UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 4.2
Eastern Division

United States of America Internal Revenue Service

Plaintiff,

v.

Case No.: 1:11−cv−05045
Honorable Edmond E. Chang

Equipment Acquisition Resources, Inc.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, February 13, 2012:

MINUTE entry before Honorable Edmond E. Chang: The appeal is under advisement. Status hearing of 02/15/12 is reset to 03/28/12 at 8:30 a.m. Mailed notice(slb,)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

CHARLES ALLEN, *et al.*, Plaintiff,	)	2:03-cv-1358-DAE-RJJ
vs.	)	
GREGORY DAMM, *et al.*, Defendant.	)	**ORDER**

IT IS HEREBY ORDERED that the parties shall file joint Interim Discovery Status Reports on April 20, 2012; June 18, 2012; and, August 17, 2012.

IT IS FURTHER ORDERED that the joint Interim Discovery Status Reports shall contain the following:

1. Shall identify the discovery that has been completed;
2. Shall identify the discovery that remains outstanding;
3. Shall identify any pending discovery motions; and,
4. Shall detail all attempts to settle the case.

DATED this 13th day of February, 2012.

ROBERT J. JOHNSTON
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-0930-REB-BNB

BANK OF AMERICA, a national banking association,

Plaintiff,

v.

MICHAEL NEIL SCHLUTERBUSCH, an individual,
BANK ONE, N.A., a national banking association,
THE INTERNAL REVENUE SERVICE,
THE COLORADO DEPARTMENT OF REVENUE,
COMPASS BANK, a Colorado corporation,
NORTH PARK HOMEOWNER'S ASSOCIATION, and
CAROL SNYDER, Public Trustee for Adams County Colorado,

Defendants.

MINUTE ORDER

Minute Order Entered by Magistrate Judge Boyd N. Boland

Pursuant to a phone call from plaintiff's counsel, it has come to the attention of the Court that this matter has been resolved between plaintiff and the Internal Revenue Service.

IT IS ORDERED that these parties shall file a stipulation or motion to dismiss with prejudice, pursuant to Fed.R.Civ.P. 41(a) on or before **February 27, 2012**, or a status report addressing why dismissal has not been accomplished.

IT IS FURTHER ORDERED that the Pretrial Conference now set for **February 27, 2012**, is **VACATED**.

DATED: February 13, 2012

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 4:11-CV-1942 (CEJ)
	)	
DAPHYNE BELCHER, et al.,	)	
	)	
Defendants.	)	

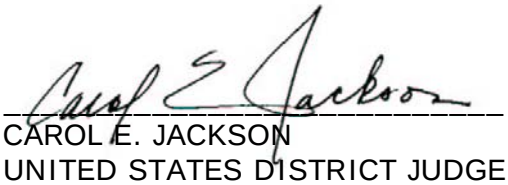
ORDER

On January 19, 2012, the Clerk of Court entered default against the defendant Westwood on Ladue Subdivision, based on the defendant's failure to file an answer or other responsive pleading as required by Fed. R. Civ. P. 12(a). No motion to set aside has been filed, and the defendant remains in default.

The defendant's default constitutes an admission of the factual allegations of the complaint. See Taylor v. City of Ballwin, 859 F.2d 1330, 1333 n. 7 (8th Cir. 1988). Therefore, the Court finds that the plaintiff is entitled to judgment against the defendant.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion for default judgment against defendant Westwood on Ladue Subdivision [Doc. #21] is **granted**. The Court will enter default judgment against defendant Westwood on Ladue Subdivision at the conclusion of this case.



CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 13th day of February, 2012.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 4:11-CV-1942 (CEJ)
	)	
DAPHYNE BELCHER, et al.,	)	
	)	
Defendants.	)	

ORDER

IT IS HEREBY ORDERED that counsel for defendants St. Louis County and Metropolitan Sewer District are not required to participate in the Rule 16 Scheduling Conference on February 16, 2012.

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 13th day of February, 2012.

In the United States Court of Federal Claims

No. 07-888 T
(Filed: February 13, 2012)

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CELLCO PARTNERSHIP
d/b/a VERIZON WIRELESS

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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ORDER

On February 13, 2012 the parties filed a joint status report and motion for enlargement of time to file dispositive motions. The parties indicate that settlement discussions have been ongoing. They request an additional 60 days to continue negotiations and to file either dispositive motions or a joint status report regarding settlement. The parties have made 15 similar requests since May 2010.

The Court hereby **STAYS** the deadline for filing dispositive motions and **DENIES** as moot the parties' motion to enlarge the deadline for filing dispositive motions. The Court **GRANTS** the parties' motion for additional time to engage in settlement negotiations. On April 13, 2012, the parties shall file a joint status report regarding settlement. The status report shall include a detailed description of the efforts made toward settlement since the previous joint status report.

s/ Edward J. Damich
EDWARD J. DAMICH
Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DEANNA CHEETHAM,

Plaintiff, CASE NO. 3:06-cv-704-J-PAM-TEM

vs.

CSX TRANSPORTATION, et al.,

Defendant.

REPORT AND RECOMMENDATION[1]

This case is before the Court on Plaintiff's Motion for Writ of Execution (Doc. #319), filed September 30, 2011; Plaintiff's Brief in Support of the Motion for Writ of Execution (Doc. #321), filed September 30, 2011; and Defendant's response thereto (Doc. #322), filed October 13, 2011. On December 15, 2011, the United States filed a brief as *amicus curiae* (Doc. #325), pursuant to the Court's November 17, 2011 order inviting its participation (Doc. #323). Plaintiff a response to the United States' *amicus* brief on January 6, 2012 (Doc. #326).

Background

In the instant action, Plaintiff brought a claim for wrongful termination under the Family and Medical Leave Act ("FMLA"). Following a jury trial, Plaintiff was awarded "damages to compensate for loss of wages and benefits" in the amount of $225,100.

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[1] Any party may file and serve specific, written objections hereto within FOURTEEN (14) DAYS after service of this Report and Recommendation. Failure to do so shall bar the party from a *de novo* determination by a district judge of an issue covered herein and from attacking factual findings on appeal. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2); and, Local Rule 6.02(a), United States District Court for the Middle District of Florida.

(Doc. #262). An amended judgment was entered in this case on July 6, 2011, directing Defendant CSX Transportation ("CSX") to pay Plaintiff damages in the amount of $199,056 and attorney's fees and costs in the amount of $66,599.12, for a total amount of $265,655.12.[2]

The issue before the Court now is whether a damages award equal to lost wages and benefits under the FMLA constitutes "wages" subject to income and employment tax withholding obligations under applicable law.

Defendant maintains that it will withhold all applicable federal and state taxes from the $199,056 on the basis that the judgment constitutes wages subject to payroll deductions.[3] In support of its argument, Defendant notes that this amount represents the amount of lost back pay that Plaintiff claimed at trial she was entitled to recover.[4]

Plaintiff maintains the judgment must be satisfied in the amount as written. Plaintiff argues Defendant's position is against authority established by federal courts finding that a judgment under the FMLA does not constitute wages subject to tax withholding obligations, based upon the statutory language of the FMLA. Plaintiff cites to three district court cases wherein the court found, based upon the unique language utilized in the FMLA statute, damages awards under the FMLA are not subject to statutory deductions. *See*

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[2] The Court found the damages awarded by the jury were greater than those requested by Plaintiff, and a remittitur was appropriate. (Doc. #300 at 13-14). Thus, the Court reduced Plaintiff's damages to the amount requested: $199,056. (Doc. #300 at 14).

[3] CSXT acknowledges it must pay $66,599.12 in attorney's fees and costs, and this amount is thus not in dispute.

[4] The Trial Transcript reflects the following from Plaintiff's counsel: "So her total wage loss after deducting her post-termination earnings is $199,055.79. That's what we are asking you award in terms of damages to replace her lost income." Trial Tr. Vol. III: 71.

Churchill v. Star Enterprises, 3 F.Supp.2d 622 (E.D. Pa. 1998); *Longstreth v. Copple*, 101 F.Supp.2d 776 (N.D. Iowa 2000); *Carr v. Fresenius Medical Care*, No. 05-2228, 2006 WL 1339970 (E.D. Pa. May 16, 2006).

Defendant has not cited, and this Court has not found, any cases in which federal courts have held damages awards under the FMLA are subject to statutory deductions. However, Defendant contends that awards for "back pay" under other employment statutes, such as Title VII and ERISA, constitute wages subject to tax withholding. *See Rivera v. Baker West, Inc.*, 430 F.3d 1253 (9th Cir. 2005); *Gerbec v. United States*, 164 F.3d 1015 (6th Cir. 1999). Defendant also contends that if it is ordered to pay the entire $199,056 without any deductions, it could be liable to the IRS for failing to withhold necessary taxes. Defendant argues Plaintiff may request a refund from the IRS for the income and employment taxes that CSX withheld if she believes the withholding is improper.

In *Kendrick v. Jefferson County Board of Education*, 13 F.3d 1510 (11th Cir. 1994), the Eleventh Circuit remanded to the district court for determination of whether a back pay award under § 1983 is subject to payroll deductions for taxes. *Id.* at 1514-15. The Eleventh Circuit noted the Internal Revenue Service ("IRS") had not been heard from in the case. *Id.* at 1515. "Given the IRS's expertise and its statutory responsibility, courts should be reluctant to decide important tax questions without giving the IRS an opportunity to express its views." *Id.* The Eleventh Circuit ordered the district court to provide the IRS and relevant state and local taxing authorities the opportunity "to express their views, through an appropriate means such as *amicus curiae* participation, on the taxation issues

within their area of responsibility." *Id.*

As this case involved a similar question of taxation, but under a distinct statute, the FMLA, the undersigned found participation by the IRS would be helpful. Therefore, the Court invited the Commissioner of Internal Revenue to file an *amicus curiae* brief (Doc. #323). Specifically, the Court requested the IRS's position on whether an award for damages equal to lost wages and benefits under the FMLA constitutes "wages" subject to income and employment tax withholding obligations under applicable law, and whether Defendant would be liable for failure to withhold necessary taxes if it paid the full amount awarded without deductions. The United States filed its *amicus* brief on December 15, 2011 (Doc. #325).

Analysis

The United States averred damages equal to lost wages and benefits under the FMLA are "wages" subject to income and employment tax withholding obligations under applicable federal law. Thus, it claims the $199,056 in damages awarded to Plaintiff is subject to withholding obligations under the Internal Revenue Code because this amount is equal to the Plaintiff's lost pay. Further, the United States claimed if Defendant fails to withhold the federal taxes due on the damages award, it would be liable to the government for those taxes, unless it could demonstrate that Plaintiff included the damages award on her income tax return and paid the taxes due. For the reasons to be discussed herein, the undersigned agrees with the United States' well-reasoned position on this issue.

Under the Internal Revenue Code ("IRC"), federal income taxes and Railroad

Retirement Tax Act ("RRTA")[5] taxes must be withheld from wages paid to employees. RRTA taxes "shall be collected by the employer of the taxpayer by deducting the amount of the taxes from the compensation of the employee as and when paid." 26 U.S.C. § 3202.[6] The IRC requires "every employer making payment of wages shall deduct and withhold upon such wages" a federal income tax determined by the Secretary of the Treasury. 26 U.S.C. § 3402(a). "Wages" are defined to include "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash," unless specifically excepted. 26 U.S.C. § 3121(a). "Remuneration for employment" constitutes wages regardless of the name by which it is designated and even though the employer and employee relationship no longer exists at the time the remuneration is paid. 26 C.F.R. § 31.3121(a)-1(c), (i).

Plaintiff argues the damage award does not represent "back wages" because no services were performed by the Plaintiff on behalf of the Defendant during the relevant time period. However, this argument has been rejected by the Supreme Court in a wrongful discharge case under the National Labor Relations Act ("NLRA").

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[5] The RRTA tax is an employment tax similar to, and in lieu of, the Federal Insurance Contributions Act ("FICA") tax, on compensation to railroad employees by employers. *See* 26 U.S.C. § 3201, et seq. Railroad employers collect and pay RRTA taxes rather than FICA taxes. *Id.* The RRTA imposes employment taxes on employees and employers measured by rail workers' "compensation . . . for services rendered." 26 U.S.C. §§ 3201(a), 3221(a). The distinction between RRTA taxes and FICA taxes does not affect the issues before this Court. The term "compensation" in the RRTA has the same meaning as the term "wages" in the FICA. Treas. Reg. § 31.3231(e)-1(a)(1).

[6] This mirrors the language in 26 U.S.C. § 3102, stating FICA taxes "shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid." As stated previously, the term "compensation" in the RRTA has the same meaning as the term "wages" in the FICA. Treas. Reg. § 31.3231(e)-1(a)(1).

In *Social Security Board v. Nierotko*, the Supreme Court held that back pay awarded to an employee who was found to have been wrongfully discharged under the NLRA constituted wages for purposes of the Social Security Act. 327 U.S. 358 (1946). The Court emphasized that "wages" and "employment" should be interpreted broadly:

> The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind import breadth of coverage. They admonish us against holding that service can only be produced activity. We think that "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.

Id. at 366-67.

Applying this principle, courts have repeatedly held that awards that reflect compensation that would have been paid to the employee, i.e. back pay or future pay, constitutes "wages" subject to withholding obligations. Following the Supreme Court's reasoning, the Sixth Circuit held settlement proceeds in an ERISA action that represented back wages and future wages were "wages" subject to tax withholding. *Gerbec v. United States*, 164 F.3d 1015, 1026 (6th Cir. 1999). The court explained,

> The phrase "remuneration for employment" as it appears in § 3121 should be interpreted broadly. We hold that the phrase "remuneration for employment" includes certain compensation in the employer-employee relationship for which no actual services were performed. . . . The holding in *Nierotko* clearly supports the conclusion that awards representing a loss in wages, both back wages and future wages, that otherwise would have been paid, reflect compensation paid to the employee because of the employee-employer relationship, regardless of whether the employee actually worked during the time period in question.

Id. (internal footnotes and citations omitted); see also *Rivera v. Baker West, Inc.*, 430 F.3d 1253, 1258-59 (9th Cir. 2005) (holding award for back pay and lost wages under Title VII constituted "wages" subject to income tax withholding); *Mayberry v. United States*, 151

F.3d 855, 860 (8th Cir. 1998) (holding compensation based on pre-layoff earnings and earnings impairment additur constituted "wages" subject to FICA tax withholding); *Hemelt v. United States*, 122 F.3d 204, 209-10 (4th Cir. 1997) (holding ERISA settlement award representing compensation for lost wages is subject to FICA tax withholding); *Blim v. Western Elec. Co.,* 731 F.2d 1473, 1480 n.2 (10th Cir. 1984) ("Back pay is taxable to the plaintiffs and subject to income tax and social security withholding."); *Archie v. Grand Central Partnership,* 86 F.Supp.2d 262, 273 (S.D.N.Y. 2000) ("[C]ourts are generally of one mind that withholding from back wages must be made, whether in the FLSA context or analogous employment discrimination contexts."); *Melani v. Board of Higher Education*, 652 F. Supp. 43, 48 (S.D.N.Y. 1986) (holding back pay award under Title VII for the loss of prospective employment because of discriminatory hiring practices subject to income tax and FICA withholding), *aff'd without published op.,* 814 F.2d 653 (2nd Cir. 1987). *But see Dotson v. United States*, 87 F.3d 682, 690 (5th Cir. 1996) (portion of settlement paid for "loss in earning capacity" was not "for services already performed" and thus not subject to wage taxation).

In the instant case, the trial transcript indicates that the damages award to Plaintiff was based on her total wage loss. Plaintiff argued for damages "to replace her lost income" and alleged "her total wage loss after deducting her post-termination earnings is $199,055.79." Trial Tr. Vol. III: 71. Thus, it appears the entire $199,056 award is to compensate Plaintiff for wages she would have been paid by Defendant had Plaintiff not been wrongfully terminated. Therefore, the award for lost wages in the instant case appears to fall squarely within the same category of awards found to constitute "wages"

subject to tax withholding in *Nierotko* and its progeny, notwithstanding the fact that Plaintiff did not perform any services for Defendant during that time.

Plaintiff argues the unique statutory language of the FMLA, which authorizes damages in an amount "equal to" any denied or lost wages, warrants different treatment of awards under its provisions. The remedial provision of the FMLA states:

> Any employer who violates section 2615 of this title shall be liable to any eligible employee affected-
>
> (A) for damages equal to-
>
> (i) the amount of-
>
> (I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
>
> (II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;
>
> (ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and
>
> (iii) an additional amount as liquidated damages ...; and
>
> (B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

29 U.S.C. § 2617(a)(1)(A)(i)(1).

Plaintiff cites to three district court cases wherein the court found, based upon the unique language utilized in the FMLA statute, damages awards under the FMLA are not subject to statutory deductions. *See Churchill v. Star Enterprises*, 3 F.Supp.2d 622 (E.D.

Pa. 1998); *Longstreth v. Copple*, 101 F.Supp.2d 776 (N.D. Iowa 2000); *Carr v. Fresenius Medical Care*, No. 05-2228, 2006 WL 1339970 (E.D. Pa. May 16, 2006).

In *Longstreth*, a former employee brought suit against her former employer and her former supervisor under the FMLA. *Longstreth*, 101 F.Supp.2d at 776. Defendants served an Offer of Judgment in the amount of $40,000, which the plaintiff accepted. *Id.* The offer did not indicate whether the amount represented lost past income and benefits, lost future income and benefits, actual and compensatory damages, or liquidated damages. *Id.* Nor did the offer indicate which portion represented damages payable by the corporation and those payable by the individual supervisor. *Id.* The court found the "equal to the amount of" language suggested Congress intended to allow for individual liability under the FMLA, because individuals held liable under the FMLA would be required to pay damages "equal to the amount of" any denied or lost wages, as opposed to "back pay." *Id.* at 780. The court concluded "the inclusion of the language 'equal to the amount of' recognizes that damages available under the FMLA do not *per se* constitute wages that are subject to statutory deductions." *Id.* at 781. The court then held that, because the defendants did not specify whether their settlement consisted of damages payable from the individual defendant (which would not trigger withholding obligations) or the defendant corporation (which would trigger withholding obligations), the defendants could not withhold taxes. *Id.*

Thus, contrary to Plaintiff's assertion, the court in *Longstreth* did not hold "that an employer may not withhold statutory deductions from an FMLA damages award" because "damages under the Act do not constitute wages." (Doc. #321, at 2). Rather, the court held that damages do not "*per se* constitute wages that are subject to statutory deductions"

because the FMLA provides for individual liability, *id.* at 781, and it was "possible that the $40,000.00 represent[ed] damages payable by [the individual supervisor] who has no obligation to withhold statutory deductions." *Id.* at 778. The court held plaintiff was entitled to the full amount of the award without withholdings, "because the defendants failed to allocate which portion of the $40,000.00 judgment represented payment by [the employer corporation] as opposed to payment by [the individual supervisor]," thus making it impossible for the court "to ascertain what amount of the $40,000.00 constitutes wages for purposes of statutory wage deductions." *Id.* Further, in contrast to Plaintiff's position, *Longstreth* actually stands for the proposition that an award which represents compensation from the defendant corporation to an employee would be subject to withholding obligations. *See id.* at 777-78 ("The court agrees with the defendants' statement that MCI is required by federal and state law to withhold from wages paid to its employees amounts owed by the employees for statutory wage deductions. . . . [H]ad MCI included language in the Offer of Judgment indicating that the $40,000 made payable to Longstreth represented payment on behalf of both MCI and Tom Copple, MCI's withholding of statutory deductions would have been proper.").

In *Churchill*, the plaintiff sued her former employer and two former supervisors under the FMLA. *Churchill*, 3 F.Supp.2d at 623. The jury returned a verdict of $8,609.02 in her favor, representing "damages equal to the amount of any wages, salary, employment benefits or other compensation denied or lost to such employees by reason of the violation" of the FMLA. *Id.* The court added prejudgment statutory interest and concluded liquidated damages, as well as reinstatement, were warranted. *Id.* Judgment was entered against

the defendants in the amount of $18,337.22. In holding that the award was not subject to tax withholding, the court reasoned,

> In this action, plaintiff, who had been terminated from her job, sought damages for the period when she was an ex-employee. Thus, the jury's award does not and cannot represent wages for services performed since she performed none during the relevant time frame. The FMLA explicitly recognizes this reality. The employer who violates the statute is liable not for any denied or lost wages but for damages "equal to the amount of" any denied or lost wages.

Id. at 624. The court also reasoned that the jury verdict did not delineate between lost wages and lost employment benefits, and noted the IRC excludes certain employee benefits from the definition of "wages." *Id.* Thus, "even if withholding were otherwise appropriate, it is not possible to determine the proper amount in this case." *Id.*

Likewise, the court in *Carr* also focused on the "equal to" language found in the FMLA. In *Carr*, the plaintiff brought suit against her former employer and two supervisors under the FMLA. *Carr*, 2006 WL 1339970, at *1. The parties entered into a settlement agreement, but disagreed as to whether the portion of the settlement representing "back pay" was subject to withholding for federal and state income and payroll taxes. *Id.* The court held, "[A] recovery under the FMLA does not constitute 'back pay' but an amount of damages 'equal to' the sum of various components, including, but not limited to, lost wages. As such, an award or settlement for an FMLA claim does not constitute 'wages' subject to withholding under the tax codes." *Id.* at *2 (internal footnotes omitted). The court then stated, "We cannot and will not assume that where Congress referred to 'damages equal to' wages it meant the same thing as 'wages.'" *Id.* at *3.

The court relied heavily on the decision in *Churchill* and agreed that damages could

not represent remuneration for services performed by the plaintiff because there was not an employee/employer relationship between the two when the loss of "back pay" occurred. *Id.* at *3. The court distinguished *Nierotko* on the grounds that it was decided in the context of an employee who was reinstated, "such that an employment relationship between the employer and employee continued after the improper discharge," and it did not involve a claim made under a remedial scheme which used 'equal to the amount of' language. *Id.* at *4.

Thus, in both *Churchill* and *Carr*, the Eastern District of Pennsylvania reasoned FMLA damages could not be wages for withholding tax purposes because the damages "cannot represent wages for services performed since [the plaintiff] performed none during the relevant time frame." *Carr*, 2006 WL 1339970 at *3; *Churchill*, 3 F.Supp.2d at 624. As discussed previously, the Supreme Court has expressly rejected the idea that the determination of whether taxes must be withheld from a damages award depends upon whether services were actually performed by the employee.

> The petitioner urges that Nierotko did not perform any service. It points out that Congress in considering the Social Security Act thought of benefits as related to "wages earned" for "work done." We are unable, however, to follow the Social Security Board in such a limited circumscription of the word "service." The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind *import breadth of coverage*. They admonish us against holding that "service" can be only productive activity. We think that "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.

Nierotko, 327 U.S. at 355-56 (footnotes omitted) (emphasis added). Relying on *Nierotko*, several circuits have followed the Supreme Court's guidance that "wages" and

"employment" should be interpreted broadly in the context of employment statutes, including ERISA, Title VII, and the ADEA. *See Gerbec*, 164 F.3d at 1026 (ERISA); *Rivera*, 430 F.3d at 1258-59 (Title VII); *Blim*, 731 F.2d at 1480 n.2 (ADEA).

The courts in *Churchill* and *Carr* also placed significant emphasis on the "unique" language of the FMLA to distinguish it from the previously employment statutes, holding the "equal to" language provided for damages representing something other than lost wages or back pay. However, the undersigned does not believe that this language mandates an award for lost wages awarded under the FMLA be treated differently from almost every other type of back pay award. The plain language of the statute provides that plaintiff is entitled to an award "equal to" three categories of damages – lost wages or actual monetary damages, plus interest, plus liquidated damages if warranted. As Defendant aptly puts it, "the most logical and plain interpretation of these provisions when read together is that 'damages equal to' is an acknowledgment of the fact that there are three separate amounts that (if awarded) can be added together to arrive at a total damages award that is 'equal to' – 'the amount of' lost wages (or other compensation), plus interest on that amount, plus any liquidated damages." (Doc. #322 at 5-6). Further, as the court in *Longstreth* recognized, this language is better explained as accounting for the fact that the FMLA allows for liability on an individual who violates its provision. *Longstreth*, 101 F.Supp.2d at 780. Finally, the undersigned finds *Carr* and *Churchill* to be distinguishable from the instant case, where Plaintiff is not suing any individual supervisors and it is not in dispute that the amount of damages awarded directly reflects the amount of wages lost, as indicated by Plaintiff herself at trial.

Plaintiff's interpretation of the FMLA damages provision would also place Defendant in an unfair position. Defendant argues if it is ordered to pay the entire $199,056 without any deductions, it could be liable to the IRS for failing to withhold necessary taxes. The United States agreed that if Defendant fails to withhold the federal taxes due on the damages award, it would be liable to the government for those taxes, unless it could demonstrate that Plaintiff included the damages award on her income tax return and paid the taxes due. This could leave Defendant in the position of potentially paying the same amount twice – once to Plaintiff and once to the IRS.

As the United States explained,

> An employer is liable to the Government for [income and RRTA] taxes, whether or not it collects them from its employees' wages. 26 U.S.C. § 3403, titled "Liability for Tax," states that "[t]he employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter," and the corresponding Treasury Regulation states that the employer "is liable for the payment of such tax whether or not it is collected from the employee by the employer." Treas. Reg. § 31-3403-1.[7] In fact, an individual employer (or a "responsible person" of a corporate employer) who fails to withhold FICA and income taxes from the wages of his employees, or who fails to pay those withheld taxes over to the Government, can be held personally liable for a penalty under 26 U.S.C. § 6672 that is equal to the amount that should have been withheld and paid over.
>
> An employer is not liable for the tax owed if the tax it failed to withhold is later paid, but, even then, the employer is not relieved of liability for any applicable penalties or other additions. 26 U.S.C. § 3402(d). Moreover, to be relieved of liability for that tax, the employer must show that the tax has been paid. Treas. Reg. § 31.3402(d)-1. Thus, an employer (such as CSX here) will not be relieved of liability for withholding taxes unless it can show that the taxes have been paid, and even then it will still be liable for applicable penalties and other statutory additions.

(Doc. # 325 at 10).

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[7] Likewise, a railroad employer is liable for the RRTA tax "whether or not collected from the employee." Treas. Reg. § 31.3202-1(e).

The Internal Revenue Code requires that federal taxes be withheld from wages because withholding is the most reliable means of ensuring that income and FICA (or RRTA) taxes are paid. *See Baral v. United States*, 528 U.S. 431, 436 (2000) (describing withholding as a "method[] for collecting the income tax"). In recognition of the burden placed on employers to properly withhold taxes and the possible penalties they could face for failure to do so, courts considering similar tax withholding issues have placed the burden on Plaintiff to seek a refund from the IRS for the amount withheld. In determining whether an award of back pay under the FLSA should consist of gross wages or wages net of taxes, the Eastern District of Virginia reasoned,

> Courts do not disagree . . . with respect to the general principle that employer-paid back pay in satisfaction of a judgment constitutes wages for purposes of income taxes and withholding, that tax authorities must receive their due, and that neither plaintiffs nor defendants should receive windfalls. Here, the Court concludes that these principles may best be satisfied by having the County withhold taxes and remit them to the appropriate revenue authorities; plaintiffs may then seek to reclaim any excess withholding according to their individual circumstances. This process will most closely approximate the actual pay that plaintiffs should have received.

Thomas v. Fairfax, 758 F.Supp. 353, 367 (E.D.Va. 1991) (internal citations omitted); *see also Rivera*, 430 F.3d at 1259-60 (holding back pay wages were "subject to withholding," noting the employer "might have been liable for failing to withhold the necessary taxes," and stating plaintiff "remain[ed] free to seek a refund for wrongfully withheld taxes via a direct claim to the Internal Revenue Service"); *Archie*, 86 F.Supp.2d at 273 ("There is no reason the plaintiffs here should be excused from following the procedure that must be followed by all employees in the country of filing the appropriate tax forms and receiving any refund from the tax authorities that may be due for excess withholding."). Permitting Defendant

to withhold taxes ensures Defendant will not be held liable to the IRS for Plaintiff's failure to pay and leaves Plaintiff "not without recourse, either as to the fact or the amount of the income tax withheld." *Rivera*, 430 F.3d at 1260.

Conclusion

As indicated in Defendant's brief and the United States' *amicus* brief, the vast weight of authority suggests damages awards equal to lost wages and benefits under the FMLA constitute "wages" subject to income and employment tax withholding obligations under applicable law. Accordingly, for the reasons discussed herein, the undersigned respectfully **RECOMMENDS** Plaintiff's Motion for Writ of Execution (Doc. #319) be **DENIED** to the extent that it requests a Court order for Defendant to pay $199,056 without withholding applicable federal and state taxes. Defendant should be permitted to withhold require federal and state taxes from the gross amount of $199,056, with the net amount payable to Plaintiff.

DONE AND ENTERED at Jacksonville, Florida this 13th day of February, 2012.

Thomas E. Morris

THOMAS E. MORRIS
United States Magistrate Judge

Copies to:
Hon. Paul A. Magnuson
All counsel of record

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In Re: Chapter 13

Gregory Albert Darst Case No. 8-11-bk-23529-CPM

Debtor
_____/

ORDER ON TRUSTEE'S AMENDED MOTION TO DISMISS FOR FAILURE TO COMPLY WITH FIRST DAY ORDER OF ONE OR MORE DEFICIENCIES AND RESCHEDULING §341 MEETING OF CREDITORS

This matter came on for consideration, for the entry of an appropriate Order in the above styled Chapter 13 case, upon the Trustee's Motion To Dismiss for failure to provide at least seven **(7) days prior** to the §341 Meeting of Creditors the Chapter 13 Trustee with copies of tax returns for the two years preceding the petition date and copies of all pay stubs, advices, or documentation of income sources (Payment Advices) for the six month period before they filed and failure to file tax returns with the Internal Revenue Service for the tax years 2007, 2008, 2009, and 2010 (Docket No. 29). The Court having reviewed the motion and based upon the facts set forth above, it is

ORDERED AND ADJUDGED as follows:

1. The Court Orders the Debtor to attend a rescheduled §341 Meeting of Creditors and failure to attend shall constitute a willful failure of the Debtor to abide by an Order of this Court.

2. The Court will reserve ruling on the Trustee's Motion to Dismiss, however, in the event the Debtor appears at the rescheduled §341 Meeting of Creditors, as herein provided, the Trustee's shall submit an order denying the Trustee's Motion to Dismiss.

3. The Debtor's §341 Meeting of Creditors shall be rescheduled to February 28, 2012 at 11:30 a.m., at Timberlake Annex, 501 East Polk Street, Suite 100-B, Tampa, Florida 33602.

4. In the event the Debtor fails to attend the rescheduled §341 Meeting of Creditors and fails to provide at least seven **(7) days prior** to the §341 Meeting of Creditors the Chapter 13 Trustee with copies of tax returns for the two years preceding the petition date and copies of all pay stubs, advices, or documentation of income sources (Payment Advices) for the six month period before they filed and fails to file tax returns with the Internal Revenue Service for the tax years 2007, 2008, 2009, and 2010, the Trustee shall submit to the Court an Order dismissing the above styled Chapter 13 case.

DONE AND ORDERED at Tampa, Florida on February 13, 2012.

Catherine Peek McEwen
United States Bankruptcy Judge

Copies to be provided by CM/ECF

JMW/LW/phl C13T 02/10/12

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF COLORADO

IN RE:

JEFFREY R. DENNIS,

Debtor.

Case No. 08-18483-MER

Chapter 11

ORDER

Having considered the United States of America's Motion for Summary Judgment and the undisputed facts set forth therein, the Motion is HEREBY GRANTED.

IT IS ORDERED that the Debtor's Objection to Proof of Claim (Rec. Doc. 112) is DENIED and Proof of Claim Number 10-2 is allowed as filed.

IT IS FURTHER ORDERED that Debtor Jeffrey R. Dennis shall immediately comply with the March 11, 2009 stipulation (Rec. Doc. 117).

Dated this 10th day of February, 2012.

BY THE COURT:

Michael E. Romero
U.S. Bankruptcy Judge

In the United States Court of Federal Claims

No. 11-908 T
(Filed: February 13, 2012)

* *
JOHN DOE,

Plaintiff,

v.

THE UNITED STATES,

Defendant.
* *

PROTECTIVE ORDER

The court finds that certain identifying information likely to be disclosed orally or in writing during the course of this litigation is confidential and that entry of a Protective Order is necessary to safeguard the confidentiality of that information. Accordingly, the parties shall comply with the terms and conditions of this Protective Order.

1. **Protected Information Defined.** "Protected information" as used in this order means identifying information pertaining to the plaintiff, including but not limited to name, address, social security number, employer, and other specific information having a tendency to identify plaintiff as an individual, which may be contained in:

a) any document (e.g., a pleading, motion, brief, notice, or discovery request or response) produced, filed, or served by a party to this litigation; or

b) any deposition, sealed testimony or argument, declaration, or affidavit taken or provided during this litigation.

2. **Documents to Be Initially Filed Under Seal.** Except for instances described in Paragraph 6 of this Order, all documents filed in this matter shall be initially filed under seal. Upon filing a document under seal, the filing party shall follow the procedures set forth in Paragraph 4 below to determine which portions, if any, of the filing must be redacted before being made public through the submission of a partially redacted copy of the sealed document (a "Public Copy").

3. **Procedure for Filing Under Seal.** Pursuant to this order, a document containing protected information may be filed electronically under the court's electronic case filing system using the appropriate activity listed in the "**SEALED**" documents menu. If filed in paper form, a the filing must be clearly marked as "**SEALED**" and must include as an attachment to the front of the parcel a copy of the certificate of service identifying the document being filed.

4. **Procedure for Submission of Redacted Public Copies.**

a) Initial Redactions. After filing a document containing protected information in accordance with paragraph 3, a party must serve on the other party within seven (7) business days a proposed redacted version marked "**Proposed Redacted Version**" in the upper right-hand corner of the first page with the claimed protected information deleted.

b) Additional Redactions. If a party seeks to include additional redactions, it must advise the filing party of its proposed redactions within seven (7) business days after receipt of the proposed redacted version. The filing party must then provide the other party with a second redacted version of the document clearly marked "**Agreed-Upon Redacted Version**" in the upper right-hand corner of the page with the additional information deleted.

c) Final Version. At the expiration of the seven-day period noted in (b) above, or after an agreement between the parties has been reached regarding additional redactions, the filing party must file with the court the final redacted version of the document clearly marked "**Redacted Version**" in the upper right-hand corner of the first page. This document will be available to the public.

d) Objecting to Redactions. Any party at any time may object to another party's proposed redaction of a filed document, providing it states such objections with specificity. If the parties are unable to reach an agreement regarding redactions, the objecting party may submit the matter to the court for resolution. Until the court resolves the matter, the disputed information must be treated as protected.

5. **Extensions of Time.** The parties may extend by written agreement the time periods described in Paragraph 4.

6. **Agreements Not to Seal.** Prior to filing any document, a filing party may obtain consent from a non-filing party to file a document without sealing it. If the parties agree that the proposed filing contains no sensitive information, then upon written agreement from the non-filing party, the filing party may file the document without sealing it. The filing party shall state that such agreement was obtained in the preamble to its filing.

7. **Retaining Protected Information After the Termination of Litigation.** Upon conclusion of this action (including any appeals and remands), the original version of any materials that have been filed with the court under seal will be retained by the court pursuant to RCFC 77.3(d). Copies of such materials may be returned by the court to the filing parties.

8. **No Use Beyond Litigation.** Sealed portions of any filed document shall not be used by the parties for any purpose other than in this action, except that agencies of the United States government may retain and access such information for related purposes.

9. **Access to Sealed Materials.** Access to sealed information shall be limited to "Qualified Persons": (i) the court, the clerk, and their employees; (ii) court reporters and videographers; (iii) counsel, employees, and contractors of counsel; (iv) witnesses at depositions and trial; (v) experts and consultants; (vi) officers, directors, supervisors, and employees of the parties, including the Internal Revenue Service, who are actively assisting in the prosecution or defense of the Litigation; and (vii) those additional persons whom counsel determines, in good faith, need to have access to the sealed information to properly protect and represent its interest in the Litigation, provided that the persons identified in categories (iv) and (vii) shall only be granted access after executing the "Acknowledgement" attached hereto or agreeing, under oath, to be bound by the restrictions in the Acknowledgement.

9. **No Prejudice.**

a) Nothing herein shall preclude any party from seeking and obtaining additional or different protection with respect to the documents or information produced hereunder.

b) Nothing herein constitutes an admission that any document is admissible as evidence.

c) The inadvertent or accidental disclosure of sealed information shall not be deemed a waiver in whole or in part of a claim of protection, provided that, as soon as the inadvertent or accidental production is discovered, the party seeking protection immediately notifies the other party, requesting the documents be redacted.

10. **Modification.** The restrictions imposed by this Agreed Protective Order may be modified only by order of the Court. Nothing in this Order shall preclude a party from seeking relief from this Order through the filing of an appropriate motion with the Court setting forth the basis for the relief sought.

11. **Written Agreement:** The term "written agreement" as used in this Agreed Order specifically contemplates agreements conveyed through email correspondence.

s/Eric G. Bruggink
ERIC G. BRUGGINK
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANGELA S. FORD, et al.,

Defendants,

CASE NO. 10-12642

HON. MARIANNE O. BATTANI

and

BAC HOME LOANS SERVICING LP,
and ANGELA S. FORD,

Counterplaintiffs,

v.

UNITED STATES OF AMERICA,

Counterdefendant,

and

BAC HOME LOANS SERVICING LP,
and ANGELA S. FORD,

Third-Party Plaintiffs,

v.

DELBERT MULLENS,

Third-Party Defendant.

/

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant/Counterplaintiff Angela Ford and BAC Home Loans Servicing LP's (Defendants) Motion for Summary Judgment (Doc. No. 59), and Plaintiff/Counterdefendant United States of America's (Plaintiff or "Government") Motion for Summary Judgment (Doc. No. 60). The Court heard oral argument on January 24, 2012, and at the conclusion of the hearing took these matters under advisement. For the reasons that follow, Plaintiff's Motion is **GRANTED** and Defendants' motion is **DENIED**.

I. INTRODUCTION AND STATEMENT OF FACTS

Plaintiff, the United States, filed suit to reduce to judgment tax debts of Delbert Mullens, and to enforce federal tax liens associated with those debts against property Mullins owned. Defendant Angela Ford now owns the property. Defendant BAC Home Loans Servicing ("BAC") is the current mortgagee. The facts giving rise to the lawsuit follow.

In August 1994, Mullens purchased property located at 4090 Cranbrook Court, No. 33, Bloomfield Hills, MI. The IRS made assessments of federal income taxes against Mullens based on returns he filed on November 26, 2001, for the 2000 tax year, and February 2, 2005, for the 2004 tax year. (Doc. No. 60, Exs. 4, 5). On February 23, 2003, an additional deficiency of taxes was assessed for the 2000 tax year. (Doc. No. 60, Ex. 4). Mullens did not pay the amount due--$359,750.15, (Doc. No. 60, Ex. 6).

On January 17, 2005, Mullens applied for a loan to refinance his property. He denied any federal tax debts in his loan application. On February 2, 2005, he executed a promissory note and mortgage in favor of Fremont Investment & Loan ("Fremont") for $595,000. (Doc. No. 60, Ex. 8). The Fremont mortgage, which was not a purchase money mortgage, was recorded over one month later, on March 9, 2005. (Doc. No. 60, Ex. 9).

After he received his loan, Mullins filed his 2004 tax return, reflecting a $193,314 tax liability. On February 16, 2005, a delegate of the Secretary of the Treasury filed a Notice of Federal Tax Lien (NFTL), as required by 26 U.S.C. § 6323(f), with the Oakland County Clerk/Register of Deeds. (Doc. No. 60, Ex. 7).

Mullens defaulted on the Fremont mortgage, and the property was foreclosed. On March 24, 2006, MERS as nominee for Fremont assigned the mortgage to Deutsche Bank National Trust Company ("Deutsche") as Trustee. The assignment was recorded on March 24, 2006. (Doc. No. 60, Ex. 10). On May 9, 2006, Litton Loan Servicing, L.P. ("Litton"), caused a sheriff's deed to be issued to Deutsche pursuant to the Michigan foreclosure by advertisement statute. (Doc. No. 60, Ex. 11). Neither Deutsche Bank nor MERS provided personal service to the IRS as required by statute; the only notice was through posting and publication. (Doc. No. 60, Ex. 9).

Litton subsequently executed a quit claim deed to Deutsche on January 8, 2009. (Doc. No. 60, Ex. 12). Angela Ford purchased the property from Deutsche that day, and the purchase was recorded on February 3, 2009. Before she purchased the Property, Ford was informed of the NFTL. (Doc No. 60, Ex. 17).

Just over two years after Ford's purchase, on April 11, 2011, the U.S. filed its

Second Amended Complaint ("SAC") in this lawsuit. In its SAC, the Government named the following as defendants: Ford, BAC, Deutsche Bank National Trust Company, Deutsche Bank as Trustee for Fremont Home Loan Trust, MERS, and Kenneth Nathan, as Chapter 7 Trustee of New Haven Foundry, Inc. On July 20, 2011, Plaintiff obtained a Judgment against Mullens in the amount of $359,750.16, for income taxes for the taxable years 2000, and 2004, plus statutory additions. (Doc. No. 55, Ex. 19).

Ford and BAC contest the lien enforcement action. They filed a counterclaim against the U.S. and a third-party complaint against Mullens. Defendants assert claims for quiet title and declaratory relief that Plaintiff has no interest in the Property, and they advance a claim of an unjust enrichment against Mullens. On January 11, 2011, a default against Mullens was entered.

The parties subsequently moved for summary judgment. The issues raised in the motions are whether the U.S. gave proper notice and therefore has a valid lien on the Property; whether Defendants' interest in the Property is superior to the Government's lien, and if not, whether Defendants nevertheless are entitled to equitable relief.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a) authorizes a court to grant summary judgment if "the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." There is no genuine issue of material fact if there is no factual dispute that could affect the legal outcome on the issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether to grant summary judgment, this Court "must construe the evidence and draw

all reasonable inferences in favor of the nonmoving party." Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 332 (6th Cir. 2008). However, the nonmoving party "cannot rely merely on allegations but must set out specific facts showing a genuine issue for trial." Chappell v. City of Cleveland, 585 F.3d 901, 906 (6th Cir. 2009).

III. ANALYSIS

A. Notice and Demand

The parties disagree as to whether notice and demand in this case were given in compliance with the law. Under 26 U.S.C. § 6321, a lien on an individual's property arises when the individual is liable to pay a tax, but neglects or refuses to pay the tax after notice of the liability is given. However, "[t]he lien imposed by section 6321 shall not be valid against any. . .holder of a security interest. . .until notice thereof which meets the requirements of [26 U.S.C. § 6323(f)] has been filed." 26 U.S.C. § 6323(a). Section 6323(f) requires that notice of a lien on real property be filed according to the laws of the state where the property is located.

Accordingly, the procedural notice requirement for a federal tax lien requires written notice and demand to the person liable, in this case, Mullins. When no payment is made within the required time frame, a lien arises.

Defendants contend that the U.S. may have failed to comply with the notice requirements, conduct which would render the NFTL void. According to Defendants, the Government's information regarding notice to Mullens is highly suspect based on the fact that Mullens filed his return two months before the April 15, 2005, deadline. They suggest that a savvy business owner would not rush to file tax returns showing his delinquent status in advance of the April 15 deadline. In 2000, for example, when there

also was a deficiency, Mullins asked for extension to file his tax return.

Defendants' speculation does not satisfy their burden. The U.S. provided forms authenticating the regularity of the notice. Specifically, under governing case law, IRS assessments evidenced by Certificates of Assessments, Payments, and Other Specified Matters, IRS Form 4340, are sufficient to prove that the IRS made its assessments and that it made these assessments according to the requirements of the Internal Revenue Code. See, e.g., Gentry v. United States, 962 F.2d 555, 557 (6th Cir.1992) (noting that "Certificates of assessments and payments are generally regarded as being sufficient proof, in the absence of evidence to the contrary, of the adequacy and propriety of notices and assessments that have been made"). Also, Form 3522-Part 1(the Notice and Demand form), provided by the IRS, corroborates the propriety of the notice and demand. The Form indicates that notice was sent to Mullens at 4090 Cranbrook Court, on February 2, 2004, the same date set forth in Form 4340. (See Doc. No. 60, Exs. 4, 5).

In light of the record evidence, Defendants fail to demonstrate the existence of a genuine factual dispute. In sum, Ford and BAC have no evidence to support their position that the IRS may not have followed proper procedures. Consequently, the Court addresses the next issue, whether Defendants can gain priority over the lien by stepping into the shoes of Fremont.

B. Priority

The question of priority, which concerns both federal and state law is well

established. When determining the interest in property or rights to property held, courts look to state law. Where a federal tax lien has attached to a state-created property interest, courts look to federal law to determine the priority of competing liens on the property or rights to property. Aquilino v. United States, 363 U.S. 509, 512–513 (1960); Mount Carmel Mercy Hosp. v. IRS, No. 09–1330, 920 F.3d 933 at * 1 (6th Cir. Dec. 12, 1990) (unpublished table opinion) ("state law is used to determine whether there is an interest in property; however, federal law is used to determine priority of interest where federal tax liens are involved."). Under the Internal Revenue Code, a federal tax lien "shall not be valid as against any purchaser, holder of a security interest, mechanic's lien or, or judgment lien creditor until notice thereof. . .has been filed by the Secretary." 26 U.S.C. § 6323(a). Thus, "priority of the federal tax lien provided by 26 U.S.C. § 6321 as against liens created under state law is governed by the common-law rule–the first in time is the first in right." United States v. Pioneer Am. Ins. Co., 374 U.S. 84, 87 (1963).

Under Michigan law, interests in real property are perfected by recording them with the Register of Deeds in the county where the property is situated. Both Plaintiff and Fremont did that, but Plaintiff acted first. The NFTL was filed with the local recorder of deeds on February 14, 2005. The Fremont Mortgage was not filed March 9, 2005. Thus, Plaintiff's tax lien has priority over Fremont's mortgage, because the lien was filed first.

There is an important qualification, however, to the first-in-time rule: "Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321." 26 U.S.C. § 6323(i)(2). Michigan courts have recognized

two forms or types of subrogation, as explained in French v. Grand Beach Co., 215 N.W. 13, 14 (Mich. 1927).

> The doctrine of subrogation rests upon the equitable principle that one, who, in order to protect a security held by him, is compelled to pay a debt for which another is primarily liable, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect. This doctrine is sometimes spoken of as "legal subrogation," and has long been applied by courts of equity. There is also what is known as "conventional subrogation." It arises from an agreement between the debtor and a third person whereby the latter, in consideration that the security of the creditor and all his rights thereunder be vested in him, agrees to make payment of the debt in order to relieve the debtor from a sacrifice of his property due to an enforced sale thereof. It is wholly independent of any interest in the property which the lender may have to protect.

More importantly, the doctrine "does not, however, inure to a mere volunteer who has no equities which appeal to the conscience of the court." Id.

Defendants' claim that the Fremont mortgage should be subrogated to the rights of the prior mortgage holder fails on this ground. Michigan only allows for subrogation when the party seeking subrogation was forced to pay, through a contractual or other duty. Hartford Accident & Indem. Co. v. Used Car Factory, Inc., 600 N.W.2d 630, 631 (Mich. 1999). Accord VanDyk Mortgage Corp. v. U.S., 503 F. Supp.2d 878, 880-81 (W.D. Mich. 2007) (reviewing Michigan law regarding the mere volunteer rule and concluding that it "has long been a part of Michigan jurisprudence regarding equitable subrogation").

At oral argument, Defendants advanced the position that the decision in Walker v. Bates, 222 N. W. 209 (Mich. 1928) eliminated the mere volunteer rule. This Court disagrees. In Walker, the Michigan Supreme Court addressed equitable subrogation and found the doctrine unavailable to the defendants, who had paid sums after notice of

lis pendens was filed. The Walker Court did not discuss the volunteer rule in the decision, and the Court rejects Defendants' request to ignore longstanding authority from Michigan's highest court.

The Court's decision is not altered by Defendants' position that the proceeds of the Fremont mortgage were necessary to preserve the property from foreclosure or another action that would cause the intervening lien holders to lose their security interests. They conclude that Fremont mortgage qualifies as an exception under Washington Mut. Bank, F.A. v. ShoreBank Corp., 703 N.W.2d 486, 496 (Mich. Ct. App. 2005) (emphasis added), wherein the court noted,

> [W]e are unaware of any authority regarding the application of the doctrine of equitable subrogation to support the general proposition that a new mortgage, granted as part of a generic refinancing transaction, can take the priority of the original mortgage, which is being paid off, giving it priority over intervening liens. . . . Such bolstering of priority may be applicable where the new mortgagee is the holder of the mortgage being paid off or where the **proceeds of the new mortgage are necessary to preserve the property from foreclosure or another action that would cause the intervening lien holders to lose their security interests.**

The case law is not persuasive because Fremont acted as a volunteer in the mortgage transaction with Mullens. It was not an intervening lien holder in danger of losing its security interest. Defendants fail to show the Court how they are entitled to advance ahead of the NFTL based upon the actions of Fremont. Fremont's own delay in recording the mortgage resulted in its loss of priority. Accordingly, the Court directs its attention to the final argument advanced by Defendants.

C. Equity

At oral argument, Defendants presented a "just stinks" rationale for a decision in

their favor, noting that Mullens, not Ford, was the taxpayer that owed the debt to the Government. Although the Court is not unsympathetic to the situation in which Ford finds herself, she is not an innocent homeowner merely because she purchased her home for value, makes mortgage payments, and pays taxes and insurance. The equities do not support this position and neither "[j]ustice" nor "good legal conscience" dictate that her interest be placed ahead of the Government's. (Doc. No. 59 at 2). She purchased her property with constructive and actual knowledge of the tax lien. The Government complied with state and federal requirements to protect its lien. The equities, therefore, do not favor Defendants.

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS** Plaintiff's motion and **DENIES** Defendants' motion.

IT IS SO ORDERED.

s/Marianne O. Battani
MARIANNE O. BATTANI
UNITED STATES DISTRICT JUDGE

Date: February 13, 2012

CERTIFICATE OF SERVICE

Copies of this Order were mailed and/or electronically filed to counsel of record on this date.

s/Bernadette M. Thebolt

Case Manager

Dated: February 13, 2012

The following is ORDERED:

TOM R. CORNISH
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF OKLAHOMA

In Re:	)	
GRISHAM, BRENT IVAN And	)	Case No. 10-80282-TRC
NICOLE LOUISE,	)	Chapter 7
Debtor(s).	)	

ORDER APPROVING FINAL PROFESSIONAL FEES AND EXPENSES

The Trustee's Amended Final Report and Proposed Distribution filed by Gerald R. Miller, Trustee herein, comes before this Court for Consideration.

After a review of the above-referenced pleading, this Court does hereby enter the following findings and conclusions in conformity with Rule 7052, Fed. R. Bankr. P., in this core proceeding:

1. After proper notice, no timely objections to the Final Report were received by this Court. The Final Report bears the approval of the United States Trustee.

2. The Trustee reports receipts into the Estate of $20,400.79, the totality of which has or will be disbursed to creditors and professionals of the Estate. The Trustee

has requested and shall receive compensation allowed in accordance with the computation provided in 11 U.S.C. §326(a) of $2,790.08. The Court finds this amount reasonable and necessary and the same is allowed pursuant to 11 U.S.C. §236(a). In addition, the Trustee requests reimbursement of expenses in the amount of $48.41, which is hereby allowed.

IT IS THEREFORE ORDERED that the professional fees and expenses requested in the Trustee's Final Report are hereby approved and the following fees and expenses are approved for payment by the Trustee:

Applicant	Fees	Expenses
Gerald R. Miller, Trustee	$2,790.08	$48.41
MILLER, GERALD, Attorney for Trustee	$912.50	$57.95

IT IS FURTHER ORDERED that the balance on hand of the Estate be paid in accordance with 11 U.S.C. §726 and §507.

IT IS FURTHER ORDERED that the Trustee may destroy all records of the Estate upon the expiration of three (3) months from and after discharge of the Trustee.

# # #

MOVANT TO NOTICE INTERESTED PARTIES

Submitted by:
Gerald R. Miller,
Gerald R. Miller PC
A Professional Corporation
P.O. Box 2667
Muskogee, OK 74402
Phone: (918) 687-1347
Fax: (918) 687-1348
gerald@gmillerpc.com

Alexis Fallon
Fallon Law Office
PMB 504 PO Box 10000
Saipan, MP 96950
Phone: 670-323-0061
Fax: 670-323-1061
Attorney for Plaintiffs

Law Office of G. Anthony Long
P. O. Box 504970, Isa Drive
Saipan, MP 96950
Tel. No. 670.235.4802
efax No. 866.779.4805
Attorney for Hong Kong Entertainment

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

HONG KONG ENTERTAINMENT (OVERSEAS) INVESTMENT, LTD. and **RIFU APPAREL CORPORATION,** CNMI corporations, for themselves and for certain of their similarly-situated current and former employees, Plaintiffs, v. **THE UNITED STATES OF AMERICA,** Defendant.	CIVIL CASE NO. 10-00019 ORDER GRANTING PLAINTIFFS' COUNSEL REQUEST FOR TELEPHONIC APPEARANCE AT CASE MANAGEMENT CONFERENCE

Based on the request by plaintiffs' counsel to appear by telephone at the case management conference and for good cause appearing,

IT IS HEREBY ORDERED

1. Alexis Fallon, plaintiffs' lead counsel, may appear by telephone at the

February 14, 2012 case management conference in this case.

So **ORDERED** this 13th day of February, 2012.

RAMONA V. MANGLONA
Chief Judge

In the United States Court of Federal Claims

No. 07-739 T

(E-Filed: February 13, 2012)

INTERSPORT FASHIONS WEST, INC.,	)	
Plaintiff,	)	Motion for Summary Judgment; 26 U.S.C. § 482; 26 C.F.R. § 1.482-1
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Karen M. Borg, Chicago, IL, for plaintiff.[1]

Jacob E. Christensen, with whom were John A. DiCicco, Principal Deputy Assistant Attorney General, David I. Pincus, Chief, and G. Robson Stewart, Assistant Chief, Court of Federal Claims Section, Tax Division, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

HEWITT, Chief Judge

Before the court are the Motion of the United States for Summary Judgment and Brief in Support Thereof (defendant's Motion or Def.'s Mot.), Docket Number (Dkt. No.) 25, filed March 6, 2009, to which defendant attached Defendant's Proposed Findings of Uncontroverted Fact (defendant's Proposed Facts), Dkt. No. 26, filed March 6, 2009; the

[1] Cheryl Tama Oblander argued on behalf of plaintiff Intersport Fashions West, Inc. (plaintiff or Intersport). See Notice of Appearance, Docket Number (Dkt. No.) 59, filed January 27, 2012; Oral Argument of January 30, 2012, Argument of Ms. Cheryl Tama Oblander at 3:33:25-3:54:37, 4:27:18-4:50:13. (The oral argument held on Monday, January 30, 2012 was recorded by the court's Electronic Digital Recording (EDR) system. The times noted in citations to the oral argument refer to the EDR record of the oral argument.).

Brief of Intersport Fashions West, Inc. in Opposition to the Motion of the United States for Summary Judgment (plaintiff's Response or Pl.'s Resp.), Dkt. No. 47, filed November 16, 2011, to which plaintiff attached Plaintiff's Proposed Findings of Uncontroverted Facts in Support of Its Opposition to the Motion of the United States for Summary Judgment (plaintiff's Proposed Facts), Dkt. No. 45, filed November 16, 2011, and Plaintiff's Response to the United States' Proposed Findings of Fact (plaintiff's Response to Defendant's Proposed Facts or Pl.'s Resp. Facts), Dkt. No. 46, filed November 16, 2011; and the Reply Brief of the United States in Support of Its Motion for Summary Judgment (defendant's Reply or Def.'s Reply), Dkt. No. 52, filed December 15, 2011.

For the following reasons, defendant's Motion is GRANTED.

I. Background[2]

A. Factual Background

This action concerns a claim for a refund of corporate tax to a controlled company stemming from restructuring expenses that had been incurred by its parent company.

Plaintiff Intersport Fashions West, Inc. (plaintiff or Intersport) is an American corporation that designed and distributed motorcycle apparel in the United States. Def.'s Mot. Ex. 2 (Plaintiff's Supplemental Response to Interrogatories) 123[3] ("[Intersport] designed motorcycle apparel and distributed products to wholesalers under third-party brands or brands of sister companies . . . ."). Intersport was purchased by a publicly traded German company, Eurobike Aktlengesellschaft (Eurobike), in 1999, Deposition of John L. Flynn (Flynn Dep.) 14:8-17, 19:8-13; Pl.'s Resp. Facts 2, and between 1999 and 2003 Intersport was wholly owned by Eurobike, Pl.'s Resp. Facts 2.[4]

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[2] The facts contained in this section and in this opinion are only those pertinent to the timeliness issue raised in the briefs or background information helpful to understand the positions of the parties. Facts cited to the filings of only one party do not appear to be in dispute.

[3] In referencing the exhibits attached to the Motion of the United States for Summary Judgment and Brief in Support Thereof (defendant's Motion or Def.'s Mot.), Dkt. No. 25, the court provides the exhibit number, if available, and the Bates numbers of the relevant pages. Two attachments to defendant's Motion, the Declaration of Jacob Christensen and the deposition of John Flynn were not assigned exhibit numbers, however. Therefore, if citing these attachments, the court provides the page and line numbers.

[4] Eurobike Aktlengesellschaft (Eurobike) may more accurately be described as plaintiff's grandparent company. Deposition of John L. Flynn (Flynn Dep.) 19:1-21:17 (explaining that, as of September 30, 2002, Eurobike owned 100 percent of a company known as Eurobike Verwaltungs, which in turn owned 100 percent of Intersport).

Around 1999, Eurobike borrowed heavily to acquire two wholesale motorcycle apparel companies, Schuh and DIFI. See Flynn Dep. 24:4-26:11. "Eurobike thought that they would have the wholesalers engaged in the distribution of motorcycle apparel . . . ." Id. at 24:17-19. Unfortunately for Eurobike, these wholesale businesses also sold their apparel to retailers that competed directly with some of Eurobike's retail subsidiaries. Id. at 24:22-25:4. Eurobike sold its wholesale apparel companies by 2001, but it continued to carry a sizeable debt of approximately 140 million euros related primarily to its prior wholesale acquisitions. See id. at 25:5-26:11.

Between 2001 and 2003, several European banks--creditors of Eurobike--requested that Eurobike hire consultants to restructure its operations and improve its liquidity. Id. at 26:16-27:16. Eurobike acquiesced and retained consultants for the years 2001, 2002 and 2003, spending €5,205,305, €8,436,406 and €4,400,460, respectively, on consulting fees and other expenses of restructuring its business. Pl.'s Resp. Facts 3.

In 2001 plaintiff paid a $40,041 "insurance charge" to Eurobike, which it claimed as a deduction on its 2001 return. Id. at 4; see also Def.'s Mot. Ex. 2 (Plaintiff's Supplemental Response to Interrogatories) 123; Def.'s Mot. Ex. 12 (2001 Amended Tax Return) 452.[5] In 2002, plaintiff paid a $526,468 "management fee" to Eurobike, which it claimed as a deduction on its 2002 return.[6] Pl.'s Resp. Facts 4, 8; Def.'s Mot. Ex. 8 (2002 Tax Return) 348, 365, 376.[7]

[5] On plaintiff's amended 2001 tax return, it characterized this amount as a "management fee expense" that was part of its insurance expense. Def.'s Mot. Ex. 12 (2001 Amended Tax Return) 452.

[6] Plaintiff's 2002 tax year ended on September 30, 2002, and its 2002 tax return, with extensions, was due on June 15, 2003. Def.'s Mot. Ex. 17 (Certificate of Assessments for Tax Year 2002) 649-50. Plaintiff's 2002 tax return was signed on June 13, 2003, Def.'s Mot. Ex. 8 (2002 Tax Return) 348, and was received and deemed filed by the IRS on June 22, 2003, id.; Def.'s Mot. Ex. 17 (Certificate of Assessments for Tax Year 2002) 650.

[7] Related to the parties' dispute, but not material to this decision, is the apparent agreement of the parties that a payment referred to as a "management fee" was paid by plaintiff to Eurobike in 2002 for "certain services rendered by Eurobike in 2002." Pl.'s Resp. to the United States' Proposed Findings of Fact, Dkt. No. 46, at 4. The parties disagree about the nature of the work for which the management fee was paid, specifically the relationship--if any--between the management fee and Eurobike's restructuring expenses. Compare Defendant's Proposed Findings of Uncontroverted Fact, Dkt. No. 26, at 3, with Plaintiff's Proposed Findings of Uncontroverted Facts in Support of Its Opposition to the Motion of the United States for Summary Judgment, Dkt. No. 45, at 5.

In July 2003 Eurobike filed for bankruptcy in Germany. Flynn Dep. 27:15-16, 44:4-6. Intersport was then acquired through a stock purchase by the Fairchild Corporation (Fairchild) in November 2003. Id. at 45:3-11, 46:15-20.

On June 22, 2004 the Internal Revenue Service (IRS) received plaintiff's 2003 tax return. Def.'s Mot. Ex. 9 (2003 Tax Return) 389. On its 2003 tax return, plaintiff claimed deductions that it classified as "management fees" and "legal & consulting" fees that were "based on its purported allocable share of the restructuring expenses incurred by Eurobike in 2003." Pl.'s Resp. Facts 9 (quoting statement from defendant's Proposed Facts).

In February 2005 the IRS selected Intersport for audit, indentifying the 2001, 2002, and 2003 tax years for examination. Id. at 10; Flynn Dep. 50:17-20. At the audit, John Flynn, the Chief Financial Officer of Fairchild, represented plaintiff, Flynn Dep. 13:6-11, and communicated with the IRS examiners regarding plaintiff's intent to file claims for allocations relating to the 2001 and 2002 tax years, see id. at 52:20-53:3. One of the IRS examiners requested that plaintiff postpone the filing of its amended tax returns (on which it would claim for allocations) until after the conclusion of the audit. Id. at 53:4-15, 71:17-21. In response, plaintiff prepared memoranda to the file relating to its claims, which it provided to the IRS examiners at the beginning of the audit. Id. at 53:7-10. Plaintiff waited until after the audit to file its amended claims. Id. at 55:14-20.

As a result of the audit, on August 29, 2005, plaintiff received additional assessments with respect to tax years 2001 and 2002, Def.'s Mot. Ex. 11 (IRS Tax Examination Changes) 449-50, which it subsequently paid, Def.'s Mot. Ex. 17 (Certificate of Assessments for Tax Year 2002) 651.

On September 22, 2005 the IRS received plaintiff's amended tax returns for its 2001 and 2002 tax years. Def.'s Mot. Ex. 12 (2001 Amended Tax Return) 451; Def.'s Mot. Ex. 13 (2002 Amended Tax Return) 478; see Pl.'s Resp. Facts 10.

On plaintiff's 2001 amended return, plaintiff claimed an allocation of $1,332,411 in expenses which, if allowed, would result in a $393,992 decrease in its 2001 tax liability. Def.'s Mot. Ex. 12 (2001 Amended Tax Return) 451-52. On its 2002 amended return, plaintiff claimed an allocation of $1,621,273 in expenses which, if allowed, would result in $583,354 decrease its 2002 tax liability. Def.'s Mot. Ex. 13 (2002 Amended Tax Return) 478-79; see also Pl.'s Resp. Facts. 10. The claimed allocations did not include the 2001 "insurance charge" and the 2002 "management fee," which had been paid to Eurobike and claimed as deductions on the original returns for those tax years. Compare Def.'s Mot. Ex. 12 (2001 Amended Tax Return) 452-53, and Def.'s Mot. Ex. 13 (2002 Amended Tax Return) 472-80, with Def.'s Mot. Ex. 7 (2001 Tax Return) 335, and Def.'s Mot. Ex. 8 (2002 Tax Return) 365, 376.

The IRS disallowed the deductions claimed on the amended returns for the 2001 and 2002 tax years on the grounds "that they were prohibited under 26 C.F.R. § 1.482-1(a)(3) because plaintiff had not claimed them on a timely filed tax return. Pl.'s Resp. Facts 11 (quoting defendant's Proposed Facts and agreeing with the quoted statement). The IRS allowed the deductions (with minor adjustments) for tax year 2003, however, which had been claimed on plaintiff's original 2003 return and were based on plaintiff's purported allocable share of the restructuring expenses that Eurobike had incurred in 2003. See id.; Def.'s Mot. Ex. 3 (Plaintiff's Response to Interrogatories) 206.

B. Procedural Background

Plaintiff filed its Complaint in this court on October 22, 2007, requesting a "refund of corporate income taxes for fiscal year September 30, 2001 [(2001 tax year)] in the amount of $393,992 and for fiscal year September 30, 2002 [(2002 tax year)] in the amount of $583,354" and "applicable interest." Compl. 1-2.[8]

[8] Counsel for Intersport submitted supplemental briefing explaining why Intersport is a proper party in this action in light of its involvement in the Fairchild bankruptcy proceedings. Supplemental Statement of Intersport Fashions West, Inc., Dkt. No. 57. Plaintiff's counsel explained as follows:

> 1. On March 18, 2009, The Fairchild Corporation ("Fairchild") and sixty (60) of its affiliates (together, the "Fairchild Debtors") commenced voluntary Chapter 11 cases in the United States Bankruptcy Court for the District of Delaware captioned The Fairchild Corporation, et al., Bankr. D. Del. Case No. 09-10899 (CSS). Intersport was one of the Fairchild affiliates that commenced such a case.
> 2. Although the cases were commenced as Chapter 11 cases, the Fairchild Debtors did not reorganize. Instead, the Fairchild Liquidating Trust (the "Liquidating Trust") was created for the purpose of conserving, protecting, collecting and liquidating assets for the benefit of the creditors of the Fairchild Debtors.
> 3. On or about December 17, 2009, the United States Bankruptcy Court for the District of Delaware entered the Order Confirming Second Amended Joint Plan of Liquidation of The Fairchild Corporation and its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code, as Amended [Docket No. 887]. The Plan became effective on January 7, 2010 (the "Effective Date[']).
> 4. The Plan provided for, among other things, the substantive consolidation of the assets and liabilities of all of the Fairchild Debtors and the transfer of all of those assets to the [Liquidating Trust].
> 5. The Plan further provided that the corporate existence of certain Debtors and non-Debtor companies owned by any of the Debtors, including Intersport, shall continue on and after the Effective Date for the limited purpose of facilitating the Liquidating Trust's recovery of assets.

On October 29, 2008 this court issued an opinion dismissing plaintiff's refund claim for the 2001 tax period for lack of subject matter jurisdiction. Intersport Fashions W., Inc. v. United States (Intersport), 84 Fed. Cl. 454, 463 (2008). The court found that plaintiff had not rebutted the presumptive validity of the IRS assessments, id. at 457, and that plaintiff had not satisfied the full-payment rule because it had outstanding tax assessments against it relating to principal, interest, and penalties for the 2001 tax period at the time that it filed its Complaint, id. at 462-63.

On March 6, 2009 defendant filed a motion for summary judgment on plaintiff's remaining claim for a refund relating to the 2002 tax period. Def.'s Mot. 1. On March 24, 2009, the court stayed the case pending plaintiff's bankruptcy proceedings. March 24, 2009 Order, Dkt. No. 28, at 1.

Following the submission of a joint status report by the parties that stated that "the United States Bankruptcy Court for the District of Delaware entered an [o]rder confirming the Plan of Liquidation" for plaintiff and a number of other companies also affiliated with Fairchild, Joint Status Report, Dkt. No. 32, at 1, the court lifted the stay on June 22, 2011, June 22, 2011 Order, Dkt. No. 33, at 1.

Plaintiff filed its Response to defendant's Motion on November 16, 2011, Pl.'s Resp., and defendant filed its Reply in support of its Motion on December 15, 2011, Def.'s Reply. The court held oral argument on defendant's Motion telephonically on Monday, January 30, 2012 at 3:30 p.m. Eastern Standard Time.

II. Legal Standards

A. Jurisdiction

> 6. Pursuant to the Plan, responsibility for prosecuting litigation actions of the Debtors, including Intersport, vested in the Trustees of the Liquidating Trust. The Trustees need not obtain an order or approval of the Bankruptcy Court for actions taken in connection with any such litigation.
> 7. Accordingly, Intersport continues the prosecution of this case in accordance with the authority vested in the Liquidating Trust.

Id. In addition, plaintiff's counsel provided the Declaration of Donald E. Miller, Dkt. No. 63-1, at 1. Mr. Miller states that he is the "Full-Time Operational Trustee of the Fairchild Liquidating Trust," that he is "authorized to assent to prosecuting litigation actions of the Debtors, including Intersport," and that the "Liquidating Trust assents to Plaintiff, Intersport Fashions West, Inc. prosecuting this claim for a tax refund for the tax year ended September 30, 2002." Id. at 1-2.

The United States Court of Federal Claims (Court of Federal Claims) has jurisdiction over federal tax-refund claims pursuant to the Tucker Act, 28 U.S.C. § 1491 (2006). The Tucker Act states:

> "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

28 U.S.C. § 1491(a)(1).

The original jurisdiction of the Court of Federal Claims over suits for the recovery of internal revenue taxes is concurrent with that of the United States district courts. 28 U.S.C. § 1346(a)(1)(2006). Specifically, concurrent jurisdiction exists over claims for (1) "the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected," (2) "any penalty claimed to have been collected without authority," and (3) "any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." Id.

In order to bring a claim before the Court of Federal Claims, the taxpayer must have fully paid the disputed tax principal and have submitted a claim for a refund to the IRS. See 26 U.S.C. § 7422 (2006) (stating that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax . . . until a claim for refund or credit has been duly filed with the Secretary"); Shore v. United States, 9 F.3d 1524, 1527 (Fed. Cir. 1993) (interpreting the United States Supreme Court's (Supreme Court) decision in Flora v. United States, 362 U.S. 145 (1960), to mean that full-payment rule applied to "the tax portion of any amount assessed," and not to penalties and interest); see Flora, 362 U.S. at 177; 26 U.S.C. § 6511 (2006) (outlining limitations periods for filing IRS claims for credit or refund); 26 U.S.C. §6532(a)(1) (2006) (providing that a suit cannot be brought "before the expiration of 6 months from the date of filing the claim . . . unless the Secretary renders a decision thereon within that time" or more than two years after the Secretary mails the taxpayer a notice of disallowance of the claim).

B. Summary Judgment

The court shall grant a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment

as a matter of law." Rules of the United States Court of Federal Claims (RCFC) 56(a).[9] A fact is material if it "might affect the outcome of the suit." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp. (Matsushita), 475 U.S. 574, 587 (1986).

The moving party has the initial burden of demonstrating "the absence of any genuine issue of material fact and entitlement to judgment as a matter of law." Crater Corp. v. Lucent Techs., Inc., 255 F.3d 1361, 1366 (Fed. Cir. 2001) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986)).[10] This burden may be discharged by "pointing out . . . that there is an absence of evidence to support the nonmoving party's case." Celotex Corp., 477 U.S. at 325. There is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." Id. at 323 (emphasis omitted). However, the moving party must file with the court documentary evidence, such as declarations, that support its assertions that material facts are beyond genuine dispute, see RCFC 56(c)(1), unless it is basing its motion for summary judgment on the "absence of evidence to support the nonmoving party's case," Celotex Corp., 477 U.S. at 325.

The party opposing the motion "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." Anderson, 477 U.S. at 257.

[9] Effective July 15, 2011, the Rules of the United States Court of Federal Claims (RCFC) were amended, changing the language and structure of Rule 56 to "reflect the corresponding revision of [Federal Rule of Civil Procedure 56] that became effective December 1, 2010." RCFC 56, Rules Committee Note (2011). Defendant's Motion for summary judgment was filed prior to July 15, 2011 and refers to the prior version of RCFC 56. Because RCFC 56 remains the same in substance, the court applies the current version of RCFC 56. See RCFC 86 ("These rules and any subsequent amendments are applicable to all proceedings pending at the time of the adoption of the revision or amendment or thereafter filed, except to the extent that the court determines that their application to a pending action would not be feasible or would work injustice, in which event the former procedure applies.").

[10] The Rules of the United States Court of Federal Claims (RCFC) generally mirror the Federal Rules of Civil Procedure (FRCP). See RCFC 56, Rules Committee Note (2008) ("The language of RCFC 56 has been amended to conform to the general restyling of the FRCP."); Flowers v. United States, 75 Fed. Cl. 615, 624 (2007) ("RCFC 56 is patterned on Rule 56 of the [FRCP] and is similar in language and effect."); Champagne v. United States, 35 Fed. Cl. 198, 205 n.5 (1996) ("In general, the rules of this court are closely pattered on the [FRCP]. Therefore, precedent under the [FRCP] is relevant to interpreting the rules of this court, including Rule 56."); C. Sanchez & Son, Inc. v. United States, 6 F.3d 1539, 1541 n.2 (Fed. Cir. 1993) ("The [RCFC] generally follow the [FRCP]. [RCFC] 56(c) is, in pertinent part, identical to [FRCP] 56(c)."). Therefore, this court relies on cases interpreting FRCP 56 as well as those interpreting RCFC 56.

"The party opposing the motion must point to an evidentiary conflict created on the record; mere denials or conclusory statements are insufficient." SRI Int'l v. Matsushita Elec. Corp. of Am., 775 F.2d 1107, 1116 (Fed. Cir. 1985) (en banc) (citing Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd., 731 F.2d 831, 836 (Fed. Cir. 1984)). It may employ "any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred." Celotex Corp., 477 U.S. at 324.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255; see also Matsushita, 475 U.S. at 587-88; Univ. of W. Va. v. VanVoorhies, 278 F.3d 1288, 1295 (Fed. Cir. 2002).

When ruling on a motion for summary judgment, the court may not make credibility determinations or weigh the evidence. Anderson, 477 U.S. at 255 (stating that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment"); Rockwell Int'l Corp. v. United States, 147 F.3d 1358, 1361-62 (Fed. Cir. 1998) (stating that "[i]n determining the propriety of summary judgment, credibility determinations may not be made" (citing SRI Int'l, 775 F.2d at 1116)). If "there is reason to believe that the better course would be to proceed to a full trial," a trial court may deny summary judgment. Anderson, 477 U.S. at 255.

C. Section 482 of the Internal Revenue Code

Section 482 of the Internal Revenue Code, 26 U.S.C. § 482, grants authority to the United States Secretary of the Treasury (Secretary) to "allocate gross income, deductions, credits, or allowances" between two or more controlled entities if the Secretary determines that an allocation is necessary either (1) to prevent tax evasion or (2) to clearly reflect income. See 26 U.S.C. § 482 (2006).

D. Treasury Regulation 1.482-1(a)

The regulations promulgated under section 482 state, "The purpose of section 482 is to ensure that taxpayers clearly reflect income attributable to controlled transactions and to prevent the avoidance of taxes with respect to such transactions." 26 C.F.R. §1.482-1(a)(1) (2011). The regulations continue, "Section 482 places a controlled taxpayer on a tax parity with an uncontrolled taxpayer by determining the true taxable income of the controlled taxpayer." Id.

The section 482 regulations provide a limited right to a controlled taxpayer to report allocable income on a timely income tax return. 26 C.F.R. §1.482-1(a)(3) (2011). More specifically, the regulation subsection titled "Taxpayer's use of section 482" states:

> If necessary to reflect an arm's length result, a controlled taxpayer may report on a timely filed U.S. income tax return (including extensions) the results of its controlled transactions based upon prices different from those actually charged. Except as provided in this paragraph, section 482 grants no other right to a controlled taxpayer to apply the provisions of section 482 at will or to compel the district director to apply such provisions. Therefore no untimely or amended returns will be permitted to decrease taxable income based on allocations or other adjustments with respect to controlled transactions.

Id.

III. Discussion

The issue for summary judgment is whether plaintiff may report deductions from a controlled transaction that would decrease plaintiff's taxable income on an amended return filed after the due date, considering extensions, of the original return. For the reasons that follow, the court concludes that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. See RCFC 56.

A. Jurisdiction

The court has jurisdiction over plaintiff's remaining refund claim pursuant to 28 U.S.C. § 1491 and 26 U.S.C. § 1346 because plaintiff filed a timely claim before the IRS and timely filed suit in this court after fully paying the amount of tax assessed. Under 26 U.S.C. § 6511, a taxpayer must file a claim for refund "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid." 26 U.S.C. § 6511. The taxpayer must then file suit no earlier than six months after filing a claim before the IRS and no later than two years after the Secretary has mailed a notice of disallowance to the taxpayer. See 26 U.S.C. § 6532.

Plaintiff's original 2002 tax return was received by the IRS on June 22, 2003. Def.'s Mot. Ex. 8 (2002 Tax Return) 348. In 2005 plaintiff was audited and assessed additional taxes and interest for its 2001 and 2002 tax years, Def.'s Mot. Ex. 11 (IRS Tax Examination Changes) 449-50, and plaintiff paid the additional amounts, the sum of $14,442.66, on November 10, 2005, see Def.'s Mot. Ex. 17 (Certificate of Assessments for Tax Year 2002) 651. After it was audited, plaintiff filed an amended return for the 2002 tax year, which was received by the IRS on September 22, 2005,[11] on which

[11] It may be the case that the initial IRS claim was made even earlier. Mr. John Flynn, the former chief financial officer of the Fairchild Corporation who prepared Intersport's 2002

plaintiff claimed a $1,621,273 deduction for tax year 2002 that would result in a refund of $583,354 for that tax year. Def.'s Mot. Ex. 13 (2002 Amended Tax Return) 478-80; see also Compl. 1. The IRS disallowed plaintiff's claim on May 26, 2006 and plaintiff filed its Complaint in the court on October 22, 2007. Compl. 1.

The court has jurisdiction over plaintiff's refund claim relating to the 2002 tax year because the tax was paid, Def.'s Mot. Ex. 17 (Certificate of Assessments for Tax Year 2002) 651, and plaintiff filed suit in this court on October 22, 2007, Compl. 1, a date within two years of the IRS's May 26, 2006 disallowance of plaintiff's refund claim.

B. The Plain Language of Treasury Regulation 1.482-1(a)(3) Bars Plaintiff From Reporting Deductions on an Untimely or Amended Return that Would Decrease Its Taxable Income

In this case, the plain meaning of the Treasury Regulations is controlling. See Roberto v. Dep't of the Navy, 440 F.3d 1341, 1350 (Fed. Cir. 2006) ("If the regulatory language is clear and unambiguous, the inquiry ends with the plain meaning."). Subject to the limited right to report a claimed allocation[12] contained in Treasury Regulation 1.482-1, a controlled taxpayer may not affirmatively use section 482 of the Internal Revenue Code or compel the Commissioner of the Internal Revenue Service (Commissioner) to make an allocation or other adjustment. 26 C.F.R. § 1.482-1(a)(3) (stating, with respect to section 482 of the IRC, that "[e]xcept as provided in this paragraph, section 482 grants no other right to a controlled taxpayer to apply the provisions of section 482 at will or to compel the district director to apply such provisions"); see also Morton-Norwich Prods., Inc. v. United States (Morton-Norwich),

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amended return, states that the IRS requested that he make an "informal claim" rather than filing an amended tax return, Form 1120X, for tax year 2002 while the audit was taking place. Flynn Dep. 13:9-11, 71:17-21. Mr. Flynn referred to two memos to the file that he prepared on February 28, 2005 regarding plaintiff's 2001 and 2002 tax years which appear in the record as Exhibits 4 and 5 to defendant's Motion. Id. at 53:4-15; 71:8-21; see Def.'s Mot. Exs. 4 (2001 Flynn Memo) 244, 5 (2002 Flynn Memo) 271. The record suggests that the IRS examiners conducting the audit saw the memos and rejected plaintiff's claims for additional deductions in tax year 2002. Flynn Dep. 53:16-54:20; Def.'s Mot. Ex. 13 (2002 Amended Tax Return) 479. However, there is no evidence that these memos were sent or forwarded to a regional service center for review, see Michael I. Saltzman, IRS Practice and Procedure, ¶ 11.12[1], at 11-74 (2d ed. 1991), prior to the filing of plaintiff's 2002 amended return, which was received by the IRS on September 22, 2005, Def.'s Mot. Ex. 13 (2002 Amended Tax Return) 478. Ordinarily "[a]ll requests for refunds and amended or superseded returns filed to reduce liabilities previously assessed are filed with regional service centers, where centralized review and classification of income, excise and employment claims are conducted." Saltzman, supra, ¶ 11.12[1], at 11-74.

[12] The court's use of "allocation" is confined to its meaning in Treasury Regulation 1.482-1, namely, "the results of [a taxpayer's] controlled transactions based upon prices different from those actually charged." 26 C.F.R. § 1.482-1(a)(3) (2006).

221 Ct. Cl. 83, 92, 602 F.2d 270, 275 (1979) (describing a 1968 version of 26 C.F.R. § 1.482-1(a)(3) as providing that "section 482 is not available to a taxpayer nor may a taxpayer force the Service to exercise its discretion [under section 482]"); Green Leaf Ventures, Inc. v. Comm'r, 69 T.C.M. (CCH) 2342, 1995 WL 151750, at *14 (1995) ("[A] taxpayer may not affirmatively use section 482; only the IRS may invoke the provisions of section 482 and the regulations promulgated thereunder.").

Under the Treasury Regulations, "a controlled taxpayer may report on a timely filed U.S. income tax return (including extensions) the results of its controlled transactions based upon prices different from those actually charged." 26 C.F.R. § 1.482-1(a)(3). However, a controlled taxpayer may not use an untimely return or an amended return to report such results in order to decrease taxable income; in this regard, the regulations state specifically that "no untimely or amended returns will be permitted to decrease taxable income based on allocations or other adjustments with respect to controlled transactions." Id.

Defendant contends that summary judgment is appropriate in this case because Treasury Regulation 1.482-1(a)(3), which "expressly prohibits the use of 'untimely or amended returns . . . to decrease taxable income based on allocations or other adjustments with respect to controlled transactions,'" precludes plaintiff's remaining refund claim for the 2002 tax year. Def.'s Reply 1. Defendant argues, "The allocations plaintiff claims for tax year 2002 are prohibited by Treasury Regulation § 1.482-1(a)(3) because plaintiff failed to claim them on a timely tax return." Def.'s Mot. 12 (some capitalization omitted) (emphasis omitted).

Plaintiff responds that defendant has failed to meet its burden to show that there is no genuine issue of material fact and that summary judgment should therefore be denied. See Pl.'s Resp. 6-7. In particular, plaintiff argues that the deduction of $1,621,273 claimed on its amended return should be permitted because (1) plaintiff reported its controlled transaction on its "timely-filed original return" because the initially reported deduction of $526,648 was a "mistake in its calculation of its allocation of the additional restructuring expense on its original return, which it corrected on its amended return," id. at 8, (2) taxpayers are generally allowed to correct mistakes by filing amended returns, id., (3) plaintiff substantially complied with the treasury regulations, id. at 9, and (4) granting plaintiff's requested deduction would further the purpose of section 482 of the Internal Revenue Code, id. at 7.

1. Plaintiff's Amended Return Relating to Tax Year 2002 Is Untimely and Barred by Treasury Regulation 1.482-1(a)(3)

Defendant argues that, because "Plaintiff did not report the $1,621,272 of allocations it claims for 2002 on a timely tax return," the Treasury Regulations prohibit the use of untimely or amended returns that would reduce taxable income. Def.'s Mot.

12-13. Plaintiff argues that it "met the requirements of § [1.482-1(a)(3)]" because it reported its "controlled transaction including the management fee with Eurobike on its timely-filed original return for 2002." Pl.'s Resp. 8.

Plaintiff's attempt to add later-claimed allocations to deductions that were claimed over two years earlier on plaintiff's original return in order to secure a tax refund of more than $500,000 is futile. By its terms, Treasury Regulation 1.482-1(a)(3) does not permit a controlled taxpayer to claim an allocation that would decrease taxable income on an untimely or amended return. See 26 C.F.R. § 1.482-1(a)(3). In addition, the Supreme Court has rejected taxpayer arguments that an amended return filed after the close of the filing period, considering any extensions that might be granted, is a timely return. See Scaife Co. v. Comm'r (Scaife), 314 U.S. 459, 461-62 (1941) (noting that under Haggar Co. v. Helvering, 308 U.S. 389, 395 (1940), "first return" includes a "timely amended return for that year," but holding that the return in Scaife was untimely because it had been filed "after the unextended or statutory due date had expired").

Plaintiff was required to file its 2002 tax return on or before June 15, 2003. See Def.'s Mot. Ex. 17 (Certificate of Assessments for Tax Year 2002) 650 (noting that, with the grant of an extension, plaintiff's tax return was due on June 15, 2003). Plaintiff's 2002 tax return was signed on June 13, 2003 and received by the IRS on June 22, 2003. Def.'s Mot. Ex. 8 (2002 Tax Return) 348. On its original return, plaintiff claimed deductions that included $526,648 in management fees. Id. at 376. More than two years later, in September 2005, plaintiff sought for the first time to claim more than $1.6 million in deductions. Def.'s Mot. Ex. 13 (2002 Amended Tax Return) 479. Were these deductions recognized, plaintiff's taxes for the 2002 tax year would be decreased by $583,354, the amount of tax that plaintiff claims is due to be refunded. See id. at 478, 480; Compl. 1.

Under Scaife, plaintiff's amended return, filed after the due date for the original return, considering extensions, is untimely.[13] Scaife, 314 U.S. at 461-62. Because plaintiff attempts to use an untimely return to seek additional deductions that would decrease its taxable income, its claims are barred by Treasury Regulation 1.482-1(a)(3).

2. Plaintiff's Contention that the Original Filing Was a Mistake Does Not Excuse the Filing of an Untimely Tax Return in This Case

[13] Although the plain language of the Treasury Regulations also appears to bar the consideration of amended returns, the United States Supreme Court (Supreme Court) has held that, in the context of the National Industrial Recovery Act, 15 U.S.C. §§ 701-712 (1934), a first return means "a return for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax purposes, and includes a timely amended return for that year." Haggar Co. v. Helvering, 308 U.S. 389, 395 (1940).

Plaintiff argues that "[t]axpayers may file amended returns to correct mistakes in original returns." Pl.'s Resp. 8 (citing United States v. Van Keppel, 321 F.2d 717, 720 (10th Cir. 1963). Defendant counters, correctly, that plaintiff's reliance on Van Keppel is mistaken in view of the Supreme Court's decisions in Scaife, 314 U.S. at 461-62, and Helvering v. Lerner Stores Corp. (Lerner), 314 U.S. 463, 466 (1941). Def.'s Reply 3-6.

In Van Keppel, the case upon which plaintiff relies, the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) held that the IRS Commissioner had abused his discretion in not permitting taxpayers to file an amended return after the close of the filing period. 321 F.2d at 720. However, the court in Van Keppel relied on the Supreme Court's decision in J.E. Riley Inv. Co. v. Comm'r (Riley), 311 U.S. 55, 58 (1940), which affirmed the IRS's disallowance of a taxpayer's amended return that was filed after the expiration of the filing period on the grounds that it was not a "first return," but noted that the case was not one of a mere error in computation, id. at 57-58.

The question left open in Riley of whether an amended return filed after the close of the filing period could cure a mistake such as a computation error was resolved by two later Supreme Court decisions. See Scaife, 314 U.S. at 461-62; Lerner, 314 U.S. at 466. In these companion cases, the Court held that where a statute required taxpayers to declare the value of their stock on a "first return," a taxpayer could not file an amended return "after the unextended or statutory due date had expired," even to correct a mistake in computation. Scaife, 314 U.S. at 460-62; see also Lerner, 314 U.S. at 466 (observing that "[t]he hardship resulting from the misplaced decimal point is plain").

That plaintiff's reporting of $526,648 may have been a mistake, an issue that defendant does not concede, Def.'s Reply. 7-12,[14] does not permit plaintiff to file an amended return in this case where the Treasury Regulations expressly prohibit the filing of an untimely or amended return, see Scaife, 314 U.S. at 461-62; Lerner, 314 U.S. 466.

3. Plaintiff Has Not Shown that It Is Entitled to Relief on the Basis of the Doctrine of Substantial Compliance

Plaintiff contends that a deduction is proper in this case because the doctrine of substantial compliance directs that a deduction should be allowed if the taxpayer "substantially complied with the regulation" and the regulation is procedural rather than

[14] Defendant contends that there is no evidence in the record to show that plaintiff made a "mistake." Reply Brief of the United States in Support of Its Motion for Summary Judgment, Dkt. No. 52, at 8-10. Defendant argues that, in order to show that plaintiff had made a mistake in its original claimed deductions of $526,648, plaintiff would need to "come forward with some evidence of an actual allocation agreement that was in existence when the original return was filed, and then to demonstrate to the Court precisely how the purported 'mistake in its calculation' occurred." Id. at 11.

substantive in nature. Pl.'s Resp. 9 (citing Taylor v. Comm'r, 67 T.C. 1071, 1077-78 (1977). Defendant responds that plaintiff's contention is contrary to applicable law in the United States Court of Appeals for the Federal Circuit (Federal Circuit). Def.'s Reply 14-15 (citing Credit Life Ins. Co. v. United States (Credit Life), 948 F.2d 723, 726-27 (Fed. Cir. 1991)).

Defendant's statement of the applicable law is correct. The Federal Circuit has construed the doctrine of substantial compliance narrowly. In Credit Life, a case also involving a tax refund, the Federal Circuit agreed with a decision by the United States Court of Appeals for the Seventh Circuit, which stated:

> We think the doctrine [of substantial compliance] should be interpreted narrowly, and point out that the courts of appeals owe no special deference to the Tax Court's legal views . . . . The common law doctrine of substantial compliance should not be allowed to spread beyond cases in which the taxpayer had a good excuse (though not a legal justification) for failing to comply with either an unimportant requirement or one unclearly or confusingly stated in the regulations or the statute.

Credit Life, 948 F.2d at 726-27 (alteration in original) (quoting Prussner v. United States, 896 F.2d 218, 224 (7th Cir. 1990) (en banc)).

Therefore, in order to invoke the doctrine of substantial compliance, plaintiff must show that it had a good excuse for noncompliance and that the regulation was unimportant or the regulation's terms were unclear or confusing. See Prussner, 896 F.2d at 224-25. Plaintiff has not pointed to evidence in the record that would support a finding of any of these factors.[15]

Accordingly, plaintiff may not invoke the doctrine of substantial compliance to overcome the plain language of the Treasury Regulations, which prohibits a taxpayer from claiming on an untimely or amended return an allocation that would decrease taxable income. 26 C.F.R § 1.482-1(a)(3).

4. Plaintiff's Contentions Regarding the Purpose of Section 482 Do Not Change the Court's Analysis

[15] Plaintiff's assertion that Treasury Regulation 1.482-1(a)(3) is procedural rather than substantive, a determination that the court need not address here, is not sufficient to show that the regulation is unimportant. See United States v. Boyle, 469 U.S. 241, 249 (1985) ("Deadlines are inherently arbitrary; fixed dates, however, are often essential to accomplish necessary results. The Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards.").

Plaintiff views the purpose of section 482 as giving controlled taxpayers "tax parity with uncontrolled taxpayers," and not "disallowing proper deductions of controlled taxpayers." Pl.'s Resp. 7. Plaintiff appears to argue that, because the deduction was allowed by the IRS on plaintiff's 2003 tax return, disallowing the deduction for the 2001 and 2002 tax years would be inconsistent with the purpose of section 482. See id. Defendant does not concede that a deduction would be proper under section 482 and argues that "[i]t is well established . . . that each tax year is a separate claim for tax purposes. Def.'s Reply 12-14 (citing Comm'r v. Sullivan, 333 U.S. 591, 598 (1948)).

As articulated in the Treasury Regulations, "[t]he purpose of section 482 is to ensure that taxpayers clearly reflect income attributable to controlled transactions and to prevent the avoidance of taxes with respect to such transactions." 26 C.F.R. § 1.482-1(a)(1). To achieve this end, the Commissioner is empowered to determine "the true taxable income of a controlled taxpayer[,] which is the taxable income which would have resulted to the controlled taxpayer had it in the conduct of its affairs dealt with the other member or members of the group at arm's length." Morton-Norwich, 221 Ct. Cl. at 91, 602 F.2d at 274; see also Aristar, Inc. v. United States, 213 Ct. Cl. 616, 620, 553 F.2d 644, 646 (1977) (stating that "[t]he express language of Section 482 is simple and clearly indicative of its purpose," and that "[w]here two or more entities are owned or controlled by the same interest, the Commissioner is granted discretion to allocate gross income between or among them" once he determines that an allocation is necessary under section 482). In other words, the Commissioner may treat controlled transactions as arms-length transactions, achieving parity between controlled and uncontrolled taxpayers, if he determines that it is necessary to ensure that income is clearly reflected and taxes are not avoided.

Plaintiff's argument that disallowing a deduction for 2001 and 2002 which was permitted in an original 2003 return is inconsistent with section 482 lacks merit. First, the parties agree that the deductions permitted in one tax year do not mandate the same outcome with regard to other tax years. See Def.'s Reply 12-13; Oral Argument of January 30, 2012, Argument of Ms. Cheryl Tama Oblander at 4:45:43-48 ("Each year does stand on its own in the ultimate analysis of whether the deduction can be allowed."). Second, the Commissioner's disallowance does not contravene the purpose of Section 482. Congress, through section 482, gave the Secretary the discretion to "allocate gross income, deductions, credits, or allowances between . . . businesses, if he determines that such . . . allocation is necessary in order to prevent evasion of taxes or clearly to reflect [] income." 26 U.S.C. § 482. Pursuant to the authority granted by section 482, the Secretary promulgated regulations, following proper notice-and-comment procedures, which implemented the statute and delegated to the IRS the authority to make allocations among controlled taxpayers. See Intercompany Transfer Pricing Regulations Under Section 482, 59 Fed. Reg. 34,971-01, 34,971-72 (July 8, 1994) (providing final regulations and directions for submission of comments); 26 C.F.R. § 1.482-1(a)(2) ("The

district director may make allocations between or among the members of a controlled group if a controlled taxpayer has not reported its true taxable income."); see also Abbot Labs. v. United States, 84 Fed. Cl. 96, 98 n.1 (2008) ("Section 482 empowers the Commissioner of Internal Revenue to allocate income, deductions, and credits between two or more controlled entities, when necessary to prevent tax evasion or clearly to reflect income") (citing, inter alia, Francis M. Allegra, Section 482: Mapping the Contours of the Abuse of Discretion Standard of Judicial Review, 13 Va. Tax Rev. 423, 424-31 (1994)). The court cannot say that the Commissioner's actions, following properly promulgated regulations designed to implement section 482, violate the statute.

C. Even If Plaintiff Were Not Barred from Seeking Allocations, the Commissioner Did Not Abuse His Discretion in Denying Plaintiff's Request

Defendant argues that the Commissioner's rejection of plaintiff's amended return was not an abuse of discretion because the Treasury Regulation 1.482-1(a)(3) "specifically prohibits the use of amended or untimely returns." Def.'s Reply 3.

As a general rule, taxpayers may not rely affirmatively on the provision of section 482. See, e.g., Morton-Norwich, 221 Ct. Cl. at 92, 602 F.2d at 275. And the Commissioner has broad discretion in the area of section 482 allocations if he determines that an allocation is necessary to prevent tax avoidance or to clearly reflect income. Young & Rubicam, Inc. v. United States, 187 Ct. Cl. 635, 654-55, 410 F.2d 1233, 1244 (1969) ("Generally, because the Commissioner is given wide discretion, the taxpayer[s] not only have the burden of overcoming the presumptive correctness of the Commissioner's action but also proving that his section 482 determination . . . was arbitrary or capricious.").

While Treasury Regulation 1.482-1 articulates the limited right of a taxpayer to report "the results of its controlled transactions based upon prices different from those actually charged,"[16] the regulation expressly precludes the taxpayer from doing so on an untimely or amended return. 26 C.F.R. § 1.482-1(a)(3). In light of the plain language of the section 482 regulations, the Commissioner's decision to disallow plaintiff's claimed allocation was not an abuse of discretion.

IV. Conclusion

[16] In general, the purpose of the temporary regulations promulgated in 1993 appears to have been the clarification of earlier assertions "that taxpayers were not permitted to report results that differed from transactional results in order to reflect an arm's length result on the tax return." Intercompany Transfer Pricing Regulations Under Section 482, 58 Fed. Reg. 5253, 5265 (Jan. 21, 1993). The temporary regulations stated, "Section 482-1T(a)(3) provides, as do the current regulations, that only the district director may apply the provisions of section 482, but clarifies that this restriction does not limit the taxpayer's ability to report its true taxable income." Id.

For the foregoing reasons, defendant's Motion for summary judgment is GRANTED. The Clerk of Court shall ENTER JUDGMENT for defendant.

IT IS SO ORDERED.

s/ Emily C. Hewitt
EMILY C. HEWITT
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES EDWARD JONES, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA; COMMISSIONER OF INTERNAL REVENUE; INTERNAL REVENUE SERVICE; U.S. DEPARTMENT OF TREASURY; and TAMMIE A. GEIER,

Defendants.

Civil Action No. 11-573 (RLW) (AK)

REPORT AND RECOMMENDATION

This case is referred to the undersigned for a report and recommendation on Defendants' Motion to Dismiss [10], Plaintiff's Motion for Leave to File an Amended Complaint [12], and Plaintiff's Motion for Declaratory Judgment [18]. Judge Wilkins stayed Plaintiff's Motion for Declaratory Judgment until a decision is rendered on Defendant's Motion to Dismiss. (Minute Order, Sept. 15, 2011.) For the foregoing reasons, the undersigned recommends that Defendants' Motion to Dismiss be granted and that Plaintiff's Motion for Leave to File an Amended Complaint be denied.

I. BACKGROUND

Charles Edward Jones, Jr. ("Jones" or "Plaintiff"), a prisoner, brings this action *pro se* against a number of defendants, including the United States, the Department of the Treasury

("Treasury"), the Internal Revenue Service ("IRS"), the Commissioner of the IRS, and Tammie A. Geier, an attorney for the IRS (collectively, "Defendants"). Originally, the IRS determined that Plaintiff owed $458 from his 2008 tax return and attempted to sue him for that amount plus interest in the U.S. Tax Court. (Compl. at 5.) Plaintiff filed a petition with the Tax Court and in 2010, the Tax Court ruled for Plaintiff against the IRS, determining that Plaintiff in fact was due a refund of $2,917. (Compl. at 5; Statement of Points and Authorities in Support of Defs.' Mot. to Dismiss [10-2] ("Defs.' Mot. to Dismiss") at 2.) Treasury did not disburse the refund to Plaintiff; rather, it used the money to offset a $3,130.21 debt from a student loan owed by Plaintiff to the U.S. Department of Education ("DOE"). (*Id.* at 2-3.) Treasury sent Plaintiff a letter dated February 4, 2011, the same day the offset was made, informing him that his overpayment had been applied to his outstanding debt. (Defs.' Mot. to Dismiss, Ex. A [10-1].)

Plaintiff's debt was incurred in May 1988 when Plaintiff received a federal student loan to attend the National Business School of Auto Mechanics in Washington, D.C. ("NBS"). *See Jones v. Dep't of Educ.*, No. 10-0712, 2010 WL 5079874, *1 (D.D.C. Dec. 13, 2010). Plaintiff used the loan to pay for his attendance, but the school closed before his expected graduation date of June 1, 1989. *Id.* NBS was operating without a license, and a class action lawsuit was filed against NBS and settled in 1997. *Id.* Plaintiff was a class member in the lawsuit and as such, received a check for $900. *Jones*, 2010 WL 5079874 at *1; *Armstrong v. Accrediting Council for Continuing Educ. And Training, Inc.* 168 F.3d 1362, 1366 (D.C. Cir. 1999).

The plaintiff in *Armstrong*, like Jones, was a student at NBS who took out a loan to finance her education. 168 F.3d at 1366. The issue in *Armstrong* was whether Armstrong could use NBS' fraud and failure to provide the education it promised as a defense to prevent the lender

from collecting on the loan. *Id.* at 1364. The court determined that Armstrong's loan was not discharged because at the time she obtained her loan in 1988, federal law protected lenders from such defenses, and Armstrong's loan did not fall under certain exceptions. *Id.* Therefore, Armstrong was still responsible for her debt. *Id.* at 1370.

Plaintiff's original complaint in this case disputes the validity of his debt to DOE and asks that the Court order Defendants to distribute to him the $2,917 refund awarded by the Tax Court. (Pl.'s Compl. at 5.) Plaintiff alleges negligence on the part of Defendants and requests compensatory and punitive damages of $518,000. (Pl.'s Surreply [17] at 3.)

Plaintiff moves this Court to allow him to file an Amended Complaint. (Pl.'s Mot. for Leave to File an Amended Compl. ("Pl.'s Mot. for Amended Compl.").) In the amended complaint, Plaintiff again asks for compensatory and punitive damages to $518,000, and also asks the Court to compel the Secretary of DOE and the Federal Student Aid Ombudsman to produce a number of documents related to his attendance at NBS and whether the loan is still enforceable. (Pl.'s Proposed Amended Compl. [12-1] at 5.) Finally, Plaintiff asks that the U.S. Department of Education be added as a defendant. (Pl.'s Mot. for Amended Compl. at 2.)

II. LEGAL STANDARD

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the plaintiff's complaint. *Browning v Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). To survive a Rule 12(b)(6) motion, the complaint must plead sufficient facts, taken as true, to provide "plausible grounds" that discovery will reveal evidence to support the plaintiffs' allegations. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007). "A claim has facial

plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Aschroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556).

In resolving a Rule 12(b)(6) motion, the court must treat as true the complaint's factual allegations, including mixed questions of law and fact, and draw reasonable inferences in the plaintiff's favor. *Kowal v MCI Communications* Corp., 16 F.3d 1271, 1276 (D.C. Cir. 2004); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003). The court need not accept as true inferences that are unsupported by facts set forth in the complaint or legal conclusions that are set out as factual allegations. *Warren v District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004); *Browning*, 292 F.3d at 242. It will not suffice for a plaintiff to make "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

A party may, as a matter of course, make one amendment to a pleading within 21 days of filing the complaint. Fed. R. Civ. P. 15(a)(1). Outside of 21 days, the court has discretion to grant leave to amend a complaint, which "should be freely given unless there is a good reason, such as futility, to the contrary." Fed. R. Civ. P. 15(a)(2); *Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999, 1003 (D.C. Cir.1996). Amendment is futile where the proposed pleading would not survive a motion to dismiss. *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 945 (D.C. Cir. 2004). The analysis for futility is, for practical purposes, the same as an

analysis of a motion to dismiss under Rule 12(b)(6) based on the allegations in the amended complaint. *In re Interbank Funding Corp.*, 629 F.3d 213 (D.C. Cir. 2010).

III. DISCUSSION

A. Defendants' Motion to Dismiss

Defendants move to dismiss Plaintiff's complaint, which alleges negligence by IRS officials in three areas: (1) the IRS' initial determination that Plaintiff owed $458 in taxes for 2008; (2) the actions of IRS officials in attempting to collect those taxes; and (3) the use of the U.S. Tax Court's judgment granting Plaintiff a refund to offset Plaintiff's student debt. (Compl. at 5; Pl.'s Surreply.)

Plaintiff brings his suit against the United States, two federal agencies and two federal officials. The United States Code, Chapter 26, Section 7433, also known as the Taxpayer Bill of Rights, provides a limited waiver of sovereign immunity in issues involving taxpayers. *See Buaiz v. United States*, 471 F. Supp. 2d 129, 135 (D.D.C. 2007). Under the statute, a taxpayer may bring a civil action for damages against the United States where an officer or employee of the IRS, acting in connection with any collection of Federal tax against the taxpayer, negligently, recklessly, or intentionally disregards a provision of the Internal Revenue Code or a related regulation. 26 U.S.C. § 7433. The statute states that "such civil action shall be the exclusive remedy for recovering damages resulting from such actions." *Id.*

The key inquiry then is whether the relevant officer's actions were undertaken in connection with collection-related activities. *See Kim v. United States*, 632 F.3d 713, 716 (D.C. Cir. 2011). The wrongful determination of taxes owed does not waive sovereign immunity under

the Taxpayer Bill of Rights because a tax assessment does not qualify as a collection-related activity. *Stewart v. United States*, 578 F. Supp. 2d 30, 33-34 (D.D.C. 2008) (claims alleging the failure of the IRS to make or record a proper assessment of taxes owed by taxpayer is not actionable under Section 7433); *Buaiz v. United States*, 471 F. Supp. 2d 129, 135-36 (D.D.C. 2007) (actions "based on and related to the IRS's alleged calculation of tax assessments" are not collection-related). Therefore, Plaintiff's claim regarding negligence in the IRS's initial determination that Plaintiff owed $458 in taxes for 2008 does not invoke collection-related activities and is not actionable under 26 U.S.C. § 7433.

Second, Plaintiff alleges that the IRS wrongfully threatened to sue Plaintiff for the $458 assessment and engaged in litigation activities against Plaintiff in U.S. Tax Court "for a debt that Plaintiff [did] not owe." (Pl.'s Surreply at 2.) Plaintiff's allegation here is that IRS officials were negligent in attempting to collect the taxes because the amount of taxes assessed was incorrect and Plaintiff was not liable for any unpaid taxes. (*Id.*) This allegation arises from an improper tax assessment, rather than tax collection efforts. *See Dockery v. IRS*, 593 F. Supp. 2d 258, 260-61 (D.D.C. 2009) (plaintiff's allegation that IRS officials' collection-related activities were improper was based on his claim that he did not owe any income taxes and therefore was not actionable under Section 7433); *Spahr v. U.S.*, 501 F. Supp. 2d 91, 96 (D.D.C. 2007) (claims alleging the tax collected for "amounts not properly assessable" arise from an assessment of taxes).

Third, Plaintiff argues that the Tax Court's judgment in his favor was improperly applied as a set-off against his student debt. (Compl. at 5.) Plaintiff argues that "no set-off notice was sent by mail [to] the tax payers' home address prior to the Tax Court's Order and decision." (*Id.*)

The set-off was a collection-related activity and is actionable under the Taxpayer Bill of Rights. *See Kim*, 632 F.3d at 717 ("the process of executing liens, levies, or seizures on property inherently involves collection activity.") However, this claim must also be dismissed on jurisdictional grounds.

A federal court only has jurisdiction to hear a claim to review the validity of a set-off where the claim is brought against the agency that requested the set-off. 26 U.S.C. § 6402(g); *Taylor v. United States*, No. CV-09-2393, 2011 WL 1843286, *2 (D. Ariz., May 16, 2011) ("26 U.S.C. § 6402(g) deprives the Court of jurisdiction over Plaintiff's claims against the Treasury and the Internal Revenue Service challenging the interception of his income tax refunds.") Here, DOE submitted a request to Treasury notifying Treasury that Plaintiff had an outstanding loan with DOE, and Treasury transferred Plaintiff's overpayment to DOE. *See* 26 U.S.C. § 6402(d). As DOE was the agency that requested the set-off, DOE must be named as the defendant for any claims challenging the set-off. Plaintiff does not name DOE as a defendant in his original complaint; therefore, his claim regarding the set-off must be dismissed for lack of jurisdiction under Rule 12(b)(1).

B. Plaintiff's Motion for Leave to File an Amended Complaint

Plaintiff seeks to amend his complaint to add the U.S. Department of Education as a defendant to contest his federal student loan. (Pl.'s Mot. for Amended Compl. at 5.) Plaintiff also requests the Court to compel DOE to provide certain documents pertaining to his student loan and attendance at NBS, information that he believes will aid him in challenging the validity of his student debt. *Id.*

Plaintiff previously sued DOE in this Court before Judge Huvelle, seeking to discharge

his student loan and asking that DOE be compelled to produce documents relating to his school records. *Jones*, 2010 WL 5079874 at *1. Judge Huvelle granted DOE's motion to dismiss, holding that the doctrine of collateral estoppel precluded Jones from challenging the validity of the loan. *Id.* In *Armstrong*, the D.C. Circuit established that Armstrong's student loans could not be discharged. 168 F.3d at 1366. Armstrong and Jones received loans through the same federal program, during the same year to attend NBS, and both were class members in the settlement against NBS. *Armstrong*, 168 F.3d at 1366; *Jones*, 2010 WL 5079874 at *1-2.

Here, Plaintiff wishes to raise the same issues that were dismissed on collateral estoppel grounds in *Jones*. Plaintiff provides no showing of how the issues would differ were he granted leave to amend his complaint. Therefore, the issues presented in the amended complaint would not survive a motion to dismiss and amending the complaint would be futile. *See In re Interbank Funding Corp.*, 629 F.3d 213 (D.C. Cir. 2010).[1] The undersigned recommends that Plaintiff's motion for leave to file an amended complaint be denied.

IV. CONCLUSION

For the foregoing reasons, the undersigned recommends that Defendants' Motion to Dismiss be granted and that Plaintiff's Motion for Leave to File an Amended Complaint be denied. Because the undersigned's recommendation is that Defendants' Motion to Dismiss be

[1]Adding DOE as a defendant would allow Plaintiff to clear the jurisdictional hurdle for challenging the notification procedures used by Treasury in the set-off of his refund. However, Plaintiff does not address the set-off notification in his amended complaint and the Court need not address whether alleging that claim against DOE would be futile.

granted, no recommendation is needed with respect to Plaintiff's Motion for Declaratory Judgment.

V. REVIEW BY THE DISTRICT COURT

The parties are hereby advised that under the provisions of Local Rule 72.3(b) of the United States District Court for the District of Columbia, any party who objects to the Report and Recommendation must file a written objection thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the report and/or recommendation to which objection is made, and the basis for such objections. The parties are further advised that failure to file timely objections to the findings and recommendations set forth in this report may waive their right of appeal from an order of the District Court that adopts such findings and recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985).

DATE: February 13, 2012

/s/

ALAN KAY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

TERRY L. NEAL; BADGER CREEK NURSERY, LLC; MICHAEL NEAL, individually, as Personal Representative of the Estate of Maureen Gail Neal, Deceased, and as Trustee of Neal Family Trust; SHANNON NEAL; STEVE MARTIN CONSTRUCTION, INC; HOEVET & BOISE, P.C.; NEAL FAMILY TRUST; and CLACKAMAS COUNTY

Defendants.

Civil No. 11-353-AC

ORDER GRANTING UNITED STATES' MOTION FOR DISTRIBUTION OF SALES PROCEEDS

ORDER TO DISBURSE MONIES

Before the Court is Plaintiff United States' Motion for Distribution of Sales Proceeds. No opposition or objection to the Motion was filed. Having considered the United States' Motion and relevant law, the motion is hereby GRANTED. It is further ORDERED that the funds, $221,000, that have been deposited with the Court on December 19, 2011, Dkt. # 37, and January 9, 2012, Dkt. # 38-39, in a noninterest bearing account, shall be disbursed as indicated below:

1. **Payment to IRS PALS:** $2,358.10 of the funds shall be paid by check to

"IRS PALS" and payment may be ~~may be~~ sent by US Mail to:

IRS PALS
c/o Mary Snoddy
500 W 12th St., Rm 110
Vancouver, WA 98660

2. Payment to Clackamas County: $17,026.80 of the funds shall be paid by check to "Clackamas County" and payment may be sent by U.S. Mail to:

Stephen L. Madkour
County Counsel for Clackamas County
2051 Kaen Road, Suite 460
Oregon City, Oregon 97045

3. Payment to the United States: The remainder of the funds shall be paid by check made payable to the "U.S. Treasury," with a notation of Terry Neal, sent by U.S. Mail to:

Tax FLU
Office of Review
P.O. Box 310
Ben Franklin Station
Washington, DC, 20044-0310

IT IS SO ORDERED this 13th day of February, 2012

Honorable John V. Acosta
U.S. Magistrate Judge

cc: Counsel of Record
Clerk, US District Court
Chief Financial Administrator, Clerk's Office (Portland)

For Court Use Only

Approved as to Form:
Mary L. Moran, Clerk of Court

Renee M. Martin
By: Financial Administrator

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	) Bankruptcy Court Case No. 10-42182
Martin Chaj Ajtun	) Chapter 7
SSN: xxx-xx-[redacted],	)
	)
Debtor.	)
	)
Martin Chaj Ajtun	) Adversary Proceeding No. 11-1538
Plaintiff,	)
	)
vs.	)
	)
Internal Revenue Service	)
Defendant.	)

ORDER REGARDING JOINT MOTION FOR EXTENSION OF TIME TO FILE DISPOSITIVE MOTIONS

IT IS ORDERED:

The NOTICE OF TRIAL AND ORDER PURSUANT TO Fed.R.Bankr.P. 7016(Fed.R.Civ.P. 16(b)) is amended to reflect the following deadlines and dates:

Paragraph 5(Dispositive motions): February 27, 2012.

Dated: February 13, 2012

BY THE COURT:

Elizabeth E. Brown,
United States Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

RALPH ESTILL, et al.,

Defendants.

Civil No. 2:10-CV-773-JLR

~~[PROPOSED]~~ ORDER CONFIRMING SALE OF REAL PROPERTY AND FOR DISTRIBUTION OF PROCEEDS

JLR

On July 11, 2011, the Court entered an Order of Judicial Sale in this case (Doc. No. 43). The Order directed the Internal Revenue Service to sell property of Defendants Ralph and Doylene Estill and report the sale to the Court. The Order permitted the sale of the property commonly known as 720 Sterling St., Sedro Woolley, Washington ("Subject Property").

The United States has reported, and the Court so finds, that the sale was

publicized in accordance with 28 U.S.C. §§ 2001-2002 and properly conducted, on November 9, at 11:00 a.m., at the Skagit County Courthouse, located at 205 W. Kincaid St., Mount Vernon, Washington. The successful bidder bid $65,000.00 (the "purchase price") for the Subject Property. The purchaser has fully paid the purchase price to the IRS Property Appraisal and Liquidation Specialist, who then deposited the funds into the Court's registry. The United States seeks an Order confirming the sale and directing the Clerk to distribute the sale proceeds.

In accordance with the foregoing, and for good cause shown, the motion is GRANTED, and it is hereby,

ORDERED, the sale on November 9, 2011, of the Subject Property was properly conducted and no objection was filed so that the sale of the real property is confirmed;

ORDERED, the Internal Revenue Service is authorized to execute and deliver to the purchaser a Certificate of Sale and Deed conveying the Subject Property;

ORDERED, on delivery of the Certificate of Sale and Deed, all interests in, liens against, or claims to the Subject Property that are held or asserted in this action by the plaintiff or any of the defendants are discharged. On delivery of the Certificate of Sale and Deed, the Subject Property shall be free and clear of the interests of the United States (or the Internal Revenue Service); Ralph and Doylene Estill; Skagit County; the State of Washington Employment Security Department; the State of Washington Department of Labor and Industries; and Defendant Bank of America.

ORDERED, possession of the property sold shall be yielded to the purchaser

United States Department of Justice
Tax Division
P.O. Box 683, Ben Franklin Station
Washington, D.C. 20044
(202) 307-6432

upon the production of a copy of the Certificate of Sale and Deed; and if there is a refusal to so yield, a Writ of Assistance may, without further notice, be issued by the Clerk of this Court to compel delivery of the Subject Property to the purchaser;

ORDERED, that the Clerk shall disburse the proceeds of the sale from the Court's registry in the following manner:

a. First, by check made payable to the "Internal Revenue Service" with "U.S. v. Ralph Estill, 2:10-CV-773-JLR, SSN ***-**-[redacted]" written in the memo line, in the amount of $1,377.68 for costs of sale, mailed to:

Roxanne Ellsworth
Internal Revenue Service, MailStop 2003
1973 N. Rulon White Blvd.
Ogden, UT 84404

b. Second, by check made payable to the "City of Sedro-Woolley" with "Account # [redacted]" written in the memo line, in the amount of $1,257.43 for unpaid sewer fees, mailed to

City of Sedro-Woolley
325 Metcalf Street
Sedro-Woolley, WA 98284

c. Third, by check made payable to the "Skagit County Treasurer," with "Estill P75519" written in the memo line, in the amount of $7,476.05 for unpaid property tax, mailed (along with a stamped envelope addressed to the Tax Division as listed in *paragraph c below*) to:

Skagit County Treasurer
P.O. Box 518
Mount Vernon, WA 98273

United States Department of Justice
Tax Division
P.O. Box 683, Ben Franklin Station
Washington, D.C. 20044
(202) 307-6432

d. Fourth, by check made payable to "Bank of America, N.A." with "[redacted] - Ralph Estill" written in the memo line, in the amount of $4,668.23 for the funds used to pay off the 1995 lien as modified in 2005 held by Skagit State Bank, mailed to:

Bank of America Triad Center
Attn: Thomas McMahon
NC4-105-02-27
4151 Piedmont Parkway
Greensboro, NC 27410-8110

e. Fifth, by check made payable to the "State of Washington" with "U.S. v. Estill" written in the memo line, in the amount of $6,997.56, for its September 27, 2006 lien, mailed to:

Office of the Attorney General
Bankruptcy & Collections Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

f. Sixth, by check made payable to the "United States Treasury" with "U.S. v. Ralph Estill, 2:10-CV-773-JLR, SSN ***-**[redacted]" written in the memo line, in the amount of $34,733.19 for application to the judgment debt of the United States in this case, mailed to:

Office of Review, Tax Division
P.O. Box 310
Ben Franklin Station
Washington, D.C. 20044

d. Seventh, the entire remaining balance, if any, by check made payable to "Bank of America, N.A." with "[redacted] – Ralph Estill" written in the memo line, mailed to:

Bank of America Triad Center
Attn: Thomas McMahon
NC4-105-02-27
4151 Piedmont Parkway
Greensboro, NC 27410-8110

DATED this 13th day of Feb., 2012.

Honorable James L. Robart
U.S. District Court Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re	Chapter 7
Tony K. Steinmann,	Case No. 11-34164-svk
Debtor.	

United States of America,	
Plaintiff,	
v.	
	Adversary Case No. 11-2917
Tony K. Steinmann,	
Defendant.	

FINAL PRETRIAL ORDER

A final pretrial conference was held on February 13, 2012. The following dates and deadlines are established for this adversary proceeding.

DISCOVERY

Discovery is to be completed by May 1, 2012. Completion of discovery means that discovery (including depositions to preserve testimony for trial) must be scheduled to allow depositions to be completed, interrogatories and requests for admissions to be answered, and documents to be produced before the deadline and in accordance with the provisions of the Federal Rules of Civil Procedure.

EXHIBITS

Exhibits must be filed and served in advance of trial, or they may not be admitted into evidence. Please redact all information required by applicable privacy regulations. If a party does not file an Exhibit List and copies of exhibits or a motion to extend the time to file the same, the Court will assume that the party does not intend to introduce any exhibits into evidence. The only exception to this rule is for exhibits that are already on file with the Court, e.g., bankruptcy schedules and exhibits attached to the complaint. However, those documents should be listed on the Exhibit List. If an exhibit is not listed on the Exhibit List, it will not be admitted at trial. The Exhibit List should contain a numbered list of the exhibits and a brief description of the exhibit (e.g., Plaintiff's Exhibit 1 – Promissory Note, Defendant's Exhibit 1, Financial Statement dated June 1, 2000).

Exhibits should be filed electronically. If the electronic files are too large to submit electronically (file must be under 21.5 Megabytes), you must provide a compact disk containing the Exhibits on or before the Exhibit deadline. Exhibits must be saved as separate .pdf documents or as a single .pdf document with Bookmarks for each individual Exhibit. The Exhibit List should still be filed electronically. If the Exhibits are filed electronically or on a disk, it is not necessary to bring paper copies to Court for the trial.

The deadline for filing and serving the exhibits and the Exhibit List in this adversary proceeding is May 11, 2012. The deadline for filing Exhibit Lists and exhibits should only be extended by agreement of the parties after contacting the Court in advance of the deadline.

WITNESSES

A list of witnesses (including parties who are expected to be called as witnesses) with a brief summary of their testimony must be filed in advance of the trial, or they may not be permitted to testify. If a party does not file a list of witnesses or a motion to extend the time to file the same on or before the deadline, the Court will assume that the party does not intend to call any witnesses.

The deadline for filing the list of witnesses in this case is May 11, 2012. The deadline for filing Witness Lists should only be extended by agreement of the parties after contacting the Court in advance of the deadline. Designation of a nonparty witness on an opponent's list of witnesses does not relieve a party of assuring the presence of that witness at trial if his or her testimony is desired.

MOTIONS

All dispositive motions must be **heard** on or before May 11, 2012, on not less than 14 days notice to the opposing party. Contact the Court to schedule the hearing prior to filing the motion.

STIPULATIONS OF FACT AND BRIEFS

The parties are encouraged to file stipulations of fact. All facts admitted in the pleadings are deemed to be stipulated. Briefs are welcome, but optional. If you choose to file a Brief or Memorandum of Law, it should be filed and served on all parties no less than 7 days before the trial.

TRIAL DATE

Trial is set for **May 23, 2012 and May 24, 2012, beginning at 9:30 a.m.** in the U.S. Courthouse, 517 East Wisconsin Avenue, Room 167, Milwaukee, Wisconsin. No more than two days have been reserved for this trial on the Court's calendar. If the parties anticipate needing more time, please contact the Court as soon as possible.

The trial date cannot be changed absent written motion for good cause shown.

Dated: February 13, 2012

By the Court:

Susan V. Kelley
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	) Bankruptcy Court Case No. 10-34255
John Lawrence Urban	) Chapter 7
Linda Susan Urban	)
	)
	)
Debtors.	)
	)
	)
John Lawrence Urban	) Adversary Proceeding No. 11-1540
Linda Susan Urban	)
Plaintiffs,	)
	)
vs.	)
	)
Internal Revenue Service	)
Defendant.	)

ORDER REGARDING JOINT MOTION FOR EXTENSION OF TIME TO FILE DISPOSITIVE MOTIONS

IT IS ORDERED:

The Order and Notice Regarding Trial Pursuant to Fed.R.Bankr.P. 7016 (Fed.R.Civ.P. 16(b)) is amended to reflect the following deadlines and dates:

Paragraph 5(Dispositive motions): February 27, 2012.

Dated: February 13, 2012

BY THE COURT:

Howard Tallman

United States Bankruptcy Judge

Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON MUTUAL, INC., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Civil No. 06-cv-1550-MJP [redacted] **ORDER REGARDING DEFENDANT'S UNOPPOSED MOTION FOR LEAVE TO TAKE A VIDEO DEPOSITION OF CHARLES ROUSSIN**

THIS MATTER having come before the Court on the Defendant's Unopposed Motion for Leave to Take a Video Deposition of Charles Roussin, and for good cause shown, it is hereby,

ORDERED, that the Defendant's motion is granted. Defendant may take a video deposition of Mr. Roussin at a place and time convenient for Mr. Roussin, but no later than March 14, 2012, for the purpose of obtaining testimony from Mr. Roussin for use at trial.

DATED this 13th day of February, 2012

Marsha J. Pechman
United States District Judge

U.S. DEPARTMENT OF JUSTICE
Tax Division, Western Region
P.O. Box 683, Ben Franklin Station
Washington, D.C. 20044-0683
Telephone: (202) 305-4929

06-CR-01550-ANS

UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES L. WATTS, et al., Defendants.	)	CIVIL NO. 3:11-CV-00116-JEG-TJS **ORDER**

With regard to issues involving electronically-stored information (ESI), the parties are directed to meet and confer, and to file a joint status report regarding matters set forth below:

1. The estimated number of custodians of electronically-stored information who will be the subject of orders of retention, and orders for search for information.

2. Identification of relevant and discoverable ESI, including all methods agreed upon by the parties for identifying any initial subset sources of ESI which are most likely to contain relevant and discoverable information, as well as methodologies agreed upon for retrieving the relevant and discoverable ESI from the initial subset.

3. The agreed time frame for all searches of computers maintained by any and all parties.

4. The agreed format for any computerized searches.

5. The agreed search terms to be utilized in any computerized search.

6. Whether the existence of, and retention of, ESI has been identified in the initial disclosures exchanged, or to be exchanged by the parties.

7. The implementation and existence of litigation holds on electronically stored information by all parties.

If the parties are unable to agree upon an appropriate protocol for the search of, and review of, electronically-stored information in this case, they are to notify the Court within ten days

of any meet and confer session regarding such failure, and the Court will then order a scheduling conference to discuss these issues.

The parties shall submit the joint status report within ten days of the meet and confer session, and in no event no later than February 27, 2012.

IT IS SO ORDERED.

Dated this 13th day of February, 2012.

THOMAS J. SHIELDS
CHIEF U.S. MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

JOSEPH J. ZAJAC, III,

Petitioner,

vs. Case No. 2:11-cv-469-FtM-29SPC

UNITED STATES OF AMERICA

Respondent.

ORDER

This matter came before the Court on an Order to Show Cause (Doc. #29), to which the United States filed a Response (Doc. #30). The Court held a hearing on February 10, 2012, and heard from counsel for the United States and from petitioner.

This case was initiated by a Petition to Quash Third Party Summonses (Doc. #1) seeking to quash summonses served on Bank of America, Charles Schwab & Co, Inc., and RBS Card Services. The United States appeared and filed a Response and Counter-Petition to Enforce Summonses (Doc. #2). On September 21, 2011, the Court issued an Opinion and Order (Doc. #10) dismissing the Petition without prejudice for lack of personal jurisdiction due to incomplete service of process, and with leave for petitioner to perfect service of process. The government's Counter-Petition, as a result, was also dismissed without prejudice for lack of personal jurisdiction.

Petitioner subsequently perfected service of process. The government filed a Response (Doc. #18) seeking a summary denial of the petition to quash for the reasons previously stated, but then stated that the "United States no longer seeks enforcement of the summonses." (Doc. #18, p. 1, n.1.) On January 3, 2012, the Court entered an Order (Doc. #24) denying petitioner's Petition to Quash Third Party Summonses as moot and dismissing the Petition as moot "[b]ased on the government's second Response in Opposition (Doc. #18) stating that it no longer seeks enforcement of the summonses." (Doc. #24, p. 2.) The case was closed and judgment was entered. Petitioner then filed a Motion for Clarification and Reconsideration of Court Order Dated January 3, 2012 (Doc. #26).

The representation that the "United States no longer seeks enforcement of the summonses," in the Court's view, meant that the government no longer sought compliance with the summonses by the third party financial institutions. This in turn resulted in the lack of a current case or controversy, and hence the case was moot. This continues to be the Court's view of the government's representation. To the extent clarification is needed, the January 3, 2012 Order (Doc. #24) means that there should be no compliance with the summonses at issue in this case by the third parties.

The Court further concludes that no contemptuous conduct was intended by either government counsel or the revenue agent.

Therefore, the Order to Show Cause is rescinded and no further action on it will be taken.

Accordingly, it is now

ORDERED:

1. The Order to Show Cause (Doc. #29) is **RESCINDED**, and the Court will take no further action on it.

2. Petitioner's Motion for Clarification and Reconsideration of Court Order Dated January 3, 2012 (Doc. #26) is **GRANTED** to the extent clarified herein. The case shall remain closed, but if petitioner believes he is entitled to further relief he may file an appropriate motion within **TWENTY-ONE (21) DAYS** of the date of this Order.

3. Petitioner's Motion to Grant Leave to File Amended Petition to Quash Third Party Summonses (Doc. #28) is **DENIED** as moot.

DONE AND ORDERED at Fort Myers, Florida, this 13th day of February, 2012.

John E. Steele

JOHN E. STEELE
United States District Judge

Copies:
Petitioner
Counsel of record