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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

CASE NO. 1:09-cv-01445-AWI-SMS

Plaintiff,

v.

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

APPROXIMATELY \$24,260.00 IN U.S.
CURRENCY, and

APPROXIMATELY \$42,482.70 IN U.S.
CURRENCY,

Defendants.

(Doc. 22)

In this civil forfeiture action, Plaintiff United States of America (“Government”) seeks (1) default judgment against the interests of Ali Ajanar, Hilda Zuniga-Salazar, Ivan Cardenas-Bribesca, and Eli Carbajal-Martinez in approximately \$24,260.00 and approximately \$42,482.70 in United States currency (the “defendant currency”) 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

1 an order adopting these findings and recommendations, to submit a proposed default and final
2 forfeiture judgment consistent with these findings and recommendations.

3 **I. Factual Background**¹

4 On March 14, 2009, a confidential source (“CS”) working on behalf of the Drug
5 Enforcement Administration (“DEA”) arranged to meet Ali Alnajar, Eli Cabajal-Martinez and
6 Ivan Cardenas-Bribesca,² all of whom were involved in marijuana and cocaine sales.

7 On March 16, 2009, CS arranged to meet Alnajar, Martinez, and Bribesca at the Camino
8 Real Restaurant, 3500 Truxton Avenue, Bakersfield, California. Anticipating a narcotic
9 transaction, the DEA equipped CS with a digital voice recorder, a video recorder, and a
10 transmitter. At approximately 12:15 p.m., DEA agents saw Cardenas arrive, followed by
11 Martinez, and at approximately 1:00 p.m., Alnajar. CS negotiated to sell 500 pounds of
12 marijuana to Alnajar and three kilograms of cocaine to Martinez. CS demanded to see the money
13 before delivering the drugs to them.

14 Shortly thereafter, Hilda Zuniga-Salazar arrived in a black SUV and parked next to CS,
15 Alnajar, Martinez, and Bribesca. When CS and Martinez walked up to the open passenger
16 window, Salazar produced a red purse containing several stacks of U.S. currency, which
17 Martinez identified as the money to pay for the cocaine. Salazar drove off with the currency, and
18 Alnajar left to get the money for the marijuana. CS also left.

19 Later, the agents saw Alnajar returned to the restaurant, driving a 2002 black Chevrolet
20 pick-up truck. Cardenas called CS and advised that all the money was ready. CS returned to the
21 restaurant, where Alnajar, Cardenas, and Martinez waited. Alnajar advised CS that he had only
22 enough money for “three” (300 pounds) of marijuana, showing him \$42,482.70 in U.S. currency
23 on the front seat of the truck. When CS provided a pre-arranged signal, agents arrested Alnajar,
24 Martinez, and Bribesca. Upon questioning, Martinez disclosed that he did not have the money
25 for the cocaine.

27 ¹ These facts were derived from the Government’s application and from the Court’s records.

28 ² The record also refers to Ivan Cardenas-Bribesca as Ivan Brebiesca-Cardenas.

1 At about 3:30 p.m., Salazar returned to the restaurant, where she was arrested. In a
2 subsequent search of her vehicle, agents found a .45 caliber pistol in the rear pocket of the front
3 passenger seat and the red purse, containing \$24,260.00 in U.S. currency, under the floorboard.

4 **II. Procedural Background**

5 On August 17, 2009, the Government filed its complaint for forfeiture in rem, alleging
6 that \$24,260.00 of the defendant currency was subject to forfeiture to the Government under 21
7 U.S.C. § 881(a)(6) because it constituted moneys furnished or intended to be furnished in
8 exchange for a controlled substance or listed chemical, all proceeds traceable to such an
9 exchange, and was used or intended to be used to facilitate one or more violations of 21 U.S.C. §
10 841, *et seq.* (Doc. 1). On August 19, 2009, the Government amended the complaint to include
11 both components of the defendant currency: the sum of \$24,260.00 and the sum of \$42,482.70
12 (Doc. 3). On August 20, 2009, based on the allegations set forth in the amended complaint (Doc.
13 3), the Clerk of the Court issued a Warrant for Arrest of Articles In Rem for the Defendant
14 Currency (Doc. 5).

15 On August 31, 2009, Alnajar and Salazar were personally served with notice of this
16 action by the U.S. Marshals Service (Docs. 9, 10). Bribesca was personally served on September
17 2, 2009 (Doc. 11). Martinez has not been personally served (Doc. 12).³

18 On September 9, 2009, this Court authorized publication of the forfeiture action via the
19 internet forfeiture website www.forfeiture.gov for at least thirty days (Doc. 6). According to the
20 Government's Declaration of Publication (Doc. 20), a Notice of Civil Forfeiture was published
21 on the official government internet site (www.forfeiture.gov) for thirty days beginning on
22 October 20, 2009. To date, no claim or answer has been filed on behalf of Salazar, Alnajar,
23 Martinez, or Bribesca.

24 As part of the Government's Request for Entry of Default (Doc. 15), FSA Paralegal
25 Autumn Magee declared under penalty of perjury that on information and belief, neither Salazar,
26 Alnajar, Martinez, nor Bribesca was in the military service or was an infant or incapacitated
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28 ³ Martinez has reportedly been deported to Mexico (Doc. 12).

1 person. Neither potential claimants Salazar, Alnajar, Martinez, and Bribesca nor any other
2 potential claimant filed an answer or otherwise defended the action. The Clerk entered default as
3 to Salazar, Alnajar, Martinez, and Bribesca on November 23, 2009 (Docs. 16, 17, 18, and 19).
4 The Government moved for Default Judgment on March 3, 2010 (Doc. 22).

5 DISCUSSION

6 **I. Sufficiency of the Complaint**

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

15 The Government's verified complaint alleges that the defendant currency is subject to
16 forfeiture since it constitutes a thing of value furnished or intended to be furnished in exchange
17 for a controlled substance, in which all proceeds were traceable to such an exchange, and/or were
18 used or intended to be used to facilitate the violation of one or more laws governing controlled
19 substances (Doc. 3 at ¶ 1). As set forth above and in the verified complaint, the DEA seized the
20 defendant currency on March 16, 2009, at 3500 Truxton Avenue, Bakersfield, California,
21 incident to a transaction for the purchase of marijuana and cocaine.

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

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1 sufficient connection between the defendant currency and illegal drug activity to support a
2 forfeiture.

3 The government need not show a relationship between the proceeds of a drug crime and a
4 specific drug transaction: Circumstantial evidence may support the forfeiture of the proceeds of a
5 drug crime. *See United States v. \$30,670.00*, 403 F.3d 448, 467-70 (7th Cir. 2005) (concluding
6 that totality of circumstances demonstrated that airline passenger’s cash hoard was connected to
7 drug trafficking and subject to forfeiture); *United States v. \$242,484.00*, 389 F.3d 1149, 1160
8 (11th Cir. 2004) (applying totality of circumstances to determine that cash carried by airline
9 passenger was the proceeds of, or traceable to, an illegal drug transaction).

10 **II. Notice Requirements**

11 The Fifth Amendment’s Due Process Clause prohibits the Government from taking
12 property without due process of law. Individuals whose property interests are at stake are
13 entitled to notice and an opportunity to be heard. The requisite notice was provided to Salazar,
14 Alnajar, Martinez, and Bribesca.

15 **A. Notice by Publication**

16 Supplemental Rule G(4) provides that in lieu of newspaper publication, the Government
17 may publish notice “by posting notice on an official government forfeiture site for at least 30
18 consecutive days.” Local Admiralty and In Rem rules further provide that the Court shall
19 designate by order the appropriate vehicle for publication. Local Rules A-530 and 83-171. On
20 September 9, 2009, this Court authorized publication of the forfeiture action via the internet
21 forfeiture website www.forfeiture.gov for at least thirty days (Doc. 6). According to the
22 Government’s Declaration of Publication (Doc. 20), a Notice of Civil Forfeiture was published
23 on the official government internet site (www.forfeiture.gov) for thirty days beginning on
24 October 20, 2009. Accordingly, the Government satisfied the requirements for notice to Salazar,
25 Alnajar, Martinez, and Bribesca by publication.

26 **B. Personal Notice**

27 When the Government knows the identity of the property owner, due process requires
28 “the Government to make a greater effort to give him notice than otherwise would be mandated

1 by publication.” *United States v. Real Property*, 135 F.3d 1312, 1315 (9th Cir. 1998). In such
2 cases, the Government must attempt to provide actual notice by means reasonably calculated
3 under all circumstances to apprise the owner of the pendency of the forfeiture action. *Dusenbery*
4 *v. United States*, 534 U.S. 161, 168 (2002) (quotations omitted). *See also Mullane v. Central*
5 *Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (requiring such notice “as one desirous of
6 actually informing the absentee might reasonably adopt to accomplish it”). “Reasonable notice,
7 however, requires only that the government attempt to provide actual notice; it does not require
8 that the government demonstrate that it was successful in providing actual notice.” *Mesa*
9 *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
11 means reasonably calculated to reach the potential claimant. Local Rule A-540 also requires that
12 a party seeking default judgment in an action in rem demonstrate to the Court’s satisfaction that
13 due notice of the arrest of the property has been given both by publication and by personal
14 service of the person having custody of the property, or if the property is in the hands of a law
15 enforcement officer, by personal service on the person who had custody of the property before its
16 possession by a law enforcement agency or officer. Notice must also be provided by personal
17 service or certified mail, return receipt requested, on every other person who has appeared in the
18 action and is known to have an interest in the property, provided that failure to give actual notice
19 to such other person may be excused upon a satisfactory showing of diligent efforts to provide
20 notice without success. L.R. A-540(a). Notwithstanding the Supplemental Rules and L.R. A-
21 540(a), the Government provides sufficient notice when the notice complies with the
22 requirements of F.R.Civ.P. 4. *See* F.R.Civ.P. 4(n)(1) (providing that when a federal statute
23 authorizes forfeiture, “[n]otice to claimants of the property shall then be sent in the manner
24 provided by statute or by service of a summons under this rule”).

25 Here, the Government personally served Alnajar and Salazar with the complaint, arrest
26 warrant, publication order, and other related documents on August 31, 2009 (Docs. 9 & 10). It
27 served Cardenas on September 2, 2009 (Doc. 11). The Government was unable to personally

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1 serve Martinez, who reportedly had been deported to Mexico (Doc. 12). Accordingly, Salazar,
2 Alnajar, Martinez, and Bribesca were served.

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

4 Supplemental Rule G(5) requires any person who asserts an interest in or right against the
5 defendant currency to file a claim with the Court within 35 days after service of the
6 Government’s complaint or 30 days after the final publication of notice. Supplemental R.
7 G(4)(b) & (5). Failure to comply with the procedural requirements for opposing the forfeiture
8 precludes a person from establishing standing as a party to the forfeiture action. *Real Property*,
9 135 F.3d at 1317. The Clerk of Court properly entered defaults against Salazar, Alnajar,
10 Martinez, and Bribesca on November 23, 2009 (Doc. 16, 17, 18, and 19).

11 **D. Default Judgment**

12 The Government seeks judgment against the interests of Salazar, Alnajar, Martinez, and
13 Bribesca, and final forfeiture judgment to vest in the Government all right, title and interest in the
14 defendant currency. The Supplemental Rules do not set forth a procedure to seek default
15 judgment in rem. Supplemental Rule A provides, “The Federal Rules of Civil Procedure also
16 apply to the foregoing proceedings except to the extent that they are inconsistent with these
17 Supplemental Rules.”

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

23 Rule 55 give the court considerable leeway as to what it may require as a
24 prerequisite to the entry of a default judgment. The general rule of law is that
25 upon default the factual allegations of the complaint, except those relating to the
26 amount of damages, will be taken as true.

27 *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987)
28 (internal citations and quotation marks omitted).

As noted above, the Government properly obtained default entries against the interests of
Salazar, Alnajar, Martinez, and Bribesca. There is no impediment to default judgment sought by

1 the Government against them. The Government properly seeks judgment against the interests of
2 the entire world, that is, a final forfeiture judgment to vest in the Government all right, title, and
3 interest in the defendant currency. “A judgment in rem affect the interests of all persons in
4 designated property [T]he plaintiff is seeking to secure a pre-existing claim in the subject
5 property and to extinguish or establish the nonexistence of similar interests of particular
6 persons.” *Hanson v. Denckla*, 357 U.S. 235, 246 n. 12 (1958). Because of Salazar, Alnajar,
7 Martinez, and Bribesca’s defaults, the Government is entitled to a final forfeiture judgment.

8 **RECOMMENDATIONS**

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

- 10 1. The District Court grant plaintiff United States of America default
11 judgment against the interests of Ali Ajanar, Hilda Zuniga-Salazar, Ivan
12 Cardenas-Bribesca, and Eli Carbajal-Martinez ;
- 13 2. The Clerk of Court enter final forfeiture judgment to vest in Plaintiff
14 United States of America all right, title and interest in the defendant
15 currency; and
- 16 3. The District Court order Plaintiff United States of America, within ten
17 (10) days of service of an order adopting these findings and
18 recommendations, to submit a proposed default and final forfeiture
19 judgment consistent with the findings and recommendations and the order
20 adopting them.

21 These findings and recommendations are submitted to District Judge Anthony W. Ishii
22 pursuant to 28 U.S.C. § 636 (b)(1)(B) and Local Rule 72-304. Within fifteen (15) court days of
23 service of this recommendation, any party may file written objections to these findings and
24 recommendations with the Court and serve a copy on all parties. Such document should be
25 captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The district
26 judge will review these findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C).

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1 The parties are advised that failure to file objections within the specific time may waive the right
2 to appeal the district judge's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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6 IT IS SO ORDERED.

7 **Dated:** May 4, 2010

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE