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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Martin Arnaudov, et al.,
10 Plaintiffs,

No. MC-16-00085-PHX-MTL

ORDER

11 v.

12 California Delta Mechanical Incorporated, et
13 al.,

14 Defendants.

15 Pending before the Court is Magistrate Judge Michael T. Morrissey's Report and
16 Recommendation ("R&R") (Doc. 43).¹ Also pending before the Court are
17 Plaintiffs/Judgment Creditor's Motion to Strike (Doc. 63) and Todor Kitchukov/Judgment
18 Debtor's Motion to Certify Question to the Arizona Supreme Court (Doc. 65). The Court
19 rules as follows.

20 **I. BACKGROUND**

21 This case originated in the U.S. District Court for the Northern District of California.
22 (Doc. 1 at 1.) Plaintiffs ("Judgment Creditors") sued Todor Kitchukov, as President and
23 CEO of California Delta Mechanical, Inc., for violations of the Fair Labor Standards Act
24 ("FLSA") and the California Labor Code. *Arnaudov v. California Delta Mech., Inc.*, No.
25 13-CV-02306 NC, 2013 WL 4082310, at *1 (N.D. Cal. Aug. 9, 2013).² The parties reached

26 ¹ Both parties have fully briefed the issues and oral argument would not have aided the
27 Court's decisional process. *See Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998); *see*
28 *also* LRCiv 7.2(f); Fed. R. Civ. P. 78(b). Moreover, Judgment Debtor and Judgment
Creditors appeared before the Magistrate Judge for oral argument in the garnishment
hearing. (Doc. 32.)

² Judgment Creditors have filed a request for this Court to take judicial notice of the (1)

1 a settlement agreement in 2015, and the California District Court entered a judgment
2 against Kitchukov (“Judgment Debtor”) personally in the amount of \$1,563,343.61. (Doc.
3 1 at 1–3.) In October 2016, the Plaintiffs registered the judgment with the District of
4 Arizona under 28 U.S.C. § 1963. (Doc. 1, Doc. 1-1).

5 In January 2021, the Judgment Creditors requested that the Court issue several Writs
6 of Garnishment in their favor. (Docs. 2, 4, 6, 8, 10, 12, 14, 16.) The Clerk of Court issued
7 the Writs (earnings and non-earnings). (Docs. 3, 5, 7, 9, 11, 13, 15, 19.) Six of the seven
8 non-earning garnishees subsequently answered or notified the Judgment Creditors that they
9 did not hold personal property belonging to the Judgment Debtor. (Docs. 20–23, 25.) Only
10 one non-earning garnishee, Comerica Bank, answered that it owed the Judgment Debtor
11 \$9,195.38; it withheld \$8,795.38 pursuant to the Writ.³ (Doc. 25.) Judgment Debtor filed
12 an Objection and Request for Hearing on Garnishment. (Doc. 28.) Judgment Debtor
13 argued that the Comerica Bank account was community property, held by both Judgment
14 Debtor and his wife, Marianna Kitchukov. (*Id.*)

15 II. LEGAL STANDARD

16 This Court “may accept, reject, or modify, in whole or in part, the findings or
17 recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). When reviewing a
18 Magistrate Judge’s Report and Recommendation, the Court must “make a de novo
19 determination of those portions of the report . . . to which objection is made,” and “may
20 accept, reject, or modify, in whole or in part, the findings or recommendations made by the
21 magistrate judge.” 28 U.S.C. § 636(b)(1)(C); *see also Baxter v. Sullivan*, 923 F.2d 1391,
22 1394 (9th Cir. 1991) (citing *Britt v. Simi Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th

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Complaint and (2) amended Complaint in the California action, (3) the California Superior Court docket, (4) an Arizona Superior Court minute entry, (5) a Deed of Trust filed in Nevada, (6) pleadings in a related Nevada case, and (7) Delta Mechanical Inc.’s annual report. (Doc. 57.) The Judgment Creditors do not indicate why the Court should take judicial notice of these documents beyond the fact that they are matters of public record. (*See id.* at 2–3.) The Court has discretion to take judicial notice of facts not subject to reasonable dispute, *United States ex rel. Hong v. Newport Sensors, Inc.*, 728 F. App’x 660, 661 (9th Cir. 2018), but declines to do so here.

³ Delta Mechanical, an earning garnishee, also answered that it employed the Judgment Debtor and the total amount owed to the Judgment Creditors is \$1,220,191.42. (Doc. 54 at 2).

1 Cir. 1983)).

2 **III. ANALYSIS**

3 **A. Procedural History of the R&R**

4 The Magistrate Judge held a garnishment hearing in February 2021 and issued a
5 Report and Recommendation (“R&R”) recommending overruling Judgment Debtor’s
6 objection to the Writ of Garnishment issued pertaining to the Comerica bank account .
7 (Doc. 32, Doc. 43 at 1, 3, *see also* Doc. 5.) Judgment Debtor’s argument was that the bank
8 account is held jointly by both him and his spouse, Mariana Kitchukov (“Spouse”), as
9 community property, and under Arizona law, the account cannot be garnished. (Doc. 43
10 at 1.)

11 After considering the parties’ position statements and arguments at the hearing, the
12 Magistrate Judge concluded that Ninth Circuit precedent supports overruling Judgment
13 Debtor’s objection. (*Id.* at 2–3.) The Magistrate Judge concluded that *Gagan v. Sharar*,
14 376 F.3d 987 (9th Cir. 2004) is directly on point, because in both cases, a judgment from
15 another judicial district was registered in Arizona pursuant to Section 1963, only one
16 spouse was named in the initial action, and the Judgment Creditors could not have sued the
17 other spouse in the underlying action. (*Id.* at 4.) The Magistrate Judge was unpersuaded
18 by Judgment Debtor’s efforts to distinguish *Gagan* and thus concluded that Judgment
19 Creditors did not voluntarily omit Spouse from the California action; in fact, including
20 Spouse in the original action would have invited Rule 11 sanctions against Judgment
21 Creditors (the “Catch-22” scenario described in *Gagan*). 376 F.3d at 990, *see 11601*
22 *Wilshire Assoc. v. Grebow*, 64 Cal. App. 4th 456 (Cal. Ct. App. 1998); *see also Reynolds*
23 *and Reynolds Co. v. Universal Forms, Labels & Syst., Inc.*, 965 F. Supp. 1392, 1395 (C.D.
24 Cal. 1997). (Doc. 43 at 5.) Moreover, the Magistrate Judge found that Judgment Debtor
25 identified no tangible, material harm to Spouse from the Judgment Debtor’s litigation in
26 California, nor any defect with the judgment under California law, and Spouse waived the
27 right to contest notice of the California action at the Garnishment hearing. (*Id.* at 6.) As
28 such, Spouse’s due process rights were not violated by Judgment Debtor’s representation

1 of the community. (*Id.* at 5–6.) The objection is fully briefed.⁴

2 Judgment Debtor argues (1) the R&R conflates Spouse’s consent to proceed with
3 the garnishment hearing with a waiver to be heard in the California action; (2) Judgment
4 Creditors could have and should have added Spouse to the California action; and (3) A.R.S.
5 § 12-544(3) bars the enforcement of the action against Spouse and the community. (Doc.
6 55.) Spouse likewise filed an objection (Doc. 73) which is also fully briefed. The Court
7 reviews *de novo* the objected-to portions of the R&R. 28 U.S.C. § 636(b)(1).

8 **B. Spouse’s Consent**

9 Judgment Debtor first argues that the R&R conflates Spouse’s consent to proceed
10 with the garnishment hearing with a waiver of her right to be heard in the 2013 California
11 action. (Doc. 55 at 2–3.) He contends that the Magistrate’s question of whether Spouse
12 “has had notice of these proceedings” and counsel’s affirmative response was a
13 miscommunication; instead, Spouse only intended to consent to proceed with the 2021
14 garnishment hearing. (Doc. 55 at 3.) But the transcript, in context, contradicts this
15 position, and shows that Spouse knew or should have known the full scope of her consent.
16 (Doc. 46 at 4.) At the hearing, the Magistrate Judge stated:

17 THE COURT: Okay. So one of my questions at the outset has
18 been whether or not Mrs. Kitchukov has had notice of these
19 proceedings, because in the creditor’s statement they indicate
20 that Mrs. Kitchukov regularly accompanied Mr. Kitchukov to
proceedings in California, which is interesting but not
necessarily dispositive of notice. . . . So is Miss – is it your
position that Miss Kitchukov has had notice of this?

21 . . .

22 MR. MAEROWITZ: I appeared on behalf of Mrs. Kitchukov
23 back in 2006 and 2007. When this case was brought to me,
24 apparently the only – the briefing asked for Todor Kitchukov,
so I got permission from Mr. Kitchukov to raise the issues on
behalf of the wife. So in reality – so we will not object that she
25 did not get notice, because *I would have been her counsel*. I

26 ⁴ Judgment Debtor filed a reply (Doc. 60), though one is not provided for under Rule 72,
without leave of the Court. *See* Fed. R. Civ. P. 72(b)(2). Judgment Creditors filed a motion
27 to strike the reply. (Doc. 63.) Judgment Debtor argues that he had good cause to file a
reply, given the “misunderstanding of events and arguments raised in the Objection.”
28 (Doc. 66 at 2.) Though the Judgment Creditors are correct that a reply is generally not
permitted in this situation (*see* Doc. 43 at 7), in the Court’s discretion, the Motion to Strike
is denied.

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would have appeared on her behalf.

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THE COURT: Okay. And I don't want to put anybody on the spot, but it's going to expedite these proceedings significantly if I don't have to set a second hearing where we would know whether or not Mrs. Kitchukov wished to intervene. So, Mr. Maerowitz, can you confer with your client? Because if it's acceptable to them, I am going to ask Mrs. Kitchukov to confirm that she has had notice . . .

MR. MAEROWITZ: Yes. That's one of the reasons we asked her to be here, because we realized that there was that procedurally. . . . I confirmed with my client, and if you'd like my client – Mrs. Kitchukov can state that we're prepared to waive notice, and that I have authority to raise arguments on her behalf also.

THE COURT: Okay. Mrs. Kitchukov, is that accurate?

MRS. KITCHUKOV: Yes.

(Doc. 46 at 4:13–6:9) (emphasis added).

Counsel for Spouse and Judgment Debtor submitted a declaration stating that he believed the foregoing exchange to apply only to the Garnishment Hearing held that day. (Doc. 55-3.) But here, the counsel referenced his representation of Spouse dating back to 2006 and 2007 (a decade before the conclusion of the California litigation, and 15 years before the date of the Garnishment Hearing), and the Magistrate Judge explicitly tied “these proceedings” to the “proceedings in California” which would be “interesting but not necessarily dispositive of notice” (Doc. 46 at 4:14–18). In the context that Judgment Debtor now posits—the Spouse waived her consent only to proceed with the 2021 garnishment hearing—the above conversation does not make sense. The Court therefore rejects the objection and adopts the R&R’s conclusion that the Spouse waived the right to contest notice of the California action at the garnishment hearing. (Doc. 43 at 6.)

Moreover, under Arizona and federal law, a non-party spouse must be given an opportunity to challenge the enforcement of the judgment against the community assets in Arizona. *Gagan*, 376 F.3d at 992; *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Greene*, 195 Ariz. 105, 11, ¶ 23 (App. 1999). As such, the Court notes that Spouse has entered a

1 motion to intervene in this case (Doc. 59) which has been granted (Doc. 71), personally
2 appeared at the garnishment hearing (Doc. 46) and filed multiple motions and objections
3 to this litigation (Docs. 72, 73). Thus, her opportunity to challenge the enforcement of the
4 judgment against the community has been adequately achieved.

5 **C. Adding Spouse to California Action**

6 Judgment Debtor and Spouse both argue that A.R.S. § 25-215(D) requires Spouse
7 to be “joined and given the opportunity to defend” the California action. (Doc. 55 at 7,
8 Doc. 73 at 8) Additionally, they argue that garnishment violates Spouse’s substantive due
9 process rights. (Doc. 55 at 7.)

10 The Magistrate Judge concluded Judgment Creditors demonstrated “a Catch-22”
11 situation, whereby asserting spousal liability in the underlying California case would have
12 invited Rule 11 sanctions under California law, but omitting the spouse violates A.R.S.
13 § 25-215(D). (See Doc. 43 at 4–5, referencing *Gagan*, 376 F.3d at 987.) Judgment Debtor
14 asserts that Spouse could have been added to the underlying California suit using the
15 procedure outlined in *Reynolds and Reynolds*, 965 F. Supp. at 1397–98. (Doc. 55 at 3–4).
16 Judgment Creditors contend first that *Gagan* applies even when the Catch-22 situation does
17 not exist, but nonetheless, this is a Catch-22 situation as contemplated by *Gagan*. (Doc.
18 56 at 7.)

19 Under A.R.S. § 25-215, when a spouse has acted for the benefit of the community
20 and therefore incurred a debt, “the spouses shall be sued jointly,” and the debt shall be
21 satisfied out of the community property. A.R.S. § 25-215(D). In contrast, under California
22 law, it is generally not necessary to name both spouses in litigation in order to bind the
23 community estate. *Reynolds and Reynolds*, 965 F. Supp. at 1396. Though it is
24 “permissible” to name non-wrongdoing spouses solely as representatives of the community
25 estate, which would then allow the court to dismiss those spouses, as the Judgment Debtor
26 suggests, it is not *necessary* to join non-wrongdoing spouses for litigation in California to
27 proceed. *Id.* at 1396–97; *see also* Cal. Fam. Code § 910 (“[T]he community estate is liable
28 for a debt incurred by either spouse before or during marriage . . . regardless of whether

1 one or both spouses are parties . . . to a judgment for the debt.”)

2 Moreover, Spouse had every right to join the California action, either cooperatively
3 or by moving to intervene. *See Stuart v. City of Scottsdale*, No. CV-20-00755-PHX-JAT,
4 2021 WL 3675220, at *5 (D. Ariz. Aug. 19, 2021). Spouse does not argue that she was
5 unaware of the California action, but rather, she argues that she was unaware of the specific
6 issue of the marital community’s liability in the California action. (Doc. 73 at 4.) She
7 contends that she had “no knowledge of the need to defend the community” because “all
8 discussions, documents, and agreements pertained to [Judgment Debtor] individually.”
9 (Doc. 73 at 5.) But this argument is unconvincing—Judgment Debtor makes no assertions
10 that he litigated the California action using only separate property, nor does Spouse. (*See*
11 *id.*) Moreover, Spouse’s—and therefore, the community’s—interest in the outcome of the
12 California action was the same as Judgment Debtor’s, which is the success or failure of the
13 claims broadly. *Oyakawa v. Gillett*, 175 Ariz. 226, 229 (App. 1993) (“No evidence
14 suggests that [Judgment Debtor] failed to protect any community interests or that his
15 interests were so unrepresentative of the community’s interest that the judgment unfairly
16 harmed the community.”).

17 Finally, Judgment Debtor and Spouse argue that *C & J Travel Inc. v. Shumway*, 161
18 Ariz. 33 (App. 1989) is the controlling case, and *Gagan* is not applicable. (Doc. 55 at 8.)
19 As an initial matter, *Gagan*, 379 F.3d 987 (9th Cir. 2004) is binding precedent on this
20 Court, while *Shumway* is not.

21 The crux of Judgment Debtor’s argument regarding *C & J Travel* is that its holding
22 must apply when “a creditor seeks to enforce a foreign judgment against a spouse who was
23 not named in the foreign action *and* was a resident of Arizona at the time the judgment was
24 entered.” (Doc. 55 at 8, emphasis in original.) While Judgment Debtor is correct that in *C*
25 *& J Travel*, the Spouse was not a party to the foreign action, nowhere in the opinion does
26 the court discuss Mrs. Shumway’s residency at the time the judgment was entered, let alone
27 rely on her residency as part of its analysis. *See* 161 Ariz. at 34–35 (explaining that
28 “although Robin Shumway was not a party to the New Hampshire judgments filed in

1 Arizona, she was married to David Shumway when the creditors' cause of action arose and
2 the judgments were obtained in New Hampshire”).

3 But unlike *C & J Travel*, the *Gagan* Court specifically noted that the Judgment
4 Debtor and Spouse in that case “lived in Arizona at all relevant times.” 376 F.3d at 989
5 (punctuation omitted). Therefore, *Gagan* is even more applicable than *C & J Travel* by
6 Judgment Debtor’s own standard. Accordingly, under that standard, and as the Magistrate
7 Judge found:

8 a federal judgment from a district other than the District of
9 Arizona, registered under § 1963, in which only one spouse
10 was named in the underlying action, may nevertheless be
11 executed on the community property of both spouses, in
12 Arizona, if the judgment is for a community obligation, despite
13 failure to name the other spouse in the action filed outside
14 Arizona.

15 *Gagan*, 376 at 992. Judgment Debtor and Spouse’s objections are overruled.

16 **D. A.R.S. § 12-544(3)**

17 Judgment Debtor raises an argument, for the first time in his Objection to the R&R,
18 that Arizona requires foreign judgments to be enforced within a four-year period. (Doc.
19 55 at 6, Doc. 73 at 9–10.) Because this argument was not raised before the Magistrate
20 Judge, the Court will exercise its discretion and not consider it. *United States v. Howell*,
21 231 F.3d 615, 622 (9th Cir. 2000) (“To require a district court to consider evidence not
22 previously presented to the magistrate judge would effectively nullify the magistrate
23 judge’s consideration of the matter and would not help to relieve the workload of the
24 district court.”) *Anna Ready Mix, Inc. v. N.E. Pierson Const. Co., Inc.*, 747 F.Supp. 1299,
25 1302 (S.D. Ill. 1990) (“[I]t would be fundamentally unfair to permit a litigant to set its case
26 in motion before the magistrate, wait to see which way the wind was blowing, and—having
27 received an unfavorable recommendation—shift gears before the district judge.”)

28 **F. Motion to Certify Question**

Judgment Debtor and Spouse move to certify a question to the Arizona Supreme
Court that they define as: “Whether a foreign judgment entered against one spouse may be

1 satisfied from community assets?” (Doc. 65 at 1–2, Doc. 72.) The Court may use its
2 discretion to make a certification decision. *See White v. Celotex Corp.*, 907 F.2d 104, 106
3 (9th Cir. 1990). If the Court chooses to rule it “must predict how the highest state court
4 would decide the issue using intermediate appellate court decisions, decisions from other
5 jurisdictions, statutes, treatises, and restatements as guidance.” *Arizona Elec., Power*
6 *Coop. v. Berkeley*, 59 F.3d 988, 991 (9th Cir.1995). Therefore, the Court looks to factors
7 such as the complexity of the issue, the availability of precedent from lower courts or other
8 jurisdictions, and the magnitude of disagreement on the issue to determine whether
9 certification is appropriate. *See id.*; *Rigden v. United States*, 795 F.2d 727, 735 n.6 (9th
10 Cir. 1986).

11 Certification is not necessary in this case because a number of Ninth Circuit, District
12 of Arizona, and Arizona Court of Appeals cases guide this Court’s analysis. *See Gagan v.*
13 *Sharar*, 376 F.3d 987 (9th Cir. 2004); *Stuart v. City of Scottsdale*, No. CV-20-00755-PHX-
14 JAT, 2021 WL 3675220 (D. Ariz. Aug. 19, 2021); *Oyakawa v. Gillett*, 175 Ariz. 226 (App.
15 1993); *Nat’l Union Fire Ins. Co. v. Greene*, 195 Ariz. 105 (App. 1999). Moreover, the
16 enforceability of an out-of-state judgment against a non-debtor spouse is not a complex
17 issue. As such, Judgment Debtor’s Motion for Certification is denied.

18 **IV. CONCLUSION**

19 Accordingly,

20 **IT IS ORDERED** that the Report and Recommendation (Doc. 43) is **accepted**,
21 accordingly, Judgment Debtor’s objection to the Writ of Garnishment (Doc. 5) as to
22 Comerica Bank is **overruled**.

23 **IT IS FURTHER ORDERED denying** Plaintiffs’ Motion to Strike (Doc. 63.)

24 **IT IS FURTHER ORDERED denying** Plaintiffs’ Request for Judicial Notice.
25 (Doc. 57.)

26 **IT IS FINALLY ORDERED denying** Todor Kitchukov’s Motion to Certify
27 Question to the Arizona Supreme Court (Doc. 65) and Mariana Kitchukov’s Joinder in the
28 same (Doc. 73).

Dated this 26th day of January, 2022.

Michael T. Liburdi

Michael T. Liburdi
United States District Judge

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