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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TAMER SALAMEH, an individual, et
al.,

Plaintiffs,

vs.

TARSADIA HOTEL, a California
Corporation, et. al.,

Defendants.

CASE NO. 09cv2739-GPC(BLM)

**ORDER ADOPTING REPORT AND
RECOMMENDATION GRANTING
IN PART AND DENYING IN PART
MOTION FOR ORDER
DETERMINING CLAIMS OF
EXEMPTION**

[Dkt. No. 465.]

On July 9, 2015, Judgment Creditors 5th Rock, LLC and MKP One, LLP filed a motion for an order determining claims of exemption of Judgment Debtors Alexis Cosio, Michele Curtis, Dale Curtis, Aleksey Kats, Diana Kats, Cesar Mota, Danon Slinkard, Benjamin Steigerwalt and Eden Steigerwald. (Dkt. No. 465.) A hearing was held before Magistrate Judge Barbara L. Major on August 6, 2015. (Dkt. No. 474.) At the hearing Judgment Debtors requested additional time to file a response and provide additional supporting evidence. (Dkt. No. 475.) On August 13, 2015, Judgment Debtors filed an opposition to the motion for order determining claim of exemption. (Dkt. No. 477.) Declarations from Alexis Cosio, Cesar Mota, Eden Steigerwalt and Dale Curtis were attached to the opposition. (*Id.*) On August 20, 2015, Judgment Creditors filed a reply. (Dkt. No. 480.) On September 4, 2015, Magistrate Judge Major issued a report and recommendation re: motion for order

1 determining claims of exemptions. (Dkt. No. 484.) In the order, the Magistrate Judge
2 recommends that the Court deny the claims of exemption filed by Alexis Cosio, Cesar
3 Mota, Aleksey and Diana Kats, Dale and Michele Curtis, Danon Slinkard and
4 Benjamin Steigerwalt; and grant the claim of exemption filed by Eden Steigerwalt. (Id.
5 at 20.) Objections were not filed by the deadline of September 18, 2015.

6 **Background**

7 On March 22, 2011, District Judge Dana M. Sabraw granted Defendants' motion
8 to dismiss Plaintiff's second amended complaint with prejudice. (Dkt. No. 158.) On
9 March 22, 2011, judgment was entered against Plaintiffs. (Dkt. No. 159.) On October
10 7, 2013, the Ninth Circuit affirmed the district court's order. (Dkt. No. 224.) On
11 October 12, 2012, the case was transferred to the undersigned judge. (Dkt. No. 215.)
12 On July 31, 2014, the Court granted Defendants' 5th Rock, LLC, and MKP One, LLP's
13 (collectively "Judgment Creditors") motion for attorney's fees. (Dkt. No. 245.) On
14 August 22, 2014, Plaintiffs filed a notice of appeal of the Court's order. (Dkt. No.
15 246.)

16 Plaintiffs filed a motion to stay enforcement of judgment pending appeal without
17 posting a supersedeas bond on April 20, 2015. (Dkt. No. 402.) The Court denied
18 Plaintiff's motion on May 19, 2015, but granted a temporary stay of thirty days to allow
19 Plaintiffs to post a supersedeas bond. (Dkt. No. 411.) Plaintiffs did not post a
20 supersedeas bond within the thirty-day period, and on June 17, 2015, the Ninth Circuit
21 denied Plaintiff's emergency motion to stay enforcement of the district court's
22 judgment pending appeal without posting a supersedeas bond. (Dkt. No. 419.) On
23 June 29, 2015, certain Plaintiffs filed an ex parte motion to stay proceedings with a
24 partial bond. (Dkt. No. 461.) The Court denied the ex parte motion to stay proceedings
25 with a partial bond on July 20, 2015. (Dkt. No. 468.)

26 On March 3, 2015 and April 7, 2015, Judgment Creditors filed writs of execution
27 against numerous Plaintiffs. (Dkt. Nos. 373, 398.) On May 7, 2015, Judgment
28 Creditors initiated bank levies. (Dkt. Nos. 407, 412-417.) On May 20, 2015, certain

1 Judgment Debtors filed claims of exemption. (Dkt. No. 465-3, Minassian Decl. at 4-
2 25¹.)

3 On July 9, 2015, Judgment Creditors filed its opposition to the claims of
4 exemption, and motion to the court for an order determining claim of exemption. (Dkt.
5 No. 465-1.) On August 13, 2015, the Judgment Debtors filed an opposition. (Dkt. No.
6 477.) The report and recommendation was filed on September 4, 2015. (Dkt. No. 484.)

7 **A. Standard of Review of Magistrate Judge’s Order**

8 The district court’s role in reviewing a Magistrate Judge’s report and
9 recommendation is set forth in 28 U.S.C. § 636(b)(1). Under this statute, the district
10 court “shall make a de novo determination of those portions of the report . . . to which
11 objection is made,” and “may accept, reject, or modify, in whole or in part, the findings
12 or recommendations made by the magistrate judge.” *Id.* Under this statute, “the district
13 judge must review the magistrate judge’s findings and recommendations de novo if
14 objection is made, but not otherwise.” United States v. Reyna-Tapia, 328 F.3d 1114,
15 1121 (9th Cir.) (en banc), cert. denied, 540 U.S. 900 (2003); see Thomas v. Arn, 474
16 U.S. 140, 149 (1985) (“It does not appear that Congress intended to require district
17 court review of a magistrate's factual or legal conclusions, under a *de novo* or any other
18 standard, when neither party objects to those findings.”).

19 **B. Paid Earnings Exemption**

20 Exemption claimants Alexis Cosio, Cesar Moto, Aleksey and Diana Kats, and
21 Danon Slinkard seek an exemption based on the paid earnings exemption. (Dkt. Nos.
22 465-3, Minassian Decl. at 4-7; 12-19.)

23 Because the exemption laws are designed to facilitate the debtor’s financial
24 rehabilitation and have the effect of shifting social welfare costs from the community
25 to judgment creditors, the exemption statutes should be construed, so far as practicable,
26 to the benefit of the judgment debtor. Ford Motor Credit Co. v. Waters, 166 Cal. App.
27 4th Supp. 1, 8 (2008) (citation omitted). “[E]xemptions are wholly statutory and cannot

28 ¹The page numbers are based on the CM/ECF pagination.

1 be enlarged by the courts.” Id. at 8.

2 Under section 704.070, debtors can claim exemptions for “[p]aid earnings that
3 can be traced into deposit accounts” Cal. Civ. Proc. Code § 704.070(b). “Paid
4 earnings” are defined as “compensation payable by an employer to an employee for
5 personal services performed by such employee, whether denominated as wages, salary,
6 commission, bonus, or otherwise”, id. § 706.011(b), and “that were paid to the
7 employee during the 30-day period ending on the date of the levy.” Id. § 704.070(a)(2).

8 The exemption claimant bears the burden of tracing the exempt funds in the
9 levied account to wages paid by the debtor’s employer, and should provide the court
10 with bank statements that show the relevant earning payments within the thirty day
11 pre-levy period. See Cal. Civ. Proc Code § 703.080(b); see also Franco v. Gennaco,
12 No. LA CV 09-893 VBF-FFMx, 2015 WL 1383525, at *4-6 (C.D. Cal. Mar. 23, 2015)
13 (debtors who claimed exemptions under section 704.070 provided the court with bank
14 statements showing their account balances on the date of the levy, and the dates and the
15 amount of earnings payment from their employers within the 30-day pre-levy period);
16 Ford Motor Credit Co. v. Waters, 166 Cal. App. 4th Supp. 1, 6-7 (2008) (debtor who
17 sought exemption under section 704.070 provided bank statements that showed a
18 balance on the date of the levy and the dates and amounts of direct payroll deposits
19 from the debtor’s employer during the 30-day period ending on the date of levy). The
20 court must apply the “lowest intermediate balance principle” to determine the amount
21 of exempt funds in a deposit account, unless the parties demonstrate that another
22 method of tracing “would better serve the interests of justice and equity under the
23 circumstances of the case.” Cal. Civ. Proc. Code § 703.080(c).

24 **1. Alexis Cosio**

25 The Magistrate Judge recommends that the Court deny her claim of exemption
26 because she has not established she is entitled to the paid earnings exemption. Her
27 claim of exemption states that the money is exempt under sections 704.070(a) and (b)
28 because “the money is paid earnings from my employment.” (Dkt. No. 465-3,

1 Minassian Decl. at 4-5.) In her opposition, her declaration states that the funds levied
2 are subject to section § 704.070(a)-(b) as they consist of paid earning paid to her by her
3 employer during the 30 day period ending on the date of the levy. (Dkt. No. 477-1,
4 Cosio Decl.)

5 Judgment Debtors appear to contend that the only proof necessary to seek an
6 exemption is that paid earning can be traced into a deposit account and submit copies
7 of their paychecks; however, tracing involves demonstrating the “lowest intermediate
8 balance” which requires submission of bank statements. See Cal. Civ. Proc. Code §
9 703.080.²

10 Cosio attaches her paycheck to show that money was deposited into her deposit
11 account but she has failed to provide any evidence about the funds in her deposit
12 account at the time of levy was executed, the date the money was levied, and the
13 account balance during the thirty days preceding the levy. Therefore, the Court is
14 unable to determine the applicable 30 day period to determine how much of the levied
15 funds are entitled to protection. See Cal. Code Civ. Proc. § 703.080; Franco, 2015 WL
16 1383525 at 4-6 (debtors who claimed exemptions under 704.070 provided the court
17 with bank statements). Accordingly, the Court ADOPTS the Magistrate Judge’s
18 recommendation that Cosio’s claim of exemption be DENIED.

19 **2. Cesar Moto**

20 The Magistrate Judge recommends that the Court deny his claim of exemption
21 because he has not established he is entitled to the paid earnings exemption. Moto’s

22 ²Section 703.080 entitled “Tracing exempt funds” provides,

- 23 (a) Subject to any limitation provided in the particular exemption, a
24 fund that is exempt remains exempt to the extent that it can be traced
25 into deposit accounts or in the form of cash or its equivalent.
26 (b) The exemption claimant has the burden of tracing an exempt fund.
27 (c) The tracing of exempt funds in a deposit account shall be by
28 application of the lowest intermediate balance principle unless the
exemption claimant or the judgment creditor shows that some other
method of tracing would better serve the interests of justice and equity
under the circumstances of the case.

Cal. Civ. Proc. Code § 703.080.

1 claim of exemption states that the “money is paid earnings from my employment.”
2 (Dkt. No. 465-3, Minassian Decl. at 16-17.) In his opposition, he attaches his paycheck
3 showing the source of the levied funds. (Dkt. No. 47, Moto Decl. at 4-6.) However,
4 similar to Cosio, Moto failed to provide a bank statement or any other evidence to
5 establish how much money was in the account when it was levied, the date the money
6 was levied and the account balance during the relevant thirty days. Thus, he has failed
7 to establish that the exemption applies to him. Accordingly, the Court ADOPTS the
8 Magistrate Judge’s recommendation that Moto’s claim of exemption be DENIED.

9 **3. Aleksey and Diana Kats**

10 The Magistrate Judge recommends that the Court deny the Kats’ claims of
11 exemption. In their claims of exemption, they state that the “money is paid earnings
12 from Diana Kats’ job and deposited directly into the account. Aleksey Kats is her
13 husband.” (Dkt. No. 465-3, Minassian Decl. at 12-15.) In the opposition, they contend
14 that the levied funds consisted of exempt earning under section 704.070 and are
15 traceable as they are direct deposits. Besides their statements in a declaration, Aleksey
16 and Kats do not provide any documentation to support their exemption claim.
17 Therefore, they have not demonstrated that they are entitled to an exemption. As such,
18 the Court ADOPTS the Magistrate Judge’s recommendation that Aleksey and Diana
19 Kats’ claims of exemption be DENIED.

20 **4. Danon Slinkard**

21 The Magistrate Judge recommends that the Court deny Slinkard’s claim of
22 exemption for failing to comply with the statutory requirement. He claims an
23 exemption because it is “where my earnings are deposited” and the “money is paid
24 from my employment” (Dkt. No. 465-3, Minassian Decl. at 18-19.) Slinkard provides
25 no documentation to support his exemption claim. Accordingly, the Court ADOPTS
26 the report and recommendation that Slinkard’s claim of exemption be DENIED.

27 **C. Retirement Accounts**

28 Judgement Debtors Dale and Michele Curits seek an exemption based on the

1 exemption for private retirement plan or profit sharing plan designed and used for
2 purposes of retirement. (Dkt. Nos. 465-3, Minassian Decl. at 8-11.)

3 Private retirement accounts are exempt as a private retirement plan or profit
4 sharing plan designed and used for retirement purposes. Cal. Civ. Proc. Code §
5 704.115(b).³ Three types of retirement accounts may qualify for exemptions: (1)
6 “[p]rivate retirement plans, including, but not limited to, union retirement plans”; (2)
7 “[p]rofit-sharing plans designed and used for retirement purposes”; and (3)
8 “[s]elf-employed retirement plans and individual retirement annuities” included in the
9 Internal Revenue Code of 1986. Id. § 704.115(a)(1)-(3). Funds in the first two
10 categories are completely exempt. Century Sur. Co. v. 350 W.A., LLC, Civil No.
11 05cv1548-L(LSP), 2008 WL 2630959, at *9 (S.D. Cal. June 27, 2008).

12 To establish that an account is exempt as a private retirement plan under section
13 704.115(a)(1) or a profit sharing plan under section 704.115(a)(2), the claimant must
14 establish two elements. See Cal. Civ. Proc. Code § 703.580(b) (an exemption claimant
15 bears the burden of proof to demonstrate that the alleged retirement plan is exempt).
16 First, the debtor must prove that the retirement plan is “established and maintained by
17 a corporation.” Cal. Civ. Proc. Code §§ 704.115(a)(1), (2); Century Sur. Co., 2008 WL
18 2630959 at *10; see also In re Cheng, 943 F.2d 1114, 1116-17 (9th Cir. 1991) (holding
19 that retirement benefit plans established by a corporation, which is solely owned by the
20 debtor, constitute fully exempted “private retirement plans” within the meaning of
21 California law). Second, the claimant must prove that the plan is “designed and used
22 for retirement purposes.” Cal. Civ. Proc. Code §§ 704.115(a)(1), (2); Century Sur. Co.,
23 2008 WL 2630959 at *10; In re Bloom, 839 F.2d 1376, 1378 (9th Cir. 1988) (section
24 704.115(a)(1) implicitly requires a claimant to prove that the private retirement plan
25 is “designed and used for retirement purposes.”).

26
27 ³California Civil Procedure Code section 704.115 provides that “[a]ll amounts
28 held, controlled, or in process of distribution by a private retirement plan, for the
payment of benefits as an annuity, pension, retirement allowance, disability payment,
or death benefit from a private retirement plan are exempt.” Cal. Code Civ. Proc. §
704.115(b).

1 In determining whether a private retirement plan is designed and used primarily
2 for retirement purposes, courts consider many factors but no one is dispositive, but all
3 must be considered in light of the policy of whether the plan was designed and used for
4 a retirement purpose. In re Bloom, 839 F.2d at 1379-80. Courts have also considered
5 the “extent of a debtor’s withdrawals or loans from the plan” and a “debtor’s subjective
6 intent in deciding whether the plans have a retirement purpose.” In re Rucker, 570 F.3d
7 1155, 1160 (9th Cir. 2009). Courts also consider evidence as to how the plan was
8 managed by the judgment debtor. Century Sur. Co., 2008 WL 2630959 at 10.

9 **1. Dale and Michele Curtis**

10 Claimants Dale and Michele⁴ Curtis filed a claim exemption stating that the two
11 accounts under the account name Curtis Michael Pension Profitsharing Plan, Inc.
12 contain “benefits derived from private retirement plan or profit sharing plan designed
13 and used for purposes of retirement.” (Dkt. No. 465-3, Minassian Decl. at 9, 11.) In
14 the opposition, Dale Curtis states that the private retirement account was set up by a
15 private employer, a corporation, not by him acting on his own. (Dkt. No. 477-4, Curtis
16 Decl. ¶ 5.) The account was set up by San Diego Pension Consultants, Inc. as a Money
17 Purchase Pension Plan for the corporation, his employer, Curtis Michael Appraisal, Inc.
18 (Id.)

19 The Magistrate Judge concluded that while the Judgment Debtors demonstrated
20 that the plan was established by a corporation, they failed to satisfy the second element
21 of establishing that the plan is designed and used for retirement purposes. Judgment
22 Debtors present a conclusory allegation that the profit sharing plan is designed and
23 used for retirement purposes but fail to provide any documents to show how the plan
24 was designed and used for retirement purposes. As noted by the Magistrate Judge,
25 “there is no evidence showing how the plan is managed and used by the Curtises, such
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27 ⁴Michele Curtis was not a named plaintiff in the underlying judgment; however,
28 under California law, a judgment creditor may enforce a money judgment by levying
the deposit account of the judgment debtor and his spouse. See Cal. Civ. Proc. Code
§ 700.160.

1 as bank statements showing deposits, withdrawals, and other account activity or
2 detailed declarations regarding the use of the funds since the plan was created.” (Dkt.
3 No. 484 at 12); see also Century Sur. Co., 2008 WL 2630959 at *5-6 (court considered
4 whether deposits to the account were made close to the time of the attachment, whether
5 funds had ever been withdrawn from the plan, and whether any of the funds were
6 documented with loan agreements and finding that a debtor’s declaration, “Adoption
7 Agreement” and redacted tax returns were insufficient to establish that the debtor’s
8 retirement account was “designed and used for retirement purposes”). Since Judgment
9 Debtors provided no evidence to support the purpose of the profit sharing plan, the
10 Court ADOPTS the Magistrate Judge’s recommendation that the Curtis’ claims of
11 exemption be denied.

12 **D. Third Party Claims**

13 Exemption claimants Danon Slinkard, and Benjamin and Eden Steigerwalt filed
14 an exemption claim based the third party exemption.

15 California Code of Civil Procedure provides a procedure for third parties, who
16 are not judgment debtors or creditors, to make claims of exemption for property levied
17 by a writ of execution. Cal. Civ. Proc. Code §§ 688.030, 720.110. After the creditor
18 levies the property pursuant to a notice of levy, the third party must file a claim with
19 “the state department or agency that issued the notice of levy.” Id. § 688.030(b)(1).

20 A third-party claim must be executed under oath and must contain the following:

- 21 (1) The name of the third person and an address in this state where
service by mail may be made on the third person.
- 22 (2) A description of the property in which an interest is claimed.
- 23 (3) A description of the interest claimed, including a statement of the
facts upon which the claim is based.
- 24 (4) An estimate of the market value of the interest claimed.

25 Cal. Civ. Proc. Code § 720.130. After filing a claim with the levying officer, the third-
26 party or the creditor may petition the court for a hearing to determine the “validity of
27 the third-party claim and the proper disposition of the property that is the subject of the
28 claim.” Id. § 720.310(a). At the hearing, the third party has the burden of proof. Id.

1 § 720.360. After the third party claimant presents evidence that it owns the property
2 in question, the burden of proof shifts to the judgment creditor to establish that the
3 judgment creditor's claim is superior. Oxford Street Props., LLC v. Rehab. Assoc.,
4 LLC, 141 Cal. App. 4th 296, 307 (2012) (citation omitted).

5 **1. Danon Slinkard**

6 The Magistrate Judge recommends that the Court deny Danon Slinkard's claim
7 of exemption, on behalf of Daryl Slinkard, a third party, because Danon cannot file a
8 claim on behalf of a third party. Danon Slinkard filed a claim of exemption on behalf
9 of Daryl Slinkard as to account number ending in 8033 stating it is a "joint account for
10 someone not a judgment debtor." (Dkt. No. 465-3, Minassian Decl. at 19.) He also
11 asserts that "[h]alf is a third party who did not receive notice their property was levied."
12 (Id.)

13 Under the statute, the third party, not the judgment debtor, must file the claim of
14 exemption. See Cal. Civ. Proc. Code § 688.030. Moreover, even if the Court
15 considered Danon's claim of exemption, he argues that the third party did not receive
16 notice of the levy. However, the Notice of Levy issued by the U.S. Marshals Service,
17 dated June 30, 2015, states that the notice was mailed on June 30, 2015 to Daryl D.
18 Slinkard, a third party. (Dkt. No. 465-3, Minassian Decl. at 26-27.)

19 Danon Slinkard has not established a right to exemption on behalf of a third
20 party, Daryl Slinkard. Accordingly, the Court ADOPTS the Magistrate Judge's
21 recommendation that Danon Slinkard's claim of exemption, on behalf of third party,
22 Daryl Slinkard, be DENIED.

23 **2. Benjamin and Eden Steigerwalt**

24 The Magistrate Judge recommends that the Court deny Benjamin's claim of
25 exemption, but grant Eden's claim of exemption. Benjamin and Eden Steigerwalt seek
26 an exemption arguing that they jointly hold the levied accounts with their parents,
27 Judgment Debtors Kerry and Beth Steigerwalt.

28 First, neither claim of exemption is signed under oath as required by the statute.

1 Benjamin and Eden both submitted an exemption claim and financial statement, but
2 neither claim was signed by them as the names are hand written and initials are placed
3 by the written names. (Dkt. No. 465-3, Minassian Decl. at 9-10; 20-22.) As a result,
4 the claim of exemption is faulty. See Cal. Civ. Proc. Code 720.130 (“third party claim
5 shall be executed under oath . . .”).

6 In addition, according to the Magistrate Judge, Benjamin does not satisfy the
7 fourth element and did not produce evidence of the amount seized and did not establish
8 “the market value of the interests claimed.” Cal. Civ. Proc. Code § 720.130(a)(4). The
9 Court agrees. Benjamin did not submit an argument or declaration or supplemental
10 evidence in the opposition. Therefore, the Court ADOPTS the report and
11 recommendation and DENIES Benjamin Steigerwalt’s claim of exemption.

12 Eden, on the other hand, submitted a supplemental declaration signed under the
13 penalty of perjury in which she states that the funds in the levied account are
14 exclusively hers, that she earned the funds from her employment as a second grade
15 teacher, and needs the money to pay for her basic living expenses and her parents have
16 not accessed the account since it was set up for her as a minor. (Dkt. No. 477-3, Eden
17 Steigerwalt Decl. ¶¶ 3-5.) Her declaration satisfies the first three elements of a third
18 party claim under section 720.130(a). In addition, in construing the exemption statutes
19 to the benefit of the judgment debtor, the Magistrate Judge took into consideration
20 Kerry Steigerwalt’s declaration, which provides sufficient information to establish the
21 fourth element, which is “the market value of the interest claimed.” (Dkt. No. 465-3,
22 Minassian Decl. at 32-33.)

23 Even though Eden did not submit a proper claim of exemption by signing her
24 exemption under the penalty of perjury, the Magistrate Judge considered her claim as
25 if she signed the original declaration based on the supplemental declaration. Based on
26 this, the Magistrate Judge recommends that the Court grant Eden’s claim of exemption.
27 After having reviewed the documents and argument, the Court agrees with the
28 Magistrate Judge’s decision, and ADOPTS this report and recommendation and


1 GRANTS Eden Steigerwalt's claim of exemption.

2 **Conclusion**

3 Based on the above, the Court ADOPTS the Magistrate Judge's report and
4 recommendation, and DENIES the claims of exemption filed by Alexis Cosio, Cesar
5 Mota, Aleksey and Diana Kats, Dale and Michele Curtis, Danon Slinkard and
6 Benjamin Steigerwalt and GRANTS the claims of exemptions filed by Eden
7 Steigerwalt.

8 IT IS SO ORDERED.

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10 DATED: October 14, 2015

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12 HON. GONZALO P. CURIEL
13 United States District Judge
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