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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BAY AREA PAINTERS AND TAPERS
PENSION TRUST FUND AND ITS JOINT
BOARD OF TRUSTEES, et al.,

Plaintiffs,

v.

TORBEN HANSEN ENTERPRISES, INC.,

Defendant.

Case No. [14-cv-00182-WHO](#)

**ORDER TO DETERMINE CLAIM OF
EXEMPTION**

Re: Dkt. No. 32, 22

INTRODUCTION

Defendant Torben Hansen Enterprises, Inc. (“Torben”) is a judgment debtor of plaintiffs Bay Area Painters and Tapers Pension Trust Fund and its Joint Board of Trustees, et. al (collectively “Bay Area Painters”). In an effort to collect on the judgment, Bay Area Painters levied an account opened by Torben. The issue before me is whether that account was exempt under the anti-alienation provision of Employment Retirement Income Security Act of 1974 (“ERISA”). Because I find that because the account was set up in the ERISA plan’s name and contained plan assets as part of the winding up of the plan, the account was exempt. Bay Area Painters’ motion for an order determining that the account was not exempt is DENIED.

PROCEDURAL BACKGROUND

On May 8, 2015 a Writ of Execution, Notice of Levy, and Memorandum of Garnishee (collectively the “Levy”) were served on U.S. Bank, N.A., defendant Torben and judgment debtor Philip Sadler. Russell Decl. ¶2 [Dkt. No. 33]. The Levy notified the levying officer to levy any and all accounts or safe deposit boxes in any and all branches of U.S. Bank in the names of Torben or Sadler, “including joint accounts in the names of any of the above-named judgment debtors and 3rd persons, alone or with other 3rd persons, pursuant to Cal. Probate Code § 15304(a), until writ

1 amount of \$184,879.53, plus \$25.33 p/d interest from 4/4/15, is satisfied.” *Id.* ¶3, Ex. A. In
2 response to the Levy, U.S. Bank released a total of \$62,014.21 to plaintiffs Bay Area Painters. *Id.*

3 On July 30, 2015, Bay Area Painters was notified by the United States Marshals Service
4 that a claim of exemption had been filed, claiming that \$55,380.09 of the funds (“the Disputed
5 Funds”) released pursuant to the Levy were from a profit sharing account and therefore exempt
6 from the Levy. *Id.* ¶5. On August 10, 2015 Bay Area Painters filed a Notice of Motion for an
7 Order to Determine Claim of Exemption. Dkt No. 21. On the day before the hearing, Torben filed
8 a Reply in Support of Claim of Exemption, Dkt. No. 27, explaining the basis of its claim. In light
9 of that explanation, I ordered the parties to meet and confer regarding the Disputed Funds and to
10 either file a notice of agreement or renew the motion. After an exchange of letters and
11 documentation between the parties, Bay Area Painters renewed their motion on November 3,
12 2015. Mot. [Dkt. No. 32]. I heard argument on December 16, 2015.

13 **FACTUAL BACKGROUND**

14 Torben Hansen Enterprises Inc. Profit Sharing Plan (“the Plan”), a profit sharing plan
15 governed by the Employment Retirement Income Security Act of 1974 (“ERISA”), was
16 established on November 1, 1989 and restated on November 1, 2013. Sadler Decl. ¶3 [Dkt. No.
17 41]. The Plan’s assets were made up of annuities purchased on behalf of Plan participants and
18 held in a pooled account with Northwestern Mutual. *Id.* ¶7. On or about October 31, 2014, Sadler
19 hired Associated Pension Consultants (“APC”) to assist with bringing the Plan into compliance,
20 filing delinquent Form 5500s, and obtaining a federal Employer Identification Number (“EIN”) on
21 the Plan’s behalf. *Id.* ¶9. Using the EIN, Sadler opened a U.S. Bank account (the “Account”) for
22 the Plan. *Id.* ¶14. Sadler declared that he opened the Account in his capacity as Plan Trustee, for
23 the Plan in the Plan’s name, using the Plan’s EIN “for the purposes of holding Plan’s assets for
24 final distribution to Plan participants, who were former employees of Torben, and for paying Plan
25 expenses.” *Id.* A bank document describes the Account as a “Silver Business Checking” account,
26 owned by a corporation in the construction business. *Id.* ¶15, Ex. I. The Account is entitled
27 “Torben Hansen Enterprises, Inc. Profit Sharing Plan” and lists the account holder as “Philip W
28 Sadler, JOO.” *Id.*

1 and used for retirement purposes.” Cal. Civ. Proc. Code § 704.115. The “exemption claimant,”
2 here Torben, has the burden of proof. Cal. Civ. Proc. Code § 703.580.

3 “[I]t is well settled that a private retirement plan is not exempt by mere virtue of its name.”
4 *In re Phillips*, 218 B.R. 520, 522 (N.D. Cal. 1998) (internal citations and quotation marks
5 omitted). “The Ninth Circuit has interpreted the statute as requiring that a retirement plan be
6 “designed and used” for retirement purposes.” *Id.* “[T]he question is whether the plan is used
7 *principally* for retirement purposes.” *In re Jacoway*, 255 B.R. 234, 239 (B.A.P. 9th Cir. 2000)
8 *aff’d*, 284 F.3d 1323 (9th Cir. 2002) (emphasis in original). In order to make this determination,
9 the court should consider certain factors including: (1) “whether withdrawals or loans were made
10 following the procedures set out in the plan;” (2) “whether the debtor used the plan to hide
11 otherwise ineligible assets from bankruptcy administration...or creditors;” (3) “whether the
12 withdrawals or loans benefited the plan's retirement purpose by preserving and enhancing the
13 capital of the plan;” and (4) “whether any withdrawals diminished or will diminish the assets in
14 the plan to such an extent that they are inconsistent with the majority of the assets being used for
15 long-term retirement purposes.” *Id.* at 239-40. (internal citations, modifications, and quotation
16 marks omitted). However, all factors are relevant and “a court is not limited to considering only
17 those factors previously considered by other California and federal courts.” *In re Rucker*, 570
18 F.3d 1155, 1162 (9th Cir. 2009).

19 There is no dispute that the Plan is a profit sharing plan. Opp. at 5 [Dkt. No. 37]; Reply at
20 1 [Dkt. No. 42]. At issue is whether the Disputed Funds retained their exempt status when they
21 were transferred from the Northwestern Mutual pooled account to the Account. Bay Area Painters
22 argues that the Levied Funds are not exempt as they were not from a profit sharing account nor
23 treated as profit sharing plan assets. Mot. at 6. Torben replies that because the Account was
24 opened in the name of the Plan to aid in the administration of the Plan and the funds in the
25 Account were transferred from Hansen’s Northwestern Mutual account, a Plan asset, the Levied
26 Funds were “undoubtedly” Plan assets. Opp. at 6.

27 Torben contends that because the Account was opened “[i]n anticipation of the Plan’s
28 termination... for purposes of paying Plan expenses and making distributions to terminated Plan

1 participants” it should be treated as a private retirement account. Opp. at 2. Bay Area Painters
2 asserts that because the Account is categorized as a “Silver Business Checking” account, it is not a
3 “trust fund” as required by the Plan’s documents. Reply at 2. But it fails to explain why holding
4 the Plan’s funds in a regular bank account is inconsistent with the Plan documents or otherwise
5 articulate why the Account is not a trust fund. The Account was opened in the Plan’s name, by the
6 Plan’s trustee, using the Plan’s EIN, and contained funds from the Plan. In conjunction with the
7 opening of the account, the Plan’s administrator also sent an email to a U.S. Bank representative
8 with documentation of the Plan’s EIN and portions of the Plan’s Adoption Agreement. The Plan’s
9 trustee had hired APC to wind up the Plan and bring it into compliance by, for example, filing
10 delinquent Form 5500s in anticipation of the Plan’s termination. This evidence is consistent with
11 Torben’s stated purpose of opening the account for the purposes of paying Plan expense and
12 making outstanding distributions to terminated Plan participants.

13 The parties focus on three principal account transactions: (1) the \$130,000 transfer to
14 Developers on December 31, 2015; (2) the May 12, 2015 transfer of \$26,627 from Brandon’s
15 Northwestern Mutual Plan account; and (3) the \$3,080 check made out to APC on May 19, 2015.
16 *Id.* The transfer from Brandon’s Plan account to the U.S. Bank account and the APC check both
17 occurred *after* the funds were levied. Of the three identified transactions, only the \$130,000 wire
18 transfer to Developers occurred before the levy.¹ Accordingly, the substantive account activity
19 from the time it was established to the date the funds were levied was the December 29, 2014
20 transfer from Hansen’s Northwestern Mutual account and the ensuing \$130,000 wire payment to
21 Developers two days later.

22 The initial transfer and the \$130,000 wire payment are both consistent with the use of the
23 Account for Plan purposes. There is no dispute that the \$185,534.59 transfer on December 29,
24 2014 was made from the Plan’s Northwestern Mutual account for a plan annuitant, Torben
25 Hansen. Hansen asserts the ensuing \$130,000 payment was made as a part of his Plan
26 distribution. This is supported by the Form 1099-R that was issued to him for this transfer,

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28 ¹ In the following four months, but prior to the levy, the only activity in the Account consisted of
monthly “Analysis Service” charges.

1 showing that the payment was a taxable distribution of a portion of Hansen’s account balance in
2 the Plan. The payment was intended to cover Hansen’s personal debt. Bay Area Painters does not
3 demonstrate why this wire payment nullifies, or is inconsistent with, the Account’s use for Plan
4 distributions.

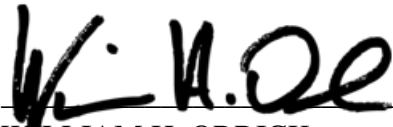
5 In short, all of the documentation concerning the Account and its source of funding
6 supports the Plan’s claim of exemption, and none of Torben’s or the Plan’s conduct is inconsistent
7 with it. Accordingly, Bay Area Painters’ motion is DENIED.

8 **CONCLUSION**

9 Torben has met its burden to show that the Disputed Funds are exempt under California
10 Civil Procedure Code § 704.115. The Plan’s claim of exemption is GRANTED and \$55,380.09
11 shall be returned to the Plan, plus interest.

12 **IT IS SO ORDERED.**

13 Dated: December 28, 2015

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15 WILLIAM H. ORRICK
16 United States District Judge
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