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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PLATTE RIVER INSURANCE
COMPANY, a Nebraska corporation,

Plaintiff,

v.

PREMIER POWER RENEWABLE
ENERGY, INC., a California corporation;
DEAN RICHARDS MARKS, an
individual; and SARILEE MARKS, an
individual,

Defendants.

No. 2:14-cv-1666-WBS-EFB

ORDER AND FINDINGS AND
RECOMMENDATIONS

This matter came before the court for hearing on plaintiff Platte River Insurance Company’s application for writs of attachment or alternatively a temporary protective order to secure \$1,011,121.00 from defendants Premier Power Renewable Energy, Inc., Dean Richards Marks, and Sarilee Marks’ property. ECF No. 18. Attorney James Curran appeared on behalf of Platte River; attorney Mark Slater appeared on behalf of defendants Dan Marks and Sarilee Marks.¹

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¹ Defendant Premier Power Renewable Energy, Inc. has not appeared in this action.

1 I. Background

2 This action arises out of a performance bond and indemnity contract, that were part of an
3 overall construction project for a roof mounted solar system for a public school district in
4 Colorado. Defendant Premier Power Renewable Energy, Inc. (“Premier Power”), which is owned
5 by defendants Dean Richards Marks and Sarilee Marks, entered into construction contracts to
6 install the solar system. The Marks and Premier Power also entered into an agreement with
7 plaintiff for plaintiff to issue performance bonds for which the Marks would hold plaintiff
8 harmless and indemnify plaintiff in the event of any claims on the bonds. As discussed below,
9 Premier Power allegedly defaulted on its performance obligations on the project and claims were
10 made against the bond. The Marks allegedly failed to meet their indemnity and hold harmless
11 plaintiff, Platte River Insurance Company (“Platte River”), and plaintiff now brings this action for
12 breach of the indemnity contract.

13 Plaintiff also alleges that certain real property was transferred by the Marks to avoid
14 having those assets available to satisfy any debt owe to plaintiff. Based on that allegation,
15 plaintiff seeks prejudgment remedies of a writ of attachment and/or a temporary protective order
16 to prevent the Marks from transferring any other assets pending either the resolution of this case
17 or the determination of whether particular assets are exempt from attachment or execution to
18 satisfy plaintiff’s claim.

19 A. Plaintiff’s Complaint

20 Plaintiff, Platte River, commenced this against Premier Power, Dean Richards Marks, and
21 Sarilee Marks, alleging claims for (1) breach of written indemnity agreement, (2) specific
22 performance, (3) injunctive relief, and (4) Quia Timet. ECF No. 1. The complaint alleges that on
23 March 3, 2009, Premier Power entered into a General Indemnity Agreement (“Agreement”) in
24 favor of Platte River, as an inducement and partial consideration for Platte River issuing surety
25 bonds on behalf of Premier Power. *Id.* ¶ 10. It further alleges that on November 4, 2010, Dean
26 Marks and Sarilee Marks entered into a General Indemnity Agreement Addendum for Additional
27 Indemnitor in favor of Platte River, as an inducement and partial consideration for Platte River

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1 issuing surety bonds on behalf of Premier Power. *Id.* ¶ 11. That same date Platte River issued the
2 performance bonds. *Id.*

3 Thereafter, Premier Power entered into a construction contract known as “3020kWp-DC
4 Roof Mount, Solar Roof System” in Douglas County, Colorado, *id.* ¶ 13, and Platte River
5 executed a Performance and Payment Bonds (collectively, “the Bonds”) for certain performance
6 and payment obligations under it. *Id.* ¶ 14. Various claimants under the Bonds have alleged that
7 Premier Power defaulted on its performance and payment obligations which were secured by the
8 Bonds.² Pursuant to the indemnity agreement with the Marks, Platte River requested defendants
9 to indemnify it for the claims made against the Bonds, but they failed to do so. *Id.* ¶ 15. As a
10 result, Platte River has incurred liabilities in excess of \$1,011,121.60. *Id.* ¶ 21.

11 The Marks have failed to indemnify, provide a defense, or otherwise hold harmless the
12 plaintiff. *Id.* ¶¶ 16-21.

13 B. Procedural History

14 Platte River filed the instant motion for writ of attachment or, in the alternative, for a
15 temporary protective order, which came before the court for hearing on December 10, 2014. ECF
16 Nos. 18, 26. After that hearing, the court set the matter for further hearing on February 18, 2015,
17 and directed the parties to submit further briefing identifying the specific property allegedly
18 subject to attachment and whether such property is subject to attachment under the applicable
19 legal standard. ECF Nos. 29, 31. After the February 18 hearing, the court took the matter under
20 submission. However, defendants Dean Marks and Sarilee Marks subsequently filed a voluntary
21 Chapter 13 Bankruptcy Petition, resulting in an automatic stay of this action. *See* 11 U.S.C.
22 § 362(a); ECF No. 36. On June 29, 2015, the parties filed a joint status report, which indicated
23 that defendants’ bankruptcy case was dismissed on June 1, 2015.

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26 ² As discussed below, Premier Power allegedly failed to pay a subcontractor for
27 constructing the project and, ultimately, an arbitration award was issued on October 2, 2014, in
28 favor of the subcontractor and against Premier Power for the amount of \$2,996,059.44. The
arbitrator found that the subcontractor had met all of its performance obligations and that Premier
Power was in breach of its obligations to make payment on the subcontract.

1 II. Motion for Writ of Attachment

2 A. Legal Standard

3 A plaintiff in federal court is entitled to every remedy that is available under the law of the
4 state where the court is located for “seizing a person or property to secure satisfaction of the
5 potential judgment,” including a writ of attachment. Fed. R. Civ. P. 64; *Reebok Int’l Ltd. v.*
6 *Marnatech Enters., Inc.*, 970 F.2d 552, 558 (9th Cir. 1992). The procedures and grounds for
7 obtaining a prejudgment writ of attachment are governed by California Code of Civil Procedure
8 sections 481.010-493.060.

9 “Attachment . . . is a remedy by which a plaintiff with a contractual claim to money (not a
10 claim to a specific item of property) may have various items of a defendant’s property seized
11 before judgment and held by a levying officer for execution after judgment.” *Waffer Int’l. Corp*
12 *v. Khorsandi*, 69 Cal. App. 4th 1261, 1271 (1999) (parenthetical in original and emphasis
13 omitted). “Attachment is a harsh remedy because it causes the defendant to lose control of his
14 property before the plaintiff’s claim is adjudicated. *Martin v. Aboyan*, 148 Cal. App. 3d 826, 831
15 (1983). “Therefore, the requirements for the issuance of a writ of attachment are strictly
16 construed against the application.” *Blastrac, N.A. v. Concrete Solutions & Supply*, 678 F. Supp.
17 2d. 1001, 1004 (C.D. Cal. 2010). Furthermore, “[t]he moving party has the burden of
18 establishing grounds for an attachment order.” *VFS Fin., Inc. v. CHF Express, LLC*, 620 F. Supp.
19 2d 1092, 1095 (C.D. Cal. 2009).

20 A court may issue an attachment “in an action on a claim or claims for money, each of
21 which is based upon a contract, express or implied, where the total amount of the claim or claims
22 is a fixed or readily ascertainable amount not less than five hundred dollars” Cal. Civ. Proc.
23 Code § 483.010 (a). Furthermore, where the defendant is a natural person, an attachment may
24 issue “only on a claim which arises out of the conduct by the defendant of a trade, business, or
25 profession.” Cal. Civ. Proc. Code § 483.010 (b). A plaintiff seeking a writ of attachment must
26 submit an affidavit demonstrating that “[t]he plaintiff on the facts presented would be entitled to a
27 judgment on the claim upon which the application is based,” and “that the property sought to be

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1 attached is not exempt from attachment.” Cal. Civ. Proc. Code § 485.210(c)(1), (3). The court
2 shall issue the writ of attachment if it finds that:

3 (1) The claim upon which the attachment is based is one upon
4 which an attachment may be issued.

5 (2) The plaintiff has established the probable validity of the claim
6 upon which the attachment is based.

7 (3) The attachment is not sought for a purpose other than the
8 recovery on the claim upon which the attachment is based.

(4) The amount to be secured by the attachment is greater than zero.

9 Cal. Civ. Proc. Code § 484.90(a). Furthermore, before a court may issue a writ of attachment,
10 “the plaintiff shall file an undertaking to pay the defendant any amount the defendant may recover
11 for any wrongful attachment by the plaintiff in the action.” Cal. Civ. Proc. Code § 489.210. The
12 presumptive amount of the undertaking under the statute is \$10,000, but that amount may be
13 increased on a showing that the probable recovery for a wrongful attachment would be greater.
14 Cal. Civ. Proc. Code § 489.220.

15 B. Platte River has satisfied section 484.90(a)

16 A claim upon which an attachment may issue is defined by California Code of Civil
17 Procedure Section 483.010(a). That section requires the following three requirements be met: (1)
18 claim for money; (2) based upon express or implied contract; and (3) the amount of the claim is
19 readily ascertainable and is not less than \$500 exclusive of costs, interest, and attorney’s fees.
20 Cal. Civ. Proc. Code § 483.010(a).

21 Platte River seeks collateral security for its ongoing exposure under the Bonds, as well as
22 attorneys’ fees in enforcing the instant action—conservatively estimated at \$200,000—for a total
23 attachment amount of \$1,221,121.60. Platte River’s claim for breach of the indemnification
24 agreement specifically alleges that it asked defendants to indemnify it pursuant to the Agreement
25 for the claims made against the Bonds, but they failed to do so. Platte River’s action seeks to
26 obtain cash or collateral in the amount of \$1,011,121.60 for the claims made against the Bonds.
27 Compl. ¶ 19. This type of action constitutes a claim for money. *See Travelers Cas. And Sur. Co.*
28 *of America v. J.K. Merz Const., Inc.*, 2007 WL 4468680, at * 5-6 (N.D. Cal. Dec. 17, 2007)

1 (finding that plaintiff’s action for collateral under an indemnity contract was not for a specific
2 piece of property, but rather one for “payment of money by the defendant should certain
3 developments occur, i.e., should a claim or demand be made on [the plaintiff] under the subject
4 bonds.”). Indeed, Platte River does not claim a right to any specific piece of property.

5 Second, the claim is based on the indemnity agreement between the parties, and therefore
6 arises out of a contract. Third, the amount claimed is readily ascertainable and is not less than
7 \$500. Platte River submits the declaration of Ron Wills, Senior Bond Claims Specialist for Platte
8 River, which shows that at defendants request Platte River executed the Bonds in connection with
9 the Construction Contract. ECF No. 18-2 ¶ 12. The Bonds were both in the amount of
10 \$1,011,121.60. *Id.* Further, there does not appear to be any dispute that Premier Power entered
11 into a Subcontract with Power Partners MasTec, LLC (“PPM”), whereby PPM was to provide
12 certain labor, materials, and equipment and services in connection with the Construction Contract.
13 *Id.* ¶ 13. PPM completed its work and asserted a claim against the Payment Bond in excess of
14 \$1.6 million, alleging that Premier Power defaulted on its payment obligations under the
15 Subcontract. *Id.* ¶ 14. The dispute over the claim eventually went to arbitration and on October
16 2, 2014, a final award was issued in the arbitration in favor of PPM and against Premier Power,
17 awarding \$1,964,419.56 in damages, \$707,191.04 in interest, and \$324,448.84 in attorney’s fees,
18 expenses and costs, for a total award of \$2,996,059.44. *Id.* ¶ 18. Platte River is bound by the
19 judgment obtained by PPM against Premier up to the amount of \$1,011.121.60 under the
20 Payment Bond. *Id.* ¶19. Pursuant to Section 8 of the Agreement, Platte River requested in
21 writing that defendants deposit cash or collateral with Platte River to cover the \$1,011,121.60, but
22 defendants failed to do so. *Id.* ¶¶ 19, 20. Based on these facts, the court is able to ascertain the
23 amount owed under the agreement is \$1,011,121.60.

24 Defendants argue, however, that Platte River’s request to attach property to secure
25 payment for an estimated \$200,000 in attorneys’ fees should be denied because Platte River has
26 failed to provide any admissible factual evidence to establish this figure. ECF No. 22 at 3-4; ECF
27 No. 33 at 6. Although the amount under the claim must be ready ascertainable, a party need only
28 provide an estimate of any costs and attorney’s fees it seeks to include in the amount to be

1 secured by the writ of attachment. *See* Cal. Civ. Proc. Code § 482.110(a) (a “plaintiff’s
2 application for a right to attach order and a writ of attachment pursuant to this title may include an
3 estimate of the costs and allowable attorney’s fees.”); Cal. Civ. Proc. Code § 482.110(b) (“In the
4 discretion of the court, the amount to be secured by the attachment may include an estimate
5 amount for costs and allowable attorney’s fees.”). The supplemental declaration of Ron Wills
6 provides that Platte River has already paid \$83,585.33 in attorneys’ fees. ECF No. 27-2 ¶ 7. He
7 further states that Platte River anticipates that additional fees to take this matter through trial will
8 likely exceed \$100,000. *Id.* ¶ 8. He also states that due to the complexity of this case, including
9 an issue regarding an alleged fraudulent transfer of property, attorney’s fees could easily exceed
10 \$200,000. *Id.* ¶ 10.

11 However, Platte River’s math does not add up. Even assuming that it will take \$100,000
12 to take this action to trial, after including the \$83,585.33 in fees already paid, the estimated total
13 would be \$183,585.33 in fees. Platte River does not explain the approximately \$16,500 it added
14 to reach the estimated total of \$200,000. Further, while it will certainly incur more litigation
15 expenses, Platte River provides no explanation for how it determined that it would take an
16 additional \$100,000 to take this matter to trial. Without further elaboration, it simply provides the
17 unsupported statements of Mr. Wills, a Senior Bond Claims Specialist for Platte River, that it will
18 take \$100,000 to litigate this matter. Mr. Wills does not purport to be a litigator, or even an
19 attorney, and there is no indication that he has specialized knowledge or experience that would
20 permit him to estimate the cost of litigating this action (or any other action for that matter).³
21 Accordingly, the court finds that Platte River has failed to demonstrate that it will incur an
22 additional \$100,000 in attorney fees. Without supporting evidence, the amount of fees therefore
23 must be limited to the \$83,585.33 that Platte River has already paid in attorneys’ fees.

24 Platte River has also established the probable validity of its claim. A plaintiff has
25 established the probable validity requirement “where it is more likely than not that the plaintiff
26 will obtain a judgment against the defendant on the claim.” Cal. Civ. Proc. Code § 481.190. The
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28 ³ If he does have such knowledge or experience, it is not apparent from his declaration.

1 record shows that on March 3, 2009, Premier Power entered into an Indemnity Agreement in
2 favor of Platte River, as an inducement and partial consideration for Platte River issuing surety
3 bonds on behalf of Premier Power. Wills Decl. ¶ 8, Ex. 1. On or about November 4, 2010, Dean
4 Marks and Sarilee Marks entered into the General Indemnity Agreement Addendum for
5 Additional Indemnitor (“the Addendum”) in favor of Platte River, as an inducement and partial
6 consideration for Platte River issuing surety bonds on behalf of Premier Power. *Id.* ¶ 9, Ex. 2.
7 Platte River received a claim against the Payment Bond by Power Partners MasTec, LLC in the
8 amount of \$1,011,121.60. *Id.* ¶ 19. Pursuant to the Indemnity Agreement, defendants were
9 required to defend, indemnify, and hold harmless Platte River from all claims against the Bonds,
10 but failed to do so. *Id.* ¶ 23, Ex. 1. Under the agreement, defendants were required to deposit
11 cash or collateral in the amount of the claim, but failed to do so. *Id.*

12 Defendants do not dispute that they breached the indemnity agreement. Nor do they
13 contend that Platte River is not likely to prevail on its claim. Instead, at the hearing defendants
14 argued that Platte River has not established probable validity because it has yet to make any
15 payments on the Bonds. Platte River conceded that it has yet to make any payments to any of the
16 claims on the Bonds, but argues that it need not first pay a claim to establish probable validity.
17 Rather, Platte River argues, under the Indemnity Agreement it is entitled to the collateral upon
18 making a demand, and failure to provide collateral is a breach of the agreement.

19 Indeed, the Indemnity Agreement provides that if Platte River deems “it necessary to set
20 up a reserve in any amount to cover any claim [or] demand . . . under or on any Bond(s) or for
21 any other reason whatsoever, [defendants] will immediately upon demand deposit with [Platte
22 River] an amount of money or collateral in an amount sufficient to cover such reserve and any
23 increase thereof, or for any payment or compromise of any liability, claims, demands, judgment,
24 damages, fees and distribution or other expenses.” ECF No. 18-2 at 10. Thus, the Indemnity
25 Agreement expressly requires defendants to provide collateral upon a demand from Platte River,
26 and does not require Platte River to make a payment on a claim prior to making such a demand.
27 Accordingly, the court finds that Platte River has established the probable validity of the claim
28 upon which the attachment is based.

1 Furthermore, Ron Wills’s declaration provides that Platte River seeks to attach
2 \$1,221,121.60 worth of defendants’ property and seeks attachment for no purpose other than the
3 recovery on Platte River’s claims upon which the attachment is based. Accordingly, Platte River
4 has satisfied the remaining requirements of Cal. Civ. Proc. Code § 484.90(a).

5 As the writ seeks to attach assets of the individual defendants Dean Marks and Sarilee
6 Marks, Platte River is also required to establish that the claim arises out of a trade or business.
7 *See* Cal. Civ. Proc. Code § 483.010(c) (where the action is against a natural person, the claim
8 must arise out of a trade or business). Platte River contends that the addendum to the security
9 agreement demonstrates that the individual defendants entered into the agreement for a business
10 purpose. ECF No. 18-1 at 11. The addendum specifically states that Richard Marks and Sarilee
11 Marks have a beneficial interest in the bonds. ECF No. 18-2 at 19. Furthermore, defendants do
12 not dispute that the claims arise out of their trade or business. Thus, Platte River has also
13 satisfied the requirements of Cal. Civ. Proc. Code § 483.010(c).

14 Accordingly, defendants have demonstrated compliance with the California procedures
15 for obtaining a writ of attachment.

16 C. Exemptions

17 Defendants contend that Platte River is not entitled to the writ because the properties it
18 seeks to attach are exempt from attachment.

19 California Code of Civil Procedure section 484.020 requires an application for a writ of
20 attachment to include, among other things, “[a] description of the property to be attached under
21 the writ of attachment and a statement that the plaintiff is informed and believes that such
22 property is subject to attachment. Cal. Civ. Proc. Code § 484.020(e). “Where the defendant is a
23 natural person, the description of property shall be reasonably adequate to permit the defendant to
24 identify the specific property to be attached.” *Id.*

25 “If the defendant claims that the personal property described in the plaintiff’s application,
26 or a portion of such property, is exempt from attachment, the defendant shall claim the exemption
27 as provided in this section. If the defendant fails to make the claim or makes the claim but fails

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1 to prove that the personal property is exempt, the defendant may not later claim the exemption
2 except as provided in Section 482.100.” Cal. Civ. Proc. Code § 484.070(a).

3 “If the plaintiff desires to oppose the claim of exemption, the plaintiff shall file and serve
4 on the defendant, not less than two days before the date set for the hearing, a notice of opposition
5 to the claim of exemption, accompanied by an affidavit supporting any factual issues raised and
6 points and authorities supporting any legal issues raised.” Cal. Civ. Proc. Code § 484.070(f). If
7 the plaintiff fails to file the requisite opposition, no writ of attachment shall issue as the property
8 claimed to be exempt. *Id.* Where the plaintiff files an opposition to the claim of exemption, “the
9 defendant has the burden of proving that the property is exempt from attachment.” Cal. Civ.
10 Proc. Code § 484.070(g).

11 Platte River’s initial motion did not specifically identify what property it is attempting to
12 attach. For that reason, analysis of any claims of exemption were largely hypothetical and the
13 court ordered Platte River to submit a supplemental brief identifying precisely the property it
14 seeks to attach. Platte River has filed its supplemental brief, and apart from a generalized
15 discussion of various properties, Platte River still contends that the specific details concerning all
16 of defendants’ assets and real property remains unclear. ECF No. 32 at 2. Thus, Platte River
17 again requests a generalized attachment order as to defendants’ known property and an injunction
18 prohibiting defendants from transferring or encumbering any interest in real property or personal
19 property, with the exception that defendants be permitted to make payments related to ordinary
20 bills, so that Platte River can determine if there is any additional property. *Id.*

21 Because an assessment must be made as to the exempt or non-exempt status of each asset
22 or category of assets, the court addresses each below. Further, as explained below, the court finds
23 that Platte River is entitled to a writ of attachment as to some of defendants’ known property, but
24 that other known properties are either exempt from attachment or that Platte River has not met its
25 burden on the motion as to them. Furthermore, the court finds that Platte River is not entitled to
26 the injunction it seeks.

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1 1. Placerville Property/Interest in Eagle Ridge

2 Platte River indicates that it seeks to attach real property located at 2540 Los Cerros
3 Drive, Placerville, California (“Placerville Property”). Platte River contends that this property
4 may be attached pursuant to California Code of Civil Procedure § 487.010(c)(1), which provides
5 that an individual’s interest in real property, except leasehold estates with unexpired terms of less
6 than one year, is subject to attachment. Cal. Civ. Proc. Code § 487.010(c)(1).

7 However, in its supplemental brief, Platte River explains that on September 11, 2012,
8 defendants assigned their interest in the Placerville Property to the Marks Living Trust. ECF No.
9 32 at 3. Thereafter, defendants, as trustees of the Marks Living Trust, transferred the Placerville
10 Property to Eagle Ridge, LLC (“Eagle Ridge”). *Id.* The Marks Living Trust owns 25 percent of
11 Eagle Ridge, with the remainder owned by defendants’ children. *Id.* Accordingly, Platte River
12 now argues that it is entitled to an order attaching all interest the Marks Living Trust has in Eagle
13 Ridge. Further, Platte River contends that the transfer of the Placerville Property to Eagle Ridge
14 was fraudulent and is therefore voidable. *Id.* at 3. Platte River states that if defendants do not
15 voluntarily unwind the transfer, it will be forced to file a separate action against defendants, the
16 Marks Living Trust, and Eagle Ridge to have the transfer voided. *Id.* Once this is completed,
17 title to the Placerville Property will be solely owned by the Marks Living Trust, and Platte River
18 will seek to attach all of the Placerville Property.

19 Thus, Platte River has changed its course. Although its motion for a writ of attachment
20 seeks to attach real property pursuant to California Code of Civil Procedure § 487.010(c)(1), in its
21 supplemental brief it now essentially argues that it is seeking to attach defendants’ interest in
22 Eagle Ridge. ECF No. at 32 at 3. California Code of Civil Procedure § 487.010(c) identifies the
23 type of property that is subject to attachment. That section provides for the attachment of real
24 property, *see* Cal. Civ. Proc. Code § 487.010(c)(1), but does not provide that an individual’s
25 interest in a Limited Liability Company is subject to attachment.

26 Platte River argued for the first time at the hearing that defendants’ interest in Eagle Ridge
27 would be subject to attachment as a security under section 487.010(c)(10). However, Platte River
28 fails to cite authority in support of its contention that an interest in an LLC constitutes a security

1 for purposes of section 487.010(c). In any event, Platte River's motion only sought to attach the
2 Placerville Property, and did not seek to attach defendants' interest in Eagle Ridge. As such, its
3 last minute attempt to seek attachment of defendants' interest in Eagle Ridge must be rejected for
4 failure to provide sufficient notice of the property it seeks to attach. Cal. Civ. Proc. Code
5 § 484.020 (requiring an application for a writ of attachment to include, among other things, "[a]
6 description of the property to be attached under the writ of attachment and a statement that the
7 plaintiff is informed and believes that such property is subject to attachment."); *see also* Cal. Civ.
8 Proc. Code § 484.020(e) ("Where the defendant is a natural person, the description of property
9 shall be reasonably adequate to permit the defendant to identify the specific property to be
10 attached."). Accordingly, Platte River has failed to demonstrate that it is entitled to a writ of
11 attachment as to defendants' interest in Eagle Ridge, and therefore its motion should be denied as
12 to this property.⁴

13 2. Accounts Receivable, Chattel, and General Intangibles from Defendants'
14 Trade, Business or Possession

15 Platte River also requests an order attaching two separate accounts, which it contends may
16 contain proceeds from the sale of Premier Power stock: (1) Fidelity Individual Investment
17 Account ending in 312 in the name of Dean and Sarilee Marks, and (2) Fidelity Individual
18 Investment Account ending in 155 in the name of Dean Marks. ECF No. 32 at 5. It contends that
19 such property is subject to attachment pursuant to California Code of Civil Procedure
20 § 487.010(c)(2). That section provides that "[a]ccounts receivable, chattel paper, and general
21 intangibles arising out of the conduct by the defendant of a trade, business, or profession, except
22 any such individual claim with a principal balance of less than one hundred fifty dollars" is
23 subject to attachment. Cal. Civ. Proc. Code § 487.010(c)(2).

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25 ⁴ Court records reflect that on August 18, 2015, Platte River filed a complaint against
26 defendants, the Marks Living Trust, and Eagle Ridge, seeking to avoid the alleged fraudulent
27 transfer of the Placerville Property to Eagle Ridge. *Platte River Ins. Co. v. Marks*, 2:15-cv-1747-
28 WBS-EFB, ECF No. 1. Should Platte River succeed in that action, it may be able to seek
attachment of the Placerville Property in this action. However, that issue is not currently before
the court and therefore need not be decided at this time.

1 Platte River contends that in September 2008, Dean Marks was issued a stock-certificate
2 for 12,488,056 shares of common stock in Premier Power. ECF No. 32 at 4. According to a Sale
3 and Purchase Agreement produced by defendants, in July 2012, Dean Marks sold 10,746,365
4 shares of that stock for \$973,800. Curran Decl. ¶ 9. Therefore, Platte River requests an order
5 attaching the \$973,800 to the extent it has not been paid. Platte River further states that
6 defendants have produced statements from their Fidelity Investment accounts which show that as
7 of November 2014, defendants “jointly own 3,000,000 shares of Premier Power stock, and Dean
8 Marks individually own [sic] \$2,550,000 [sic].” ECF No. 32 at 4. Therefore, Platte River seeks
9 an order attaching the Fidelity Individual Investment Account ending in 312 and in 115.
10 Defendants’ pleadings do not address Platte River’s argument to attach the \$973,800 or the
11 Fidelity Individual Investment Accounts ending in 312 and 115. Accordingly, Platte River’s
12 request to attach this property is unopposed.

13 The investment accounts purport to contain stock that arises out of defendants’ trade,
14 business, or profession. Accordingly, the accounts are subject to attachment pursuant to
15 California Code of Civil Procedure § 487.010(c)(2). As defendants do not claim that this
16 property is exempt, Platte River is entitled to a writ of attachment as to the Fidelity Individual
17 Accounts ending in 312 and 115.

18 Defendants’ request for an order attaching the \$973,800 is more problematic. While the
19 money does arise out of the sale of Premier Power stock and is therefore subject to attachment
20 pursuant to California Code of Civil Procedure § 487.010(c)(2), it is unclear where the money is
21 located, or whether defendants even still have possession of this money. Without the location of
22 money, the court is unable to issue an order having the property “seized before judgment and held
23 by a levying officer for execution after judgment.” *See Waffer Int’l. Corp.*, 69 Cal. App. 4th at
24 1271. Accordingly, the motion should be denied without prejudice to the \$973,800.

25 3. Deposit Accounts

26 Platte River also seeks to attach all but the first \$1,000 of defendants’ individual deposit
27 account ending in account number 172, at U.S. Bank pursuant to California Code of Civil
28 Procedure § 487.010(c)(7). ECF No. 32 at 5. That section provides:

1 Money on the premises where a trade, business, or profession is
2 conducted by the defendant and, except for the first one thousand
3 dollars (\$1,000), money located elsewhere than on such premises
4 and deposit accounts, but, if the defendant has more than one
5 deposit account or has at least one deposit account and money
6 located elsewhere than on the premises where a trade, business, or
7 profession is conducted by the defendant, the court, upon
8 application of the plaintiff, may order that the writ of attachment be
9 levied so that an aggregate amount of one thousand dollars (\$1,000)
10 in the form of such money and in such accounts remains free of
11 levy.

12 Cal. Civ. Proc. Code § 487.010(c)(7).

13 Defendants argue that this account holds earnings from Sarilee Marks's employment with
14 the El Dorado Community Health Center in Placerville, which are exempt pursuant to California
15 Code of Civil Procedure §§ 487.020(c) and 706.011. ECF No. 33 at 5. Platte River concedes that
16 earnings are exempt from attachment. ECF No. 34 at 4. Accordingly, the court finds that the
17 individual deposit account ending in account number 172 at U.S. Bank is exempt and not subject
18 to attachment. Accordingly, the motion must be denied as to this property.⁵

19 4 Loan Instruments

20 Platte River also seeks to attach any amount payable under a loan made by Dean Marks to
21 Premier Power. ECF No. 32 at 5-6. According to Platte River, Dean Mark entered into three
22 separate loan agreements with Premier Power, totaling \$400,000. ECF No. 32-1 ¶ 13. The loan
23 repayment term under each agreement is "at the request of the lender." *Id.* Defendants have not
24 produced any documents evidencing that these loans have been repaid. *Id.*

25 California Code of Civil Procedure § 487.010(c)(8) provides that instruments are subject
26 to attachment. An instrument is defined as "a negotiable instrument of any other writing that
27 evidences a right to the payment of monetary obligation, is not itself a security agreement or
28 lease, and is of a type that in ordinary course of business is transferred by delivery with any
necessary endorsement or assignment." Cal. Comm. Code § 9102(a)(47).

⁵ At the hearing, Platte River argued that it is unable to discern whether the account only contains Ms. Marks's earnings because defendants have failed to adequately respond to Platte River's discovery requests. Platte River, however, has not filed a motion to compel discovery, or for discovery sanctions and there is no evidence before the court indicating that the account at issue contains monies that are not exempt.

1 Accordingly, Dean Marks's right to receive payment for a loan made to Premier Power is
2 subject to attachment pursuant to California Code of Civil Procedure § 487.010(c)(8).

3 Furthermore, defendants do not contend that such property is exempt. Accordingly, Platte
4 River's motion as to this property must be granted.

5 5. Securities Accounts

6 Platte River seeks to attach multiple brokerage and investment accounts pursuant to
7 California Code of Civil Procedure § 487.010(c)(10), which provides that securities are subject to
8 attachment. Platte River states that defendants have the following accounts which may be subject
9 to attachment:

- 10 1. Fidelity Education Account ending in 061 in the name of Dean Marks, as
11 participant and Richard H. Marks, as beneficiary.
- 12 2. Fidelity Rollover IRA Account ending in 219 in the name of Sarilee Marks.
- 13 3. Fidelity Rollover IRA Account ending in 254 in the name of Dean Marks.
- 14 4. Fidelity Individual IRA Account ending in 990 in the name of Dean Marks.
- 15 5. Vanguard Retirement Savings Plan ending in 658 in the name of Dean Marks

16 As for the education account ending in 061 in the name of Dean Marks, defendants do not
17 contend that it is exempt, and therefore court finds that it is subject to attachment.⁶

18 As for the remaining accounts (accounts ending in 219, 254, 658, 990), defendants argue
19 that these accounts are retirement accounts and are therefore not subject to attachment. ECF No.
20 33 at 6. Platte River does not dispute that any validly-funded retirement account would be
21 exempt from attachment. ECF No. 32 at 6. It only claims that defendants have not provided it
22 with sufficient documents to determine whether the retirement accounts were properly funded.

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26 ⁶ At the February 18 hearing, defendants' counsel requested additional time to conduct
27 research as to whether education accounts are exempt from attachment. Notwithstanding the fact
28 that the motion was before the court for further hearing and the parties had already submitted
supplemental briefs, the court entertained the request and permitted defendants' to file a one-page
brief by the end of the day. No brief was filed.

1 *Id.* “Therefore, Platte River reserves the right to seek an attachment of any retirement accounts,
2 including but not limited to any accounts listed above, to the extent those accounts were not
3 properly funded.”⁷ *Id.*

4 Based on the evidence currently before the court, it cannot be determined that these
5 accounts are not subject to attachment and the motion must be denied, without prejudice, as to
6 these accounts. Should Platte River discover evidence demonstrating that the accounts are not
7 properly-funded retirement accounts, it may renew its motion as to these accounts.

8 D. Temporary Protective Order

9 Platte River argues that it is entitled to a Temporary Protective Order to protect its rights
10 under the Indemnity Agreement, which provides that defendants agreed to assign, transfer, and
11 convey all their rights, title, interests and estate in and to all of their property to Platte River. ECF
12 No. 32 at 7. It contends that the assignment provision in the Indemnity Agreement is broad
13 enough to support Platte River’s request for a right to attach order against all of Defendants’
14 property located in California, as well as a temporary restraining order prohibiting defendants
15 from disposing of any other property located outside of California. *Id.*

16 Platte River further explains that it has already served discovery requests on defendants to
17 determine their assets. ECF No. 32 at 2. Defendants have refused to provide complete responses
18 to Platte River’s discovery requests, and Platte River intends to bring a motion to compel
19 responses to its discovery request. *Id.* Specifically, defendants have refused to produce their tax
20 returns, a complete copy of the Marks Family Trust, and information regarding the \$973,800
21 received for the sale of Dean Marks’ sale of stock in Premier Power. *Id.*

22 Accordingly, Platte River requests that the court issue an order prohibiting defendants
23 from transferring, encumbering, refinancing or otherwise dissipating any of their assets until
24 Platte River can complete discovery, determine the location of defendants’ property, determine
25 what property is subject to attachment, enforce any order issued by the court, and pursue any
26 other remedies necessary to protect its rights. *Id.*

27
28 ⁷ Again, Platte River has not moved to compel further responses to its discovery requests.

1 “California law allows a creditor to obtain a TPO against a debtor’s property after it has
2 been shown in an ex-parte proceeding the probable validity of its claim and the probability of
3 great harm if relief is not granted.” *In re Wind Power Systems, Inc.*, 841 F.2d 288, 291 (9th Cir.
4 1988). California Code of Civil Procedure section 486.010 provides that “[a]t the time of
5 applying for a right to attach order under Chapter 4 . . . , the plaintiff may apply pursuant to this
6 chapter for a temporary protective order by filing an application for the order with the court in
7 which the action is brought. Cal. Civ. Proc. Code § 486.010(a). That section further provides
8 that “[t]he application shall state what relief is requested and shall be supported by an affidavit,
9 which may be based on information and belief, showing that the plaintiff would suffer great or
10 irreparable injury . . . if the temporary protective order were not issued. Cal. Civ. Proc. Code
11 § 486.010(b).

12 After obtaining a TPO, a creditor can then “obtain an order to attach and a writ of
13 attachment after notice and a full hearing.” *In re Wind Power Systems, Inc.*, 847 F.2d at 291. A
14 TPO shall expire at the earliest of the following: (1) forty days from its issuance, (2) a period of
15 less than 40 days if ordered by the court, or (3) when a levy of attachment upon the property is
16 made by the plaintiff. “The attachment statutes are given strict construction.” *See Rose v.*
17 *Abraham*, No. CIV F 08-606 AWI SMS, 2008 WL 2275573, at * 3 (E.D. Cal. May 21, 2008).

18 Platte River seeks a TPO to provide it with an opportunity to conduct further discovery
19 into whether defendants possess additional property that may be subject to attachment. It is clear,
20 however, that the purpose of a TPO is to provide a temporary injunction until the court has had
21 the opportunity to conduct a full hearing on plaintiff’s application for a writ of attachment. *See In*
22 *re Wind Power Systems, Inc.*, 847 F.2d at 291; *Rose*, 2008 WL 2275573, at * 3. Platte River does
23 not seek a TPO for this purpose. Instead, it seeks an injunction to prevent defendants from
24 hiding assets while it conducts additional discovery into what other assets may be subject to
25 attachment. Platte River is not entitled a TPO for this purpose. Accordingly, Platte River’s
26 request for a TPO must be denied.

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1 IV. Conclusion

2 Accordingly, it is hereby ORDERED that Platte River submit a proposed right to attach
3 order and a proposed writ of attachment for issuance by the clerk, consistent with the
4 recommendations above, within fourteen days of the date of these findings and recommendations.


5 Further, it is hereby RECOMMENDED that:

6 1. Platte River's motion for a writ of attachment be granted in part as detailed above.

7 2. The Clerk be directed, after Platte River files a \$10,000 undertaking,⁸ to issue a writ
8 that would attach only to the property subject to attachment as set forth above, and, within that
9 list, only such property as is necessary to secure an obligation in the amount of \$1,094,706.93
10 (\$1,011,121.60 for claims made on the Bonds and \$83,585.33 for attorneys' fees).

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

18 DATED: September 17, 2015.

19 
20 EDMUND F. BRENNAN
21 UNITED STATES MAGISTRATE JUDGE

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⁸ The parties' briefs do not address the requirement that Platte River file an undertaking,
and therefore the court finds the statutory presumed amount of \$10,000 appropriate.