UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

Petitioner,

v.

PRICEWATERHOUSECOOPERS, LLP

Respondent.

Civil No. 12-mc-0009 (PJS/JJG)

ORDER TO SHOW CAUSE

Upon the United States' Petition to Enforce IRS Summonses Issued to PricewaterhouseCoopers, LLP (Doc. No. 1) and the Declaration of Revenue Agent Delvin Fischer, including the exhibits attached thereto (Doc. No. 2),

IT IS HEREBY ORDERED that respondent PricewaterhouseCoopers, LLP appear on **April 12, 2012, at 9:30 a.m.** before the Honorable Jeanne J. Graham in Courtroom 3B, Warren E. Burger Federal Building and United States Courthouse, 316 North Robert Street, St. Paul, Minnesota 55101, to show cause why the respondent should not be compelled to obey both of the Internal Revenue Service summonses issued to PricewaterhouseCoopers, LLP, on October 5, 2011.

IT IS FURTHER ORDERED that:

1. A copy of this Order, together with the petition and its supporting affidavit and exhibits, shall be served in accordance with Federal Rule of Civil Procedure 4(h) upon the respondent within thirty (30) days of the date that this Order is served upon counsel for the United States or as soon thereafter as possible. Pursuant to Rule 4.1(a),

the Court hereby appoints Revenue Agent Delvin Fischer, or any other person designated by the IRS, to effect service in this case.

2. Proof of any service done pursuant to paragraph 1, above, shall be filed with the Clerk as soon as practicable.

3. Because the file in this case reflects a prima facie showing that the investigation is being conducted for a legitimate purpose, that the inquiries may be relevant to that purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Internal Revenue Code have been substantially followed, the burden of coming forward has shifted to the respondent to oppose enforcement of the summonses.

4. If the respondent has any defense to present or opposition to the petition, such defense or opposition shall be made in writing, filed with the Clerk, and copies served on counsel for the United States, at the address on the petition, at least fourteen (14) days prior to the date set for the show cause hearing. The United States may file a reply memorandum to any opposition at least five (5) days prior to the date set for the show cause hearing.

5. At the show cause hearing, only those issues brought into controversy by the responsive pleadings and factual allegations supported by affidavit will be considered. Any uncontested allegation in the petition will be considered admitted.

6. Respondent may notify the Court, in a writing filed with the Clerk and served on counsel for the United States, at the address on the petition, at least fourteen (14) days prior to the date set for the show cause hearing, that the respondent has no

objection to enforcement of the summonses. The respondent's appearance at the hearing will then be excused.

The respondent is hereby notified that a failure to comply with this Order may subject it to sanctions for contempt of court.

Dated: February 6, 2012

s/ *Jeanne J. Graham*
JEANNE J. GRAHAM
United States Magistrate Judge

In the United States Court of Federal Claims

* *

JOHN E. KETTLE and ANNE R. KETTLE, et al.

Plaintiffs,

v.

UNITED STATES,

Defendant.

* *

Nos. 04-683T, 05-1384T, 09-205T
Filed: February 6, 2012

O R D E R

The court is in receipt of the plaintiffs' February 6, 2012, unopposed motion to extend the time to file previously ordered submissions, that were due on or before Friday, February 17, 2012, by seven days, to and including Friday, February 24, 2012. Plaintiffs' motion is **GRANTED**. The parties shall file their submissions on or before **Friday, February 24, 2012**.

IT IS SO ORDERED.

s/Marian Blank Horn
MARIAN BLANK HORN
Judge

In the United States Court of Federal Claims

* *

JOHN E. KETTLE and ANNE R. KETTLE, et al.

Plaintiffs,

v.

UNITED STATES,

Defendant.

* *

Nos. 04-683T, 05-1384T, 09-205T
Filed: February 6, 2012

O R D E R

The court is in receipt of the plaintiffs' February 6, 2012, unopposed motion to extend the time to file previously ordered submissions, that were due on or before Friday, February 17, 2012, by seven days, to and including Friday, February 24, 2012. Plaintiffs' motion is **GRANTED**. The parties shall file their submissions on or before **Friday, February 24, 2012**.

IT IS SO ORDERED.

s/Marian Blank Horn
MARIAN BLANK HORN
Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOSEPH IANTOSCA, individually and as trustee of the Faxon Heights Apartments Realty Trust and Fern Realty Trust, BELRIDGE CORPORATION, GAIL A. CAHALY, JEFFREY M. JOHNSTON, BELLEMORE ASSOCIATES, LLC, and MASSACHUSETTS LUMBER COMPANY, INC., Plaintiffs, vs.	)	1:11-mc-0066-RLY-DML
BENISTAR ADMIN SERVICES, INC., DANIEL CARPENTER, MOLLY CARPENTER, BENISTAR PROPERTY EXCHANGE TRUST COMPANY, INC., BENISTAR LTD., BENISTAR EMPLOYER SERVICES TRUST CORPORATION, CARPENTER FINANCIAL GROUP, LLC, STEP PLAN SERVICES, INC., BENISTAR INSURANCE GROUP, INC., and BENISTAR 419 PLAN SERVICES, INC., Defendants,	)	
TRAVELERS INSURANCE COMPANY and CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, Reach and Apply Defendants, and	)	
UNITED STATES OF AMERICA, Plaintiff by Intervention.	)	
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, and all participating insurers and syndicates,	)	

Third-Party Plaintiff,)
vs.)
)
WAYNE H. BURSEY,)
Third-Party Defendant.)

ENTRY ON MOVANTS' OBJECTION TO MAGISTRATE JUDGE'S DENIAL OF MOTION TO QUASH GOVERNMENT'S SUBPOENA TO JP MORGAN CHASE BANK FOR MOVANTS' FINANCIAL RECORDS AND MOVANTS' REQUEST FOR ORAL ARGUMENT

This matter is before the court on the Movants'[1] Objection to the Magistrate Judge's denial of the Movants' motion to quash the Government's subpoena duces tecum ("subpoena") to J.P. Morgan Chase Bank, N.A. ("Chase Bank") for use in a case pending in the District of Massachusetts ("Massachusetts Action"), and the Movants' request for oral argument. The Movants consist of Daniel Carpenter and his wife, Molly, and numerous corporate entities controlled by Daniel Carpenter, including the "Benistar"-named entities, the "Carpenter"- named entities, and the "STEP"- named entities. The court finds, for the reasons set forth below, that the Magistrate Judge's ruling was not contrary to law and, therefore, **OVERRULES** the Movants' Objection. The court further finds that oral argument would not be especially helpful to the court, and thus, that motion is **DENIED**.

[1] The Movants are: defendants Benistar Admin Services, Inc. ("Benistar Admin"), Benistar 419 Plan Services, Inc. ("Benistar 419"), Benistar Insurance Group, Inc., Benistar Ltd., Daniel E. Carpenter, Carpenter Financial Group, LLC, and STEP Plan Services, Inc., and nonparties Benistar Admin Services Employee Stock Ownership Plan, Benistar Group, Ltd., Benefit Concepts International, Inc., Benefit Concepts, Inc., Carpenter Financial Group Employee Stock Ownership Plan, Carpenter Group, Ltd., Inc. a/k/a Carpenter Financial Group, Inc. and/or Carpenter Financial Group, LLC, BPETCO Litigation Group, LLC and/or BPETCO Litigation Group, Inc., and STEP Multiple Employer Supplemental Benefit Plan & Trust.

I. Background

The plaintiffs in the Massachusetts Action obtained a judgment for breach of contract and breach of fiduciary duty against Daniel Carpenter and certain "Benistar" (including Benistar Admin) and "Carpenter" entities in the amount of $20 million. *See Iantosca v. Step Plan Serv., Inc.*, 604 F.3d 24, 27 (1st Cir. 2010). Following that judgment, STEP Plan Services, Inc., Benistar Admin, and Benistar 419, among others, settled an action in an unrelated case in the amount of $4.5 million dollars. *Id*. at 28. In the Massachusetts Action, the plaintiffs seek to reach and apply those settlement proceeds in partial satisfaction of their $20 million judgment. *Id*. Complicating matters, the United States intervened in the Massachusetts Action, asserting that it holds $1.12 million in tax liens against Benistar Admin and Benistar 419. The United States claims a right to the settlement proceeds and asserts that its tax lien has priority over the plaintiffs' judgment. Meanwhile, Benistar Admin and Benistar 419 requested Collection Due Process ("CDP") administrative hearings with the Internal Revenue Service ("IRS") regarding the tax assessment and tax lien. The court presumes that a final decision has not been made.

The Government served a subpoena issued by this court, dated June 1, 2011, to Chase Bank, ordering it to produce the financial records of the Movants for any and all accounts held by them from January 1, 2000, to the present. (Motion to Quash, Ex. A). On June 22, 2011, the Movants moved to quash the subpoena. The Magistrate Judge denied the Movants' motion on July 26, 2011, and, two days later, Chase Bank produced

three boxes of records to the Government. The Movants object.

II. The Objection

The Movants advanced three arguments to the Magistrate Judge in support of their motion to quash: (1) some of the Movants were not served a copy of the subpoena in violation of Connecticut law; (2) the subpoena violates 26 U.S.C. § 6330(e)(1) ("Section 6330(e)(1)"), which requires the suspension of "levy actions" when a CDP hearing is pending; and (3) the subpoena is overly broad. The Government responded to the arguments raised in the Objection, and argued that the Movants did not have standing to object to the subpoena. The Magistrate Judge ruled that: (1) contrary to the Government's assertion, the Movants had standing to challenge the subpoena; (2) the Government's failure to serve the subpoena on every Movant (party or nonparty) did not invalidate the subpoena under Connecticut law; (3) the subpoena did not violate the IRS Code's suspension of levy actions pending a CDP hearing; and (4) the subpoena was not overly broad. The Movants' Objection[2] focuses on rulings (3) and (4) above. The Movants filed a supplemental memorandum after they learned that Chase Bank had produced the Movants' financial records to the Government, and request that the records be returned to them. The Movants represent that Chase Bank also produced the financial records of entities that were not listed in the subpoena. Movants ask that those financial

[2] The Government's Response includes a challenge to the Magistrate Judge's finding that the Movants had standing to challenge the subpoena. The court will not entertain this argument because, as even the Government concedes, the court can sustain the Magistrate Judge's decision without addressing this issue.

records be returned to them as well.

A. Section 6330's Suspension of Levy Actions Provision

Internal Revenue Code Section 6330 ("Section 6330") provides that, before the IRS may levy on a taxpayer's property, the taxpayer is entitled to an administrative CDP hearing. At the CDP hearing, the taxpayer can "challenge the appropriateness of collection actions," propose "offers of collection alternatives," and may challenge the underlying tax debt in limited circumstances. 26 U.S.C. § 6330(c). The Code also provides that, when the taxpayer requests a hearing pursuant to Section 6330(e)(1), "the levy actions which are the subject of a requested hearing . . . shall be suspended for the period during which such hearing, and appeals therein, are pending."

Movants argue that the Government intervened in the Massachusetts Action for the express purpose of seizing and executing on settlement proceeds of Benistar Admin and Benistar 419. According to the Movants, it logically follows that the Government's subpoena, which seeks financial records to prove the validity of the tax assessments against Benistar Admin and Benistar 419, violates Section 6330's suspension of levy actions provision.

A levy, as that term is used in the Internal Revenue Code, "includes the power of distraint and seizure by any means." 26 U.S.C. § 6331(b); *see also EC Term of Years Trust v. United States*, 550 U.S. 429, 431 (2007) (defining a levy as a "legally sanctioned seizure and sale of property"). A subpoena bears no relation to a seizure or a sale of property. Accordingly, as correctly observed by the Magistrate Judge, the issuance of a

subpoena cannot reasonably be viewed as a "levy action" subject to the statute. Moreover, even though Benistar Admin and Benistar 419 requested CDP hearings in response to notices of intent to levy issued by the IRS, there is nothing in the IRS Code which prohibits the Government from instituting a judicial lien-enforcement action pursuant to 26 U.S.C. § 7403 to protect any interest it has in the settlement proceeds and to assert priority over competing claimants. *See United States v. National Bank of Commerce*, 472 U.S. 713, 720 (1985) (distinguishing between a levy and a Section 7403 action); *Beery v. Commissioner*, 122 T.C. 184, 190-91 (2004) ("[T]here is no provision in section 6320 or 6330 that prohibits the Commissioner from filing a Federal tax lien . . . .]"). The Treasury Regulations support this view. *See* 26 U.S.C. § 6330-1(g)(2) ("[W]hether or not covered by the CDP Notice issued under section 6330 . . . the IRS . . . may take other non-levy collection actions *such as initiating judicial proceedings to collect the tax shown on the CDP Notice*." (emphasis added)). Accordingly, the Government may issue subpoenas in furtherance of that action. The court therefore agrees with the Magistrate Judge, and finds that the Government's subpoena for the Movants' financial records from Chase Bank does not violate the suspension provisions of Section 6330.

B. Breadth of the Subpoena

The Magistrate Judge ruled that the subpoena was not overly broad, reasoning that:

> [T]he bank records . . . may reveal the entity or entities that controlled the litigation that produced the $4.5 million settlement, a factor . . . relevant to the [Government's] nominee and alter ego theories . . . [and] may

> demonstrate an intertwining of finances probative of the kind of control material to the alter ego and nominee theories.

(Order on Motion to Quash at 7). The Movants' Objection does not address the breadth of the subpoena. Instead, the Movants argue that the financial records the Government seeks will not show ownership of the entities or shared management, and thus, will not lead to the discovery of admissible evidence. Whether the subpoena will produce admissible evidence is not the test under Rule 26(b)(1) of the Federal Rules of Civil Procedure. Instead, under that rule, a party may move for discovery of "any nonprivileged matter that is relevant to a[] party's claim or defense," even evidence that may not be admissible at trial, so long as it "appears reasonably likely to lead to the discovery of admissible evidence." Because the bank records may show undercapitalization, corporate control, and payment of litigation costs, among other facts essential to the nominee and alter ego theories, the Magistrate Judge's determination that the subpoena met the liberal standard of Rule 26(b)(1) will not be disturbed.

The Movants also argue that the subpoena will not lead to admissible evidence regarding the validity of the tax penalty assessments and liens. Without going into specifics, what is at issue here, and what the Government seeks, relates to whether Benistar Admin and/or Benistar 419 were "material advisors" within the meaning of 26 U.S.C. § 6112(a) such that the entities were subject to tax penalties for failing to maintain a list of advisees with respect to reportable transactions per 26 U.S.C. § 6708. The financial records sought by the Government, as correctly assessed by the Magistrate

Judge, "may shed light whether they were material advisors by leading to evidence that they provided 'material, aid, assistance, or advice' to [Benistar] Plan & Trust or derived certain income." (Order on Motion to Quash at 8 (citing 26 U.S.C. § 6111(b)(1)(A) (definition of "material advisor")). The court therefore agrees with the Magistrate Judge, and finds that the Magistrate Judge's determination of relevance for purposes of Rule 26(b)(1) was proper.

C. Financial Records Provided to the Government

As noted previously, Chase Bank provided the Movants' financial records to the Government before the Movants filed the present Objection. The Movants ask that the records be sent to the Movants' counsel, and that the Government certify under oath that it has not retained any copy of the records or notes concerning the content of those records. Because the court finds the subpoena was lawfully issued by the court, the Movants' financial records provided by Chase Bank will remain with the Government for purposes of discovery in the Massachusetts Action.

In a related matter, the Movants represent that the Government received the financial records of twenty-one (21) entities that were not listed in the subpoena. The Movants' counsel wrote a letter to the Government with a list of the entities, demanding that it send the records of those entities to counsel. (*See* Movants' Reply, Ex. A). (The court's copy of the letter has been redacted such that the only visible words are either "Inc." or "Charitable Remainder Trust." (*Id.*)). The Government responded to the letter, stating that Chase Bank's document production was responsive to the subpoena, and,

even if it was not, the Movants have not established their relationship with those entities. (*Id.*, Ex. B). Thus, the court is left with an accusation from the Movants, and a denial from the Government. On this record, the court is unable to fashion an appropriate remedy. The court therefore finds that the best course of action is to refer this issue to the Magistrate Judge.

III. Conclusion

The court finds that the Magistrate Judge's Order on the Movants' Motion to Quash, dated July 26, 2011, was not contrary to law, and that oral argument is not necessary. Accordingly, the court **OVERRULES** the Movants' Objection (Docket # 16), and **DENIES** the Movants' Request for Oral Argument (Docket # 17). The court **REFERS** the issue relating to the financial records of entities allegedly not listed on the subpoena, but produced by Chase Bank to the Government, to the Magistrate Judge.

SO ORDERED this 6th day of February 2012.

RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

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In the United States Court of Federal Claims

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JOHN E. KETTLE and ANNE R. KETTLE, et al.

Plaintiffs,

v.

UNITED STATES,

Defendant.

* * * * * * * * * * * * * * * * * * * *

Nos. 04-683T, 05-1384T, 09-205T
Filed: February 6, 2012

O R D E R

The court is in receipt of the plaintiffs' February 6, 2012, unopposed motion to extend the time to file previously ordered submissions, that were due on or before Friday, February 17, 2012, by seven days, to and including Friday, February 24, 2012. Plaintiffs' motion is **GRANTED**. The parties shall file their submissions on or before **Friday, February 24, 2012**.

IT IS SO ORDERED.

s/Marian Blank Horn
MARIAN BLANK HORN
Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

GREGORY ALBERT DARST,

Debtor.
_____/

Case No. 8:11-bk-23529-CPM
Chapter 13

ORDER DENYING MOTION TO COMPEL

THIS CASE came on for consideration of the Debtors' motion to compel (the "Motion") (Doc. 21). The Motion requests that the Internal Revenue Service ("IRS") be compelled to produce certain documentation in support of referenced tax debts. The IRS, however, has not filed a proof of claim in this case, and the deadline for governmental units to file a proof of claim is 180 days from the date of filing of the petition, or until June 26, 2012, as set forth in the Notice of Commencement (Doc. 7).

Accordingly, it is

ORDERED that the Motion is DENIED, without prejudice to file an objection to claim if the IRS files a proof of claim in this case. The hearing scheduled for February 8, 2012, is cancelled.

DONE and ORDERED on February 06, 2012

BY THE COURT

Catherine Peek McEwen
United States Bankruptcy Judge

United States District Court
District of Massachusetts

JOSEPH IANTOSCA, Individually and as Trustee of the Faxon Heights Apartments Realty Trust and Fern Realty Trust, BELRIDGE CORPORATION, GAIL A. CAHALY, JEFFREY M. JOHNSTON, BELLEMORE ASSOCIATES, LLC, and MASSACHUSETTS LUMBER COMPANY, INC., Plaintiffs, v. BENISTAR ADMIN SERVICES, INC., DANIEL CARPENTER, MOLLY CARPENTER, BENISTAR PROPERTY EXCHANGE TRUST COMPANY, INC., BENISTAR LTD., BENISTAR EMPLOYER SERVICES TRUST CORPORATION, CARPENTER FINANCIAL GROUP, LLC, STEP PLAN SERVICE INC., BENISTAR INSURANCE GROUP, INC., and BENISTAR 419 PLAN SERVICES INC., Defendants, TRAVELERS INSURANCE COMPANY and CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, Reach and Apply Defendants.	Civil Action No. 08-11785-NMG
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON and All Participating Insurers and Syndicates, Third-Party Plaintiff, v. WAYNE H. BURSEY, Third-Party Defendant.	

MEMORANDUM & ORDER

GORTON, J.

This action is scheduled to proceed at a bench trial in this Session on Monday, March 26, 2012. Currently before the Court is the defendants' motion for a jury trial on all claims by the plaintiffs and the government, a plaintiff by intervention. The motion is opposed by both the plaintiffs and the government.

I. Background

Plaintiffs are judgment creditors of several of the defendants in an aggregate of $33 million, only $15.3 million of which has been paid. That judgment ("the Cahaly Judgment") is the result of an action in the Massachusetts Superior Court Department for Suffolk County ("the Cahaly Litigation") in which it was held that several of the defendants improperly invested plaintiffs' escrowed funds.[1]

Defendants Benistar Property Exchange Trust Company, Daniel Carpenter, Molly Carpenter, Benistar Admin Services, Inc. ("BASI"), Benistar Ltd., Benistar Employer Services Trust Corporation and Carpenter Financial Group, LLC (together "the Cahaly Defendants") were parties to the Cahaly Litigation and are liable under the resulting judgment. Not all of those parties

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[1] That case is captioned: Cahaly et al. v. Benistar Property Exchange Trust Co., Inc., No. 01-0116-BLS (Mass. Sup. Ct., filed Jan. 2001).

were originally named in the Cahaly Litigation but, in September, 2003, the state court "pierced the corporate veil" and extended liability to additional entities owned by Daniel and Molly Carpenter.

The remaining defendants in this case, Benistar Insurance Group, Benistar 419 Plan Services, Inc. ("Benistar 419") and Step Plan Services Inc. ("Step Plan"), were not parties to the Cahaly Litigation but were plaintiffs in a different lawsuit brought in Pennsylvania ("the Pennsylvania Litigation"). The Pennsylvania Litigation arises out of an action by those defendants, along with Wayne Bursey ("Bursey") and BASI (which was also a party to the Cahaly Litigation), against John Koresko ("Koresko") and several entities he owned.[2] The purported settlement is for approximately $4.5 million ("the Pennsylvania Settlement").

Travelers Insurance Company ("Travelers") and Certain Underwriters of Lloyd's, London ("Certain Underwriters") (together "the Reach and Apply Defendants") are poised to deliver the proceeds of the Pennsylvania Settlement to the defendants. Plaintiffs seek to reach and apply those proceeds in satisfaction of the Cahaly Judgment. Although not all of the same entities are both judgment debtors in the Cahaly Litigation and plaintiffs in the Pennsylvania Litigation, plaintiffs allege that the

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[2] That case is captioned: Step Plan Services, Inc, et al. v. Koresko Associates, No. 7718 (Court of Common Pleas, Philadelphia County, PA, filed March, 2004).

defendants have abused and are abusing the corporate form in order to avoid the Cahaly Judgment.

The defendants maintain that Step Plan is the sole payee of the Pennsylvania Settlement proceeds and that, because that entity was not a party to the Cahaly Litigation, the plaintiffs cannot enforce the Cahaly Judgment against them.

This Court, after determining that the plaintiffs would likely succeed on the merits of their reach and apply claim, entered a preliminary injunction barring the Reach and Apply Defendants from distributing any proceeds of the Pennsylvania Settlement to the defendants until further order of the Court. Subsequently, in February, 2011, the Court allowed the government's motion to intervene in the case. The government seeks to enforce two federal tax liens, for $1.12 million dollars each, that it has filed against BASI and Benistar 419 with the Town of Simsbury, Connecticut. The government alleges that the liens attach to any proceeds to which those entities are entitled as a result of the Pennsylvania Settlement and have priority over plaintiffs' claims.

I. Analysis

A. Legal Standard

The right to a jury trial is a fundamental right which should be "jealously guarded by the courts." See Jacob v. City of New York, 315 U.S. 752, 752 (1942). Under Fed. R. Civ. P.

38(a), a defendant has such a right where either the Seventh Amendment or a federal statute so requires. Because the defendants do not rely on a federal statute to support their claim of right to a jury trial, their claim depends upon the Seventh Amendment.

The Seventh Amendment limits the right to a jury trial to "[s]uits at common law", U.S. Const. Amend. VII, meaning suits in which "legal rights" rather than "equitable rights" were determined. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 348 (1998); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41 (1989). The right to a jury trial also attaches to suits seeking to vindicate statutory rights which are "analogous to common-law causes of action" and which ordinarily would have been decided in English law courts, not equity or admiralty courts, in the late 18th century. Granfinanciera, 492 U.S. at 42.

Thus, whether a defendant is entitled to trial by jury depends on whether his suit will resolve legal or equitable rights. The determination hinges on 1) whether the action is, or is analogous to, an action that would have been brought in a court of law or equity and 2) whether the nature of the remedy sought is legal or equitable. Tull v. United States, 481 U.S. 412, 417-18 (1987). The second stage of the inquiry is more important than the first. Id.

A. Plaintiffs' Action

Plaintiffs seek 1) to reach and apply any right, title or interest the Cahaly Defendants may have in the proceeds from the Pennsylvania Settlement, 2) to reach and apply all of Step Plan's obligations to the Cahaly Defendants, 3) to hold all the defendants liable for the Cahaly Judgment pursuant to the doctrine of corporate disregard and 4) to set aside the allegedly fraudulent transfer of rights in the Pennsylvania Settlement to Step Plan.

Pursuant to the Massachusetts reach and apply statute, M.G.L. c. 214, § 3(6), a creditor may "reach and apply" a debtor's interest in property that cannot otherwise be executed against in an action at law. To obtain relief, a plaintiff must file a complaint against both the principal defendant and any third party who possesses property of, or owes a debt to, the principal defendant. In re Osgood, 203 B.R. 865, 869 (Bkrtcy. D. Mass. 1997). The plaintiff must also seek an injunction restraining the debtor or a third party from disposing of property which the plaintiff intends to reach and apply in satisfaction of its claim. Id. A plaintiff who has obtained such an injunction "has established an equitable attachment constituting security for satisfaction of a judgment." In re Ballarino, 180 B.R. 343, 348 (D. Mass. 1995).

The Massachusetts Supreme Judicial Court has stated that the

reach and apply statute "combines in a single proceeding two different matters or steps in procedure, one at law and the other in equity." Stockbridge v. Mixer, 215 Mass. 415, 418 (1913). The first step, "the establishment of an indebtedness on the part of the principal defendant to the plaintiff," is an action at law. Id. The second step is the equitable process of collecting an established debt "out of property rights which cannot be reached on an execution." Id. "In short, a bill to reach and apply is essentially a proceeding at law supplemented by an equitable attachment." Salvucci v. Sheehan, 349 Mass. 659, 662 (1965). Thus, a defendant is entitled to a jury trial with respect to his alleged indebtedness but is not entitled to a jury trial with respect to "the other branches of the case which relate to remedy and which are purely equitable in their nature." Id.

Here, plaintiffs have obtained a judgment at law against the Cahaly Defendants and are seeking to enforce that judgment through the reach and apply action. Although the indebtedness of the Cahaly Defendants is established, the issue of whether those defendants have a right to proceeds from the Pennsylvania Settlement is hotly contested because 1) BASI is the only Cahaly Defendant that was also a plaintiff in the Pennsylvania Litigation and 2) the settlement proceeds are purportedly to be paid only to Step Plan. Moreover, plaintiffs seek not only to

reach and apply the rights of the other Cahaly Defendants to the settlement proceeds but also to foreclose the rights thereto of the remaining defendants on the theory that all the entities are, in reality, alter egos of one another and/or that interests in the proceeds were fraudulently conveyed to Step Plan.

Under the theory of plaintiffs' case, therefore, their reach and apply claims are contingent upon their claims for corporate disregard and/or fraudulent conveyance. Because, for the reasons stated below, the Court finds that plaintiffs seek legal rather than equitable remedies, the Court concludes that the defendants are entitled to a jury trial with respect to all of plaintiffs' claims. Stockbridge, 215 Mass. at 418 (where a constitutional jury trial right exists, "a party cannot be deprived of that right because a change in the form of procedure has made it cognizable in courts of equity").

Claims involving fraud or the doctrine of piercing the corporate veil have roots in both courts of law and equity and, consequently, it is generally the nature of the remedy sought that resolves whether a right to jury trial attaches to such claims. See Wm. Passalacqua Builders v. Resnick Developers, 933 F.2d 131, 135-36 (2d Cir. 1991) (piercing the corporate veil); Hyde Props. v. McCoy, 507 F.2d 301, 305 (6th Cir. 1974) (fraud). Traditionally, legal remedies involve money damages whereas equitable remedies are "typically coercive, and are enforceable

directly on the person or thing to which they are directed." Int'l Fin. Servs. Corp. v. Chromas Tech. Canada, Inc., 356 F.3d 731, 736 (7th Cir. 2004).

Here, plaintiffs seek to collect the proceeds of the Pennsylvania Settlement to satisfy the judgment entered against the Cahaly Defendants. "The fact that [they] seek money indicates a legal action." Wm. Passalacqua Builders, 933 F.2d at 136 (and cases cited). That they use equitable procedural means to pursue that remedy, or that the funds have not yet been disbursed, does not alter the legal nature of their claims. See Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002) ("[S]uits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages'.... [a]nd money damages are, of course, the classic form of legal relief.").

First, through their veil-piercing claim, plaintiffs do not simply seek a determination that the corporate veil should be pierced but instead seek to enforce the Cahaly Judgment against all defendants. The nature of the relief sought, that is, the enforcement of a money judgment, is legal in nature. See Wm. Passalacqua Builders, 933 F.2d at 136 (where judgment-creditor sought to pierce the corporate veil and enforce a judgment obtained against a subsidiary, nature of relief sought was legal). But see Int'l Fin. Servs. Corp., 356 F.3d at 736

(determining that, under Illinois law, piercing the corporate veil is an equitable remedy in part because the remedy itself does not result in money damages).

Second, with respect to their fraudulent conveyance claim, plaintiffs contend that the Cahaly Defendants' release of their right, title and interest in the Pennsylvania Settlement to Step Plan is intended to hinder, delay or defraud the plaintiffs' collection of their judgment and is thus a fraudulent conveyance. They therefore ask that, pursuant to the Massachusetts Uniform Fraudulent Transfer Act, M.G.L. c. 109A, the Court set aside the assignment of the right and foreclose Step Plan's interest in the settlement. In essence, plaintiffs' action is to recover an alleged fraudulent conveyance of a determinate sum of money (the entire Pennsylvania Settlement), a remedy which the Supreme Court has concluded would have been sought in a court of law in 18th-century England. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 46-49 (1989).

In sum, the Court concludes that plaintiffs seek legal remedies and that defendants are therefore entitled to a jury trial on plaintiffs' claims.

B. The Government's Action

Pursuant to 26 U.S.C. §§ 7403 and 7424, the United States intervened in this case to enforce federal tax liens against BASI and Benistar 419. The government asks the Court to decide that

the tax penalty assessments underlying the liens are valid and that the liens may be enforced against any right BASI and Benistar 419 may have to the Pennsylvania Settlement.

The government concedes that BASI and Benistar 419 are entitled to a jury trial with respect to the validity of the tax penalty assessments underlying the liens but contends that, once the liens are established as valid, defendants have no right to a jury trial with respect to enforcing those liens against the Pennsylvania Settlement.

Even if validity is established, however, enforcement of the liens will require the government to prove that the Pennsylvania Settlement is the property of BASI and Benistar and not, as defendants maintain, solely the property of Step Plan. The government posits two alternative theories by which to establish BASI and Benistar 419's property rights: it contends that Step Plan either 1) holds title to the settlement as nominee of BASI and/or Benistar 419 or 2) is the alter ego of BASI and/or Benistar 419.

In all material respects for purposes of analyzing the defendants' right to a jury trial, the government's alter ego theory is the equivalent of plaintiffs' claim of piercing the corporate veil and its nominee theory is the equivalent of plaintiffs' fraudulent conveyance claim. Thus, for the same reasons, the Court concludes the defendants are entitled to a

jury trial with respect to the government's alter ego and nominee claims.

ORDER

In accordance with the foregoing, Defendants' Motion for Trial by Jury (Docket No. 295) is **ALLOWED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated February 6, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOSEPH IANTOSCA, BELRIDGE CORPORATION, GAIL A. CAHALY, JEFFREY M. JOHNSTON, BELLMORE ASSOCIATES, LLC, MASSACHUSETTS LUMBER COMPANY, INC., UNITED STATES OF AMERICA **Plaintiffs,** **v.** **BENISTAR ADMINISTRATIVE SERVICES, INC., DANIEL CARPENTER, MOLLY CARPENTER, BENISTAR PROPERTY EXCHANGE TRUST COMPANY, INC., BENISTAR LTD., BENISTAR EMPLOYER SERVICES TRUST CORPORATION, CARPENTER FINANCIAL GROUP, LLC, STEP PLAN SERVICES, INC., BENISTAR 419 PLAN SERVICES, INC., TRAVELERS INDEMNITY COMPANY, CERTAIN UNDERWRITERS AT LLOYDS, LONDON, TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, WAYNE H. BURSEY** **Defendants.**	**Civil Action No. 08-CV-11785NMG**

MOTION PURSUANT TO FED. R. CIV. P. 17(a)(3)
FOR LEAVE TO SUBSTITUTE JOSEPH J. IANTOSCA AND
DAVID A. IANTOSCA AS GUARDIANS OF JOSEPH IANTOSCA, SR.

Plaintiffs move, pursuant to Fed. R. Civ. P. 17(a)(3) for leave to substitute Joseph J. Iantosca and David A. Iantosca (as guardians of Joseph Iantosca, Sr.) for Joseph Iantosca, Sr. individually and to substitute Joseph J. Iantosca and David A. Iantosca for Joseph Iantosca, Sr. as trustee of the Faxon Heights Apartment Trust and Fern Realty Trust. As grounds for this motion, plaintiffs state that Joseph J. Iantosca and David A. Iantosca were appointed as guardians for Joseph Iantosca, Sr. on January 2, 2008 and became successor trustees of the

Because defendants will suffer no prejudice as a result of the substitution and, pursuant to Fed. R. Civ. P. 9(a) and 17(a)(3), motion allowed. /s/ M. Gorton, USDJ 2/6/12

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

GREGORY ALBERT DARST,

Debtor.
_____/

Case No. 8:11-bk-23529-CPM
Chapter 13

ORDER DENYING MOTION TO COMPEL

THIS CASE came on for consideration of the Debtors' motion to compel (the "Motion") (Doc. 21). The Motion requests that the Internal Revenue Service ("IRS") be compelled to produce certain documentation in support of referenced tax debts. The IRS, however, has not filed a proof of claim in this case, and the deadline for governmental units to file a proof of claim is 180 days from the date of filing of the petition, or until June 26, 2012, as set forth in the Notice of Commencement (Doc. 7).

Accordingly, it is

ORDERED that the Motion is DENIED, without prejudice to file an objection to claim if the IRS files a proof of claim in this case. The hearing scheduled for February 8, 2012, is cancelled.

DONE and ORDERED on February 06, 2012

BY THE COURT

Catherine Peek McEwen
United States Bankruptcy Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NO. 1:12-CV-00171-LJO-JLT

STEVEN BOOTH, ET AL. ,

Plaintiff(s),

v.

ACACIA CORPORATE MANAGEMENT, LLC, ET AL. ,

Defendant(s).

/

ORDER SETTING MANDATORY SCHEDULING CONFERENCE

DATE: May 23, 2012
TIME: 09:00 AM

JENNIFER L. THURSTON
U.S. MAGISTRATE JUDGE
Bakersfield, CA

Rule 16, F.R.Civ.P., requires the Court to enter a Scheduling Conference Order within 120 days of the date of the Complaint being served upon the defendant. Therefore, it is ordered that you appear for a formal Scheduling Conference before the United States Magistrate Judge Jennifer L. Thurston, at the United States District Court Bakersfield Office, 1200 Truxtun Avenue, Suite 120, Bakersfield, CA.

The Court is unable to conduct a scheduling conference until defendants have been served with the summons and complaint. Accordingly, plaintiff(s) shall diligently pursue service of summons and complaint and dismiss those defendants against whom plaintiff(s) will not pursue claims. Plaintiff(s) shall promptly

file proofs of service of the summons and complaint so the Court has a record of service. Counsel are referred to F.R.Civ.P., Rule 4 regarding the requirement of timely service of the complaint. Failure to timely serve summons and complaint may result in the imposition of sanctions, including the dismissal of unserved defendants.

Due to the mandates of Rule 16, this Order may be served upon counsel for the plaintiff(s) before appearances of defendant(s) are due. It is the obligation of counsel for the plaintiff(s) to serve a copy of this Order on the defendant(s), or, if identified, on their counsel, **promptly** upon receipt of this Order, and to file an appropriate proof of such service with the Court, in compliance with Rule 5-135(a) of the Local Rules of Practice for the Eastern District of California.

Attendance at the Scheduling Conference is *mandatory* upon each party not represented by counsel or, alternatively, by retained counsel. Only counsel who are thoroughly familiar with the facts and the law of the instant case, and who have full authority to bind his or her client, shall appear. Trial counsel should participate in this Scheduling Conference whenever possible. It may be necessary for counsel to spend as much as 45 minutes in this Conference.

A Joint Scheduling Report, carefully prepared and executed by all counsel, shall be electronically filed in CM/ECF, one (1) full week prior to the Scheduling Conference, and shall be e-mailed, in WordPerfect or Word format, to **jltorders@caed.uscourts.gov**.

For reference purposes, the Court requires that counsels'

Joint Scheduling Report indicate the date, time, and chambers of the Scheduling Conference opposite the caption on the first page of the Report.

Among other things, counsel will be expected to discuss the possibility of settlement. Counsel are to thoroughly discuss settlement with each other before undertaking the preparation of the Joint Scheduling Report and engaging in extensive discovery. However, even if settlement negotiations are progressing, counsel are expected to comply with the requirements of this Order unless otherwise excused by the Court. If the case is settled, please **promptly** inform the Court, and counsels' presence, as well as the Joint Scheduling Report, will not be required.

Counsel may request that their attendance be by telephonic conference. If two or more parties wish to appear telephonically, counsel shall decide which will be responsible for making prior arrangements for the conference call and shall initiate the call at the above-designated time. After all parties are on the line, the call should then be placed to Judge Thurston's chambers at 661-326-6620 . **Additionally, counsel are directed to indicate on the face page of their Joint Scheduling Report that the conference will be telephonic.**

At least twenty (20) days prior to the Mandatory Scheduling Conference, the actual trial counsel for all parties shall conduct and conclude a conference at a time and place arranged by counsel for the plaintiff(s). This conference should preferably be a personal conference between all counsel but, due to the distances involved in this District, a telephonic conference call involving

all counsel is permissible. The Joint Scheduling Report shall respond to the following items by corresponding numbered paragraphs:

Form and Contents of the Joint Scheduling Report

1. Summary of the factual and legal contentions set forth in the pleadings of each party, including the relief sought by any party presently before the Court.

2. Any proposed amendment to the pleadings presently on file shall be filed by its proponent contemporaneously with the Scheduling Conference Report. If the matter cannot be resolved at the Scheduling Conference, the matter will be set as a Motion to Amend in accordance with the Rules of Practice of the Eastern District of California. A proposed deadline for amendments to pleadings.

3. A summary detailing the uncontested and contested facts.

4. A summary of the legal issues as to which there is no dispute, i.e., jurisdiction, venue, applicable federal or state law, etc., as well as a summary of the disputed legal issues.

5. The status of all matters which are presently set before the Court, i.e., hearing all motions, etc.

6. A complete and detailed discovery plan addressing the following:

(a) A date for the exchange of initial disclosures required by Fed.R.Civ.P. 26(a)(1) or a statement that disclosures have already been exchanged;

(b) A firm cut-off date for non-expert discovery;

(c) A firm date(s) for disclosure of expert witnesses as

required by Fed.R.Civ.P. 26(a)(2);

(d) firm cut-off date for expert witness discovery;

(e) Any proposed changes in the limits on discovery imposed by Fed.R.Civ.P. 26(b); 30(a)(2)(A), (B) or (C); 30(d); or 33(a)

(f) Whether the parties anticipate the need for a protective order relating to the discovery of information relating to a trade secret or other confidential research, development, or commercial information;

(g) Any issues or proposals relating to the timing; sequencing, phasing or scheduling of discovery;

(h) Whether the parties anticipate the need to take discovery outside the United States and if so a description of the proposed discovery;

(i) Whether any party anticipates video and/or sound recording of depositions;

(j) A proposed date for a Mid-Discovery Status Report and Conference;

7. Discovery relating to Electronic, Digital and/or Magnetic data.

Prior to a Fed.R.Civ.P. 26(f) conference, counsel should carefully investigate their client's information management system so that they are knowledgeable as to its operation, including how information is stored and how it can be retrieved. Likewise, counsel shall reasonably review the client's computer files to ascertain the contents thereof; including archival and legacy data (outdated formats or media), and disclose in initial discovery

(self-executing routine discovery) the computer based evidence which may be used to support claims or defenses.

(A) Duty to Notify. A party seeking discovery of computer-based information shall notify the opposing party immediately, but no later than the Fed.R.Civ.P. 26(f) conference of that fact and identify as clearly as possible the categories of information which may be sought.

(B) Duty to Meet and Confer. The parties shall meet and confer regarding the following matters during the Fed.R.Civ.P. 26(f) conference:

(i) Computer-based information (in general) . Counsel shall attempt to agree on steps the parties will take to segregate and preserve computer-based information in order to avoid accusations of spoilation;

(ii) E-mail information . Counsel shall attempt to agree as to the scope of e-mail discovery and attempt to agree upon an e-mail search protocol. This should include an agreement regarding inadvertent production of privileged e-mail messages.

(iii) Deleted information. Counsel shall confer and attempt to agree whether or not restoration of deleted information may be necessary, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration; and

(iv) Back-up data Counsel shall attempt to agree whether or not back-up data may be necessary, the extent to which backup data is needed and who will bear the cost of obtaining back-up data.

The Joint Scheduling Report shall summarize the parties' conference relating to discovery of electronic data.

8. Dates agreed to by all counsel for:

(a) Filing non-dispositive[1] and dispositive[2] pre-trial motions with the understanding that motions (except motions in *limine* or other trial motions) will not be entertained after the agreed upon date. (No later than 10 weeks prior to the proposed Pre-Trial Conference date.)

(b) Pre-Trial Conference date. (No later than 45 days prior to the proposed trial date.)

(c) Trial date.

All of these dates should be considered firm dates. Dates should be set to allow the court to decide any matters under submission before the Pre-Trial Conference is set.

9. At the conference referred to above, counsel are encouraged to discuss settlement, and the Court will expect a statement in the Joint Scheduling Report as to the possibility of settlement. Counsel shall indicate when they feel a settlement conference is desired, i.e., before further discovery, after discovery, after pre-trial motions, etc.

10. A statement as to whether the case is a jury or non-jury case. If the parties disagree as to whether a jury trial has been timely demanded or whether one is available on some or all of the claims, the statement shall include a summary of each party's

[1]Motions to compel discovery, amend, remand, etc.

[2]Motions for summary adjudication or to dismiss, strike, etc.

position.

11. An estimate of the number of trial days required. When counsel cannot agree, each party shall give his or her best estimate. In estimating the number of trial days counsel should keep in mind that this court is normally able to devote the entire day to trial.

12. Because the District Judges' dockets are extremely crowded dockets the parties should consider and address the issue of whether they are willing to consent to the jurisdiction of a U.S. Magistrate Judge pursuant to 28 U.S.C. section 636(c). All non-dispositive motions are routinely heard by the Magistrate Judge whether or not the parties consent.

13. Whether either party requests bifurcation or phasing of trial or has any other suggestion for shortening or expediting discovery, pre-trial motions or trial.

14. Whether this matter is related to any matter pending in this court or any other court, including any bankruptcy court.

15. Joint Scheduling Reports are to be e-mailed, in WordPerfect or Word format, to **jltorders@caed.uscourts.gov**.

SHOULD COUNSEL OR A PARTY APPEARING *PRO SE* FAIL TO APPEAR AT THE MANDATORY SCHEDULING CONFERENCE, OR FAIL TO COMPLY WITH THE DIRECTIONS AS SET FORTH ABOVE, AN EX PARTE HEARING MAY BE HELD AND JUDGMENT OF DISMISSAL, DEFAULT, OR OTHER APPROPRIATE JUDGMENT MAY BE ENTERED, OR SANCTIONS, INCLUDING CONTEMPT OF COURT, MAY BE IMPOSED AND/OR ORDERED.

UNITED STATES MAGISTRATE JUDGE

/s/ JENNIFER L. THURSTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

ORDER

vs

1:05-CR-344 (1)

RICHARD A. MUTO

Defendant.

The sum of $50,000.00 was deposited in the Registry of this Court on February 29, 2008 by Gracelyn M. Bax, the Surety herein, on behalf of the Defendant, Richard A. Muto, to secure his appearance before this Court to answer to charges pending against him.

On January 24, 2011 before the Hon. Richard J. Arcara, the Defendant pled guilty and on October 4, 2011 was sentenced to the custody of the Bureau of Prisons for a period of 36 months, followed by 1 year supervised release. The Defendant was also ordered to pay a special penalty assessment in the amount of $100.00 which has been paid in full.

N O W, upon written request by Gracelyn M. Bax, the Surety herein, for refund of said cash bail and certification that original District Court receipt number BUF006747 was lost or misplaced, it is

O R D E R E D, that the Clerk of the Court is hereby directed to instruct First Niagara Bank, this Court's designated depository, to close account number 9960139372

and issue a bank draft payable to Clerk, U.S. District Court equal to the sum of 10% of the interest earned while such funds were held. Such fee is to be paid to the Treasury of the United States in accordance with law. The remaining balance of the $50,000.00 bail deposit plus accrued interest to date is to be paid to Gracelyn M. Bax representing the refund of said cash bail.

Richard J. Arcara

HON. RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

Dated: January 27 2012
Buffalo, New York

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

GARY WESTERMAN PLAINTIFF

V. Civil No. 10-6055

THE UNITED STATES OF AMERICA DEFENDANT

J U D G M E N T

For reasons set forth in the Memorandum Opinion, filed contemporaneously herewith, the Motion for Summary Judgment (doc. 14) by the United States is **GRANTED** and the Motion for Summary Judgment by Westerman (doc. 19)is **DENIED**. The United States' Motion to Remove Plaintiff's Summary Judgment Motion from the Docket as Untimely and to Strike Plaintiff's Statement of Facts (doc. 24) is **DENIED**. All parties are to bear their own costs and fees, and Plaintiff's complaint is DISMISSED WITH PREJUDICE. **The parties have thirty days from entry of this judgment on the docket in which to appeal.**

IT IS SO ORDERED this 3rd day of February, 2012.

/s/ Robert T. Dawson
Honorable Robert T. Dawson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. PAUL E. FOSTER Jr., SHEREE MCDADE, d/b/a MIAMI TAX, ADVANCE TAXES,INC., PAUL'S TAX, Defendants.	)	Case No. 2:11-CV-246-WKW

ORDER

Upon consideration of the United States's and Ms. McDade's joint Motion to Approve and Enter Agreed Judgment (Doc. # 28), it is ORDERED that the motion is GRANTED.

Based on the stipulation entered into between Sheree McDade and the United States, the court finds as follows:

1. The United States filed a three-count complaint against Sheree McDade. Count one of the complaint seeks injunctive relief in accordance with 26 U.S.C. § 7407. Count two of the complaint seeks injunctive relief in accordance with 26 U.S.C. § 7408. Count three of the complaint seeks injunctive relief in accordance with 26 U.S.C. § 7402.

2. The parties agree as to the entry of permanent injunction, and the parties waive further findings of fact pursuant to Fed. R. Civ. P. 52 and 26 U.S.C. §§ 7402, 7407 and 7408.

3. Sheree McDade has waived any right she may have to appeal from the Final Judgment of Permanent Injunction.

4. Sheree McDade has entered into the Final Judgment of Permanent Injunction voluntarily.

5. Sheree McDade has acknowledged that the Final Judgment of Permanent Injunction neither precludes the Internal Revenue Service from assessing penalties against her for asserted violations of the Internal Revenue Code, nor precludes her from contesting any such penalties.

6. This court shall retain jurisdiction over this case for the purpose of implementing and enforcing this injunction.

An appropriate final judgment will be entered separately.

DONE this 6th day of February, 2012.

/s/ W. Keith Watkins
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. PAUL E. FOSTER JR., SHEREE MCDADE, d/b/a MIAMI TAX, ADVANCE TAXES,INC., PAUL'S TAX, Defendants.	)	Case No. 2:11-CV-246-WKW

FINAL JUDGMENT

In accordance with the prior proceedings, opinions, and orders of the court, it is the ORDER, JUDGMENT, and DECREE of the court that the following permanent injunctions are entered against Defendants.

A. Final Judgment of Permanent Injunction Against Paul E. Foster Jr.

The Court enters this Final Judgment of Permanent Injunction against Paul E. Foster Jr., as follows:

a. Paul E. Foster Jr. is permanently enjoined from preparing or filing, or assisting in preparing or filing, federal tax returns for other persons.

b. Paul E. Foster Jr. is permanently enjoined from advising, counseling, assisting or instructing anyone about the preparation of a federal tax return.

c. Paul E. Foster Jr. is permanently enjoined from owning, managing, controlling, advising, working for or volunteering for a tax-return-preparation business.

d. Paul E. Foster Jr. is permanently enjoined from making, in connection with organizing or selling a plan or arrangement, a false or fraudulent statement regarding whether income can be excluded from a tax return or regarding the securing of any other tax benefit.

e. Paul E. Foster Jr. is permanently enjoined from engaging in any other activity subject to penalty under IRC §§ 6694, 6695, 6700, 6701 or any other penalty provision in the Internal Revenue Code.

f. Paul E. Foster Jr. is permanently enjoined from engaging in any conduct that interferes with the administration and enforcement of the internal revenue laws.

g. Paul E. Foster Jr. shall contact by mail all persons for whom he has prepared federal tax returns or assisted in preparing tax returns for the tax years 2006 and thereafter, and send them a copy of this Final Judgment of Permanent Injunction and a copy of the Complaint, and certify to the Court within thirty days of entry of this Final Judgment of Permanent Injunction, under penalty of perjury, that he has complied with this provision.

h. Paul E. Foster Jr. shall provide to counsel for the United States a list of everyone for whom he has prepared (or helped to prepare) a federal tax return for tax year 2006 and thereafter, and certify to the Court within thirty days of entry of this Final Judgment of Permanent Injunction that he has complied with this provision. This list shall include each person's name, address, email address, social security number, telephone number, and the tax year(s) for which a return was prepared.

i. Paul E. Foster Jr. and the United States will bear his and its own costs, including attorney's fees.

B. Final Judgment of Permanent Injunction Against Sheree McDade

The Court enters this Final Judgment of Permanent Injunction against Sheree McDade as follows:

a. Sheree McDade is permanently enjoined from preparing or filing, or assisting in preparing or filing, federal tax returns for other persons.

b. Sheree McDade is permanently enjoined from advising, counseling, assisting or instructing anyone about the preparation of a federal tax return.

c. Sheree McDade is permanently enjoined from owning, managing, controlling, advising, working for or volunteering for a tax-return-preparation business.

d. Sheree McDade is permanently enjoined from engaging in any other activity subject to penalty under IRC §§ 6694, 6695, 6700, 6701 or any other penalty provision in the Internal Revenue Code.

e. Sheree McDade is permanently enjoined from engaging in any conduct that interferes with the administration and enforcement of the internal revenue laws.

f. Sheree McDade shall contact by mail all persons for whom she has prepared federal tax returns or assisted in preparing tax returns for the tax years 2006 and thereafter, and send them a copy of this Final Judgment of Permanent Injunction and a copy of the Complaint, and certify to the Court within thirty days of entry of this Final Judgment of Permanent Injunction, under penalty of perjury, that she has complied with this provision.

g. Sheree McDade shall provide to counsel for the United States a list of everyone for whom she has prepared (or helped to prepare) a federal tax return for tax year 2006 and thereafter, and certify to the Court within thirty days of entry of this Final Judgment of Permanent Injunction that she has complied with this provision. This list shall include each person's name, address, email address, social security number, telephone number, and the tax year(s) for which a return was prepared.

h. Sheree McDade and the United States will bear her and its own costs, including attorney's fees.

The court shall retain jurisdiction over this case for the purpose of implementing and enforcing these injunctions.

The Clerk of the Court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DONE this 6th day of February, 2012.

/s/ W. Keith Watkins
CHIEF UNITED STATES DISTRICT JUDGE

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

BAYER CORPORATION and SUBSIDIARIES,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 09-351
THE UNITED STATES,	)	
Defendant.	)	

OPINION

This civil action arises out of the denial of federal income tax credits for qualified research expenses claimed by Plaintiffs, Bayer Corporation and Subsidiaries ("Bayer"), for the years 1990-2006. Before the Court is Bayer's Amended Motion for a Case Management/Protective Order Based on Statistical Sampling ("Amended Sampling Motion"). (Docket No. 71). For the reasons set forth below, the Amended Sampling Motion will be denied.

FINDINGS OF FACT

After consideration of the testimony and evidence presented by the parties during a hearing on the Amended Sampling Motion, the Court makes the following findings of fact:[1]

[1] Due to the complexity and lengthy procedural history of this case, the Court also has included applicable provisions of the Internal Revenue Code and undisputed facts in its findings for background purposes. The undisputed facts are derived from the docket, evidence submitted in support of other motions filed by the parties and Bayer's informational Power Point presentation to the Court on May 4, 2010.

Internal Revenue Code

1. A federal income tax credit for qualified research expenses, commonly referred to as "QREs," was established by the Economic Recovery Tax Act of 1981. The purpose of the tax credit for QREs was to "stimulate a higher rate of capital formation and to increase productivity." S.Rep. No. 97-144, at 76-77 (1981).

2. QREs are a subset of research expenses in general and are limited to salaries and wages, supplies and contract research performed by third parties.[2] (Docket No. 81, pp. 45-46). In general, the credit for QREs for any taxable year is 20% of the excess QREs for the taxable year over a specified base period.[3] 26 U.S.C. § 41(a) and (c).

3. Due to concerns that taxpayers were interpreting the tax credit for QREs too broadly and that "some taxpayers ... claimed the credit for virtually any expenses relating to product development," S.Rep. No. 99-313, at 694-95 (1986), the credit for QREs was amended by the Tax Reform Act of 1986,

[2] QREs are defined in the Internal Revenue Code as the sum of in-house research expenses and contract research expenses paid or incurred by the taxpayer during the taxable year in carrying on any trade or business of the taxpayer. "In-house research expenses" include "any wages paid or incurred to an employee for qualified services performed by such employee," and "any amount paid or incurred for supplies used in the conduct of qualified research." 26 U.S.C. § 41(b)(2)(A)(i). The term "contract research expenses" means "65 percent of any amount paid or incurred by the taxpayer to any person (other than an employee of a taxpayer) for qualified research." 26 U.S.C. § 41(b)(3)(A).

[3] Excess (currently unusable) QRE credits may be carried backward or forward by a taxpayer to offset tax liability for other years.

Pub.L. 99-514, section 231(b), 100 Stat. 2173, to provide a definition of "qualified research."

4. Under Section 41(d) of the Internal Revenue Code, "qualified research" means research "which is undertaken for the purpose of discovering information - (i) which is technological in nature, and (ii) the application of which is intended to be useful in the development of a new or improved business component of the taxpayer, ...," and the term "business component" means "any product, process, computer software, technique, formula, or invention which is to be - (i) held for sale, lease, or license, or (ii) used by the taxpayer in a trade or business of the taxpayer." 26 U.S.C. § 41(d)(1). The test for determining whether an expense was incurred in connection with qualified research is to be applied separately to each business component of the taxpayer. 26 U.S.C. § 41(d)(2)(A).

5. In 2003, the Treasury Regulation relating to recordkeeping requirements for QRE credits was changed to read, in relevant part, as follows:

> **§ 1.41-4 Qualified research for expenditures paid or incurred in taxable years ending on or after December 31, 2003**
>
> * * *
>
> **(d) Recordkeeping for the research credit.** A taxpayer claiming a credit under section 41 must retain records in sufficiently usable form and detail to substantiate that the expenditures claimed are eligible for the credit....

* * *

Treas.Reg. § 1.41-4(d).

Although the 2003 amendment to recordkeeping requirements for QRE credits under Section 41 of the Internal Revenue Code is prospective, taxpayers may opt for retroactive application of the regulation and Bayer has done so in this case.[4] (Hearing Tr. 7/18/11, Docket No. 81, pp. 103-04).

Background

6. Bayer is a multifaceted company employing more than 20,000 people in the United States. It is headquartered in Pittsburgh, Pennsylvania. Bayer is comprised of the following divisions: healthcare, material science and crop science. Bayer HealthCare includes animal health, biological, consumer care and pharmaceutical units; Bayer MaterialScience LLC is one of the leading producers of polymers and high performance plastics in the United States; and Bayer CropScience is one of the world's leading innovative companies in the areas of crop protection, non-agricultural pest control, and seed and plant biotechnology. (Bayer Power Point presentation, 5/4/10).

7. Bayer engages in research activities at numerous sites throughout the United States. Bayer also conducts research in other countries including Germany, Japan, India, France, the

[4] Records of Bayer's research expenses are maintained in two forms: paper and electronic. (Hearing Tr. 7/18/11, Docket No. 81, pp. 52-54).

United Kingdom and Singapore. The availability of the tax credit for QREs in Section 41 of the Internal Revenue Code is a factor in the decision of Bayer's parent, Bayer AG, a publicly traded German company, as to where research will be conducted. (Hearing Tr. 7/18/11, Docket No. 81, pp. 38-41).

8. Commencing in the 1960s and continuing through the 1990s, Bayer maintained two main frames, i.e., big, bulky IBM computers, in the United States. Bayer purchased or leased software to keep general ledgers, sales ledgers, payroll, inventory and logistical information on the main frames. In the late 1990s, Bayer changed to the SAP Enterprise Accounting System which utilizes servers that connect personal computers, i.e., desktop and laptop computers, rather than large main frame computers. To reduce high software and maintenance costs, the electronic information stored on Bayer's two main frames in the United States was consolidated on the main frame in Pittsburgh at some point. Thereafter, in 2005, the Pittsburgh main frame was decommissioned and the electronic information moved to Bayer's main frame in Germany. In late June 2011, the Germany main frame, which was Bayer's last remaining main frame, was decommissioned. At the time, the electronic information stored on the main frame was examined and certain data was retained in light of this litigation. (Hearing Tr. 7/18-19/11, Docket No. 81, pp. 52-54, Docket No. 82, pp. 94-97, 102-03).

9. Bayer does not account for research expenses by individual projects. Rather, Bayer uses an accounting system that is based on the nature of activities performed. Similar activities are grouped into "cost centers" and individual expenses, such as payroll, supplies and outside services, are charged to the appropriate cost centers and then to specific expense classes within those cost centers.[5] (Docket No. 71-4, p. 2, ¶ 6).

10. In addition to accounting records, Bayer substantiates QREs for the purpose of claiming tax credits under Section 41 of the Internal Revenue Code with internal status reports, emails, correspondence with federal agencies, EXCEL files, Word documents, Power Point presentations, access databases, lab notebooks, patent applications, and standardized and centrally maintained personnel and payroll records.[6] Bayer also substantiates QREs through evidence provided by the employees and former employees who performed the research. (Hearing Tr. 7/18/11, Docket No. 81, pp. 54-56).

11. Paul F. Wright has been employed in Bayer's Tax Department for 28 years. Mr. Wright, who currently serves as

[5] Examples of Bayer's cost centers include "formulation development" (for crop protection agents) and "clinical studies" (for pharmaceuticals). (Docket No. 72, p. 6).

[6] Prior to the initiation of this litigation, Bayer's legal department issued hold notices to individuals identified by Bayer's tax department as working in relevant cost centers to retain all paper and electronic documents that could in any way relate to research. (Hearing Tr., 7/18/11, Docket No. 81, pp. 61-62).

Vice President, Tax for Bayer, oversees the preparation of all tax returns filed by Bayer and its affiliates (approximately 5,000 returns annually). (Hearing Tr. 7/18/11, Docket No. 81, p. 33).

12. In the mid-1990s, Mr. Wright became aware through discussions with various Bayer employees that Bayer's claims for QRE credits under Section 41 of the Internal Revenue Code were limited to expenses incurred in cost centers involving pure or indisputable qualified research activities, and that expenses charged to other cost centers, such as quality assurance, also may include expenses for qualified research activities. (Hearing Tr. 7/18/11, Docket No. 81, pp. 93-94).

13. In 1997, based on Mr. Wright's recommendation, Bayer retained Deloitte & Touche LLP, an accounting firm, to conduct a study to determine whether Bayer was claiming all of the QRE credits to which it was entitled under Section 41 of the Internal Revenue Code ("the Deloitte study"). At the time, the Internal Revenue Service ("IRS") had completed its examination of QRE credits claimed by Bayer for two audit cycles, *i.e.*, 1990-1991 and 1992-1994, and the parties had reached an agreement concerning those credits.[7] Following completion of the

[7] The IRS typically audits Bayer for 2 or 3 years at a time. (Hearing Tr. 7/18/11, Docket No. 81, p. 90).

Deloitte study in 1998,[8] Bayer filed a claim with the IRS for additional QRE credits for all open tax years which included 1990 to 1997.[9] The IRS denied not only Bayer's claim for additional QRE credits for the open tax years, it denied the credits for QREs that had previously been agreed upon for the 1990-1991 and 1992-1994 audit cycles. (Hearing Tr. 7/18/11, Docket No. 81, pp. 33-34, 90-91, 93-96).

Commencement and History of Litigation to Date

14. On March 23, 2009, Mr. Wright initiated this civil action against the Government on Bayer's behalf seeking a refund of federal income taxes in the amount of $49,236,589.[10] The refund claim arises out of the IRS's complete or partial denial of QRE credits claimed by Bayer or its predecessors-in-interest for the years 1990-2006 inclusive (the "credit years").[11] Bayer

[8] As part of the Deloitte study, 23 of Bayer's 49 research sites generating the QREs that are the subject of this case were visited. (Hearing Tr. 7/18/11, Docket No. 81, p. 96).

[9] Bayer submitted the report of the Deloitte study, which was comprised of sixty 3-ring binders, to the IRS in support of the claim for additional QRE credits. (Hearing Tr. 7/18/11, Docket No. 81, p. 96).

[10] Prior to the commencement of this case, Bayer-Onyx, a partnership, by Bayer, its "tax matters partner," filed a Complaint for Readjustment of Partnership Items under Section 6226 of the Internal Revenue Code, and the case was assigned Civil Action No. 08-693. In that case, Bayer-Onyx alleges that the Government erred in disallowing $178,271 of QRE credits claimed in 1994, $115,427 of QRE credits claimed in 1995 and $63,593 of QRE credits claimed in 1996. At the request of the parties, Civil Action No. 08-693 was stayed until April 13, 2009. Prior to the expiration of the stay, the present related case was filed. On April 20, 2009, the parties filed a joint motion to consolidate Civil Action No. 08-693 with this case for discovery purposes. The motion was granted the next day.

[11] According to Mr. Wright, after the filing of its claim for additional QRE credits for 1990 to 1997 based on the Deloitte study, the IRS disallowed approximately 98% of the credits for QREs previously agreed upon for the 1990-1991 and 1992-1994 audit cycles. Thus, "[Bayer] ended up much worse off

alleges that as a result of the IRS's complete or partial denial of its claims for credits for QREs incurred during the credit years, Bayer overpaid the federal income tax due for the years 1987-1990, 1995 and 2006.[12] (Docket No. 1, No. 81, p. 33).

15. The Government denies that Bayer is due a refund of federal income taxes for the years 1987-1990, 1995 and 2006. Moreover, the Government has asserted a counterclaim against Bayer for federal income taxes for the year 2006 in the amount of $80,361,674, together with accrued interest totaling $13,323,180, which was assessed against Bayer by the IRS on September 9, 2009. The assessment arises out of the disallowance of Bayer's claim "for research tax credits under 26 U.S.C. § 41 for the year 2006 (including research credit carry forwards from prior years applied to 2006), as well as other non-research tax credit adjustments the [IRS] made during the audit of [Bayer] for the 2006 tax year."[13] (Docket No. 25, ¶ 18).

16. On March 15, 2010, the Government served Bayer with its First Set of Interrogatories. In Interrogatory No. 26, Bayer was asked to "[i]dentify and describe each new or improved

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than when [Bayer] actually started this process." (Hearing Tr. 7/18/11, Docket No. 81, pp. 101-02).

[12] With respect to the years for which no refund is claimed, QREs were incurred but could not be used because Bayer incurred no tax liability for those years. The unusable credits were carried backward or forward to other tax years by Bayer. (Bayer Power Point presentation, 5/4/10).

[13] Bayer estimates the total amount at stake in this tax litigation to be $175,000,000. (Bayer Power Point presentation, 5/4/10, Hearing Tr. 7/18/11, Docket No. 81, p. 93).

business component Bayer contends it incurred qualified research expenses to develop during the credit years."[14] (Docket No. 31-1). Bayer responded to Interrogatory No. 26 as follows:

> Response. In addition to its general objection, Bayer objects on the basis that this Interrogatory is overbroad and unduly burdensome without the adoption of a suitable sampling method. During the credit years, Bayer estimates that it developed more than 100,000 business components, which Bayer's books and records do not, and are not required to, track individually.[15]

(Docket No. 31-2).

17. On May 25, 2010, the Government filed a Motion to Compel Plaintiff to Answer Interrogatory No. 26 ("Motion to Compel"). (Docket No. 30). Noting the Court's previously stated preference for the parties to develop a methodology to streamline this prodigious case, the Government indicated in its memorandum in support of the Motion to Compel that the parties "have a fundamental disagreement that affects their views on a suitable methodology," and that it was necessary for the Court

[14] As noted in Finding of Fact No. 4, Section 41(d)(2)(A) of the Internal Revenue Code provides that the test for determining whether a research expense is a QRE for purposes of the tax credit is to be applied separately to each business component of the taxpayer. Thus, in Interrogatory No. 26, the Government sought the identity of the business components underlying the QREs claimed by Bayer for the credit years. In this connection, the Court notes that the parties have reached an agreement regarding the QRE credits claimed by Bayer for the years 2007 and 2008, and that prior to the IRS audit for the tax years 2007 and 2008, Bayer had never been asked to identify the business components giving rise to claimed QRE credits. (Hearing Tr. 7/18/11, Docket No. 81, pp. 139, 150).

[15] As noted in Finding of Fact No. 9, Bayer uses a cost center system of accounting for research expenses rather than a project (or business component) based system. The cost centers at issue did not remain constant throughout the credit years. Cost centers were added, deleted or renumbered when Bayer's accounting system was modified or business units were sold, divided or closed. (Hearing Tr. 7/18/11, Docket No. 81, pp. 46-47).

to resolve the disagreement to enable the parties to engage in discussions regarding such a methodology. With respect to Bayer's objection to identifying business components until the parties had adopted a sampling method, the Government contended that Bayer had it "exactly backwards."[16] That is, until Bayer identifies the business components for which it claims the QRE credits at issue, it is impossible for the Government to determine if this case could be streamlined through some form of sampling.[17] (Docket No. 31, pp. 9-10).

18. By Order dated June 17, 2010, the parties were directed to be prepared to discuss discovery matters, including the appointment of a Special Master to oversee discovery, during a status conference scheduled for June 22, 2010. (Docket No. 40). Thereafter, on August 24, 2010, with the parties' consent, the Court appointed Thomas D. Arbogast, Esquire to serve as Special Master ("SM") with regard to discovery disputes in this case. (Docket No. 50).

19. In a Joint Status Report filed October 13, 2010, the parties indicated that SM Arbogast heard argument on the Government's Motion to Compel on September 20, 2010. Based on

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[16] Bayer has never undertaken an analysis to determine whether it can establish a nexus between the QRE credits at issue and the business components generating the QREs. The parties disagree on Bayer's ability to do so. (Hearing Tr. 7/18/11, Docket No. 81, pp. 148-49).

[17] In a footnote, the United States stated: "To be clear, the United States does not concede that sampling is permissible or appropriate; that said, unless Bayer identifies its business components, it will be impossible to determine if sampling is even workable." (Docket No. 31, p. 10, n.4).

discussions during the hearing and feedback from SM Arbogast, the Government agreed to "table" its Motion to Compel and to serve additional discovery requests on Bayer to better understand the scope of Bayer's claims and the organization of Bayer's records to enable the Government to evaluate any future sampling proposals, and Bayer agreed to reevaluate its response to Interrogatory No. 26 to determine if it could further clarify the response. (Docket No. 52).

20. Despite the Government's willingness to "table" its Motion to Compel, by Order dated October 26, 2010, the Court denied the Motion to Compel without prejudice to the Government's right to renew the motion at an appropriate time if necessary. (Docket No. 55).

21. By letter dated November 29, 2010, the Government proposed that the parties engage in a "pilot sample" to determine the feasibility of utilizing a sampling method to resolve this case. In its responsive letter dated December 15, 2010, Bayer rejected the idea of a pilot sample because "whether sampling is possible at all ... does not depend on the results of a prior mini-sample," and a pilot sample "would require two separate discovery periods and two separate trials" and "consume substantial additional time and resources." (Gov't Hearing Exh. 115 (Tab 15)).

22. On March 3, 2011, the Government renewed its Motion to Compel with SM Arbogast. In the transmittal letter, Government counsel stated: "After extensive discussions with Bayer, the United States has determined that it will not consent to sampling." (Docket No. 54, No. 66, No. 71-3).

23. The next day, Bayer filed a Motion for a Case Management/Protective Order Based on Statistical Sampling ("Sampling Motion") that would "enable the parties to conduct all of the necessary discovery *and* allow the Court to decide the entire case in the next two to three years." (Docket No. 63). Bayer attached two documents to the Sampling Motion: (1) a memorandum dated March 4, 2002 from the IRS's Director of Field Specialists to the Directors of the IRS's Large and Mid-Sized Business Division regarding a Field Directive that provided guidance on the use of statistical sampling in audits of taxpayers' QRE credits, and (2) the Field Directive attached to the March 4, 2002 memorandum. (Docket No. 63-1, No. 63-2).

24. In the memorandum filed in support of its Sampling Motion, Bayer stated:

* * *

> During the years at issue, Bayer's research spending exceeded $6 billion at 49 separate sites across the country. The research was performed by tens of thousands of individual Bayer employees. It consisted of millions of individual expenditures that were charged to more than 1300 cost centers. The vast scope of this enterprise is illustrated by the fact that Bayer has already collected

> more than one billion (1,000,000,000) pages of electronic records that are potentially relevant to its claims from just four of the forty-nine sites at issue and has already turned over more than 3 million pages of responsive documents to the government.
>
> Given the massive size and scope of the activities and expenditures at issue, it is essential that the parties and the Court be able to focus their analysis on a manageable universe of information. If the parties were to try to conduct a detailed investigation of every one of the millions of expenditures, at every one of the forty-nine sites, for each of the more than twenty years at issue,[18] discovery alone would require decades. Even if the parties were to depose all of the likely more than ten thousand relevant current and former Bayer employees located all across the country, it would be impossible to introduce more than a tiny fraction of their testimony at trial. Some form of sampling is absolutely essential to comply with the Court's directive that the parties find a way to streamline this case.
>
> * * *

(Docket No. 64, p. 6).

Bayer also stated that its proposed sampling method "is a framework that will govern the scope of discovery and the facts Bayer must prove at trial. The proposal does not, however, oblige the government or the Court to accept any of these facts as true. As usual in tax cases, it will be Bayer's responsibility to prove them." (Docket No. 64, p. 3).

25. In a memorandum filed April 1, 2011, SM Arbogast denied the Government's Motion to Compel as premature and

[18] With respect to the statement that "more than twenty years [are] at issue," 1984 to 1988 is the base period for computing Bayer's QRE credits for 1990 through 2006. Thus, those years also are relevant in this case.

burdensome.[19] Noting that Bayer maintains a cost center system of accounting for research activities, as opposed to a project based system, SM Arbogast denied the Motion to Compel "based upon the practical conclusion that compelling Bayer to identify all business components at this stage of the discovery process is not feasible because of the inherent limitations in Bayer's recordkeeping." SM Arbogast cautioned, however, that "nothing in this Order should be read as excusing Bayer from disclosing to the United States during the course of discovery the business components associated with Bayer's identified research activities."[20] SM Arbogast emphasized that the denial of the Government's Motion to Compel did not equate with the imposition of statistical sampling upon the Government for discovery purposes, which he clearly viewed as an entirely separate issue and the subject of Bayer's pending Sampling Motion. (Docket No. 66).

26. On April 4, 2011, the Government filed an objection to SM Arbogast's ruling on its Motion to Compel based on Bayer's alleged failure to provide evidence supporting its claim that

[19] Because the Government had not had the opportunity to respond to the Sampling Motion filed by Bayer, SM Arbogast declined to address the merits of the Sampling Motion at that time. (Docket No. 66, p. 3).

[20] As noted previously, the Internal Revenue Code provides that the test for determining whether an expense was incurred in connection with qualified research is to be applied separately to each business component of the taxpayer. 26 U.S.C. § 41(d)(2)(A). Bayer does not dispute its obligation to identify the business components to which the claimed QRE credits apply. Due to its method of accounting, however, Bayer claims that it cannot do so without interviews of numerous researchers and extensive document collection.

responding to Interrogatory No. 26 was unduly burdensome. (Docket No. 67).

27. Three days later, Government counsel sent a letter to SM Arbogast requesting clarification of the following statement in his ruling on the Motion to Compel:

> However, nothing in this Order should be read as excusing Bayer from disclosing to the United States during the course of discovery the business components associated with Bayer's identified research activities, whatever form that discovery process takes, as that information is available.

28. On April 22, 2011, SM Arbogast responded to the letter of Government counsel and Bayer's response thereto as follows:

* * *

> My proposed order was founded upon the practical conclusion that it would not be feasible, in light of the Court's instructions, to compel Bayer to disclose all of its business components over a 17 year period for all research sites. I did, however, purposely make clear that I viewed Bayer as obligated to disclose the business components supporting its claims for qualified research and that I would support a reasonable effort by the Defendant to secure identification of business components within the context of an efficient discovery plan.
>
> The United States has now identified four large research sites that Bayer has visited (footnote omitted) and for which substantial amounts of electronic records have been collected and produced. On behalf of the United States Mr. Geht now requests that I clarify whether my March 15, 2011 Order requires Bayer to identify business components from these four major research sites or, alternatively, to clarify Bayer's current obligation with respect to Interrogatory Number 26 "in light of the [data] collection efforts undertaken by Bayer to date."
>
> In specific response to Mr. Geht's question, at this time I am aware of no outstanding discovery request, except for Interrogatory No. 26, the enforcement of which has been

> denied, which asks Bayer to identify its business components. If the United States wishes to tailor such a request, such as that suggested in Mr. Geht's letter (assuming a renewed objection to such a discovery demand as outlined in Mr. McIntyre's April 11, letter) your Special Master could again consider a revised motion to compel a response to a revised interrogatory. However, because of the alleged magnitude of data at these four research sites, my suggestion is that any renewed demand for a compilation of business component information be directed initially at specific costs centers for specific years at specific sites. Such a more limited request might enable the United States, and certainly the Special Master, to gain some understanding of the procedure by which business components can be identified under Bayer's "cost center" accounting system. Were Bayer to claim that such a limited discovery request presents an undue burden, I might be more inclined to issue an order compelling compilation and disclosure.
>
> * * *

Gov't Hearing Exh. 106 (Tab 7)).

29. With regard to the Government's assertion in its objection to SM Arbogast's ruling on the Motion to Compel Bayer to answer Interrogatory No. 26 that the denial lacked evidentiary support, Bayer noted in its brief in opposition that Mr. Wright was present during oral argument on the Government's initial Motion to Compel before SM Arbogast on September 20, 2010; that Mr. Wright was available for questioning; and that Mr. Wright did, in fact, answer questions regarding the burden presented by the Government's Interrogatory No. 26. (Docket No. 69, p. 3). Bayer also attached an affidavit of Mr. Wright to its opposition in which he attested to Bayer's estimates regarding the number of current and former Bayer employees who

performed qualified research that is relevant in this case (10,000); the method by which Bayer accounts for its research activities (cost centers rather than individual projects); the amount of research expenses incurred by Bayer during the credit years ($6,000,000,000); the number of cost centers that are relevant in this litigation (1,300); the number of research sites at issue (49); and the number of documents that had been turned over in response to the Government's discovery requests (3,000,000). (Docket No. 69-2). On June 23, 2011, the Government's objection to SM Arbogast's ruling on the Motion to Compel was overruled by the Court. (Docket No. 77).

30. On May 3, 2011, Bayer filed the Amended Sampling Motion referred to in SM Arbogast's April 22, 2011 letter. (Docket No. 71). In addition to the two documents attached to its original Sampling Motion, Bayer attached the following documents: (1) an expert report by a statistician regarding a sampling proposal (Docket No. 71-1); (2) the Government's March 3, 2011 letter to SM Arbogast regarding its renewal of the Motion to Compel in which counsel stated that "[a]fter extensive discussions with Bayer, the United States has determined that it will not consent to sampling" (Docket No. 71-3); and (3) a declaration of Mr. Wright to which was attached a memo by Deloitte & Touche LLP regarding the methodology used in the 1997-1998 study of Bayer's QREs on which its claim for

additional tax credits for the credit years is based (Docket No. 71-4, No. 71-5). In the memorandum in support of its Amended Sampling Motion, Bayer re-iterates its position that the proposed sampling method "is a framework that will govern the scope of discovery and the facts Bayer must prove at trial." (Docket No. 72, p. 3).

31. In denying the Government's Motion to Compel on April 1, 2011, SM Arbogast stated, among other things: "Whether the Defendant's view on sampling ultimately prevails is yet to be determined, but in the first instance the government is free to take some other approach to compel the production of the data it believes is necessary to test Bayer's claims. Whether that request is broad or narrow is the government's call." (Docket No. 66, p. 8). In accordance with this statement, as well as SM Arbogast's April 22, 2011 letter to counsel responding to the Government's request for a clarification of the ruling on the Motion to Compel, the Government served Bayer with a Fourth Set of Interrogatories on May 3, 2011 which included a similar, but much narrower, interrogatory to Interrogatory No. 26 which was the subject of its Motion to Compel. Specifically, Bayer was asked by the Government in Interrogatory No. 68 to identify the business components relating to QREs claimed for 3 cost centers at 4 of the research sites where document retrieval efforts had

been undertaken for one year each. (Gov't Hearing Exh. 105 (Tab 6)).

32. Bayer responded to the Government's narrowed discovery request as follows:

> Response. Objection. This interrogatory is premature and improper given the Plaintiffs' Amended Motion for a Case Management/Protective Order Based on Statistical Sampling dated May 3, 2011, which is presently pending before the Special Master. In that Motion, as amplified in the supporting Memorandum, Plaintiffs ask the Court to order sampling methodology that defines both the facts to be proven at trial and the scope of discovery. Until the Motion is decided, both are unknown. Fed.R.Civ.Pro. 26(c)(2) contemplates that when a motion for a protective order is made, the court rule on that motion before the discovery complained of is permitted to proceed. Responding to Defendant's latest discovery would require Plaintiff to forego the very relief it seeks in its pending Motion before the Court has rendered a decision thereon. If the protective order sought in Plaintiff's Motion is granted, then except for those documents that pertain to the sample elements chosen by the Court, the documents now sought by Defendant will be outside the scope of permissible discovery, as defined in Fed.R.Civ.Pro. 26(b). Defendant's Request is therefore objectionable....

(Gov't Hearing Exh. 105 (Tab 6)).[21]

33. On June 13, 2011, SM Arbogast sought guidance from the Court regarding his authority to rule on Bayer's Amended Sampling Motion. Specifically, SM Arbogast noted:

* * *

[21] During his deposition, Mr. Wright was asked whether Bayer included in its proposed sampling method the specific procedure by which the business components underlying Bayer's claimed QRE credits could be identified from the sampled data as suggested by SM Arbogast in his letter to counsel on April 22, 2011. Mr. Wright testified that Bayer had not. When asked "why not?", Mr. Wright testified that "business component is common sense," "it's not necessary." Docket No. 73-1, p. 31 (Depo. p. 62)).

> Bayer's initial and amended Sampling Motions request that the Court devise a discovery plan based upon statistical sampling and further requests that the results of the sample be extrapolated to the entirety of Bayer's claims without the requirement to introduce further evidence. Under Bayer's motion there would be no required proof of any underlying facts on claims or taxable years not examined as part of the statistical sample. The United States has consistently and vigorously opposed the idea that it can be forced to accept statistical sampling as a means of discovery or as a basis by which Bayer can meet its burden of proof at trial.
>
> As stated in my May 2, 2011 Second Report my plan is to frame a report and recommendation on or before August 30, 2011 to resolve this discovery dispute. However, in light of the scope of the Bayer Amended Sampling Motion the issue is presented as to whether any proposed order should be limited to matters of discovery or may, in my discretion, outline a basis by which such discovery should govern the scope of facts which may be introduced at trial.
>
> Both parties agree that unless I have the authority to issue a proposed (footnote omitted) order dealing with the evidence to be introduced at trial, I cannot fully dispose of Bayer's Amended Sampling Motion....
>
> I have made no judgment at this stage of the proceedings as to whether Bayer's Amended Sampling Motion has merit or whether the Court has the power to compel the United States to accept such a proposal over its objection. The United States argues vigorously in the negative on both points. Further, the United States objects to the Special Master's seeking to propose any ruling over what evidence can be introduced at trial....
>
> My objective is to seek clarification of whether I have authority from this Court to deal with all aspects of the Bayer Amended Sampling Motion. In order to fully address the issues raised by the Motion, both parties agree that more than discovery issues are involved, but apparently disagree whether the existing orders of this Court provide me with such authority. Thus, I seek guidance from you on this question.

(Docket No. 74).

34. A week later, the parties' filed a Joint Motion for Hearing by the Court which stated in part:

* * *

> 7. Bayer's Amended Sampling Motion asks that the Court issue an Order that would: a) compel the parties to randomly select 100 components of Bayer's claim for intensive analysis; b) limit discovery, with certain minor exceptions, to the 100 components selected; c) set a comprehensive schedule for the remainder of the case; and d) provide that the proof at trial will be limited to the evidence subject to discovery.
>
> 8. The parties agree that the Special Master has the authority to decide whether to order (a), (b), and/or (c) above.
>
> 9. Federal Rule of Civil Procedure 53 places certain limitations on the authority of Masters where the parties have not consented.
>
> 10. While Bayer has no objection to the Special Master deciding its Amended Sampling Motion in its entirety, the United States is not willing to provide its consent.
>
> 11. Because Bayer's Amended Sampling Motion asks the Court to establish certain procedures for trial in this matter (step (d) above), the parties have agreed that the Motion seeks relief beyond the scope of the authority granted to the Special Master under the appointment order and Rule 53.
>
> 12. The United States believes that if the Court decides that step (d) is premature at this point in the litigation, the Special Master can decide the remainder of the pending motion....
>
> * * *
>
> 14. Bayer believes that its entire motion must be decided at this time because of its view that the evidence at trial must come from the same pool of evidence that will be examined in discovery. Without such an assurance at this point, the parties might spend the next two to three years in discovery only to learn that the trial would

> require the examination of a raft of other, previously unexplored evidence. Bayer believes that such a result would be remarkably inefficient and a misuse of judicial resources.
>
> * * *

(Docket No. 75).

35. The parties' Joint Motion for a Hearing on Bayer's Amended Sampling Motion was granted and a hearing held on July 18, 19 and 20, 2011. SM Arbogast was present throughout the hearing. (Hearing Tr. 7/18/11, Docket No. 81, No. 82, No. 83).

Substantiation of Claimed QRE Credits

36. Luis Rodriguez is the lead Project Manager for Bayer Business & Technology Services LLC ("BBTS"). Since July 2009, Mr. Rodriguez has been assigned to Bayer's Tax Department to collect and preserve evidence relating to the QREs incurred by Bayer during the credit years. (Hearing Tr. 7/19/11, Docket No. 82, pp. 72-73, No. 78-1, ¶¶ 1-2).

37. To begin retrieval of documents to substantiate Bayer's claim for a refund in this case, Mr. Wright chose 5 of the 49 research sites generating QREs for the credit years. The sites include 4 current research sites, Berkeley, California ("Berkeley"), Kansas City, Missouri ("Kansas City"), Research Triangle Park in Raleigh, North Carolina ("RTP") and Pittsburgh, Pennsylvania ("Pittsburgh"), and 1 research site that was closed

in 2006, West Haven, Connecticut ("West Haven").[22] (Hearing Tr. 7/18-19/11, Docket No. 81, pp. 63-66, No. 82, p. 76). The 5 sites comprise 49% of the total QRE credits claimed by Bayer for the credit years (Berkeley - 10%, Kansas City - 6%, RTP - 2%, Pittsburgh - 7% and West Haven - 24%), and at least 42% of the total cost centers generating QREs during the credit years (Berkeley - 6%, Kansas City - ?%,[23] RTP - 9%, Pittsburgh - 15% and West Haven - 12%). (Hearing Tr. 7/19/11, Docket No. 82, pp. 64-71).

38. Mr. Rodriguez led the document collection teams during the site visits. The following periods of time were devoted to

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[22] For variety purposes, Mr. Wright selected 2 sites from Bayer HealthCare, 2 sites from Bayer CropScience and 1 site from Bayer MaterialScience. In addition, Mr. Wright selected these sites because "it also seemed to make sense to pick the bigger sites. Sites that no matter what decision is made, we're going to need documents from these five sites." (Hearing Tr. 7/18/11, Docket No. 81, pp. 64-65).

[23] During the cross-examination of Mr. Wright by Government counsel, counsel for Bayer objected to exhibits prepared by the Government to summarize a 300-page spreadsheet submitted to the IRS by Bayer in November 2010 in support of the QRE credits claimed in this case. The massive spreadsheet showed the amount of QREs claimed to have been incurred in each of the 49 research sites, as well as the number of cost centers in each of the 49 research sites that included expenses for qualified research. To eliminate Bayer's objection, the parties agreed that after Mr. Wright's review of the spreadsheet, Government counsel would be permitted to ask Mr. Wright additional questions regarding (a) the percentage of claimed QRE credits in each of the 5 research sites selected as the starting point for document collection and (b) the percentage of the 1,300 cost centers at issue in this case in each of the 5 selected research sites. (Hearing Tr. 7/18/11, Docket No. 81, pp. 112-15, 162). When Mr. Wright was called to testify in this regard the next day, another dispute arose between the parties regarding the Government's obvious inadvertent failure to specifically identify Kansas City as a site to be reviewed by Mr. Wright for purposes of his additional testimony. Ultimately, the parties resolved this dispute and stipulated to the percentage of the total QRE credits claimed in this case that were incurred at Kansas City (6%). If the parties also stipulated to Kansas City's percentage of total of cost centers generating QREs during the credit years, the stipulation was not read into the record. (Hearing Tr. 7/19/11, Docket No. 82, pp. 63-68, 71).

each site by Mr. Rodriquez and his teams: Berkeley - 5 months; Kansas City - 4½ months; RTP - 5 months; Pittsburgh - 3 months (although document retrieval at the Pittsburgh site had not been completed at the time of the hearing); and West Haven - 3 months.[24] (Hearing Tr. 7/19/11, Docket No. 82, pp. 144-46).

39. Of the 13,000 hours devoted to document retrieval for this litigation at the time of the hearing, approximately 6,000 hours related to site visits and 7,000 hours related to reviewing and preserving data on Bayer's last remaining main frame which was decommissioned in June 2011. (Hearing Tr. 7/19/11, Docket No. 82, p. 163).

40. Bayer offered testimony and/or documentary evidence to establish that at the time of the hearing, $3,632,790 had been incurred to collect documents for this litigation. (Hearing Tr. 7/18/11, Docket No. 81, p. 66). This sum consists of the following items: (1) payroll costs of approximately $1.6 million for work performed by employees of BBTS since July 2009;[25] (2)

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[24] At this rate, Mr. Wright rendered the opinion that a reasonable estimation of the time it would take to collect the documents necessary to substantiate all of the QRE credits claimed by Bayer for the credit years is "decades." (Hearing Tr. 7/18/11, Docket No. 81, p. 69). In contrast, Bayer contends that the entire case can be resolved in 2 to 3 years if a sampling methodology is utilized. (Docket No. 72, p. 3).

[25] The hours devoted to document retrieval for this litigation by employees of BBTS is tracked by a system within the SAP Enterprise Accounting System called CATS. The exact figure for the cost of work performed by BBTS employees at the time of the hearing is $1,682,791. (Hearing, Bayer Exh. 12). This figure does not include the cost for work performed by employees of Bayer's tax and legal departments in connection with this litigation or the cost for Bayer researchers who have participated in document retrieval activities. (Hearing Tr. 7/19/11, Docket No. 82, p. 136).

$388,500 in hardware/software costs; (3) $499,935 for imaging services performed by Iron Mountain, a storage facility at which Bayer has stored 122,019 unindexed boxes of documents;[26] (4) $370,355 for imaging services performed by Crivella West in connection with the West Haven site that was closed in 2006;[27] and (5) outside legal fees of $694,000. (Hearing Tr. 7/19/11, Docket No. 82, pp. 135-41).

41. Of the 49 research sites generating QREs during the credit years, the following 17 sites have been sold by Bayer: Addyston, OH; Akron, OH; Branchburg, NJ; Bushy Park, SC; Chicago, IL; Clayton, NC; Columbus, OH; Indian Orchard, MA; Medfield, MA; Middletown, VA; Orange, TX; Orangeburg, NY; Tarrytown, NY; Wilmington, MA; Newtown Square, PA; Trenton, NJ; and Walpole, MA.[28] (Hearing Tr. 7/18/11, Docket No. 81, pp. 116-18).

42. When a site is sold by Bayer, financial and tax records are retained. In addition, the sales agreement includes a provision requiring the purchaser to retain records and cooperate with Bayer regarding tax issues and litigation. Mr. Wright concedes that it is more difficult to collect documents relating to this litigation from sold sites. However, he "still

[26] Bayer Hearing Exh. 9.
[27] Bayer Hearing Exh. 8.
[28] Although the exact number was not clear from the testimony and evidence admitted during the hearing, a number of the 49 research sites involved in this litigation also have been closed by Bayer.

expect[s]" that Bayer will be able to do so. (Hearing Tr. 7/18/11, Docket No. 81, pp. 61-62, 75-77, Bayer Hearing Exhs. 4 and 5).

Bayer's Sampling Proposal and the Government's Response Thereto

43. Sampling is a scientific method developed over a hundred years ago that is designed to allow for the examination of a subset of units comprising a population in order to make inferences about the entire population through the use of probability. (Hearing Tr. 7/18/11, Docket No. 81, p. 184, Gov't Hearing Exh. 117 (Tab 17)).

44. Stephen E. Fienberg, a Maurice Falk University Professor of Statistics and Social Sciences at Carnegie Mellon University, was retained by Bayer to design a sampling method to assess the accuracy of the QREs claimed by Bayer for the credit years.[29] Professor Fienberg chose a statistically valid sampling methodology known as sampling with probability proportional to size ("PPS") with replacement.[30] (Hearing Tr. 7/18/11, Docket No. 81, pp. 189-91). Using sampling with PPS, the likelihood of

[29] In the 1960's, Professor Fienberg received a masters' degree and Ph.D. in statistics at Harvard University. He is a member of the National Academy of Sciences, an honorary society founded in 1863 to advise the Government on scientific issues. (Hearing Tr. 7/18/11, Docket No. 81, pp. 178, 181, Gov't Hearing Exh. 117 (Tab 17)). Professor Fienberg prepared an expert report and testified on Bayer's behalf at the hearing on the Amended Sampling Motion. (Hearing 7/18-19/11, Docket No. 81, pp. 177-97, No. 82, pp. 1-62).

[30] Professor Fienberg based his proposed sampling methodology on lengthy discussions with Mr. Wright and Bayer's counsel concerning the problems presented by the scope of this litigation, a review of the Deloitte study and a visit to Bayer's Pittsburgh site where he met with the managers of several units who participated in the Deloitte study. (Hearing Tr. 7/18-19/11, Docket No. 81, p. 189, No. 82, pp. 30, 39).

a particular research site being selected for analysis is directly proportional to the amount of QREs claimed at the research site.[31] (Gov't Hearing Exh. 117 (Tab 17)). As to PPS "with replacement," Professor Fienberg explained the concept as follows: "... each time I draw a site, I draw it independently of whatever happens in any other draw, and it's like picking a site and putting it back into the population of sites so that it could come up a second time." (Hearing Tr. 7/19/11, Docket No. 82, pp. 9-10)). PPS "with replacement" is utilized to ensure that sample selections are independent and that selection probabilities are constant for all draws. (Docket No. 72, p. 11).

45. In summary, under Professor Fienberg's sampling methodology, 8 of the 49 research sites generating QREs during the credit years would be selected using sampling with PPS with replacement. Next, two of the credit years, i.e., 1990-2006, would be randomly selected for each of the 8 sample research sites using PPS with replacement. Next, 50 cost centers from the 8 sample research sites for the 2 sample years would be randomly selected using PPS with replacement for extensive analysis.[32] (Gov't Hearing Exh. 117 (Tab 17)).

[31] For example, a research site with $100 million in QREs would be ten times as likely to be chosen for analysis as a research site with $10 million in QREs. (Docket No. 72, p. 11).

[32] The 50 sample cost centers, each with 2 associated sample years (for a total of 100 sample units), would constitute the sample population and define the

46. Following completion of the sampling process and Bayer's presentation of evidence to support the QREs claimed in the 100 sample cost centers, the Court would determine (a) Bayer's entitlement to the QREs claimed in each of the 100 sample cost centers and (b) calculate, in percentage terms, the extent to which Bayer had proved the QREs claimed for the sample cost centers ("the observed percentage").[33] The observed percentage would then be applied to the remaining cost centers at issue, i.e., the cost centers not included in the sample, without the submission of any further evidence for a final resolution of this dispute. (Docket No. 72, pp. 14-15).

47. To support its opposition to Bayer's proposed sampling methodology, the Government retained Joseph B. Kadane, a Leonard J. Savage University Professor of Statistics and Social Sciences, Emeritus at Carnegie Mellon University.[34] Professor Kadane agrees with Professor Fienberg that (a) there is nothing about QREs that would preclude sampling in this case, and (b)

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scope of discovery and evidence to be presented at trial. (Docket No. 72, p. 12).

[33] This calculation would be performed by dividing the amount of QREs proven by Bayer for the sample cost centers by the total amount of claimed QREs for those cost centers. In effect, the calculation is a measure of the accuracy of Bayer's refund claim in this case.

[34] Professor Kadane received a B.A. degree in mathematics cum laude from Harvard College in 1962 and a Ph.D. in Statistics from Stanford University in 1966. He has been elected a Fellow of the American Statistical Association and the Institute for Mathematical Statistics and a member of the International Statistical Institute and the American Academy of Arts and Sciences. Professor Kadane prepared an expert report and testified on the Government's behalf at the hearing. (Hearing Tr. 7/20/11, Docket No. 83, pp. 5-58, Gov't Hearing Exh. 110 (Tab 10)). Professors Fienberg and Kadane are colleagues at Carnegie Mellon University. In fact, Professor Kadane hired Professor Fienberg. (Hearing Tr. 7/20/11, Docket No. 83, p. 7).

sampling can produce more accurate information about a population than direct measurement of the entire population in certain circumstances.[35] However, if sampling were imposed on the Government in this case as requested by Bayer, Professor Kadane would support the use of a sampling plan that utilized unrestricted random selection of cost centers and credit years with PPS with replacement, rather than restricted as proposed by Professor Fienberg. (Hearing Tr. 7/20/11, Docket No. 83, pp. 6, 31, 41-42, 49).

48. Professor Kadane recommends the use of a pilot sample which he describes as a "dress rehearsal" for a full sampling plan that may facilitate a settlement of this dispute by "confronting" the parties with facts. (Hearing Tr. 7/20/11, Docket No. 83, pp. 31-33). For a pilot sample, Professor Kadane recommended the random selection of 5 to 10 cost center/years utilizing PPS with replacement. Bayer would then collect the evidence necessary to establish the QREs in those cost

[35] Professors Fienberg and Kadane also agree that the accuracy of a sampling plan cannot be assessed until the sampling plan is completed. (Hearing Tr. 7/20/11, Docket No. 83, pp. 6, 31, 41-42, 49). Bayer proposes that the final determination of its total QREs for the credit years be determined from the sample mean which Professor Fienberg testified is "unbiased" and "the most likely estimate based on repeated sampling." (Hearing Tr. 7/19/11, Docket No. 82, p. 36). On the other hand, Professor Kadane opines that if a sampling plan is imposed on the Government, the final determination of Bayer's total QREs for the credit years should be based on the 95% one-sided confidence limit that is least advantageous to Bayer because the use of sampling to establish the QRE credits at issue in this case is being proposed by Bayer. (Hearing Tr. 7/20/11, Docket No. 83, p. 14-15). In light of the Court's conclusion that Bayer's Amended Sampling Motion must be denied, it is not necessary to address this dispute.

center/years and the Court would determine the extent to which Bayer proved the QREs. After the Court's determination, the parties would know what evidence was necessary to prove the claimed QREs and the parties could decide on the manner in which they wished to proceed. Professor Kadane could not estimate the time or cost of performing a pilot sample which would resolve only a small portion of Bayer's refund claim in this case.[36] (Hearing Tr. 7/20/11, Docket No. 83, pp. 36-37, 51).

CONCLUSIONS OF LAW

1. Whether and to what extent tax deductions are allowed are a matter of legislative grace, and a taxpayer claiming a deduction must be able to point to an applicable statute and show that he meets all of the requirements. New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934). See also National Starch and Chemical Co. v. Commissioner of Internal Revenue, 918 F.2d 426 (3d Cir.1990), citing, E.I. du Pont de Nemours and Co. v. United States, 432 F.2d 1052, 1059 (3d Cir.1970)(The burden is on the taxpayer to show that expenses are deductible). Moreover, provisions granting special tax exemptions are to be strictly construed. Helvering v. Northwest Steel Rolling Mills, 311 U.S. 46, 49 (1940). See also Galloway v. United States, 492

[36] Prior to rendering his opinions concerning Bayer's proposed sampling plan and the benefits of a pilot sample, Professor Kadane did not review Bayer's accounting system, the Deloitte study or the manner in which Bayer maintains records; he did not visit any of Bayer's research sites; and he never spoke with any employee of Bayer about the claims in this case. (Hearing Tr. 7/20/11, Docket No. 83, p. 53).

F.3d 219, 223 (3d Cir.2007)(Courts are admonished to strictly construe tax deductions and allow such deductions only as there is a clear provision therefor).

2. Despite the foregoing well established principles of tax law, Bayer's Amended Sampling Motion seeks an Order from the Court that would eliminate entirely its burden of proof with regard to all QREs claimed at 41 of the 49 research sites during the credit years, as well as the QREs not selected for analysis in the 8 sample research sites, over the Government's objection. Simply put, the Court can find no authority for the extraordinary relief sought by Bayer.

3. The Court acknowledges that Rule 1 of the Federal Rules of Civil Procedure provides that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding," and that the Supreme Court has stated that "the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1." See Herbert v. Lando, 441 U.S. 153, 177 (1979). The Court further acknowledges that "Rule 26(c) grants federal judges the discretion to issue protective orders that impose restrictions on the extent and manner of discovery where necessary 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" Pearson v. Miller, 211 F.3d 57, 65 (3d Cir.2000). Finally, the

Court acknowledges that "sampling has long been considered an acceptable method of determining the characteristics of a large universe." Rosado v. Wyman, 322 F.Supp. 1173, 1180 (E.D.N.Y. 1970), aff'd, 437 F.2d 619 (2d Cir.), aff'd, 402 U.S. 991 (1971). Nevertheless, the Court concludes that Bayer is not entitled to the relief requested in the Amended Sampling Motion.

4. First, as noted in Finding of Fact No. 5, the recordkeeping requirements applicable to Bayer's claim for QRE credits during the credit years mandate that Bayer "retain records in sufficiently usable form and detail to substantiate that the expenditures claimed are eligible for the credit." Bayer's estimate that it will take "decades"[37] to gather the evidence necessary to support the QREs claimed for the credit years establishes Bayer's failure to comply with its recordkeeping obligation. The Court agrees with the Government that granting the relief sought in Bayer's Amended Sampling Motion would, in effect, constitute a reward to Bayer for failing to keep evidence regarding research expenses in "sufficiently usable form and detail." (Docket No. 73, p. 18).

5. In Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D.C.Mass.1976), a products liability suit, plaintiff filed a request for production of documents relating to complaints concerning personal injuries or death allegedly caused by the

[37] Hearing Tr. 7/18/11, Docket No. 81, p. 69.

burning of children's nightwear which had been manufactured by defendant. Defendant filed a motion to quash and plaintiff filed a motion to compel. Defendant's motion was denied; plaintiff's motion was granted; and Defendant was ordered to produce the documents within 30 days. When defendant failed to produce the documents as directed, plaintiff moved for, and was granted, default judgment on the issue of liability. The district court conditioned removal of the default judgment on defendant's full compliance with the discovery order. Defendant moved to vacate the judgment by default; however, the motion was denied. The following section of the district court's opinion in Kozlowski is applicable in this case:

* * *

> Under Rule 34, Fed.R.Civ.P., the party from whom discovery is sought has the burden of showing some sufficient reason why discovery should not be allowed, once it has been determined that the items sought are properly within the scope of Rule 26(b), Fed.R.Civ.P. See Wright & Miller, Federal Practice & Procedure: Civil § 2214, p. 644 (1970). Merely because compliance with a "Request for Production" would be costly or time-consuming is not ordinarily sufficient reason to grant a protective order where the requested material is relevant and necessary to the discovery of evidence. Luey v. Sterling Drug, Inc., 240 F.Supp. 632, 634-5 (W.D.Mich.1965).
>
> In the instant case, the requested documents are clearly within the scope of Rule 26(b), Fed.R.Civ.P., the plaintiff has a demonstrable need for the documents, the defendant undisputedly has possession of them, and the plaintiff has no other access to them. Thus, the defendant has a duty pursuant to Rule 34, Fed.R.Civ.P., to produce its records of similar suits. The defendant seeks to absolve itself of this responsibility by alleging the

> herculean effort which would be necessary to locate the documents. The defendant may not excuse itself from compliance with Rule 34, Fed.R.Civ.P., by utilizing a system of recordkeeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition. To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules. See Hickman v. Taylor, 329 U.S. 495, 500, 67 S.Ct. 385, 91 L.Ed. 451 (1947); Holtzoff, Instruments of Discovery Under Federal Rules of Civil Procedure, 41 Mich.L.Rev. 205, 224 (1942).
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> * * *

73 F.R.D. at 76.

Similarly, in the present case, the discovery sought by the Government is within the scope of Fed.R.Civ.P. 26(b); the Government has a demonstrable need for the discovery; the discovery is in Bayer's possession; the Government has no other means to obtain the discovery; and responsibility for the burden presented by producing the discovery falls squarely on Bayer.

6. Second, although Bayer established that its employees have spent considerable time and it has incurred significant expenses in searching for evidence to support the QREs at issue in this case, the Court is not persuaded that the time spent and expenses incurred are "undue." Of the 13,000 hours spent on document retrieval efforts at the time of the hearing, 7,000 hours were devoted to the one-time project of reviewing and preserving data from Bayer's last remaining main frame at the

time it was decommissioned.[38] As to the 6,000 hours devoted to evidence retrieval efforts from 5 of the 49 research sites generating QREs that are relevant in this case, the 5 research sites are, or were, among Bayer's largest research sites, comprising 49% of the claimed QREs and at least 42% of the cost centers at issue. See Finding of Fact No. 37. It is simply unbelievable that the amount of time devoted to these research sites will be necessary at each of the remaining research sites many of which are, or were, much smaller.

7. Third, the court must limit the frequency or extent of discovery otherwise allowed by the Federal Rules of Civil Procedure if it determines, among other things, that "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed.R.Civ.P. 26(b)(C)(iii). In the present case, Bayer estimates that $175,000,000 is at stake; Bayer has not claimed, and there is no evidence of, insufficient resources to retrieve the evidence from which the business components underlying all of the QRE credits claimed

[38] Regarding the review and retention of data on Bayer's last remaining main frame, Mr. Rodriguez testified that 20 individuals worked on the project full-time. (Hearing Tr. 7/19/11, Docket No. 82, p. 98). According to the Court's calculation, assuming a 40-hour week, this project took approximately 9 weeks to complete - not an overly burdensome period of time for a one-time project.

for the credit years can be identified; the issues at stake clearly are important; and Bayer's identification of all business components generating QREs during the credit years is critical to proving its refund claim. Under the circumstances, the Court cannot conclude that the burden of the discovery sought by the Government outweighs its benefit.

8. Bayer notes, and the Court acknowledges, that sampling methodologies have been utilized in tax cases. However, the tax cases cited by Bayer in support of the Amended Sampling Motion are distinguishable from the present case.

9. The first type of tax case cited by Bayer involves the IRS's use of a formula based on seized evidence to reconstruct a taxpayer's unreported income from illegal activity. In Gerardo v. Commissioner, 552 F.2d 549 (3d Cir. 1977), the IRS levied an assessment against the taxpayer for unreported gambling income in 1966 and 1967. To compute the assessment, the IRS calculated the average daily gross receipts from the betting slips comprising the daily tallies for 3 days' operation and projected that amount over the period of time covered by the assessment. The taxpayer appealed the Tax Court's determination of deficiencies in his income tax due for 1966 and 1967 based on the unreported income from illegal gambling activity. The taxpayer contended, among other things, that the formula used by the IRS to calculate the deficiencies in income was arbitrary

and without foundation. The Court of Appeals for the Third Circuit rejected this argument stating:

> "Since appellant kept no records, ... 'it was proper and indeed necessary to devise some substitute method for reconstructing income.' See Agnellino v. Commissioner, 302 F.2d 171, 799 (3d Cir.1962). Where unreported income from gambling is at issue, the projection of average daily gross receipts over a period of time to calculate gross income is an acceptable method of reconstruction. (citations omitted). Furthermore, Gerardo failed to sustain his burden of producing evidence which would have obviated the use of the Commissioner's formula. Therefore, we have concluded that the Tax Court did not err in approving the Commissioner's method of reconstruction."

552 F.2d at 552, fn.6.

A decision upholding the IRS's use of formula to reconstruct unreported illegal income due to the taxpayer's failure to meet his burden of producing evidence to establish his income simply does not support Bayer's request to be relieved from its burden of proving a substantial portion of the QREs claimed for the credit years due to its failure to maintain voluminous research expense records in "sufficiently usable form." Further, there is no indication in Gerardo that the taxpayer would have been precluded from presenting evidence to rebut the IRS's projection of his income which is precisely what Bayer is seeking in this case.

10. Turning to the Supreme Court's decision in United States v. Janis, 428 U.S. 433 (1976), the taxpayer was arrested for bookmaking activity after the seizure of wagering records

and $4,940 in cash during the search of an apartment pursuant to a warrant. Based on the arresting officer's representation that he had conducted surveillance of the taxpayer's activities which indicated the taxpayer had been involved in bookmaking activity during the 77-day period preceding his arrest, the IRS assessed the taxpayer for wagering taxes. The amount of the assessment was calculated by determining the taxpayer's average daily gross proceeds for the 5-day period covered by the seized wagering records, and then multiplying that amount by 77, the period of the police officer's surveillance of the taxpayer's bookmaking activities. Subsequently, the IRS levied on the $4,940 in cash that had been seized pursuant to the search warrant in partial satisfaction of the assessment against the taxpayer. After the search warrant was determined to be defective and quashed, the taxpayer filed a civil claim for refund of the $4,940. The taxpayer did not challenge the method used by the IRS to compute the assessment for wagering taxes, i.e., extrapolation of the taxpayer's average daily gross proceeds to the total number of days the police officer observed bookmaking activities. Rather, the taxpayer challenged the legitimacy of an assessment based solely on documents seized during an illegal search.[39] Thus,

[39] The Supreme Court held in Janis that the rule excluding evidence obtained in violation of Fourth Amendment rights would not be extended to exclude from a federal civil tax proceeding, in the absence of any proof of federal participation in the illegality, evidence obtained by a state criminal law

Janis provides even less support for the relief sought in Bayer's Amended Sampling Motion.

11. In the second type of tax case cited by Bayer in support of the Amended Sampling Motion, estimation of tax credits was approved. However, a close reading of those cases shows that the taxpayers were not relieved of their burden of providing evidence to support the tax credits prior to estimation. See United States v. McFerrin, 570 F.3d 672 (5th Cir.2009)("If McFerrin can show activities that were 'qualified research,'" then the court should estimate the expenses associated with those activities."); Cohan v. Commissioner of Internal Revenue, 39 F.2d 540 (2d Cir.1930)(Tax Board erred in failing to estimate entertainment expenses, even though amount may be trivial and unsatisfactory, in light of its finding that taxpayer had spent much and the sums were allowable expenses); Fudim v. Commissioner of Internal Revenue, T.C. Memo. 1994-235 (U.S. Tax Ct. 1994)(After determining based on evidence presented by petitioner that he "no doubt" engaged in qualified research during 1986, 1987 and 1988, tax court estimated time worked on such research by petitioner and his wife based on petitioner's testimony and other evidence in the record. Due to insufficient information concerning the work performed by his

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enforcement officer in good faith reliance on a warrant later proved to be defective.

daughter, however, petitioner was not entitled to any research credit based on the wages he paid her).

12. In the present case, the Government disputes Bayer's ability to meet its burden of identifying the business components for which the QREs claimed for the credit years were incurred, a requirement clearly set forth in Section 41 of the Internal Revenue Code. Until this burden is satisfied, quantifying the amount of QRE credits to which Bayer is entitled is premature. See also Oates v. Commissioner of Internal Revenue, 316 F.2d 56 (8th Cir.1963)("We believe that considerable discretion exists in the application of the Cohan rule, and that such rule should be applied only in cases where the taxpayer has clearly shown that he is entitled to some deduction and that uncertainty exists only as to the exact amount thereof.").[40]

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[40] The Court also notes a recent tax refund suit in which the district court declined to estimate the QRE credits to which the taxpayer was entitled, despite the fact that the taxpayer provided evidence of qualified research activities. The district court in Trinity Industries, Inc. v. United States of America, No. 3:06-CV-0726-N, 2010 U.S.Dist. LEXIS 25691 (N.D.Tex. 1/29/2010), stated in relevant part:

> "The Court is aware of case law instructing it to estimate the amount of QRE if it determines that the taxpayer has made *some* qualified expenditure: 'If the taxpayer can establish that qualified expenses occurred, however, then the court should estimate the allowable tax credit.' United States v. McFerrin, 570 F.3d 672, 675 (5th Cir.2009) (citing Cohan v. Comm'r, 39 F.2d 540, 544 (2d Cir.1930). In this case, however, Trinity did not offer any evidence from which the Court could make a meaningful estimate. The Court, therefore, finds there is no evidence from which it can estimate QREs relating to any business component smaller than an entire vessel."

2010 U.S.Dist. LEXIS 25691, at ** 12-13.

13. In the third type of tax case cited by Bayer in support of the Amended Sampling Motion, the Government agreed to a trial of less than all of the projects for which QRE credits were claimed. See Union Carbide Corp. and Subsidiaries v. Commissioner of Internal Revenue, T.C.Memo 2009-50 (U.S. Tax Ct. 2009)(Petitioner claimed additional QRE credits based on 106 projects conducted in various units within 6 manufacturing plants during 1994 and 1995. To resolve the action expeditiously, the parties agreed to try 5 of the largest projects underlying petitioner's additional QRE claims). Unlike the situation presented in Union Carbide, the Government has not agreed to consider less than all of the research sites generating the QRE credits claimed for the credit years to resolve Bayer's refund claim. In fact, the Government vigorously opposes Bayer's proposed sampling plan, and the Court can find no authority for compelling it to accept such a procedure. Further, there is no indication in the Union Carbide case that the taxpayer was excused from proving the QRE credits

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See also Williams v. United States, 245 F.2d 559 (5th Cir.1957)("That the trier, ..., might have considerable latitude in making estimates of amounts probably spent [for entertainment expenses] in light of accepted practice amongst law-abiding businessmen of moral standing considering the nature and kind of records which might reasonably be kept for such expenditures, Cohan v. Commissioner, 2 Cir., 39 F.2d 540, 543, certainly does not require that such latitude be employed. The District Court may not be compelled to guess, or estimate... For the basic requirement is that there be sufficient evidence to satisfy the trier that at least the amount allowed in the estimate was spent or incurred for the stated purpose. Until the trier has that assurance from the record, relief to the taxpayer would be unguided largesse.").

claimed for the projects not addressed at trial. Specifically, the Tax Court instructed the parties to resolve any issues regarding the QRE credits claimed for the other projects in a manner consistent with the Court's opinion.

14. As noted by the Government, attempts by taxpayers to impose sampling on the Government in tax cases have been rejected in the past.[41] See, e.g., United States v. Helms, No. 08 CV 151, 2010 WL 3384997 (S.D.Cal. 8/26/2010)(Tax assessments are entitled to a presumption of correctness, and burden is on taxpayer to rebut the presumption by producing countervailing evidence that assessments are in error. HELD: Taxpayer could not defeat summary judgment as to a whole category of deductions by using "samples."); Kikalos v. Commissioner of Internal Revenue, No. 11486-01, 2004 WL 565161 (U.S. Tax Ct. 3/23/2004) (Taxpayers received unreported income in coupon and buy-down payments from cigarette company. HELD: Taxpayer could not use sampling to demonstrate that coupons and buy-downs were completely recorded); Lee v. Commissioner of Internal Revenue, Nos. 4498-94, 4503-94, 1995 WL 750122 (U.S. Tax Ct. 12/19/1995) (In taxpayer challenge to federal income tax deficiency determinations, taxpayer's use of sampling to estimate gross

[41] Docket No. 73, p. 19.

profit percentage was rejected where the Government's expert examined all underlying sales and purchase journals).

15. Bayer also cites the decision by the Court of Appeals for the Ninth Circuit in Ratanasen v. State of California, Dept. of Health Servs., 11 F.3d 1467 (9th Cir.1993), in support of the Amended Sampling Motion. Again, the Court finds the case distinguishable from the present case.

16. In Ratanasen, a Chapter 11 debtor-doctor filed an objection to the allowance of a claim by the State of California in the bankruptcy proceeding because the State's claim was based on an audit using sampling that revealed the debtor-doctor had overbilled the Medi-Cal program. The bankruptcy court concluded that the State's use of a random sample to prove the amount overbilled was valid and the debtor-doctor appealed. The district court affirmed the decision of the bankruptcy court, and the debtor-doctor filed a further appeal. In affirming the decision of the district court, the Ninth Circuit stated in relevant part: "We now join other circuits in approving the use of sampling and extrapolation as part of audits in connection with Medicare and other similar programs, **provided the aggrieved party has an opportunity to rebut such evidence.**" 11 F.3d at 1471 (emphasis added). In the Amended Sampling Motion, Bayer specifically seeks to preclude the Government from offering at a trial of this matter any evidence not produced as part of the

sampling plan proposed by Professor Fienberg. Ratanasen does not provide support for such preclusion.[42]

17. In support of the Amended Sampling Motion, Bayer also cites class action cases in which sampling methods were utilized. Again, the Court concludes that the cases are distinguishable from the present case. For example, in Long v. Trans World Airlines, Inc., 761 F.Supp. 1320 (N.D.Ill.1991), airline employees who had been replaced while on strike filed a class action to challenge the airline's failure to provide them with "designated rights" letters showing that they were eligible for first-hire rights under the employee protection provisions of the Airline Deregulation Act. Following the entry of summary judgment in favor of the employees on the issue of liability, a dispute arose concerning the propriety of using a sampling method to limit discovery on damages. Plaintiffs argued that

[42] Bayer cites another distinguishable auditing case in support of its Amended Sampling Motion. Policy of the Department of Health and Human Services ("HHS") allowed post-payment sampling audits of suspected Medicare overpayments based on the Secretary's conclusion that sampling provided the only feasible means for protecting the Medicare Trust Fund in situations where a provider is suspected of overbilling and the number of claims involved is large. In Chaves County Home Health Service, Inc. v. Sullivan, 931 F.2d 914 (D.C.Cir.1991), the amount of the plaintiff-provider's overpayment liability was calculated from the percentage of claims denied in a sample. A challenge to the sampling procedure by the plaintiff-provider was rejected by the Court of Appeals for the District of Columbia which held that the sampling audit procedure did not violate the Medicare Act or procedural due process. In so holding, the Court of Appeals noted that providers were given the same opportunity to challenge determinations regarding sample claims as that provided on pre-payment review, and, in case of any incorrect determinations, the overcharge projection would be correspondingly reduced. In contrast, Bayer's proposed sampling plan would preclude the Government from challenging any QREs that were not generated by the sample cost centers.

full-blown damages discovery was unnecessary and unduly burdensome, while defendant argued that the presence of individual issues entitled them to discovery from each plaintiff. After reviewing the law concerning discovery and the law governing class actions, the district court agreed with plaintiffs that a sampling method should be used. Unlike Long in which defendant's liability was established and only the determination of damages remained, Bayer has not established its entitlement to the claimed QRE credits because it has failed to identify the business components generating QREs during the credit years. In fact, although Bayer represented in its objection to the Government's Interrogatory No. 26 that more than 100,000 business components were produced during the credit years and Mr. Wright contends that identification of business components is "common sense," Bayer has refused for some unknown reason to identify a single business component supporting its refund claim in the almost two years this civil action has been pending.

18. Similarly, in Hilao v. Estate of Ferdinand Marcos, 103 F.3d 767 (9th Cir.1996), a class action was brought by Philippine nationals against the estate of the former Philippines president seeking damages for human rights abuses committed against them or their decedents. The issues of liability and damages were bifurcated for trial. After a jury reached a verdict in favor

of the class and against the estate on the issue of liability, the district court allowed the use of a statistical sample of class claims to determine compensatory damages. Subsequently, the Court of Appeals for the Ninth Circuit rejected a due process challenge by the estate to the sampling methodology utilized by the district court to determine compensatory damages.[43] As in Long, statistical sampling was not utilized to establish liability which is essentially what Bayer is seeking in the Amended Sampling Motion with regard to a substantial portion of the QRE credits claimed for the credit years.

19. The Court agrees with the Government that this case is more analogous to the situation presented in United States ex rel. Fry v. Guidant Corp., Civ. No. 3:03-0842, 2009 WL 3103836 (M.D.Tenn.9/24/2009). Fry was a *qui tam* action brought pursuant to the False Claims Act, 31 U.S.C. § 3730. The United States claimed that defendant systemically and intentionally concealed from hospitals and clinics the availability of certain warranty and replacement credits due upon the replacement of implantable cardiac devices manufactured and sold by defendant, which caused hospitals and clinics to submit to the United States false and

[43] As noted by the Government, the Third Circuit also has noted in the class action context that liability must be established before a sampling method to establish damages can be considered. See Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 929-930 (3d Cir.1999) ("What is more, in proposing a solution to the speculative nature of their damages - i.e., using aggregation and statistical modeling to measure damages - the Funds focus too far down the road to assist their case for standing: The task of accurately measuring damages can be approached only after a plaintiff has met the requirements for standing and has proven liability.").

overstated claims for reimbursement following replacement procedures. Defendant filed a motion to compel the United States to produce, among other things, the cost reports submitted to the United States that contained false or inflated claims. In response, the United States sought a protective order permitting it to respond to defendant's discovery request by providing a statistically valid random sample of the hospital cost reports at issue based on a claim of undue and unnecessary burden. In granting defendant's motion to compel production of the cost reports and denying the Government's motion for a protective order, the court stated:

* * *

> ... None of the cited cases directly addresses the issue presented here - whether production in discovery of a sample of the allegedly false claims is sufficient in a case in which these claims are "critical to assessing both liability and damages."
>
> Because these cost reports form the basis of a False Claims Act case and are clearly relevant to a determination of liability and damages, the undersigned Magistrate Judge finds that the government should produce in discovery all hospital cost reports containing allegedly false claims for which it seeks to recover in this case....

* * *

2009 WL 3103836, at *2.

Similarly, because identification of business components is critical to establishing Bayer's entitlement to QRE credits for the credit years, a sampling plan that would not identify all of

the business components underlying the claimed QRE credits is not acceptable in the absence of agreement by the Government.

20. In sum, the Court is not persuaded by Bayer's arguments that denial of the Amended Sampling Motion would render the credit for QREs set forth in Section 41 of the Internal Revenue Code "illusory" and "defeat the clear legislative purpose of the research credit." (Docket No. 72, p. 5). As noted by the Government, Bayer's arguments regarding the burden presented to large research corporations by the recordkeeping requirements applicable to Section 41 of the Internal Revenue Code should be directed to the Legislative Branch, not this Court. (Docket No. 84, p. 28, ¶ 47).

William L. Standish

Judge William L. Standish
United States District Judge

Date: February 6, 2012

Randal S. Mashburn
U.S. Bankruptcy Judge

Dated: 02/03/12

E UNITED STATES BANK URT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:	)	
Jose Rodolfo Carbajal	)	**Chapter 13**
	)	**Judge Mashburn**
Debtor(s)	)	**Case No. 10-10800**

ORDER VOLUNTARILY DISMISSING CASE

This case came before the Court on motion of Debtor, Jose Rodolfo Carbajal, for a voluntary dismissal of his Chapter 13 case. It appears to the Court that all interested parties were notified of said motion and there is no opposition to said motion of record.

It is therefore ORDERED that:

1. Debtor's motion to voluntary dismiss his Chapter 13 case is hereby granted and said case is hereby dismissed.

2. Trustee's motion to dismiss for failure to fund the plan is denied as moot.

3. Objection to the claim of Internal Revenue Service is denied as moot.

THIS ORDER WAS SIGNED AND ENTERED ELECTRONICALLY
AS INDICATED AT THE TOP OF THE FIRST PAGE

Submitted For Entry By:

/s/ *Renard A. Hirsch*
Renard A. Hirsch, 009489
3250 Dickerson Pike, Ste 121
Nashville, TN 37207
(615) 242-5003
rhirschesq@smithhirschlaw.com
rhirschesq@yahoo.com

Attorney for Debtor

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this motion, was forwarded via electronic mail or U. S. Mail postage prepaid to:

The Office of the Chapter 13 Trustee, pleadings@ch13nsh.com
The United States Trustee's Office, ustpregion08.na.ecf@usdoj.gov
U. S. Department of Justice, C/O Daniel J. Healy, Daniel.J. Healy@usdoj.gov]

And by U.S. Mail to:

Mid First Bank, c/o Valerie Ann Spicer, Esq, 208 Adams Avenue, Memphis, TN 38103.

This 1st day of February 2012 or the next business day thereafter.

/s/ *Renard A. Hirsch, Sr.*
Renard A. Hirsch, Sr.

This Order has Been electronically signed. The Judge's signature and Court's seal appear at the top of the first page.
United States Bankruptcy Court.

Entered on Docket February 6, 2012

Below is the Order of the Court.

Brian D. Lynch
U.S. Bankruptcy Judge
(Dated as of Entered on Docket date above)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

In re:	)	
	)	Case No. 11-44189
PITRE, Arnold and Judith,	)	
	)	**ORDER APPROVING AMENDMENT OF**
Debtors	)	**CONFIRMING DEBTORS' FIRST**
	)	**AMENDED PLAN**

THIS MATTER having come before the Court upon the Debtors' Motion to Amend their Chapter 13 Plan; it appearing to the Court that a copy of the Motion and Notice of the hearing thereon was mailed to all creditors and interested parties; it appearing to the Court that there has been no objection to the Plan Amendment; the Court being fully advised and good cause appearing therefore;

IT IS HEREBY ORDERED as follows:

1. The Debtors' Motion to amend their Chapter 13 Plan dated May 24, 2011 is hereby approved; and

2. The Debtors' Chapter 13 case will be extended, as necessary, up to a 60 month Plan maximum, to allow the Debtors to cure any previous Plan payment default.

/// end of order ///

PRESENTED BY:

CARLSON & THACKER, PLLC

By: /s/ Don Thacker
Don Thacker, WSB #15708
Of Attorneys for Debtors

Carlson & Thacker, PLLC
Attorneys at Law
PO Box 5279
Vancouver WA 98668

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-00682-CMA-MJW

CHARLES L. JUDD,

Plaintiff(s),

v.

INTERNAL REVENUE SERVICE,

Defendant(s).

RECOMMENDATION ON
(1) UNITED STATES' MOTION TO DISMISS (Docket No. 5),
(2) PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS (Docket No. 13),
(3) PLAINTIFF'S MOTION FOR ORDER GRANTING APPROVAL OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS SUBMITTED AUGUST 25, 2011 (Docket No. 15), and
(4) PLAINTIFF'S MOTION FOR COMPLIANCE (Docket No. 27)

MICHAEL J. WATANABE
United States Magistrate Judge

This case is before this court pursuant to an Order Referring Case issued by Judge Christine M. Arguello on March 31, 2011. (Docket No. 3).

The pro se plaintiff's Complaint against defendant Internal Revenue Service is not a model pleading, but it appears that the plaintiff is alleging the following. The action is brought pursuant to 26 U.S.C. § 7433 and 26 C.F.R. § 301.7433-1 for an unauthorized collections action. Plaintiff is not a "Federal Taxpayer" as defined in the Internal Revenue Code ("IRC") and his income from his labor "is not income in its Constitutional Sense for purposes of taxation by the United States government." (Docket No. 1 at 2, ¶¶ 5, 6). On January 31, 2007, IRS Operations Manager R. M.

Owens recklessly and intentionally failed to follow statutes and regulations of the IRC when he mailed a Notice of Levy to Wells Fargo in Phoenix, Arizona. The Notice of Levy was an intentional violation of 26 U.S.C. §§ 6331(a) and 7433. When plaintiff was called and threatened with levy action in January 2007, plaintiff "reminded the IRS that a Notice of Federal Tax Lien or Levy was outside its jurisdiction." (Docket No. 1 at 3, ¶ 27).

Wells Fargo bank in Aurora, Colorado, however, acted on the Notice of Levy, taking $22,493.08 from the plaintiff's bank account "in violation of 26 C.F.R. § 301.6332-1(a)(2) and (i) and (ii)." That Wells Fargo branch "is not located in United States territory" and "is not within territorial jurisdiction of the United States government or a United States Court." (Docket No. 1 at 2, ¶ 20; 3, ¶ 21). The Notice of Levy was not supported by a State or Federal court judgment. It was "mailed to Wells Fargo bank, which is a bank outside the United States or a possession of the United States did not specify the district director's intention to reach Plaintiff's deposit." (Docket No. 1 at 3, ¶ 23). "There is no provision of law that extends enforcement of Subtitle A of the [IRC] to those domiciled in any State of the Union or who are not employees of the United States Government." (Docket No. 1 at 3, ¶ 25).

The IRS has violated other federal laws by taking private property, namely, 18 U.S.C. §§ 241 (conspiracy against rights), 242 (deprivation of rights under color of law), 872 (extortion by officers or employees of the United States), 876 (mailing threatening communications), 880 (receiving the proceeds of extortion), 1583 (enticement into slavery), and 1589 (forced labor), 15 U.S.C. §§1692-1692p (debt collection practices), 5 U.S.C. § 1553 (Administrative Procedures Act), and 44 U.S.C. § 1505 (Federal Register

Act which requires enforcement regulations to be published in the Federal Register).

It appears plaintiff is seeking monetary damages in the following amount: "[t]he present value of $22,498.08 taken on February 1, 2007 can be calculated using the number of federal reserve notes (645) on February 1, 2007 and the present number of federal reserve notes required to purchase the same amount of gold." (Docket No. 1 at 4, ¶ 45). Attached to the Complaint are a number of exhibits.

Now before the court for report and recommendation are the following four motions: (1) United States' Motion to Dismiss (Docket No. 5), (2) Plaintiff's Motion for Judgment on the Pleadings (Docket No. 13), (3) Plaintiff's Motion for Order Granting Approval of Plaintiff's Motion for Judgment on the Pleadings Submitted August 25, 2011 (Docket No. 15), and (4) Plaintiff's Motion for Compliance (Docket No. 27). Plaintiff filed responses to the motion to dismiss (Docket Nos. 7 and 12), and the United States filed a reply. (Docket No. 11). The United States also filed a response to the plaintiff's first two motions. (Docket No. 17). The plaintiff's third motion was filed while this court was drafting this report and recommendation. The court has considered all of these motions papers as well as applicable Federal Rules of Civil Procedure and case law. In addition, the court has taken judicial notice of its file. The court now being fully informed makes the following findings, conclusions, and recommendations.

Defendant, the United States of America,[1] moves to dismiss pursuant to Fed. R.

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[1]Defendant notes that the IRS may not be sued *eo nomine* in this case, see Murphy v. Internal Revenue Serv., 493 F.3d 170, 174 (D.C. Cir. 2007), Shelton v. United States Customs Serv., 565 F.2d 1140, 1141 (9th Cir. 1977) ("It is well established that federal agencies are not subject to suit eo nomine unless so authorized by Congress in explicit language."). Furthermore, this action is brought under 26 U.S.C. § 7433, which explicitly provides that a "taxpayer may bring a civil action for damages

Civ. P. 12(b)(1), (5), and (5) on the following grounds: (1) plaintiff has failed to state a claim under 26 U.S.C. § 7433, (2) plaintiff has failed to exhaust his administrative remedies, (3) plaintiff's claim is barred by the statute of limitations, and (4) the Complaint should be dismissed for insufficient service of process pursuant to Fed. R. Civ. P. 12(b)(5). Plaintiff moves for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), asserting that defendant IRS was served on April 27, 2011, but "[p]ursuant to Rule 8(d), none of the allegations have been denied and therefore are admitted. In addition to the admissions, Defendant injected five new matters, all shown to be without merit."

Rule 12(b)(1):

> empowers a court to dismiss a Complaint for "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). As courts of limited jurisdiction, federal courts may only adjudicate cases that the Constitution and Congress have granted them authority to hear. *See* U.S. CONST. art. III, § 2; *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994). Statutes conferring jurisdiction on federal courts are to be strictly construed. *See F & S Constr. Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964). A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere conclusionary allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).
>
> Motions to dismiss pursuant to Rule 12(b)(1) may take two forms. First, if a party attacks the facial sufficiency of the complaint, the court must accept the allegations of the complaint as true. *See Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995). Second, if a party attacks

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against the *United States* in a district court of the United States." 26 U.S.C. § 7433 (emphasis added). See Clark v. United States, 2010 WL 1660110, at *2-3 (E.D. Cal. Apr. 22, 2010) (dismissing the IRS from suit under § 7433). Defendant thus notes that in the event the court does not either dismiss this action or grant summary judgment, the IRS should be dismissed as a party, and the United States substituted in its place.

> the factual assertions regarding subject matter jurisdiction through affidavits and other documents, the court may make its own findings of fact. *See id.* at 1003. A court's consideration of evidence outside the pleadings will not convert the the motion to dismiss to a motion for summary judgment under Rule 56. *See id.*

Cherry Creek Card & Party Shop, Inc. v. Hallmark Marketing Corp., 176 F. Supp. 2d 1091, 1094-95 (D. Colo. 2001).

For purposes of a motion to dismiss pursuant to Rule 12(b)(6), the court must accept all well-pled factual allegations in the complaint as true and resolve all reasonable inferences in the plaintiff's favor. Morse v. Regents of the Univ. of Colo., 154 F.3d 1124, 1126-27 (10th Cir. 1998); Seamons v. Snow, 84 F.3d 1226, 1231-32 (10th Cir. 1996). A motion to dismiss pursuant to Rule 12(b)(6) alleges that the complaint fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "A complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) if it does not plead 'enough facts to state a claim to relief that is plausible on its face.'" Cutter v. RailAmerica, Inc., 2008 WL 163016, at *2 (D. Colo. Jan. 15, 2008) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." Bell Atlantic Corp., 550 U.S. at 555 (citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." Id. "[A] plaintiff must 'nudge [] [his] claims across the line from conceivable to plausible' in order to survive a motion to dismiss. . . . Thus, the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of

the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting Bell Atlantic Corp., 127 S. Ct. at 1974).

"A motion for judgment on the pleadings brought pursuant to Fed. R. Civ. P. 12(c) is reviewed under a similar standard as a motion brought pursuant to Fed. R. Civ. P. 12(b)(6)." Escobar v. Reid, 668 F. Supp.2d 1260, 1284 (D. Colo. 2009). "Therefore, in ruling on a motion for judgment on the pleadings, courts should look to the specific allegations of the complaint to determine whether they plausibly support a legal claim for relief, that is, a complaint must include enough facts to state a claim for relief that is plausible on its face." Id. (quotations omitted). "Judgment on the pleadings should not be granted unless the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law." Park Univ. Enters., Inc. v. American Cas. Co., 442 F.3d 1239, 1244 (10th Cir. 2006) (quotation omitted). "In ruling on a motion for judgment on the pleadings, the Court may consider the Complaint, any material that is attached to the Complaint, and the Answer." Escobar, 668 F. Supp.2d at 1285. "A Rule 12(c) motion may be of particular value when the statute of limitations provides an effective bar to a party's claims and the entire controversy could be disposed of by a pretrial summary motion." Hamilton v. Cunningham, 880 F. Supp. 1407, 1410 (D. Colo. 1995).

Rule 56(a) provides that summary judgment shall be granted "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." Fed. R. Civ. P. 56(a). "A party seeking summary

judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrate the absence of genuine issues for trial." Robertson v. Board of County Comm'rs of the County of Morgan, 78 F. Supp.2d 1142, 1146 (D. Colo. 1999) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Mares v. ConAgra Poultry Co., 971 F.2d 492, 494 (10th Cir. 1992)). "Once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in the complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried. . . . These facts may be shown 'by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings by themselves.'" Southway v. Central Bank of Nigeria, 149 F. Supp.2d 1268, 1273 (D. Colo. 2001), aff'd, 328 F.3d 1267 (10th Cir. 2003). However, "[i]n order to survive summary judgment, the content of the evidence that the nonmoving party points to must be *admissible*. . . . The nonmoving party does not have to produce evidence in a form that would be admissible at trial, but '"the content or substance of the evidence must be admissible."' . . . Hearsay testimony that would be inadmissible at trial cannot be used to defeat a motion for summary judgment because 'a third party's description of a witness' supposed testimony is "not suitable grist for the summary judgment mill."'" Adams v. American Guarantee & Liability Ins. Co., 233 F.3d 1242, 1246 (10th Cir. 2000).

"Summary judgment is also appropriate when the court concludes that no reasonable juror could find for the non-moving party based on the evidence presented in the motion and response." Southway, 149 F. Supp.2d at 1273. "The operative

inquiry is whether, based on all documents submitted, reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . . Unsupported allegations without 'any significant probative evidence tending to support the complaint' are insufficient . . . as are conclusory assertions that factual disputes exist." Id.; Robertson, 78 F. Supp.2d at 1146 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); quoting White v. York Int'l Corp., 45 F.3d 357, 360 (10th Cir. 1995)). "Evidence presented must be based on more than 'mere speculation, conjecture, or surmise' to defeat a motion for summary judgment." Southway, 149 F. Supp.2d at 1274. "Summary judgment should not enter if, viewing the evidence in a light most favorable to the non-moving party and drawing all reasonable inferences in that party's favor, a reasonable jury could return a verdict for that party." Id. at 1273.

Since the plaintiff is not an attorney, his pleading and other papers have been construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing Haines v. Kerner, 404 U.S. 519, 520-21 (1972)). Therefore, "if the court can reasonably read the pleadings to state a claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements. . . . At the same time, . . . it is [not] the proper function of the district court to assume the role of advocate for the pro se litigant." Id.

Section 7433 of Title 26, United States Code, provides in pertinent part:

(a) **In general**. – 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. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.
>
> . . .
>
> (d) **Limitations.**--
>
> (1) **Requirement that administrative remedies be exhausted.**–A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.
>
> . . .
>
> (3) **Period for bringing action.**–Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.

26 U.S.C. § 7433.

Here, the United States correctly asserts that while the plaintiff cites to § 7433 and alleges that the IRS employee "recklessly and intentionally failed to follow statutes and regulations of the IRC concerning tax levy," he does not cite any specific actions by the IRS employee that violated any specific statutes. Instead, he merely advances frivolous arguments that he is not a Federal Taxpayer, that a Notice of Levy is an intentional violation of the power granted to the federal government by the U.S. Constitution, that a tax levy on his Wells Fargo account was unauthorized because the bank is not located within territorial jurisdiction of the United States government, and that any collection actions by the IRS are in violation of federal law because the income

from his labor is not income. Therefore, this court agrees with the United States that the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. See Macleod v. Internal Revenue Serv., 2000 WL 1358703, at *3 (S.D. Cal. Aug. 8, 2000) ("To state a claim under [§7433(a)], plaintiffs must . . . refer in their complaint to a specific section of the [IRC] that the employees might have violated."); Addington v. United States, 75 F. Supp.2d 520, 524-25 (S.D. W. Va. 1999) ("Plaintiffs have failed to cite any specific Code provision or regulation which [an IRS employee] intentionally or recklessly violated in serving the levy to collect taxes. 26 U.S.C. § 6331(a). . . . Since [the IRS employee] was simply collecting taxes pursuant to methods prescribed by the Code, the Court believes that plaintiffs have no cause of action pursuant to Section 7433 for the levy . . . .").

While plaintiff appears to claim that the levy on his Wells Fargo account was in violation of 26 C.F.R. § 301.6332-1(a)(2)(i) and (ii), the United States correctly notes that § 301.6332-1(a)(2) simply provides that if a levy is made upon a taxpayer's account with a bank doing business in the United States, such levy shall not be enforced by means of deposits held in offices of that bank outside the United States unless certain procedures and requirements are met. Here, plaintiff himself alleges that the levy was enforced with deposits in the Wells Fargo branch in Aurora, Colorado. He makes no allegation that a levy was enforced with deposits held in Wells Fargo branches outside of the country. Therefore, the regulation cited by the plaintiff is inapplicable.

The United States has further shown that the plaintiff did not exhaust his administrative remedies as set forth in 26 C.F.R. § 301.7433-1(e), which is required prior to bringing suit under § 7433. While plaintiff attached an administrative claim to

his pleading, see Docket No. 1 at 8-10, Pl.'s Ex. 2, such claim did not comply with the procedures for an administrative claim as set forth in the regulation because his claim did not include his taxpayer identification number, the grounds, in reasonable detail, for his claim, and his signature.

Even if that were not the case, the United States has further established that the plaintiff's claim is barred by the two-year statute of limitations set forth in § 7433. An action accrues under § 7433 when the taxpayer has had a reasonable opportunity to discover all of the essential elements of a possible cause of action. 26 C.F.R. § 301.7433-1(g)(2) ("A cause of action under paragraph (a) of this section accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action."). Here, the Notice of Levy at issue is dated January 31, 2007. (Docket No. 1, Pl.'s Ex. 1). As noted by the United States, plaintiff was aware of this levy in February 2007 because in an "Affidavit of Negative Averment" that is attached to his Complaint, plaintiff states that on February 9, 2007, he "wrote [a] letter to Wells Fargo Bank advising the bank that its intention to honor the levy would be illegal and cautioned the bank not to do so. On February 21, Well [sic] Fargo dismissed Affiant's advice and took the money from Affiant's account." (Docket No. 1 at 11, Pl.'s Ex. 3 at 1,). Plaintiff, however, did not file this action until over four years later on March 18, 2011. (Docket No. 1).

In addition, the United States has shown that the plaintiff did not properly serve the defendant. Plaintiff has not shown that the Attorney General or the United States Attorney for the District of Colorado were ever served. See Fed. R. Civ. P. 4(i)(1).

Finally, plaintiff's motion for judgment on the pleadings fails. He seems to argue

that the defendant has not filed a responsive pleading admitting or denying the allegations in the Complaint and thus such allegations have been admitted pursuant to Fed. R. Civ. P. 8(d). As the United States correctly responds, however, plaintiff never properly served the United States. Therefore, pursuant to Fed. R. Civ. P. 12(a)(2), its time to serve a responsive pleading has not elapsed, and judgment on the pleadings is improper. Even if the United States had been properly served, it timely filed its motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), (5), and (6), and thus pursuant to Fed. R. Civ. P. 12(a)(4)(A), in the absence of another time set by the court, it has until fourteen days after notice of the court's ruling on the motion to dismiss to file a responsive pleading. Therefore, the plaintiff's allegations in his Complaint have not been deemed admitted by the defendant as a result of any purported failure to respond timely.

WHEREFORE, for the foregoing reasons, it is hereby

RECOMMENDED that the United States' Motion to Dismiss (Docket No. 5) be **granted**. It is further

RECOMMENDED that the Plaintiff's Motion for Judgment on the Pleadings (Docket No. 13) be **denied**. It is further

RECOMMENDED that the Plaintiff's Motion for Order Granting Approval of Plaintiff's Motion for Judgment on the Pleadings Submitted (Docket No. 15) be **denied**. It is further

RECOMMENDED that the Plaintiff's Motion for Compliance (Docket No. 27) be **denied as moot**.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives *de novo* review of the recommendation by the District Judge, Thomas v. Arn, 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions. Makin v. Colorado Dep't of Corrections, 183 F.3d 1205, 1210 (10th Cir. 1999); Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Date: February 6, 2012
Denver, Colorado

s/ Michael J. Watanabe
Michael J. Watanabe
United States Magistrate Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

TEXTURE SOURCE, INC, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	2:10-cv-00495-GMN -VCF **O R D E R**
HUTCHINS DRYWALL, INC, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	2:10-cv-00497-LRH -VCF **O R D E R**

This matter is before the court in Case No. 2:10-cv-00495-GMN-VCF on defendant/counterclaimant United States of America's Motion For Protective Order. (#30). Plaintiff Texture Source, Inc. filed an Opposition (#31), and the government filed a Reply (#32). This matter is also before the court in Case No. 2:10-cv-00497-LRH-VCF on defendant/counterclaimant USA's Motion For Protective Order. (#29). Plaintiff Hutchins Drywall, Inc. filed an Opposition (#30), and the government filed a Reply (#31).

In two similar actions in this District (Case No. 2:10-cv-00490-KJD-GWF and Case No. 2:10-cv-00498-LRH-GWF)(hereinafter the "Judge Foley Actions"), the government filed motions for protective orders seeking to protect the same information related to the motions before this court. A combined hearing was held on the motions in the Judge Foley Actions on October 24, 2011. As counsel is the same for all plaintiffs, the legal arguments and discovery sought in the actions before this court

and the Judge Foley Actions are identical. The underlying facts in all of the aforementioned actions are substantially similar, and the names, specific monetary amounts, and dates are the only factual differences for purposes of these instant motions.

In the interest of consistent rulings, this court reviewed Judge Foley's orders in preparing this order. Since the parties are familiar with the underlying facts of the actions, the court will not restate them here.

Motions For Protective Order (#30 and #29)[1]

On April 20, 2011, plaintiffs served their first set of requests for production of documents and first interrogatories upon the government. (#30 and #29). The discovery requests seek documents and information regarding the Internal Revenue Service's (hereinafter "IRS") purported prior examinations of Centennial Drywall Systems, Inc (hereinafter "Centennial" or "CDSI"))(the company that provided drywall workers to plaintiffs for construction projects in Nevada), "including documents prepared, or relied upon, by the [IRS] in connection with one of several, specific purported examinations of Centennial, as well as the [IRS]'s purported efforts to collect taxes from Centennial." *Id.*

In plaintiffs' first supplemental Rule 26(a)(1) disclosures, plaintiffs identified numerous individuals that plaintiffs may call as witnesses who, while employed by the IRS, allegedly participated in examinations of plaintiffs and/or Centennial. *Id.* Plaintiffs indicated that they anticipate calling on these witnesses to testify regarding "worker classification determinations" made by the IRS relating to plaintiffs, Centennial, and the "drywall companies." *Id.* The government argues that plaintiffs are essentially trying to "elicit testimony regarding impressions formed and conclusions reached by the [IRS] during the administrative process, and/or the factual and legal analysis employed by the [IRS] in evaluating [p]laintiff[s'] potential liability for the taxes at issue in th[ese] suit[s], to support [their] claims or defense[s]." *Id.*

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The government asserts that a protective order is appropriate because "neither the [IRS]'s analysis of the tax liabilities at issue in [these suits], nor the [IRS]'s purported prior examinations of Centennial, are relevant to any party's claim or defense in [these actions]." *Id.* The government also asserts that the protective order is necessary because "details of the [IRS]'s purported prior examinations of Centennial, if any, are protected from disclosure pursuant to 26 U.S.C. § 6103." *Id.* The parties attempted to resolve this issue without the court's involvement pursuant to Local Rule 26-7(b), but were unable to resolve the matter. *Id.*

A. Discussion

In support of the motions for protective orders (#30 and #29), the government relies on *R.E. Dietz Corp. v. United States*, 939 F.2d 1, 4 (2nd Cir. 1991) and other cases regarding the standard which governs the district court's determination in a tax refund action.

Dietz states in this regard:

> Ordinarily, in an action brought pursuant to 28 U.S.C. § 1346(a)(1) for a refund of taxes already paid to the government, the district court is required to redetermine the entire tax liability. *Lewis v. Reynolds*, 284 U.S. 281, 283, 52 S.Ct. 145, 146, 76 L.Ed. 293 (1932). The factual and legal analysis employed by the Commissioner is of no consequence to the district court. *National Right to Work Legal Def. & Educ. Found. v. United States*, 487 F.Supp. 801, 805 (E.D.N.C.1979); see also *Ruth v. United States*, 823 F.2d 1091, 1094 (7th Cir.1987) ("courts will not look behind an assessment to evaluate the procedure and evidence used in making the assessment."); *Kentucky Trust Co. v. Glenn*, 217 F.2d 462, 465-66 (6th Cir.1954). "[T]he court does not sit in judgment of the Commissioner; the court places itself in the shoes of the Commissioner." *National Right to Work*, 487 F.Supp. at 805. Thus, a de novo review of the determination and assessment should be conducted. *Ruth*, 823 F.2d at 1094.

Based on this *de novo* review standard, trial courts have prohibited or restricted discovery regarding the IRS's administrative determinations of the tax liability on the grounds that it is irrelevant, except in those cases in which the IRS Commissioner is vested with some discretion in the imposition of a tax. *See Vons Companies, Inc. v. United States*, 51 Fed.Cl. 1, 6 (2001); *McLeod v. United States*,

2000 WL 1902257 *2 (D.Nev. 2000) and *Xcel Energy, Inc. v. United States*, 237 F.R.D. 416 (D.Minn. 2006).

In *Xcel Energy, Inc. v. United States*, the government disallowed certain corporate interest deductions on life insurance policies that the plaintiff had purchased on behalf of its employees. The plaintiff requested production of documents relating to the government's decision to disallow the deduction. The government produced most of the requested documents, but redacted those portions of the documents that contained the analysis and opinions of the IRS personnel based on lack of relevancy and the deliberative process privilege. In holding that the redacted portions were irrelevant, the court relied on *Mayes v. United States*, 1986 WL 10093 (W.D.Mo. 1986) in which the plaintiff sought to discover an internal agency memorandum prepared by an IRS agent during the administrative appeal of the plaintiff's claim. After noting the de novo standard to be applied, the *Mayes* court stated:

> . . The court will not be reviewing the analysis followed by the IRS employee or the reasons why the IRS made the assessment. As the cases cited earlier indicate, it will be of no moment whether the IRS employee was correct or not in his interpretation of the law at the administrative stage. The court's determination of plaintiff's correct tax liability will be made by examining the deduction in question in light of the underlying facts and the applicable law. Given these circumstances, the court concludes that the portion of the supporting statement comprising the IRS employee's legal analysis is not relevant to any of the issues herein and is thus outside the scope of discovery.

Xcel Energy, 237 F.R.D. at 419, quoting *Mayes*, 1986 WL 10093 at *2-3.

The plaintiff in *Xcel Energy* argued, however, that the internal memoranda of the IRS agents were relevant because the Internal Revenue Code provides an exception to the imposition of penalties if there is "substantial authority" for the taxpayer's position. *Id.*, 237 F.R.D. at 419, citing 26 U.S.C. § 6662(d)(2)(B)(I) and Treasury Regulation §1.6620-4(d)(2). In rejecting the argument that the memoranda were relevant on this basis, the court stated that it had "found no authority for the proposition that the internal ruminations of IRS agents, during an administrative consideration of the taxpayer's tax liability, could serve, however slightly, as the "substantial authority" required by Section

6662(d)(2)(B)(I), and Xcel has drawn none to our attention." *Id.*

There are, however, contexts in which such information may be relevant and discoverable. In *United States v. Cathcart*, 2009 WL 482220, *3-4 (N.D.Cal. 2009), the government sought the imposition of a penalty against the defendant based on the allegation that he participated in a "90% stock loan program" which constituted an abusive tax shelter or tax fraud scheme. The government was required to prove that defendant knew or should have known that the program was fraudulent. The defendant sought to discover whether the IRS had concluded, in prior audits of other taxpayers, that the same loan program was not an abusive tax shelter. In holding that defendant was entitled to some discovery on this issue, the court stated: "If the IRS concluded that the program was legitimate when it audited borrowers, that may tend to show that a reasonable person in defendant's position would believe that the program was not an abusive tax shelter." *Id.* at *5.

As a general rule, a taxpayer's reliance on an erroneous IRS administrative ruling is no defense to the payment of a lawful tax. *See Vons Companies, Inc. v. United States*, 51 Fed.Cl. 1, 6- 7 (2001), citing *Dixon v. United States*, 381 U.S. 68, 72-73, 85 S.Ct. 1301 (1965). The "safe haven" provision of §530 of the Revenue Act of 1978, however, provides an exception to this rule as it relates to the employment status of individuals for whom employment taxes may be owed.

Section 530(a)(1) states as follows:

> If –
>
> > (A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period, and
> >
> > (B) in the case of periods after December 31, 1978, all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayer's treatment of such individual as not being an employee,
>
> then, for purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.

Section 530(a)(2) sets forth statutory standards "providing one method of satisfying the requirements of paragraph (1)." It states:

> For purposes of paragraph (1), a taxpayer shall in any case be treated as having a reasonable basis for not treating an individual as an employee for a period if the taxpayer's treatment of such individual for such period was in reasonable reliance on any of the following:
>
> (A) judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;
>
> (B) a past Internal Revenue Service audit of the taxpayer in which there was no assessment attributable to the treatment (for employment tax purposes) of the individuals holding positions substantially similar to the position held by this individual; or
>
> © long-standing recognized practice of a significant segment of the industry in which such individual was engaged.

Section 530 "was designed to relieve employers of the burden of surprise or uncertain imposition of retroactive tax liability resulting from an increase in IRS employment-status audits." *General Investment Corp. v. United States*, 823 F.2d 337, 339 (9th Cir. 1987).[2] The statute is to be liberally construed in favor of the taxpayer, although the taxpayer has the burden of establishing that he meets the requirements of §530 by a preponderance of the evidence. *Springfield v. United States*, 88 F.3d 750, 753 (9th Cir. 1996). In addition to the matters listed in §530(a)(2)(A),(B) and ©, "a taxpayer may demonstrate any other reasonable basis for the treatment of an employee for tax purposes." *Id*. *See also*

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[2] As stated in *Springfield v. United States*, 88 F.3d 750, 751 n. 2 (9th Cir. 1996):

> Section 530 of the Revenue Act of 1978, Pub.L. No. 95-600, 92 Stat. 2763, 2885-86, was originally intended to provide interim relief for taxpayers who were involved in employment tax controversies with the IRS, and it therefore initially applied only to periods prior to January 1, 1980. H.R.Rep. No. 1748, 95th Cong., 2d Sess. 4 (1978), *reprinted in* 1978-3 C.B. 629, 632. It was temporarily extended twice and then extended indefinitely by Section 269 of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub.L. No. 97-248, 96 Stat. 324, 552. Section 530 was never codified, but it is reproduced in the notes following I.R.C. § 3401 [26 U.S.C.§ 3401].

General Investment Corp., 823 F.2d at 340 ("Section 530(a)(2)© is but one way for an employer to prove it had a 'reasonable basis' for not treating its workers as employees for tax purposes.").

In support of the relevancy of their discovery requests, plaintiffs state that "to demonstrate, in part, [their] entitlement to relief under Section 530 [plaintiffs] will present evidence that there was a recognized industry practice wherein *Centennial's workers were independent contractors* and the status of Centennial's workers as independent contractors was *accepted by the IRS* (as well as being an accepted practice in the local drywall industry). [Plaintiffs] appropriately believed [they] did not have to pay taxes for Centennial's workers since no other subcontractor was." (#31 and #30).

Subsection 530(a)(2)© requires the taxpayer to prove two elements. First, the taxpayer must prove that there was, in fact, a long-standing recognized practice in a significant segment of the industry. Second, the taxpayer must prove that he relied on this practice in the tax treatment of his or her workers. The court in *General Investment Corp.* held that the plaintiff satisfied its burden by presenting testimony by its principal officer and another mine operator that mining companies in the county treated their mine workers as independent contractors. 823 F.2d at 340-41. In *Springfield*, the plaintiff met his burden by presenting undisputed testimony by himself and by salesmen that independent used car dealers in the county treated their salesmen as independent contractors. 88 F.3d at 753-54. *See also 303 West 42nd St. Enterprises, Inv. v. Internal Revenue Services*, 181 F.3d 272, 277 (2nd Cir. 1999) (holding that taxpayer's survey of its particular industry regarding the tax treatment of the same type of worker may be sufficient to establish the practice of a significant segment of the industry). Statements made by IRS officers or employees to business operators/taxpayers recognizing the existence of the practice in the industry are also relevant and may be admissible to prove the existence of the practice. The Government is therefore not entitled to a protective order in regard to discovery of any such statements.

The taxpayer can also establish reasonable reliance based on judicial precedent, published rulings, technical advice with respect to the taxpayer, a letter ruling to the taxpayer or a past IRS audit that resulted in a finding or inference that similarly situated workers were not employees for tax

purposes. §530(a)(2)(A) and (B).

The IRS apparently did not issue any technical advice memoranda or private letter rulings to plaintiffs stating that it was proper for them to treat the drywall workers as independent contractors. Nor did the IRS conduct any prior audits of plaintiffs relating to the tax treatment of such workers. Plaintiffs allege, however, that they relied on representations made to them by CDSI that the IRS had approved CDSI's treatment of the drywall workers as independent contractors and that it was proper for the plaintiffs to also treat such workers as independent contractors so long as the same conditions relating to control over the workers were present. In support of this argument, plaintiffs cite a September 6, 1989 letter that an IRS officer sent to the president of CDSI, which stated as follows:

> Per our discussion relating to the employment tax examination just completed, as long as the same independent contractor conditions exist, there is no employment tax issue.
>
> The independent subing to you is:
>
> > at risk (can lose cash out of pocket on a particular job), completing work on a per job basis rather than by the hour, not required by you to perform personally, and control of work rests with sub (outside general requirements)
>
> I would like you to pass on some information to your subs if you would be so kind. If the so called subs to your subs are not operating under the same conditions as I mentioned briefly above, those workers are employees and your subs are employers subject to employment taxes.

(#31 and #30), Exhibit 1.

Plaintiffs also cited a purported January 4, 2007 letter from an IRS Revenue Office Examiner.[3] The document concerns an examination as to whether a corporate vice-president of CDSI, who consulted on real estate development matters, was an independent contractor. Although the document does not directly concern the employment status of drywall workers, item 10 at the bottom of the page

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[3] Nothing on the face of the document confirms that it was a letter from an IRS officer. The Government, however, has not disputed Plaintiffs' representation regarding the exhibit.

states:

> Due to a previous employment tax examination, the taxpayer is afforded a Section 530 safe harbor for the dry-waller class of employee. The taxpayer has never been examined for independent real estate development class of worker.

Plaintiffs argue that this document confirms that as recently as the end of 2006, the IRS recognized CDSI's right, pursuant to §530, to treat the drywall workers as independent contractors.

Section 530(a)(2) does not provide any express authority for a taxpayer to rely on IRS technical memoranda or private letter rulings issued to other taxpayers. In these actions, however, the plaintiffs contracted with CDSI to provide drywall workers for their construction projects and allegedly relied on its representations that the IRS had approved or confirmed the independent contractor status of the workers. The Court could therefore find, pursuant to §530, that it was reasonable for plaintiffs to rely on CDSI's representations so long as CDSI had a reasonable basis for making such representations. Technical advice memoranda or private letter rulings issued to CDSI which approved or confirmed the independent contractor status of the workers would provide evidence supporting the reasonableness of CDSI's belief and representations. Likewise, prior IRS audits of CDSI which resulted in no assessments being made based on a finding that the workers were employees could also support the reasonableness of CDSI's belief and representations. Discovery regarding such matters is therefore relevant. On the other hand, the internal memoranda of IRS agents containing their analysis regarding the employment status of the drywall workers is irrelevant so long as the memoranda and/or their contents were not disclosed to CDSI or plaintiffs. If the memoranda discuss communications between the IRS and CDSI (or plaintiffs) regarding the employment status of the workers, however, information regarding such communications are relevant and discoverable.

The Government also argues that pursuant to 26 U.S.C. §6103(a) it is prohibited from disclosing any return or return information concerning a non-party taxpayer, in these actions CDSI. (#30 and #29). As the Government notes, however, §6103 contains several exceptions, including an exception which

permits disclosure to a person authorized by the taxpayer to receive such information. CDSI is a defunct corporation. Plaintiffs have attached to their response an authorization by CDSI's former president, Edwin Braithwaite, authorizing the release of return information to plaintiffs for purposes of this lawsuit. The Government appears to accept, or at least does not strenuously dispute, the validity of this authorization pursuant to 26 U.S.C. §6103(e)(1)(D). Section 6103(h)(4)© also provides that return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer, and which directly affects the resolution of an issue in the proceeding. In these actions, return information relating to the employment tax treatment of CDSI's drywall workers appears to directly relate to the tax treatment of those workers by plaintiffs arising out of the contractual relationship between CDSI and plaintiffs. It therefore also directly relates to the resolution of the tax issue in these actions. Section 6103(a) therefore does not preclude the discovery of relevant return information relating to the tax treatment of CDSI's drywall workers.

B. Conclusion

Based on the foregoing, the Court concludes that discovery into the internal analysis, impressions or conclusions of IRS employees or officers relating to plaintiffs' or CDSI's potential liability for the employment taxes at issue is irrelevant. The Government is therefore entitled to a protective order against plaintiffs' efforts to discover such information, whether it be through depositions of IRS personnel, interrogatories or requests for production. Plaintiffs are not precluded, however, from discovering statements made by the IRS to CDSI and/or plaintiffs regarding the employment status of the drywall workers, regardless of whether such statements were made in the form of technical advice memoranda, private letter rulings or other forms of communication. Plaintiffs are also not precluded from discovering relevant information regarding prior IRS audits of CDSI which resulted in determinations relevant to the drywall workers' status as independent contractors or

employees, and upon which CDSI may have relied in allegedly representing to plaintiffs that the workers were independent contractors.

Accordingly, and for good cause shown,

IT IS ORDERED that Defendant/Counterclaimant United States' Motion for Protective Order (#30) in Case No. 2:10-cv-00495-GMN-VCF and Motion for Protective Order (#29) in Case No. 2:10-cv-00497-LRH-VCF are GRANTED in accordance with and subject to the limitations set forth in this order.

DATED this 6th day of February, 2012.

CAM FERENBACH
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

TEXTURE SOURCE, INC,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

2:10-cv-00495-GMN -VCF

O R D E R

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A. Discussion

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Section 530(a)(2) sets forth statutory standards "providing one method of satisfying the requirements of paragraph (1)." It states:

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Section 530 "was designed to relieve employers of the burden of surprise or uncertain imposition of retroactive tax liability resulting from an increase in IRS employment-status audits." *General Investment Corp. v. United States*, 823 F.2d 337, 339 (9th Cir. 1987).[2] The statute is to be liberally construed in favor of the taxpayer, although the taxpayer has the burden of establishing that he meets the requirements of §530 by a preponderance of the evidence. *Springfield v. United States*, 88 F.3d 750, 753 (9th Cir. 1996). In addition to the matters listed in §530(a)(2)(A),(B) and ©, "a taxpayer may demonstrate any other reasonable basis for the treatment of an employee for tax purposes." *Id*. *See also*

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> Section 530 of the Revenue Act of 1978, Pub.L. No. 95-600, 92 Stat. 2763, 2885-86, was originally intended to provide interim relief for taxpayers who were involved in employment tax controversies with the IRS, and it therefore initially applied only to periods prior to January 1, 1980. H.R.Rep. No. 1748, 95th Cong., 2d Sess. 4 (1978), *reprinted in* 1978-3 C.B. 629, 632. It was temporarily extended twice and then extended indefinitely by Section 269 of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub.L. No. 97-248, 96 Stat. 324, 552. Section 530 was never codified, but it is reproduced in the notes following I.R.C. § 3401 [26 U.S.C.§ 3401].

General Investment Corp., 823 F.2d at 340 ("Section 530(a)(2)© is but one way for an employer to prove it had a 'reasonable basis' for not treating its workers as employees for tax purposes.").

In support of the relevancy of their discovery requests, plaintiffs state that "to demonstrate, in part, [their] entitlement to relief under Section 530 [plaintiffs] will present evidence that there was a recognized industry practice wherein *Centennial's workers were independent contractors* and the status of Centennial's workers as independent contractors was *accepted by the IRS* (as well as being an accepted practice in the local drywall industry). [Plaintiffs] appropriately believed [they] did not have to pay taxes for Centennial's workers since no other subcontractor was." (#31 and #30).

Subsection 530(a)(2)© requires the taxpayer to prove two elements. First, the taxpayer must prove that there was, in fact, a long-standing recognized practice in a significant segment of the industry. Second, the taxpayer must prove that he relied on this practice in the tax treatment of his or her workers. The court in *General Investment Corp.* held that the plaintiff satisfied its burden by presenting testimony by its principal officer and another mine operator that mining companies in the county treated their mine workers as independent contractors. 823 F.2d at 340-41. In *Springfield*, the plaintiff met his burden by presenting undisputed testimony by himself and by salesmen that independent used car dealers in the county treated their salesmen as independent contractors. 88 F.3d at 753-54. *See also 303 West 42nd St. Enterprises, Inv. v. Internal Revenue Services*, 181 F.3d 272, 277 (2nd Cir. 1999) (holding that taxpayer's survey of its particular industry regarding the tax treatment of the same type of worker may be sufficient to establish the practice of a significant segment of the industry). Statements made by IRS officers or employees to business operators/taxpayers recognizing the existence of the practice in the industry are also relevant and may be admissible to prove the existence of the practice. The Government is therefore not entitled to a protective order in regard to discovery of any such statements.

The taxpayer can also establish reasonable reliance based on judicial precedent, published rulings, technical advice with respect to the taxpayer, a letter ruling to the taxpayer or a past IRS audit that resulted in a finding or inference that similarly situated workers were not employees for tax

purposes. §530(a)(2)(A) and (B).

The IRS apparently did not issue any technical advice memoranda or private letter rulings to plaintiffs stating that it was proper for them to treat the drywall workers as independent contractors. Nor did the IRS conduct any prior audits of plaintiffs relating to the tax treatment of such workers. Plaintiffs allege, however, that they relied on representations made to them by CDSI that the IRS had approved CDSI's treatment of the drywall workers as independent contractors and that it was proper for the plaintiffs to also treat such workers as independent contractors so long as the same conditions relating to control over the workers were present. In support of this argument, plaintiffs cite a September 6, 1989 letter that an IRS officer sent to the president of CDSI, which stated as follows:

> Per our discussion relating to the employment tax examination just completed, as long as the same independent contractor conditions exist, there is no employment tax issue.
>
> The independent subing to you is:
>
> > at risk (can lose cash out of pocket on a particular job), completing work on a per job basis rather than by the hour, not required by you to perform personally, and control of work rests with sub (outside general requirements)
>
> I would like you to pass on some information to your subs if you would be so kind. If the so called subs to your subs are not operating under the same conditions as I mentioned briefly above, those workers are employees and your subs are employers subject to employment taxes.

(#31 and #30), Exhibit 1.

Plaintiffs also cited a purported January 4, 2007 letter from an IRS Revenue Office Examiner.[3] The document concerns an examination as to whether a corporate vice-president of CDSI, who consulted on real estate development matters, was an independent contractor. Although the document does not directly concern the employment status of drywall workers, item 10 at the bottom of the page

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[3] Nothing on the face of the document confirms that it was a letter from an IRS officer. The Government, however, has not disputed Plaintiffs' representation regarding the exhibit.

states:

> Due to a previous employment tax examination, the taxpayer is afforded a Section 530 safe harbor for the dry-waller class of employee. The taxpayer has never been examined for independent real estate development class of worker.

Plaintiffs argue that this document confirms that as recently as the end of 2006, the IRS recognized CDSI's right, pursuant to §530, to treat the drywall workers as independent contractors.

Section 530(a)(2) does not provide any express authority for a taxpayer to rely on IRS technical memoranda or private letter rulings issued to other taxpayers. In these actions, however, the plaintiffs contracted with CDSI to provide drywall workers for their construction projects and allegedly relied on its representations that the IRS had approved or confirmed the independent contractor status of the workers. The Court could therefore find, pursuant to §530, that it was reasonable for plaintiffs to rely on CDSI's representations so long as CDSI had a reasonable basis for making such representations. Technical advice memoranda or private letter rulings issued to CDSI which approved or confirmed the independent contractor status of the workers would provide evidence supporting the reasonableness of CDSI's belief and representations. Likewise, prior IRS audits of CDSI which resulted in no assessments being made based on a finding that the workers were employees could also support the reasonableness of CDSI's belief and representations. Discovery regarding such matters is therefore relevant. On the other hand, the internal memoranda of IRS agents containing their analysis regarding the employment status of the drywall workers is irrelevant so long as the memoranda and/or their contents were not disclosed to CDSI or plaintiffs. If the memoranda discuss communications between the IRS and CDSI (or plaintiffs) regarding the employment status of the workers, however, information regarding such communications are relevant and discoverable.

The Government also argues that pursuant to 26 U.S.C. §6103(a) it is prohibited from disclosing any return or return information concerning a non-party taxpayer, in these actions CDSI. (#30 and #29). As the Government notes, however, §6103 contains several exceptions, including an exception which

permits disclosure to a person authorized by the taxpayer to receive such information. CDSI is a defunct corporation. Plaintiffs have attached to their response an authorization by CDSI's former president, Edwin Braithwaite, authorizing the release of return information to plaintiffs for purposes of this lawsuit. The Government appears to accept, or at least does not strenuously dispute, the validity of this authorization pursuant to 26 U.S.C. §6103(e)(1)(D). Section 6103(h)(4)© also provides that return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer, and which directly affects the resolution of an issue in the proceeding. In these actions, return information relating to the employment tax treatment of CDSI's drywall workers appears to directly relate to the tax treatment of those workers by plaintiffs arising out of the contractual relationship between CDSI and plaintiffs. It therefore also directly relates to the resolution of the tax issue in these actions. Section 6103(a) therefore does not preclude the discovery of relevant return information relating to the tax treatment of CDSI's drywall workers.

B. Conclusion

Based on the foregoing, the Court concludes that discovery into the internal analysis, impressions or conclusions of IRS employees or officers relating to plaintiffs' or CDSI's potential liability for the employment taxes at issue is irrelevant. The Government is therefore entitled to a protective order against plaintiffs' efforts to discover such information, whether it be through depositions of IRS personnel, interrogatories or requests for production. Plaintiffs are not precluded, however, from discovering statements made by the IRS to CDSI and/or plaintiffs regarding the employment status of the drywall workers, regardless of whether such statements were made in the form of technical advice memoranda, private letter rulings or other forms of communication. Plaintiffs are also not precluded from discovering relevant information regarding prior IRS audits of CDSI which resulted in determinations relevant to the drywall workers' status as independent contractors or

employees, and upon which CDSI may have relied in allegedly representing to plaintiffs that the workers were independent contractors.

Accordingly, and for good cause shown,

IT IS ORDERED that Defendant/Counterclaimant United States' Motion for Protective Order (#30) in Case No. 2:10-cv-00495-GMN-VCF and Motion for Protective Order (#29) in Case No. 2:10-cv-00497-LRH-VCF are GRANTED in accordance with and subject to the limitations set forth in this order.

DATED this 6th day of February, 2012.

CAM FERENBACH
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GARY SWEETWOOD,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

UNITED STATES OF AMERICA,

Counterclaim Plaintiff

v.

GARY SWEETWOOD, CHARLES R. MCHAFFIE,

Counterclaim Defendants

CASE NO. 10cv2189-W (MDD)

REPORT AND RECOMMENDATION FOR TERMINATING SANCTIONS AGAINST COUNTERDEFENDANT CHARLES MCHAFFIE

On October 21, 2010, Plaintiff filed this action against the United States Internal Revenue Service ("United States"). (Doc. No. 1). According to Plaintiff, from 2004 to the end of 2006, he was the president and director of Carrizo Gorge Railway Tours Inc. Payroll taxes for the periods ending December 2005 and December 2006 remain unpaid and the IRS assessed a Trust Fund Recovery Penalty under 26 U.S.C. § 6672. Plaintiff paid a part of the assessment and brought this refund action. In response to Plaintiff's complaint, the United States filed an Answer and Amended Counterclaim against Plaintiff. (Doc. No. 8). The United States also filed a

counterclaim against Charles R. McHaffie (McHaffie). (Id.) McHaffie filed an Answer to the United States counterclaim. (Doc. No. 13). With the pleadings settled the Court issued an order regulating discovery on June 28, 2011. (Doc. No. 18).

Discovery Proceedings and Mr. McHaffie

On July 27, 2011, during a telephonic case management conference, the United States indicated it had been having trouble obtaining requested discovery from McHaffie. The Court ordered McHaffie to cooperate with the United States in the exchange of discovery. (Doc. No. 20). On September 14, 2011, during a telephonic case management conference, the United States noted continuing problems with McHaffie in the exchange of discovery. The Court again ordered McHaffie to cooperate with the United States. (Doc. No. 21).

On October 14, 2011, a further telephonic case management conference was held with the United States and McHaffie. (Doc. No. 24). During that conference, the United States informed the Court that McHaffie had not produced responses to the United States' interrogatories, requests for production, nor had he provided his initial disclosures. All of McHaffie's discovery was overdue by at least thirty days. The Court ordered McHaffie to produce all outstanding discovery on or before October 21, 2011. (Id.)

On October 27, 2011, the United States filed a Request for Order to Show Cause based upon McHaffie's failure to produce discovery by the Court ordered deadline. (Doc. No. 25). The Court conducted a hearing on the request for Order to Show Cause on November 9, 2011. The United States and Plaintiff (through counsel) appeared. McHaffie failed to appear. At the hearing the Court noted that McHaffie had been properly advised of his discovery obligations on several occasions and stated in its order "[t]he Court is satisfied that Defendant McHaffie was aware of his discovery obligations which were explained to him at the telephonic conference held on October 14, 2011." (Doc. No. 28). Based on the record presented, the Court granted the United States' request for Order to Show Cause. (Id.) In its written order, the Court set a further hearing for November 29, 2012, to determine whether sanctions should be imposed on McHaffie for failure to comply with discovery. The Court also ordered McHaffie to bring all outstanding discovery to the Order to Show Cause hearing. (Id.)

Attending the hearing on November 29, 2011, were the United States, McHaffie, and Plaintiff (through counsel). During the hearing, the Court admonished McHaffie that his continued failure to comply with the Court's discovery orders could result in sanctions up to and including a recommendation for entry of a default judgment against him in this case. The Court reminded McHaffie of his scheduled deposition for November 30, 2011, and granted the United States' request for an extra day to depose McHaffie. The Court also ordered the parties to submit an update upon the conclusion of McHaffie's deposition and exchange of discovery.

On November 30, 2011, McHaffie appeared for his deposition "and indicated that he did not want to be deposed and that he preferred to be defaulted in this action." Pl's Request for Sanction of Default Judgment Against Defendant McHaffie at 2. The following conversation was recorded at the deposition:

> McHaffie: My position is that I am agreeing to a default until such time that we can work out a collection settlement.
>
> Castaldi: Yes. Are we under an understanding, Mr. McHaffie, that it would be for the full amount in the tax periods requested in the United States counterclaim against you, plus any accrued interest?
>
> McHaffie: Roughly.
>
> Castaldi: So that would be the periods ending December 31st, 2005, 2006, and 2007, plus any accrued interest. I believe that amount is approximately, I don't have a copy of the counterclaim right now, approximately $400 to $450,000 dollars. Is that agreeable Mr. McHaffie?
>
> McHaffie: Yes.
>
> Castaldi: Okay. And no one has forced you to enter into this agreement and you're not under duress or anything of that nature. Correct?
>
> McHaffie: Nobody has forced me, I am under duress though.
>
> Castaldi: What do you mean by that?
>
> McHaffie: The proceedings are "duressful."
>
> Castaldi: But you haven't been physically threatened or anything?

McHaffie: You have not physically threatened me, no.

Transcript of Proceedings In Re Deposition of Charles McHaffie, November 30, 2011.

As a result of McHaffie's refusal to go forward with his deposition, the United States filed a Motion for Order to Show Cause and Sanctions on November 30, 2011. (Doc. No. 30). The Court ordered McHaffie to file a response under penalty of perjury confirming his statements and accepting a judgment against him. (Doc. No. 32). To date, McHaffie has failed to comply with the Court's order and neither the Court nor counsel has had any further communication with him.

Legal Analysis

Federal Rule of Civil Procedure 37(b)(2)(vi) allows for "rendering a default judgment against the disobedient party" when "a party fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a)..." *Id.* Upon review of the record in this case, the Court believes the only appropriate action is to recommend the entry of a default judgment against Counterdefendant McHaffie.

The Ninth Circuit has created a five part test for the court to apply in considering whether a dismissal or default is justified as a Rule 37 sanction: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Thompson v. Housing Authority of City of Los Angeles,* 782 F. 2d 829, 831 (9th Cir. 1986). These factors are not a series of conditions precedent before the judge can act, but a way for the court "to think about what to do." *In re Phenylpropanolamine (PPA) Products Liability Litigation,* 460 F.3d 1217, 1226 (9th Cir. 2006). The Court addresses each of the factors as follows:

1. Public's interest in expeditious resolution of litigation.

The instant case was filed October 21, 2010. McHaffie has been a litigant in the case since February 15, 2011. Discovery has been ongoing since May 10, 2011. (Doc. No. 15). Based upon the facts of this case, particularly upon McHaffie's stated desire not to be deposed and coupled with his preference for an entry of default against him, further delay is unjustified.

2. The Court's need to manage its docket.

As noted herein, this case has been pending since 2010. The parties have been engaged in active discovery and settlement negotiations for approximately eight months. The Court has held multiple case management conferences and hearings in an effort to resolve McHaffie's continual failure to comply with his discovery obligations. The United States has exhausted its legal remedies with respect to McHaffie. McHaffie should no longer be permitted to unjustifiably delay litigation in this case and waste limited judicial resources.

3. Risk of prejudice.

The Ninth Circuit has held that "[f]ailing to produce documents as ordered is considered sufficient prejudice." *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1227 (9th Cir. 2006). Here the record is clear. Time after time McHaffie has failed to produce discovery as ordered. This failure has essentially prevented the United States and Plaintiff from moving toward a resolution of Plaintiff's claim.

4. Public policy favoring disposition of cases on their merits.

The Ninth Circuit has found that public policy favoring disposition of cases on their merits strongly counsels against dismissal. *Id.* at 1223. In the instant case, however, McHaffie's unreasonable delay, refusal to be deposed and recent verbalization of his preference for default, keeps the case from moving forward toward resolution on the merits.

5. Availability of less drastic sanctions.

"Warning that failure to obey a court order will result in dismissal can itself meet the 'consideration of alternatives' requirements." *Id.* The Court's attempts at curing McHaffie's repeated failures to comply with discovery orders has been well documented. At the Court's hearing on November 29, 2011, the Court again expressed the importance of complying with discovery and warned McHaffie about the possible consequences:

> The Court: As far as I know, there have been no – none of the mandatory disclosures required by the Rules and no effective response to the Government's discovery requests. So this hearing today is an order to show cause hearing. It's really about – for me to hear what your explanation is for your failure to comply

with discovery. And if the explanation isn't good, I can recommend to the Court that you be defaulted, that you – that the Government gets a judgment against you for the full amount of their claim.

Despite the Court's numerous warnings, McHaffie repeatedly failed to comply with the Court's orders. Coupled with McHaffie's statements on the record acquiescing to an entry of judgment rather than being deposed, the imposition of the extreme sanction of default pursuant to Fed.R.Civ.P 37 is justified.

Conclusion

For these reasons the Court recommends a default judgment be entered against Charles McHaffie.

IT IS ORDERED that no later than **February 29, 2012,** any party to this action may file written objections with the Court and serve a copy on all parties. The documents should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **March 12, 2012.** The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order.

IT IS SO ORDERED.

DATED: February 6, 2012

Hon. Mitchell D. Dembin
U.S. Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID O. HENDRICKSON; LORI R. HENDRICKSON; LORI R. HENDRICKSON AND DENZEL G. WILLIAMS AS TRUSTEES FOR D.L. FAMILY TRUST; ZIONS FIRST NATIONAL BANK; WELLS FARGO BANK, Defendants.	ORDER Case No. 1:09-CV-166-TC

The United States has moved for Entry of Default Judgment Pursuant to Fed. R. Civ. Pro. 37(b)(2)(vi) or, in the alternative, for Summary Judgment Pursuant to Fed R. Civ. Pro. 56 (Dkt. No. 50) against Defendants David O. and Lori R. Hendrickson. The court has fully reviewed the briefing on the matter and for the reasons stated in the United States' Memorandum supporting its motion, the court GRANTS the Motion for Summary Judgment. The Motion for Entry of Default Judgment is dismissed as moot. According to the court's ruling, it is hereby:

ORDERED that judgment is entered in favor of the United States and against David O. and Lori R. Hendrickson for the unpaid balance of federal income taxes for the years 1991 and 1993 in the amount of $70,138.32, as of November 15, 2011, plus further accrued penalties and interest accruing after November 15, 2011, pursuant to 26 U.S.C. §§ 6601, 6621, and 6622, and

28 U.S.C. § 1961(c), until paid;

ORDERED that judgment is entered in favor of the United States and against David O. Hendrickson for the unpaid balance of federal income taxes for the years 1995-2000 in the amount of $2,522,391.34, as of November 15, 2011, plus further accrued penalties and interest accruing after November 15, 2011, pursuant to 26 U.S.C. §§ 6601, 6621, and 6622, and 28 U.S.C. § 1961(c), until paid;

ORDERED that the United States' tax liens against David O. and Lori R. Hendrickson for the 1991 and 1993 tax years, and against David O. Hendrickson for the 1995-2000 tax years attached to the parcel of real property located at 1660 E Wasatch Drive, Ogden, Utah 84403 and legally described as follows:

> All of Lot 6, LAKEVIEW RIDGE SUBDIVISION NO. 1, Ogden City, Weber County, Utah, according to the official plat thereof, on file and of record in the Weber County Recorder's Office.

(the Property) are hereby foreclosed;

ORDERED that D.L. Family Trust has no interest in the Property.

SO ORDERED this 3rd day of February, 2012.

BY THE COURT:

Tena Campbell

_____

TENA CAMPBELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID O. HENDRICKSON; LORI R. HENDRICKSON; LORI R. HENDRICKSON AND DENZEL G. WILLIAMS AS TRUSTEES FOR D.L. FAMILY TRUST; ZIONS FIRST NATIONAL BANK; WELLS FARGO BANK, Defendants.	ORDER OF FORECLOSURE AND DECREE OF SALE Case No. 1:09-CV-166-TC

On February 3, 2012, the court granted summary judgment against Defendants. The judgment imposes federal tax assessments against David O. and Lori R. Hendrickson ("Hendricksons") and forecloses federal tax liens against the Hendricksons against the real property located at 1660 E Wasatch Drive, Ogden, Utah 84403, and legally described as follows:

> All of Lot 6, LAKEVIEW RIDGE SUBDIVISION NO. 1, Ogden City, Weber County, Utah, according to the official plat thereof, on file and of record in the Weber County Recorder's Office

(the Property). Based on the judgment, and statutory authority under 28 U.S.C. §§ 2001 and 2002 and 26 U.S.C. §§ 7402 and 7403, the court ORDERS as follows:

1. The United States Marshal for the District of Utah, his representative, or an Internal Revenue Service Property Appraisal and Liquidation Specialist ("PALS"), is authorized

and directed under 28 U.S.C. §§ 2001 and 2002 to offer the Property for public sale and to sell the Property. The United States may choose either the United States Marshal or a PALS to carry out the sale under this order and shall make the arrangements for any sale as set forth in this Order.

2. The Marshal, his representative, or a PALS representative is authorized to have free access to the Property and to take all actions necessary to preserve the Property, including, but not limited to, retaining a locksmith or other person to change or install locks or other security devices on any part of the Property, until the deed to the Property is delivered to the ultimate purchaser.

3. The terms and conditions of the sale are as follows:

a. The sale of the Property shall be free and clear of any interests of the Hendricksons, D.L. Family Trust, Wells Fargo Bank, and Zions First National Bank;

b. The sale shall be subject to building lines, if established, all laws, ordinances, and governmental regulations (including building and zoning ordinances) affecting the Property, and easements and restrictions of record, if any;

c. The sale shall be held at the courthouse of the county or city in which the Property is located, on the Property's premises, or at any other place in accordance with the provisions of 28 U.S.C. §§ 2001 and 2002;

d. The date and time for sale are to be announced by the United States Marshal, his representative, or a PALS;

e. Notice of the sale shall be published once a week for at least four consecutive weeks before the sale in at least one newspaper regularly issued and of general circulation in Salt Lake County, and, at the discretion of the Marshal, his representative, or a PALS, by any other notice deemed appropriate. The notice shall contain a description of the Property and shall contain the terms and conditions of sale in this order of sale;

f. The minimum bid will be set by the Internal Revenue Service for the Property. If the minimum bid is not met or exceeded, the Marshal, his representative, or a PALS may, without further permission of this Court, and under the terms and conditions in this order of sale, hold a new public sale, if necessary, and reduce the minimum bid or sell to the highest bidder;

g. The successful bidder for the Property shall be required to deposit at the time of the same with the Marshal, his representative, or a PALS a minimum of ten percent of the bid, with the deposit to be made by certified or cashier's check or cash payable to the United States District Court for the District of Utah. Before being permitted to bid at the sale, bidders shall display to the Marshal, his representative, or a PALS proof that they are able to comply with this requirement. No bids will be received from any person who has not presented proof that, if that person is the successful bidder, that person can make the deposit required by this

order of sale;

h. The balance of the purchase price for the Property is to be paid to the United States Marshall or a PALS (whichever person is conducting the sale) within twenty days after the date the bid is accepted, by a certified or cashier's check payable to the United States District Court for the District of Utah. If the bidder fails to fulfill this requirement, the deposit shall be forfeited and shall be applied to cover the expenses of the sale, including commissions due under 28 U.S.C. § 1921(c), with any amount remaining to be applied to the income tax liabilities of the Hendricksons at issue herein. The Property shall be again offered for sale under the terms and conditions of this order of sale. The United States may bid as a credit against its judgment without tender of cash;

i. The sale of the Property shall be subject to confirmation by this court. The Marshal or a PALS shall file a report of sale with the court, together with a proposed order of confirmation of sale and proposed deed, within forty days from the date of receipt of the balance of the purchase price;

j. On confirmation of the sale, the Marshal or PALS shall execute and deliver a deed of judicial sale conveying the Property to the purchaser;

k. On confirmation of the sale, all interests in, liens against, or claims to, the Property that are held or asserted by all parties to this action are discharged and extinguished;

l. On confirmation of the sale, the recorder of deeds, Weber County, Utah,

shall cause transfer of the Property to be reflected on that county's register of title; and

m. The sale is ordered pursuant to 28 U.S.C. § 2001, and is made without right of redemption.

4. Until the Property is sold, the Hendricksons and their relatives shall take all reasonable steps necessary to preserve the Property (including all buildings, improvements, fixtures and appurtenances on the property) in its current condition including, without limitation, maintaining a fire and casualty insurance policy. They shall neither commit waste against the Property nor cause or permit anyone else to do so. They shall neither do anything that tends to reduce the value or marketability of the Property nor cause or permit anyone else to do so. They shall not record any instruments, publish any notice, or take any other action (such as running newspaper advertisements or posting signs) that may directly or indirectly tend to adversely affect the value of the Property or that may tend to deter or discourage potential bidders from participating in the public auction, nor shall they cause or permit anyone else to do so.

5. All persons occupying the Property shall leave and vacate the Property permanently within sixty days of the date of this Order, each taking his or her personal property (but leaving all improvements, buildings, fixtures, and appurtenances to the Property). If any person fails or refuses to leave and vacate the Property by the time specified in this Order, the United States Marshal's Office, alone, is authorized to take whatever action it deems appropriate to remove such person from the premises, whether or not the sale of such Property is being conducted by a PALS. Specifically, the United States Marshal (or his designee) is authorized and directed to take all actions necessary to enter the Property at any time of the day or night and

evict and eject all unauthorized persons located there, including the Hendricksons, and any occupants. To accomplish this and to otherwise enforce this Order, the United States Marshal shall be authorized to enter the Property and any and all structures and vehicles located thereon, and to use force as necessary. When the United States Marshal concludes that all unauthorized persons have vacated, or been evicted from the Property, he shall relinquish possession and custody of the Property to the Internal Revenue Service, or its designee. No person shall be permitted to return to the Property or remain thereon without the express written authorization by the United States Marshal, the Internal Revenue Service, the United States Department of Justice, or their respective representatives or designees. Unauthorized persons who re-enter the Property during the time this Order is in effect may be ejected by the United States Marshal without further order of the court.

6. If any person fails or refuses to remove his or her personal property from the Property by the time specified herein, the personal property remaining on the Property thereafter is deemed forfeited and abandoned, and the United States Marshal's Office is authorized to remove it and to dispose of it in any manner it deems appropriate, including sale, in which case the proceeds of the sale are to be applied first to the expenses of sale and the balance to be paid into the court for further distribution.

7. The proceeds arising from sale are to be paid to the clerk of this court and applied as far as they shall be sufficient to the following items, in the order specified:

a. To the United States Marshal or the PALS (whichever person conducted the sale as arranged by the United States) for the costs of the sale;

b. To all taxes unpaid and matured that are owed (to county, city or school

district) for real property taxes on the Property and any other unpaid local taxes; and

c. To Wells Fargo Bank, pursuant to the stipulation regarding priority filed in this action (Dkt. No. 18);

d. To Zions First National Bank, pursuant to the stipulation regarding priority filed in this action (Dkt. No. 17);

e. To Lori R. Hendrickson, for her one-half interest in any proceeds remaining after the above disbursement, less the amount due to the United States for the unpaid balance of the Hendricksons' federal income tax liabilities for the years 1991 and 1993, plus all interest and penalties due and owing thereon;

f. To the United States, without reduction for registry fees,[1] for the unpaid balance of the Hendricksons' federal income tax liabilities for the years 1991 and 1993, plus all interest and penalties due and owing thereon, and for the unpaid balance of David O. Hendrickson's federal income tax liabilities for the years 1995-2000, plus all interest and penalties due and owing theron; and

[1] Any registry fees charged against the registry funds shall be included in the funds disbursed to the United States. "In cases where the United States Government is a party to the action underlying the registry investment, the funds initially withheld in payment of the [registry] fee may be restored to the United States upon application filed with the court by . . . government counsel." 56 FR 56356-01; see also Housekey Fin. Corp. v. Hofer, No. CTV-F-00-6054REC, 2001 WL 429821 at *1 (E.D. Cal. Mar. 23, 2001) (ordering the Clerk to disburse all registry funds to the United States "undiminished by any registry fees assessed").

g. Any balance remaining after the above payments shall be held by the Clerk until further order of the Court.

SO ORDERED this 3rd day of February, 2012.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

AO 450 (Rev.5/85) Judgment in a Civil Case

United States District Court

Central Division for the District of Utah

USA

v.

David O. Hendrickson, et al.

JUDGMENT IN A CIVIL CASE

Case Number: 1:09cv00166 TC

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment is entered in favor of the United States and against David O. and Lori R. Hendrickson for the unpaid balance of federal income taxes for the years 1991 and 1993 in the amount of $70,138.32, as of November 15, 2011, plus further accrued penalties and interest accruing after November 15, 2011, pursuant to 26 U.S.C. §§ 6601, 6621, and 6622, and 28 U.S.C. § 1961(c), until paid;
that judgment is entered in favor of the United States and against David O. Hendrickson for the unpaid balance of federal income taxes for the years 1995-2000 in the amount of $2,522,391.34, as of November 15, 2011, plus further accrued penalties and interest accruing after November 15, 2011, pursuant to 26 U.S.C. §§ 6601, 6621, and 6622, and 28 U.S.C. § 1961(c), until paid; and that the United States' tax liens against David O. and Lori R. Hendrickson for the 1991 and 1993 tax years, and against David O. Hendrickson for the 1995-2000 tax years attached to the parcel of real property located at 1660 E Wasatch Drive, Ogden, Utah 84403 and legally described as follows:

> All of Lot 6, LAKEVIEW RIDGE SUBDIVISION NO. 1, Ogden City, Weber County, Utah, according to the official plat thereof, on file and of record in the Weber County Recorder's Office.

(the Property) are hereby foreclosed.

The court orders that D.L. Family Trust has no interest in the Property

February 6, 2012
Date

D. Mark Jones
Clerk of Court

(By) Deputy Clerk

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA Plaintiff, v. TERRY L. SMITH, both individually and as trustee for the TERRY L. SMITH AND LOUISE A. SMITH FAMILY REVOCABLE LIVING TRUST; LOUISE A. SMITH, both individually and as trustee for the TERRY L. SMITH AND LOUISE A. SMITH FAMILY REVOCABLE LIVING TRUST; BLUE BEAR COMPANY; HSBC BANK NEVADA, N.A.; and JEFFERSON COUNTY Defendants.	Civil No. 11-05101-RJB ORDER GRANTING UNITED STATES' MOTION TO COMPEL THE DEPOSITIONS OF TERRY L. SMITH AND LOUISE A. SMITH AND EXTENDING THE DISCOVERY AND DISPOSITIVE MOTION DEADLINES

This matter comes before the court on the United States' Motion to Compel the Depositions of Terry L. Smith and Louise A. Smith and To Extend the Discovery and Dispositive Motion Deadlines (Dkt. 58). Defendants have not filed an opposition to the motion. The court has considered the motion and the records and files herein.

IT IS HEREBY ORDERED THAT the United States' Motion to Compel the Depositions of Terry L. Smith and Louise A. Smith, both in their individual capacities and their capacities as trustees of the Terry L. Smith and Louise A. Smith Family Revocable Trust, is GRANTED. Further, Terry L. Smith, and Louise A. Smith, both in their individual capacities and their capacities as trustees of the Terry L. Smith and Louise A. Smith Family Revocable Trust, are put on notice that their failure to

United States Department of Justice
Tax Division
P.O. Box 683
Washington, D.C. 20044
(202) 353-1844

comply with this order may result in a rendering of a default judgment against them under Fed. R. Civ. P. 37(b)(2)(A).

IT IS FURTHER ORDERED THAT the United States's application for reasonable expenses and attorney's fees is GRANTED pursuant to Federal Rule of Civil Procedure 37(d)(3). Within twenty-one days of this ORDER, the United States will submit a declaration its expenses and attorney's fees for review and approval by the Court. Objections to specific costs or fees must be filed fourteen days thereafter.

IT IS FURTHER ORDERED THAT the Court's Minute Order (Dkt. 42) is hereby amended such that the close of discovery is now extended to April 9, 2012, and the deadline for submitting dispositive motions is now extended to April 27, 2012.

DATED this 6th day of February, 2012.

Robert J Bryan
United States District Judge

JOHN A. DICICCO
Principal Deputy Assistant Attorney General
/s/ Quinn P. Harrington
MICHAEL P. HATZMICHALIS
QUINN P. HARRINGTON
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JENNY A. DURKAN

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

KING MOUNTAIN TOBACCO COMPANY, INC.; DELBERT WHEELER, SR.; and THE CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, Plaintiffs, v. ALCOHOL AND TOBACCO TAX AND TRADE BUREAU; JOHN J. MANFREDA, in his official capacity as Administrator of the Alcohol and Tobacco Tax and Trade Bureau; UNITED STATES DEPARTMENT OF THE TREASURY; and TIMOTHY GEITHNER, in his official capacity as the Secretary of the United States Dept. of the Treasury, Defendants.	NO: CV-11-3038-RMP ORDER DENYING PLAINTIFFS' MOTION TO CONSOLIDATE

Before the Court is the Plaintiffs' motion to consolidate hearings on dispositive motions. ECF No. 58. The Court has reviewed the motion, the relevant filings, and is fully informed.

On October 12, 2011, the United States moved this Court to dismiss the above-caption complaint asserting that this Court lacks subject matter jurisdiction. ECF No. 24. The United States noted the motion for hearing with oral argument on February 10, 2012. ECF No. 25. On January 19, 2012, the Plaintiffs filed their motion for partial summary judgment. ECF No. 52. The Plaintiffs noted their summary judgment motion for hearing on April 25, 2012. The Plaintiffs simultaneously moved this Court to continue the February 10, 2012, hearing on the United States' motion to dismiss and to consolidate both motions for a single hearing on April 25, 2012. The United States opposes consolidation and, in its response, suggested that the appropriate course of action would be to stay resolution of the Plaintiffs' motion until the Defendants' motion is resolved.

While there may be some overlap in the subjects discussed in both the Defendants' motion to dismiss and the Plaintiffs' motion for partial summary judgment, the Court concludes that the jurisdictional issues should be resolved before the summary judgment motion is addressed. Subject Matter jurisdiction is a threshold matter. *Baryton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1135 (9th Cir. 2010). By delaying the hearing on the jurisdictional question so that

the Court may concurrently consider issues on the merits, the Court risks spending judicial and the parties' resources on matters over which it may not have jurisdiction.

In order to avoid this risk, the Court concludes that the best course of action is to leave the motion to dismiss as currently set, strike the current hearing date for the Plaintiffs' motion for partial summary judgment, and stay deadlines on the Plaintiffs' summary judgment motion until the Court resolves the Defendants' motion to dismiss.

Accordingly, **IT IS HEREBY ORDERED:**

1. The Plaintiffs' motion to expedite, **ECF No. 62**, is **GRANTED**.
2. The Plaintiffs' motion to consolidate hearings, **ECF No. 58**, is **DENIED**.
3. The hearing on the Plaintiffs' motion for partial summary judgment**,** **ECF No. 52**, currently set for **April 25, 2012**, is **STRICKEN**.
4. All briefing and other deadlines regarding the Plaintiffs' motion for partial summary judgment, **ECF No. 52**, are **STAYED** pending resolution of the Defendants' motion to dismiss, **ECF No. 24**.

6. In its order disposing of the Defendants' motion to dismiss, the Court will set out a briefing schedule and note a hearing on the Plaintiffs' motion if necessary.

IT IS SO ORDERED.

The District Court Executive is hereby directed to enter this Order and to provide copies to counsel.

DATED this 6th of February 2012.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In re:

AmericanWest Bancorporation

Debtor(s)

Case Number: **10-06097-PCW**

Chapter: **11**

SCHEDULING ORDER

THIS MATTER came on for hearing before the Honorable Patricia C. Williams on February 02, 2012 for a Continued Hearing - Status on Holdco's Emergency Motion to Conditionally Approve Disclosure Statement, Continued Hearing on Status on Debtor's Confirmation. The parties agreed on the following dates and deadlines.

IT IS HEREBY ORDERED:

1) A Status Conference is scheduled on March 8, 2012 at 10:00 a.m. via telephone conference call to be initiated by the parties calling 509-353-3183.

2) Holdco shall file and serve its brief regarding the issue of Holdco's standing no later than March 14, 2012.

3) Any reply briefs shall be filed and served no later than March 20, 2012.

4) Holdco's responsive brief shall be filed and served no later than March 22, 2012.

5) The hearing on the standing issue is scheduled on March 23, 2012 at 10:00 a.m. in open court (may change to a phone conference).

6) The hearing on Holdco's Disclosure Statement is scheduled on April 26, 2012 at 10:00 a.m. in open court (PST) (904 W. Riverside Ave, Spokane Washington). All parties shall be at the court 30 minutes prior to the commencement of the hearing to go over exhibit and witness lists.

7) The parties shall exchange exhibit and witness lists regarding issues relevant to approval of the Disclose Statement no later than April 23, 2012 with a copy to be emailed to Jolene_Britton@waeb.uscourts.gov.

Pursuant to LBR 9070-1, all exhibits shall be pre-marked and listed on the Court's local form Exhibit Index. A copy of the Exhibit Index is available at http://www.waeb.uscourts.gov under Forms. The parties shall provide an original set of exhibits for the witness stand, a copy for each counsel of record, and a copy for the bench. The moving party is assigned letters and the responding party is assigned numbers for exhibit identification.

Patricia C. Williams
Bankruptcy Judge

02/06/2012 09:45:32

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re:	)	Case No. 11-33025
William E. Lewinski, Jr., and Cheryl Lewinski,	)	Chapter 13
Debtors.	)	Judge Speer

ORDER

The Creditor United States' Consented-to Motion to Continue Hearing on Debtors' Objection to Claim of Internal Revenue Service Scheduled for February 29, 2012, is GRANTED.

It is ORDERED that the hearing on debtor's Objection, previously scheduled for February 29, 2012, at 1:30 pm, is continued until a date to be determined after resolution of the Chapter 13 Trustee's pending Motion to Dismiss for Failure to Make Plan Payments.

Dated: 2/6/12

RICHARD L. SPEER
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA Petitioner, v. BRAD J. MONTAGNE Respondent.	)))))))))	Civil No. 12mc00011 PJS/JJK **ORDER TO SHOW CAUSE**

Upon the Petition To Enforce Internal Revenue Service Summons and the Exhibits attached thereto (Doc. No. 1), including the Declaration of Richard A. Wallin of the Internal Revenue Service, **IT IS HEREBY ORDERED** that Respondent, Brad J. Montagne, appear at the United States District Court for the District of Minnesota, Warren E. Burger Federal Courthouse, **Courtroom 6A**, 316 North Robert Street, St. Paul, Minnesota, before the undersigned, on **March 15, 2012, at 9:30 a.m**., to show cause why Respondent should not be compelled to obey the Internal Revenue Service summons served upon Respondent on November 7, 2011.

IT IS HEREBY FURTHER ORDERED that a copy of this Order, together with the Petition and Exhibits thereto, be personally served on Brad J. Montagne by an official of the Internal Revenue Service within thirty (30) days of the date of this Order.

IT IS HEREBY FURTHER ORDERED within fourteen (14) days of service of copies of this Order, the Petition, and Exhibits, the Respondent shall file and

serve a written response to the Petition supported by appropriate affidavits, as well as any motions the Respondent desires to make. All motions and issues raised by the pleadings will be considered on the return date of this Order. Only those issues raised by motion or brought into controversy by the responsive pleadings and supported by affidavit will be considered at the return of this Order. Any uncontested allegations in the petition shall be considered admitted.

Dated: February 6, 2012

s/ Jeffrey J. Keyes
JEFFREY J. KEYES
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA

In the Matter of the Tax Indebtness of CHARLES H. ROLFES	))))	Misc. No. 12-2 (JRT/JSM)

NOTICE AND ORDER TO SHOW CAUSE

You, Charles H. Rolfes, are hereby notified that the United States has petitioned this Court for an Order allowing the Internal Revenue Service ("IRS") to LEVY upon the real property located at 7606 Carnelian Lane, Eden Prairie, Minnesota in order to sell your interest to satisfy part or all of your unpaid trust fund recovery taxes under 26 U.S.C. § 6672, plus interest and penalties, according to law, in the following amounts.

Tax Period	Initial Assessment	Amount Owed with Interest and Penalties (as of 01/13/12)
4th Qtr., 2000	$65,644.14	$50,768.99
1st Qtr., 2001	$24,098.99	$38,908.46
Total	$89,743.13	$89,677.45

This Court has examined the United States' Petition and accompanying Declaration of Revenue Officer Anne Ohm and it is hereby ORDERED that you have 25 days from the date of this Order to file with the Court a written **OBJECTION TO PETITION**. Any written **OBJECTION TO PETITION** should demonstrate either that:

A. Your liabilities have been satisfied; OR

B. You have other assets from which the unpaid tax liabilities can be satisfied; OR

C. Applicable laws and administrative procedures relevant to the levy were not followed by the IRS.

It is FURTHER ORDERED that if you file a written **OBJECTION TO PETITION**, the Court will hold a hearing to determine the facts of this case. The hearing will be scheduled upon the filing of your **OBJECTION TO PETITION** if one is filed.

It is FURTHER ORDERED that, in addition to filing your **OBJECTION TO PETITION** with the Court, you must also mail a copy of your **OBJECTION TO PETITION** to the attorney for the United States, James C. Strong, U.S. Department of Justice, Tax Division, P.O. Box 7238, Ben Franklin Station, Washington, D.C. 20044, on or before the filing date.

If you do not file an OBJECTION TO PETITION within 25 days of the date of this order, of if you file an OBJECTION TO PETITION but fail to appear before the Court for the hearing, once scheduled, the Court will enter an ORDER APPROVING AN INTERNAL REVENUE SERVICE LEVY ON THE REAL PROPERTY LOCATED AT 7606 Carnelian Lane, Eden Prairie, Minnesota.

It is FURTHER ORDERED that a copy of this NOTICE AND ORDER TO SHOW CAUSE, together with the United States' Petition and accompanying Declaration of Revenue Officer Anne Ohm, shall be served upon Charles H. Rolfes within ten days of the date of this Order by the U.S. Marshal's Service, by any manner of service described in Rule 4(e)(1) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED this 6th day of February, 2012.

s/ Janie S. Mayeron
JANIE S. MARYERON
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Thomas L. Spear, Plaintiff, v. United States of America, Defendant.	CIV. 11-1742-PHX-PGR **SCHEDULING ORDER**

A Scheduling Conference having been held before this Court on February 6, 2012,

IT IS ORDERED that:

(1) Motions pursuant to Fed.R.Civ.P. 12(b), motions to amend pleadings, and motions to join additional parties shall be filed no later than **February 27, 2012**.[1]

(2) Plaintiff shall disclose its expert witnesses, if any, and their reports in compliance with Fed.R.Civ.P. 26(a)(2)(B) no later than **May 29, 2012**. Defendants shall disclose their expert witnesses and reports no later than **June 12, 2012**. Rebuttal experts and their reports, if any, shall be disclosed no later than **July 11, 2012**. Expert witness depositions shall be completed by **August 13, 2012**.

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[1] In order to conserve scarce judicial resources, the parties are directed to promptly inform the Court if they are involved in negotiations which they reasonably believe may make the resolution of any pending motion unnecessary.

Counsel are advised that the Chambers' e-mail box, established pursuant to the Court's CM/ECF rules, is to be used solely for the purpose of sending proposed orders to the Court, **and is NOT to be used as a means of communicating with Chambers' staff**.

(3) All discovery, including answers to interrogatories, shall be completed by **September 24, 2012**, and supplemental disclosures and discovery responses shall thereafter be made as required by Fed.R.Civ.P. 26(e). Discovery which cannot be timely responded to prior to the discovery deadline will be met with disfavor, and could result in denial of an extension, exclusion of evidence, or the imposition of other sanctions. Parties are directed to LRCiv 7.2(j), which prohibits filing discovery-related motions unless the parties have first met to resolve any discovery difficulties. If parties cannot reach a resolution of discovery disputes arising during depositions, they are directed to arrange a conference call with the Court to resolve the disputes.

(4) All dispositive motions shall be filed by **October 29, 2012**.

(5) A Joint Pretrial Statement shall be filed by **December 19, 2012**. If dispositive motions are filed, then this Joint Pretrial Statement shall be due either on the above date or 30 days following the resolution of the motions, whichever is later. The content of the Joint Pretrial Statement shall include, but not be limited to, that prescribed in a standard form of Joint Pretrial Statement provided to the parties. The parties shall augment the Joint Pretrial Statement as necessary so it contains all of the pretrial disclosures as defined and required by Fed.R.Civ.P. 26(a)(3). It shall be the responsibility of the plaintiff to timely initiate the process of drafting the Joint Pretrial Statement and the plaintiff shall submit its draft of the Joint Pretrial Statement to the defendant no later than ten business days prior to the date for filing the Joint Pretrial Statement.

(6) Motions in limine shall be filed no later than the date of filing of the Joint Pretrial Statement. Responses to motions in limine are due ten business days after service. No replies are permitted. The hearing on the motions in limine, if one is permitted by the Court, will take place at the time of the Pretrial Conference. No motion in limine shall be filed unless a statement of moving counsel is attached thereto certifying that after personal consultation and sincere efforts to do so, counsel have been unable to satisfactorily resolve the matter.

(7) The attorneys for each party who will be responsible for trial of the lawsuit shall appear and participate in a final Pretrial Conference in Courtroom 601 of the Sandra Day O'Connor United States Courthouse in Phoenix, Arizona, on **Monday, January 7, 2013, at 11:00 a.m.** Because Pretrial Conferences are held for the parties' benefit, and further because the parties' presence will facilitate frank discussion of the pertinent issues in the lawsuit, each party or a representative with binding settlement authority shall attend the Pretrial Conference. If dispositive motions are filed, the Court will continue the date of the Pretrial Conference, if one is still necessary, until after the resolution of such motions and the filing of a Joint Pretrial Statement.

(8) Unless otherwise ordered by the Court, the parties' trial briefs, proposed findings of fact and conclusions of law or proposed jury instructions and proposed voir dire questions shall be filed no later than **January 17, 2013**.[2]

(9) Unless otherwise ordered by the Court, the trial of this action shall commence on **Tuesday, February 5, 2013, at 9:00 a.m.** in Courtroom 601 of the Sandra Day O'Connor United States Courthouse in Phoenix, Arizona.

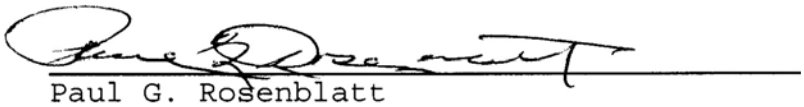
(10) **The parties are cautioned that the deadlines set in this Scheduling Order shall be enforced, and that the Court will not entertain any stipulations to continue them—any request to extend any of the deadlines set herein must be made by means**

[2] The trial brief shall raise all significant disputed issues of law and fact, including foreseeable procedural and evidentiary issues, and shall set forth the party's positions thereon with supporting arguments and authorities.

A form with instructions regarding the marking, listing and custody of exhibits, and a form with instructions regarding the submission of jury instructions, shall be given to counsel at the Pretrial Conference.

of a motion, joint or otherwise, and no such motion shall be granted unless very good cause is shown.

DATED this 6th day of February, 2012.



Paul G. Rosenblatt
United States District Judge

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GREGORY S TIFT,

Plaintiff,

v.

INTERNAL REVENUE SERVICE, et al.,

Defendants.

CASE NO. C11-1673-JCC

ORDER

This matter comes before the Court on the motion to dismiss of Defendant Internal Revenue Service. (Dkt. No. 11.) This motion was originally noted for December 23, 2011. On December 21, 2011, Plaintiff moved for additional time to respond to the motion, indicating that he needed additional time to review the appropriate rules and procedures. (Dkt. No. 16.) The Court granted the motion and re-noted Defendant's motion for January 13, 2012. (Dkt. No. 18.) Plaintiff has failed to respond to Defendant's motion. Pursuant to Local Rule 7(b)(2), the Court deems Plaintiff's failure to respond as an admission that the motion to dismiss has merit. Accordingly, the motion is GRANTED. (Dkt. No. 11.) This matter is dismissed without prejudice.

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The Clerk is DIRECTED to CLOSE the case.

DATED this 6th day of February 2012.

John C. Coughenour
UNITED STATES DISTRICT JUDGE