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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Marcus Labertew aka Mark Labertew and)
Jane Doe Labertew, husband and wife;)
10 John McDermott aka Jack McDermott and)
Jennifer McDermott, husband and wife,)

No. CV 13-01785-PHX-DGC

REPORT AND RECOMMENDATION

11)
Plaintiffs/Judgment Creditors,)

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vs.)

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Loral Langemeier,)

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Defendant/Judgment Debtor.)

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Chartis Property Casualty Company,)
17 otherwise known as AIG Casualty)
Company, and 21st Century North)
18 America Insurance Company, formerly)
known as American International)
19 Insurance Company,)

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Garnishees.)

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TO THE HONORABLE DAVID G. CAMPBELL, UNITED STATES DISTRICT JUDGE;

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This matter arises on Garnishees Chartis Property Casualty Company, otherwise known as AIG Casualty Company, and 21st Century North America Insurance Company, formerly known as American International Insurance Company's (together "Garnishees") Notice of Lodging Judgment Pursuant to A.R.S. §12-1581(A). (Doc. 9.) Plaintiffs/Judgment Creditors (hereinafter "Plaintiffs") filed a Response, (Doc. 17), and Garnishees filed a Reply (Doc. 18). The matter was referred to this Court by presiding District Court Judge Campbell on December 9, 2013. (Doc. 19.)

1 **BACKGROUND**

2 On March 11, 2010, Plaintiffs filed a Complaint in the Maricopa County Superior
3 Court of Arizona against Fred R. Auzenne and Loral Langemeier (hereinafter the “state
4 litigation”). (Doc. 1-1, at 2.) The matter proceeded to trial, but settled before completion,
5 and on May 30, 2013, the parties entered into a stipulated judgment in favor of Plaintiffs on
6 their claims of defamation, false arrest, false imprisonment and malicious prosecution, and
7 tortious interference with contractual relations against Defendant Loral Langemeier
8 (“Defendant/Judgment Debtor” in this litigation) in the amount of \$1,500,000.00 with post-
9 judgment interest. (Doc. 1-16, at 9, 27-28.) The remaining claims and defendants were
10 dismissed. (Id., at 10-27.)

11 On July 29, 2013, Plaintiffs filed Applications for Writs of Garnishment, and
12 corresponding Writs of Garnishment, against Garnishees in state court, seeking to recover
13 on the stipulated judgment. (Doc. 1-16, at 31- 55.) The applications asserted that Plaintiffs
14 had reason to believe that Garnishees were indebted to Plaintiffs for non-earnings.¹
15 Plaintiffs asserted that Defendant/Judgment Debtor had tendered her defense to the
16 complaint in the state litigation to Garnishees, notifying Garnishees of the Complaint and
17 providing excerpts from Plaintiff McDermott’s deposition in which he claimed to have
18 suffered a stroke as a result of Defendant/Judgment Debtor’s actions. (Id., at 32.) Plaintiffs
19 assert that Garnishees denied insurance coverage “without seeking any additional
20 information from [Defendant/Judgment Debtor] or her representatives,” and “owed a duty
21 to defend her from all potentially covered claims alleged in the [state litigation].” (Id.)

22 As part of this settlement in the state litigation, Plaintiffs asserted that
23 Defendant/Judgment Debtor “assigned her claims against Garnishees to Plaintiffs pursuant
24 to *Damron v. Sledge*, 105 Ariz. 11, 460 P.2d 997 (1969)” (hereinafter “Damron
25 Agreement”). (Doc. 1-1, at , at 33.) The claims assigned, according to Plaintiffs, included
26 claims that “Garnishees failed to timely and properly investigate the claims against
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28 ¹The applications for Writs for Garnishment were filed against the two Garnishees separately, and contained the same language.

1 [Defendant/Judgment Debtor]; improperly denied coverage; failed to comply with the
2 reasonable expectations of [Defendant/Judgment Debtor]; failed to investigate the duties it
3 owed under the insurance policies; failed to adequately communicate with and/or advise
4 [Defendant/Judgment Debtor] regarding the policies; failed to give equal consideration to
5 the interests of [Defendant/Judgment Debtor]; failed to consider the applicable authority
6 addressing the relevant issues; failed to satisfy its obligations, *inter alia*, to defend and
7 indemnify [Defendant/Judgment Debtor]; and violated state and federal law related to unfair
8 claims handling practices.²” (Id.)

9 Garnishees then removed the matters to federal court based upon diversity of
10 jurisdiction. (Do. 1, at 1-7.) On September 4, 2013, Garnishees filed their Answers to the
11 Writs of Garnishment. (Docs. 6-7.) In their Answers, Garnishees denied being indebted to
12 or otherwise being in possession of monies belonging to Defendant/Judgment Debtor. (Id.)
13 On September 11, 2013, Garnishees filed a Demand for Jury Trial. (Doc. 8.) On October
14 1, 2013, Garnishees filed a Notice of Lodging Judgment Pursuant to A.R.S. § 12-1581(A),
15 requesting therein that the Court lodge judgment in favor of Garnishees in light of no timely
16 written objection by Plaintiffs to their Answers, as “mandated by Arizona law.” (Doc. 9,
17 at 2.)

18 **APPLICABLE LAW**

19 A.R.S. §12-1581(A) provides that any party having an objection to the answer of a
20 garnishee has ten days to file a written objection and request for hearing. “[I]f no written
21 objection to the answer is timely filed, the court shall enter judgment discharging the
22 garnishee.” Since Plaintiffs did not file an objection and timely request for hearing within
23 ten days of the filing of Garnishees’ Answers (and have not as of this date), Garnishees
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25 ²Garnishees deny being put on adequate notice of the state litigation, asserting that
26 counsel for Defendant/Judgment Debtor, after 3-years of litigation and 40-days before trial,
27 finally tendered a letter to Garnishees that contained various documents filed in the state
28 litigation. (Doc. 18, at 2.) Garnishees assert that they began an investigation into the claim,
but that before their investigation was completed, Plaintiffs and Defendant/Judgment Debtor
entered into the Damron Agreement. (Id.)

1 argue that the Court must enter judgment in their favor. Garnishees also cite Moody v.
2 Lloyd's of London, 61 Ariz. 534 (1944) in support of their assertion. In Moody, the
3 Arizona Supreme Court held that “garnishment is strictly a statutory proceedings and all
4 pleadings under it must be in accordance with the statute.” 61 Ariz. at 540 (construing
5 Arizona Code 1939 §25-209, now A.R.S. §12-1581, which provided that when the answer
6 of a garnishee is not controverted, the court must enter judgment discharging the garnishee).

7 Plaintiffs argue in their response that, once this garnishment action was removed to
8 federal court, the Federal Rules of Civil Procedure govern the time limits, not the state court
9 garnishment procedures, “for Answers and Replies to Answers.” (Doc. 17, at 3.) Plaintiffs
10 cite Granny Goose Foods, Inc. v. Brotherhood of Teamsters, et al., 415 U.S. 423 (1974),
11 Wallace v. Microsoft Corp., 596 F.3d 703, 706 (10th Cir. 2010), Richard v. Harper, 864
12 F.2d 85, 87 (9th Cir. 1988), and Beecher v. Wallace, 381 F.2d 372 (9th Cir. 1967), in
13 support of its position.

14 The Supreme Court’s decision in Granny Goose Foods, Inc., does not support
15 Plaintiffs’ sweeping proposition that the Federal Rules of Civil Procedure, not the state court
16 garnishment statutes apply once a case is removed to federal court. The case did not involve
17 a garnishment proceeding, but a restraining order that was issued by the state court, and the
18 question of whether or not a federal statute was intended to allow state-issued injunctions
19 to remain in effect longer than that intended under state law. 415 U.S. at 423. The Court
20 found that it did not, and that the restraining order should remain in effect no longer than
21 the time period provided by the state rule, but in any event no longer than the time
22 limitations imposed by the federal rule, measured from the date of removal. Id., at 439-440.

23 The Ninth Circuit decisions in Richards and Beecher likewise have very little
24 applicability here. The Court in Harper analyzed the applicability of the federal rules to
25 service of process, and announced, generally, that “[a]fter removal, federal rather than state
26 law governs the course of the later proceedings.” 864 F.2d at 87. The Court in Beecher also
27 discussed the interplay between state and federal rules relating to service of process, and
28 held that when a defendant has never been served process prior to removal, the federal court

1 can not “complete” the state process, but must issue new process pursuant to the federal
2 rules. Beecher, 381 F.2d at 373. The 10th Circuit case cited by Plaintiffs also involved a
3 service of process issue similar to Beecher, and in fact cited Beecher as authority in reaching
4 the same conclusion. Wallace, 596 F.3d at 707.

5 Plaintiffs also argue that a Damron case can be litigated in federal court as a bad faith
6 and breach of contract case, a declaratory judgment proceeding, or as a garnishment
7 proceeding. Although the cases cited by Plaintiffs in support of this assertion are cases in
8 which the appellate court was reviewing Damron agreements in the context of a breach of
9 contract case³, a declaratory judgment proceeding⁴, and a garnishment proceeding⁵, the fact
10 remains that Plaintiffs filed this action as a garnishment proceeding. Plaintiffs cite no
11 authority for the proposition that a garnishment proceeding is similar enough in substance
12 to the other forms of action, to be treated as such. For instance, there are many federal rules
13 that apply to civil actions initiated by a civil complaint, that have no applicability to writs
14 of garnishment.

15 Plaintiffs argue that the removal to federal court “brought into play F.R.Civ.P. 81(c)
16 and (c)(2),” that states in pertinent part:

17 (c) Removed Actions.

18 (1) Applicability. **These rules apply to a civil action after it is
19 removed from a state court.**

20 (2) Further Pleading. After removal, repleading is unnecessary unless
21 the court orders it. A defendant who did not answer before removal must
22 answer or present other defenses or objections under these rules within the
23 longest of these periods:

(A) 21 days after receiving ... a copy of the initial pleading stating the
claim for relief;

24 ³Lozier v. Auto Owners Ins. Co., 951 F.2d 251 (9th Cir. 1991)(case originally brought
in state court as a bad faith and breach of contract action and then removed to federal court).

25 ⁴Safeway Ins. Co., Inc. v. Botma, 2003 WL 24100783 (D.Ariz. 2003) (insurance
26 company filed declaratory action in federal court alleging insured breached insurance policy
27 by entering into Damron agreement).

28 ⁵Thomas v. Liberty Mut. Ins. Co., 173 Ariz. 322; 842 P.2d 1335 (App. 1992) (state
garnishment action filed against insurance company to enforce Damron agreement).

1 (B) 21 days after being served with the summons for an initial pleading
2 ...; or (C) 7 days after the notice of removal is filed.
3 (emphasis added by Plaintiffs).

4 Plaintiffs argue this rule supports their assertion that that the Federal Rules of Civil
5 Procedure, not state garnishment statutes, apply to this action. Plaintiffs also cite
6 Fed.R.Civ.P. 7(a), which sets forth which pleadings are allowed in federal court. A reply
7 to an answer is allowed “if the court orders one.” Fed.R.Civ.P. 7(a)(7). Plaintiffs assert that
8 once this case was removed to federal court, “[they] were entitled to assume that this
9 Damron case would proceed under the federal rules as a regular ‘civil action,’ and were not
10 required to replead their action as a bad faith/breach of contract action in order for it to be
11 treated as such.” (Doc. 17, at 6.)

12 Garnishees, in their Reply, argue that the federal rules cited by Plaintiffs have no
13 application to garnishment proceedings. A “reply” as contemplated by Fed.R.Civ.P. 7(a)(7)
14 does not equate to an objection and request for a hearing in response to an answer to a writ
15 of garnishment. (Doc. 18, at 4.) A “reply” as defined in Black’s Law Dictionary is, “[i]n
16 federal practice, the plaintiff’s response to the defendant’s counterclaim.” (Id., at 4.)
17 Furthermore, Garnishees assert, the Federal Rules of Civil Procedure specifically
18 contemplate deferring to state law to enforce both state and federal judgments. For instance,
19 Fed.R.Civ.P. 64(a) & (b) provides as follows:

20 (a) Remedies Under State Law - In General. At the commencement of and
21 throughout an action, every remedy is available that, under the law of the state where the
22 court is located, provides for seizing a person or property to secure satisfaction of the
23 potential judgment. But a federal statute governs to the extent it applies.

24 (b) Specific Kinds of Remedies. The remedies available under this rule include the
25 following - however designated and regardless of whether state procedure requires an
26 independent action:

- 27 arrest;
- 28 attachment;
- garnishment;
- replevin;
- sequestration; and
- other corresponding or equivalent remedies.

1 Fed R. Civ. P. 69(a)(1) also provides as follows with respect to money judgments:

2 Money Judgment; Applicable Procedure. A money judgment is enforced by a writ
3 of execution, unless the court directs otherwise. The procedure on execution - and in
4 proceedings supplementary to and in aid of the judgment of execution - must accord with
the procedure of the state where the court is located, but a federal statute governs to the
extent it applies.

5 Citing this rule, the Ninth Circuit Court of Appeals has held that the analysis of execution
6 proceedings in federal court begins with an analysis of state law, and that federal rules may
7 apply to the extent they conflict directly with state rules. Hilao v. Estate of Ferdinand E.
8 Marcos, 95 F.3d 848, 851-853 (9th Cir. 1996) (“California’s requirements for service ...are
9 not preempted by, but instead supplement [Fed.R.Civ.P.] 4.1” and are thus applicable).
10 Also, at least one Arizona District Court, citing Rule 69(a) found that “[t]he validity of the
11 writ of garnishment is governed by Arizona law.” Wojtunik v. Kealy, 2009 WL 805816 *2
12 (D. Ariz. 2009).

13 This Court finds Plaintiffs’ arguments unpersuasive. The authority they cite simply
14 does not support their conclusion that A.R.S. § 12-1581(A) has no applicability once a state
15 garnishment action is removed to federal court. Furthermore, Plaintiffs’ argument that this
16 garnishment action should proceed like any civil action ignores the federal rules specific to
17 garnishment, and additionally, makes little practical sense. Plaintiffs claim that they still
18 had time, pursuant to Fed.R.Civ.P. 81(c) to file a “Reply” contemplated by Fed.R.Civ.P.
19 7(a). Rule 7(a), however, provides that only the following pleadings are allowed: a
20 complaint, an answer to a complaint, an answer to a counterclaim designated as a
21 counterclaim, an answer to a crossclaim, a third-party complaint and an answer to a third-
22 party complaint. There is no mention in that rule of an “answer to a writ of garnishment.”

23 Furthermore, Rule 3, Federal Rules of Civil Procedure provides that “[a] civil action
24 is commenced by filing a complaint with the court.” A garnishment proceedings is
25 commenced by the filing for an application for writ of garnishment. See, A.R.S. §12-1572.
26 On its face, Fed.R.Civ.P. 81(c) is specific to civil actions ... “[a]fter removal, repleading is
27 unnecessary unless the court orders it. **A defendant who did not answer before removal**
28 **must answer or present other defenses or objections under these rules within the longest of**

1 these periods ...” Fed. R.Civ.P. 81(c)(2) (emphasis added). At best, this rule may be
2 applicable in garnishment proceedings to the extent that there are motions pending at the
3 time of removal, such that the time period for a response would be extended. Here,
4 Garnishees filed their Answers after removal.

5 Although Plaintiffs are correct that a Damron agreement may be litigated in a civil
6 action, a garnishment proceeding, or by way of a declaratory judgment proceeding,
7 Plaintiffs chose to proceed by way of garnishment. Plaintiffs argue that they should not
8 have to “replead” their case as a civil action, suggesting that the proceedings are
9 substantially the same. On the contrary, they are dissimilar in many respects. Garnishment
10 proceedings are, by statute, conducted without a jury. A.R.S. §12-1584(E)(2003). They are
11 also intended to be expedited. A.R.S. §12-1580(E)(2003). Garnishment is considered to
12 be a “harsh remedy,” justifying strict adherence to statutory requirements. Robert W. Irwin
13 Co. v. Sterling, Inc., 14 F.R.D. 250, 254 (W.D.Mich. 1953). The Arizona legislature
14 “enact[ed] a statutory scheme designed to protect [an innocent] garnishee from unnecessary,
15 oppressive and extended litigation.” DeSuno v. Safeco Ins. Co. of America, 118 Ariz. 553,
16 554; 578 P.2d 634, 635 (App. 1978).

17 In addition, in several District Court cases in Arizona, A.R.S. §12-1581(A) has been
18 found applicable in federal garnishment proceedings. See, Reidhead v. Meyers, 2013 WL
19 6118699 (D.Ariz. 2013); Essex Music, Inc. v. Sonora Clarement, Inc., 2012 WL 78196
20 (D.Ariz. 2012); Dittmar v. Thunderbird Collection Specialists, Inc., 2008 WL 4369268
21 (D.Ariz. 2008); Carpenters Southwest Administrative Corp. v. Lone Cactus Const., 2008
22 WL 1994939 (D. Ariz. 2008).

23 In violation of A.R.S. §12-1581(A), Plaintiffs did not file an objection and request
24 for hearing within 10 days after Garnishees filed their Answers. To this day, over four
25 months later, Plaintiffs have still not filed an objection and request for hearing. For all of
26 the above reasons, this Court will recommend that Garnishees’ Notice of Lodging Judgment
27 Pursuant to §12-1581(A) be granted, and that judgment be entered discharging the
28 Garnishees.

