

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

First State Bank and Trust,
a Minnesota banking corporation,

Civil No. 11-2804 (DWF/TNL)

Plaintiff,

**ORDER FOR PRIORITY AND
FOR PARTIAL DISMISSAL
OF DEFENDANT, UNITED STATES
OF AMERICA, DEPARTMENT
OF TREASURY-INTERNAL
REVENUE SERVICE**

v.

The Vessel, *B & B on the River*, U.S. Official
No. 1196593, *in rem*, Verne B. Porter,
Rebekah L. Porter, and United States of
America, Department of Treasury-Internal
Revenue Service,

Defendants.

This matter came on before the undersigned upon stipulation by Plaintiff, First State Bank and Trust, a Minnesota banking corporation (“First State”), and Defendant, United States of America, Department of Treasury-Internal Revenue Service (“IRS”) (Doc. No. [23]). Pursuant to the Stipulation of Priority,

IT IS HEREBY ORDERED:

1. The interest of Plaintiff, First State Bank and Trust, evidenced by that certain preferred ship mortgage, security agreement and financing statement made by Defendant, Verne B. Porter, in favor of Plaintiff, First State Bank and Trust, dated February 22, 2007, and recorded with the U.S. Department of Homeland Security, U.S. Coast Guard on March 2, 2007, as Batch No. 578020, Document ID 6760973, was, and is, prior and superior to any right, title, interest, lien or claim which may be found in favor of Defendant, the United States of America, Department of Treasury-Internal Revenue

Service, in this or any other action affecting the vessel, *B & B on the River*, U.S. Official No. 1196593, Hull No. TKZ00932A898 ("Vessel"), together with:

(a) all of the sails, fittings, structures, and other improvements now standing or at any time hereafter constructed or placed upon the vessel; and (b) all heating, plumbing, and lighting apparatus and fixtures, boilers, furnaces, oil burners, communication and navigation systems, and motors, engines, and machinery, electrical equipment, air conditioning apparatus, water and gas apparatus, pipes, ranges, water heaters, mirrors, mantels, refrigerating plant and refrigerators, water softeners, carpets, carpeting, cooking apparatus, appliances and appurtenances, furniture, furnishings, maintenance equipment, storm windows and doors, window shades, and blinds, locks, and all other fixtures, machinery, equipment, appliances, and personal property of every kind and nature whatsoever now or hereafter owned by Mortgagor specifically excluding property owned by any tenant of the Mortgaged property (as hereinafter defined) and further excluding any equipment or trade fixtures for which seller financing is provided, located in, on, or about, or used or intended to be used with or in connection with the use, operation, or enjoyment of the vessel, including all extensions, additions, improvements, betterments, renewals, and replacements of any of the foregoing and all the right, title, and interest of Mortgagor inane such personal property or fixtures, together with the benefit of any deposits or payments now or hereafter made by Mortgagor or on its behalf; and (c) all hereditaments, rights, privileges, and appurtenances now or hereafter belonging, attached, or in any way pertaining to the vessel or to any structure, or improvement now or hereafter located therein (all of the foregoing, together with the "whole" of the vessel, are hereinafter referred to as the "Mortgaged Property").

2. Defendant, United States of America, Department of Treasury-Internal Revenue Service, its successors and assigns is hereby **DISMISSED WITHOUT PREJUDICE**, and without costs or disbursements to any party.

Dated: February 7, 2012

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

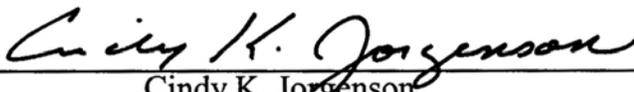
WILLIAM WAGNER and
SHARON WAGNER, husband and wife,)
Plaintiffs,)
vs.)
UNITED STATES OF AMERICA,)
Defendant.)

No. CV-11-0677-CKJ

ORDER

Currently pending before the Court is the United States' Unopposed Motion for Extension of Time to File a Responsive Pleading [Doc. 7]. Having reviewed the same, IT IS HEREBY ORDERED that the United States' Unopposed Motion for Extension of Time to File a Responsive Pleading [Doc. 7] is GRANTED. IT IS FURTHER ORDERED that Defendant United States of America shall Answer or otherwise respond to Plaintiffs' Complaint on or before **March 1, 2012**.

DATED this 8th day of February, 2012.


Cindy K. Jorgenson
United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,
Plaintiff,
v.
Gino Carlucci,
Defendant.

CR 10-464-001-PHX-KHV

ORDER

The Court having considered Defendant Carlucci's Motion for Extension of Time to Submit Objections to Draft Presentence Investigation Report (Third Request), for good cause shown and noting that counsel for the government does not object to the relief sought, it is hereby

ORDERED that Defendant Carlucci's Motion For Extension Of Time To Submit Objections To Draft Presentence Investigation Report (Third Request) be and hereby is **SUSTAINED**.

IT IS FURTHER ORDERED that defendant Carlucci's objections/responses to the draft presentence investigation report shall be submitted by **February 17, 2012**.

Dated this 6th day of February, 2012 at Kansas City, Kansas.

s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA)
)
 Plaintiff,)
)
 v.) Case No. 11-0484-CV-W-HFS
FRANK FALCO, et al.,)
)
)
 Defendants.)

SCHEDULING ORDER

Pursuant to Local Rule 16.1(d) and on the direction of this court, the parties filed their proposed scheduling order on February 3, 2012. After taking the matter under advisement, the court hereby establishes the following deadlines in this matter. Accordingly, it is hereby

ORDERED that:

1. All discovery should be commenced and served in time to be completed on or before September 28, 2012.
2. All discovery motions should be filed no later than September 28, 2012.
3. All dispositive motions should be filed no later than October 23, 2012. **The parties are requested to submit courtesy paper copies to chambers of all dispositive motions and all briefing associated with such motions. Lengthy and numerous exhibits must be tabbed and bound.**
4. On or before November 16, 2012, the parties are to file witness and exhibit lists, together with statements of anticipated length of the trial and whether a jury trial should be scheduled.

Lists shall include all potential witnesses and exhibits except those to be used for the sole purpose of unanticipated rebuttal or impeachment.

5. The parties are to meet, in person, on or before November 26, 2012, to produce each of their exhibits for inspection and agree on all exhibits for which objection will be waived as to admissibility on the ground of lack of identification.
6. The parties are to meet, in person, on or before December 6, 2012, to agree upon a proposed pretrial order containing the following:
 - a. a statement of the nature of the action, including a designation of the parties and a list of the pleadings raising the issues,
 - b. a statement of the facts and legal authority upon which federal jurisdiction is based,
 - c. a stipulation of uncontroverted facts,
 - d. a list of reservations by any party to the stipulation of uncontroverted facts,
 - e. a list of facts that, although not admitted, are not to be contested at trial by evidence to the contrary,
 - f. a list of exhibits expected to be offered at trial, with a description of each sufficient for identification, and a statement of all admissions by and all issues between any of the parties as to the genuineness thereof, together with a statement of any objections reserved as to the admissibility in evidence thereof.
 - g. In addition, the parties are strongly encouraged, although not required, to include in the proposed pretrial order a statement of factual and legal issues remaining to be litigated.
7. The parties are to file the proposed pretrial order on or before January 17, 2013. If agreement is impossible, separate pretrial orders should not be filed, but any disputes

concerning the proposed order should be set forth in the proposed pretrial order. The proposed pretrial order should be filed in accordance with the general rules governing the filing of pleadings, and **the parties are requested to submit a courtesy paper copy to chambers along with courtesy paper copies of the relevant pleadings identified in the proposed pretrial order.**

8. As the undersigned does not automatically receive copies of pleadings and other documents filed in the CM/ECF system, the parties are also requested to submit courtesy paper copies to chambers of all documents filed during trial or within three days prior to trial.
9. The parties have informed the court that they anticipate that three days will be required to try this action. Since the undersigned no longer presides over jury trials, this matter will be set for trial after any dispositive motions have been resolved. If neither party intends to file a dispositive motion, then the parties should inform the Court that no such motions will be filed and request a trial date.

SO ORDERED.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

February 8, 2012

Kansas City, Missouri

DATED this 8th day of February, 2012.

BY THE COURT:

A handwritten signature in black ink, reading "Brooke C. Wells". The signature is written in a cursive style with a large initial "B".

BROOKE C. WELLS

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND
SOUTHERN DIVISION

FILED
U.S. DISTRICT COURT
DISTRICT OF MARYLAND

2012 FEB -8 P 1:09

CLERK'S OFFICE
AT BALTIMORE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 RELIABLE LIMOUSINE SERVICE, LLC, et al.,)
)
 Defendants.)

BY: _____

No. 8:11-cv-03383-JFM

AGREED ORDER FOR PERMANENT INJUNCTION

In accordance with Fed. R. Civ. P. 65, the Court makes the following findings of fact and conclusions of law and enters this order for permanent injunction against all defendants, resolving Count III of the United States' Complaint.

Standards for Injunction

In order to obtain an injunction under section 7402(a) of the Internal Revenue Code, the United States must show that an injunction is "necessary or appropriate for the enforcement of the internal revenue laws." 26 U.S.C. § 7402(a). Alternatively, the court may issue an injunction based upon the traditional equity criteria of: (1) whether the United States has a strong likelihood of success on the merits; (2) whether the United States would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.

Findings of Fact

Based upon the evidence presented by the parties, the Court finds as follows:

1. Defendant Paul Rodberg has operated a limousine service business located at 11941 Tech Road, Silver Spring, Maryland under the name Reliable Limousine, Inc. ("RLI") since 1996.
2. As president of RLI, Rodberg was responsible for RLI's federal tax obligations.
3. Beginning 2001, RLI failed to timely file its federal tax returns. Specifically with respect to the federal employment tax return (Form 941), RLI did not file the return for the tax periods ending 12/31/2002, 3/31/2003 and 12/31/2008, and filed it late for the tax periods ending 9/30/2001 through 9/30/2002, and 6/30/2003 through 6/30/2005. With respect to the federal unemployment tax return (Form 940), RLI did not file the return for tax year 2008, and filed it late for tax years 2001 through 2004.
4. RLI also failed to fully pay its federal employment and unemployment taxes between years 2001 and 2008, and accrued over \$2.9 million in federal tax liabilities, including penalties and interest. Specifically, RLI failed to fully pay its federal employment taxes for the tax periods ending 12/31/2001 through 9/30/2002, 6/30/2003 through 9/30/2005, 12/31/2006, and 12/31/2007. It also failed to fully pay its federal unemployment taxes for the tax years 2001 through 2004.
5. Beginning 2003, the Internal Revenue Service ("IRS") has devoted a considerable

amount of its resources to encourage RLI's voluntary compliance and to administratively collect its delinquent taxes.

6. The IRS's collection efforts were largely unsuccessful, and RLI's unpaid federal tax liabilities continued to increase.
7. In 2009, without satisfying RLI's federal tax debts and without notifying the IRS, Rodberg began operating his limousine service business under a new name, Reliable Limousine Service, LLC ("RLSL"), a successor to RLI, with a new employer identification number.
8. As the sole member of RLSL, Rodberg is responsible for RLSL's federal tax obligations.
9. RLSL has not filed a single federal tax return and has not paid any federal taxes except for a few payroll tax deposits during the tax periods ending 9/30/2009 and 3/31/2011.
10. On December 7, 2011, Rodberg formed yet another business entity, Reliable Limousine Bus Service, LLC ("RLBS"), to take over the business operation of RLSL, beginning January 1, 2012.
11. Rodberg also controls RLBS and is responsible for its compliance with the internal revenue laws.
12. Based on the history of non-compliance by its predecessors, RLBS is likely to violate the internal revenue laws for filing tax returns and paying taxes.
13. Rodberg is likely to continue to operate his limousine service business, as RLI,

RLSL, RLBS or another successor business entity, without regards to its federal tax obligations and further pyramid the federal tax liabilities.

14. Further administrative collection efforts by the IRS will not resolve RLI's large outstanding tax liability, stop RLSL's continuing noncompliance with the internal revenue laws, or prevent RLBS from violating the internal revenue laws.

Conclusions of Law

15. Rodberg, RLI, and RLSL have interfered and are interfering with the enforcement of the internal revenue laws. They have violated and continue to violate 26 U.S.C. §§ 3102, 3111, 3301, 3402, 6011(a) and 6041 by failing to file their employment and unemployment tax returns as required by law, and by failing to pay the IRS the full amounts of the federal employment and unemployment taxes due and owing.
16. Because Rodberg, RLI and RLSL are pyramiding their unpaid federal employment and unemployment tax liabilities and are likely to continue their violation of the internal revenue laws, an injunction against them is necessary or appropriate for the enforcement of the internal revenue laws, and is therefore appropriate under 26 U.S.C. § 7402(a).
17. Because RLBS is RLI and RLSL's successor company and Rodberg is likely to continue violating the internal revenue laws through his operation of RLBS, an injunction against RLBS is necessary or appropriate for the enforcement of the internal revenue laws, and is therefore appropriate under 26 U.S.C. § 7402(a).

18. The United States is also entitled to injunctive relief under the traditional equitable principles described above.
19. The United States lacks an adequate remedy at law because Rodberg, RLI and RLSL have evaded the United States' previous collection efforts and further collection efforts will not stop the Defendants' violations. The pattern of noncompliance is likely to continue with RLBS under Rodberg's control, and the IRS's collection efforts against RLBS is not likely to be successful.
20. The United States will suffer irreparable harm in absence of an injunction because the Defendants' ever-increasing federal tax liabilities of over \$2.9 million may never be collected, therefore depriving the Government of its lawful tax revenues.
21. The injury to the United States outweighs any potential injury to the Defendants. In the absence of an injunction, the United States will suffer the permanent loss of federal tax revenues, to which it is entitled. An injunction will only require the Defendants to comply with their federal tax obligations and place them on a level playing field with other tax-paying businesses, causing no cognizable harm.
22. An injunction will also serve the public interest. The efficacy of the federal tax system relies on employers to voluntarily file correct tax returns and pay the taxes due. The Defendants' failure to do so undermines this system and gives them an unfair advantage over the competitors who comply with the law. Enjoining the Defendants will promote fair administration of the tax laws and

fair competition among businesses.

Order for Injunction

23. The Court hereby orders and issues this injunction against all Defendants as follows:

a. The Defendants shall immediately cease violating Internal Revenue Code sections 3102, 3111, 3301, 3402, 6011(a) and 6041;

b. The Defendants shall timely make the deposits of (1) federal employment (Form 941) taxes (income and FICA taxes withheld from the employees' wages and the employer's share of FICA taxes), and (2) federal unemployment (Form 940) tax, in an appropriate federal depository bank in accordance with the federal deposit regulations;

c. The Defendants shall timely file all employer's quarterly federal tax returns (Form 941) and employer's annual federal unemployment tax returns (Form 940), and pay any balances shown as due on those returns upon filing, as they become due;

d. The Defendants shall be enjoined from paying other creditors and transferring, disbursing or assigning any money, property or assets, if the required tax deposits have not been fully and timely made for the given tax period;

e. The Defendants shall file with the IRS all of their unfiled and past-due federal employment and unemployment tax returns (Forms 941 and 940) with the IRS within 60 days of the entry of this injunction;

f. The Defendants shall notify the undersigned counsel for the United States or her designee within 10 business days if they or their representative, agent, employee, attorney, or anyone in active concert or participation with them begins to operate any new business enterprise, and they shall identify the new business by its name, address, and employer identification number;

g. For a period of five years from the entry of this injunction, the Defendants shall mail or otherwise deliver the proof of the Forms 941 and 940 federal tax deposit payments to the undersigned counsel for the United States or her designee, within 5 business days of their due date;

h. If the Defendants violate any part of this injunction, the Court may find the violating party to be in civil and/or criminal contempt;

i. If Rodberg has set up or has begun using an entity other than RLI, RLSL and RLBS to operate his limousine service business, such entity shall be subject to this injunction to the same extent as RLI, RLSL, and RLBS.

Entered this 8th day of July, 2012.


UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Kathleen M. Tafoya

Civil Action No. 11-cv-02921-WYD-KMT

JILAPUHN, INC., d/b/a Her Majesty's Credit Union, a credit union chartered in the United States Virgin Islands,

Plaintiff,

v.

BANK OF AMERICA, N.A.,

Defendant.

ORDER

This matter is before the court on "Plaintiff's Motion to Set Hearing on Replevin Complaint" (Doc. No. 9, filed November 16, 2011). Defendant filed its response on December 9, 2011 (Doc. No. 18), and Plaintiff filed its reply on December 16, 2011 (Doc. No. 23). This matter is ripe for ruling.

Plaintiff Jilapuhn Inc., d/b/a Her Majesty's Credit Union, alleges in April 2011, it opened an account with Defendant Bank of America (BOA) and deposited two checks totaling \$874,714.00 into that account. (Doc. No. 1-1, ¶¶ 1, 6.) Plaintiff alleges that BOA refused to credit Plaintiff's account, failed to return the two checks to Plaintiff, and closed Plaintiff's account. (*Id.*, ¶ 6.)

On October 31, 2011, Plaintiff filed its Verified Complaint in Replevin in Denver County District Court, seeking to recover the amount of the checks, or in the alternative the return of the checks. (*See* Doc. No. 1-1.) On November 9, 2011, Defendant removed the matter to this Court. On November 16, 2011, Plaintiff filed its motion seeking a hearing on its Verified Complaint in Replevin.

Rule 104 of the Colorado Rules of Civil Procedure governs replevin actions in the State of Colorado. Colo. R. Civ. P. 104. After the filing of a complaint in replevin, the

court shall, without delay, examine the complaint and affidavit, and if it is satisfied that they meet the requirements of [Colo. R. Civ. P. 104(b)], it shall issue an order directed to the defendant to show cause why the property should not be taken from the defendant and delivered to the plaintiff.

Colo. R. Civ. P. 104(c). However, “[u]nder the *Erie* doctrine,” it is long settled, “federal courts sitting in diversity apply state substantive law and federal procedural law.” *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996); *see Erie R. Co. v. Tompkins*, 304 U.S. (1938).

Thus, this Court is not required to follow Colorado’s rules for setting a hearing on Plaintiff’s replevin complaint. The Court also notes that there is a Motion to Dismiss or, in the alternative, motion for summary judgment pending before Chief District Judge Wiley Y. Daniel. To the extent Judge Daniel deems it appropriate to hold a hearing on the merits of the Motion to Dismiss, he will notify the parties of such hearing.

Therefore, it is

ORDERED that “Plaintiff’s Motion to Set Hearing on Replevin Complaint” (Doc. No. 9) is DENIED.

Dated this 8th day of February, 2012.

BY THE COURT:



Kathleen M. Tafoya
United States Magistrate Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Case No. 8:11-bk-21104-MGW
Chapter 11

AURORA OF TAMPA, INC.,

Debtor.

_____ /

**ORDER GRANTING UNITED STATES TRUSTEE'S
MOTION TO DISMISS OR CONVERT CHAPTER 11 CASE**

THIS CASE came on for hearing on February 1, 2012 at 1:30 p.m., to consider the United States Trustee's Motion to Dismiss Case or, in the Alternative, Convert Case to Chapter 7 (Doc. No. 28) and Supplemental Motion to Dismiss or Convert Chapter 11 Case (Doc. No. 72). For the reasons stated in open court that shall constitute the decisions of this Court, accordingly, it is

ORDERED:

1. The United States Trustee's Motion to Dismiss Case or Convert Chapter 11 Case (Doc. No. 28) is **GRANTED**.
2. The United States Trustee's Supplemental Motion to Dismiss Case or Convert Chapter 11 Case (Doc. No. 72) is **GRANTED**.
3. The Debtor has seven (7) days from today's hearing to complete the following: file all outstanding monthly operating reports for November and December 2011; submit payment for all outstanding quarterly fees for fourth quarter 2011; provide proof of closing all pre-petition bank accounts; and file all outstanding 941 tax returns.

4. If the Debtor fails to timely perform the requirements in the preceding paragraph, the United States Trustee will file a request for an emergency hearing for the Court to further determine whether the case should be dismissed or converted to a case under Chapter 7.

DONE and ORDERED in Chambers at Tampa, Florida, on February 08, 2012.



Michael G. Williamson
United States Bankruptcy Judge

Copies to:

Debtor, Debtor's Attorney

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Case No. 8:11-bk-21105-MGW
Chapter 11

ABE JOHN SROUR,

Debtor.

_____ /

**ORDER GRANTING UNITED STATES TRUSTEE'S
MOTION TO DISMISS OR CONVERT CHAPTER 11 CASE**

THIS CASE came on for hearing on February 1, 2012 at 1:30 p.m., to consider the United States Trustee's Motion to Dismiss Case or Convert Case to Chapter 7 (Doc. No. 25) and Supplemental Motion to Dismiss or Convert Chapter 11 Case (Doc. No. 62). For the reasons stated in open court that shall constitute the decisions of this Court, accordingly, it is

ORDERED:

1. The United States Trustee's Motion to Dismiss Case or Convert Chapter 11 Case (Doc. No. 25) is **GRANTED**.
2. The United States Trustee's Supplemental Motion to Dismiss Case or Convert Chapter 11 Case (Doc. No. 62) is **GRANTED**.
3. The Debtor has seven (7) days from today's hearing to file all outstanding monthly operating reports for November and December 2011 and submit payment for all outstanding quarterly fees for fourth quarter 2011.

4. The Debtor has twenty-one (21) days from today's hearing to prepare and file his Federal Income Tax Return for tax year 2010.

5. If the Debtor fails to timely perform the requirements in the preceding paragraph, the United States Trustee will file a request for an emergency hearing for the Court to further determine whether the case should be dismissed or converted to a case under Chapter 7.

DONE and **ORDERED** in Chambers at Tampa, Florida, on February 08, 2012.

A handwritten signature in black ink that reads "M G Williamson". The signature is written in a cursive, slightly slanted style.

Michael G. Williamson
United States Bankruptcy Judge

Copies to:

Debtor, Debtor's Attorney

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

GERALD D. CATER,

)

)

Plaintiff,

)

)

v.

)

Case No.: 4:09-CV-754-VEH

)

**THE UNITED STATES OF
 AMERICA,**

)

)

)

Defendant.

)

ORDER REGARDING PRIVACY REDACTIONS

Since 2001, the Judicial Conference of the United States has had a policy to protect sensitive private information about parties, witnesses, and others involved in a civil, criminal, or bankruptcy case. The policy covers all documents filed with the court and made available to the public, whether electronically or on paper, and it requires filers to limit certain information as follows:

- for Social Security numbers and taxpayer identification numbers, use only the last four digits;
- for financial account numbers, use only the last four digits;
- for names of minor children, use only their initials;
- for dates of birth, use only the year; and

- (in criminal cases only) for home addresses, use only the city and state.

In 2007, the policy's requirement that filings not include these personal-data identifiers in case filings was codified in the federal civil, criminal, bankruptcy, and appellate rules. *See* Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; Fed. R. App. P. 25; and Fed. R. Bankr. P. 9037.

In accordance with these rules and policies, all counsel are reminded of these restrictions. The Court **ORDERS** that counsel is to apply this policy to exhibits shown to the jury, or used at trial, as well. **Counsel** must make these redactions prior to showing any exhibit to the jury or otherwise using any exhibit at trial. The Court **WILL NOT** make these redactions.

Further, because trial transcripts are electronically available, please keep these restrictions in mind in making statements in court and in formulating your questions so that you do not reveal this information or ask questions that elicit this type of information.

DONE this the 8th day of February, 2012.



VIRGINIA EMERSON HOPKINS
United States District Judge

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

In Re:)	Chapter 11
)	
CHARLES K. BRELAND, JR.,)	Case No. 09-11139
)	
<u>Debtor.</u>)	Honorable Margaret A. Mahoney

ORDER

This matter is before the Court on the (1) Emergency Motion for Stay Pending Appeal (Doc. 616); and (2) Emergency Motion To Expedite Hearing on Emergency Motion of United States for Stay Pending Appeal (Doc. 617) filed by the claimant, United States of America.

Upon consideration of the motions, and based upon the debtor’s representation that he does not oppose the relief requested in the claimant’s motions but does not consent to or agree to the reasons articulated in the motions requesting the stay, the motions are **GRANTED**.

IT IS THEREFORE ORDERED that the (1) Emergency Motion for Stay Pending Appeal (Doc. 616); and (2) Emergency Motion To Expedite Hearing on Emergency Motion of United States for Stay Pending Appeal (Doc. 617) are **GRANTED**.

IT IS FURTHER ORDERED that the Order Denying Motion of Internal Revenue Service To Amend Its Priority Claim and Declaring That Any Rights To Amend Its General Unsecured Claim Remain Intact and Granting Motion To Compel on a Limited Basis (Docs. 603 and 604) entered by this Court on December 20, 2011 (“order”), is stayed pending the outcome of the appeal of the above-referenced order (“stay”).

3374008.1

IT IS FURTHER ORDERED that any further proceedings involving the debtor's objection to the IRS claim (Doc. 287), including any discovery remaining to be conducted in connection therewith, are suspended pending the outcome of the appeal of the above-referenced order ("suspension").

IT IS FURTHER ORDERED that by entering this order, the Court does not make any findings of fact or conclusions of law with regard to any factors or standards regarding the stay.

Notwithstanding the above, the Court reserves the right to review periodically the continued validity of the stay and suspension, and make any other appropriate orders of relief that it deems necessary to protect the rights of all parties in interest; provided, however, that such orders shall remain subject to the power of the district court and court of appeal as reserved to them in the Federal Rules of Bankruptcy Procedure, Federal Rules of Civil Procedure, and the Federal Rules of Appellate Procedure.

Dated: February 8, 2012


MARGARET A. MAHONEY
CHIEF U.S. BANKRUPTCY JUDGE

DE CASTRO, WEST, CHODOROW, MENDLER, GLICKFELD & NASS, INC.
FOURTEENTH FLOOR EAST
10960 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90024-3881
TELEPHONE (310) 478-2541

1 MICHAEL C. COHEN (SBN 093700)
mcohen@dwclaw.com
2 DE CASTRO, WEST, CHODOROW,
MENDLER, GLICKFELD & NASS, INC.
3 10960 Wilshire Boulevard, Suite 1400
Los Angeles, California 90024-3881
4 Telephone: (310) 478-2541
Facsimile: (310) 473-0123
5 Attorneys for Plaintiff
6 LHJB, LLC

7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 LHJB, LLC,
12 Plaintiff,
13 v.
14 UNITED STATES OF AMERICA,
15 Defendant.

Case No. CV 11-05820-GW(AJWx)

**ORDER GRANTING LEAVE TO FILE
AMENDED PETITION, AND RE-
CALENDARING MEDIATION CUT-OFF
AND POST-MEDIATION STATUS
CONFERENCE**

16 Having considered Plaintiff's Unopposed Motion for Leave to File Amended Petition and to
17 Re-Calendar Mediation Cut-Off and Post-Mediation Status Conference, it is ORDERED as
18 follows:

- 19 1. Plaintiff is granted leave to **manually** file the Amended Petition that has been lodged
20 with the Court.
21 2. The Mediation Cut-Off in this case shall be April 4, 2012.
22 3. The Post-Mediation Status Conference shall be held at **8:30 AM on April 5, 2012.**

23
24 _February 8, 2012_



25 Date

GEORGE H. WU, U.S. District Judge

26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

VENTURE BANK, INC.,

CIVIL NO. 11-3548 (ADM/JSM)

Plaintiff,

v.

**AMENDED ORDER FOR
PRETRIAL CONFERENCE**

UNITED STATES OF AMERICA,

Defendant.

TO: Plaintiff above named and to Leslie M. Witterschein, Esq., attorneys for plaintiff;
Defendant above named and to Mark C. Milton, Esq., attorneys for defendant.

If counsel for all parties are not listed above, it is the responsibility of counsel for plaintiff to (1) immediately notify those parties and counsel of this conference, and (2) inform those parties and counsel of the requirements set forth in this notice.

Failure of any party or counsel to comply with any part of this Order, **including delivery of a hard copy of the Rule 26(f) Report and confidential settlement letter to Magistrate Judge Mayeron by the date specified in this Order**, may result in the postponement of the pretrial conference, an imposition of an appropriate sanction on the party, company or attorney who failed to comply, or both.

I. DATE, TIME, PLACE AND PARTICIPANTS

Pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 16 of the Rules of this District, a pretrial conference of trial counsel in the above matter will be held in chambers in Room 632, U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota, on **April 25, 2012 at 10:00 a.m.** before United States Magistrate Judge Janie S. Mayeron to consider the matters set forth in Rule 16(c), the Rule 26(f) disclosures,

and related matters.

Counsel who will be trying the case should make every effort to be present **in person** at the conference. If this is not possible, substitute counsel should attend who can knowledgeably discuss the dispute and the matters set forth in Rule 16(c), the Rule 26(f) disclosures, and related matters.

II. MEETING, REPORTS AND DISCLOSURES REQUIRED

A. Pursuant to Federal Rule of Civil Procedure 26(f), trial counsel for each party shall confer in person or by telephone on or before **April 4, 2012** to discuss (a) settlement, and (b) to prepare the report required by Rule 26(f) and Local Rule 16.2.

B. If the case does not settle, no later than **April 11, 2012**, counsel shall jointly prepare and file with the Clerk of Court on ECF ("Electronic Case Filing") a complete written report of the Rule 26(f) meeting. **A copy of the 26(f) Report and the confidential settlement letter shall be mailed, or hand delivered, or faxed to 651-848-1192 or emailed to chambers at mayeron_chambers@mnd.uscourts.gov on the same day.**

The Report shall contain the following information:

1. **Date and Place of the Meeting; Identification of the Parties and Their Attorneys; Agenda of Matters for Pretrial Conference.**
 - a. The date and place at which the meeting was held;
 - b. Name, address and occupation or business of each party, together with the name, address and telephone number of the attorneys who represented each party at the meeting;
 - c. Name of insurance carriers that may be liable for the defense or payment of any damage award; and
 - d. An agenda of matters to be discussed at the Pretrial Conference.

2. Description of the Case

- a. A concise statement of the jurisdictional basis of the case, giving statutory citation and a brief narrative description;
- b. A brief narrative of the facts giving rise to the lawsuit, including a description of legal claims and defenses; and
- c. A summary itemization of the dollar amount of each element of the alleged damages.

3. Pleadings

- a. A statement of whether the Complaint and all responsive pleadings have been filed, and whether any party proposes to amend its pleadings;
- b. The date by which all motions that seek to amend the pleadings to add parties, claims and defenses will be filed; and
- c. Whether a jury trial is available under the law, and whether a jury trial has been timely demanded.

4. Discovery Plan (If the parties are unable to agree on a discovery plan, the Report shall separately set forth each party's proposed plan.) Such a plan shall include such matters as focusing the initial discovery on preliminary issues that might be case dispositive or might lead to early settlement discussions, instituting document control mechanisms, stipulating to facts to eliminate unnecessary discovery, and any other matters counsel may agree upon to control litigation costs and delay. In addition, the plan shall provide the following information:

- a. Date by which the initial Rule 26(a)(1) disclosures of witnesses, documents, itemized damage computations and insurance will be completed. (**Note:** Unless otherwise agreed by counsel, the initial disclosures under Rule 26(a)(1) shall be exchanged no later than 14 days from the Rule 26(f) meeting);
- b. Whether the parties wish to engage in any method of alternative dispute resolution following Rule 26(a)(1) disclosures but before formal discovery is commenced, and if not, when the parties believe that alternative dispute resolution would be appropriate. In addition, state the proposed method of alternative dispute resolution;

- c. Whether discovery should be conducted in phases (e.g., to first discover information bearing on dispositive issues or on settlement), or limited to or focused upon, particular issues;
- d. How the parties propose handling any issues relating to the disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
- e. How the parties propose handling claims of privilege and protection of trial preparation material;
- f. How the parties propose handling the protection of confidential information;
- g. The date by which each party shall disclose the identity of expert witnesses and their reports under Rule 26(a)(2)(A) and (B), including rebuttal experts;
- h. Whether changes should be made in the limitations on discovery imposed by the Federal Rules of Procedure or the Local Rules, and what other limitations should be imposed, if any;
- i. The number of interrogatories each party shall be permitted to serve, including subparts;
- j. The number of depositions (excluding depositions of expert witnesses) each party shall be permitted to take; and
- k. The number of expert depositions each party shall be permitted to take.

5. Close of Fact and Expert Discovery and Non-Dispositive Motions

- a. The date by which all fact discovery shall be completed;
- b. The date by which all expert discovery, including expert depositions, shall be completed;
- c. The date by which any independent medical examination shall be completed and the report served on the opposing party; and
- d. The date by which all non-dispositive motions shall be served, filed and heard by the Court.

6. Dispositive Motions and Trial

- a. Date by which all dispositive motions shall be served, filed and heard by the Court;
- b. Date by which case will be ready for trial;
- c. The number of expert witnesses each party expects to call at trial; and
- d. Estimated trial time (the number of days needed for trial, including jury selection and instructions, if applicable).

C. Each party shall also submit a letter to Magistrate Judge Mayeron concerning settlement which shall remain confidential between the Court and that party. This confidential letter shall describe the following information: (a) the status of settlement discussions to date; (b) whether you are interested in participating in a voluntary settlement conference with the Magistrate Judge; (c) if you are interested in participating in a voluntary settlement conference with the Magistrate Judge, when you believe this settlement conference should take place. The confidential letter shall be **mailed, or hand delivered, or faxed to 651-848-1192 or emailed to chambers at mayeron_chambers@mnd.uscourts.gov** on or before **April 11, 2012**.

III. EXERCISE OF JURISDICTION BY U.S. MAGISTRATE JUDGE PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 636(c)

If the parties consent to have this matter tried before the Magistrate Judge, all counsel are requested to sign the enclosed form by **April 25, 2012**, and electronically file said form pursuant to Section II, Part F, of the electronic Case Filing Procedures for the District of Minnesota (Civil).

Dated: February 8, 2012

s/ Janie S. Mayeron

JANIE S. MAYERON
United States Magistrate Judge

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

RBS Citizens, N.A.

Plaintiff,

v.

Case No.: 1:10-cv-02929

Honorable John F. Grady

Bentley Motors, Inc., et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, February 8, 2012:

MINUTE entry before Honorable John F. Grady: Motion hearing held. The parties unopposed motion to extend fact discovery [152] is granted as stated in open court. Discovery shall close on June 8, 2012. A pretrial status hearing is set for June 13, 2012 at 11:00 a.m. A jury trial is set for June 18, 2012 at 9:30 a.m. Mailed notice(cdh,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at www.ilnd.uscourts.gov.

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

GERALD D. CATER,

)

Plaintiff,

)

)

)

v.

)

Case No.: 4:09-CV-754-VEH

)

**THE UNITED STATES OF
AMERICA,**

)

)

)

Defendant.

)

ORDER REGARDING NARRATIVE TESTIMONY

Counsel are reminded that, except as to initial matters that are not controverted, narrative testimony generally is improper. Counsel are **ORDERED** to explain to all of their witnesses that, except as set out above, they are to answer the question that is asked and then they are to stop and wait for the next question. The court may instruct witnesses to stop giving narrative answers if they violate this Order.

DONE and ORDERED this the 8th day of February, 2012.



VIRGINIA EMERSON HOPKINS

United States District Judge

The plaintiffs also seek to recover federal income tax refunds said to be due them for the tax year ended December 31, 2003 (the “income tax refund claim”). The Court’s jurisdiction is invoked pursuant to 26 U.S.C. §§ 1491(a)(1) and 7422.

Plaintiffs’ trust fund recovery claim:

As to their trust fund recovery claim, the plaintiffs assert that pursuant to 26 U.S.C. § 6672, plaintiff Louis D. Ruscitto was assessed a civil tax penalty as an alleged “responsible person” relating to A&L, Inc. (“A&L”) in the amount of \$389,896.44 for the taxable periods ending September 30, 2005, December 31, 2005, and March 31, 2006 (Second Amended Complaint at ¶ 9). Plaintiff Louis D. Ruscitto is the President and Chief Executive Officer of A&L (Affidavit of Louis Ruscitto at ¶ 1 [which is attachment 7 to the Second Amended Complaint]).¹ It is the plaintiffs’ position that during the aforesaid tax periods at issue, the financial functions of A&L were completely controlled by Safeco Insurance Company, not the plaintiffs (Second Amended Complaint at ¶ 25), such that they had no duty, nor the ability to pay over the withholding tax of A&L for the tax periods at issue (Id. at ¶¶ 26-27).

On June 17, 2009, Louis D. Ruscitto filed three Form 843s with the IRS, requesting a total combined tax refund of \$389,896.44 and abatement of the balance and interest thereon (Second Amended Complaint at ¶ 13). On June 24, 2009, Louis Ruscitto’s claim for a refund and abatement was denied (Id. at ¶ 14). Due to the IRS’ denial of Mr. Ruscitto’s claim for a refund and abatement of the civil tax penalty assessed against him as an alleged “responsible person” related to A&L, the plaintiffs demand judgment in the amount of \$389,896.44 and

¹ We note that employers are required to withhold federal income taxes and social security taxes from their employees’ wages, and to hold such monies in trust for the United States. McCloskey v. United States, 2009 WL 2970123, *3 (W.D.Pa., Sept. 15, 2009), citing 26 U.S.C. §§ 3102, 3402, 7501. Employers are obligated to remit these withheld sums to the IRS on a quarterly basis. Id. The IRS must credit employees for the withheld taxes regardless of whether the employer actually remits payment of these funds. McCloskey, 2009 WL 2970123, at *3, citing In re Ribs - R – US, Inc., 829 F.2d 199, 200 (3d Cir. 1987). To ensure employer compliance, Congress enacted 26 U.S.C. § 6672 which imposes a penalty of personal liability on responsible persons who willfully fail to turn over the withholding taxes to the IRS. McCloskey, 2009 WL 2970123, *at 3, citing 26 U.S.C. § 6672(a).

abatement of the penalties and interest thereon.

In response to the plaintiffs' trust fund recovery claim, the defendant acknowledges that plaintiff Louis Ruscitto may challenge the trust fund recovery penalties, since he was assessed with the penalties, filed administrative claims for refund, and had those claims denied. However, the defendant has moved to dismiss the trust fund recovery claim of plaintiff Carol Ruscitto pursuant to F.R.Civ.P. 12(b)(1) and 12(b)(6). In support of its motion to dismiss, the defendant argues that the Court lacks subject matter jurisdiction over Mrs. Ruscitto, as she seeks a refund of tax penalties that were assessed against someone else, i.e., her husband, and she failed to exhaust her administrative remedies. For the same reasons, the defendant avers that Carol Ruscitto fails to state a viable claim, as she does not allege that she exhausted her administrative remedies, nor set forth facts which would entitle her to relief.

A Rule 12(b)(1) motion to dismiss "may be treated as either a facial or factual challenge to the court's subject matter jurisdiction." Gould Electronics Inc. v. U.S., 220 F.3d 169, 176 (3d Cir. 2000). In reviewing a "facial attack", as here, which is based on the legal sufficiency of the claim, the Court "must only consider the allegations of the complaint and documents referenced therein and attached thereto in the light most favorable to the plaintiff." Id. Conversely, in reviewing a "factual attack", where a challenge is based on the sufficiency of jurisdictional fact, "the Court is free to weigh the evidence and satisfy itself whether it has power to hear the case." Carpet Group Intern. v. Oriental Rug Importers, 227 F.3d 62, 69 (3d Cir. 2000).

We agree that Carol Ruscitto's claim to recover trust fund tax penalties assessed against her husband, Louis Ruscitto, for taxable periods ending September 30, 2005, December 31, 2005, and March 31, 2006 should be dismissed for lack of subject matter jurisdiction. Section 7422(a) of the Internal Revenue Code provides in pertinent part:

(a) No suit prior to filing claim for refund. – No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, ... until a claim for refund or credit has been duly filed with the Secretary...

26 U.S.C. § 7422(a).

As discussed above, on June 17, 2009, Louis D. Ruscitto filed three (3) Form 843's with the IRS, claiming a total combined tax refund of \$389,896.44 and abatement of the balance in connection with the trust fund tax penalties assessed against him (Second Amended Complaint at ¶ 13 and attachment 1 thereto). On June 24, 2009, the IRS denied Louis Ruscitto's claim for refund and abatement (Second Amended Complaint at ¶ 14 and attachment 2 thereto).

Significantly, the plaintiffs have neither alleged, nor shown that Carol Ruscitto submitted a refund claim in connection with the trust fund tax penalties assessed against her husband.

Having failed to plead that Mrs. Ruscitto exhausted her administrative remedies on this claim, the defendant's motion to dismiss Carol Ruscitto's trust fund recovery claim should be granted.

Plaintiffs' income tax refund claim:

With respect to their income tax refund claim, the plaintiffs allege that in 2004, they jointly filed their 2003 Treasury Form 1040 for the year ended December 31, 2003, claiming a tax refund of approximately \$86,854; that in 2009, they jointly filed their amended 2003 Treasury Form 1040X for the year ended December 31, 2003, pursuant to a carryback, claiming a joint tax refund of approximately \$434,293, of which they were joint tenants by the entireties in the ownership of the claimed tax refund; that at least \$268,121 of the \$434,293 claimed refund was paid jointly by them, and their filing of a 2003 Form 1040X constituted an administrative claim for both of them; and that the defendant has not paid their administrative claim, and six months have elapsed since their claim was filed (Second Amended Complaint at ¶¶ 15-20).

In support of their income tax refund claim, the plaintiffs aver that they filed

administrative refund claims when they submitted their joint 2003 federal income tax return in 2004 and their 2003 Treasury Form 1040X in 2009 (Second Amended Complaint at ¶¶ 15, 16, 19). We agree.

In cases as here, where a claim for credit or refund is filed after June 30, 1976, it is provided in 26 C.F.R. § 301.6402-3(a):

...
(2) In the case of an overpayment of income taxes for a taxable year of an individual for which a Form 1040 or 1040A has been filed, a claim for refund shall be made on Form 1040X (“Amended U.S. Individual Income Tax Return”).

....
(5) A properly executed individual, fiduciary, or corporation original income tax return or amended return (on 1040X or 1120X if applicable) shall constitute a claim for refund or credit within the meaning of section 6402 and section 6511 for the amount of the overpayment disclosed by such return (or amended return)...

The plaintiffs also assert that they may properly maintain an income tax refund claim, as more than six months have passed since their claim was filed, and their refund claim has not been paid (Second Amended Complaint at ¶ 20). Pursuant to 26 U.S.C. § 6532(a)(1), a taxpayer refund suit may be commenced after the expiration of 6 months from the date of the filing of a claim, unless the Secretary renders a decision on the claim within that time. Based on the foregoing, we find that the plaintiffs exhausted their administrative remedies on their joint claim for a refund of their 2003 income taxes, such that the Court has subject matter jurisdiction over the claim.

In moving to dismiss the plaintiffs’ income tax refund claim, the defendant argues that the plaintiffs already received credit for overpaying their 2003 income taxes, as the IRS applied that overpayment to other liabilities. Specifically, the defendant asserts that Louis Ruscitto’s trust fund recovery penalty was satisfied by the applied overpayment of the plaintiffs’ 2003 income taxes. According to the defendant, the plaintiffs cannot receive the overpaid funds again,

and their pleadings demonstrate that their claim for a refund was accepted, and the overpayment was applied to other liabilities.

We will treat the defendant's motion to dismiss this claim as a Rule 12(b)(6) motion because, as discussed above, the Court has subject matter jurisdiction over the plaintiffs in connection with their income tax refund claim for the tax year ended December 31, 2003.

In reviewing a Rule 12(b)(6) motion to dismiss, the Court "must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." Fowler v. UPMC, 578 F.3d 203, 210-11 (3d Cir. 2009), citing Ashcroft v. Iqbal, – U.S. –, 129 S.Ct. 1937, 1949 (2009). The court "must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" Fowler, 578 F.3d at 211, quoting Iqbal, 129 S.Ct. at 1950. To be "plausible", a claimant's factual allegations must "permit the court to infer more than the mere possibility of misconduct." Id. That is, "a complaint must do more than allege the plaintiff's entitlement to relief"; it "has to 'show' such an entitlement with its facts." Fowler, 578 F.3d at 211. A pleading that only proffers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

The plaintiffs contend that "Defendant either offset or failed to pay the various income tax refunds due to the[m] which apparently paid the federal civil tax penalty and the interest accumulated thereon" (Second Amended Complaint at ¶ 11). They also allege that "Defendant failed to notify the Plaintiffs of its unilateral and illegal actions" (Id. at ¶ 12). In opposing the motion to dismiss their income tax refund claim, the plaintiffs insist it is unclear what the IRS did with their 2003 tax refund claim, and they "do not know what happened to their refunds" (Opposition brief [Doc. No. 29] at pp. 1, 7).

The defendant points out that Congress expressly authorized the IRS to apply overpayments to other liabilities in 26 U.S.C. § 6402. Section 6402(a) of the Internal Revenue Code provides:

(a) General rule. – In the case of any overpayment, the Secretary, within the applicable limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), (e) and (f), refund any balance to such person.

26 U.S.C. § 6402(a).

The above statute, 26 U.S.C. § 6402(a), allows the IRS to credit an overpayment to ‘the person who **made** the overpayment...’ (Emphasis added). “The person who made the payment does not have to be the person who incurred the liability.” United States v. Macphail, 149 Fed.Appx. 449, 453 (6th Cir. 2005), citing United States v. Elam, 112 F.3d 1036, 1038 (9th Cir. 1997) (“Simply put, the person who overpaid is entitled to claim the overpayment credit.”). As explained in Elam, supra, “[s]pouses who file a joint return have separate interests in any overpayment, the interest of each depending upon his or her relative contribution to the overpaid tax.” 112 F.3d at 1038. Indeed, “courts have consistently found that a refund should be disbursed in proportion to the amount each spouse paid to the taxes owed.” Macphail, supra, 149 Fed.Appx. at 453, citing Ragan v. Comm’r., 135 F.3d 329, 333 (5th Cir. 1998).

As recounted above, the plaintiffs contend that in 2009, they jointly filed their amended 2003 Treasury Form 1040X for the year ended December 31, 2003, pursuant to a carryback, claiming a joint tax refund of approximately \$434,293; that at least \$268,121 of the claimed refund was paid jointly by them; and that the defendant has not paid their income tax refund claim (Second Amended Complaint at ¶¶ 16, 18, 20). At this juncture, we cannot discern whether, or to what extent the IRS applied the plaintiffs’ overpayment of their 2003 income taxes

to Louis Ruscitto's trust fund recovery penalty. Thus, based on the plaintiffs' pleadings, we find that they have stated a plausible claim for relief on their income tax refund claim, such that it should survive the defendant's motion to dismiss.²

Therefore, it is recommended that the defendant's motion to dismiss portions of the second amended complaint (Document No. 24) be granted as to plaintiff Carol A. Ruscitto's claim to recover trust fund tax penalties and related interest assessed against her husband, plaintiff Louis D. Ruscitto, for taxable periods ending September 30, 2005, December 31, 2005, and March 31, 2006, and denied in all other respects.

Litigants who seek to challenge this Report and Recommendation must seek review by the district judge by filing objections within fourteen (14) days of this date. Failure to do so will waive the right to appeal. Any party opposing written objections shall have seven (7) days from the date of service of objections to respond to them.

Respectfully submitted,

s/ROBERT C. MITCHELL
United States Magistrate Judge

Dated: February 8, 2012

² As an alternate basis to support their income tax refund claim, the plaintiffs allege that Carol Ruscitto is an "injured spouse" or an "innocent spouse" as those terms are defined under the Internal Revenue Code (Second Amended Complaint at ¶¶ 21-22). However, the plaintiffs have failed to plead facts to support a claim for "injured spouse" or "innocent spouse" relief, only proffering "labels and conclusions" which will not do. Twombly, 550 U.S. at 555.

