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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

CASE NO. 1:10-cv-00231-AWI-SMS

Plaintiff,

v.

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

APPROXIMATELY \$10,760.00 IN U.S.
CURRENCY,

Defendant.

(Doc. 18)

In this civil forfeiture action, Plaintiff United States of America (“Government”) seeks (1) default judgment against the interests of Michael Scott Ioane, Jr, and Samantha Dennis in approximately \$10,760.00 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**¹

2 In August 2009, Merced County Sheriff’s Department officers executed a search warrant
3 at 650 El Portal Drive, Merced, California. In the course of the search, the officers encountered
4 Ioane, who was the target of their investigation.

5 Using a drug-sniffing dog, the officers searched Ioane’s bedroom and discovered the
6 defendant currency in a safe that also contained 24 grams of cocaine, 30 oxycontin tablets, a
7 digital scale, and Ioane’s California driver’s license. In a post-*Miranda*² statement, Ioane
8 admitted that the cocaine and oxycontin belonged to him. Ioane stated that he sold cocaine,
9 oxycontin, and marijuana to approximately ten customers each day.

10 **II. Procedural Background**

11 On February 10, 2010, the Government filed its complaint for forfeiture in rem, alleging
12 that \$10,760.00 of the defendant currency was subject to forfeiture to the Government under 21
13 U.S.C. § 881(a)(6) because it constituted moneys furnished or intended to be furnished in
14 exchange for a controlled substance or listed chemical, all proceeds traceable to such an
15 exchange, and was used or intended to be used to facilitate one or more violations of 21 U.S.C. §
16 841, *et seq.* (Doc. 1). On February 17, 2010, based on the allegations of the amended complaint,
17 the Clerk of the Court issued a Warrant for Arrest of Articles In Rem for the Defendant Currency
18 (Doc. 5). The warrant was executed on February 24, 2010 (Doc. 6).

19 On February 17, 2010, this Court authorized publication of the forfeiture action via the
20 internet forfeiture website www.forfeiture.gov for at least thirty days (Doc. 4). According to the
21 Government’s Declaration of Publication (Doc. 10), a Notice of Civil Forfeiture was published
22 on the official government internet site (www.forfeiture.gov) for thirty days beginning on
23 February 22, 2010.

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

28 ² *Miranda v. Arizona*, 384 U.S. 436 (1966).

1 On March 2, 2010, both Ioane and Dennis were personally served with notice of this
2 action by the U.S. Marshals Service (Docs. 8 & 9). To date, no claim or answer has been filed on
3 behalf of Ioane or Dennis.

4 As part of the Government's Requests for Entry of Default (Docs. 11 and 14), FSA
5 Paralegal Autumn Magee declared under penalty of perjury that on information and belief,
6 neither Ioane or Dennis was in the military service or was an infant or incapacitated person.
7 Neither potential claimants Ioane nor Dennis, nor any other potential claimant, filed an answer or
8 otherwise defended the action. The Clerk entered default as to Dennis on April 30, 2010, and as
9 to Ioane on May 12, 2010 (Docs. 12 and 15). The Government moved for Default Judgment on
10 December 21, 2010 (Doc. 18).

11 DISCUSSION

12 **I. Sufficiency of the Complaint**

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

21 The Government's verified complaint alleges that the defendant currency is subject to
22 forfeiture since it constitutes a thing of value furnished or intended to be furnished in exchange
23 for a controlled substance, in which all proceeds were traceable to such an exchange, and/or were
24 used or intended to be used to facilitate the violation of one or more laws governing controlled
25 substances (Doc. 1 at ¶ 1). As set forth above and in the verified complaint, the DEA seized the
26 defendant currency on August 6, 2009, at 650 El Portal Drive, Merced, California, incident to a
27 search of Ioane's residence.

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

9 The government need not show a relationship between the proceeds of a drug crime and a
10 specific drug transaction: Circumstantial evidence may support the forfeiture of the proceeds of a
11 drug crime. *See United States v. \$30,670.00*, 403 F.3d 448, 467-70 (7th Cir. 2005) (concluding
12 that totality of circumstances demonstrated that airline passenger's cash hoard was connected to
13 drug trafficking and subject to forfeiture); *United States v. \$242,484.00*, 389 F.3d 1149, 1160
14 (11th Cir. 2004) (applying totality of circumstances to determine that cash carried by airline
15 passenger was the proceeds of, or traceable to, an illegal drug transaction).

16 **II. Notice Requirements**

17 The Fifth Amendment's Due Process Clause prohibits the Government from taking
18 property without due process of law. Individuals whose property interests are at stake are
19 entitled to notice and an opportunity to be heard. The requisite notice was provided to Ioane and
20 Dennis.

21 **A. Notice by Publication**

22 Supplemental Rule G(4) provides that in lieu of newspaper publication, the Government
23 may publish notice "by posting notice on an official government forfeiture site for at least 30
24 consecutive days." Local Admiralty and In Rem rules further provide that the Court shall
25 designate by order the appropriate vehicle for publication. Local Rules A-530 and 83-171. On
26 February 17, 2010, this Court authorized publication of the forfeiture action via the internet
27 forfeiture website www.forfeiture.gov for at least thirty days (Doc. 4). According to the
28 Government's Declaration of Publication (Doc. 10), a Notice of Civil Forfeiture was published

1 on the official government internet site (www.forfeiture.gov) for thirty days beginning on
2 February 22, 2010. Accordingly, the Government satisfied the requirements for notice to Ioane
3 and Dennis by publication.

4 **B. Personal Notice**

5 When the Government knows the identity of the property owner, due process requires
6 “the Government to make a greater effort to give him notice than otherwise would be mandated
7 by publication.” *United States v. Real Property*, 135 F.3d 1312, 1315 (9th Cir. 1998). In such
8 cases, the Government must attempt to provide actual notice by means reasonably calculated
9 under all circumstances to apprise the owner of the pendency of the forfeiture action. *Dusenbery*
10 *v. United States*, 534 U.S. 161, 168 (2002) (*quotations omitted*). See also *Mullane v. Central*
11 *Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (requiring such notice “as one desirous of
12 actually informing the absentee might reasonably adopt to accomplish it”). “Reasonable notice,
13 however, requires only that the government attempt to provide actual notice; it does not require
14 that the government demonstrate that it was successful in providing actual notice.” *Mesa*
15 *Valderrama v. United States*, 417 F.3d 1189, 1197 (11th Cir. 2005).

16 Supplemental Rule G(4)(b) mirrors this requirement, providing for notice to be sent by
17 means reasonably calculated to reach the potential claimant. Local Rule A-540 also requires that
18 a party seeking default judgment in an action in rem demonstrate to the Court’s satisfaction that
19 due notice of the arrest of the property has been given both by publication and by personal
20 service of the person having custody of the property, or if the property is in the hands of a law
21 enforcement officer, by personal service on the person who had custody of the property before its
22 possession by a law enforcement agency or officer. Notice must also be provided by personal
23 service or certified mail, return receipt requested, on every other person who has appeared in the
24 action and is known to have an interest in the property, provided that failure to give actual notice
25 to such other person may be excused upon a satisfactory showing of diligent efforts to provide
26 notice without success. L.R. A-540(a). Notwithstanding the Supplemental Rules and L.R. A-
27 540(a), the Government provides sufficient notice when the notice complies with the
28 requirements of F.R.Civ.P. 4. See F.R.Civ.P. 4(n)(1) (providing that when a federal statute

1 authorizes forfeiture, “[n]otice to claimants of the property shall then be sent in the manner
2 provided by statute or by service of a summons under this rule”).

3 Here, the Government personally served Ioane and Dennis with the complaint, arrest
4 warrant, publication order, and other related documents on March 2, 2010 (Docs. 8 and 9).
5 Accordingly, both Ioane and Dennis were personally served.

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

7 Supplemental Rule G(5) requires any person who asserts an interest in or right against the
8 defendant currency to file a claim with the Court within 35 days after service of the
9 Government’s complaint or 30 days after the final publication of notice. Supplemental R.
10 G(4)(b) & (5). Failure to comply with the procedural requirements for opposing the forfeiture
11 precludes a person from establishing standing as a party to the forfeiture action. *Real Property*,
12 135 F.3d at 1317. The Clerk of Court properly entered default against Ioane on May 12, 2010,
13 and against Dennis on April 30, 2010 (Docs. 12 and 15).

14 **D. Default Judgment**

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

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

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

1 captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The district
2 judge will review these findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C).
3 The parties are advised that failure to file objections within the specific time may waive the right
4 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:** March 3, 2011

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

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