

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

AUGUSTINE FALLAY,  
Plaintiff,  
  
v.  
  
CITY AND COUNTY OF SAN  
FRANCISCO, et al.,  
  
Defendants.

Case No. [08-cv-02261-CRB](#) (JCS)

**ORDER DENYING MOTION FOR  
WITHHOLDING ORDER**

Re: Dkt. No. 257

**I. INTRODUCTION**

Defendants and judgment creditors First American Specialty Insurance Company, Cindy Lloyd, and Robert Dalton (collectively, “FASIC”) move for issuance of a withholding order against the earnings of Zainab K. Fallay to satisfy a judgment against her spouse, Plaintiff Augustine Fallay. The case has been referred to the undersigned magistrate judge for issues of post-judgment collection. *See* 1st Order of Reference (dkt. 219); 2d Order of Reference (dkt. 276). The Court held a hearing on August 25, 2016, and thereafter took supplemental briefing. For the reasons discussed below, the motion is DENIED.

**II. BACKGROUND**

This order assumes the parties’ familiarity with the long history of this case and FASIC’s attempts to collect its judgment against Augustine Fallay. Following briefing by FASIC and Augustine Fallay on the present motion, Zainab Fallay submitted a letter to the Court stating that she and her husband had separated, and noted that the recent death of their son—a United States military veteran who committed suicide after an honorable discharge—left her in a state where she did not feel she could attend hearings in this case at that time. *See* July 13, 2017 Letter (dkt. 263). The Court continued the hearing to August 25, 2016, at which time Augustine Fallay and counsel for FASIC appeared, but Zainab Fallay did not. *See* Order Continuing Hearing (dkt. 264); Civil

1 Minute Order (dkt. 265). FASIC filed a letter the following week indicating that the parties were  
2 unable to resolve the dispute and requesting that the Court rule on the motion. *See* Sept. 1, 2017  
3 Letter (dkt. 266).

4 Recognizing that it had misstated the law regarding separation of spouses at the hearing,  
5 the Court issued an order to show cause on September 1, 2017, identifying the current standard  
6 under California law as looking no longer to whether the two spouses are “living separately and  
7 apart,” but instead to whether there has been ““a complete and final break in the marital  
8 relationship,”” as indicated by one spouse having ““expressed to the other spouse his or her intent  
9 to end the marriage”” and exhibiting conduct consistent with that intent. Order to Show Cause  
10 (dkt. 267) (quoting Cal. Fam. Code § 70). Because the record at that time contained only unsworn  
11 statements regarding the status of Augustine Fallay and Zainab Fallay’s marriage, however, the  
12 Court ordered the parties to show cause why the motion should not be granted by submitting  
13 sworn declarations. *Id.*

14 On September 19, 2017, Zainab Fallay filed a notarized response to the order to show  
15 cause setting forth a number of facts that she “declare[d] . . . to be true.” Zainab Fallay’s 1st  
16 Response (dkt. 269). FASIC filed a brief two days later arguing that Zainab Fallay’s response was  
17 not sworn—and thus failed to meet the instructions of the order to show cause—and that the facts  
18 included therein failed to demonstrate separation within the meaning of Family Code section 70.  
19 FASIC Response (dkt. 270). Zainab Fallay filed a revised response on September 25, 2017  
20 including substantially similar factual assertions, but now stating that she “declare[s] *under*  
21 *penalty of perjury*” the following facts to be true:

- 22 1. That we are currently separated, and were hardly on a speaking  
23 terms until the death of our son.
- 24 2. That I know nothing about the said insurance company in  
25 question, Mr. Fallay’s involvement with it predated my migration to  
26 this country from Germany in 2000.
- 27 3. Mr. Fallay has nothing to do with my work and/or my wages.  
28 Indeed he does not even know where I work. We had a joint account  
but closed it when we separated.
4. Mr. Fallay has nothing to do with money, and I have nothing to  
do with his. I have my separate account.

1 5. I also have nothing to do with his law suit or case. I don't know  
2 the nature and/or the details of it. I have never been to his trials,  
except the day of his acquittal at the state court in 2007.

3 6. I expect nobenefit [sic] from his law suit.

4 7. Yes, we live in the same house, but I sleep on the top floor and  
5 he sleeps downstairs.

6 Zainab Fallay's Revised Response (dkt. 272) (capitalization altered; emphasis added). Zainab  
7 Fallay also attached a California appellate court decision that she believed to be "very similar to  
8 this case." *Id.* (attaching *11601 Wilshire Assocs. v. Grebow*, 64 Cal. App. 4th 453 (1998)).  
9 FASIC objects to the revised response as untimely, not meeting the requirements for a declaration  
10 under penalty of perjury set forth in 28 U.S.C. § 1746, and not evincing a complete break in the  
11 marital relationship. FASIC Objection (dkt. 274). FASIC also argues that the *11601 Wilshire*  
12 decision is not applicable to the case at hand. *Id.*

13 **III. ANALYSIS**

14 **A. Form of Declaration**

15 FASIC objects to Zainab Fallay's revised response as untimely and as not satisfying the  
16 Court's request for a sworn declaration under penalty of perjury, citing 28 U.S.C. § 1746. FASIC  
17 Obj. at 2. Because the revised response is substantially similar to Zainab Fallay's initial response  
18 except to correct the apparent oversight of failing to state that her declaration is under penalty of  
19 perjury, the Court excuses the late filing. As for § 1746, that statute provides in relevant part that  
20 where "any matter is required . . . to be supported, evidenced, established, or proved by [a] sworn  
21 declaration . . . such matter may, with like force and effect, be supported, evidenced, established,  
22 or proved by [an] unsworn declaration," so long as the declaration is "subscribed by[the  
23 declarant], as true under penalty of perjury, and dated, in *substantially* the following form:"

24 If executed within the United States, its territories, possessions, or  
25 commonwealths: "I declare (or certify, verify, or state) under  
26 penalty of perjury that the foregoing is true and correct. Executed on  
(date).  
(Signature)".

27 28 U.S.C. § 1746 (emphasis added).

28 Zainab Fallay introduced the declaratory portion of her revised response as follows: "I

1 declare under penalty of perjury the following to be true to the best of my belief in regards with  
2 my relationship with Mr. [Augustine] Fallay.” Zainab Fallay’s Revised Response at 1. The  
3 revised response includes a date (albeit at the beginning of the document) and concludes with  
4 Zainab Fallay’s signature. *Id.* at 1, 2. In the context of this case, where Zainab Fallay is a pro se,  
5 non-attorney, nonparty litigant, the Court concludes that her signed statement that she declares  
6 certain facts to be true under penalty of perjury satisfies § 1746’s requirement of taking  
7 “substantially” the form specified therein.

8 **B. Motion for Withholding Order**

9 Under Rule 69 of the Federal Rules of Civil Procedure, a money judgment is enforced by a  
10 writ of execution. “The procedure on execution—and in proceedings supplementary to and in aid  
11 of judgment or execution—must accord with the procedure of the state where the court is located,  
12 but a federal statute governs to the extent it applies.” Fed. R. Civ. P. 69(a)(1). California law  
13 provides that the wages of a spouse during marriage are generally community property, and a  
14 judgment creditor may move for a court to issue a withholding order against a judgment debtor’s  
15 spouse. *See* Cal. Fam. Code § 760; Cal. Civ. Proc. Code §§ 695.020(a), 706.109. Earnings after  
16 spouses have separated, however, are separate property and therefore cannot be reached to satisfy  
17 the other spouse’s debts. Cal. Fam. Code §§ 771(a), 913(b)(1).

18 Augustine Fallay testified at a judgment debtor examination in November of 2016 that he  
19 and Zainab Fallay have been married since 2000. Chatowski Decl. (dkt. 257-3) Ex. C at 76:8–11.  
20 Zainab Fallay’s most recent response to the Court’s order to cause, however, states under penalty  
21 of perjury that she and Augustine Fallay are currently separated, and includes specific factual  
22 assertions to support that conclusion: (1) that she and Augustine Fallay “were hardly on speaking  
23 terms until the death of [their] son,” Zainab Fallay’s Revised Response ¶ 1; (2) that Augustine  
24 Fallay does not know where she works, *id.* ¶ 3; (3) that she and Augustine Fallay closed their joint  
25 bank account when they separated and currently “have nothing to do with” each other’s money, *id.*  
26 ¶¶ 3–4; and (4) that although they live in the same house, they sleep on different floors, *id.* ¶ 7.  
27 There is no evidence in the record to refute the contention that Zainab Fallay and Augustine Fallay  
28 have separated. The record therefore reflects that both spouses’ conduct “is consistent with [their]

1 intent to end the marriage,” and it is reasonable to infer from these facts, taken together and in the  
2 absence of evidence to the contrary, that at least one spouse at some point expressed his or her  
3 intent to end the marriage. *See* Cal. Civ. Code § 70.

4 **IV. CONCLUSION**

5 The Court finds that Zainab Fallay and Augustine Fallay have separated, and does not  
6 reach the parties’ remaining arguments. Because the parties have separated, Zainab Fallay’s  
7 wages are her separate property, and are not subject to withholding to satisfy a judgment against  
8 Augustine Fallay. FASIC’s motion for issuance of a withholding order is DENIED.

9 **IT IS SO ORDERED.**

10 Dated: November 6, 2017

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13 JOSEPH C. SPERO  
14 Chief Magistrate Judge

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