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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DONALD R. WHITMAN; CYNTHIA L.  
CHERRY, formerly known as CYNTHIA  
L. WHITMAN; WILLIAM RYAN  
FOWLER, in his capacity as Trustee of  
RUBY TRUST; WHITEWATER LLC;  
STATE OF CALIFORNIA FRANCHISE  
TAX BOARD,

Defendants.

No. 2:12-cv-2316-MCE-EFB

FINDINGS AND RECOMMENDATIONS

This case was referred to the undersigned pursuant to Eastern District of California Local Rule 302(c)(19) and 28 U.S.C. § 636(b)(1) for hearing on plaintiff's motion for entry of default judgment against Donald R. Whitman and Cynthia L. Cherry, formerly known as Cynthia L. Whitman ("Cherry"). ECF No. 35; *see also* ECF No. 1 (Compl.). The State of California Franchise Tax Board filed a statement of non-opposition. ECF No. 36. The other defendants have failed to file either oppositions or statements of non-opposition, as required by Eastern District of California Local Rule 230. *See* E.D. Cal. L. R. 230(c). For the following reasons, the application for entry of default judgment should be granted.

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1 I. BACKGROUND

2 On September 10, 2012, the United States filed a complaint against Donald R. Whitman,  
3 Cynthia L. Cherry, formerly known as Cynthia L. Whitman, and against Donald R. Whitman and  
4 Cynthia L. Whitman jointly to reduce tax assessments to judgment and to foreclose federal tax  
5 liens. Compl., ECF. No. 1. The complaint also named William Ryan Fowler, in his capacity as  
6 Trustee of Ruby Trust, Whitewater LLC, and the State of California Franchise Tax Board as  
7 defendants because they may claim some right, title, or interest in the real property that is the  
8 subject of this action. *Id.* ¶¶ 6-8.

9 This court has jurisdiction pursuant to 28 U.S.C. §§ 1340 and 1345 and 26 U.S.C.  
10 (Internal Revenue Code) §§ 7402 and 7403. *Id.* ¶ 3. Venue is proper in this district pursuant to  
11 28 U.S.C. § 1396 as defendants' 2004 joint federal income tax return was filed within this judicial  
12 district and because the federal tax liabilities at issue arose in this judicial district. *Id.* ¶ 4.

13 Defendants Donald R. Whitman and Cynthia L. Whitman, also known as Cindy Cherry  
14 (“taxpayers”) have been assessed, both separately and jointly, with unpaid federal income taxes.  
15 *Id.* ¶ 5. Defendants William Ryan Fowler, in his capacity as Trustee of Ruby Trust; Whitewater,  
16 LLC; and State of California Franchise Tax Board were made parties to the action because they  
17 may claim some right, title, or interest in the real property that is the subject of this action. *Id.*  
18 ¶¶ 6-8. The real property that is the subject of this foreclosure action (“Subject Property”)  
19 consists of six adjoining parcels of real property commonly referred to as “4276, 4304, and 4358  
20 Quincy-La Porte Road.” *Id.* ¶ 9. On August 9, 2000, Donald R. Whitman and Cynthia L. Cherry,  
21 then husband and wife, acquired the Subject Property for \$150,000 cash and titled the Subject  
22 Property in the name of Ruby Trust. *Id.* ¶ 10. Ruby Trust paid no consideration for the Subject  
23 Property. *Id.* ¶ 11. On November 29, 2005, the Subject Property was transferred to Defendant  
24 Whitewater LLC. *Id.* ¶ 12. Whitewater LLC paid no consideration for the Subject Property. *Id.*  
25 ¶ 13. Defendants William Ryan Fowler, as Trustee of the Ruby Trust, and Whitewater LLC are  
26 alter egos, nominees, or transferees of Defendants Donald R. Whitman and Cynthia L. Cherry,  
27 a.k.a. Cynthia Whitman. *Id.* ¶ 14.

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1           On February 9, 2012, the Internal Revenue Service recorded Notices of Federal Tax Liens  
2 with the Plumas County Clerk and Recorder against Cynthia Whitman, a.k.a. Cindy Cherry as the  
3 nominee, alter ego, or transferee of Donald Whitman of the Subject Property for federal income  
4 taxes assessed against Donald Whitman, and against Whitewater, LLC as the nominee or  
5 transferee of Cynthia Cherry, a.k.a. Cynthia Whitman, of the Subject Property for federal income  
6 taxes assessed against Cynthia Cherry, a.k.a. Cynthia Whitman. *Id.* ¶¶ 15, 17.

7           Plaintiff's first claim for relief seeks to reduce to judgment federal tax assessments  
8 individually against Donald R. Whitman in the amount of \$477,224.41 plus statutory interest and  
9 other statutory additions that continue to accrue as provided by law. *Id.* ¶¶ 18-21. The second  
10 claim for relief seeks to reduce to judgment federal tax assessments individually against Cynthia  
11 L. Cherry. *Id.* ¶¶ 23-25. The third claim for relief seeks to reduce to judgment federal tax  
12 assessments jointly against Donald R. Whitman and Cynthia L. Cherry in the amount of  
13 \$2,324.39. *Id.* ¶¶ 26-29. The fourth claim for relief seeks to establish that the Ruby Trust is a  
14 sham trust, *id.* ¶¶ 30-36, and the fifth claim for relief seeks to establish that Whitewater, LLC is  
15 the alter ego, nominee, or fraudulent transferee of the taxpayers, *id.* ¶¶ 37-42. The sixth claim for  
16 relief seeks to establish that Cynthia Whitman, a.k.a. Cindy Cherry, is the alter ego, nominee, or  
17 fraudulent transferee of Donald Whitman. *Id.* ¶¶ 43-45. The seventh claim for relief seeks to set  
18 aside the fraudulent transfers of the Subject Property. *Id.* ¶¶ 46-50. Finally, the eighth claim for  
19 relief seeks to foreclose federal tax liens against the Subject Property and to obtain an order for  
20 judicial sale. *Id.* ¶¶ 51-59.

21           On October 18, 2012, plaintiff filed a summons returned executed as to defendant  
22 Whitewater LLC, indicating that service was effected on October 3, 2012 by serving Judy Best,  
23 as the authorized agent for service on Whitewater LLC. ECF No. 5. On November 16, 2012,  
24 plaintiff filed a summons returned executed as to defendant William Ryan Fowler, as Trustee of  
25 the Ruby Trust, indicating that Mr. Fowler was personally served on November 7, 2012. ECF  
26 No. 8. On December 4, 2012, plaintiff filed a summons returned executed as to defendant Donald  
27 Whitman, indicating that Mr. Whitman was personally served on November 8, 2012. ECF No. 9.

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1 On December 31, 2012, plaintiff filed a summons returned executed as to defendant Cherry,  
2 indicating that service was effected on December 6, 2012, by leaving a copy of the complaint and  
3 summons at Cherry's dwelling house or usual place of abode at 905 North Pine Street in Truth or  
4 Consequence, New Mexico with a person of suitable age and discretion then residing therein  
5 (Jerry Trumbull). ECF No. 12.

6 All defendants failed to respond to respond to the complaint. Therefore, on December 4,  
7 2012, plaintiff requested entry of default against Whitewater, Fowler, and Mr. Whitman. ECF  
8 No. 10. Plaintiff also requested entry of default against Cherry on December 31, 2012. ECF No.  
9 13. Default was entered against all defendants. ECF Nos. 11, 14.

10 On February 22, 2013, plaintiff moved for default judgment against Cherry on Counts  
11 Two and Three of the Complaint. ECF No. 15. That motion was granted and default judgment  
12 was entered in favor of plaintiff and against Cherry in the amount of \$30,937.85 for Cherry's  
13 individual income tax liabilities, plus statutory interest from March 1, 2013 (Claim Two), and in  
14 the amount of \$2,324.39 for Cherry's 2004 joint federal income tax liabilities, plus statutory  
15 interest from March 1, 2013 (Claim Three). ECF Nos. 21, 29, 30.

16 On June 7, 2013, plaintiff moved for default judgment against Donald Whitman,  
17 Whitewater, William Fowler, as Trustee of the Ruby Trust, and Cynthia Cherry. ECF No. 22. In  
18 that motion, the United States sought default judgment against Mr. Whitman as to Counts One  
19 and Three of the complaint. Plaintiff also sought default judgment against William Ryan Fowler,  
20 in his capacity as Trustee of Ruby Trust and against Whitewater, LLC, as to Count Five of the  
21 complaint, as these entities are the nominees, alter egos, and/or fraudulent transferees of the  
22 Whitmans with respect to the Subject Property. The United States also requested entry of  
23 judgment against Cherry as to Count Six of the complaint, as Cherry is the nominee, alter ego,  
24 and fraudulent transferee of Mr. Whitman with respect to the Subject Property. In the alternative  
25 to the relief sought in Counts Four through Six, the United States requested entry of judgment as  
26 to County Seven and to set aside the fraudulent transfers of the Subject Property to Ruby Trust,  
27 Whitewater, LLC and Cynthia Cherry. ECF No. 22 at 2-3.

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1 On August 26, 2013, the court granted plaintiff's motion for default judgment in part. *See*  
2 ECF Nos. 28, 31. As to Count One of the complaint, default judgment was entered in favor of the  
3 United States and against Donald Whitman in the amount of \$486,853.17, plus accrued statutory  
4 interest from May 31, 2013, for individual income tax liabilities. As to Count Three, default  
5 judgment was entered in favor of the United States and against Donald Whitman in the amount of  
6 \$2,369.81 for Mr. Whitman's 2004 joint federal income tax liabilities, plus accrued statutory  
7 interest from May 31, 2013. As to Count Seven of the complaint, the court determined and  
8 adjudged that defendants Ruby Trust, Whitewater LLC, and Cynthia Cherry are the fraudulent  
9 transferees of Donald Whitman and Cynthia Cherry, and the purported transfer of the Subject  
10 Property was set aside and title returned in the name of Donald Whitman and Cynthia L. Cherry.  
11 The court also determined and adjudged that the United States has valid liens against all rights to  
12 property of Donald Whitman and Cynthia Cherry, including but not limited to the Subject  
13 Property.<sup>1</sup> *Id.*

14 Plaintiff now moves for default judgment against Donald Whitman and Cynthia Cherry as  
15 to Count Eight of the complaint, which seeks to foreclose federal tax liens against the Subject  
16 Property and to obtain an order for judicial sale. ECF No. 35.

## 17 II. DISCUSSION

### 18 A. Default Judgment Standard

19 It is within the sound discretion of the district court to grant or deny an application for  
20 default judgment. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In making this  
21 determination, the court considers the following factors:

22 (1) the possibility of prejudice to the plaintiff, (2) the merits of  
23 plaintiff's substantive claim, (3) the sufficiency of the complaint,  
24 (4) the sum of money at stake in the action, (5) the possibility of a  
25 dispute concerning the material facts, (6) whether the default was  
due to excusable neglect, and (7) the strong policy underlying the  
Federal Rules of Civil Procedure favoring decisions on the merits.

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26 <sup>1</sup> The relief sought in Count Seven was in the alternative to the relief sought in Counts  
27 Four through Six. Because the court found that plaintiff was entitled to relief on Count Seven, the  
28 court did not address plaintiff's entitlement to relief under Counts Four through Six. ECF No. 28  
at 11 n. 6.

1 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). “In applying this discretionary  
2 standard, default judgments are more often granted than denied.” *Philip Morris USA, Inc. v.*  
3 *Castworld Products, Inc.*, 219 F.R.D. 494, 498 (C.D. Cal. 2003) (quoting *PepsiCo, Inc. v.*  
4 *Triunfo-Mex, Inc.*, 189 F.R.D. 431, 432 (C.D. Cal. 1999)).

5 As a general rule, once default is entered, the factual allegations of the complaint are taken  
6 as true, except for those allegations relating to damages. *TeleVideo Systems, Inc. v. Heidenthal*,  
7 826 F.2d 915, 917-18 (9th Cir. 1987) (citations omitted). However, although well-pleaded  
8 allegations in the complaint are admitted by defendants’ failure to respond, “necessary facts not  
9 contained in the pleadings, and claims which are legally insufficient, are not established by  
10 default.” *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992).

11 B. Application of the *Eitel* Factors

12 The court finds that the majority of the *Eitel* factors support entering default judgment  
13 against defendants Donald Whitman and Cynthia Cherry. Both of these defendants have not  
14 answered the complaint or otherwise participated in this action, and plaintiff will suffer prejudice  
15 if default judgment is not entered. Specifically, plaintiff’s ability to collect the outstanding tax  
16 liabilities will be jeopardized if plaintiff is not permitted foreclose on its federal tax liens.

17 Furthermore, the merits of plaintiff’s substantive claim, the sufficiency of the complaint,  
18 and possibility of a dispute concerning the material facts all favor entry of default judgment. The  
19 IRS has been specifically authorized by Congress to collect outstanding federal tax liabilities. 26  
20 U.S.C. §§ 6321, 6322, 6331(a). In *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931), the  
21 Supreme Court held that “[t]he right of the United States to collect its internal revenue by  
22 summary administrative proceedings has long been settled.” See also *Commissioner v. Shapiro*,  
23 424 U.S. 614 (1976). Under 26 U.S.C. § 7401, the IRS authorizes the Department of Justice to  
24 institute proceedings seeking to collect or recover federal taxes. Section 7403(a) authorizes the  
25 United States to bring a civil action in district court to enforce a federal tax lien where a taxpayer  
26 has refused or neglected to pay any federal tax with respect to any such federal tax lien or to  
27 subject any property in which the taxpayer has any right, title, or interest to the payment of such  
28 federal tax or liability.

1 Section 7403(b) requires the United States to name as defendants in any action brought  
2 under § 7403(a) all persons who have liens upon or claim an interest in the property involved in  
3 any such action. 26 U.S.C. § 7403. Section 7403(c) provides that after all parties have been duly  
4 notified of any such action brought under § 7403, the court shall proceed to adjudicate all matters  
5 involved in any such action and finally determine the merits of all claims to and liens upon the  
6 property. Further, § 7403(c) provides that in all such actions wherein a claim or interest of the  
7 United States is established, the court may decree a sale of such property and a distribution of the  
8 proceeds of such sale according to the findings of the court as to the interests of the parties and  
9 the United States.

10 The court has already entered default judgment in favor of plaintiff and against Cynthia  
11 Cherry in the amount of \$30,937.85 for Cherry's individual tax liabilities. The court has also  
12 entered default against Cherry in the amount of \$2,324.39 for her 2004 joint federal income tax  
13 liabilities. ECF Nos. 21, 29. Default judgment has also been entered against Donald Whitman in  
14 the amount of \$486,853.17 for individual tax liabilities and \$2,369.21 for his 2004 joint federal  
15 income tax liabilities. Furthermore, the court set aside the fraudulent transfer of the Subject  
16 Property to defendants Ruby Trust, Whitewater LLC, and Cynthia Cherry. Finally, the court has  
17 already adjudged that the United States has valid lien against all property and right to property of  
18 Donald Whitman and Cynthia Cherry, including but not limited the Subject Property. ECF Nos.  
19 28, 31. For the same reasons previously relied on by the court, the United States is entitled to  
20 foreclose the federal tax liens upon the Subject property and obtain an order of judicial sale of the  
21 real property.

22 Furthermore, it is clear that defendants' defaults were not due to excusable neglect. Both  
23 Mr. Whitman and Cherry have been served with the complaint and summons, as well as the  
24 instant motion for default judgment and defendants' prior motions for default judgment. *See* ECF  
25 Nos. 9, 12, 15, 22. Although the amount at stake in this action is significant and there is a strong  
26 policy favoring decisions on the merits, those factors do not preclude entry of default. *See, e.g.,*  
27 *Elektra Entm't Group, Inc. v. Crawford*, 226 F.R.D. 388, 393 (C.D. Cal. 2005). Therefore, the  
28 court finds that the *Eitel* factors weigh in favor of granting the motion for default judgment.

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III. CONCLUSION

Accordingly, it is hereby RECOMMENDED that:

1. Plaintiff’s motion for default judgment, ECF No. 35, be granted;
2. As to Count Eight of the complaint, default judgment be entered in favor of the United States and against Donald R. Whitman and Cynthia L. Cherry, and that the United States’ tax liens encumbering the real property at issue be foreclosed; and
3. The court approve plaintiff’s proposed order of sale attached to plaintiff’s motion for default judgment, ECF No. 35-2.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections within the specified time may waive the right to appeal the District Court’s order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

Dated: March 4, 2014.

  
EDMUND F. BRENNAN  
UNITED STATES MAGISTRATE JUDGE