UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CAROL DIANE GRAY	)
	)
And	)
	)
STRATEGIC RESEARCH CONSULTING, INC.	) Case No. 11 cv 03269
	)
	) Judge Coleman
Plaintiffs,	)
	)
	) COMPLAINT FOR DAMAGES
	) FOR VIOLATION OF 26 U.S.C. § 7433(a)
v.	) AND REIMBURSEMENT FOR
	) OVERPAYMENT OF TAXES, INTEREST,
UNITED STATES OF AMERICA,	) AND PENALTIES
	)
	)
	)
	)
Defendant.	)
	) JURY DEMANDED

SECOND AMENDED COMPLAINT

Plaintiffs, CAROL DIANE GRAY and STRATEGIC RESEARCH CONSULTING, INC., by and through their attorneys, Leavens, Strand, Glover & Adler,, LLC, for their Second Amended Complaint, allege as follows:

I. SUMMARY

By this complaint, Plaintiff Diane Gray ("D. Gray") seeks to recover damages and reimbursement for the willful violation of her rights by Defendant, UNITED STATES OF AMERICA, through its agent, COMMISSIONER OF INTERNAL REVENUE ("Commissioner"). The basis of Plaintiff D. Gray's Second Amended Complaint is that Defendant has violated 26 U.S.C. §7433(a) because various officers and employees of the Internal Revenue Service ("IRS") have recklessly, intentionally or negligently disregarded

certain provisions of Title 26 in connection with Federal tax collection activities against Plaintiff D. Gray. As set forth in detail below, in May and June of 2009, the IRS conducted an unauthorized audit of Plaintiffs' tax returns for tax years 1992, 1993, 1994, and 1995 and changed her returns (without her signature, compliance, or approval) to reflect an increase in taxes due. This audit was conducted after the expiration of the applicable statute of limitations for such activities. In addition, various officers and employees of the IRS have refused to acknowledge a Determination Letter dating from October 1997 advising Plaintiff Gray that she owed no taxes for those years (1992 through 1995, inclusive). Further, the Commissioner's agents have, in all the years since 1997, maliciously lied to Plaintiff Diane Gray regarding her tax liability, her rights, and the United States Code with respect to collection of taxes, has ignored her proactive requests for assistance and resolution, and intentionally indulged in unjustifiable delays in her Collections Due Process. As a direct result of the Defendant's actions, Plaintiff Diane Gray has suffered grievous harm to her business, her financial affairs, and her health.

II. JURISDICTION AND VENUE

1. This is a Complaint under 26 U.S.C. § 7433, et. seq., Civil Damages for Certain Unauthorized Collection Actions, 26 U.S.C. § 6501, et. seq., Limitations on Assessment and Collections.

2. The Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1340, and 28 U.S.C. § 1346.

3. The Court has personal jurisdiction over Defendants because Defendants maintain offices in this District.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), because a substantial part of the events giving rise to the claim occurred, and continue to occur, in the Northern District of Illinois. The Defendant's agents that have perpetrated the damages against Plaintiff Diane Gray are located in the Northern District of Illinois.

III. THE PARTIES

5. Plaintiff, Carol Diane Gray ("Gray"), is an individual, whose home address is 26 S. Hickory Ave., Fox Lake IL 60020.

6. Plaintiff, STRATEGIC RESEARCH CONSULTING, Inc. ("SRCI"), is an Illinois corporation, located at 300 North State Street, Suite 3204, Chicago, Illinois 60654.

7. On information and belief, Defendant, COMMISSIONER OF INTERNAL REVENUE, maintains offices in Chicago, including 200 West Adams Street, Suite 2300, Chicago, IL 60606.

8. On information and belief, Defendant, UNITED STATES OF AMERICA, maintains offices in Chicago through the US Attorney, including 219 S. Dearborn Street, 5th Floor, Chicago, IL 60020.

IV. STATEMENT OF FACTS

A. Taxes For Tax Years 1992-1995.

9. Plaintiff Diane Gray was married Steven Michael Gray on December 24, 1983.

10. During the period of time that Plaintiff Diane Gray was married to Steven Gray, Steven Gray prepared and filed all of their tax returns.

11. Although Plaintiff Gray provided supporting documentation for completing the forms, Plaintiff Gray did not prepare the forms, did not review the forms and believed that the forms were true, correct, complete and timely filed.

12. Plaintiff Gray filed for divorce from Steven Gray in 1994.

13. In June 1995, Plaintiff Gray learned that her tax returns had not been filed nor taxes paid for the years 1990 through 1995.

14. In June 1995, Plaintiff Gray learned that she and her husband owed between $2,800 to $8,000 in unpaid taxes for the years 1990 through 1995.

15. Between the years 1990 through 1995, Plaintiff Gray and Steven Gray had taken out two mortgages on their home. Plaintiff Gray believed that some of the money received was to pay some or all of their tax liability. Plaintiff Gray did not see any of the mortgage-related documents until after their divorce was final in July 1996.

16. On or about September 28, 1995, Steven Gray violated an Order of Protection and removed Plaintiff Gray's business records, including and business receipts, from their house at 26 South Hickory Avenue in Fox Lake (the "Fox Lake Residence").

17. Subsequent to the initiation of divorce proceedings, Plaintiff Gray discovered that Steven Gray had intercepted correspondence from the Illinois Department of Revenue and/or the IRS and that he had hidden it from her in the Fox Lake Residence.

18. During the divorce proceedings, Plaintiff Gray attempted to obtain tax related documents and on May 8, 1996, the evening before the divorce trial date Plaintiff Gray received some, but not all, of the requested tax information.

19. The divorce settlement with Steven Gray addressed payment of certain tax liabilities for the years 1992 through 1995, which Plaintiff Gray believed to be between $2,800 and $8,000 based on information produced during the divorce proceedings.

20. In October 1996, Plaintiff Gray, through her accountant, David Hafft ("Hafft"), prepared and filed tax returns for the years 1992 through 1995.

21. Although Plaintiff Gray was aware that the tax returns may have been inaccurate or incomplete, on the advice her accountant Hafft she filed the tax returns because of the risk of additional penalties.

22. At the time that tax returns for the years 1992 through 1995 were filed, Plaintiff Gray presumed that Steven Gray had made estimated tax payments and that no taxes were owed.

23. It was not until after the returns were filed that Plaintiff Gray learned that no payments had ever been made for estimated taxes for the years 1992 through 1995.

24. As of the filing of this Complaint, Plaintiff Diane Gray still does not know what happened to the money that was received as part of the mortgages on the Fox Lake Residence that was to be used by Steven Gray to pay taxes.

25. After her divorce was finalized, Plaintiff Gray independently re-mortgaged the Fox Lake Residence.

26. Plaintiff Gray did not, and could not, know her tax liability for the years 1992 to 1996 because Steven Gray lied to her regarding the filing and payment of federal and state income taxes during that period.

27. Plaintiff Gray did not, and could not, know her tax liability for the years 1992 to 1996 because Steven Gray restricted Plaintiff Gray's access to all information that would have alerted her to the fact that their taxes arrearages were both considerable and delinquent.

28. Upon information and belief, Steven Gray misappropriated checks from Plaintiff Gray's business account, forged her signature, misappropriated funds from the real estate escrow account for the home, and failed to make mortgage payments required under an Order of Temporary Support.

29. Subsequent to the divorce, Plaintiff Gray attempted to enter into an installment agreement to pay tax arrearages for the years 1992 through 1995.

30. Plaintiff Gray began making regular monthly payments of $200 to the Internal Revenue Service in January 1997. She continued making such payments until September, 1997.

31. During the period between January 1997 and September 1997, Plaintiff Gray had several telephone conversations with Internal Revenue Service Revenue Officer Rick Arriega regarding options for resolving the tax liabilities.

32. Plaintiff Gray's conversations with Officer Arriega included discussions regarding amending taxes, separation of liability, renegotiating the Dissolution of Marriage, and possible criminal sanctions against her ex-husband Steven Gray.

33. On September 27, 1997, Plaintiff Gray received a telephone call from Officer Arriega (the "First September 27 Call").

34. During the First September 27, 1997 telephone call, **Officer Arriega instructed Plaintiff Gray to stop making payments, because no taxes were owed for the years 1992 through 1995**.

35. During the First September 27 call, Officer Arriega told Plaintiff Gray that she was "off the hook".

36. During the First September 27 call, Plaintiff Gray asked Officer Arriega to verify, in writing, that she owed no taxes for the years 1992 through 1995. Officer Arriega told Plaintiff Gray that he would "get the details" and call her back later.

37. On September 27, 1997, Plaintiff Gray received a telephone call from Officer Arriega (the "Second September 27 Call").

38. During the Second September 27 call, Officer Arriega informed Plaintiff Gray that a formal letter would be issued from a different part of the Internal Revenue Service and **Officer Arriega emphasized that the letter would make it clear that Plaintiff Gray owed no taxes for tax years 1992 through 1995**.

39. Subsequently, Plaintiff Gray received a letter dated October 8, 1997 from Chief of the ACS Branch in Kansas City. The letter was on IRS letterhead and was signed by Jeffrey D. Eppler, Chief of the ACS Branch in Kansas City, MO (the "Eppler Letter"). The Eppler letter clearly states that Plaintiff Gray owes no taxes for tax years 1992 through 1995 and states that an installment arrangement cannot be considered. A true and correct copy of the Eppler Letter is attached hereto as Exhibit A.

40. Based upon the Eppler Letter and her conversations with Officer Arriega on September 27th, 2007, it was reasonable for Plaintiff Gray to believe that tax arrearages had been dismissed as a result of those proceedings.

41. Plaintiff Gray stopped making payments on tax arrearages for 1992 through 1995, and considered the matter closed.

42. In June 1998, Plaintiff Gray received a letter from the IRS dated June 22, 1998, demanding that she pay taxes for tax year 1994.

43. By the time Plaintiff Gray received this letter, her liability for tax years 1992 through 1995, the deadline for amending those taxes had expired.

44. The deadline for Plaintiff Gray to challenge false and misleading information given by Steven Gray during the divorce discovery process (and thereby renegotiate her Dissolution of Marriage) also expired during this time.

45. In July of 1998, Plaintiff Gray filed a request for Innocent Spouse relief on the advice of her accountant Hafft.

46. During the period from April 1999 to May 2000, Plaintiff Gray had several phone conversations, conducted correspondence and had personal meetings with Internal Revenue Agent Wayne Koller regarding the tax liability for the years for 1992 through 1995. **Agent Koller informed Plaintiff Gray that she could not amend the tax returns for tax years 1992 through 1995.**

47. During the period from April 1999 to May 2000, Plaintiff Gray discussed with Agent Koller the inaccurately filed returns for tax years 1992 through 1995 and application of the Eppler Letter.

48. Agent Koller suggested that Plaintiff Gray seek Equitable Relief as an Innocent Spouse and gave her the forms to seek such relief.

49. During the period from April 2000 to February 2001, Plaintiff Gray attended several Appeals hearings, presided over by Internal Revenue Service Appeals Officer Juanita Zimmerman, to consider Plaintiff Gray's Equitable Relief Appeal.

50. Plaintiff Gray had an Appeal Hearing scheduled for June 27, 2000 with Officer Zimmerman. Approximately one month prior to the hearing, Officer Zimmerman telephoned Plaintiff Gray and verbally abused her by screaming at Plaintiff Gray that she could not reduce liability regarding her own taxes.

51. During the June 27, 2000 Appeals Hearing, Plaintiff Gray, through her accountant, stressed the inaccuracy of the 1992 through 1995 tax returns. Officer Zimmerman told Plaintiff Gray that Plaintiff Gray could not amend the returns for the years 1992 through 1995.

52. During the June 27, 2000 Appeals Hearing Officer Zimmerman examined copies of the original returns for tax years 1992 through 1995 and told Plaintiff Diane Gray that by signing returns that Plaintiff Gray suspected were inaccurate, Plaintiff Diane Gray had committed perjury and was therefore liable for criminal prosecution.

53. During the June 27, 2000 Appeals Hearing Officer Zimmerman refused to examine documents offered by Plaintiff Gray's in support of her claim for Equitable Relied as an Innocent Spouse for the Tax years 1992 through 1995.

54. During the June 27, 2000 Appeals Hearing, Officer Zimmerman was abusive, condescending, disruptive and refused to examine evidence offered by Plaintiff Gray's in support of her claim for Equitable Relied as an Innocent Spouse for the Tax years 1992 through 1995.

55. During the June 27, 2000 Appeals Hearing, Officer Zimmerman admitted that she was not aware of the Conference Report on Revenue Procedure, an Internal Revenue Service Revenue Procedure for processing equitable relief applications.

56. During the June 27, 2000 Appeals Hearing, Officer Zimmerman refused to consider Internal Revenue Service procedures for equitable relief applications, stating that because Plaintiff Diane Gray had a college education and spoke English, that she could not claim to be an Innocent Spouse.

57. During the June 27, 2000 Appeals Hearing, Officer Zimmerman refused to acknowledge or consider the Eppler Letter and Officer Zimmerman's Letter of Determination February 8, 2001 (the "Zimmerman Determination Letter") is void of its mention. A true and correct copy of the Zimmerman Determination Letter is attached hereto as Exhibit B.

58. During the June 27, 2000 Appeals Hearing, Officer Zimmerman informed Plaintiff Gray that she intended to abate all penalties for the tax years 1992 through 1995, but she did not.

59. After receiving the Zimmerman Determination Letter, Plaintiff Gray requested an Offer in Compromise, which was rejected.

60. Following her receipt of the Zimmerman Determination Letter, Plaintiff Gray began receiving demands for payment for arrearages for 1992 through 1995.

61. Plaintiff Gray wrote a series of letters to the IRS explaining her situation and asking for assistance, attaching to each letter a copy of the Eppler Letter.

62. In 2007, Revenue Officer Barbara Holcomb resumed collection activities against Plaintiff Gray for tax years 1992 through 1995.

B. Taxes For Tax Years 2002-2005.

63. Plaintiff Gray's Dissolution of Marriage included the stipulation that Steven Gray could claim their son, Jonathon Gray as a dependent on his taxes.

64. Steven Gray did not pay child support or his share of Jonathon Gray's college tuition while Plaintiff Gray did pay Jonathon Gray's college tuition.

65. Because Plaintiff Gray paid Jonathon Gray's college tuition, she was unable to pay her 2002 income taxes.

66. Plaintiff Gray retained attorney Marjorie Sher on August 12, 2003 to assist Plaintiff Gray to sue her ex-husband for custody of Jonathon Gray (the "Custody Lawsuit") thereby permitting a tax exemption based on Jonathon Gray's status as a dependent on Plaintiff Gray' tax returns.

67. Plaintiff Gray requested exemption based on Jonathon Gray's status as a dependent on her tax returns, retroactive to tax year 2000.

68. In September 2004, the Custody Lawsuit was resolved, permitting Plaintiff Gray to claim Jonathon Gray as a dependent for the three (3) year period from 2003 to 2006.

69. During the six year pendency of the Custody Lawsuit, Plaintiff Gray did not file tax returns because she did not know whether she could claim Jonathon Gray as a dependent.

70. Plaintiff Gray's ability to claim Jonathon Gray as a dependent would have had a material affect on the calculation the taxes she owed.

71. Since Plaintiff Gray was unable to accurately determine her tax liability, Plaintiff Gray feared that filing based on an incorrect calculation would subject her to prosecution for perjury based on Officer Zimmerman's admonition to Plaintiff Gray during the June 27, 2000 Appeals Hearing.

72. Because Officer Zimmerman told Plaintiff Gray that filing an incorrect return was committing perjury, Plaintiff Gray believed that she could not file tax returns based on an estimated calculation and later file an amended return based on a correct calculation.

73. If Plaintiff Gray had not been told by Officer Zimmerman that filing an incorrect return was committing perjury, she would have filed timely returns and amended them once the Custody Lawsuit was resolved.

74. Because Plaintiff Gray did not file tax returns for fear of committing perjury, she was prevented from requesting financial aid for Jonathon Gray's college tuition.

75. At all relevant times, Plaintiff Gray believed that she would be able to pay any unpaid taxes and fully intended to pay any unpaid taxes.

76. During the month of September 2004, Plaintiff Gray's friend Enza Hill replaced a hard drive on Plaintiff Gray's computer.

77. Plaintiff Gray lost many of her data files in the process, including detailed financial records for the years 2001, 2002, 2003, and 2004.

78. In June 2005, Plaintiff Gray received correspondence from the IRS at which point she contacted the IRS, explained her situation in full and ultimately filed tax returns for the years 2001, 2002, 2003, and 2004.

79. In November, 2004 Plaintiff Gray switched telephone service providers. Due to an unknown error related the voicemail system, the telephone service did not function properly, Plaintiff Gray was unable to operate her business properly and her business suffered greatly, generating almost no revenue from November 2004 until early 2006.

80. In May, 2006 Plaintiff Gray began making monthly payments on unpaid taxes due for tax years 2001 through 2004.

81. Subsequently in 2006, Plaintiff Gray contacted the IRS via telephone to request a payoff amount for arrearages for the tax years 2001 through 2004.

82. On or about March 13, 2007, Plaintiff Gray received a letter from IRS Revenue Officer Barbara Holcomb regarding tax years 2001, 2003, and 2004 (the "Holcomb Letter"). Tax year 2002 had been omitted. The Holcomb Letter contained information regarding a taxpayer's right to seek a hearing to contest/avoid a lien being placed on taxpayer property. A true and correct copy of the Holcomb Letter is attached hereto as Exhibit C.

83. On March 13, 2007, Plaintiff Gray telephoned Officer Holcomb to request a CAP/CDP hearing to contest a lien.

84. During the March 13, 2007 telephone conversation, Officer Holcomb told Plaintiff Gray that an "Offer in Compromise" was being discussed and, therefore, any hearing was premature because such a hearing would have to be with the Revenue Officer having the "controls" for the years at issue.

85. Subsequent to the March 13, 2007 telephone conversation, Officer Holcomb placed a lien on Plaintiff Gray's property located at 300 North State Street, Suite 3204, Chicago, Illinois 60654.

86. By the time Plaintiff Diane Gray actually met with Officer Holcomb, her thirty (30) day time period for requesting a CAP hearing had elapsed and Revenue Officer Holcomb had already filed the liens.

87. Because Plaintiff Gray's followed Officer Holcomb's *erroneous* advice that it was premature to have a CAP hearing, Plaintiff Gray consequentially lost her opportunity to forestall tax liens against her business property.

88. As a result of the liens, Plaintiff Gray received a poor credit rating.

89. Subsequently, Officer Holcomb received "controls" for tax years 1992, 1993, 1994, 1995 and 2002.

90. Officer Holcomb promised Plaintiff Gray that if Plaintiff Gray adhered to payment schedule, no additional liens would be filed.

91. By the middle of June 2007, Plaintiff Gray had paid more than $17,000 towards arrearages for the years 2001 through 2004. She had also begun to make estimated tax payments for 2007.

92. Despite the fact that Plaintiff Gray adhered to payment schedule entered into with the IRS, in April 2007, Officer Holcomb filed liens for tax years 1992 through 1995 and 2002.

93. Plaintiff Gray telephoned Officer Holcomb requesting an explanation for the existence of the liens for tax years 1992 through 1995 and 2002, Officer Holcomb informed her that she could have her CDP hearing with an Appeals Officer.

94. During a telephone conversation between Plaintiff Gray and Officer Holcomb, Plaintiff Gray was informed that Officer Holcomb "was not comfortable" with the actions that her supervisors were demanding of her.

INTERNAL REVENUE SERVICE APPEALS

95. On August 8, 2007, Plaintiff Gray met with Settlement Officer Randy Allen at his office in Peoria, Illinois.

96. During the August 8, 2007 meeting, Plaintiff Gray and Officer Allen discussed in detail tax years 1992, 1993, 1994, 1995, 2001, 2002, 2003 and 2004, including why there had been no resolution for the years 1992 thru 1995.

97. On September 13, 2007, Officer Allen telephoned Plaintiff Gray and requested that she provide her reasons for seeking a penalty abatement for tax years 2001, 2002, 2003 and 2004 by September 20, 2007.

98. Plaintiff Gray responded on September 20, 2007

99. In October 2007, Plaintiff Gray retained lawyers Patrick Sheehan and Robert Rush to assist with her request for abatement of penalties.

100. Although attorney Rush had a telephone conversation with Officer Allen on October 30, 2007, the results of the conversation were not satisfactory, Plaintiff Gray terminated the engagement of the attorneys and resolved to write a Request for Abatement herself.

101. On November 27, 2007 Plaintiff Gray sent Officer Allen a hard copy of her Request for Abatement of Penalties and Interest for Tax years 1992, 1993, 1994, and 1995. The

Request contained a selection of exhibits, including Internal Revenue Service's ACS Branch Chief Jeffrey Eppler's letter, and legal papers documenting Steven Gray's removal of Plaintiff Gray's business records from the Fox Lake Residence on September 28, 1995, in violation of an Order of Protection.

102. On November 27, 2007, Officer Allen telephoned Plaintiff Gray and asked her to submit amended returns for 1992, 1993, 1994, and 1995 on the explanation that he needed corrected tax returns for those years to reduce liability.

103. During the November 27, 2007 conversation Officer Allen did not mention a possible audit or formal examination of the returns for 1992, 1993, 1994, and 1995.

104. Plaintiff Gray reasonably believed that the amended returns would provide the basis for a settlement to resolve her tax liabilities for all tax years at issue.

105. During December 2007, Plaintiff Gray received a Letter of Determination from Officer Allen dated December 18, 2007, concerning collection actions under Sec. 6320 and 6330 for the tax years, 2001, 2003 and 2004 refusing to remove the lien placed on her property.

106. At some point in the fall of 2010, Plaintiff Gray received a copy of Officer Allen's Case Activity Record whereupon she learned that on January 18, 2008 her ex-husband Steven Gray contacted Officer Allen.

107. Following intermittent negotiations with Officer Allen, Plaintiff Gray met with her ex-husband Steven Gray completing and, on January 26, 2008, filing amended tax returns for 1992 through 1995, correcting certain mistakes made by accountant Hafft related to Plaintiff Gray's business expenses and Plaintiff Gray's single client during 1992 through 1995, Westport Consulting Group, Inc. ("Westport"), such as failing to include many expenses like repairs and maintenance and utilities, and mischaracterizing others.

108. On January 26, 2008, Plaintiff Gray sent these amended returns to Officer Allen.

109. On June 27, 2008, Officer Allen determined that "the statute for a claim on all returns had lapsed so the amended returns cannot be considered."

110. Upon Plaintiff Gray's review of her original returns for tax years that followed her divorce (1996 through 1999), Plaintiff Gray discovered additional errors with respect to treatment of expenses by accountant Hafft.

111. On July 28, 2008 Plaintiff Gray informed Officer Allen of her intent to file amended returns for years 1996 through 1999.

112. Because taxes for years 1996 through 1999 had been paid in full, Plaintiff Gray expected that she would be owed a refund for years 1996 through 1999.

113. During the July 28, 2008 conversation with Officer Allen, Officer Allen told Plaintiff Gray that asking for a refund would be a "waste of time," that the Internal Revenue Service dedicates a team of attorneys to cases involving refunds and that they would drag out a refund case "forever," he advised Plaintiff Gray not to file any amended returns that would merit a refund and he told Plaintiff Gray that she had enough equity in her Chicago business property to pay off the IRS telling her that she should "get on with her life."

114. On information and belief, Defendant has removed or destroyed certain records related to Plaintiff Gray's appeal of the penalties assessed for the 1992, 1993, 1994, and 1995 that were being discussed with Officer Allen because there is a gap in Officer Allen's Case Activity Record from August 7, 2008 to May 5, 2009.

115. Plaintiff Diane Gray filed amended returns for 1996 through 1999 tax years during February and April of 2009. The returns showed a collective overpayment in the excess of $40,000.

116. On March 18, 2009, Plaintiff Gray received a letter from Assessment Officer Donna James requesting a "conference" and asking that Plaintiff Gray bring to the meeting detailed receipts, cancelled checks and other documents.

117. Although the proposed meeting was called a "conference" it was in effect a full audit of all of Plaintiff Gray's records and tax returns for the tax years 1992, 1993, 1994 and 1995.

118. On May 15, 2009, Plaintiff Gray met with Officer James in the Chicago office of the IRS. Officer James asked Plaintiff Gray to sign a Form 872 "Tax Assessment Extension Form" to grant permission for an audit, which Plaintiff Gray declined to do. Also present at the May 15, 2009 meeting was an examiner who demanded that Plaintiff Gray produce receipts for every item on the amended returns for the 1996 through 1999 tax years.

119. At the May 15, 2009 meeting, Plaintiff Gray showed Officer James the documents describing Steven Gray's theft of her business records, informed Officer James that her banks no longer have copies of her bank account records, and that a store that Plaintiff Gray had purchased equipment and supplies from was not even in business anymore.

120. For most of the expenses Plaintiff Gray had cancelled checks, not receipts. Officer James disregarded the cancelled checks as proof of expenses, even though they were a type of document that Officer James had requested in her letter of March 18, 2009.

121. At the May 15, 2009 meeting, Officer James and the examiner made arbitrary and capricious decisions to disallow certain expenses of Plaintiff Gray, including a decision that Plaintiff Gray's office was "too big" and "unnecessary."

122. At the May 15, 2009 meeting, Officer James accused Plaintiff Gray of committing perjury when Plaintiff Gray signed original returns back on October 7, 1996, further stating that

perjury charges could be brought against Plaintiff Gray if she persisted in amending the returns.

123. At the May 15, 2009 meeting, Plaintiff Gray presented Officer James with a copy of the Eppler Letter (stating that no taxes were owed). Officer James ignored the Eppler Letter and then demanded that Plaintiff Gray organize all receipts and records by line item for all tax return documents for tax years 1992, 1993, 1994 and 1995, and be ready to present such receipts and records at a second conference.

124. On June 23, 2009, Plaintiff Gray and Officer James had a second meeting during which Plaintiff Gray presented a letter from Ronald Chickering, the CPA retained by Westport. The letter states that the 1099-MISC forms included reimbursement for expenses as well as payment of consultant's fees.

125. At the June 23, 2009 meeting, Plaintiff Gray explained that she had been taxed on the reimbursed amounts as 1099-MISC income in the tax returns for 1992 and 1993.

126 This explanation was rejected by Officer James.

127. At the June 23, 2009 meeting, Officer James and the examiner found Plaintiff Gray's records to be inadequate, even though Plaintiff Gray presented cancelled checks, receipts, or copies of receipts for most expenses.

128. Although Plaintiff Gray devoted significant time to organizing records, she was able to compile records for only the 1992 and 1993 tax years.

129. For each item noted on the data sheets, Plaintiff Diane Gray provided either an original receipt, copy of receipt (generally in the case of reimbursed expenses, as the original receipts for those expenses had been given to Westport), or a cancelled check.

130. At the June 23, 2009 meeting, Officer James and the examiner made arbitrary and capricious decisions to disallow certain expenses of Plaintiff Gray as "unnecessary," including

decisions to disallow expenses associated with Plaintiff Gray's computer, the vast majority of the paper, folders, printing supplies, search service subscriptions and other expenses that Plaintiff Gray had incurred, paid for, and documented.

131. At the conclusion of the June 23, 2009 meeting, Officer James told Plaintiff Gray that she would not have the opportunity to present records for 1994 and 1995.

132. The two meetings occurring on May 15, 2009 and June 23, 2009 were an unauthorized audit of Plaintiff Gray's for tax years 1992, 1993, 1994 and 1995 that occurred after the expiration of the applicable statute of limitations.

133. On July 2, 2009, Officer James called Officer Allen and advised him that, based on the audit of Plaintiff Gray's tax returns for 1992 and 1993, changes would be made to liability for those years but not the years 1994 and 1995.

134. On September 21, 2009, during a telephone conversation with Plaintiff Gray, Officer Allen expressed shock that Plaintiff Gray had been subjected to a full audit on tax returns so old, further stating that it was his impression that Officer James' evaluation would be more of a discussion.

135. During the September 21, 2009 conversation, Officer Allen explained that, despite his title of "Settlement Officer," he actually did not have authority to settle cases even though Officer Allen instructed Plaintiff Gray to file amended returns because he needed correct numbers in order to come to a settlement.

136. During the September 21, 2009 conversation, Plaintiff Gray asked Officer Allen what other evidence she could have introduced that would have resulted in relief of her tax situation and Officer Allen replied that there is no possible further evidence that Plaintiff Gray could have presented that would enabled him to resolve her tax situation.

137. During the September 21, 2009 conversation, Officer Allen, when asked about the Eppler Letter stated that, "the IRS should never have sent that letter" and "But don't ask me to repeat that in Tax Court, because I will deny it."

138. During the September 21, 2009 conversation, while expressing her frustration with the IRS stating her intention to file a lawsuit against the IRS, Officer Allen, "You cannot sue the IRS."

139. On March 30, 2010 Mr. Steven Shellie, Taxpayer Advocate Service (TAS) Manager at the Chicago office of the IRS, informed Plaintiff Gray that Mayer Silber, an IRS attorney actively involved cases Plaintiff Gray has pending before the U.S. Tax Court, directed members of to pursue liens (specific to 2007 and 2008) against Plaintiff Gray's home and business properties.

140. On or about November 16, 2011, Plaintiff Gray filed an administrative claim for the determination of her tax liabilities for the years at issue in this Complaint.

COUNT I

VIOLATION OF 26 U.S.C. §7433(a)

For Tax Years 1992 through 1995

141. 26 U.S.C. §7433(a) provides in relevant part that "*If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.*"

142. An action pursuant to §7433 is appropriate where a plaintiff has exhausted her administrative remedies. 26 U.S.C. §7433(d).

143. Plaintiff Gray has exhausted her administrative remedies.

144. In April 2007, Officer Holcomb filed liens for taxes assessed during the period form 1992 to 1995.

145. In November 2007, Officer Allen requested that Plaintiff Gray submit tax returns for the period 1992-1995 for the ostensible purpose of determining Plaintiff Gray's Request for Abatement for that period.

146. On July 28, 2008, Officer Allen denied Plaintiff Gray's request for abatement.

147. On May 18, 2009 and on June 23, 2009, the IRS, through Officer James, conducted an unauthorized audit of Plaintiff Gray's tax returns for the period 1992 through 1995 and made arbitrary and capricious decisions to disallow certain expenses.

148. During the period between 1998 and 2009, Plaintiff Gray mad numerous attempts to have her tax assessment corrected, to have taxes abated, to enter into Offers in Compromise and to enter into installment agreements.

149. During the period between 1998 and 2009, IRS Officers reviewing Plaintiff Gray's tax returns for the period from 1992 through 1995 negligently, recklessly or intentionally disregarded the Eppler Letter that specifically stated Plaintiff Gray had no tax liability for 1992 through 1995.

150. During the period between 1998 and 2009, IRS Officers reviewing Plaintiff Gray's tax returns for the period from 1992 through 1995 negligently, recklessly or intentionally disregarded the facts, circumstances and egregious conduct of Plaintiff Gray's ex-husband and denied Plaintiff Gray's claim for equitable relief as an innocent spouse.

151. During the period between 1998 and 2009, IRS Officers reviewing Plaintiff Gray's tax returns for the period from 1992 through 1995 negligently, recklessly or intentionally

provided or failed to provide accurate information concerning Plaintiff Gray's rights to appeal IRS decisions, including the decision to place a lien on Plaintiff Gray's property.

152. The audit conducted by Officer James in 2009 for tax years 1992 through 1995 was conducted long after the expiration of the statute of limitations.

153. As a direct and proximate result of negligent, reckless and/or intentional actions of various IRS Officers, Plaintiff Gray suffered direct damages in an amount in excess of $47,660.33, which sum represents amounts that have been assessed for tax years 1992 through 1995 and for which the IRS has commenced collection actions.

COUNT II

VIOLATION OF 26 U.S.C. §7432

For Tax Years 2002 through 2005

155. On or about March 13, 2007, Plaintiff Gray received a letter from IRS Revenue Officer Barbara Holcomb regarding tax years 2001, 2003, and 2004 (the "Holcomb Letter").

156. Officer Holcomb negligently, recklessly or intentionally told Plaintiff Gray that an "Offer in Compromise" was being discussed and, therefore, any hearing to contest the filing of a lien was premature.

157. Officer Holcomb negligently, recklessly or intentionally placed a lien on Plaintiff Gray's property located at 300 North State Street, Suite 3204, Chicago, Illinois 60654.

158 As a direct and proximate result of negligent, reckless and/or intentional actions of Officer Holcomb, Plaintiff Gray suffered direct damages resulting from the lien placed upon property located at 300 North State Street, Suite 3204, Chicago, Illinois 60654.

COUNT III

VIOLATION OF 26 U.S.C. §7422

For Tax Years 2002 through 2005

159. Plaintiff Gray filed amended returns for 1996 through 1999 tax years during February and April of 2009. The returns showed a collective overpayment in the excess of $40,000.

160. Plaintiff Gray is entitled to a refund in the amount of the overpayment.

COUNT IV

VIOLATION OF 26 U.S.C. §7433

161. On May 15th and June 23rd, 2009, Officer James conducted an assessment of Plaintiff Gray's tax returns for years 1992 through 1995. This audit was conducted on returns that had been filed between 14 and 17 years ago.

163. Plaintiff Diane Gray had no way of knowing that she was being audited until May 15, 2009, when Assessment Officer James tried to get her to sign a Form 872.

164. As a direct result of the audit, Defendant continues to pursue collection actions for taxes assessed for 1992 through 1995.

WHEREFORE, Plaintiff Diane Gray respectfully prays that this Court:

1. Issue a judgment against Defendant that it has:

   (a) Violated 26 U.S.C. §7433(a) with respect to Plaintiff Gray for tax years 1992 through 1995;

   (b) Violated 26 U.S.C. §7433(a) with respect to Plaintiff Gray for tax years 2002 through 2005; and

   (c) Violated 26 U.S.C. §7433(a) with respect to Plaintiff Gray by conducitong an audit of Plaintiff Gray for tax years 1992 through 1995.

2. Issue a judgment awarding maximum damages against Defendant for each tax years at issue in this complaint and any other tax year affected by Collections Actions taken by Defendant, as provided 26 U.S.C. § 7433, et. seq.,

3. Order an award of attorney's fees and costs against Defendant Commissioner of Internal Revenue and Defendant United States of America

4. Order a refund for any overpayment of tax for any year at issue and any year affected by Collections Actions taken by Defendant Commissioner, and

5. Any other or further relief that the Court deems appropriate.

V. JURY DEMAND

Plaintiff Diane Gray hereby demands a trial by jury of all issue in this case.

DATED this January 16, 2012.

Respectfully submitted,

By: [s]/David M. Adler/

Attorney for Plaintiffs

David M. Adler
Leavens, Strand, Glover & Adler, LLC
203 N. LaSalle St., Suite 2550
Chicago, IL 60601
(866) 734-2568
dadler@lsglegal.com

STATE OF TENNESSEE
CHANCERY COURT OF JEFFERSON COUNTY
4th Judicial District

Regions Bank, **Plaintiff**

Tracey D. Cotner, The United States of America Department of Treasury Internal Revenue Service, U.S. Bank National Ass'n, as Trustee, and Wilson & Associate, P.L.L.C., in its capacity as Substitute Trustee, **Defendants**

Civil Action No. 11-CV-305

Sheriff of Jefferson County, Tennessee

SUMMONS

TO: **IRS, c/o William C. Killian, U.S. Attorney for the Eastern District of Tennessee, 800 Market Street, Suite 211, Knoxville, TN 37902**

You are hereby summoned and required to serve upon

Gordon D. Foster, Plaintiff's Attorney,

Whose address is **Suite 1000, First Tennessee Plaza, 800 South Gay Street, Knoxville, Tennessee 37929 (865) 637-1980**

A true copy of the defense to the complaint which is herewith served upon you, **within 30 days** after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

ISSUED and tested this 19 day of December, 2011.

Witness, Nancy Humbard, Clerk and Master of said Court, at office in Dandridge, Tennessee.

Nancy C. Humbard
NANCY HUMBARD, Clerk and Master

By: Patricia J. Thornton
Deputy Clerk

U. S. Attorney's Office
Eastern District of Tennessee
Service Received by: Vicki Pedrina
Date & Time Received: 12-20-11; 11:20am
Regular Mail: ____ Personally Served: ____ Other: ____
Registered or Certified Mail: 7011 2970 0001 7919 2031

Government Exhibit
A

NOTICE TO THE DEFENDANT(S):

Tennessee Law provides a ten thousand dollar ($10,000.00) personal property exemption from execution or seizure to satisfy a judgment. If a judgment should be entered against you in this action and you wish to claim property as exempt, you must file a written list, under oath, of the items you wish to claim as exempt with the clerk of the court. The list may be filed at any time and may be changed by you thereafter as necessary; however, unless it is filed before the judgment becomes final, it will be effective as to any execution of garnishment issued prior to the filing of the list. Certain items are automatically exempt by law and do not need to be listed; these include items of necessary wearing apparel (clothing) for yourself and your family and trunks or other receptacles necessary to contain such apparel, family portraits, the family Bible, and school books. Should any of these items be seized you would have the right to recover them. If you do not understand your exemption right or how to exercise it, you may wish to seek the counsel of a lawyer. T.C.A. §26-2-114.

RETURN ON SERVICE OF SUMMONS

Received this _____ day of _____, 20___.

_____
Deputy Sheriff/Process Server

I hereby certify and return that on the ____ day of _____, 20___, I served this Summons together with the complaint as follows: _____

_____

I failed to serve this Summons within 30 days after its issuance because: _____

_____

_____
Deputy Sheriff / Process Server

IN THE CHANCERY COURT FOR JEFFERSON COUNTY, TENNESSEE

REGIONS BANK,	)	
Plaintiff,	)	No. 11-CV-305
v.	)	
TRACEY D. COTNER, THE UNITED STATES OF AMERICA DEPARTMENT OF TREASURY INTERNAL REVENUE SERVICE, U.S. BANK NATIONAL ASS'N, as Trustee, and WILSON & ASSOCIATE P.L.L.C., in its capacity as Substitute Trustee,	)	
Defendants.	)	10:05 A.

COMPLAINT TO QUIET TITLE

Regions Bank hereby brings this action to quiet title to certain real property known as and located at 1707 and/or 1711 Green Lawn Drive, New Market, Tennessee 37820 (the "Property") as more particularly described in the Deed of Trust attached hereto as Exhibit A (the "Regions Bank Deed of Trust").

In support of the relief sought herein Regions Bank states as follows:

1. Regions Bank is a banking organization organized under the laws of the State of Alabama with its principal offices located in Alabama.

2. Tracey D. Cotner is an individual residing at 1711 Green Lawn Drive in New Market, Jefferson County, Tennessee 37820.

3. The United States of America Department of Treasury, Internal Revenue Service (the "IRS") is a department of the government of the United States of America, and the office out of which its interest in the subject property is in Nashville, TN.

4. This Court has subject matter jurisdiction over this matter insofar as the IRS is named a party defendant under 28 U.S.C. § 2410.

This is a true and perfect copy of the original filed in this office.
This 19 day of Dec 2011
Tracy C. Hunter C.&M.

5. U.S. Bank National Association ("US Bank") is a national banking organization with offices located in Tennessee. US Bank is named as defendant in its capacity as Trustee, successor in interest to Wachovia Bank, N.A., as Trustee for Chase Funding Mortgage Loan Asset-Backed Certificates Series 2, and may be served with process at 700 Kansas Lane, MC 8000, Monroe, LA 71203.

6. Upon information and belief, US Bank, as Trustee, is the assignee and/or holder of certain rights of Chase Manhattan Mortgage Corp ("Chase") including Chase's rights under a certain deed of trust referenced in paragraph 11 herein as the "Chase Deed of Trust."

7. Wilson & Associates P.L.L.C. ("Wilson") is a law firm organized under the laws of the State of Arkansas with its principal offices located in Tennessee. Wilson's registered agent for service of process is CT Corporation System, 800 S. Gay Street, Suite 2021, Knoxville, Tennessee 37929. Wilson is identified as the successor trustee under the Chase Deed of Trust.

8. Jurisdiction and venue are appropriate in this case because the Property at issue is located in Jefferson County, Tennessee.

9. Regions Bank loaned money to Mr. Cotner, which loan was secured by the Property pursuant to the Regions Bank Deed of Trust.

10. The Regions Bank Deed of Trust was properly recorded with the Register of Deeds for Jefferson County, Tennessee on January 8, 2003, at Book 543, Pages 177-192. A copy of the Regions Bank Deed of Trust is attached hereto as Exhibit A.

11. Therefore, Mr. Cotner subdivided his property into two (2) separate tracts, 28R and 26R.

12. On March 11, 2004, Chase Manhattan Mortgage Corp. recorded a deed of trust with the Register of Deeds for Jefferson County, Tennessee, at Book 636, Pages 447-466, encumbering a portion of the property, that being Lot 28R (the "Chase Deed of Trust"). A copy of the Case Deed of Trust is attached hereto as Exhibit B.

13. It is Regions Bank's understanding that Chase and/or its successor in interest asserts that its lien interest has priority over the lien interest of Regions Bank despite the fact that its Deed of Trust was recorded after the Regions Bank Deed of Trust.

14. On March 15, 2010, the IRS recorded a Notice of Federal Tax Lien against Tracey D. Cotner, 5131 Barber Road, Straw Plains, Tennessee 37871 with the Register of Deeds for Jefferson County, Tennessee, at Book 1028, Page 717 (the "IRS Notice of Lien"). The IRS Notice of Federal Tax Lien states that it was signed by R.A. Mitchell for Theresa Harley in Nashville, Tennessee. A copy of the IRS Notice of Tax Lien is attached hereto as Exhibit C.

15. On September 17, 2010, Regions Bank recorded a Release of Deed of Trust with the Register of Deeds for Jefferson County, Tennessee at Book 1052, Page 19 (the "Release of Deed of Trust"). A copy of the Release of Deed of Trust is attached hereto as Exhibit D.

16. Regions Bank executed and recorded the Release of Deed of Trust in error. Mr. Cotner still owed money to Regions Bank that was secured the Regions Bank Deed of Trust when the Release of Deed of Trust was mistakenly executed and recorded, and he continues to have an outstanding balance due to Regions Bank.

17. On August 15, 2011, Regions Bank recorded its Affidavit of Erroneous Release with the Register's Office for Jefferson County, Tennessee at Book 1090, Pages

650-651 (the "Regions Bank Affidavit"). A copy of the Regions Bank Affidavit is attached hereto as Exhibit E and incorporated herein.

18. Pursuant to Tennessee law, as set forth in the case *Holiday Hospitality Franchising, Inc. v. States Res., Inc.*, 232 S.W.3d 41 (Tenn. Ct. App. 2006), Regions Bank is entitled to maintain its lien against the Property and have the lien recognized by this Court as effective continuously since January 8, 2003. The liens of the IRS and Chase are junior to the lien of Regions Bank to the extent they assert a lien against the same real property. Regions Bank has also recorded a lien lis pendens pursuant to T.C.A. § 20-3-101.

19. Regions Bank has conducted a title search regarding the Property, and as of the date of filing this Complaint, Regions Bank is not aware of any other recorded lien claims against the Property other than those identified herein.

WHEREFORE, Regions Bank requests that this Court:

A. Issue a lien lis pendens against the property;

B. Enjoin the pending foreclosure sale of the Chase Deed of Trust scheduled on January 3, 2012.

C. Declare that the Release of Deed of Trust is null and void, and that the Regions Bank Deed of Trust remains a valid first priority lien on the Property effective since January 8, 2003; and

D. Award such additional relief as is appropriate.

E. Tax the costs of this action as the Court shall determine.

This the 16th day of December, 2011.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

REGIONS BANK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No.:_____
	)	(Formerly Case No.11-cv-305 in the
TRACEY D. COTNER, THE UNITED	)	Chancery Court for Jefferson County,
STATES OF AMERICA DEPARTMENT	)	Tennessee)
OF THE TREASURY INTERNAL	)	
REVENUE SERVICE, U.S. BANK	)	
NATIONAL ASS'N, as Trustee, and	)	
WILSON & ASSOCIATE P.L.L.C., in its	)	
capacity as Substitute Trustee,	)	
	)	
Defendants.	)	

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that the United States of America Department of the Treasury Internal Revenue Service (hereinafter "United States"), through undersigned counsel and pursuant to the provisions of 28 U.S.C. §§ 1441, 1442, 1444, and 1446, removes this action from the Chancery Court for Jefferson County, Tennessee, to the United States District Court for the Eastern District of Tennessee, on the following basis and state:

1. Plaintiff filed in the Chancery Court for Jefferson County, Tennessee, a "Complaint to Quiet Title," styled Regions Bank v. Tracey D. Cotner, The United States of America Department of the Treasury Internal Revenue Service, U.S. Bank National Ass'n, as Trustee, and Wilson & Associate P.L.L.C., in its capacity as Substitute Trustee, Case No. 11-cv-305. The Office of the Prothonotary of Jefferson County stamped the complaint as received on December 19, 2011.

2. Plaintiff initiated the above-captioned civil action in an attempt to enjoin the pending foreclosure sale of the real property located at 1707 and/or 1711 Green Lawn Drive, New Market, Tennessee, 37820 and to determine the relative priorities of the parties to that property.

3. Plaintiff alleges that its lien against the subject property is superior to the federal tax liens of the United States. (Compl. ¶ 18.)

4. A civil action commenced in any state court against the United States or any agency thereof in connection with the collection of the federal revenue may be removed to the district court of the United States for the district and division embracing the place wherein the suit is pending. 28 U.S.C. § 1442(a)(1).

5. A civil action commenced in state court against the United States concerning quiet title to real or personal property on which the United States has a claim, mortgage, or lien may be removed by the United States to the district court of the United States for the district and division in which the action is pending. 28 U.S.C. §§ 2410(a)(1) and 1444.

6. Any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant to the district court of the United States for the district and division embracing the place where such action is pending. 28 U.S.C. § 1441(a). The district courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. The district courts have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue. 28 U.S.C. § 1340.

7. Plaintiff's civil action is filed against an agency of the United States acting in connection with collection of the federal revenue. Plaintiff's action is filed in a state court, *viz*., the Chancery Court of Jefferson County, Tennessee.

8. The United States District Court for the Eastern District of Tennessee is the district court of the United States for the district embracing the place wherein the suit is pending. 28 U.S.C. § 123(a) (Eastern District of Tennessee includes Jefferson County).

9. The United States is filing this Notice of Removal within 30 days after it received the complaint. The U.S. Attorney's office was served with the Summons and Complaint on December 20, 2011.

10. Attached as Exhibit A is a true and accurate copy of plaintiff's civil complaint filed in this proceeding.

11. No previous application for removal has been made in this case.

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WHEREFORE, the United States removes this case from the Chancery Court of Jefferson County, Tennessee to the United States District Court for the Eastern District of Tennessee.

Dated: January 18, 2012

Respectfully submitted,

JOHN A. DICICCO
Principal Deputy Assistant Attorney General

/s/ E. Christopher Lambert
E. CHRISTOPHER LAMBERT
Trial Attorneys, Tax Division
U.S. Department of Justice
Post Office Box 227
Washington, D.C. 20044
Telephone: (202) 307-6536
Facsimile: (202) 514-6866
E.C.Lambert@usdoj.gov
FL Bar # 0052276

Respectfully submitted,

Walter N. Winchester, BPR #014530
Gordon D. Foster, BPR #013792
Attorneys for Plaintiff Regions Bank
Winchester, Sellers, Foster & Steele, P.C.
Suite 1000, First Tennessee Plaza
800 South Gay Street
Knoxville, TN 37929
Phone: (865) 637-1980

COST BOND

We hereby acknowledge ourselves as principal and surety for all costs and taxes in this case in accordance with T.C.A. § 20-12-120.

PRINCIPAL:

Regions Bank

Winchester, Sellers, Foster & Steele, P.C.

By: _____

12:05 A

Title: VP

SURETY:

WINCHESTER, SELLERS,
FOSTER & STEELE, P.C.

By: _____

Title: VP

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OFFICE IF THE ATTORNEY GENERAL
Gilbert J. Birnbrich
Chief of Civil Division
James R. Stump
Assistant Attorney General
P.O. Box 10007
Saipan, MP 96950
Telephone: (670) 664-2375
Fax: (670) 664-2387
JRStump@CNMILaw.com

FILED
Clerk
District Court
JAN 19 2012
For The Northern Mariana Islands
By_____
(Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. TIMOTHY GEITHNER, Secretary of the Treasury; DEPARTMENT OF THE TREASURY; DOUGLAS SHULMAN, Commissioner of Internal Revenue, INTERNAL REVENUE SERVICE, Defendants.	CIVIL ACTION NO. 12-0003 **COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

COMES NOW, the Commonwealth of the Northern Mariana Islands, and avers as follows:

PARTIES

1. Plaintiff, Commonwealth of the Northern Mariana Islands, is a duly formed government established under the COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA. Pub.L. No. 94-241, 90 Stat. 263 (1976), *reprinted in* 48 U.S.C. § 1801 note (hereinafter "Covenant").

2. Defendant Timothy Geithner is the Secretary of the Treasurer for the United States of America and is sued in that capacity

3. Defendant Douglas Shulman is the Commissioner of Internal Revenue and is sued in that capacity.

4. Defendant Department of the Treasury is an executive department of the United States federal government. The Department is administered by the Secretary of the Treasury. Among many responsibilities, the Department of the Treasury collects federal taxes, duties and money paid to and due to the U.S. through the Internal Revenue Service.

5. Defendant Internal Revenue Service is a bureau of the Department of the Treasury, and is under the immediate direction of the Commissioner of Internal Revenue. The IRS is responsible for collecting taxes and the interpretation and enforcement of the Internal Revenue Code.

JURISDICTION AND VENUE

6. This Court has jurisdiction of this matter pursuant to Sections 401-403 of the Covenant (authorizing Congress to establish this Court), 48 U.S.C. § 1821-22 (establishing this Court and granting it the jurisdiction of a district court of the United States), Covenant § 903 (the action arises under the Covenant and involves the undertakings of the Government of the United States), 28 U.S.C. § 1346 (district courts have original jurisdiction for civil action against the United States founded upon any Act of Congress or any regulation of an executive department), 28 U.S.C. § 1331 (action arising under the laws of the United States), 28 U.S.C. § 1340 (district courts have original jurisdiction in civil action arising under internal revenue laws).

7. Venue lies in this judicial district by virtue of 28 U.S.C. § 1391(e)(2)-(3) because a substantial part of the events or omissions giving rise to the claims occurred in this district and plaintiff is the Commonwealth of the Northern Mariana Islands. Venue is also proper under 28 U.S.C. § 1402(a)(2).

FACTUAL ALLEGATIONS

8. Presentation of the facts in this document are divided into two subsections: (1) the Covenant and Federal Insurance Contribution Act tax liability; and (2) Control of immigration and the Consolidated Natural Resources Act.

The Covenant and Federal Insurance Contribution Act Tax Liability

9. In 1976, the Northern Mariana Islands entered into political union with the United States. COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, Act of Mar. 24, 1976, Pub.L. No. 94–241, 90 Stat. 263 (codified as amended at 48 U.S.C. § 1801 note (1998)). The Covenant was approved unanimously by the Mariana Islands District Legislature, by an overwhelming majority vote of the people of the Northern Mariana Islands, and by a joint resolution of the United States Congress. It consists of ten articles setting forth the agreement governing the relationship between the Commonwealth of the Northern Mariana Islands (hereinafter "CNMI") and the United States. *Id.*

10. The Covenant "together with the provisions of the Constitution, treaties, and laws of the United State applicable to the Northern Mariana Islands, [are] the supreme law of the Northern Mariana Islands." Covenant § 102.

11. Qualification for benefits under the Federal Insurance Contribution Act is based on earned participation and is not a right provided by citizenship or residency. *See* 42 U.S.C. §§ 414(a)-(b).

12. To qualify for full benefits under the Federal Insurance Contribution Act, an individual must accrue 40 quarters of participation. 42 U.S.C. § 414(b).

13. United States law imposes a F.I.C.A. excise tax on employees for wages earned in

employment in the United States equal to 7.65%.[1] 26 U.S.C. § 3101 (Employee F.I.C.A. Tax).

14. In turn, United States law imposes a F.I.C.A. excise tax on employers for wages paid in employment in the United States equal to 7.65%. 26 U.S.C. § 3101 (Employee F.I.C.A. Tax).

15. United States law provides an exemption from employer and employee F.I.C.A. Taxation for employment associated with "service performed in Guam by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15)(H)(ii)of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii))." 26 U.S.C. § 3121(b)(18).

16. United States law provides an exemption from F.I.C.A. Taxation for employment associated with "service performed in Guam by a resident of the Republic of Korea while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15(H)(ii)of the Immigration and Nationality Act (8U.S.C. 1101(a)(15)(H)(ii))." United States – Republic of Korea Income Tax Convention, art. 25 (1979) (hereinafter "Korean Tax Treaty").

17. The stated purpose of the Philippine and Korean exemptions was to avoid imposing F.I.C.A. taxation on alien individuals who, due to the limited nature of their visa status, would be unlikely to receive benefits. Social Security Act Amendments of 1960; Hearing on H.R. 125580 before the S. Comm. on Finance, 86th Congress 47-50 (1960) (unpublished document statement of Robert M. Ball, Social Security Administration).

18. As part of the extension of the United States Social Security System to the Northern Mariana Islands, the Covenant provided that "those laws of the United States which

[1] The United States Congress is currently considering a 2% reduction in the rate of F.I.C.A. tax imposed on employees. However, this is only a temporary reduction, and for purposes of this complaint this reduction in the applicable F.I.C.A. tax rate is disregarded.

impose excise and self-employment taxes to support or which provide benefits from the United States Social Security System . . .[shall] become applicable to the Northern Mariana islands as they apply to Guam." Covenant § 606(b).

19. In 1997, a United States Social Security Administration document stated that because the Covenant provided for federal laws on Social Security to apply to the CNMI as they apply to Guam, the Internal Revenue Service determined that the employment of Philippine and Korean workers admitted to the Commonwealth under authority of the Commonwealth Entry and Deportation Act. United States Government Accountability Office, *Commonwealth of the Northern Mariana Islands – Status of Transition to Federal Immigration Law*, 13 (GAO-11-805T) (hereinafter "GAO-11-805T").

20. An October 5, 2011 communication issued by the United States Department of Treasury, Internal Revenue Service Office of Chief Counsel ("IRS Memorandum") states that Philippine nationals admitted to the Northern Mariana Islands under authority of the Commonwealth Nonresident Worker Act (Q-8 Visa) were exempted from payment of Social Security tax liability under terms of sections 601(c) and 606(b) of the Covenant and extension of the United States exemption provided in 26 U.S.C. § 3121(b)(18). Attached as **Exhibit 1** is a true and accurate copy of the October 5, 2011 IRS Memorandum.

21. Nonimmigrant Philippine and Korean nationals present and working in the Northern Mariana Islands have never been required to participate in the United States Social Security System.

Control of Immigration and the Consolidated Natural Resources Act of 2008

22. Under the initial terms of the Covenant, immigration and naturalization laws of the United States were inapplicable in the Commonwealth. *See* Covenant, § 503(a).

23. Upon establishment of the Commonwealth, local control over immigration was

established. NMI Pub. L. 1-8 (1978); 53 T.T.C § 2.

24. In 2008, under authority of the Consolidated Natural Resources Act of 2008 ("CNRA"), the United States Immigration and Nationality Act was extended to the Commonwealth by amendment of the Covenant. The CNRA further authorized the promulgation of associated regulations. Pub. L. 110-229, 122 Stat. 854 (amending 48 U.S.C. § 1806 note), 855 (requirement for regulations).

25. In order to transition from Commonwealth control of immigration to United States control of immigration, a transitional worker classification was created which applied to alien individuals who are maintaining their foreign residence and coming to the Commonwealth to perform temporary labor and have been certified as "Commonwealth Only Transitional Worker" ("CW-1"). Pub. L. 110-229, 122 Stat. 856-857; 76 Fed. Reg. 55535 (2011).

26. The "Commonwealth Only Transitional Worker" classification is only to exist for a five year period (ending December 31, 2014) during which, aliens using CW-1 classification are to be transitioned to other visa classifications including the H-2 classification used in Guam by alien temporary workers which is excluded from F.I.C.A. taxation. P.L. 110-229, 122 Stat. 856 (aliens may seek admission as nonimmigrant under section 101(a)(15)(H) of the Immigration and Nationality Act), 857 (CW-1 to terminate December 31, 2014 and workers may change to other nonimmigrant status); 76 Fed. Reg. 55536 (CW-1 allowed if not eligible for other nonimmigrant status).

27. It was the expressed intent of Congress in the CNRA:

a. to ensure the effective border control procedures are implemented by extension of immigration laws to the Commonwealth with special provisions to allow for,

i. (A) the orderly phasing-out of the nonresident contract worker program of the Commonwealth; and

ii. (B) the orderly phasing-in of Federal responsibilities over immigration in the Commonwealth; and

b. to minimize, to the greatest extent practicable, potential adverse economic and fiscal effects of phasing-out the Commonwealth's nonresident contract worker program and to maximize the Commonwealth's potential for future economic and business growth, including the continued use of alien workers to supplement the Commonwealth's residential workforce.

Pub. L. 110-229, 122 Stat. 853 - 854.

28. In recognition of the Commonwealth's unique economic circumstances, history, and geographical location, it was the intent of Congress in the drafting of the CRNA that the Commonwealth be given as much flexibility as possible in maintaining existing businesses and other revenue sources and developing new economic opportunities. Pub. L. 110-229, 122 Stat. 854.

29. In order to allow for a coordinated transfer of immigration authority from the Commonwealth to the United States, the CNRA establishes a five-year period commencing from one year after the date of the enactment of the CNRA and ending on December 31, 2014, during which the Secretary of Homeland Security in consultation with the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of the Interior were to administer immigration to the Commonwealth and develop appropriate regulations ("Transition Period"). Pub. L. 110-229, 122 Stat. 855.

30. In order to ensure adequate labor during the Transition Period, the CNRA established a Commonwealth Only Transitional Worker classification ("CW-1 classification") that shall be treated as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15) for use in the Commonwealth. P.L. 110-228, 122 Stat. 856-858; 74 Fed. Reg. 55535 (establishes CW-1 transitional worker visa classification).

31. The number of CW-1 workers authorized in the Commonwealth is not to exceed 22,416 in fiscal year 2012, and shall be reduced each year so as to be zero by December 31, 2014. P.L. 110-228, 122 Stat. 857; 174 Fed. Reg. 55535.

32. Employers seeking to use workers with a CW-1 Classification must provide

documentary evidence that no United States worker is available to fill the position in order to prevent adverse effects on wages and working conditions of United States workers. P.L. 110-228, 122 Stat. 857; 74 Fed. Reg. 55536.

33. The October 5, 2011, IRS Memorandum states that adoption of the CNRA eliminates the legal authority for extension of the Philippine and Korean Exemptions from F.I.C.A. taxation to the Commonwealth and that these individuals are now subject to taxation.

34. On January 5, 2012, the IRS issued *Publication 80, (Circular SS), Federal Tax Guide for Employers in the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands*. This publication confirmed the imposition of F.I.C.A. taxes on CW-1 workers.

35. The current United States minimum wage in the Commonwealth is $5.05 per hour.

36. An employee who works 40 hours per week for 52 weeks in a year would have 2,080 hours or $10,504 in gross income.

37. A Commonwealth employee earning $10,504 per year who is subject to a F.I.C.A. tax rate of 7.65% would incur annual liability of $803. 26 U.S.C. § 3101.

38. An employer paying an employee $10,504 per year who is subject to F.I.C.A. Tax liability of 7.65% would incur $803 in annual tax liability for the wages paid to that employee. 26 U.S.C. § 3111.

39. If 75%[2] of the 22,416 CW-1 classification visas that are authorized to be issued in 2012 are provided to Philippine and Korean workers, working full-time and earning the minimum wage, a total annual F.I.C.A. tax liability (employee and employer) of $27,018,766.

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[2] Figures from 2009 indicate that Philippine and Korean workers comprised 75% of foreign workers. United States Government Accountability Office, *Commonwealth of the Northern Mariana Islands – Status of Transition to Federal Immigration Law*, GAO-11-805T (July 2011).

40. The United States does not provide refunds to individuals who fail to fulfill the required forty quarters of participation for qualification of full F.I.C.A. benefits.

41. The CNMI economy is in a prolonged recession due to the departure of the garment industry in 2009 and a 49 percent decline in tourism from its peak in 1997. GAO-11-805T.

42. In contrast, since 2007, labor costs have increased dramatically due to imposition of the federal minimum wage. GAO-11-805T.

43. As the Commonwealth economy has contracted, its real gross domestic product dropped at an average annual rate of 4.2 percent from 2002 to 2007. GAO-11-805T.

44. Due to the contracting economy, Commonwealth Government revenue has fallen, reflected in the fact that the Government's budget has fallen from $240 million in Fiscal Year 2005 to $120,679,000 in Fiscal Year 2012. Such contraction has been devastating to the Government's ability to maintain operations and provide services.

45. Small insular economies such as the Commonwealth historically suffer from skilled labor shortages that must be supplemented by the use of alien labor. This is illustrated by the current exemption from F.I.C.A. taxation provided to Philippine and Korean workers in Guam.

46. More so than Guam, the Commonwealth currently depends in large part on labor from the Philippines and Korea. This alien labor is concentrated in the Commonwealth's one remaining vital industry, tourism. For example, a large percentage of the labor of hotels is provided by Philipino and Korean workers.

47. Imposition of the unlawful F.I.C.A. tax on businesses struggling in the contracting economy will certainly cause a large percentage of businesses to close. Thus, the Commonwealth's economy will be further devastated and the Government's budget will be

further reduced. Thus, the Commonwealth's revenue and will shrink further and its ability to provide services will further erode.

48. The ability of the Commonwealth to supplement local labor with short-term nonimmigrant aliens provides flexibility to the Commonwealth and avoids imposition of a 15.3% tax for which there is little likelihood of benefits and no opportunity for refund. 26 USC §§ 3101; 3111.

49. The avoidance of an inequitable, inappropriate, and detrimental tax structure was the specific intent of Congress in both the Covenant; the Consolidated Natural Resources Act of 2008; and the F.I.C.A. tax liability exemption provided to nonresident aliens. Social Security Act Amendments of 1960; Hearing on H.R. 125580 before the S. Comm. on Finance, 86th Congress 47-50 (1960) (unpublished document statement of Robert M. Ball, Social Security Administration); United States – Republic of Korea Income Tax Convention, art. 25 (1979); Pub. L. 110-229, 122 Stat. 853 – 854.

50. The Consolidated Natural Resources Act of 2008 does not make any changes to sections 601(c) or 606(b) of the Covenant, and no authority for overruling these exemptions from F.I.CA. taxation has been provided by the United States Internal Revenue Service.

FIRST CAUSE ACTION
Breach of the Covenant

51. Plaintiffs incorporate herein by reference paragraph 1-47 as hereinabove alleged as if set forth here in full.

52. The Covenant defines and governs the relationship between CNMI and the United States. The CNMI has a sovereign interest in the Covenant and seeing that it correctly enforced.

53. Under terms of the Covenant, "the laws of the United States which impose excise and self-employment taxes to support or which provide benefits from the United States Social Security System . . . [became] applicable to the Northern Mariana Islands as they apply to

Guam." Covenant § 606(b).

54. United States law provides that "service performed in Guam by a resident of the Republic of the Philippines while there on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii))," ("H-2 visa") is exempt from F.I.C.A tax liability. 26 U.S.C. § 3121(b)(18).

55. United States law provides that "service performed in Guam by a resident of the Republic of the Korea while there on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii))," ("H-2 visa") is exempt from F.I.C.A tax liability. United States – Republic of Korea Income Tax Convention, art. 25 (1979).

56. The stated purpose of the Philippine and Korean exemptions was to avoid imposing F.I.C.A. taxation on alien individuals who due to the limited nature of their visa status would be unlikely to receive benefits. Social Security Act Amendments of 1960; Hearing on H.R. 125580 before the S. Comm. on Finance, 86th Congress 47-50 (1960) (unpublished document statement of Robert M. Ball, Social Security Administration).

57. For over twenty-five years, Philippine and Korean nonresident aliens working in the Commonwealth have been exempted from Social Security tax liability based on the language of section 601(c) and 606(b) of the Covenant. Covenant §§ 601(c), 606(b); *Commonwealth of the Northern Mariana Islands – Status of Transition to Federal Immigration Law*, 13 (GAO-11-805T).

58. An October 5, 2011 IRS Memorandum states that adoption of the CNRA eliminates the legal authority for extension of the Philippine and Korean Exemptions from F.I.C.A. taxation to the Commonwealth and that these individuals are now subject to taxation.

59. Defendant's imposition of F.I.C.A. tax liability upon Philippine and Korean

nationals while present in the Commonwealth violates sections 601(b) and 606(c) of the Covenant.

SECOND CAUSE OF ACTION
Violation of Consolidated Natural Resources Act

60. Plaintiffs incorporate herein by reference paragraph 1-56 as hereinabove alleged as if set forth here in full.

61. The Consolidated Natural Resources Act of 2008 ("CNRA") states that it is the intent of Congress that special provisions be taken so as to "minimize to the greatest extent practicable, potential adverse economic and fiscal effects of phasing out the Commonwealth's nonresident contract worker program." P.L. 110-229 122 Stat. 854.

62. Philippine and Korean nonresident workers in the Commonwealth are currently exempt from payment of F.I.C.A. tax liability under authority of the Covenant. Covenant §§ 601(c), 606(b); 26 U.S.C. § 3121(b)(18); United States – Republic of Korea Income Tax Convention, art. 25 (1979).

63. The stated purpose of the Philippine and Korean exemptions was to avoid imposing F.I.C.A. taxation on alien individuals who due to the limited nature of their visa status would be unlikely to receive benefits. Social Security Act Amendments of 1960; Hearing on H.R. 125580 before the S. Comm. on Finance, 86th Congress 47-50 (1960) (unpublished document statement of Robert M. Ball, Social Security Administration).

64. The CNRA makes no changes to the Covenant sections authorizing the exemption from F.I.C.A. tax liability provided to Philippine and Korean nonresident alien workers in the Commonwealth. Covenant §§ 601(c), 606(b).

65. The United States has extended F.I.C.A. tax liability to Philippine and Korean nonresident alien workers in the Commonwealth which could result in the imposition of $24,000,000 annually in illegal taxes on the Commonwealth economy.

66. It is unlikely that alien nationals present in the Commonwealth under a CW-1 classification paying F.I.C.A. taxes will qualify for any associated benefits and the law does not provide a refund to either the employee or employer.

67. This imposition of illegal taxation will cause significant unnecessary harm to the Commonwealth economy and is contrary to the stated intent of Congress that the CNRA is to be implemented in such a manner as to minimize its impact.

PRAYER FOR RELIEF

WHEREFORE, it is respectfully prayed that, after due hearing, orders and judgment be rendered in favor of the plaintiff as follows:

1. That the Court issue a declaratory judgment declaring that the imposition of tax liability associated with the Federal Insurance Contribution Act on Philippine and Korean workers present in the Commonwealth under a CW-1 classification of the Immigration and Nationality Act violates the Covenant and/or The Consolidated Natural Resources Act of 2008, Pub. L. 110-229 122 Stat. 854.

2. That the Court issue a preliminary injunction and permanent injunction enjoining the Secretary of the Treasurer and Commissioner of Internal Revenue, and all who act in concert with them, from imposing tax liability associated with the Federal Insurance Contribution Act on Philippine and Korean workers present in the Commonwealth under a CW-1 classification of the Immigration and Nationality Act.

3. Award costs of court and attorneys fees as permitted by law;

4. Grant any further relief it deems appropriate.

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DATED: January 19, 2012

OFFICE OF THE ATTORNEY GENERAL

/s/

James R. Stump
Assistant Attorney General
Attorney for Plaintiff