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8 IN THE UNITED STATES DISTRICT COURT

9 EASTERN DISTRICT OF CALIFORNIA

10
11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 MICHAEL JAMES BRADY,

15 Defendant and Debtor.

16
17 BP3 GLOBAL INCORPORATED,
18 (and its Successors and Assignees)

19 Garnishee.

Case No. 1:22-mc-00053-EPG
Criminal Case No. 1:00-CR-05345-AWI

ORDER DIRECTING CLERK OF COURT TO
ASSIGN A DISTRICT JUDGE

FINDINGS AND RECOMMENDATIONS
RECOMMENDING GRANTING, IN PART,
REQUEST FOR FINAL ORDER OF CONTINUING
GARNISHMENT

(ECF No. 9)

TWENTY-ONE DAY DEADLINE

20 Currently pending before the Court is the United States' request for findings and
21 recommendations regarding issuance of a final garnishment order against the nonexempt disposable
22 earnings of the Defendant and Judgment Debtor, Michael James Brady (Defendant) from his employer,
23 BP3 Global Incorporated. (ECF No. 9). The matter was referred to the undersigned pursuant to 28
24 U.S.C. § 636(b)(1)(B) and Local Rule 302(c)(7).

25 **I. BACKGROUND**

26 In December 2001, Defendant was sentenced on six counts for violations of 18 U.S.C. § 1341
27 and 18 U.S.C. § 2, mail fraud and aiding and abetting, receiving a total term of 33 months in prison, to
28 be followed by 36 months of supervised release. (*United States v. Brady*, Case No. 1:00-cr-05345-AWI

1 (ECF No. 13, pp. 1-3)). As part of his judgment, he was ordered to pay a statutory assessment of
2 \$600.00 and \$165,732.66 in restitution. (*Id.* at 5).

3 In December 2021, in an attempt to collect money still owed, the United States filed an
4 application for a writ of continuing garnishment against Defendant's nonexempt earnings from
5 Plaintiff's former employer, Windstream Services II, LLC. (*United States v. Brady*, Case No. 1:21-mc-
6 00133-DAD-BAM (ECF No. 1)). Ultimately, the District Judge issued an order granting a writ of
7 continuing garnishment in March 2022, approving a 10% surcharge of \$14,137.29 in addition to the
8 judgment balance of \$141,372.92. (*Id.* (ECF No. 14)). However, on April 12, 2022, the United States
9 requested, and the District Judge later entered on April 19, 2022, an order terminating the continuing
10 garnishment because Defendant was no longer employed by Windstream Services II, LLC. (*Id.* (ECF
11 Nos. 16, 17)).

12 On April 11, 2022, the United States filed the instant application for a writ of continuing
13 garnishment against Defendant's nonexempt earnings from Plaintiff's current employer, BP3 Global
14 Incorporated (the Garnishee). (ECF No. 1). The United States asserts that as of April 11, 2022,
15 Defendant still owes \$138,084.80, plus the \$14,137.29 surcharge that was approved in *United States v.*
16 *Brady*, Case No. 1:21-mc-00133-DAD-BAM, seeking a total of \$152,222.09.

17 The Clerk of Court issued the writ of garnishment on April 13, 2022. (ECF No. 4). The United
18 States served Defendant with copies of the writ and related documents on the same day. (ECF No. 5).
19 The documents served on Defendant advised him, among other things, of his right to claim exemptions
20 to garnishment and request a hearing. (*See* ECF Nos. 5-1, 5-4).

21 The Garnishee filed its acknowledgement of service and answer on April 28, 2022, identifying
22 the applicable pay period and amount of disposable earnings for Defendant. (ECF No. 6). The Garnishee
23 served the acknowledgement of service and answer on Defendant on April 28, 2022. (*Id.*).

24 The United States now seeks a final order of garnishment pursuant to § 3205(c)(7) of the Federal
25 Debt Collections Procedure Act (FDCPA), 28 U.S.C. §§ 3001, *et seq.*, against 25% of Defendant's non-
26 exempt disposable earnings from the Garnishee. (ECF No. 9).

27 **II. DISCUSSION**

28 Pursuant to the Mandatory Victims Restitution Act, the United States may enforce a judgment

1 imposing a fine, including restitution, in accordance with the practices and procedures for enforcing a
2 civil judgment under the FDCPA. *United States v. Mays*, 430 F.3d 963, 965, n.2 (9th Cir. 2005). The
3 FDCPA sets forth the “exclusive civil procedures for the United States . . . to recover a judgment on. . .
4 an amount that is owing to the United States on account of . . . restitution.” *Id.* at 965 (quoting 28
5 U.S.C. §§ 3001(a)(1), 3002(3)(B)).

6 The FDCPA permits the Court to “issue a writ of garnishment against property (including
7 nonexempt disposable earnings) in which the debtor has a substantial nonexempt interest and which is in
8 the possession, custody, or control of a person other than the debtor, in order to satisfy the judgment
9 against the debtor.” 28 U.S.C. § 3205(a). “Disposable earnings” is defined as “that part of earnings
10 remaining after all deductions required by law have been withheld.” 28 U.S.C. § 3002(5). “Nonexempt
11 disposable earnings,” in turn, “means 25 percent of disposable earnings, subject to section 303 of the
12 Consumer Credit Protection Act.” 28 U.S.C. § 3002(9). “Several courts have explained that 25% is the
13 maximum figure, and not a mandatory amount.” *United States v. Masten*, No. C 10-80230 CRB JCS,
14 2011 WL 5975132, at *2 (N.D. Cal. Jan. 3, 2011), *report and recommendation adopted*, No. C 10-
15 80230 CRB, 2011 WL 5974974 (N.D. Cal. Nov. 29, 2011). Additionally, “the United States is entitled
16 to recover a surcharge of 10 percent of the amount of the debt in connection with the recovery of the
17 debt, to cover the cost of processing and handling the litigation and enforcement . . . of the claim for
18 such debt.” 28 U.S.C. § 3011(a).

19 The United States is required by the FDCPA to provide the judgment debtor with notice of the
20 commencement of garnishment proceedings. 28 U.S.C. § 3202(b). The judgment debtor then has twenty
21 days after receipt of the notice to request a hearing. *Id.* After the garnishee files an answer, and if no
22 hearing is requested within the required time period, the Court must promptly enter an order directing
23 the garnishee as to the disposition of the judgment debtor’s property. 28 U.S.C. § 3205(c)(7).

24 Here, Defendant’s nonexempt disposable earnings are subject to garnishment under the FDCPA.
25 *See* 28 U.S.C. § 3205(a). The United States provided Defendant with notice of the garnishment
26 proceedings on April 13, 2022. (ECF No. 5). The documents served on Defendant advised him of his
27 rights to claim exemptions and request a hearing. (*Id.*) Defendant was further advised of the applicable
28 deadlines for exercising these rights under the FDCPA. (*Id.*) Neither Defendant nor any other person

1 filed any exemption claims, objections, requests for hearing, or other response in this garnishment action
2 and their time to do so has now expired. Pursuant to 28 U.S.C. § 3205(c)(7), as no hearing was requested
3 during the applicable time period, the Court will recommend that an order issue directing the Garnishee
4 as to the disposition of Defendant’s nonexempt disposable wages.

5 The United States also seeks to recover a total surcharge of \$14,137.29 as previously ordered in
6 *United States v. Brady*, Case No. 1:21-mc-00133-DAD-BAM. (Docs. 1, 9.) The FDCPA provides that
7 the United States is entitled to recover a litigation surcharge “of 10 percent of the amount of the debt in
8 connection with the recovery of the debt.” 28 U.S.C. § 3011(a). A defendant’s criminal monetary
9 penalties, including the assessment, fine, and restitution, all constitute “debt” as defined by the FDCPA.
10 28 U.S.C. § 3002(3)(B). The debt recovery action must be one that arises under the FDCPA’s pre-
11 judgment remedies or post-judgment remedies. 28 U.S.C. § 3011(a); see *United States v. Sackett*, 114
12 F.3d 1050, 1053 (10th Cir. 1997). The government’s garnishment action here is a qualifying post-
13 judgment remedy under 28 U.S.C. § 3205. Subject to exclusions not relevant here, § 3011 provides that
14 the recoverable surcharge amount is 10% of the debt sought to be collected. 28 U.S.C. § 3011(a)
15 (addressing writs of garnishments).

16 The United States is entitled to a surcharge on the amount of the debt sought to be collected.
17 However, the Court does not believe that the United States is entitled to \$14,137.29. Notably, while that
18 amount was previously ordered in *United States v. Brady*, Case No. 1:21-mc-00133-DAD-BAM (ECF
19 No. 14), that 10% surcharge was based off a greater judgment balance \$141,372.92, as opposed to
20 \$138,084.80 now owed, and the district judge later terminated the final order for writ of garnishment
21 that awarded that amount. The United States has presented no authority that it may seek a previously
22 awarded surcharge in an order that was subsequently terminated, especially when the new amount
23 sought is lesser than the original amount that the surcharge was based on.¹

24 Because, as of April 11, 2022, Defendant owes restitution in the amount of \$138,084.80, the
25 Court will recommend authorizing a surcharge totaling \$13,808.48, representing 10% of the amount of
26 the debt.

27
28 ¹ The United States may present supplemental authority on this issue in its objections if it so chooses.

1 **III. ORDER AND RECOMMENDATIONS**

2 Accordingly, the Clerk of the Court is directed to assign a District Judge to this action. Further,
3 IT IS ORDERED that the United States is directed to serve a copy of these findings and
4 recommendations on the Garnishee and Defendant and file proof of such service within seven (7) days
5 of entry of these findings and recommendations.

6 Based on the foregoing, IT IS RECOMMENDED that:

7 1. The United States' Request for Findings and Recommendations for Final Order of
8 Continuing Garnishment be GRANTED, in part;

9 2. Garnishee BP3 Global Incorporation be directed to pay the Clerk of the United States
10 District Court twenty-five percent (25%) of Michael James Brady's ongoing and non-exempt disposable
11 earnings, including, but not limited to wages, earnings, commissions, and bonuses;

12 3. Garnishee BP3 Global Incorporation be directed to pay the Clerk of the United States
13 District Court the amount of non-exempt disposable earnings, including, but not limited to wages,
14 earnings, commissions, and bonuses, already withheld as a result of the writ, within fifteen (15) days of
15 the filing of the Final Order. Payment shall be made in the form of a cashier's check, money order, or
16 company draft, made payable to the "Clerk of the Court" and delivered to:

17 United States District Court, Eastern District of California
18 Office of the Clerk
19 501 I St., Rm. 4-200
20 Sacramento, CA 95814

21 The criminal docket number (1:00-CR-05345-AWI) shall be stated on the payment instrument;

22 4. The United States' request to recover a \$14,137.29 litigation surcharge after satisfaction
23 of the judgment in the criminal case be denied, but the United States be instead authorized to recover
24 \$13,808.48.

25 5. After the restitution is paid in full, Garnishee BP3 Global Incorporation shall pay the
26 litigation surcharge to the United States Department of Justice via a single payment within twenty (20)
27 days of the garnished wages accumulating to the \$13,808.48 surcharge amount, and send the payment in
28 the form of a cashier's check, money order, or company draft made payable to "United States
Department of Justice," and delivered to:

1 U.S. Department of Justice
2 Nationwide Central Intake Facility
3 P.O. Box 790363
4 St. Louis, MO 63179-03673

5 The payment instrument shall state “CDCS Number 2022A41591” on the face of the payment
6 instrument;²

7 6. The Court shall retain jurisdiction to resolve matters through ancillary proceedings in the
8 case, if necessary; and

9 7. The garnishment shall terminate when (1) the United States seeks to terminate the writ or
10 (2) when the judgment amount and litigation surcharge are fully satisfied.

11 These findings and recommendations are submitted to the United States District Judge assigned
12 to the case pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one (21) days, after being
13 served with these findings and recommendations, any party may file written objections with the court
14 and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s
15 Findings and Recommendations.” Failure to file objections within the specified time may waive the
16 right to appeal the District Court’s order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez*
17 *v. Ylst*, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

18 IT IS SO ORDERED.

19 Dated: May 25, 2022

20 /s/ Eric P. Groj
21 UNITED STATES MAGISTRATE JUDGE

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27 ² The Court notes that in *United States v. Brady*, Case No. 1:21-mc-00133-DAD-BAM (ECF No. 9-1, p. 2), the
28 United States provided the following address—U.S. Bank Government Lockbox, Attn: DOJ Production
Manager/Box 790363, 1005 Convention Plaza, SL-MO-C2G1, St. Louis, MO 63101—and the United States
provided the following CDCS Number— 2002A55594.