
23 Fernandez or Garcia, nor any other potential claimant, has filed an answer or otherwise defended  
24 the action. The Clerk entered default as to Fernandez on August 21, 2009, and as to Garcia on  
25 May 3, 2011. The Government moved for Default Judgment on May 11, 2011.

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1 **DISCUSSION**

2 **I. Sufficiency of the Complaint**

3 The Government contends that the allegations set forth in the verified complaint for  
4 Forfeiture In Rem and the cited facts provide ample grounds for forfeiture of the defendant  
5 currency. A complaint's sufficiency is one factor in deciding whether to grant default judgment.  
6 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9<sup>th</sup> Cir. 1986). Money or other things of value are  
7 subject to forfeiture if they (1) are furnished or intended to be furnished by any person in  
8 exchange for a controlled substance, (2) constitute proceeds traceable to such an exchange, or (3)  
9 are used or intended to be used to facilitate any violation of the laws governing controlled  
10 substances. 21 U.S.C. § 881(a)(6).

11 The Government's verified complaint alleges that the defendant currency is subject to  
12 forfeiture since it constitutes a thing of value furnished or intended to be furnished in exchange  
13 for a controlled substance, in which all proceeds were traceable to such an exchange, and/or were  
14 used or intended to be used to facilitate the violation of one or more laws governing controlled  
15 substances. As set forth above and in the verified complaint, the DEA seized the defendant  
16 currency on September 25, 2008, incident to a search of an automobile owned by Garcia and  
17 driven by Fernandez.

18 The complaint meets the requirements of Rule G of the Supplemental Rules for  
19 Admiralty or Maritime Claims and Asset Forfeiture Actions, Federal Rules of Civil Procedure, in  
20 that it is verified; states the grounds for subject matter jurisdiction, in rem jurisdiction, and  
21 venue; describes the property seized and the circumstance of its seizure; and identifies the  
22 relevant statutes. In the absence of assertion of interests in the defendant currency, this Court is  
23 not in a position to question the facts supporting its forfeiture. As alleged, the facts set forth a  
24 sufficient connection between the defendant currency and illegal drug activity to support a  
25 forfeiture.

26 The government need not show a relationship between the proceeds of a drug crime and a  
27 specific drug transaction: Circumstantial evidence may support the forfeiture of the proceeds of a  
28 drug crime. *See United States v. Funds in the Amount of Thirty Thousand Six Hundred Seventy*

1 *Dollars (\$30,670.00)*, 403 F.3d 448, 467-70 (7<sup>th</sup> Cir. 2005) (concluding that totality of  
2 circumstances demonstrated that airline passenger’s cash hoard was connected to drug trafficking  
3 and subject to forfeiture); *United States v. \$242,484.00*, 389 F.3d 1149, 1160 (11<sup>th</sup> Cir. 2004)  
4 (applying totality of circumstances to determine that cash carried by airline passenger was the  
5 proceeds of, or traceable to, an illegal drug transaction).

6 **II. Notice Requirements**

7 The Fifth Amendment’s Due Process Clause prohibits the Government from taking  
8 property without due process of law. Individuals whose property interests are at stake are  
9 entitled to notice and an opportunity to be heard. The requisite notice was provided to Fernandez  
10 and Garcia.

11 **A. Notice by Publication**

12 Supplemental Rule G(4) provides that in lieu of newspaper publication, the Government  
13 may publish notice “by posting notice on an official government forfeiture site for at least 30  
14 consecutive days.” Local Admiralty and In Rem rules further provide that the Court shall  
15 designate by order the appropriate vehicle for publication. Local Rules A-530 and 83-171. On  
16 March 19, 2009, this Court authorized publication of the forfeiture action via the internet  
17 forfeiture website [www.forfeiture.gov](http://www.forfeiture.gov) for at least thirty days. According to the Government’s  
18 Declaration of Publication, a Notice of Civil Forfeiture was published on the official government  
19 internet site ([www.forfeiture.gov](http://www.forfeiture.gov)) for thirty days beginning on April 3, 2009. Accordingly, the  
20 Government satisfied the requirements for notice to Fernandez and Garcia by publication.

21 **B. Personal Notice**

22 When the Government knows the identity of the property owner, due process requires  
23 “the Government to make a greater effort to give him notice than otherwise would be mandated  
24 by publication.” *United States v. Real Property*, 135 F.3d 1312, 1315 (9<sup>th</sup> Cir. 1998). In such  
25 cases, the Government must attempt to provide actual notice by means reasonably calculated  
26 under all circumstances to apprise the owner of the pendency of the forfeiture action. *Dusenbery*  
27 *v. United States*, 534 U.S. 161, 168 (2002) (*quotations omitted*). See also *Mullane v. Central*  
28 *Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (requiring such notice “as one desirous of

1 actually informing the absentee might reasonably adopt to accomplish it”). “Reasonable notice,  
2 however, requires only that the government attempt to provide actual notice; it does not require  
3 that the government demonstrate that it was successful in providing actual notice.” *Mesa*  
4 *Valderrama v. United States*, 417 F.3d 1189, 1197 (11<sup>th</sup> Cir. 2005).

5 Supplemental Rule G(4)(b) mirrors this requirement, providing for notice to be sent by  
6 means reasonably calculated to reach the potential claimant. Local Rule A-540 also requires that  
7 a party seeking default judgment in an action in rem demonstrate to the Court’s satisfaction that  
8 due notice of the arrest of the property has been given both by publication and by personal  
9 service of the person having custody of the property, or if the property is in the hands of a law  
10 enforcement officer, by personal service on the person who had custody of the property before its  
11 possession by a law enforcement agency or officer. Notice must also be provided by personal  
12 service or certified mail, return receipt requested, on every other person who has appeared in the  
13 action and is known to have an interest in the property, provided that failure to give actual notice  
14 to such other person may be excused upon a satisfactory showing of diligent efforts to provide  
15 notice without success. L.R. A-540(a). Notwithstanding the Supplemental Rules and L.R. A-  
16 540(a), the Government provides sufficient notice when the notice complies with the  
17 requirements of F.R.Civ.P. 4. *See* F.R.Civ.P. 4(n)(1) (providing that when a federal statute  
18 authorizes forfeiture, “[n]otice to claimants of the property shall then be sent in the manner  
19 provided by statute or by service of a summons under this rule”).

20 Here, the Government personally served Fernandez with the complaint, arrest warrant,  
21 publication order, and other related documents on April 2, 2009. Although the Government was  
22 unable to personally serve Garcia, whose whereabouts are unknown, it demonstrated diligent  
23 efforts to personally serve her.

24 **C. Failure to File Claim or Answer**

25 Supplemental Rule G(5) requires any person who asserts an interest in or right against the  
26 defendant currency to file a claim with the Court within 35 days after service of the  
27 Government’s complaint or 30 days after the final publication of notice. Supplemental R.  
28 G(4)(b) & (5). Failure to comply with the procedural requirements for opposing the forfeiture

1 precludes a person from establishing standing as a party to the forfeiture action. *Real Property*,  
2 135 F.3d at 1317. The Clerk of Court properly entered default against Fernandez on August 21,  
3 2009, and against Garcia on May 3, 2011.

4 **D. Default Judgment**

5 The Government seeks judgment against the interests of Fernandez and Garcia, and final  
6 forfeiture judgment to vest in the Government all right, title and interest in the defendant  
7 currency. The Supplemental Rules do not set forth a procedure to seek default judgment in rem.  
8 Supplemental Rule A provides, “The Federal Rules of Civil Procedure also apply to the  
9 foregoing proceedings except to the extent that they are inconsistent with these Supplemental  
10 Rules.”

11 Pursuant to the Federal Rules of Civil Procedure, default entry is a prerequisite to default  
12 judgment. “When a party against whom a judgment for affirmative relief is sought has failed to  
13 plead or otherwise defend, and the failure is shown by affidavit or otherwise, the clerk must enter  
14 the party’s default.” F.R.Civ.P. 55(a). Generally, the default entered by the clerk establishes a  
15 defendant’s liability.

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

20 *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9<sup>th</sup> Cir. 1987)  
21 (*internal citations and quotation marks omitted*).

22 As noted above, the Government properly obtained default entries against the interests of  
23 Fernandez and Garcia. There is no impediment to default judgment sought by the Government  
24 against them. The Government properly seeks judgment against the interests of the entire world,  
25 that is, a final forfeiture judgment to vest in the Government all right, title, and interest in the  
26 defendant currency. “A judgment in rem affect the interests of all persons in designated property  
27 . . . . [T]he plaintiff is seeking to secure a pre-existing claim in the subject property and to  
28 extinguish or establish the nonexistence of similar interests of particular persons.” *Hanson v.*  
*Denckla*, 357 U.S. 235, 246 n. 12 (1958). Because of Hernandez and Garcia’s defaults, the  
Government is entitled to a final forfeiture judgment.

1 **RECOMMENDATIONS**

2 In light of the reasons discussed above, this Court recommends that

- 3 1. The District Court grant Plaintiff United States of America default  
4 judgment against the interests of Marcos Fernandez and Maria Teresa  
5 Garcia in the defendant currency;
- 6 2. The Clerk of Court enter final forfeiture judgment to vest in Plaintiff  
7 United States of America all right, title and interest in the defendant  
8 currency; and
- 9 3. The District Court order Plaintiff United States of America, within ten  
10 (10) days of service of an order adopting these findings and  
11 recommendations, to submit a proposed default and final forfeiture  
12 judgment consistent with the findings and recommendations and the order  
13 adopting them.

14 These findings and recommendations are submitted to District Judge Lawrence J. O’Neill  
15 pursuant to 28 U.S.C. § 636 (b)(1)(B) and Local Rule 72-304. Within fifteen (15) court days of  
16 service of this recommendation, any party may file written objections to these findings and  
17 recommendations with the Court and serve a copy on all parties. Such document should be  
18 captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The district  
19 judge will review these findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C).  
20 The parties are advised that failure to file objections within the specific time may waive the right  
21 to appeal the district judge’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

22  
23 IT IS SO ORDERED.

24 **Dated: July 5, 2011**

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE