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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO. 1:11-cv-00304 LJO-GSA
	)	
Plaintiff,	)	
	)	
v.	)	ORDER GRANTING MOTION TO
	)	WITHDRAW AS COUNSEL
REAL PROPERTY LOCATED AT	)	
6415 NORTH HARRISON AVENUE,	)	ORDER DENYING MOTION TO APPOINT
FRESNO, FRESNO COUNTY,	)	COUNSEL
CALIFORNIA, APN: 407-751-08,	)	
INCLUDING ALL APPURTENANCES	)	ORDER GRANTING EXTENSION OF
AND IMPROVEMENTS THERETO,	)	TIME TO FILE AN ANSWER
	)	
	)	(Docs. 20 and 23)
Defendant.	)	
_____	)	

**I. Introduction**

On February 22, 2011, Plaintiff, United States of America (“United States” or “the government”), filed a complaint for forfeiture of Defendant Real Property located at 6415 North Harrison Avenue, Fresno, California (“the subject property”). (Doc. 1). On July 7, 2011, Brenda Grantland, counsel for Claimant Bok Hee Ee (“Claimant” or “Ms. Ee”), filed a motion to allow her to withdraw as counsel, as well as an application for court appointed counsel pursuant to 18 U.S.C. § 983(b)(2)(A). (Doc. 20). On July 11, 2011, the United States filed a response. (Doc. 21). On July 12, 2011, Claimant filed a motion for extension of time to file an answer to the

1 complaint and a reply to the United States' response. (Doc.23).<sup>1</sup> She also filed a supplement  
2 memorandum in support of her requests on July 26, 2011. (Doc. 28).

3 On July 27, 2011, this Court ordered supplemental briefing. (Doc. 30). On August 10,  
4 2011, Claimant filed a second declaration. (Doc. 38). The United States filed an opposition on  
5 August 24, 2011. Claimant filed a Reply on August 31, 2011. (Doc. 41). The matter was set for  
6 hearing on September 9, 2011. The Court took the matter under submission pursuant to Local  
7 Rule 230(g) on September 8, 2011. (Doc. 54). Upon a review of all of the pleadings, the Motion  
8 to Withdraw as Counsel is GRANTED. The Motion for Appointment of Counsel is DENIED.  
9 The Motion for an Extension of Time to File an Answer is GRANTED.

10 **II. The Motion to Withdraw as Counsel**

11 Ms. Grantland filed the Motion to Withdraw on the basis that she currently represents the  
12 Claimant and Claimant's daughter who are joint tenants of the subject property. Since the time  
13 Ms. Grantland was retained, she contends that a conflict has arisen between her two clients. In  
14 particular, she asserts pleadings filed in this case by the United States indicate that Claimant has  
15 been under investigation as a co-conspirator in the underlying criminal case against Claimant's  
16 husband in United States v. Kwan Choi, 1:10-cr-206 OWW. Although Claimant has not been  
17 indicted, counsel argues that her two clients now have divergent interests. Initially, both clients  
18 had an innocent owner defense, however, if Ms. Ee were to reveal any Fifth Amendment  
19 privileged information, Ms. Grantland's representation of both clients would be compromised.  
20 Ms. Grantland contends that California Rule of Professional Conduct 3-310(C) requires that she  
21 withdraw since Ms. Ee is unwilling to sign a written consent waiving the conflict. Additionally,  
22 although counsel has handled some criminal matters, criminal law is not her area of expertise and  
23 she believes Claimant would be better served by an attorney who specializes in that area.

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27 <sup>1</sup> These motions were originally noticed before District Judge Oliver W. Wanger. Judge Wanger requested that  
28 the motions be reset and considered by Magistrate Judge Sheila K. Oberto who took the matter under submission. (Doc.  
24.) The case was reassigned to the undersigned on July 19, 2011, due to Judge Oberto's recusal. (Doc. 25).

1           The government argues that there currently is no conflict of interest because Ms. Ee has not  
2 been criminally indicted. Moreover, the United States contends that counsel appears to be using the  
3 alleged conflict as a basis to support Claimant’s request for court appointed counsel.

4           Rule 3-310(C)(2) of the California Rules of Professional Conduct prohibits counsel from  
5 representing clients with adverse interests unless the client gives informed written consent. Rule 3-  
6 310 (C)(2) of the California Rules of Professional Conduct; *Cal West Nurseries, Inc. v. Superior*  
7 *Court*, 129 Cal. App. 4<sup>th</sup> 1170, 1175 (2005). In the Ninth Circuit, the California Rules of  
8 Professional Conduct are interpreted according to California state law. *Image Technical Services,*  
9 *Inc. v. Eastman Kodak Co.*, 820 F.Supp. 1212, 1215 (N.D. Cal. 1993). Under California law, an  
10 adverse interest is one that is hostile, opposed, antagonistic, detrimental, or unfavorable to one’s own  
11 interests. *Ames v. State Bar*, 8 Cal. 3d 910, 917 (1973). An attorney-client conflict of interest exists  
12 when an attorney must contend or assert a position on behalf of one client, that he must oppose on  
13 behalf of another client. *Flatt v. Superior Court*, 9 Cal. 4<sup>th</sup> 275, 282 fn 2 (1994).

14           In this case, counsel has argued that an actual conflict exists because Claimant may be  
15 criminally prosecuted in the future. The United States contends that there is no actual conflict  
16 because no indictment has been filed. At this juncture, it is unclear whether an indictment may be  
17 filed which at a minimum creates a potential conflict. The issue of whether this situation is a  
18 potential or actual conflict is of no consequence because both forms of conflict requires a written  
19 waiver. Rule 3-310 (C)(2) of the California Rules of Professional Conduct. In this instance,  
20 Claimant has indicated that she is not willing to sign a consent to continued joint representation.  
21 Thus, Ms. Grantland’s continued representation of Claimant and her daughter is not appropriate.  
22 Moreover, counsel has indicated that given her limited experience in criminal law, she believes  
23 counsel with criminal law expertise would better represent Claimant’s interest. This Court will not  
24 require Ms. Grantland to continue representing Claimant under these circumstances. Accordingly,  
25 the Motion to Withdraw as Counsel is GRANTED.

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1 **III. The Motion to Appoint Counsel**

2 Claimant requests that she be appointed counsel pursuant to the Civil Asset Forfeiture  
3 Reform Act (“CAFRA”) which provides that a claimant may be appointed counsel in a judicial  
4 forfeiture proceeding *if* the claimant is financially unable to obtain representation by counsel *and*  
5 the property subject to forfeiture is real property that is being used by the person as a primary  
6 residence. 18 U.S.C. § 983(b)(2)(A). Claimant argues that she qualifies under this provision  
7 because she has no funds to pay for counsel and the subject property is her primary residence.  
8 The government opposes the appointment of counsel on the basis that Claimant has not lived at  
9 the subject property for over three years. Moreover, the government alleges Claimant is  
10 financially able to pay for counsel as evidenced by the fact that she recently transferred  
11 approximately \$400,000.00 to accounts in Korea.

12 Claimant concedes that she has not lived at the residence since March 2008 when she  
13 moved to Korea. *See*, Declaration of Bok Hee Ee dated August 8, 2011 at ¶ 3. (Doc. 38 at pg. 3-  
14 4). She returned to the United States in March of 2011 and moved to her daughter’s house  
15 because she did not have any money. *Id.* Claimant alleges that while she was living in Korea she  
16 intended to return to the subject residence. *Id.* She left her belongings at the house and allowed  
17 a friend to stay there in her absence. *Id.* While she was gone, she kept the subject property as the  
18 address listed on all of her bank accounts, tax documents, and drivers license and she set up  
19 automatic payments to pay her monthly bills. *Id.* Claimant alleges that during her absence, her  
20 friend stole her identity including taking out credit cards her name and making deposits and  
21 withdrawals from her bank account. As a result, she has no money and her credit is ruined. *Id.*  
22 She has rented out the subject property because she did not have a car or the money to pay the  
23 mortgage when she returned to the United States. She is currently living with her daughter and  
24 caring for her grandchild, however, she intends to move back into the residence when she is  
25 financially able to do so. *Id.* at ¶¶ 4-5.

26 The issue in this case is whether the subject property can be considered Plaintiff’s  
27 primary residence in light of her extended absence from the residence. As noted by both parties,  
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1 there are no cases that define the term “primary residence” in the context of the CAFRA statute.  
2 However, the definition of this term in other contexts is instructive.

3 The term “primary residence” is a term of art. There are differing definitions in the Code  
4 of Federal Regulations depending on the agency interpreting this term, however, all appear to  
5 have the common theme that an individual must reside at the residence for a substantial portion  
6 of the year:

7 Primary residence means the dwelling where the mortgagor maintains his or her  
8 permanent place of abode and *typically spends the majority of the calendar year*.  
9 A mortgager can only have one primary residence.  
24 C.F.R. §§ 257.7 and 4001.07 (both relating to the Hope for Homeowners  
Program).

10 Primary residence means *the dwelling where the applicant normally lives during*  
11 *the major portion of the calendar year*, a dwelling which is required because of  
12 proximity to employment, or to agricultural activities as referenced in paragraph  
(c)(1)(ii) of this section.  
44 C.F.R. § 206.111 (relating to FEMA federal disaster assistance)

13 Claimant means a person who has occupied and used a cabin or other structure as  
14 a primary, permanent resident *for a substantial portion of the time*, and who, when  
15 absent, has the intention of returning to it as his/her primary permanent residence.  
16 Factors demonstrating a person’s primary residence include, but are not limited to,  
17 documentary evidence, e.g. the permanent address indicated on licenses issued by  
the State of Alaska and tax returns and the location where the person is registered  
to vote.  
36 C.F.R. 13.104 (relating to cabins in the National Park System)

18 Even under California law, a person is considered to be a resident if the individual is in  
19 the state for more than a temporary or transitory purpose. Cal. Rev. & Tax § 17014. A person  
20 who spends more than nine months in California shall be presumed to be a resident. Cal. Rev. &  
21 Tax § 17016. Conversely, any individual absent from the state for an uninterrupted period of at  
22 least 546 consecutive days under an employment related contract is considered outside this state  
23 for other than a temporary or transitory purpose. Cal. Rev. & Tax § 17014 (d). This exemption  
24 also applies to spouses who accompany their spouses for work purposes for at least 546  
25 consecutive days.

26 Claimant urges the Court to employ a multi-faceted test to determine this issue. She  
27 notes that other Courts have examined a variety of factors to define primary residence for the  
28 purposes of insurance litigation and have held that an analysis of the totality of the circumstances

1 is required. *See, State Farm Fire and Cas. Co v. Lange*, 2011WL 149482 at \* 5 (S.D. Tex. Jan  
2 18, 2011). Factors the courts have considered include : 1) how transient a person is, 2) how long  
3 he or she has resided in a residence, 3) where the person’s belongings are, 4) what address is  
4 listed on important documents, 5) whether a person rents or owns the property, 6) whether he or  
5 she plans to vacate the premises, 7) whether the residence is shared by others, 8) whether a blood  
6 relationship exists between the individual and the other people living in the residence, 9) whether  
7 the person has full and free access to the residence and its contents, and 10) the subjective views  
8 of others living at the residence. *Id.*

9           However, in *State Farm Fire and Cas. Co. v. Lange*, the Court noted that where a person  
10 spends the majority of time is the most important factor. *State Farm Fire and Cas. Co v. Lange*,  
11 2011WL 149482, at \* 6. Applying these factors to that case, the Court determined that Lange’s  
12 parent’s address could not be considered his primary residence when he had been living in an  
13 apartment for thirteen months. The Court made this determination despite the fact that Lange  
14 kept many of his belongings at his parent’s house, both he and his parents testified that his stay in  
15 the apartment was only temporary, and he had listed his parent’s address on a number of  
16 important documents. *Id.* In doing so, the Court noted that these facts were “not enough,  
17 however, to overcome the stronger evidence supporting a finding that [the apartment] was his  
18 primary residence, including the fact that he spent the majority of his time there. The Court has  
19 found no case in any jurisdiction where the term ‘primary residence’ was determined so as to  
20 afford coverage.” *Id.* Applying this reasoning to the instant case, the subject property can not be  
21 considered Plaintiff’s primary residence as she spent the majority of her time at another residence  
22 in Korea.

23           Finally, Claimant argues that the legislative history of CAFRA indicates that this Court  
24 has broad latitude when determining whether to appoint counsel. (Doc. 41 at pgs. 8-13). She  
25 cites several of the proposed versions of the statute that allowed for the representation of counsel  
26 even in cases where the property to be seized was not the primary residence. However, the fact  
27 that the enacted version of the statute is more limiting indicates that Congress clearly intended  
28 that appointment of counsel is to be granted only in cases where the subject property is the

1 primary residence. Even in the cases Claimant cited where counsel was appointed under  
2 CAFRA, the claimants spent some time during the year at the residence in question.

3 Here, Claimant has not resided at the property or even in the United States for over three  
4 years. Although she contends that she stored her belongings at the house and kept the address  
5 listed on several documents, she did not return to the residence when she came back to the  
6 United States. Instead, she rented the property out and is living with her daughter. While the  
7 Court is sympathetic to the circumstances influencing Claimant's decision to live with her  
8 daughter, she nevertheless does not qualify for appointment of counsel. Accordingly, the Motion  
9 to Appoint Counsel is DENIED.

10 Given the Court's finding regarding the Claimant's primary residence, it is not necessary  
11 to assess Claimant's ability to pay for counsel. It is noted however that the United States argues  
12 that Claimant transferred monies in the sum of approximately \$400,000.00 to Korea and she is  
13 therefore able to pay for counsel. The parties are advised that these facts were not considered.  
14 Although the government supplied a very organized graph of these transactions, it did not submit  
15 any evidence for the Court's review. As noted in this Court's previous order, the representations  
16 of counsel, without more, are not evidence.

#### 17 **IV. Motion for Extension of Time**

18 In light of the above, Claimant's request for an extension of time to file an answer is  
19 GRANTED. Plaintiff shall file her answer no later than **October 27, 2011**. A Scheduling  
20 Conference is scheduled for **November 1, 2011 at 9:30 am** before the undersigned in Courtroom  
21 10. The parties shall submit a joint scheduling conference statement that contains the information  
22 outlined in Judge Wanger's order dated February 22, 2011 (Doc. 4) no later than **October 26, 2011**.

#### 23 **V. Conclusion**

24 Based on the forgoing, IT IS HEREBY ORDERED that :

25 1) The Motion to Withdraw as counsel is GRANTED. Ms. Grantland shall provide Claimant  
26 with copies of the relevant materials from her case file no later than **September 30, 2011**;

27 2) The Motion to Appoint Counsel is DENIED;

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1 3) The Motion for an Extension of time is GRANTED in accordance with the deadlines set  
2 forth in this order.

3 Claimant is cautioned that she no longer has the assistance of an attorney and it is  
4 recommended that she seek further legal assistance. If Claimant does not retain another attorney to  
5 represent her, she is responsible for complying with all Court rules and applicable laws. **Failure to**  
6 **do so, or failing to comply with any order of this Court, including following the instructions**  
7 **outlined in this order, may result in sanctions including an entry of entry of judgment against**  
8 **her.**

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12 IT IS SO ORDERED.

13 **Dated: September 20, 2011**

**/s/ Gary S. Austin**  
UNITED STATES MAGISTRATE JUDGE